CENTER FOR Children's Law and Policy

VIA ELECTRONIC MAIL TO ice.regulations@ice.dhs.gov

November 5, 2018

Debbie Seguin
Assistant Director
Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Ms. Seguin:

I am writing on behalf of the Center for Children's Law and Policy in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (proposed rule) to express my/our strong opposition to the proposed rule to amend regulations relating to the apprehension, processing, care, custody, and release of alien juveniles published in the Federal Register on September 7, 2018.

The Center for Children's Law and Policy (CCLP) is a national public interest law and policy organization based in Washington, D.C. focused on the reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in those systems. Our staff work to help jurisdictions throughout the United States make their juvenile justice systems more equitable and effective.

Over the last 10 years, we have worked on juvenile justice reform in 32 U.S. states and the District of Columbia. We have played a leading role in the largest juvenile justice reform initiatives in the U.S., including the Annie E. Casey Foundation's Juvenile Detention

1701 K Street, NW
Suite 1100
Washington, DC 20006

tel: 202.637.0377
fax: 202.379.1600

www.cclp.org

Alternatives Initiative and the John D. and Catherine T. MacArthur Foundation's Models for Change Initiative. We have also worked to help juvenile justice systems and agencies in the wake of litigation, investigations, and media coverage of policies and practices.

Our organization is widely recognized for our expertise on issues related to conditions of confinement in facilities that house children. Our staff have spent decades working with jurisdictions across the country to improve conditions of confinement in facilities that house youth. Our staff co-authored the extensive Juvenile Detention Facility Assessment Standards used by the Annie E. Casey Foundation in its Juvenile Detention Alternatives Initiative, known as JDAI.[1] The JDAI Standards are the most comprehensive and demanding set of standards for juvenile facilities in the country. They are the standards that are used to assess and improve conditions in over 300 JDAI sites in 39 states and the District and Columbia. The JDAI standards have been cited in investigations by the U.S. Department of Justice's Civil Rights Division. They have also served as the basis for federal and state legislation, as well as many agencies' policies. Our staff worked with legislative task forces in Louisiana and Mississippi in recent years to help those states develop comprehensive standards for their juvenile facilities following numerous lawsuits and concerns about conditions in those states.

For the reasons detailed in the comments that follow, DHS and the Department of Health and Human Services (HHS) should immediately withdraw their current proposal, and dedicate their efforts to advancing policies that safeguard the health, safety, and best interests of children and their families, not least through robust, good-faith compliance with the Flores Settlement Agreement.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact me with any questions. to provide further information.

Sincerely,

Jason Szanyi, Deputy Director
Center for Children's Law and Policy

[1] Juvenile Detention Facility Assessment Standards Instrument, 2014 Update: Juvenile Detention Alternatives Initiative, a project of the Annie E. Casey Foundation, available at: http://www.cclp.org/documents/Conditions/JDAI%20Detention%20Facility%20Assessment%20Standards.pdf.

Center for Children's Law and Policy Comments on NPRM

1. There Are Significant Overall Harms of Prolonged Detention Upon Children and Society

In this NPRM both DHS and HHS propose regulations that would increase (1) the number of children and youth subjected to secure detention, and (2) the length of time children and youth would be subjected to secure detention.[2] Troublingly, the NPRM lacks any meaningful analysis of the dire consequences of such detention for children and society, rendering hollow the agencies' claims that their proposed changes reflect any "special concern" for children's "particular vulnerability".[3]

Research has demonstrated the profound and negative impact of secure detention on young people in a wide range of areas.[4] In a 2017 study published in *Pediatrics*, researchers found that 12 years after being released from detention, just one in five male youth and one in two female youth had achieved a majority of key measures of well-being in domains such as educational attainment, interpersonal functioning, and parenting responsibility.[5] Youth who are incarcerated may experience new mental health problems or see a worsening of existing mental health conditions[6] and can be more likely to engage in self-harm and suicide.[7]

The negative impact of detention on individual young people extends to broader society. Youth who have been incarcerated have lower future earning potential and are less likely to remain in the workforce as taxpayers.[8] Moreover, placement in detention significantly lowers a youth's

---

[2] First, DHS's proposal to substitute its own family residential standards where other licensing is not available will remove the current limitation under the Flores Settlement Agreement that most children may only be held temporarily in unlicensed, secure facilities, freeing DHS to hold children in its so-called family residential centers, which constitute secure detention, indefinitely. *See* 83 FR 45525. Second, HHS's proposal includes significant and unjustified expansion of the qualifying circumstances for placing an unaccompanied child in secure ORR custody, which are juvenile jail settings. *See* 83 FR 45530. This is by no means an exhaustive list, as demonstrated by the additional harms posed in 83 FR 45507, *see* Releasing a UAC from ORR custody (sponsors).

[3] Proposed 8 CFR § 236.3(a)(1), 83 FR 45505

[4] Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978.

[5] 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, 123–132 (2017).

[6] *See, e.g.*, Javad H. Kashani et al., *Depression Among Incarcerated Delinquents*, 3 PSYCHIATRY RESOURCES 185, 185-191 (1980) (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 (2001) (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) (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).

[7] *Id.*

[8] Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978, at p. 2.

likelihood of attending and graduating from school, with studies finding that the majority of youth who have been incarcerated do not go back or end up dropping out of school after their return to the community.[9] Importantly, the harms of detention on young people's education and employment prospects have been documented even when comparing youth with similar backgrounds who are not placed in detention. For example, a 2013 study released by the National Bureau of Economic Research found that placement in detention "results in large decreases in the likelihood of high school completion and large increases in the likelihood of adult incarceration" when compared with similarly situated youth who are not detained.[10]

Simply put, the use of detention carries significant and negative consequences for young people and society at large. This is one of the primary reasons that cities, states, and counties throughout the country have significantly reduced the inappropriate and unnecessary use of secure detention for young people in public systems, specifically the juvenile justice system.[11] These jurisdictions have achieved better outcomes for young people and their communities by avoiding the use of detention for youth who do not require it and by identifying alternatives to incarceration for young people who require some degree of supervision or custody.

2. Family Detention Negatively Impacts the Well-Being of Children and Families

According to medical experts, DHS detention facilities are not appropriate places for children to be housed. In 2017, the American Academy of Pediatrics published a policy statement titled *Detention of Immigrant Children* stating that immigrant children seeking safe haven in the United States should never be placed in detention facilities.[12] The American Medical Association has also adopted a policy opposing family immigration detention given the negative health consequences that detention has on both children and their parents.[13] In 2018, the American College of Physicians released a policy stating that "forced family detention—indefinitely holding children and their parents, or children and their other primary adult family caregivers, in

---

[9] *Id.* at 9 (stating that 60% of youth who have been incarcerated do not go back or end up dropping out of school altogether within five months of their return).
[10] Anna Aizer and Joeseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned* Judges, 2013 Nat'l Bureau of Econ. Res. Working Paper Series (2013).
[11] *See* Richard A. Mendel, *Two Decades of JDAI: From Demonstration Project to National Standard* (2009), https://www.aecf.org/m//resourcedoc/aecf-TwoDecadesofJDAIfromDemotoNatl-2009.pdf.
See also Josh Weber et al., Georgetown University Center for Juvenile Justice Reform, *Transforming Juvenile Justice Systems to Improve Public Safety and Youth Outcomes* (2018), http://cjjr.georgetown.edu/wp-content/uploads/2018/05/Transforming-Juvenile-Justice-Systems-to-Improve-Public-Safety-and-Youth-Outcomes.pdf; The Pew Charitable Trusts, *Re-Examining Juvenile Incarceration* (April 2015), https://www.pewtrusts.org/-/media/assets/2015/04/reexamining_juvenile_incarceration.pdf; Tony Fabelo et al., Council of State Governments Justice Center, *Closer to Home: An Analysis of the State and Local Impact of the Texas Juvenile Justice Reforms* (2015), https://csgjusticecenter.org/wp-content/uploads/2015/01/exec-summary-closer-to-home.pdf.
[12] Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.
[13] American Medical Association, "AMA Adopts New Policies to Improve Health of Immigrants and Refugees," June 12, 2017, https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees.

government detention centers until the adults' immigration status is resolved—can be expected to result in considerable adverse harm to the detained 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."[14]

Despite these and many other warnings from medical experts, DHS proposes in this NPRM to substitute its own Immigration and Customs Enforcement (ICE) family residential standards where its family detention facilities cannot obtain licensing from state, municipal, or other appropriate child welfare entities.[15] This would have the effect of eliminating the critical Flores Settlement Agreement limitation on the detention of children in unlicensed facilities. As a result, and as explicitly intended by DHS in promulgating these proposed rules, DHS would detain children with their families for the entirety of their immigration proceedings--in effect, indefinitely.

There is no evidence that any amount of time in detention is safe for children.[16] In fact, even short periods of detention can cause psychological trauma and long-term mental health risks for children.[17] Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder.[18] Detention itself undermines parental authority and capacity to respond to their children's needs; this difficulty is complicated by parental mental health problems.[19] Parents in detention centers have described regressive behavioral changes in their children, including decreased eating, sleep disturbances, clinginess, withdrawal, self-injurious behavior, and aggression.[20]

Visits to family detention centers by pediatric and mental health advocates have revealed discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited mental health services.[21] Other reports describe prison-like conditions; inconsistent access to quality medical, dental, or mental health care;[22] and lack of appropriate developmental or educational opportunities.[23] Conditions in CBP processing facilities, which include forcing

---

[14] 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.
[15] *See* 83 FR 45525
[16] Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] American Medical Association, "AMA Adopts New Policies to Improve Health of Immigrants and Refugees," June 12, 2017, https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees.
[23] Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483.

children to sleep on cement floors, open toilets, constant light exposure, insufficient food and water, no bathing facilities, and extremely cold temperatures, are traumatizing for children.[24] No child should ever have to endure these conditions.

In July, fourteen major medical organizations joined together to voice deep concerns about the treatment that immigrant children and their parents face in federal custody.[25] The letter from these organizations note that two physicians within DHS' Office of Civil Rights and Civil Liberties found serious compliance issues in DHS-run facilities resulting in "imminent risk of significant mental health and medical harm."[26] The DHS physicians stated that "detention of innocent children should never occur in a civilized society, especially if there are less restrictive options, because the risk of harm to children simply cannot be justified."[27] Currently, there is no mechanism for health professionals to regularly monitor the conditions in DHS facilities and their appropriateness for children.

After almost a year of investigation, the DHS Advisory Committee on Family Residential Centers concluded 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 are never in the best interest of children.[28] We must remember that immigrant children are still children. Protections for children in law or by the courts exist because children are uniquely vulnerable and are at high risk for trauma, trafficking, and violence. Proposals like this rule that seek to override the *Flores Settlement Agreement* in order to allow for the longer-term detention of children with or without their parents or to weaken federal child trafficking laws strip children of protections designed for their safety and well-being and put their health and well-being at risk.

3. *The Department of Homeland Security Has a Poor Track Record of Accountability and Transparency with Respect to Immigration Detention Facilities*

The Flores settlement agreement and the court decisions implementing it require that immigration detention facilities that hold children for more than twenty days be licensed by "an

---

[24] *Id.*
[25] Letter from American Pediatric Association *et al.* to The Honorable Charles Grassley, *et al.*, July 24, 2018, https://downloads.aap.org/DOFA/Senate%20Congressional%20Oversight%20Request%20Letter%20Final%2007%2024%2018.pdf.
[26] Letter from Dr. Scott Allen and Dr. Pamela McPherson to the Honorable Charles Grassley and the Honorable Ron Wyden, July 17, 2018, https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf.
[27] *Id.*
[28] *Report of the DHS Advisory Committee on Family Residential Centers*, Sept. 30, 2016, https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf.

appropriate State agency" to meet certain standards of care.[29] Because most states have not licensed facilities to detain parents with their children, the Department of Homeland Security (DHS) has had difficulty obtaining licenses for family detention centers, limiting the length of family detention.

Under the proposed regulation that would supersede *Flores*, DHS would be able to detain children for prolonged periods in facilities that are not licensed by a state child welfare agency. The proposal would allow DHS to "employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE [Immigration and Customs Enforcement]."[30] DHS claims that this would provide "materially identical assurances about the conditions" of family detention centers while allowing for longer periods of detention.[31]

If implemented, the regulation would also end both *Flores* class counsel's access to DHS and Health and Human Services (HHS) facilities that hold minors, and ongoing reporting and monitoring requirements imposed by the court.

Self-inspections by DHS and its contractors are much weaker than the protections that *Flores* provides. DHS's record of oversight, transparency, and accountability with regard to immigration detention facilities is abysmal. This record demonstrates just how dangerous it would be to allow DHS to bypass state certification standards for facilities that detain children.

A. Gaps in Inspections of Family Residential Centers

The proposed regulations make clear that DHS does not intend to increase oversight of family detention centers as part of its new licensing authority. DHS asserts in its proposed regulation that "ICE currently meets the proposed licensing requirements" because it currently requires family detention facilities to comply with ICE's detention standards and hires inspectors to monitor compliance, and therefore "DHS would not incur additional costs in fulfilling the requirements of the proposed alternative licensing scheme."[32]

Since May 2015, DHS has contracted with a company called Danya International to inspect family detention centers (which ICE calls family residential centers, or FRCs) for compliance with ICE's internal standards. According to court documents, Danya has conducted unannounced

---

[29] *Flores v. Reno* Stipulated Settlement Agreement, Aug. 12, 1996, p. 4. https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf (Downloaded Oct. 15, 2018)

[30] Department of Homeland Security and Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," *Federal Register*, Vol. 83, No. 174, Sept. 7, 2018, p. 45525. https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf (Downloaded Oct. 15, 2018)

[31] *Id.*, p. 45488.

[32] *Id.*, p. 45518.

monthly inspections of all three family residential centers since August 2015.[33] Only three reports from those inspections—one from each facility, as selected by ICE—are publicly available.[34] With respect to the others, the only information available to the public is an assertion by an ICE official in a court declaration that "Danya has generally found the FRCs to be compliant with a majority" of standards, and "[w]here Danya observed individual issues of non-compliance, the facilities took corrective action as appropriate and achieved compliance although this is a continuous process."[35] These vague descriptions provide very little information about what individual standards were violated, or how severe and prolonged those violations were.

ICE denied requests by DHS's own Advisory Committee on Family Residential Centers for access to the other Danya International inspection reports.[36] The three reviews that are available consist mainly of checklists of standards with limited further explanation of the findings, and no apparent input from detainees.

DHS's Office of Civil Rights and Civil Liberties has conducted more in-depth inspections and investigations of family detention centers, but those documents and reports are likewise unavailable to the public. Two medical doctors who served as subject matter experts for the Office of Civil Rights and Civil Liberties on family detention centers, Dr. Pamela McPherson and Dr. Scott Allen, recently reported to Congress that their investigations "frequently revealed serious compliance issues resulting in harm to children."[37] Drs. McPherson and Allen stated that family detention centers "still have significant deficiencies that violate federal detention standards," including repeated violations of the standards for medical staffing, clinic space, timely access to medical care, and language access, and gave detailed examples of cases when children have been harmed by inadequate medical care.

B. Systematic Failings in Inspections of Adult Detention Centers

More information is publicly available regarding DHS's record on inspections of adult ICE detention centers—but that record provides further evidence that the agency's self-inspections are a poor substitute for state child welfare agencies or court supervision.

---

[33] Declaration of Jon Gurule, ¶6, *Flores* v. *Holder*, No. CV 85-4544-DMG (C.D. Cal June 3, 2016) https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0030.pdf (Downloaded Oct. 11, 2018)
[34] *Id*., exhibits 1, 2 and 3.
[35] *Id*. ¶6.
[36] *Report of the DHS Advisory Committee on Family Residential Centers*, Oct. 7, 2016, p. 93 https://www.humanrightsfirst.org/sites/default/files/dhs-advisory-committee-on-family-residential-centers.pdf (Downloaded Oct. 11, 2018)
[37] Letter from Dr. Scott Allen and Dr. Pamela McPherson of the Department of Homeland Security Office of Civil Rights and Civil Liberties, to Sens. Charles E. Grassley and Ron Wyden, Senate Whistleblowing Caucus, July 17, 2018 https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf (Downloaded Oct. 11, 2018)

A DHS Office of Inspector General (OIG) investigation published in June found that because of the flaws in inspections of ICE detention facilities, deficiencies "remain uncorrected for years."[38] The most frequent inspections of ICE facilities are conducted by a private contractor called the Nakamoto Group. The OIG found that Nakamoto's inspections were severely lacking. According to OIG, "typically, three to five inspectors have only 3 days to complete the inspection, interview 85 to 100 detainees, brief facility staff, and begin writing their inspection report for ICE." An ICE employee told the OIG that this was not "enough time to see if the [facility] is actually implementing" required policies. Other ICE personnel described Nakamoto inspections as "very, very, very difficult to fail" and "useless."

For the inspections that DHS OIG observed, Nakamoto reported having conducted 85 to 100 detainee interviews. But contrary to what Nakamoto's contract required, the conversations with detainees that OIG saw were not conducted in private, were conducted only in English, and OIG wrote that it "would not characterize them as interviews." (OIG found that inspections conducted by the Office of Detention Oversight were much more thorough, but occurred only once every three years on average, and ICE did not adequately follow up to ensure that problems were corrected.)

C. Inaccurate Statements by DHS Leadership

In addition to the systemic flaws in detention monitoring described above, DHS's current leadership has shown a disturbing pattern of deceiving Congress and the public about the agency's treatment of children. Over the last few months, Secretary of Homeland Security Kirstjen Nielsen has claimed that DHS does not detain children;[39] that DHS did not have a policy of family separation;[40] that deterrence was not one of the purposes of family separation;[41] and that parents deported without their children had been given the opportunity to reunite and

---

[38] Department of Homeland Security Office of Inspector General, *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 (Downloaded Oct. 11, 2018)

[39] Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Threats to the Homeland," Oct. 10, 2018 [Quote at 1:29:43]. https://www.c-span.org/video/?452548-1/secretary-nielsen-fbi-director-wray-testify-homeland-security-threats&live&start=5375 (Downloaded Oct. 15, 2018)

[40] Kirstjen Nielsen, Twitter Post, June 17, 2018, 2:52 p.m. https://twitter.com/secnielsen/status/1008467414235992069?lang=en (Downloaded Oct. 15, 2018).

[41] Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Authorities and Resources Needed to Protect and Secure the United States," May 15, 2018. [Quote at 56:58]. https://www.c-span.org/video/?445411-1/homeland-security-secretary-kirstjen-nielsen-testifies-senate-panel&start=3406 (Downloaded Oct. 15, 2018)

declined to take it.[42] All of those statements are false, and provide further evidence that DHS cannot be trusted to monitor itself with regard to treatment of children in detention.[43]

4. There Are Cost-Effective Alternatives to Secure Confinement of Children

Incarceration of youth is extremely expensive – particularly when compared with alternatives that accomplish the same goals at a fraction of the cost of secure facilities.[44] In many jurisdictions, the daily cost of youth incarceration is hundreds of dollars per day[45] and hundreds of thousands of dollars per year in direct costs to taxpayers.[46] These dollar figures frequently omit the costs associated with the short and long-term negative impacts upon society that are associated with secure detention.[47] Indeed, the high costs of incarceration have made the use of cheaper, effective alternative to detention programs popular across the political aisle.[48] Those alternatives, including electronic monitoring and intensive supervision, can cost a tenth as much as an institutional placement or less.[49]

In the juvenile justice field, jurisdictions throughout the country have sharply reduced their use of incarceration in favor of cheaper and more effective alternatives to secure custody during the last several decades. For example, since 1992, the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI) has helped jurisdictions in 39 states and the District of Columbia reduce the number of youth in detention by an average of 43%.[50] These jurisdictions

---

[42] Samuel Chamberlain, "DHS Secretary Nielsen says White House is 'on track' to reunite separated families by deadline," *Fox News*, July 24, 2018. https://www.foxnews.com/politics/dhs-secretary-nielsen-says-white-house-is-on-track-to-reunite-separated-families-by-deadline (Downloaded Oct. 15, 2018)

[43] Letter from Danielle Brian and Lisa Rosenberg to Sens. Ron Johnson and Claire McCaskill, Oct. 2, 2018. https://www.pogo.org/letter/2018/10/letter-to-senators-regarding-kirstjen-nielsens-inaccurate-testimony/ (Hereinafter Brian and Rosenberg Letter); Department of Homeland Security Office of Inspector General, "Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, Sept. 27, 2018. https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf (Downloaded Oct. 12, 2018)

[44] Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978 at 10.

[45] Richard A. Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration*, 2, 19 (2011), http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf (citing an American Correctional Association survey finding that the average cost of juvenile incarceration per youth was roughly $241.00 a day).

[46] Amanda Petteruti, Marc Schindler, and Jason Ziedenberg, Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration* (2014), http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf.

[47] *Id.*

[48] *See, e.g.,* Alex Nowrasteh, *Alternatives to Detention Are Cheaper than Universal Detention*, The Cato Institute, Cato At Liberty (June 2018), https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention; American Civil Liberties Union, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up* (January 2014), https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd.

[49] *See* Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), http://www.justicepolicy.org/research/1978 at 11.

[50] The Annie E. Casey Foundation, *JDAI at 25: Insights from the Annual Results Reports* (2017).

have achieved better public safety outcomes at lower costs through the use of effective alternatives to detention, such as foster care placements, shelter care, and community-based supervision programs.[51] These programs ensure that youth appear for scheduled court appearances while allowing them to retain the connections to school, family, and community that are vital to healthy child and adolescent development.

There is no need to reinvent the wheel here. The programs described above have a demonstrated track record of being effective, and cost-effective, in rural, suburban, and urban localities throughout the country. These same programs can and should be employed as alternatives to secure facilities here.

5. *The Proposed Procedures for the Placement of Unaccompanied Children Into Secure Custody Raise Serious Due Process Concerns.*

Proposed 45 C.F.R. §410.203 raises significant due process concerns for children placed in staff secure or secure detention. At its base, the proposed regulation does not clearly enumerate the specific list of behaviors or offenses that lead ORR to detain a child in secure facilities. Instead, ORR authorizes itself to place children in a secure facility if the child has been charged with a crime, is chargeable (under a standard of probable cause) with a crime, has been convicted of a crime, poses a risk of danger to self or others, has made threats to commit a violent or malicious act, or engages in unacceptable behavior. This broad and non-specific list is confusing for children and fails to put them on notice of the rules that may result in them being detained in a jail-like setting. ORR claims that its updated proposed regulation brings ORR policies into compliance with a July 30 Flores court order because it clarifies the meaning of "chargeable" as requiring probable cause to believe a UAC has committed an offense. However, this clarification does not cure the proposed regulations of their failure to satisfy the requirements of basic due process.

A. HHS' Unconstitutional Overreach of its *Parens Patriate* Role

Any clarification provided by the proposed regulations is subsequently eliminated by the catchall categories, allowing ORR to place a child in secure custody "where ORR deems those circumstances demonstrates that the UAC poses a danger to self or others" or where a UAC "has made credible threats to commit, a violent or malicious act," or when the UAC (as determined by ORR) "engages in unacceptably disruptive behavior that interferes with the normal functioning of a 'staff secure' shelter". These justifications for placing children in highly restrictive settings give unfettered discretion to ORR staff and contractors to place a child in a juvenile jail for any reason, from disrupting the lunch line in the cafeteria to refusing to follow a dress code to

[51] Richard A. Mendel, *Two Decades of JDAI: From Demonstration Project to National Standard* (2009), https://www.aecf.org/m//resourcedoc/aecf-TwoDecadesofJDAIfromDemotoNatl-2009.pdf.

actually threatening another child or staff with a weapon. It provides no guidance for who makes these decisions, how they are made, who reviews them, what threats are deemed "credible" and why, or what would be sufficiently disruptive behavior to interfere with shelter functioning. Additionally, the proposed regulations as well as the ORR Policy Guide[52] fail to elaborate what criteria ORR uses to make a determination that a child is a danger to self or others. It leaves full discretion in any such determination to ORR or its contractors. Past experience working with UACs held in staff secure or secure detention has revealed ORR's justifications for deeming children dangerous to themselves or to others to be weak at best, and highly suspect or blatantly inaccurate at worst.

Equally concerning, the NPRM also lists "fighting" and "intimidation of others" as a justification for placing a child in a more restrictive setting. This necessarily implicates behavior less serious than any of the aforementioned justifications or it would be duplicative. This suggests that normal "school yard" fights or bullying, which should be addressed in a developmentally appropriate and productive way, will instead be treated as equally serious as other enumerated behaviors, therefore placing all children, regardless of the degree of alleged misbehavior or developmental typicality, at risk of incarceration in secure settings. This is at odds with the broad field of research and best practices for children exhibiting disruptive behavior and with child development and child welfare more generally.[53]

B. HHS' Procedural Due Process Obligations

The specific process for placing a child in staff secure or secure detention, as outlined by the NPRM, violates due process by failing to lay out procedures that will meet the minimum protections mandated by the Constitution to ensure due process of law.[54] The nature of the private interest here is of the greatest magnitude – detention in a secure facility is a dramatic curtailment of a child's liberty, with serious implications for their health and development. Respect for an individual's interest in their liberty is fundamental to our legal system and, as such, civil commitment is only permitted when necessary to ensure the safety of the individual or

---

[52] Office of Refugee Resettlement, *ORR Guide: Children Entering the United States Unaccompanied,* https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied

[53] *See, e.g.*, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Nov. 2006, http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf; Coalition for Juvenile Justice, *Applying Research to Practice Brief: What Are the Implications of Adolescent Brain Development for Juvenile Justice?* (2006), http://www.juvjustice.org/sites/default/files/resource-files/resource_138_0.pdf; Jessica Feierman, Kacey Mordecai, and Robert G. Schwartz, Juvenile Law Center, *Ten Strategies to Reduce Juvenile Length of Stay*, Apr. 22, 2015, https://jlc.org/resources/ten-strategies-reduce-juvenile-length-stay; Jessica Feierman and Lauren Fine, Juvenile Law Center, *Trauma and Resilience: A new look at legal advocacy for youth in the juvenile justice and child welfare systems*, Apr. 2014, https://jlc.org/sites/default/files/publication_pdfs/Juvenile%20Law%20Center%20-%20Trauma%20and%20Resilience%20-%20Legal%20Advocacy%20for%20Youth%20in%20Juvenile%20Justice%20and%20Child%20Welfare%20Systems.pdf.

[54] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

the public.[55] This is a narrow justification, which makes clear that civil confinement cannot be used a tool to punish.[56]

The paltry procedural protections contemplated in the NPRM will expose unaccompanied children to a high risk of erroneous deprivation of their liberty. Meaningful notice and an opportunity to be heard are fundamental to due process protections. Notice must provide the specific basis for the action taken, such that the child may prepare a response and meaningfully contest ORR's decision. The proposed section 410.206 of the NPRM states only that ORR will give children in secure or staff secure facilities "notice of the reasons" for this placement "within a reasonable time." In practice, children receive only nominal, non-specific notice of the general basis for their placement in a secure facility, as ORR does not provide the evidence or factual findings which it relied on nor does it provide a specific explanation of its reasoning. These proposed regulations establish no protections ensuring sufficient notice to children placed in highly restrictive settings. Similarly, stating that the child will receive notice "within a reasonable time" is so vague as to fail to establish requirements consistent with due process. Such opaque decision-making lacking any timeline denies the child meaningful notice.

Due process also demands that ORR provide an opportunity for the child to be heard. The Supreme Court has recognized that in cases in which an individual faces immediate deprivation of their liberty, this hearing must include substantial procedural protections, including the presentation of evidence and witnesses, as well as the opportunity to be heard in person, to present testimony and evidence, and to confront and cross-examine opposing witnesses. Additionally, the opportunity to be heard must conform to the capacity of the individual at risk of deprivation of their liberty. Therefore, the due process protections

---

[55] *See Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (finding due process violation when an individual who is detained on grounds of dangerousness is denied an adversarial hearing in which the state must prove by clear and convincing evidence that individual is a danger to the community); *Schall v. Martin*, 467 U.S. 253, 263 (1984) (finding no due process violation where hearing held to determine dangerousness).

[56] The Supreme Court has repeatedly affirmed that civil commitments cause "massive curtailment[s] of liberty." *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). As such, "involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Justice Burger, concurring). Further, "incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends." *Id.* at 575.

The substantive component of due process forbids the government from infringing in any way upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 301-301 (1993); *United States v. Salerno*, 481 U.S. 739, 749 (1987). It "prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" *Salerno*, 481 U.S. at 746; *see also United States v. Al-Hamdi*, 356 F.3d 564, 574 (4th Cir. 2004). In the immigration context, whether the infringement is narrowly tailored to serve a compelling governmental interest is determined by evaluating whether the infringement on liberty: 1) is impermissible punishment or permissible regulation; and 2) is excessive in relation to the regulatory goal Congress sought to achieve. *See U.S. v. Salerno*, 481 U.S. 739, 747 (1987); *see also Zadvydas v. Davis*, 533 U.S. 678, 701 (2001).

guaranteed to the unaccompanied child as a part of the hearing must counterbalance their youth and vulnerability.

Proposed 45 CFR 410.203 provides only that ORR itself "will review and approve all placements of UAC in secure facilities consistent with legal requirements." This unilateral review of the child's placement by an ORR employee fails to provide an adequate opportunity to be heard. It is only an undefined amount of time after the child has been placed in a secure facility that the proposed regulations require even nominal notice. The NPRM notes that once a UAC has been placed in a secure facility, they would be subject to the review procedures under TVPRA, which include monthly placement reviews by "care provider staff, in collaboration with the Case Coordinator and the ORR/FFS" and the option to request that the ORR Director, or their designee, "reconsider their placement." ORR establishes a "hearing" in proposed section 410.810 for children deemed a danger to themselves or others (though not for any of the other listed justifications for placing a child in a secure facility). An "810 hearing", however, does not satisfy the requirements of due process.

6. *The Proposed 810 Hearings Raise Serious Due Process Concerns*

HHS proposes, through this NPRM, to replace the Flores Settlement Agreement's (FSA) requirement that an immigration judge review a child's placement in a custody redetermination ("bond") with hearings run by an HHS administrative officer, in effect making HHS both jailer and judge.[57] Currently, FSA paragraph 24(A) requires that a child in deportation proceedings "shall be afforded a bond redetermination hearing before an immigration judge in every case", a mandate upheld by the Ninth Circuit Court of Appeals in *Flores v. Sessions*.[58] Despite this, HHS claims that a child's opportunity to be heard by a neutral, independent arbiter is reasonably replaced by an HHS employee reviewing his own agency's placement decision.[59]

---

[57] Recent reporting demonstrates how HHS already assumes these inherently conflicting roles at the expense of children. Only this summer, HHS officials "helped" five-year-old Helen withdraw her request for a custody redetermination (bond) hearing:

> "[I]n early August, an unknown official handed Helen a legal document, a "Request for a Flores Bond Hearing," which described a set of legal proceedings and rights that would have been difficult for Helen to comprehend. ("In a Flores bond hearing, an immigration judge reviews your case to determine whether you pose a danger to the community," the document began.) On Helen's form, which was filled out with assistance from officials, there is a checked box next to a line that says, "I withdraw my previous request for a Flores bond hearing." Beneath that line, the five-year-old signed her name in wobbly letters."

Sarah Stillman, *The New Yorker*, "The Five-Year-Old Who Was Detained at the Border and Persuaded to Sign Away Her Rights," Oct. 11, 2018, https://www.newyorker.com/news/news-desk/the-five-year-old-who-was-detained-at-the-border-and-convinced-to-sign-away-her-rights.

[58] *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017).

[59] 83 FR 45509-10, 45533-34.

As such, proposed 45 C.F.R. 410.810 fails to ensure that the due process rights of unaccompanied children are protected. Due process requires a UAC to receive detailed and meaningful notice of the charges and evidence against them, and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). 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." *Marshall v. Jerico, Inc.*, 446 U.S. 238, 242 (1980). Indeed, "involuntary confinement of an individual for any reason is a deprivation of liberty which the State cannot accomplish without due process of law." *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Justice Burger, concurring). Federal courts have evaluated similar ORR procedures to those proposed in 45 C.F.R. 410.810 and found them lacking:

> Virtually all of those procedures, however, consisted of internal evaluation and unilateral investigation. In effect, Respondents contend that due process was satisfied here because ORR made a significant effort to reach the correct decision. But due process does not concern itself only with the degree to which one can trust the government to reach the right result on its own initiative; rather, due process is measured by the affected individual's opportunity to protect his or her own interests. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) ("the Due Process Clause grants the aggrieved party the opportunity to present his case").

Beltran v. Cardall, 222 F. Supp. 3d 476, 486–87 (E.D. Va. 2016).

Moreover, if the government wants to detain a child in a secure setting, "the government must establish the necessity of detention by clear and convincing evidence. . . This is no less true where the government is claiming detention is necessary due to dangerousness." *Santos v. Smith*, 260 F. Supp. 3d 598, 613 (W.D. Va. 2017) (citing *United States v. Salerno*, 481 U.S. 739, 751, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (pretrial detention); *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Foucha v. Louisiana*, 504 U.S. 71, 81, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) (finding due process violation where an individual detained on grounds of dangerousness was denied an adversarial hearing in which the state had to prove his dangerousness by clear and convincing evidence); Va. Code Ann. §§ 37.2–800 et seq. (setting forth requirements for involuntary civil commitment of an adult, which includes a judicial hearing in front of a district judge or special justice)).

First, the well-laid out requirements of procedural due process require the provision of notice to the UAC of the specific reasons and evidence HHS is depending upon for its dangerousness determination prior to any 810 hearing, with sufficient time to allow the UAC to gather their own evidence to counter HHS's assertion of dangerousness. Due process mandates that such notice be

provided *prior to* a child's transfer to a secure or staff-secure facility (and the associated severe deprivation of his or her liberty), to allow the child to contest the evidence and transfer decision. Nonetheless, there is no requirement in this section or any other that HHS provide detailed notice to the UAC explaining the evidence upon which it relied to determine that the child must be placed in a secure setting. It would be impossible for a child to present evidence proving that he or she is not dangerous without seeing the evidence upon which the government is relying to make such a determination. Notice of hearing procedures does not satisfy the meaningful notice requirements of due process.

Second, the burden of demonstrating that the UAC will be a danger to the community or flight risk properly rests on HHS, rather than on the UAC. As HHS engages in its own internal research and decision-making regarding dangerousness and risk of flight, which they otherwise do not share with the UAC who is the subject of that determination, it is grossly unfair to require a detained child to provide evidence to the contrary without first seeing the evidence against them. This is in line with the Ninth Circuit's view that the bond hearings required under paragraph 24A of the FSA "compel the agency to provide its justifications and specific legal grounds for holding a given minor." *Flores v. Sessions*, 862 F.3d 863, 868 (9th Cir. 2017). It is also consistent with the Flores Settlement Agreement's requirement that the government place detained children in the "least restrictive setting appropriate to the minor's age and special needs," and its presumption of a general policy favoring release. Flores Settlement at ¶¶ 11, 14; § VI. Given the gravity of the consequences of this determination (continued detention, or continued detention in a lockdown facility), the government should demonstrate that the child is a danger to the community or flight risk by clear and convincing evidence. The clear and convincing evidence standard is the governing standard in almost all civil detentions, with the exception of immigration detention. Given that children's liberty interests are at stake in the context of detained UACs, this higher standard of proof must be applied. *See, e.g.*, *In Re Gault*, 387 U.S. 1 (1967).

Third, the "opportunity to be heard" in the proposed regulations does not meet due process requirements. We strongly disagree with HHS's assertions that "as the legal custodian of UACs who are in federal custody," it "clearly has the authority to conduct the hearings envisioned by the FSA," 83 Fed. Reg. 45486, 45509 (Sept. 7, 2018) (to be codified at 8 CFR pts. 212 and 236, 45 CFR pt. 410), or that HHS could possibly provide "the same type of hearing paragraph 24(A) [of the FSA] calls for." *Id.* By removing the option for UACs to come before an immigration judge working as a part of the DOJ, this proposed rule positions HHS/ORR as both judge and jailer. This is problematic for several reasons.

First, the Ninth Circuit Court of Appeals has already considered and rejected the same arguments advanced by HHS in the proposed regulations regarding its authority to conduct hearings that would comply with paragraph 24(A) of the FSA. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017). The court went into detail about the benefits provided by the bond hearing guaranteed to

children in paragraph 24(A), despite their differences from bond hearings for accompanied minors or adults, including the importance of having their detention assessed by an independent immigration judge. *Flores* v. *Sessions*, 862 F.3d at 867 ("The hearing is a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge.") The court went on to discuss the benefits to UACs held in both secure and non-secure facilities. For UACs held in secure facilities, the hearings provide an opportunity for youth to directly contest the basis for their confinement in secure detention, as the TVPRA only allows children to be placed in secure facilities if they pose a safety risk to themselves or others, or have committed a criminal offense, both of which are determinations made by an immigration judge at a bond hearing. For youth in non-secure facilities, the hearings still provide UACs an opportunity to be represented by counsel and have their detention assessed by an independent immigration judge, outside of the ORR system, among other benefits.

Not only is proposed regulation 45 C.F.R. 410.810 completely at odds with the FSA and the Ninth Circuit's decision interpreting that provision, but in practice, the enumerated benefits of having access to a *Flores* bond hearing would be extremely curtailed were HHS to assume the role of arbiter in re-evaluating detention decisions. In fact, there is an inherent tension in the idea that the very same agency that has the power to make placement and release decisions for UACs, including whether they are a danger to the community or present a flight risk, could neutrally re-evaluate its own decisions.

The proposed regulations raise several additional concerns. The appeal process set forth in 45 C.F.R. 410.810(e) is not only insufficient, but inappropriately tasks a political appointee with deciding the outcome of a child's appeal. This all but ensures that political considerations will take precedence over any neutral consideration of the merits of the appeal and the best interests of the child.[60] If UACs will not be provided the ability to challenge the basis for their detention in front of an independent immigration judge, they should at a minimum be advised of their right to appeal a decision of an HHS adjudicator to an independent judge in a federal court, as a binding HHS decision would constitute final agency action. Furthermore, if HHS proposes to make a binding determination that a child cannot be reunified because he or she poses a danger to the community (as opposed to a decision that pending reunification a child must be in a secure setting), a full, in-person hearing before a neutral (non-HHS) arbiter is absolutely required to satisfy due process. In either situation, an internal review by the agency itself is in no way sufficient given the liberty interests at stake, the long-term health and mental health consequences that result from the detention of children, and the relatively small population of children held in secure or staff-secure detention. Finally, best practices in child welfare and

[60] Examples of harm to children from politically-driven decisions by political appointees at HHS continue to accumulate. A notable example found that such agency decision-making represented the "zenith of impermissible agency action". *LVM v. Lloyd,* Opinion and (June 27, 2018), https://www.nyclu.org/en/press-releases/court-halts-trump-administration-policy-prolonging-detention-hundreds-immigrant (noting that the agency's creation of the release policy without a record indicating need for a change "is at the zenith of impermissible agency actions").

fairness require a UAC's 810 hearing to occur in person rather than through video- or teleconferencing. *See* Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Northwestern U. L. Rev. 4, 933 (2015).

Additionally, the limitation on "810 hearings" in subsection (h) to disallow the use of these hearings for challenges to placement or level of custody decisions is in direct conflict with the Ninth Circuit's decision in *Flores v. Sessions*, and will strip children of one of the most meaningful protections provided by such a hearing. As the Ninth Circuit pointed out, "[p]roviding unaccompanied minors with the right to a hearing under Paragraph 24A therefore ensures that they are not held in secure detention without cause." *Flores v. Sessions*, 862 F.3d at 868. The level of ORR detention in which children are held can drastically affect their experiences and length of detention, so this is not to be taken lightly. *See, e.g.,* Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages, *Lucas R. v. Alex Azar*, No. 2:18-CV-05741-DMG-PLA (C.D. Cal. filed June 28, 2018); *see also*, *L.V.M. v. Lloyd*, 318 F.Supp. 3d 601 (S.D. N.Y. 2018); *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017).

A. 810 Hearings Must Consider the Best Interests of the Child, Not Just Dangerousness or Risk of Flight

Proposed 45 C.F.R. 410.810 allows an unaccompanied child to seek review of "whether [she] would present a risk of danger to the community or risk of flight if released." 83 Fd. Reg. 45533. If this paragraph is intended as HHS asserts, to afford unaccompanied children "the same type of hearing Paragraph 24(A) calls for," 83 Fed. Reg. 45509, it should provide the child with the same sort of substantive review that she would have received in a *Flores* bond hearing.

In August 2016, the *Flores* class of accompanied and unaccompanied children filed a motion to enforce the Agreement, alleging that the government's refusal to grant bond hearings to children in immigration detention violated Paragraph 24A:

> 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.

District court Judge Dolly Gee found the government in breach of the Agreement and granted the motion. *Flores v. Lynch,* No. 2:85-cv-04544-DMG-AGR (C.D. Cal. Jan. 20, 2017). The government immediately entered a stay and appealed, asserting, *inter alia*, that the interceding passage of HSA and TVPRA terminated the requirement of Paragraph 24A. The Ninth Circuit in *Flores v. Sessions* affirmed the district court's finding, and held that "[n]othing in the text, structure, or purpose of the HSA or TVPRA renders continued compliance with Paragraph 24A . . . impermissible" (internal citations omitted). *Flores v. Sessions*, D.C. No. 2:85-cv-04544-DMG-AGR (9th Cir. 2017). As contemplated by the Ninth Circuit, bond hearings acted as a

judicial review of the child's custody based on the following provisions of the TVPRA: (1) children be placed in the least restrictive setting that is in the best interest of the child, and (2) that ORR consider the child's danger to self, community, and flight risk when making these placements.

The TVPRA sets the statutory standard for the custody of unaccompanied children, requiring ORR to place children in the "least restrictive setting that is in the best interests of the child" while permitting the agency to also consider the child's "danger to self, danger to the community, and risk of flight." 8 U.S.C. 1232 (c)(2) (". . . an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight." (emphasis added)). To be consistent with Paragraph 24(A) of the FSA and the TVPRA, any review of ORR's custody determination should therefore consider the full statutory standard—not just the part of it currently described in the NPRM. An 810 hearing that reviews only ORR's assessment of the child's perceived dangerousness without consideration of whether the placement is in the child's best interests would eviscerate the intent of the Ninth Circuit decision and Paragraph 24(A) of the FSA, which was to provide review of ORR's statutorily prescribed custody determination.

B. Importance of Evaluating Custodial Criteria through a Best Interest Lens before an Independent Arbiter

The "810 hearings" proposed at 45 C.F.R. 410.810[61] repudiate the evidence-based consensus on best practices in evaluating custody determinations for children and youth. Again, troublingly, the NPRM fails to engage in any meaningful analysis of the large body of evidence militating against the efficacy or fairness of a custody redetermination process that casts the same government agency as judge and jailer.[62]

Custody decisions made regarding a young person's flight risk and danger to self or others should be made using objective criteria related to those specific factors. These factors should be weighed by a neutral and independent arbiter – in this case, a judge. This is precisely how custody decisions are made in other contexts, including in this country's juvenile justice system. In jurisdictions throughout the country, officials make detention decisions using a detention screening instrument, which assesses a youth's likelihood of failing to appear in court or committing a new offense prior to the adjudication of their case.[63] These instruments contain a set list of factors and assign points based on a youth's background and circumstances. Youth

[61] 83 FR 45533-34.
[62] 83 FR 45509.
[63] The Annie E. Casey Foundation, *Juvenile Detention Risk Assessment: A Practice Guide for Juvenile Detention Reform* (2006), https://www.aecf.org/resources/a-practice-guide-to-juvenile-detention-reform-1/.

who receive a high score are detained, youth who score in the middle range are assigned to a detention alternative program, and youth who score in the low range are released upon conditions to appear in court.[64] These instruments also allow for a limited use of overrides to release or detain a young person when circumstances warrant reconsideration of the youth's assigned score. The use of a detention screening instrument helps ensure that decisions are made fairly and consistently, and in a way that reserves the most expensive interventions for the relatively small number of young people who are determined to require secure custody.

Independent judicial review of custody decisions is necessary to ensure that detention decisions are made through a best interest lens that applies appropriate weight to the factors listed above and the costs and benefits of potential placements. The U.S. Department of Justice has noted youth in this country's juvenile justice system are entitled to detention hearings before a judicial officer and an assessment of probable cause for their detention within 48 hours of being taken into custody.[65] Even in jurisdictions that use detention screening instruments described above to make initial decisions at the time of youth's contact with law enforcement, judicial officers ultimately make custody decisions using the results of those instruments alongside a number of other factors, including a presumption of placing youth in the least restrictive setting possible consistent with public safety and the youth's likelihood of failing to appear. Independent judicial review ensures that all legal factors are weighed independently, fairly, and objectively.

[64] *Id.*

[65] Letter from Assistant Attorney General Thomas E. Perez to Mississippi Governor Phil Bryant (Aug. 10, 2012), http://www.justice.gov/iso/opa/resources/26420128101217336747 91.pdf. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1974); *In re Gault*, 387 U.S. at 33-57; *see also Moss v. Weaver*, 525 F.2d 1258, 1260 (5th Cir. 1976) (holding that Gerstein probable cause hearings are required for youth).