

September 14, 2018

BRIEF ANALYSIS OF

United States Department of Homeland Security (DHS) &
United States Department of Health & Human Services (HHS)
September 7, 2018 NOTICE OF PROPOSED RULEMAKING (NPRM):
***Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied
Alien Children***

The Tahirih Justice Center reviewed the September 7, 2018 DHS/HHS NPRM entitled *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*.ⁱ The proposed rule impacts immigrant children seeking admission to the United States alone or with a parent. Many children and families arriving at the border are seeking safe haven from unspeakable violence such as rape, severe domestic abuse, and human trafficking. The following is a summary of the most notable aspects of the rule.

- The stated purpose of the proposed rule is to implement the terms of the *Flores* Settlement Agreement,ⁱⁱ certain provisions of the Homeland Security Act of 2002 (HSA)ⁱⁱⁱ and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).^{iv} The primary purpose of the *Flores* Agreement – struck after a group of incarcerated immigrant children sued the federal government over 30 years ago – is to minimize the use of immigration detention for children and to maximize children’s well-being if and when detained.
- The federally mandated *Flores* Agreement remains in place after several decades, despite various unsuccessful attempts by the government to weaken it. In July, Judge Dolly Gee reaffirmed that the Agreement remains fully in force. Judge Gee noted that the parties “voluntarily agreed to its terms,” yet DHS impermissibly “seeks to light a match to the...Agreement and ask[s] this Court to upend the parties’ agreement by judicial fiat...”^v DHS’ proposed rule is yet another attempt to flout the law. The proposed rule purports to provide protections for children that are “materially identical” to those required by the *Flores* Agreement. **However, the proposed rule all but eliminates such protections in practice, giving DHS the authority to incarcerate children for longer periods of time and in facilities licensed by DHS itself.**
- Under the *Flores* Agreement, detained children must be held in facilities licensed by “an appropriate State agency...for dependent children.”^{vi} Because State licensing schemes generally don’t exist for facilities holding families,^{vii} the Agreement prohibits DHS from detaining children who are part of a family unit for prolonged periods of time. DHS argues that as a result, families will be separated when children are released. To alleviate this, DHS proposes to create an alternative federal licensing scheme to govern so-called “Family Residential Centers,” which are jails for immigrant families.

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- DHS proposes the new federal licensing scheme as its *only option* to both comply with the *Flores* Agreement and prevent family separation. This is a false premise. Rather, jails housing immigrant children and families *need not – and should not –* be used at all. Their use is widely criticized as inhumane, unnecessarily costly to the government, and inappropriate as a deterrence strategy for those seeking asylum. By contrast, various alternatives to detention exist that are far less expensive for taxpayers than incarceration, and indisputably alleviate a primary concern of DHS by yielding very high immigration court appearance rates.^{viii}
- DHS asserts that the basic principle underlying the rule, consistent with the *Flores* Agreement, is that the government should treat children with “dignity, respect, and special concern for their particular vulnerability as minors.” This does not ring true, however, when the rule would lengthen the incarceration of children and expose children to the risks of abuse and mistreatment in custody. For example, DHS has been accused of perpetrating various human rights abuses against children while in its custody including sexual, verbal, and physical assault, deprivation of food and water, subjection to extreme temperatures, and most recently, using intentionally coercive and cruel separation from parents as a deterrence tactic. Punitive deterrence tactics are inappropriate for vulnerable asylum seekers because they are in dire need of international protection. The United Nations High Commissioner for Refugees, which is responsible for providing international protection to refugees, recommends that the U.S. “ensure that all migration policies protect people’s legal right to seek asylum, and refrain from using detention as a deterrent.”^{ix}
- In addition, DHS continues to try to expand family incarceration in the face of overwhelming evidence of its deeply traumatizing impact on children. Experts are unanimous that children should never be unnecessarily incarcerated as a matter of course, even when held along with their parents, because of detention’s long-lasting negative mental and physical health consequences and its severe impact on child development. Such consequences include chronic anxiety, depression, sleep and appetite disruption, post-traumatic stress, and more. According to the American Academy of Pediatrics, “[t]he act of detention or incarceration itself is associated with poorer health outcomes, higher rates of psychological distress, and suicidality making the situation for already vulnerable women and children even worse.”^x
- DHS also proposes changes to the parole determination process for children in expedited removal proceedings that run afoul of the *Flores* Agreement. The rule would impose the same very narrow standard for release of children on parole as adults – in other words, they could only be released for a medical necessity or to serve a law enforcement need. More families will be held for longer periods of time in costly immigration jails, harming the children and draining taxpayer dollars unnecessarily.
- The rule would require “third party oversight of compliance” with DHS’ proposed family incarceration licensing scheme. This is cold comfort when DHS has been accused of harming children in custody, and the objectivity and the weight of authority of this third party has not been laid out. Regardless, oversight will not end the essentially traumatizing nature of child imprisonment itself.
- Other proposed changes similarly undermine existing protections for children in practice. For example, the rule allows “operational feasibility” and “emergencies” to be considered in the discretion of DHS, even when it comes to implementing required practices to ensure children’s well-being.

ⁱ <https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf>

ⁱⁱ <https://www.aila.org/File/Related/14111359b.pdf>

ⁱⁱⁱ Public Law 107–296, sec. 462, 116 Stat. 2135, 2202.

^{iv} Public Law 110–457, title II, subtitle D, 122 Stat. 5044.

^v <https://www.aila.org/File/Related/14111359ac.pdf>

^{vi} Paragraph 6.

^{vii} It is noteworthy that in a 2016 case, a Judge in Texas denied a license for an immigration jail to hold children.

^{viii} <https://www.womensrefugeecommission.org/images/zdocs/The-Real-Alternatives-to-Detention-FINAL-06-27-17.pdf>

^{ix} <http://www.unhcr.org/publications/operations/5630f24c6/women-run.html>

^x [https://www.aap.org/en-us/advocacy-and-policy/federal-](https://www.aap.org/en-us/advocacy-and-policy/federal-advocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf)

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Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (June 2003); see also A. S. Keller, et al, *The Mental Health of Detained Asylum Seekers*, 362 *The Lancet* 1721 (2003); See also [https://www.tahirih.org/wp-](https://www.tahirih.org/wp-content/uploads/2015/10/Righting-the-Wrong-Why-Detention-of-Asylum-Seeking-Mothers-and-Children-Must-End-Now-Web-Copy.pdf)

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