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110 Lafayette Street, 8th Fl., New York, NY 10013 212.966.6420 800.244.2540 www.lawyersforchildren.org

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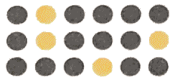

U.S. Department of Homeland Security
U.S. Department of Health & Human Services
Email: ICE.Regulations@ice.dhs.gov

RE: DHS Docket No. ICEB-2018-0002
Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Minor Children

To Whom It May Concern:

Lawyers For Children ("LFC") is a not-for-profit legal corporation dedicated to protecting the legal rights of individual children in New York City and compelling system-wide child welfare reform. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody, and visitation. LFC's clients include numerous immigrant children who have arrived in this country as unaccompanied minors. Through our Immigration Rights Project, two attorneys and a masters-level social worker, who have a particular expertise in issues affecting immigrant youth, provide advocacy for abused, neglected and abandoned children seeking Special Immigrant Juvenile Status. Most recently, LFC joined other child welfare organizations in filing an amicus brief which was cited in the successful lawsuit, *Ms. L v. U.S. Immigration and Customs Enforcement, et. Al* (No. 18-428 S.D. Cal.), and effectively ended the Administration's zero-tolerance policy separating children and families. LFC's insight into the issues raised by the proposed regulations referenced above is borne of more than thirty years' experience representing children in child welfare and immigration matters.

We write to express our deep concern that the proposed regulations would violate the terms of the Flores Settlement Agreement (FSA), run afoul of fundamental constitutional principles, and threaten to seriously harm children in the custody of the Department of Homeland Security (DHS) and the Department of Health & Human Services (HHS). The extended, indefinite and unnecessary detention of children, which would result from the proposed changes, is forbidden under the FSA and has significant consequences for children's development, health,

safety and well-being[1]. The FSA is in place to ensure children are treated with "dignity, respect and special concern for their particular vulnerability as minors." The proposed rules fail to meet those standards.

Proposed Self-Licensing Scheme Fails to Protect Children & Skirts State Protections

The Departments' proposal to self-license and create "Family Residential Centers" under 8 CFR 236.3(b) directly contravenes the FSA by attempting to allow for children to be placed in detention indefinitely and by placing children in facilities that have not been licensed by state agencies.

The FSA requires that the government expeditiously release children to a parent or other family. If this is not possible, the government must release the child to a program licensed by a state child welfare agency program. The "Family Residential Centers" created in the proposed regulations would, in violation of the FSA, provide a vehicle for children to be held by the federal government indefinitely and place children in facilities that are not licensed by a state. Such a change would eliminate the oversight of state child welfare licensing standards, used to determine whether an out-of-home facility is safe, provides appropriate care, and promotes child development. The federal licensing/oversight proposed by the regulations is a clear violation of the terms of the Flores Settlement.

Rules Violate the Constitutional Right of Family Unity

8 CFR 236.3: Dramatic Changes to Bond Hearing Determinations

The proposed changes to 8 CFR 236.3 have significant unacceptable implications for both accompanied and unaccompanied minors. The existing regulations provide several categories of individuals to whom a child can be released from custody, including a parent, a legal guardian or an adult relative. The proposed rules amend this section to only permit release to a "parent or legal guardian not in detention" and removes the option of release to a grandparent, uncle, aunt, sibling, and other relative caregivers. This change violates the heart of the FSA, which requires DHS and HHS to release children "without unnecessary delay" to a relative as accorded by 7 CFR 236.3. Furthermore, this proposed change is contrary to HHS's recognition that when a child cannot be in the care of a parent, placement with a relative or family friend is the preferred option.[2]

45 CFR 410.302: Fingerprinting of Sponsors & Sponsor Suitability Assessment

Sponsor suitability assessments must not impermissibly delay (and perhaps prevent) children from being placed with family members. In order for the proposed suitability assessments to comply with the terms of the FSA, the regulations must set forth clear time frames within which

[1] http://pediatrics.aappublications.org/content/139/5/e20170483
[2] https://www.childwelfare.gov/topics/outofhome/kinship/

the suitability assessments are to be completed. Fingerprinting can be required only if the regulations include clear guidelines setting forth reasonable bases under which the results of the criminal history check will preclude the resource from caring for the child. In no event should the results of a background check prevent children from residing with their parents unless the results establish that the child would be at imminent risk of harm. And, safeguards must be put into place to ensure that the agencies do not use information collected during suitability assessments for deportation purposes.

Rules Create Strong Risk for Due Process Violations

Section 410.810 Changes to Bond Hearings Lacks Due Process Protections

The proposed regulation provides an entirely new procedure for custody determinations for unaccompanied children by overturning the right to a judicial bond hearing guaranteed under the FSA. Under the FSA, "a minor in deportation proceedings shall be afforded a bond redetermination hearing before *an immigration judge* in every case, unless the minor indicates...that he or she refuses such a hearing."[3]

Section 410.810 would create a new internal administrative process, giving HHS itself, instead of an immigration judge, the authority to adjudicate challenges by minors to HHS custody. This scheme does not appear to comport with the dictates of due process, by depriving individuals of the right to have custody determinations made by an independent body.

8 CFR 236.3(c) Age Determinations

Under the FSA, children must be presumed to be their self-reported age and receive the legal protections for minors unless the totality of circumstances indicates that the individual is 18 years old or older. Age determinations should be consistent with the TVPRA standards to "take into account multiple forms of evidence, including the non-exclusive use of radiographs." Section 235(b)(4) of the TVPRA. The proposed rule would codify a vague "reasonable person" standard that ignores the complex decision-making process of making this determination. The proposed rule permits exclusive reliance on medical tests without including non-medical evaluations of age. The rule fails to include standards on the reliability of medical tests or a probability-based framework for medical results.

Rules Weaken Protections for Children While in CBP Processing

The proposed change to 8 CFR 236.3(g) inappropriately allows the Department to house unaccompanied children with unrelated adults for more than 24 hours in "emergencies or exigent circumstances." This provision is contrary to existing law 6 CFR 115.14(b) which prohibits young people from being placed with adults, unless the child is the presence of an adult family member. The proposed change places children at grave risk of harm and cannot be permitted.

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[3] FSA Paragraph 24(A)

In addition, the same section allows the Department to claim "operational feasibility" when determining whether a child can be allowed contact with accompanying family members. Any action that would limit a child's right to have contact with family members risks running afoul of the basic constitutional right to family integrity. As drafted, the vaguely worded regulation is certain to fall to constitutional challenge.

CONCLUSION

We ask that DHS and HHS seriously consider these comments so that children in their care remain protected, safe, and well. We specifically urge HHS to ensure that nationally accepted child welfare standards are applied to children in HHS and DHS care, including placement in the least restrictive setting that is appropriate to their needs. Long-term detention of children has devastating consequences and is extraordinarily costly both to children and the American taxpayer. Legally appropriate alternatives to detention, such as the Family Case Management system have proven successful[4] and should be implemented instead of the proposed regulations.

Thank you for the opportunity to provide these comments. If you have any questions regarding our concerns, or we can provide you with additional information, do not hesitate to contact us.

Sincerely,

Betsy Kramer
Public Policy Project Director

Myra Elgabry
Immigration Rights Project Director

[4] *See* "Alternatives to Detention Are Cheaper than Universal Detention" June 20, 2018, Cato Institute. https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention