



Summary of Proposed Regulations Regarding Children and Immigration Detention

Overview

On September 7, 2018, the Department of Homeland Security (DHS) and Department of Health and Human Services (HHS) issued proposed [regulations](#)¹ to “ultimately lead to the termination” of the [Flores Settlement Agreement](#), the 1997 legal settlement that governs the conditions of children held in immigration detention. Under the terms of a 2001 Stipulation to the Flores Agreement, the parties agreed that the Flores Agreement would terminate “45 days following the [federal government’s] publication of final regulations implementing this Agreement.” To date, no such final regulations have been published, with the 2018 proposed regulations representing the first regulations that have been formally proposed.

The Trump administration maintains that the proposed regulations “parallel” the “relevant and substantive terms” of Flores while “still implement[ing] the substantive and underlying purpose of” the Flores Agreement, while departing at times from its “literal text.” The government asserts that the regulations will continue to carry out the Flores Agreement’s basic purpose to ensure that all juveniles in the government’s custody are “treated with dignity, respect, and special concern for their particular vulnerability as minors.”

The deadline for public comments to these proposed regulations is **November 6, 2018**.

Concerns

The proposed regulations would remove and weaken protections for children who DHS and HHS hold in custody due to immigration laws. If finalized, they would permit the indefinite detention of families, change the standards of care a detention facility needs to provide for children, and make it more difficult for a child to be released for urgent humanitarian reasons.

What the Proposed Regulations Do

Remove Limits on Length of Family Detention: The proposed regulations would permit the indefinite detention of families, [eliminating](#) the Flores Agreement’s existing limitations on the detention of children. Contrary to federal court rulings that [barred](#) the long-term incarceration of children in immigration detention and [declined to modify](#) the Flores Agreement to permit family detention, the regulations would permit children to be held with their parents

¹ The promulgation of the proposed regulations follow the issuance of an [executive order](#) by the administration in June 2018 in response to the growing outrage over the [separation of families](#) at the border. The executive order sought to detain children with their families. Because federal courts have found that that Flores Agreement bars the long-term immigration detention of children – including in family detention – the executive order called on the attorney general to file a request to modify the Flores Agreement to permit family detention. U.S. District Judge Dolly Gee, who oversees the agreement, [denied that request](#), calling it “a cynical attempt...to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate.”

during the pendency of immigration proceedings, which can take years. The average wait time for an immigration case to be heard is [721 days](#), about two years; with wait times in San Antonio, Chicago, Imperial, CA, Denver, and Arlington, VA averaging over 1,400 days (almost four years) as of June 2018.

The proposed regulations retain existing language from the Flores Agreement in many areas, and would leave in place many existing policies governing detention, apprehension, and transportation of unaccompanied children (UACs).

Change Licensing Requirements for Family Detention Facilities: The regulations also would end existing Flores Agreement requirements that states license facilities that hold children, including family detention facilities. The administration’s main argument justifying this change is that Flores requires licenses for facilities for children detention and because most states don’t have existing schemes for these types of facilities, it creates bottlenecks in licensing facilities that are able to hold children together with parents. Instead, the rule would create a federal licensing scheme for family facilities. Under the new licensing scheme, unspecified third-parties would audit family facilities to enforce federal requirements, likely facilitating the opening of additional family detention facilities beyond existing family facilities (Berks, Dilley, and Karnes).

Expand Definitions of Emergency and Influx: The proposed regulations would allow DHS and HHS to weaken protections for children in the event of an “emergency” or an “influx” of migrants, both of which are defined broadly. These broader exceptions would generally permit DHS and HHS to suspend protections for children in a great number of situations, even impacting basic needs, like the provision of meals and snacks. Also, DHS is currently required by the Trafficking Victims Protection Restoration Act (TVPRA) to transfer UACs to DHS’s Office of Refugee Resettlement (ORR) within 72 hours of determining that the child is a UAC and other minors within three to five days. While the original Flores Agreement permits the departments to delay transfer of a child in emergency situations, the new, broad “emergency” and “influx” definitions may make longer stays more common.

The proposed regulations define “emergency” as a natural disaster, fire, civil disturbance, medical or health concerns and other similar circumstances. “Influx” is defined as a situation when more than 130 minors or UACs are eligible for placement in a licensed facility. The inflow of Central Americans along the southern border in recent years likely would meet the standard for an “influx,” suggesting that DHS and HHS would likely be exempted from meeting established standards of care were the regulations to become final.

Provide for Continual Reassessments of UACs: Under the proposed regulations, even after an initial determination that a child is a UAC, immigration officers must redetermine whether someone is a UAC each time they encounter the child including considering whether the child has 1) turned 18 years old (“aging out”), 2) acquired legal status, or 3) if his or her parent or legal guardian is found to be in the U.S. and available to assume custody. This continual reassessment would add an extra layer of uncertainty and administrative burden as they pursue their immigration cases leading to increased backlogs and cost of our immigration court system. Re-designating a UAC as an accompanied minor or adult would also remove protections such as an exception to the one-year filing deadline for asylum and the opportunity for a non-adversarial asylum adjudication despite arriving as a UAC.

The rule would also establish a “totality of circumstances” approach to determine whether someone is 18 years of age. The standard called to considering “multiple forms of evidence,”

including medical examinations and other procedures, in determining whether an individual is actually a minor. This provision is overly vague and could lead to harm in cases where a child is mistakenly classified as an adult, losing key due process protections. The proposed regulations do not specify when medical and dental examination are required and provide no guidance as to the level of training or expertise needed to conduct such examinations.

Limit use of parole: The proposed regulations limit the use of the government’s discretion to allow someone into the U.S. temporarily who do not have a legal basis for being admitted to the U.S., which is referred to as “parole,” making it more difficult for a child to be released for urgent circumstances. The proposed regulations would permit the release only in case of medical necessity or law enforcement need.

Under the Flores Agreement, children may be released on parole when there is an “urgent humanitarian” reason or in similar circumstances, based on specifics of the given case. Under a new heightened standard in the proposed regulations, children in expedited removal proceedings would face the same harsh parole standards as adults.

The proposed regulations also limit release of a paroled child to a parent or legal guardian, a departure from the Flores Agreement, which permits release to other relatives.

DHS admits that changes to its current practice for parole determinations may increase detention levels and higher costs, although it does not specifically calculate these additional costs. Already, the child detention center in Tornillo, Texas, which opened in June 2018, is being expanded from 1,200 to 3,800 beds, and is estimated to cost about \$100 million a month to operate.