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Submitted via email to ice.regulations@ice.dhs.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 0970-AC42 1653-AA75, Comments Opposing Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Sir/Madam:

I am writing on behalf of the Schuyler Center for Analysis and Advocacy in response to the Department of Homeland Security's (DHS) Notice of Proposed Rulemaking (proposed rule) to express our strong opposition to the proposed rule to amend regulations relating to the apprehension, processing, care, custody, and release of alien juveniles published in the Federal Register on September 7, 2018.

As a child and family policy organization, we know that children do best when they're with their families and that detention, and the stress and uncertainty associated with detention, can have long-term damaging impacts on children, even into adulthood. The proposed rule would terminate the 1997 Flores Settlement Agreement (FSA), as amended in 2001, and introduce new regulations that are more likely to result in the indefinite detention of immigrant children and negatively impact their well-being. Such regulations are plainly "inconsistent" with the FSA's mandate to favor the release of children from government custody, and cannot serve as a valid basis to terminate the FSA. The Schuyler Center condemns the indefinite detention of immigrant children and families and respectfully opposes the proposed rule.

For the reasons detailed in the comments that follow, DHS and the Department of Health and Human Services (HHS) should immediately withdraw their current proposal, and dedicate their efforts to advancing policies that safeguard the health, safety, and best interests of children and their families, not least through robust, good-faith compliance with the Flores Settlement Agreement.

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact us to provide further information.

Sincerely,

Dede Hill
Director of Policy
Schuyler Center for Analysis and Advocacy

DETAILED COMMENTS in opposition to DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

The Schuyler Center for Analysis and Advocacy is a 147-year old non-profit, non-partisan organization dedicated to public policy solutions that improve the well-being of New York's most vulnerable families and children. Among our areas of expertise are child welfare, and child and family health, including children's mental health. We know that detaining children and families inflicts severe trauma on children -- and parents, the effects of which may last a lifetime. This is particularly true when those who are detained have already experienced trauma, as is the case for many of the families seeking entry at U.S. borders who are fleeing unthinkable violence at home.

At the Schuyler Center, we devote each day to advancing policies that improve children's well-being and enable them to thrive. This proposed rule would, if adopted, inflict grave and lasting harm on countless children and families. Accordingly, we strongly oppose this proposed rule, and request that it be withdrawn, for the following reasons:

Child Welfare Concerns

Detention of children & families is contrary to child welfare principles: The federal government has long recognized the need to not only reduce the number of children in group homes, but also to keep children safely at home with their families. Just this year, a sweeping new federal law was enacted -- the Family First Prevention Services Act of 2018 -- a primary purpose of which is to reduce the number of children placed in congregate settings whenever possible, reflecting the consensus of the nation's child welfare experts and practitioners that under most circumstances, children do not fare well in congregate care settings. Specifically, the law places new limits on federal funding for the use of congregate care, as well as additional expectations for quality of care and family engagement in foster care, and places an emphasis on supporting the programs and supports that help to keep families together.¹ Placing children in indefinite detention -- with or without their parents -- runs contrary to the spirit of the Family First Prevention Services Act.

What is more, child welfare researchers have found that youth who have been placed in group homes, instead of family foster care, have higher rates of delinquency and worse educational outcomes. In addition, youth who have experienced trauma are at higher risk of further abuse when placed in group homes compared to family homes.² In recognition of the problems posed by congregate care, state child welfare systems have significantly reduced the number of children placed in these settings over the last ten years.³ Placing children in indefinite detention and/or separating them from their families is contrary to this research.

The proposed rule could cause more family separation and place more children in federal foster care: Currently, when a minor in DHS custody is authorized for release on bond, parole, or recognizance, and there is no suitable sponsor available, DHS must evaluate, on a case-by-case basis, the simultaneous release of a "parent, legal guardian, or adult relative in Service detention." The proposed regulations eliminate this provision entirely. Without the requirement to consider simultaneous release for parents along with their children, more children may be separated from their parents and placed in ORR custody. Under the proposed regulations when a detained parent/guardian is not released with a child and no parent/guardian is available to take custody of the child, DHS may treat the child as an unaccompanied alien child (UAC), separate the child from the detained parent/guardian, and transfer the child to ORR custody to begin the process of locating a sponsor.⁴

The American Psychiatric Association has concluded that forced separation “is highly stressful for children and can cause lifelong trauma, as well as an increased risk of other mental illnesses, such as depression, anxiety, and posttraumatic stress disorder (PTSD).”⁵ Further, it would delay their release and prolong their institutionalization, and would swell an already overburdened ORR shelter system.

Limits to family reunification: The proposed rule would permit ORR to deny reunification on the basis of a belief that the child’s sponsor will not secure the child’s appearance before DHS or the immigration courts. It does not, however, establish how ORR is to determine whether custody is required to secure the child’s appearance, nor does it establish any process by which a child may be protected from an erroneous determination. This is entirely at odds with ORR’s child welfare mandate.

The proposed rule (§410.301(f)) fails to recognize ORR’s court-ordered obligation to provide due process if withholding a UAC from his or her parent. If denying a parent-sponsor, ORR is required to provide detailed notice to the parent, including notice of the evidence leading to a denial decision, and must offer a hearing before a neutral arbiter at which the parent and/or child may be heard.⁶ This proposed regulation runs contrary to past court rulings on the release of UACs to parent sponsors.

Prolonged incarceration re-traumatizes and delays healing for mothers and children fleeing gender-based violence: Many asylum seeking mothers and children who flee to the US have survived horrific violence such as domestic and child abuse, rape, sexual slavery, and human trafficking. Trauma can manifest in children as chronic anxiety, depression, and sleep and digestive disturbances, which in turn cause developmental delays physically, cognitively, and emotionally. Compounding this trauma are the profoundly damaging effects of incarceration in and of 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.”⁷

Meaningful access to trauma-informed 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 go without such desperately needed services, the more challenging the healing process may be. Finally, the power dynamics inherent in any custodial setting are especially damaging to survivors of gender-based violence. These dynamics are reminiscent of the power and control maintained by traffickers and abusers to keep survivors in a chronic state of fear, submission, and helplessness.⁸

The proposed rules pose further harm to women and children fleeing violence and run contrary to established research on the health and healing of young people who have experienced trauma.

Health Concerns

The detention of children is fundamentally harmful: Just as separation of children from their parents is inherently harmful, so is child detention. Numerous clinical studies have demonstrated that the mitigating factor of parental presence does not negate the damaging impact of detention on the physical and mental health of children.⁹ In 2017, the American Academy of Pediatrics published a policy statement titled *Detention of Immigrant Children* stating that immigrant children seeking safe haven in the United States should never be placed in detention facilities.¹⁰ The American Medical Association has also adopted a policy opposing family immigration detention given the negative health consequences that detention has on both children and their

parents.¹¹ In 2018, the American College of Physicians released a policy stating that “forced family detention— indefinitely holding children and their parents, or children and their other primary adult family caregivers, in government detention centers until the adults’ immigration status is resolved—can be expected to result in considerable adverse harm to the detained children and other family members, including physical and mental health, that may follow them through their entire lives, and accordingly should not be implemented by the U.S. government.”¹²

Detained children have been reported to have tenfold increase in developing psychiatric disorders.¹³ Studies of health difficulties of detained children found that most children since being detained reported symptoms of depression, sleep problems, loss of appetite, and somatic complaints such as headaches and abdominal pains; specific concerns include inadequate nutritional provisions, restricted meal times, and child weight loss.¹⁴

We must remember that immigrant children are still children. Protections for children in law or by the courts exist because children are uniquely vulnerable and are at high risk for trauma, trafficking, and violence. Proposals like this rule that seek to override the *Flores Settlement Agreement* in order to allow for the longer-term detention of children, with or without their parents, or to weaken federal child trafficking laws, strip children of protections designed for their safety and well-being and put their health and well-being at risk. What is more, allowing for “exceptions” to established standards of treatment of children for one class of children, i.e., immigrant children – threaten to erode the protections for all of our children. It is a slippery slope we must not start down.

Detention centers are unable to provide adequate services: Family residential centers, often located in remote areas far from urban centers, have struggled to recruit adequate health staff, including pediatricians, child and adolescent psychiatrists, and pediatric nurses. While families released through non-custodial measures have access to providers based in the community, families in detention often have inadequate access to qualified medical and mental health professionals.

Another crucial factor in health care access is language: requests for medical care, information about available care and access to care are all conditioned on being able to communicate with health professionals in an understandable language. In any emergency situation, there is no reliable mechanism to allow staff to communicate effectively with all detainees.

State licensing is essential to ensure a minimum level of protection: State licensing is key to ensuring that facilities are safe and appropriate for children and families. State-level oversight includes examining minimum standards for adequate conditions of confinement, including maintaining medical and mental health staff, provision for adequate language interpretation, physical facilities that are appropriate for children, and preparation for emergency situations. The proposal to remove state licensing and begin self-licensing facilities removes an important layer of protection and third-party oversight.

Education Concerns

The *Flores* parties reached the Flores Settlement Agreement (FSA) through their shared belief in the “particular vulnerability” of children. That is why the FSA has a strong presumption in favor of releasing immigrant children to a parent, legal guardian, family member, or other adult as authorized by a parent or legal guardian or, when no such adult can be identified, to a state-licensed program that, *at a minimum*, complies “with all applicable state child welfare laws” and provides “[e]ducational services appropriate to the minor’s level of development... in a structured classroom setting.”¹⁵

When children are in an unstable environment or when parents or caregivers are unable to act as providers for their children, their education suffers. For example, children placed in temporary living facilities, children experiencing homelessness, and children in foster care all face significantly higher barriers to learning.¹⁶ The proposed rule will deprive more children of the opportunity to reach their full developmental and academic potential by restricting their release to trusted caregivers and their access to schools with supportive norms and structures.

The Schuyler Center believes that all children deserve the best chance to learn and succeed. We all suffer when we do not invest in the education and development of our children. The parties to the FSA created a policy favoring children's release from government custody and providing access to education. The proposed rule is inconsistent with, and undermines the purposes of, the FSA.

Root Cause Concerns

In addition to the concerns outlined above, we are also concerned the proposed rules ignore the serious root causes that are driving children and families to leave their countries of origin.

There is substantial evidence to demonstrate that not only poverty but also violence, corruption, and impunity drive forced migration from countries of Central America, including Guatemala, Honduras, and El Salvador, to the United States. In recent years, numerous studies have evidenced that violence is a main push factor of forced migration from this region and a major reason that individuals seek international protection.¹⁷ Indefinite detention in the United States for children and families would only serve to compound the trauma that these individuals have already suffered before arriving at the U.S.-Mexico border given the conditions in their home countries. Moreover, a substantial number of children, families, and individuals fleeing this region have grounds for asylum based on these conditions.

For the reasons outlined above, we respectfully urge DHS and HHS to withdraw this proposal.

¹ For a summary *see* Congressional Research Service, "Family First Prevention Service Act (FFPSA)," Feb. 9, 2018, https://www.everycrsreport.com/files/20180209_IN10858_f4acfb3c556414a49462f8d88f0d559505245e68.pdf.

² For a summary, *see* Casey Family Programs, "What are the outcomes for youth placed in congregate care settings," updated Jan. 2017, https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_CC-Outcomes-Resource.pdf.

³ U.S. Department of Health and Human Services, Administration for Children and Families, U.S. Children's Bureau, "A National Look at the Use of Congregate Care in Child Welfare," May 13, 2015, https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf.

⁴ Proposed regulation 8 CFR § 236.3(j)(2).

⁵ The American Psychiatric Association, *APA Statement Opposing Separation of Children from Parents at the Border* (May 30, 2018), <https://www.psychiatry.org/newsroom/news-releases/apa-statement-opposing-separation-of-children-from-parents-at-the-border>.

⁶ *See, e.g., Beltran v. Cardall*, 222 F.Supp.3d 476 (E.D. Va. 2016); *Santos v. Smith*, 260 F.Supp.3d 598, 614 (W.D. Va. 2017).

⁷ 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), https://s3.amazonaws.com/PHR_Reports/persecution-to-prison-US-2003.pdf; *see also* A. S. Keller, et al, *The Mental Health of Detained Asylum Seekers*, 362 *The Lancet* 1721 (2003); Tahirih Justice Center, *Righting the Wrong: Why Detention of Asylum-Seeking Mothers in America Must End Now* (Oct. 28, 2015), <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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- ⁸ Women’s Refugee Commission, *Locking Up Family Values Again* (May 2016), <https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again>;
- Tahirih Justice Center interview with Jonathan Ryan, Executive Director of RAICES, conducted in June 2015.
- ⁹ Dudley, Michael, Zachary Steel, Sarah Mares, and Louise Newman. Children and Young People in Immigration Detention. *Current Opinion Psychiatry* 25, no. 4 (July 2012): 285-92; Ehntholt, K., Trickey, D., Harris Hendriks, J., Chambers, H., Scott, M., Yule, W., & Tibbles, P. (2018). Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centres. *Clinical Child Psychology and Psychiatry*, 23(2), 238–257; Kronick, R., Rousseau, C., & Cleveland, J. (2015). Asylum-seeking children’s experiences of detention in Canada: A qualitative study. *American Journal of Orthopsychiatry*, 85(3), 287.
- ¹⁰ Julie M. Linton, Marsha Griffin, Alan Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.
- ¹¹ American Medical Association, “AMA Adopts New Policies to Improve Health of Immigrants and Refugees,” June 12, 2017, <https://www.ama-assn.org/ama-adopts-new-policies-improve-health-immigrants-and-refugees>.
- ¹² American College of Physicians, “The Health Impact of Family Detentions in Immigration Cases,” July 3, 2018, https://www.acponline.org/acp-policy/policies/family_detention_position_statement_2018.pdf.
- ¹³ Steel, Zachary, Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleyva Everson, Konya Roy, Michael Dudley, Louise Newman, Bijou Blick, and Sarah Mares. Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia. *Australian and New Zealand Journal of Public Health* 28, no. 6 (September 25, 2004): 527-36.
- ¹⁴ Lorek, Ann, Kimberly Ehntholt, Anne Nesbitt, Emmanuel Wey, Chipso Githinji, Eve Rossor, and Rush Wickramasinghe. The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study. *Child Abuse & Neglect* 33, no. 9 (September 2009): 573-85.
- ¹⁵ Exhibit 1 to *Flores v. Reno* Settlement Agreement (1997) (“Minimum Standards for State Licensed Programs”).
- ¹⁶ See, e.g., Press Release, U.S. Department of Education, Education Department Releases Guidance on Homeless Children and Youth (Jul. 27, 2016), <https://www.ed.gov/news/press-releases/education-department-releases-guidance-homeless-children-and-youth>; U.S. Dep’t of Educ. & U.S. Dep’t of Health and Human Servs., Dear Colleague Letter: Elementary and Secondary Education Act (June 23, 2016), <https://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercaredcl.pdf>.
- ¹⁷ See, e.g., United Nations High Commissioner for Refugees, *Children on the Run* (May 13, 2014), <http://www.unhcr.org/56fc266f4.html>; United Nations High Commissioner for Refugees, *Women on the Run* (Oct. 26, 2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>; Jonathan T. Hiskey, Abby Cordova, Diana Orces, Mary Fran Malone, American Immigration Council, *Understanding the Central American Refugee Crisis: Why They are Fleeing and How U.S. Policies are Used to Deter Them* (Feb. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/understanding_the_central_american_refugee_crisis.pdf, Center for Gender and Refugee Studies, *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (Feb. 2015), https://cgrs.uchastings.edu/sites/default/files/Childhood_Migration_HumanRights_English_1.pdf, and Michael Clemens, Center for Global Development, *Violence, Development, and Migration Waves: Evidence from Central American Child Migrant Apprehensions* (July 27, 2017), <https://www.cgdev.org/publication/violence-development-and-migration-waves-evidence-central-american-childmigrant>.