

October 30, 2018

Submitted via www.regulations.gov

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 1653-AA75, 0970-AC42; Comments in Response to Proposed Rulemaking: *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*

Dear Ms. Seguin:

The Tahirih Justice Center is pleased to submit the following comments in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (proposed rule) published in the Federal Register on September 7, 2018, relating to the apprehension, processing, care, and custody of alien minors and unaccompanied alien children (UACs).

For the following reasons, Tahirih strongly opposes the proposed rule and respectfully urges you to withdraw it. We advocate instead for policies and practices consistent with the Flores Settlement Agreement's (*Flores Agreement*) mandate to minimize detention for children, and maximize their health and safety when detention is deemed necessary in limited circumstances.ⁱ

I. Introduction and Tahirih's Specific Expertise

Tahirih is a national policy and direct services organization with over twenty years of experience serving immigrant survivors of gender-based violence. Individuals of all ages reach out to us for help, after courageously fleeing trauma either on their own or with their families. Our clients endure abuses such as human trafficking, domestic violence, forced marriage, sexual assault, and other torture. We have served children who were as young as five years old when they escaped on their own to the United States. One of our cases involved a girl from Central America named Sofia* who was raped and impregnated at age thirteen. After being held hostage for several months by her captors, she escaped with her young daughter through a broken window to seek safe haven in the U.S. Tahirih also represents Maria,* a young survivor of sex trafficking who fled Central America with her infant in her arms. Maria herself is an unaccompanied minor, and like many others, gave birth to her child as the result of a brutal rape.

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The proposed rule would increase the frequency and length of incarceration for migrant children and their parents, many of whom are survivors of gender-based violence. Locking up traumatized children is patently inhumane, along with forcing their mothers to care for them in a punishing environment with minimal access to the outside world. Incarceration also directly triggers re-traumatization, particularly for the many survivors who have been held against their will for any length of time by violent abusers or traffickers. Instead, survivors require ready access to trauma-informed services in a non-punitive, non-hostile setting.

We appreciate your careful consideration of our views, and ask that you also review the resources cited to throughout our comments for important additional background information.

- II. The prolonged incarceration of children contemplated by the proposed rule violates, rather than implements, the *Flores Agreement*; incarceration is unnecessary and inappropriate for vulnerable mothers and children fleeing gender-based violence.

The *Flores Agreement* requires the government to minimize the frequency and duration of incarceration of children. If incarceration is deemed necessary as a last resort, the government must maximize children's well-being while in custody. Contrary to the *Agreement*, however, the proposed rule promotes prolonged incarceration of children, including those arriving with their parents, with very narrow criteria for release.

As described above, many asylum seeking mothers and children who flee to the U.S. have survived horrific violence, and overwhelmingly suffer Post-Traumatic-Stress-Disorder (PTSD) as a result. Sarah* was five years old when her father held a machete to her mother's throat, threatening to kill her. Her mother fled to the U.S., followed by Sarah, after her father beat her with electrical cords and raped her when she was fourteen. He warned that he would kill her loved ones if she told anyone.

A common thread among various forms of gender-based violence is the perpetrator's use of power and control to keep survivors in a chronic state of fear, submission, and helplessness. The power dynamics inherent in any custodial setting are therefore especially debilitating for survivors. While detained, survivors inevitably re-endure the paralyzing intimidation and loss of agency they suffered at the hands of their traffickers or abusers prior to incarceration.ⁱⁱ For political prisoners such as our client Leah,* who endure torture within prison itself, incarceration is devastating. Leah was a political activist in Africa, and still bears scars from being beaten with rifles and sexually assaulted while jailed by government officials. Her daughter was also arrested and raped so brutally while in custody that she lost consciousness.

For children, trauma can manifest as chronic anxiety, depression, and sleep and digestive disturbances which in turn cause developmental delays physically, cognitively, and emotionally. Compounding this trauma are the deeply damaging effects of incarceration in itself, on both mothers and children. Experts are unanimous that children should never be unnecessarily incarcerated even when held along with their parents. 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.”ⁱⁱⁱ

Meaningful access to high-quality mental health care, particularly in cases of sexual assault, is critical to ensure that both adult and child survivors heal and ultimately achieve self-sufficiency. The longer survivors wait for desperately needed services, the more challenging the healing process may be.^{iv} DHS Immigration & Customs Enforcement (ICE) reports that trauma-informed care training is provided for all staff who interact with incarcerated adults, and it is increasing the number of trained mental health care providers on staff.^v Our client Clara* desperately needed counseling after fleeing Honduras, where her partner beat, raped, and threatened her with a gun in front of their four year old daughter. Despite these assurances from ICE, Clara was only able to receive counseling after her release from detention. For others who do receive counseling while in custody, it is often inadequate due to lack of interpreter services among other issues.

More importantly, while Tahirih unequivocally supports increased training and service capacity where incarceration is unavoidable, no amount of training or services delivered within the confines of a prison can mitigate the unnecessary trauma of incarceration itself. As with so many young survivors such as Sarah above, abusers routinely threaten to retaliate against them if they confide in anyone. Knowing firsthand the violence they are capable of, and due to the shame and stigma often associated with gender-based violence, survivors must overcome immense terror in order to trust anyone with their story. Truly client-centered, trauma informed services by their nature are only effective in an environment where survivors feel safe; a detention facility is a far cry from this standard.

Tahirih recently represented Patricia,* a mother who fled to the U.S. with her twelve year-old daughter. They were incarcerated for over six months. As a result of the incarceration, Patricia had no choice but to reveal the traumatic story of her daughter’s conception to her during their credible fear interview. Patricia described to the Asylum Officer how she had been kidnapped and raped for weeks, resulting in her pregnancy. She then recounted how her daughter used to love to sing and play outdoor games with her friends, but she became increasingly quiet and withdrawn as the weeks and months in detention passed. She stopped verbalizing her emotions, stopped laughing, and would no longer sing or play with other children at the facility. The only mental health counselor at the facility was an elderly, former military officer and Patricia’s daughter was afraid to speak with him. She feared that he might use the information she shared against her and her mother. Patricia requested a female counselor, but during the thirty days Tahirih was in contact with her, none was provided.

As survivors heal, they are better able to prepare and present their legal cases in a complete and efficient manner. Mental health providers also serve as key witnesses in asylum claims, by diagnosing and documenting PTSD. Their expert testimony helps inform adjudicators’ credibility assessments, yielding more accurate adjudications to the benefit of all stakeholders involved. Efficiencies also greatly increase when mothers and children are able to retain *pro bono* counsel to help gather evidence, present appropriate legal arguments, and minimize the risk of due process violations resulting in lengthy, costly appeals. Yet, detention facilities are often located in remote

areas where counsel is scarce. Increasing the use of detention as the rule proposes is therefore not only to the detriment of survivors, but it compromises the integrity of the judicial process.

- III. Additional provisions^{vi} in the proposed rule violate the spirit and terms of the *Flores Agreement* and Trafficking Victims Protection Act (TVPRA) and punish survivors of gender-based violence.

The proposed rule will increase the risk of further abuse to survivors of sexual assault and trafficking in custody, as well as threaten the safety of all children. For example, the rule outlines expansive definitions of the terms “emergency” and “influx,” giving DHS virtually unchecked discretion to abandon critical safeguards for children in certain circumstances. Safeguards include timely transfers of children out of DHS custody, and timely separation of children in custody from unrelated adults.^{vii} The proposed rule’s age determination scheme also puts child survivors at heightened risk of exposure to adult perpetrators in custody, by containing no presumption that an individual is a child. The rule should err on the side of caution, instead of increasing the risk of DHS wrongfully deeming a child an adult subject to DHS incarceration with other adults.

In addition, contrary to the TVPRA, the proposed rule allows for repeated determinations by DHS as to whether a child meets the legal definition of a UAC. Designation as a UAC confers significant substantive and procedural protections that specifically contemplate the vulnerability of children. Protections include more time to prepare one’s legal case, access to child-appropriate medical and mental health services, appointment of a child advocate, and the opportunity to present one’s case in a non-adversarial setting. Child survivors of gender-based violence particularly benefit from such protections; sexual trauma involves extremely sensitive fact-finding and testimony that takes time to elicit by trusted care givers and skilled counselors. And, in addition to renewed uncertainty, the repeated questioning by DHS that status re-determinations entail is also accompanied by profound re-traumatization.

- IV. DHS’ proposed federal licensing scheme^{viii} for so-called “Family Residential Centers” - jails for immigrant families – will not provide adequate oversight and standards of care for survivors.

While the rule proposes a federal licensing scheme for immigration prisons, it does not specify who will be responsible for developing such a scheme. At a minimum, the rule should prohibit DHS itself from adopting this role. The rule requires “third party oversight of compliance” with the scheme, but likewise does not outline the weight of authority and level of objectivity of the third party conducting oversight. Also absent is a description of the mechanism for redress. These omitted details are critical given that DHS has been accused of harming children in its custody, including by committing sexual, verbal, and physical assaults, depriving children of food and water, and subjecting them to extreme temperatures.^{ix} Regardless, as explained above, no amount of oversight can alleviate the traumatizing nature of imprisonment itself for children and survivors of gender-based violence.

- V. Conclusion

Tahirih opposes the proposed rule issued by DHS and urges instead an end to the incarceration of immigrant children in all cases, barring rare and exceptional circumstances. The incarceration of children has been shown to cause them mental and physical harm. For child asylum seekers, the majority have already experienced trauma and incarceration is especially damaging.

Detaining vulnerable children seeking asylum is anathema to our values, laws, and international treaty obligations. It will not deter children from seeking protection; our years of experience working directly with survivors reliably reveal that the vast majority, including young children, flee unspeakable horrors at all costs; the smallest hope of finding safety outweighs the threat of incarceration upon arrival in the U.S. In addition, the excessive, wasteful cost to taxpayers of this proposal is well-documented. With time-tested, low-cost alternatives available, there is no clear public policy purpose to justify incarcerating children that also falls in line with our legal obligations.

Again, we appreciate the opportunity to submit these comments and we look forward to your detailed feedback on this critical issue. For additional information, please contact me at irenas@tahirih.org or 571-282-6180.



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*Pseudonym

ⁱ *Flores v. Sessions*, No. 2:85-cv-04544 (C.D. Cal. June 27, 2017).

ⁱⁱ <https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again>, p. 11;

Tahirih interview with Jonathan Ryan, Executive Director of RAICES, conducted in June 2015.

ⁱⁱⁱ Letter to Secretary Jeh Johnson, July 24, 2015, <https://www.aap.org/en-us/advocacy-and-policy/federaladvocacy/Documents/AAP%20Letter%20to%20Secretary%20Johnson%20Family%20Detention%20Final.pdf>; 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-content/uploads/2015/10/Righting-the-Wrong-Why-Detention-of-Asylum-Seeking-Mothers-and-Children-Must-End-Now-Web-Copy.pdf>

^{iv} <https://www.psychologytoday.com/us/blog/trauma-and-hope/201704/overcoming-sexual-assault-symptoms-recovery>: “From a clinical perspective, the amount of suffering and distress is substantially reduced when a person seeks treatment earlier on.”

^v <https://www.dhs.gov/news/2018/06/18/myth-vs-fact-dhs-zero-tolerance-policy>

^{vi} <https://www.regulations.gov/document?D=HHS-OS-2018-0023-0001> at 45525-6.

^{vii} In addressing the separation of adults from children, the proposed rule references 6 CFR 115.14(b) and 6 CFR 115.114(b). While these provisions are intended to lessen the risk of sexual assault in custody, invoking them here will have little practical effect due to the rule’s broad definitions of “emergency” and “influx.” And, the rule further weakens the separation requirement by saying that children will “generally” be held separately from adults.

^{viii} <https://www.regulations.gov/document?D=HHS-OS-2018-0023-0001> at 45525-6.

^{ix} <https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuseinvs/index.html>; https://www.dropbox.com/s/lplnufjwci0xn/CBP%20Report%20ACLU_IHRC%205.23%20FINAL.pdf?dl=0; Guillermo Contreras, “Complaint: Women at Karnes Immigration Facility are Preyed upon by Guards,” My San Antonio, October 3, 2014, available at <http://www.mysanantonio.com/news/local/article/Complaint-Women-at-Karnes-immigration-facility-5797039.php>