



STATE OF WASHINGTON

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Via Federal eRulemaking Portal

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Assistant Director Debbie Seguin
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Department of Homeland Security
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Washington, DC 20536

Director Scott Lloyd
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Secretary Alex M. Azar II
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
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RE: **Comments on Proposed Rule: *Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children*, 83 Fed. Reg. 45486 (Sept. 7, 2018), (RIN 1653-AA75, 0970-AC42, DHS Docket No. ICEB-2018-0002)**

Dear Secretary Nielsen, Assistant Director Seguin, Director Lloyd, and Secretary Azar:

On behalf of Washington State and our residents, we write in response to the proposed “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children” rule (Proposed Rule). We have repeatedly expressed concern about the recent practices of the Department of Homeland Security (DHS) and Office of Refugee Resettlement (ORR) concerning immigrant families. We are deeply troubled by the Proposed Rule, which attempts to remove legal protections for children for reasons that have already been rejected by the courts.

Since 1997, the *Flores* Settlement Agreement (FSA) has set our “nationwide policy for the detention, release, and treatment of minors in the custody” of DHS. These standards apply to both accompanied and unaccompanied children detained by DHS. FSA ¶ 9. While purporting to “codify current requirements of the [FSA] and court orders enforcing [its] terms,” 83 Fed. Reg.



at 45510, the Proposed Rule would in fact *nullify* the FSA's key protections by (1) allowing for prolonged (and potentially indefinite) detention of children; and (2) evading state licensing standards for places where children are housed. Both of these changes would almost certainly lead to poorer outcomes for children in DHS custody, which is contrary to the agency's mission.

The Proposed Rule inflicts punitive measures on migrant children for the purported purpose of deterring future immigration, an unconscionable act that serves no legitimate government objective. We urge its immediate withdrawal.

1. Washington State Will Not Be Complicit in Family Detention.

The current discourse around family detention is sadly reminiscent of some of the worst chapters in our country's history. The Pacific Northwest is scarred by similar efforts to separate Native American families and institutionalize their children.¹ Federal policies specifically targeting Native American families began in the post-Civil War era and continued through the 1970s.² In 1860, the Bureau of Indian Affairs created the first boarding school on the Yakama Reservation in Washington.³

"In some cases, police were sent onto the reservations to seize children from their parents, whether willing or not."⁴ As one former student told *The Seattle Times*, "Imagine being a 10-year-old at boarding school. You're told everything about you is wrong. I don't think we can even perceive the degree of shame involved."⁵ By the late 1970s, between 25% and 35% of all Native American children had been separated from their families and placed in foster care, adoptive families, or institutions.⁶

Removing Native American children from their families and communities was intended to deter future rebellion and forcibly assimilate the children into the dominant culture. The resulting psychological damage to both families and children, the cultural devastation (loss of language,

¹ Auditi Guha, *Family Separation Is a US Tradition. Just Ask Native Communities*, Rewire.News, June 25, 2018, <https://rewire.news/article/2018/06/25/family-separation-u-s-tradition-just-ask-native-communities/>.

² Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacific Northwest* (Univ. of Wash. Libraries Digital Collections), <https://content.lib.washington.edu/aipnw/marr.html> (last visited Oct. 23, 2018); *American Indian Boarding Schools Haunt Many*, NPR Morning Edition, May 12, 2008 : 12:01 AM ET, <https://www.npr.org/templates/story/story.php?storyId=16516865>.

³ Paula Becker & David Wilma, *United States Establishes Fort Simcoe at the Foot of the Simcoe Mountains on August 8, 1856*, History Link, Feb. 24, 2003, <http://www.historylink.org/File/5292>.

⁴ Northern Plains Reservation Aid, *History and Culture: Boarding Schools*, http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools (last visited Oct. 24, 2018).

⁵ Marsha King, *Tribes confront painful legacy of Indian boarding schools*, *The Seattle Times*, Feb. 3, 2008, <https://www.seattletimes.com/seattle-news/tribes-confront-painful-legacy-of-indian-boarding-schools/>.

⁶ William N. Smith & Richard T. Okrent, *The Washington State Indian Child Welfare Act: Putting the Policy Back into the Law*, Vol. II, Iss. I *Am. Indian L.J.* 146, 147 (Fall 2013), <https://law.seattleu.edu/Documents/ailj/Fall2013/Okrent-Final.pdf>.

loss of access to important rites, loss of traditional family structures of support), and generational trauma is well documented.⁷

This Administration's family separation policies also echo unsupported internment practices during World War II. Washington's experience with civil internment began on March 24, 1942, with Civilian Exclusion Order No. 1, which gave the 227 Japanese American residents of Bainbridge Island six days to prepare for their "evacuation" directly to the Manzanar Relocation Center in California.⁸ Over the ensuing months, more than 100 exclusion orders resulted in the removal of Japanese Americans from the West Coast.⁹ In Washington, over 7,000 men, women and children of Japanese descent passed through the Puyallup Assembly Center.¹⁰

Internment had a lasting impact on children's development and wellbeing, as well as family dynamics, culture, and educational outcomes in the Japanese American community.¹¹ The loss of homes, businesses, and other property intensified the psychological trauma.¹² The resulting distrust of American government and institutions in this community cannot be disregarded,¹³ particularly because of the racist motivations behind internment.¹⁴

These historical events continue to adversely impact Washington's residents and communities. Washington State will not accept the efforts of this Administration, embodied in the Proposed Rule, to return to the devastating and immoral practices of the past.

⁷ Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacific Northwest* (Univ. of Wash. Libraries Digital Collections), <https://content.lib.washington.edu/aipnw/marr.html> (last visited Oct. 23, 2018); *American Indian Boarding Schools Haunt Many*, NPR Morning Edition, May 12, 2008 : 12:01 AM ET, <https://www.npr.org/templates/story/story.php?storyId=16516865>.

⁸Nina Wallace, *Photo Essay: Exclusion Order No. 1, Bainbridge Island*, Densho Blog (Mar. 29, 2017), <https://densho.org/photo-essay-bainbridge-island/> (Japanese American Incarceration and Japanese Internment).

⁹ J. Burton et al., *A Brief History of Japanese American Relocation During World War II* (Nat'l Park Serv., Apr. 1, 2016), <https://www.nps.gov/articles/historyinternment.htm>.

¹⁰ *Japanese American Internment During World War Two* (Univ. of Wash. Libraries Digital Exhibits) <http://digitalexhibits.libraries.wsu.edu/exhibits/show/japanese-internment/japanese-internment-in-washing> (last visited Oct. 23, 2018)

¹¹ Mark Takano, *Trump's family separation policy echoes my family's World War II internment. That damage lasted decades*, NBC News, June 20, 2018: 837 AM PDT, <https://www.nbcnews.com/think/opinion/trump-s-family-separation-policy-echoes-my-family-s-world-ncna885021>.

¹² Natasha Varner, *Sold, Damaged, Stolen, Gone: Japanese American Property Loss During WWII*, Densho Blog (Apr. 4, 2017), <https://densho.org/sold-damaged-stolen-gone-japanese-american-property-loss-wwii/> (Japanese American Incarceration and Japanese Internment).

¹³ *Center shatters myth of "quiet" Japanese Americans imprisoned in camps*, UCLA Newsroom, Sept. 15, 2015, <http://newsroom.ucla.edu/stories/center-shatters-myth-of-quiet-japanese-americans-imprisoned-in-camps>; The Suyama Project, *Renunciants* (UCLA Asian American Studies Center, Oct. 1, 2014), <http://www.suyamaproject.org/?p=79>; Densho Encyclopedia, Eric L. Muller, *Heart Mountain Fair Play Committee*, http://encyclopedia.densho.org/Heart_Mountain_Fair_Play_Committee/ (last visited Nov. 1, 2018).

¹⁴ Harrison Smith, *Aiko Herzig Yoshinaga, whose research lead to internment reparations, dies at 93*, Wash. Post, July 26, 2018, https://www.washingtonpost.com/local/obituaries/aiko-herzig-yoshinaga-champion-of-interned-japanese-americans-dies-at-93/2018/07/25/4086b026-9015-11e8-bcd5-9d911c784c38_story.html?utm_term=.0567b14b96ba.

2. The Proposed Rule will Promote the Indefinite Civil Detention of Families, Contrary to the FSA.

As the current administration candidly admits, “it is not possible for the U.S. government to detain families together during the pendency of their immigration proceedings” because the FSA does not permit children to be detained for indefinite periods.¹⁵ *Flores v. Sessions*, Case No. 85-cv-04554 (DMG) (C.D. Cal.), Dkt. 435-1, at 2. The Proposed Rule would permit DHS to detain children who cross the border with a parent or legal guardian for the entirety of the family’s immigration proceedings. We oppose the provisions in the Proposed Rule that promote the indefinite detention of children in family detention centers, raise barriers for children seeking to be released into the care of an approved sponsor, and allow DHS essentially unfettered discretion to prolong the detention of children during an “emergency” or “influx.”

The Proposed Rule would remove the longstanding presumption that all children in DHS custody should be expeditiously placed in the least restrictive environment possible, instead promoting the incarceration of entire families in “detention centers.” Noting that the courts have rejected DHS’ prior attempts to modify the FSA (*see* 82 Fed. Reg. at 45520), DHS nevertheless transparently intends the Proposed Rule to evade FSA limits on the detention of children, including children already found by the government to have viable asylum claims. *Id.* at 45518.

The Proposed Rule increases the potential for indefinite detention by removing provisions permitting children to be released to the care of adult relatives such as a “brother, sister, aunt, uncle, or grandparent.” FSA ¶ 14(C). Instead, the Proposed Rule would prohibit children who are apprehended with their families from being released from detention except to a “parent or legal guardian” and strips parents of their authority to designate a person to take custody of the child if a parent remains in detention. *Compare* FSA ¶ 14(D). As a result, children crossing the border with a parent can remain in detention with their parents indefinitely, against the parents’ wishes and contrary to the best interest of the child, even when there is a grandparent or relative willing and able to care for the child.

Nor does the Proposed Rule provide any clear timeframes for the sponsorship process or new “suitability assessment” that may be required by ORR. 83 Fed. Reg. at 45531. This is particularly concerning given new and onerous sponsorship policies including the collection of biometric and background information from all household members and the sharing of that information with ICE. These policies have delayed, and in many instances prevented, the placement of migrant children with resident family members who wish to serve as sponsors. The Proposed Rule forces prospective sponsors to make an untenable choice between abandoning children in federal custody or meeting new onerous, time-consuming, and expensive vetting requirements that could flag their families for immigration enforcement.

Finally, the Proposed Rule abrogates the requirement that children be placed in a state-licensed facility within 72 hours by giving DHS discretion in a wide range of “emergency” and “influx”

¹⁵ The FSA sets out a presumption in favor of releasing minors from DHS detention, and a preference for release of a minor to a parent first and then to other adult relatives if no parent is available. FSA ¶ 14. The FSA does not distinguish between unaccompanied minors and minors who cross the border with a parent or legal guardian. *See* 83 Fed. Reg. at 45498 (the “FSA does not distinguish between minors and UACs”).

events. 83 Fed. Reg. at 45496, 45525. These loopholes would “not only delay placement of minors, but could also delay compliance with other provisions of this proposed rule, or excuse noncompliance.” 83 Fed. Reg. at 45496. DHS would have discretion to ignore any of the protections purportedly codified by the Proposed Rule if compliance would affect “timely transport or placement” of detainees, would otherwise “impact other conditions,” or if there is an “influx.” These caveats render the Proposed Rule essentially meaningless, particularly because the government also asserts that DHS is currently operating within an “influx” and has been for years “as a steady state.” *Id.* at 45525.

3. The Proposed Rule Eliminates State Licensing Protections and Interferes with State Sovereignty.

We also oppose provisions of the Proposed Rule that would end the existing requirement that facilities where children live be state-licensed and “non-secure.” See FSA ¶¶ 6, 19. Under the FSA, DHS “must house children ... in a non-secure facility that is licensed by an appropriate state agency to care for dependent children.” *Flores v. Johnson*, 212 F. Supp. 3d 864, 877, *clarified on denial of reconsideration sub nom. Flores v. Lynch*, 212 F. Supp. 3d 907 (C.D. Cal. 2015), *aff’d in part, rev’d in part, and remanded*, 828 F.3d 898 (9th Cir. 2016). Under current law, if proposed “family residential centers cannot be licensed by an appropriate state agency,” children “cannot be housed in these facilities” except for the limited periods and under the conditions permitted by the FSA. *Id.*

The Proposed Rule attempts to evade this licensing requirement by providing that, if no existing state licensing program is available for the anticipated family detention facilities, “a facility will be considered licensed if DHS employs an outside entity to ensure that the facility complies with family residential standards established by ICE.” 83 Fed. Reg. at 45497. The suggestion that it is appropriate for DHS to house children in unlicensed family facilities because ICE will adopt appropriate standards is questionable, at best.

The conditions of ICE detention facilities have been the subject of significant litigation and scrutiny, including allegations of physical and sexual assault, a lack of food and water, freezing and hot temperatures, and a lack of medical care. See, e.g., *Flores v. Johnson*, Case No. 85-cv-04544 (DMG) (C.D. Cal.), Dkt. 177, at 18 (holding children in “ice boxes,” substandard blankets, absence of trash cans, accounts of inadequate nutrition). Existing ICE residential standards do not comply with the FSA, and the Proposed Rule’s empty assurances that new ICE standards would retain all of the protections that exist under state licensing regimes are not credible. See *Flores v. Lynch*, 828 F.3d 898, 904 (9th Cir. 2016) (“ICE’s Family Residential Standards . . . do not comply with the Settlement.”).

In addition to abrogating the state licensing requirement, the Proposed Rule seeks to circumvent the FSA’s requirement that children be housed in “non-secure” facilities. The Proposed Rule defines “non-secure” facilities in a manner that allows the government significant latitude to detain children who have committed no crime in any facility that is not an actual jail. This is particularly troubling, given the government’s prior attempts to house children in unsuitable

facilities, such as military bases and tent cities.¹⁶ Indeed, the *Flores* district court has already held that ICE's family residential centers – the exact type of facility for which DHS hopes to avoid state licensing – are “secure.” *Flores v. Sessions*, No. 2:85-cv-04544 (C.D. Cal. June 27, 2017), *appeal pending*, No. 17-56297 (9th Cir.).

Washington State has a sovereign interest in enforcing our laws requiring minimum standards of care for children. Many states, including Washington, do not have licensing standards in place for family detention facilities – precisely because holding families in civil detention is contrary to our country's values and long-established standards on what is best for children. The Proposed Rule will force the states to either enact new licensing provisions to set standards for family detention centers or to accept that children will be held in facilities that adhere to no local guidelines. This is an untenable choice, and it interferes with the states' traditional licensing authority, their sovereign interests in their existing legal codes, and public policies to foster the best interests of the children in their jurisdictions.

4. The Purported Justifications for the Proposed Rule Do not Stand up to Scrutiny.

The Proposed Rule negates the FSA's presumption of release for all migrant children and strips the protections that ensure that such release occurs swiftly. The notice of proposed rulemaking asserts that these changes are required by “changed circumstances.” 83 Fed. Reg. at 45487. On multiple occasions, however, the federal courts have rejected these arguments, holding that a purported “influx” or the enactment of other federal statutes were insufficient changed circumstances to merit modification of the FSA's terms.

Years ago, the *Flores* district court ruled that the FSA applies to all migrant children in DHS custody, regardless of whether they were apprehended alone or with their families. The application of the FSA to children traveling with their families is not a new or changed circumstance. Likewise, both that court and the Ninth Circuit Court of Appeals rejected the argument that an “influx” of families migrating to the United States constitutes “changed circumstances” warranting modification of these protections. *See Flores v. Lynch*, 212 F. Supp. 3d 907, 913 (C.D. Cal. 2015), *aff'd in part, rev'd in part, and remanded*. 828 F.3d 898, 910 (9th Cir. 2016). And, as noted above, the government itself does not describe influx as new – declaring instead that DHS has been operating for years at influx levels.

Finally, the FSA does not conflict with the Trafficking Victims Protection Reauthorization Act (TVPRA), 8 U.S.C. § 1232(c)(2) (TVPRA). *Flores, et al. v. Johnson, et al.*, Case No. CV 85-4544-DMG (C.D. Cal.), Dkt. 177, at 21-23. Rather, the FSA is consistent with the TVPRA's requirements that children be provided “[s]afe and secure placements ... in the least restrictive setting that is in the best interest of the child” which would typically be with “a suitable family

¹⁶ Philip Elliott & W.J. Hennigan, *Exclusive: Navy Document Shows Plan to Erect “Austere” Detention Camps*, Time, June 22, 2018, <http://time.com/5319334/navy-detainment-centers-zero-tolerance-immigration-family-separation-policy/>; see Phil Stewart, *Pentagon eyes temporary camps for immigrants at two bases*, Reuters, June 24, 2018, <https://www.reuters.com/article/us-usa-immigration-military/pentagon-eyes-temporary-camps-for-immigrants-at-two-bases-idUSKBN1JL015>; Dan Lamothe et al., *Pentagon will make room for up to 20,000 migrant children on military bases*, Washington Post, June 21, 2018, https://www.washingtonpost.com/news/checkpoint/wp/2018/06/21/pentagon-asked-to-make-room-for-20000-migrant-children-on-military-bases/?utm_term=.decab089f684.

member.” *Id.* (quoting 8 U.S.C. § 1232(c)(2)). The FSA also reflects the TVPRA’s prohibition on placing a child in a “secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.” *Id.*

The Proposed Rule furthers the Administration’s cruel attempts to separate children from their parents at the Southwestern border, and is ostensibly justified by the same deterrence goals. For example, in seeking relief from the FSA to allow for family detention, Attorney General Jeff Sessions recently asserted – as the Proposed Rule does – that there is “a powerful incentive for aliens to enter this country with children” and the government must have some way to “deter[] others from unlawfully coming to the United States.” *Flores v. Sessions*, Dkt. 435-1, at 2, 13 (internal citations omitted); *see* 83 Fed. Reg. at 45493. As an empirical matter, there is virtually no support for the contention that family detention will deter future migration. There is substantial evidence that it will not. *See* 83 Fed. Reg. at 45494 (admitting that “statistics specific to family units have not been compiled”); *Flores, et al. v. Johnson, et al.*, Case No. CV 85-4544-DMG (C.D. Cal.), Dkt. 177, at 23 (finding no evidence that detention “has deterred or will deter others from attempting to enter the United States”); *see also id.*, Dkt. 455, at 3.

Conclusion

In conclusion, as a matter of law and policy, we strongly oppose the Proposed Rule’s attempt to allow the indefinite detention of children in family detention centers, raise barriers for children seeking to be released into the care of sponsors, and grant the Department of Homeland Security essentially unfettered discretion to prolong the detention of children during an “emergency” or “influx.” The consensus among medical providers, mental health experts, and social scientists is that institutional detention harms children. To leverage that harm as a means of deterring future immigration is shameful and contrary to the evidence.

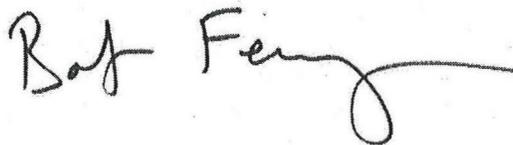
The periods of institutionalization of Native American children and the internment of Japanese American residents were some of the worst times in our nation’s history. This Administration’s cruel attempts to separate children from their parents at the Southwestern border, including the policies and practices laid out in the Proposed Rule, are alarmingly reminiscent of those regrettable episodes. These historical events continue to adversely impact and live in the memory of Washington’s residents and communities. Washington State will not accept the efforts of this Administration, embodied in the Proposed Rule, to return to the devastating and immoral practices of the past.

We urge the immediate withdrawal of the Proposed Rule.

Sincerely,



JAY INSLEE
Washington State Governor



BOB FERGUSON
Washington State Attorney General