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November 6, 2018

DELIVERED ELECTRONICALLY

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

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

Dear Ms. Seguin:

The National Health Law Program (NHeLP) protects and advances the health rights of low income and underserved individuals by advocating, educating, and litigating at the federal and state level. In particular, for almost fifty years, NHeLP has worked to improve the mental and physical health of children and youth, and to support the overall health and wellness of children and their families. We write to express our strong opposition to the proposed rule to amend regulations relating to the apprehension, processing, care, custody, and release of alien juveniles.

For the reasons detailed in the comments that follow, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) should immediately withdraw their current proposal. Instead, we suggest the agencies 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.

I. LONG-TERM PLACEMENT OF CHILDREN IN FAMILY RESIDENTIAL CENTERS HAS SERIOUS HEALTH IMPLICATIONS

According to medical experts, DHS detention facilities are not appropriate places for children to be housed. 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.¹ 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.² Although 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.³ In 2018, the American College of Physicians released a policy stating:

[F]orced 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.⁴

In a retrospective analysis, detained children were reported to have a tenfold increase in developing psychiatric disorders.⁵ Studies of health difficulties of detained children found that most children since being detained reported symptoms of depression, sleep

¹ Julie M. Linton et al., American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

² 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>.

³ Michael Dudley et al., *Children and Young People in Immigration Detention*, 25(4) CURRENT OPINION PSYCHIATRY 285-92 (July 2012); Ehntholt, K. et al., *Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centres*, 23(2) CLINICAL CHILD PSYCHOLOGY AND PSYCHIATRY 238–257 (2018); Kronick, R. et al., *Asylum-seeking children’s experiences of detention in Canada: A qualitative study*, 85(3) AMERICAN JOURNAL OF ORTHOPSYCHIATRY 287 (2015).

⁴ 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.

⁵ Zachary Steel, et al., *Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia*, 28(6) AUSTRALIAN AND NEW ZEALAND JOURNAL OF PUBLIC HEALTH 527-36 (Sept. 25, 2004).

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.⁶

Despite these and many other warnings from medical experts, DHS proposes in this NPRM to substitute its own Immigration and Customs Enforcement (ICE) family residential standards where its family detention facilities cannot obtain licensing from state, municipal, or other appropriate child welfare entities.⁷ This would have the effect of eliminating the critical Flores Settlement Agreement limitation on the detention of children in unlicensed facilities. As a result, and as explicitly intended by DHS in promulgating these proposed rules, DHS could detain children with their families for the entirety of their immigration proceedings--in effect, indefinitely.

No evidence exists that any amount of time in detention is safe for children.⁸ In fact, even short periods of detention can cause psychological trauma and long-term mental health risks for children.⁹ Studies of detained immigrants have shown that children and parents may suffer negative physical and emotional symptoms from detention, including anxiety, depression and posttraumatic stress disorder.¹⁰ Detention itself undermines parental authority and capacity to respond to their children's needs; this difficulty is complicated by parental mental health problems.¹¹ Further, parents in detention centers have described regressive behavioral changes in their children, including decreased eating, sleep disturbances, clinginess, withdrawal, self-injurious behavior, and aggression.¹²

Visits to family detention centers by pediatric and mental health advocates have revealed discrepancies between the standards outlined by ICE and the actual services provided, including inadequate or inappropriate immunizations, delayed medical care, inadequate education services, and limited mental health services.¹³ Other reports describe prison-

⁶ Ann 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 & NEGLECT 573-85 (Sept. 2009).

⁷ See 83 Fed. Reg. 45485, 45525 (Sept. 7, 2018).

⁸ Julie M. Linton et al., American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*



like conditions; inconsistent access to quality medical, dental, or mental health care; and lack of appropriate developmental or educational opportunities.¹⁴

In July, fourteen major medical organizations joined together to voice deep concerns about the treatment that immigrant children and their parents face in federal custody.¹⁵ The letter from these organizations notes that two physicians within DHS' Office of Civil Rights and Civil Liberties found serious compliance issues in DHS-run facilities resulting in "imminent risk of significant mental health and medical harm."¹⁶ The DHS physicians stated that "detention of innocent children should never occur in a civilized society, especially if there are less restrictive options, because the risk of harm to children simply cannot be justified."¹⁷ Currently, no mechanism exists for health professionals to regularly monitor the conditions in DHS facilities and their appropriateness for children.

After almost a year of investigation, the DHS Advisory Committee on Family Residential Centers concluded that detention is generally neither appropriate nor necessary for families— and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children.¹⁸ 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 long-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.

¹⁴ 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>; Julie M. Linton et al., American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children*, Apr. 2017, <http://pediatrics.aappublications.org/content/early/2017/03/09/peds.2017-0483>.

¹⁵ Letter from American Pediatric Association *et al.* to The Honorable Charles Grassley *et al.*, July 24, 2018, <https://downloads.aap.org/DOFA/Senate%20Congressional%20Oversight%20Request%20Letter%20Final%2007%2024%2018.pdf>.

¹⁶ Letter from Dr. Scott Allen and Dr. Pamela McPherson to the Honorable Charles Grassley and the Honorable Ron Wyden, July 17, 2018, <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf>.

¹⁷ *Id.*

¹⁸ *Report of the DHS Advisory Committee on Family Residential Centers*, Sept. 30, 2016, <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.



II. DHS DOES NOT PROVIDE ADEQUATE HEALTH CARE IN ITS FACILITIES

DHS has a long history of providing inadequate health care to adults in its facilities. Given the poor provision of health care for adults, it is particularly worrisome that DHS is now asking for additional discretion to establish standards under which children and families will be held.

The history of health care in U.S. immigration detention facilities is checkered with institutional neglect and harm of migrants and asylum seekers, which has caused fatal health outcomes.¹⁹ In Fiscal Year 2018, nine individuals died in ICE custody.²⁰ At least 100 migrants died in ICE detention from 2007 to 2017.²¹ Many of these deaths were a result of medically treatable conditions, diseases, and infections that were ignored by ICE.²² The fact that ICE does not meet basic standards of care in facilities that house adults should militate against permitting “self-regulation” in child facilities.

Despite recent assertions from ICE that it has improved its standard of care, evidence suggests otherwise. The number of deaths in these facilities has been trending upwards. Fiscal Year 2017 saw the most deaths in detention facilities in nearly a decade.²³ As recently as September 2018, the DHS Inspector General issued another report regarding the Adelanto ICE Processing Center documenting several serious issues that “pose significant health and safety risks at the facility.”²⁴ The facility did not ensure that detainees had access to necessary medical or dental care, and some individuals were left on months- or years-long waitlists to receive dental care, which resulted in tooth loss and

¹⁹ This is a product of ICE officials consistently delaying and refusing medically necessary treatments and denying access to critical mental and physical health care, even for the child asylum seekers being detained in adult facilities. Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigrant Detainees*, 57 B.C. L. Rev. 167, 174, 176, 181 (2016); Det. Watch Network, *Expose & Close: Theo Lacy Detention Center* 5 (2012), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Theo%20Lacy.pdf>.

²⁰ Press Release, U.S. Imm. Customs Enf’t, ICE Detainee Passes Away (Jul. 27, 2018), <https://www.ice.gov/news/releases/ice-detainee-passes-away-0>.

²¹ U.S. Imm. Customs Enf’t, *List of Deaths in Ice Custody* (2018), <https://www.ice.gov/doclib/foia/reports/detaineddeaths-2003-2017.pdf>; see also Jeanne Kuang, *Immigration Detention Deaths Reach Highest Total Since 2009*, Houston Chron., Jan. 12, 2018, <https://www.houstonchronicle.com/news/houston-texas/houston/article/Immigration-detention-deaths-reach-the-highest-12494624.php>

²² Tovino, *supra* note 19, at 169-170, 179.

²³ U.S. Imm. Customs Enf’t, *supra* note 21.

²⁴ Office Inspect. Gen., *Management Alert—Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California* 1 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf>.



unnecessary tooth extractions.²⁵ Moreover, the report revealed that health care providers, including nurses, physicians, and mental health providers, routinely stamped medical records to falsely indicate that they had conducted an examination, despite never having any contact with the detainee; these issues persisted notwithstanding a previous report in 2017 documenting the same problems.²⁶

The 2018 report also documented numerous “nooses” made from braided sheets hanging in detainee cells, which have been used for repeated suicide attempts. Suicide attempts notwithstanding, the facility’s management did not consider the prevalence of these nooses a “high priority,” and the report concluded that despite clear awareness of the issue, “ICE’s lack of response . . . shows a disregard for detainee health and safety.”²⁷

ICE also fails to have or enforce health care standards specific to women. Pre- and post-natal care in detention facilities remains inadequate and threatens to cause irreparable harm to women and their children.²⁸ In 2017, a pregnant woman detained in a California facility miscarried after detention officials repeatedly denied her medical care despite numerous requests for help.²⁹ Even after the miscarriage, facility administrators refused to let her see a doctor despite her persisting health needs.³⁰ In March of 2018, ICE publicly announced the end of its policy that forbade the detention of pregnant women except in “extraordinary circumstances” and eliminated reporting requirements that record their treatment of pregnant women—actions that will only increase similar occurrences as ICE detains more women during their pregnancies.³¹

²⁵ *Id.* at 7.

²⁶ *Id.*

²⁷ *Id.* at 3-4.

²⁸ Am. College of Obstets. & Gyn., *Committee Opinion: Health Care for Pregnant and Postpartum Incarcerated Women and Adolescent Females*, 118 OBSTETRICS & GYNECOLOGY 1198, *2, *3 (2011), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co511.pdf>; Hum. Rights Watch, *Detained and Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention* 4, 17, 52, 53 (2009), https://www.hrw.org/sites/default/files/reports/wrd0309webwcover_1.pdf; Michael T. Kinsella & Catherine Monk, *Impact of Maternal Stress, Depression & Anxiety on Fetal Neurobehavioral Development*, 52 Clinical Obstetrics & Gynecology 425, *3, *4, *7 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3710585/>.

²⁹ Letter from Am. Civ. Lib. Union *et al.* to Cameron Quinn & John Roth, Dep’t Homeland Sec. 8, 9 (Nov. 13, 2017), https://americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf.

³⁰ *Id.* at 9.

³¹ U.S. Imm. Customs Enf’t, *ICE Directive 11032.3: Identification and Monitoring of Pregnant Detainees* (Dec. 14, 2017), https://www.ice.gov/sites/default/files/documents/Document/2018/11032_3_PregnantDetainees.pdf



Several investigations have also found inconsistent medical documentation of detained patients and incomplete administrative information on medical costs.³² Among numerous administrative errors, ICE's refusal to appropriately collect basic information has allowed negative health outcomes to go unseen.³³ In one investigation of HIV/AIDS care in ICE-supervised facilities, detention centers did not deliver consistent care, risking a drug resistance that could inflict tremendous harm on the patients and the general public.³⁴ The facilities also improperly handled medical records and failed to protect medical confidentiality, exposing patients to harassment due to their health status.³⁵

For those who receive care, individual reports recount facility staff superseding doctors' directives by unilaterally denying recommended treatments and seizing vital prescription medications from patients.³⁶ Independent medical doctors have cited this widespread practice of patient neglect and "systemic indifference" as an apparent cause of several injuries in detention facilities, namely the loss of vision, the loss of mobility, and a preventable death.³⁷

; U.S. Imm. Customs Enf't, FAQs: Identification and Monitoring of Pregnant Detainees, <https://www.ice.gov/faqs-identification-and-monitoring-pregnant-detainees> (last visited May 11, 2018) ("ICE has ended the presumption of release for all pregnant detainees."); see also Letter from 18MillionRising.org to Thomas D. Homan, U.S. Imm. Customs Enf't (Apr. 11, 2018), <https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/ICE%20sign-on%20letter%20FINAL%204.11.18.pdf>.

³² John V. Kelly, Office Inspect. Gen., Dep't Homeland Sec., *Concerns about ICE Detainee Treatment and Care at Detention Facilities* 7 (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>; Hum. Rights Watch, *Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention* 24 (2017), [hereinafter Hum. Rights Watch, *Systemic Indifference*], https://www.hrw.org/sites/default/files/report_pdf/usimmigration0517_web_0.pdf; U.S. Gov't Account. Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care* ii, 12 (2016), <https://www.gao.gov/assets/680/675484.pdf>.

³³ Derrick Silove et al., *Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development*, 357 THE LANCET 1436, 1437 (2001), <https://pdfs.semanticscholar.org/00c0/35b22fc12fad531fe5371c7111342d7eeaa.pdf>.

³⁴ Hum. Rights Watch, *Chronic Indifference: HIV/AIDS Services for Immigrants Detained by the United States* 38-39 (2007), <https://www.hrw.org/report/2007/12/05/chronic-indifference/hiv/aids-services-immigrants-detained-united-states>.

³⁵ *Id.* at 2, 20, 46, 60.

³⁶ Hum. Rights First, *Ailing Justice: New Jersey Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention* 6-7 (2018) <https://www.humanrightsfirst.org/sites/default/files/Ailing-Justice-NJ.pdf>.

³⁷ *Id.* at 2; Hum. Rights Watch, *Systemic Indifference* 1, 27, 38-40, 54-56 (2017), https://www.hrw.org/sites/default/files/report_pdf/usimmigration0517_web_0.pdf.



Nor does ICE adequately treat detainees' mental health. For migrants, many of whom are fleeing war, conflict, or natural disaster, the immense stress of apprehension and detention in these facilities can deteriorate their mental health.³⁸ Understanding the circumstances of their apprehension and their previous history of trauma is important to ensuring that detainees receive adequate mental health care.³⁹ Medical experts report that separation from loved ones, fear of deportation, and general conditions in detention facilities are clear causes of frustration and anxiety, which often progress into lifelong psychological issues, such as clinical depression and post-traumatic stress disorder (PTSD).⁴⁰ The detrimental effects of detention on the mental health of migrants and asylum seekers intensifies with time.⁴¹ In one survey of asylum seekers in U.S. detention, 77 percent had clinically significant symptoms of anxiety, 86 percent had symptoms of depression, and 50 percent had symptoms of PTSD, all of which increased in prevalence with the length of detention.⁴² In a follow-up survey, participants who were no longer

³⁸ Kenneth E. Miller & Andrew Rasmussen, *War Exposure, Daily Stressors, and Mental Health in Conflict and Post-Conflict Settings*, 70 SOC. SCI. MED. 7, 11-12 (2010).

³⁹ Substance Abuse & Mental Health Servs. Admin., *A Treatment Improvement Protocol: Trauma-Informed Care in Behavioral Health Services* 17-18, 93 (2014), <https://store.samhsa.gov/shin/content/SMA14-4816/SMA14-4816.pdf>; Luis H. Zayas & Laurie Cook Heffron, *Disrupting young lives: How detention and deportation affect US-born children of immigrants*, Am. Psych. Ass'n: CYF News (Nov. 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation.aspx>.

⁴⁰ Derrick Silove et al., *Detention of Asylum Seekers: Assault on Health, Human Rights, and Social Development*, 357 THE LANCET 1436, 1436-37 (2001), <https://pdfs.semanticscholar.org/00c0/35b22fc12fadb531fe5371c7111342d7eeaa.pdf>; Hum. Rights First, *Ailing Justice: New Jersey Inadequate Healthcare, Indifference, and Indefinite Confinement in Immigration Detention* 6-7 (2018) <https://www.humanrightsfirst.org/sites/default/files/Ailing-Justice-NJ.pdf>; Physicians Hum. Rights et al., *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* 55-56, 83-85 (2003), https://s3.amazonaws.com/PHR_Reports/persecution-to-prison-US-2003.pdf; Omar Martinez et al., *Evaluating the Impact of Immigration Policies on Health Status Among Undocumented Immigrants: A Systematic Review*, 17 J. IMMIGR. MINORITY HEALTH 947, *9 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4074451/>; Etienne V Langlois et al., *Refugees: Towards Better Access to Health-Care Services*, 387 THE LANCET 319, 320 (2017), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(16\)00101-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)00101-X/fulltext); Zachary Steel et al., *Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees*, 188 BRITISH J. PSYCHIATRY 58, 61, 63 (2006) <https://www.cambridge.org/core/journals/the-british-journal-of-psychiatry/article/impact-of-immigration-detention-and-temporary-protection-on-the-mental-health-of-refugees/B6914BF421D202CE4474C5F757BC541E/core-reader>.

⁴¹ Hum. Rights First, *supra* note 40, at 8; Physicians Hum. Rights et al., *supra* note 40, at 55-56; Steel et al., *supra* note 40, at 58-60, 63.

⁴² Allen S. Keller et al., *Mental Health of Detained Asylum Seekers*, 362 THE LANCET 1721, 1722 (2003). Over one-quarter of these detained migrants reported suicidal thoughts while detained, some having attempted it, a troubling, pervasive issue that is underreported by ICE despite being a leading cause of death in these facilities. *Id.* at 1722; see also Tovino, *supra* note 19, at 181-87;

detained had reduced psychological symptoms, while individuals still in custody were more distressed than before.⁴³

The inadequate health services and conditions in U.S. immigration detention facilities are well documented and are due in large part to the absence of accountability and oversight.⁴⁴ In 2017, the DHS Inspector General reported long waits for medical services in numerous facilities, even for urgent or necessary care.⁴⁵

III. DHS' PROPOSAL TO SELF-REGULATE FAMILY RESIDENTIAL CENTERS POSES RISKS TO CHILDREN AND FAMILIES

The *Flores* settlement agreement and the court decisions implementing it require that immigration detention facilities that hold children for more than twenty days be licensed by “an appropriate State agency” to meet certain standards of care.⁴⁶ Because most states have not licensed facilities to detain parents with their children, the Department of Homeland Security (DHS) has had difficulty obtaining licenses for family detention centers, limiting the length of family detention.

Under the proposed regulation that would supersede *Flores*, DHS would be able to detain children for prolonged periods in facilities that are not licensed by a state child welfare agency. The proposal would allow DHS to “employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE.”⁴⁷

DHS's record of oversight, transparency, and accountability with regard to immigration detention facilities is abysmal. This record demonstrates just how dangerous it would be to allow DHS to bypass state certification standards for facilities that detain children. DHS claims that this would provide “materially identical assurances about the conditions” of family detention centers while allowing for longer periods of detention.⁴⁸ In reality, self-

Megan Granski et al., *Death Rates among Detained Immigrants in the United States*, 12 INT'L J. ENV. RES. & PUB. HEALTH 14414, 14416 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4661656/>.

⁴³ Keller et al., *supra* note 42, at 1722.

⁴⁴ Hum. Rights Watch, *Systemic Indifference*, *supra* note 37, at 79-92.

⁴⁵ Kelly, *supra* note 32, at 7; see also Hum. Rights Watch, *Systemic Indifference*, *supra* note 37, at 45.

⁴⁶ *Flores v. Reno*, Stipulated Settlement Agreement, Aug. 12, 1996, p. 4.

https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settleme nt011797.pdf.

⁴⁷ 83 Fed. Reg. at 45525 (Sept. 7, 2018).

⁴⁸ *Id.* at 45488.



inspections by DHS and its contractors are much weaker than the protections that *Flores* provides.

DHS's inspections of adult ICE detention centers provides evidence that the agency's self-inspections are a poor substitute for state child welfare agencies or court supervision. A DHS Office of Inspector General (OIG) investigation published in June 2018 found that because of the flaws in inspections of ICE detention facilities, deficiencies "remain uncorrected for years."⁴⁹ For example, the OIG found that inspections conducted by the Nakamoto Group, a private contractor that frequently inspects ICE facilities, are inadequate. According to OIG, "typically, three to five inspectors have only 3 days to complete the inspection, interview 85 to 100 detainees, brief facility staff, and begin writing their inspection report for ICE."⁵⁰ An ICE employee told the OIG that this was not "enough time to see if the [facility] is actually implementing" required policies.⁵¹ Other ICE personnel described Nakamoto inspections as "very, very, very difficult to fail" and "useless."⁵²

For the inspections that DHS OIG observed, Nakamoto reported having conducted 85 to 100 detainee interviews. But contrary to what Nakamoto's contract required, the conversations with detainees that OIG saw were not conducted in private, were conducted only in English, and OIG wrote that it "would not characterize them as interviews."⁵³ OIG found that inspections conducted by the ICE Office of Detention Oversight were much more thorough, but occurred only once every three years on average, and ICE did not adequately follow up to ensure that problems were corrected.

IV. PROPOSED LONG-TERM FAMILY DETENTION IS DISCRIMINATORY

The proposed regulations do not "implement" the *Flores* Settlement's terms; instead, they undermine the critical protections the Settlement guarantees to children held in immigration prison.⁵⁴ This is not the first time that an administration has attempted to enact immigration policy that is not based on evidence and is punitive and harmful to

⁴⁹ Department of Homeland Security Office of Inspector General, *ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights* (OIG-18-67) (June 26, 2018) <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at 7, fn. 12.

⁵² *Id.*

⁵³ *Id.* at 8.

⁵⁴ As noted in the summary for the proposed rule, the settlement agreement states that agreement will terminate forty-five days after publication of final regulations implementing the rule. Therefore, it is extremely important that any proposed rules actually implement the terms of the agreement.



children and families. In fact, these are the policies of anti-immigrant white supremacist groups, based in fear, xenophobia, and scapegoating.⁵⁵ Undermining the protections in the *Flores* Settlement disproportionately impacts immigrant communities of color, especially Central Americans, who are detained at high rates.⁵⁶ Research further shows that “availability of detention and deportation can incentivize law enforcement to engage in racial profiling of the Latino/a/x community.”⁵⁷

Many asylum seeking mothers and children who flee to the U.S. have survived horrific violence such as domestic and child abuse, rape, sexual slavery, and human trafficking. Survivors of such abuses overwhelmingly suffer PTSD as a result. 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.

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 these desperately needed services, the more challenging the healing process may be.⁵⁸ 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.⁵⁹ No

⁵⁵ See Innovation Law Lab, “Sessions, Connections and Bias,” <https://innovationlawlab.org/sessions-connections/>; The Southern Poverty Law Center, *The Trump administration’s ‘public charge’ policy is the latest of many that reflect the playbook of anti-immigrant hate groups* (Oct. 1, 2018), <https://www.splcenter.org/hatewatch/2018/10/01/trump-administrations-public-charge-policy-latest-many-reflect-playbook-anti-immigrant-hate>.

⁵⁶ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U.PENN. L.R. 1, 46, Fig. 13 (2015), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.

⁵⁷ *Id.* at 46.

⁵⁸ Elyssa Barbash, PhD., “Overcoming sexual assault: symptoms and recovery,” *PSYCHOLOGY TODAY* (Apr. 18, 2017) (“From a clinical perspective, the amount of suffering and distress is substantially reduced when a person seeks treatment earlier on.”) <https://www.psychologytoday.com/us/blog/trauma-and-hope/201704/overcoming-sexual-assault-symptoms-recovery>.

⁵⁹ 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.



amount of oversight can alleviate the traumatizing nature of imprisonment itself for children and survivors of gender-based violence.

The proposal to make family detention facilities licensed facilities for holding children will lead to prolonged detention of families, including prolonged detention of LGBTQ immigrants and their families. Immigration detention is extremely unsafe for LGBTQ immigrants. Numerous studies demonstrate that LGBTQ people in detention are at heightened risk of verbal and physical abuse, harassment, sexual violence, and inadequate access to necessary medical care.⁶⁰ Although LGBTQ people make up less than one percent of people in immigration detention each year, they account for 12 percent of reported victims of sexual abuse and assault in ICE detention.⁶¹

The withholding of necessary medical care as well as provision of inadequate medical care for LGBTQ immigrants in detention is well-documented. The worst reported result of this was the recent death of transgender asylum seeker Roxana Hernandez from complications related to HIV after being detained by ICE. LGBTQ people living with HIV face delays in receiving the life-saving treatment they rely on.⁶²

Immigrants are less likely to win their immigration cases when they are detained.⁶³ Not being detained improves an asylum applicant's ability to gather evidence and document the persecution they escaped and secure counsel to help them obtain asylum or related protection.⁶⁴ For LGBTQ people, who face criminalization and persecution in much of the world, losing their case could mean death. The impact of detaining LGBTQ asylum

⁶⁰ Sharita Gruberg, Center for American Progress, *Dignity Denied: LGBTQ Immigrants in U.S. Immigration Detention* (2013), <https://www.americanprogress.org/issues/immigration/reports/2013/11/25/79987/dignity-denied-lgbtq-immigrants-in-u-s-immigration-detention/>; Shana Tabak, Rachel Levitan, *LGBTQI Migrants in Immigration Detention: a Global Perspective*, Harv. J.L. & Gender 1 (2014), <http://harvardjlg.com/wp-content/uploads/2012/01/2014.1.pdf>; Lauren Zitsch, "Where the American Dream Becomes a Nightmare: LGBTQ Detainees in Immigration Detention Facilities," 22 Wm. & Mary J. Women & L. 105 (2015-2016).

⁶¹ Letter from Congresswoman Kathleen Rice to the Department of Homeland Security Secretary Kirstjen Nielsen (May 30, 2018).

⁶² John Washington, *The Nation*, "An HIV-Positive Gay Asylum Seeker Staged a 7-Day Hunger Strike in an ICE Detention Facility," Dec. 12, 2017, <https://www.thenation.com/article/an-hiv-positive-gay-asylum-seekerstaged-a-seven-day-hunger-strike-in-an-ice-detention-facility/>; Shana Tabak, Rachel Levitan, *LGBTQI Migrants in Immigration Detention: a Global Perspective*, 37 HARV. J.L. & GENDER 1 (2014), <http://harvardjlg.com/wp-content/uploads/2012/01/2014.1.pdf>.

⁶³ New York Immigrant Representation Study, *Accessing Justice: the Availability and Adequacy of Counsel in Immigration Proceedings* (2011), <https://brooklynworks.brooklaw.edu/cqi/viewcontent.cqi?referer=https://www.google.com/&httpsredir=1&article=1551&context=faculty>.

⁶⁴ Anneliese Hermann, Center for American Program, *Asylum in the Trump Era* (2018).

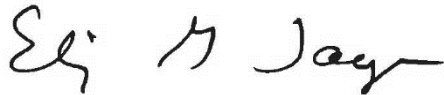


seekers for longer periods of time is too dangerous to disregard. A study from the Center for American Progress found that, controlling for all other factors, being detained made LGBTQ asylum seekers with excellent legal counsel over 10 percent less likely to win their cases than their counterparts who were not detained.⁶⁵ In other words, detaining LGBTQ asylum seekers makes them less likely to receive protection, regardless of the strength of their asylum case.

IV. CONCLUSION

Thank you for the opportunity to submit comments on the NPRM. Please do not hesitate to contact Senior Attorney Jennifer Lav at lav@healthlaw.org or 202-289-7661 to provide further information.

Sincerely,



Elizabeth G. Taylor
Executive Director

⁶⁵ Sharita Gruberg and Rachel West, *Humanitarian Diplomacy: the U.S. Asylum System's Role in Protecting Global LGBTQ Rights* (2015), <https://www.americanprogress.org/issues/LGBTQ/reports/2015/06/18/115370/humanitarian-diplomacy/>.

