



October 23, 2018

Sent via Electronic Submission at <https://www.regulations.gov>

Debbie Seguin, Assistant Director
Office of Policy, U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street, S.W.
Washington, DC 20536

RE DHS Docket No. ICEB-2018-0002 Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children (RIN 1653-AA75, 0970-AC42)

Dear Ms. Seguin:

The National Education Association (“NEA”) appreciates the opportunity to comment on the notice by the Department of Homeland Security (“DHS”) and the Department of Health and Human Services (“HHS”) (together, the “Departments”) of their proposed amendments to regulations relating to the apprehension, processing, care, custody, and release of alien juveniles (the “proposed rule”). The proposed rule is intended to terminate the 1997 Flores Settlement Agreement, as amended in 2001, (“FSA”), and introduce new regulations that are more likely to result in the indefinite detention of immigrant children and negatively impact their access to education. Such regulations are plainly “inconsistent” with the FSA’s mandate to favor the release of children from government custody, and thus cannot serve as a valid basis to terminate the FSA.¹ NEA condemns the indefinite detention of immigrant children and families and respectfully opposes the proposed rule.

The *Flores* parties reached the FSA through their shared belief in the “particular vulnerability” of children.² That is why the FSA has a strong presumption in favor of releasing

¹ *Flores v. Reno* Settlement Agreement (1997) ¶ 9 (“The final regulations shall not be inconsistent with the terms of this Agreement.”).

² *Id.* at ¶ 11.

immigrant children to a parent, legal guardian, family member, or other adult as authorized by a parent or legal guardian³ 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.”⁴

NEA’s more than three million members—comprised of teachers, school nurses, counselors, and education support professionals—know well the particular vulnerability of children and believe that an education is essential to advancing the worth, dignity, and equality of every child. Both experts and NEA’s members also know that children are best equipped to succeed academically when they live in a stable home with an adult they trust and learn in a normal, structured and supportive classroom.⁵

But when children are in an unstable environment or when parents or other caregivers are unable to act as providers for their children, their education suffers. For example, children placed in temporary living facilities such as shelters, children experiencing homelessness, and children in foster care or separated from a parent all face significantly higher barriers to learning.⁶ 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. Instead, the Departments seek to keep them in indefinite detention without adequate services and protections.

Despite purporting to “implement” the FSA, the Departments have proposed a rule that completely strips the FSA of its policy “favoring release” of children from government custody by limiting the types of sponsors with whom children can be placed.⁷ The proposed rule also significantly increases the possibility that more children will be placed in “*indefinite* detention in unlicensed facilities”⁸ by (1) introducing a federal licensing scheme administered by U.S. Immigration and Customs Enforcement (“ICE”) that may not provide the same protections and

³ *Id.* at ¶¶ 11, 14, & 18.

⁴ Exhibit 1 to *Flores v. Reno* Settlement Agreement (1997) (“Minimum Standards for State Licensed Programs”).

⁵ See American Academy of Pediatrics Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106(5) PEDIATRICS 1145, 1146 (2000); I. J. BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT (Basic 1969); NATIONAL RESEARCH COUNCIL INSTITUTE OF MEDICINE, FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (J.P. Shonkoff & D.A. Phillips eds., 2000).

⁶ See, e.g., Press Release, U.S. Department of Education, Education Department Releases Guidance on Homeless Children and Youth (Jul. 27, 2016), available at <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), available at <https://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercaredcl.pdf>.

⁷ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486, 45502 & 45528 (Proposed Sept. 7, 2018) (to be codified at 8 C.F.R. 236.3(j)).

⁸ See *Flores, et al. v. Sessions, et al.*, Case No. CV 85-4544, Dkt. No. 455, 4 (C.D. Cal. Jul. 9, 2018) (emphasis in original).

services as state-licensed facilities,⁹ and (2) expanding the types of “emergencies” that suspend the Departments’ obligations to place children in non-secure, licensed facilities.¹⁰

Whether a child is placed in an ICE-licensed or an unlicensed detention facility, educational development will suffer. It is well documented that long-term detention of *any form*, even accompanied by a parent, is traumatic and will have lasting negative effects on learning and development.¹¹ Children react to detention with extreme distress, fear, and helplessness, all of which can lead to various physiological and psychological harms and ultimately result in a deterioration of functioning.¹² Children studied in immigration detention facilities in Australia, the United Kingdom, and the United States show consistent patterns of physiological harms, including disruptive conduct, bed wetting, and sleep disturbances such as nightmares, night terrors, and sleep-walking.¹³ Psychological symptoms observed in detained children include severe depression, PTSD, psychotic disorders, deliberate self-harm and suicidal behavior, and acute anxiety about delays in their own educational development.¹⁴ And smaller children are the most vulnerable, often displaying regression in language development, social withdrawal, impaired cognitive development, and other developmental delays.¹⁵ These negative physiological and psychological outcomes affect broad areas of functioning, and are likely to significantly, and even permanently, impair the ability to learn.¹⁶

⁹ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486, 45525 (Proposed Sept. 7, 2018) (to be codified at 8 C.F.R. 263.3(b)(9) & (b)(11)).

¹⁰ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486, 45496, 45525, & 44429-30 (Proposed Sept. 7, 2018) (to be codified at 8 C.F.R. 236.3(b)(5) & 45 C.F.R. 410.101, 202).

¹¹ A. Lorek et al., *The Mental and Physical Health Difficulties of Children Held Within a British Immigration Detention Center: A Pilot Study*, 33(9) CHILD ABUSE & NEGL. 573 (2009); R. Kronick et al. *Asylum-seeking Children’s Experiences of Detention in Canada: A Qualitative Study*, 85(3) AM. J. ORTHOPSYCHIATRY 287 (2015); S. Mares & J. Jureidini, *Psychiatric Assessment of Children and Families in Immigration Detention: Clinical, Administrative and Ethical Issues*, 28(6) AUSTL. & N.Z. J. PUB. HEALTH 520 (2004); M. Dudley et al., *Children and Young People in Immigration Detention*, 25(4) CURRENT OP. IN PSYCHIATRY 285 (2012).

¹² R. Kronick et al. *Asylum-seeking Children’s Experiences of Detention in Canada: A Qualitative Study*, 85(3) AM. J. ORTHOPSYCHIATRY 287 (2015).

¹³ K. Robjant et al., *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194(4) BRIT. J. OF PSYCHIATRY 306 (2009).

¹⁴ *Id.*

¹⁵ K. Robjant et al., *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194(4) BRIT. J. OF PSYCHIATRY 306 (2009); M. Dudley et al., *Children and Young People in Immigration Detention*, 25(4) CURRENT OP. IN PSYCHIATRY 285 (2012).

¹⁶ See, e.g., American Academy of Pediatrics, *Policy Statement on Early Childhood Adversity, Toxic Stress, and the Role of the Pediatrician: Translating Developmental Science Into Lifelong Health*, 129 PEDIATRICS e224, e225 (2012); National Scientific Council on the Developing Child, Center on the Developing Child at Harvard U., *Persistent Fear and Anxiety Can Affect Young Children’s Learning and Development: Working Paper No. 9* (2010), <http://www.developingchild.net>.

Indefinite detention is never appropriate for children and will have a profoundly damaging effect on their educational development.¹⁷ What is more, the proposed rule does not even address how the Departments intend to provide “[e]ducational services appropriate to the minor’s level of development . . . in a structured classroom setting”, as is currently required under the FSA. And in unlicensed “emergency” or “influx” facilities, the Departments may opt to provide *no* educational services at all.¹⁸ In short, the Departments’ proposed rule will keep more children in government custody, contrary to the FSA’s policy favoring release, and provides no assurance that detention facilities will even comply with the FSA’s “minimum standards” for educational services.

NEA 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 for access to education. The proposed rule is inconsistent with, and undermines the purposes of, the FSA. The proposed rule must be withdrawn in favor of regulations consistent with the FSA.

Sincerely,

/s/

Alice O’Brien
General Counsel
National Education Association

/s/

Emma Leheny
Senior Counsel
National Education Association

/s/

Gypsy Moore
Civil Rights Law Fellow
National Education Association

¹⁷ See U.S. Department of Homeland Security Advisory Committee on Family Residential Centers, *Report of the ICE Advisory Committee on Family Residential Centers* (Oct. 7, 2016), <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf> (“detention is generally neither appropriate nor necessary for families”).

¹⁸ See Office of Refugee Resettlement, ORR Guide: Children Entering the United States Unaccompanied, Section 1.7 Placement and Operations During an Influx (Mar. 21, 2016), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.7> (“To the extent practicable, non-State licensed HPCs and Influx Care Facilities are encouraged to provide . . . [e]ducational services.”); see also Caitlin Dickerson, *Migrant Children Moved Under Cover of Darkness to a Texas Tent City*, N.Y. TIMES (Sept. 30, 2018), <https://www.nytimes.com/2018/09/30/us/migrant-children-tent-city-texas.html>.