Family Detention & the *Flores* Settlement Agreement[1]

Updated July 2016

In the summer of 2014, the migration of refugee families and unaccompanied refugee children fleeing Central America reached unprecedented rates.[2] The Obama Administration responded by detaining families in order to deter future migration. While the government is bound in its treatment and protection of migrant children by the 1997 *Flores* Settlement Agreement (*Flores*) and the Trafficking Victims Protection Act of 2008 for unaccompanied children, the Administration refused to comply with *Flores* for accompanied children and instead opened massive immigration detention facilities for mothers and children. USCIS data shows that 88 percent of these families passed initial screenings and may be eligible for protection.

This response to refugees, especially children, has now continued for two years. It is unprecedented and un-American. Historically, the United States has always been welcoming towards refugees, especially during times of significant upheaval. International and national human rights groups, immigration and refugee service providers, child welfare organizations, members of Congress, medical and mental health experts, and the press have all called on the Administration to stop detaining refugee families.

The *Flores* Litigation in 2015-2016: A Timeline

- February 2015: attorneys representing the *Flores* class – children in federal immigration custody – initiated litigation to require the government to comply with the child welfare standards set out in *Flores*.
- July 24, 2015: After attempted negotiations between the government and *Flores* class broke down, Judge Dolly Gee of the Central District of California ruled that *Flores* applies to both unaccompanied and accompanied migrant children and the government was not complying. Judge Gee gave the government a limited period of time to respond as to why her order should not be implemented.
- On July 31, 2015: After several repeated calls, and following letters by 33 Senators and 136 Representatives earlier that year, 178 Representatives and the ranking members of the Senate Judiciary Committee and the Senate Committee on Health, Education, Labor, and Pensions called on DHS to end family detention.
- August 6, 2015: DOJ filed a response strongly opposing Judge Gee's ruling and remedy.
- August 21, 2015: Judge Gee modified her order in part but affirmed her order that the Department of Homeland Security (DHS) reform family detention practices to be consistent with *Flores* and adhere to short-term custody standards.
- September 18, 2015: The Administration filed its notice of appeal and announced its intention to continue a practice of family detention, but for shorter periods.
- October 5, 2015: Customs and Border Protection (CBP) announced their release of the new short-term custody standards- National Standards for Transport, Escort, Detention and Search (TEDS), which include custody standards for the treatment and accommodation of children.
- October 23, 2015: DHS ordered to demonstrate compliance with Judge Gee's ruling requiring adherence to

[1] For an extensive analysis of *Flores* and DHS custody, see LIRS, KIND, and WRC: "Flores Settlement Agreement & DHS Custody." Available at: http://tinyurl.com/qxccfo8

[2] For families, May numbers were twice that of April and June was more than triple that of April 2014. Unaccompanied children came at all-times highs of over 10,000 a month in May and June 2014. In total, 68,445 families and 68,541 unaccompanied children refugees were apprehended fiscal year 2014. The vast majority of these children and families were seeking protection at the border.

Flores.

- December 1, 2015: DHS filed a motion to expedite the briefing and hearing schedule for its appeal of Judge Gee's ruling.
- January 15, 2016: The government filed a brief with the Ninth Circuit, asking the court to overturn Judge Gee's ruling. The government argues that *Flores* does not apply to children when accompanied by their parents.
- May 15, 2016: Attorneys representing the *Flores* class filed a motion to enforce in District Court Judge Gee's ruling and to appoint a Special Monitor to oversee the government's compliance with Judge Gee's order.
- June 6, 2016: The U.S. 9th Circuit Court of Appeals held that all children in Department of Homeland Security custody are protected under *Flores*. The decision affirmed the July 2015 ruling by Judge Gee holding that the *Flores* agreement requires that children be held in the least restrictive form of custody and that they must be released to parents or other relatives in the order of the child's preference. However, the Ninth Circuit interpreted Judge Gee's decision as providing affirmative rights to parents and reversed on this point. The Court ruled the lower court inaccurately placed the burden on DHS to justify accompanying parents' continued detention and refrained from deciding whether DHS is complying with their obligations for an individualized custody determination. The case has been remanded to Judge Gee for further proceedings regarding DHS's obligations under *Flores* with respect to family detention and short-term custody.

What is the *Flores* Settlement?

The 1997 *Flores* Settlement Agreement (*Flores)* was the result of over a decade of litigation responding to the U.S. government's detention policy towards an influx of unaccompanied migrant children in the 1980s from Central America.[3] The agreement set national standards regarding the detention, release, and treatment of all children in immigration detention and underscores **the principle of family unity**. It requires that:

1) Juveniles be **released from custody without unnecessary delay**, with the preferential release to their parent in accordance with the family reunification requirement.
2) Where they cannot be released because of significant public safety or flight risk concerns, juveniles must be held in the **least restrictive setting** appropriate to age and special needs, generally, in a non-secure facility licensed by a child welfare entity and separated from unrelated adults and delinquent offenders.

In times of **influx** or **emergencies**, the government has more leeway with the timeframe for the transfer of children to licensed facilities who cannot be promptly reunified in custody. This policy acknowledges that agents at the border may not have the initial staff resources to process and transport children, who cannot otherwise be released (*e.g.,* unaccompanied children who do not have a parent or legal guardian traveling with them). However, it should not result in lengthy or unnecessary detainment of children.

Recent Court Decisions Regarding the *Flores* Settlement

The U.S. Court of Appeals for the Ninth Circuit upheld Judge Gee's finding that *Flores* applies to ***all children, including children*** in CBP custody and ***accompanied children*** in ICE family detention:

- *Flores* **clearly applies to all children** in U.S. immigration custody, whether traveling alone or apprehended with their parents, and current DHS family detention policies are in violation of *Flores*.

[3] The Flores Settlement Agreement, Case No. CV 85-4544-RJK(Px); Available at: http://tinyurl.com/qagjr8n. Some of the agreement's terms have been codified at 8 CFR §§236.3, 1236.3. **(**Although it was the Immigration and Naturalization Service (INS) who consented to the agreement, *Flores* also binds "their agents, employees, contractors, and/or successors in office."[3] Therefore, it applies to all those in Department of Homeland Security (DHS) custody—including short-term Customs and Border Protection (CBP) custody and long-term Immigration and Customs Enforcement (ICE) family detention facilities—and those transferred to Office of Refugee Resettlement (ORR) custody).

- **DHS must promptly and expeditiously** begin the process of release and **family reunification**.
- *Flores* articulates a **preference for release to a parent** over another relative or community sponsor; thus parents should be released together with their children whenever possible. An **exception is provided in** limited cases where:
    - A parent is "subject to mandatory detention under applicable law," or
    - Where an individualized custody determination finds a significant flight risk, or a threat to others or national security, and these risks cannot be mitigated by bond or conditions on release.
- *Flores* also directs that **in the rare case** where a **child must be detained** they **must be held in non-secure facilities licensed by child welfare agencies**. Judge Gee found the use of non-licensed and secure facilities a material breach of *Flores*.
- In times of influx, *Flores* may allow for some flexibility with the five day requirement in some cases so long as Defendants proceed expeditiously with family reunification and placement in a non-secure, licensed facility—all of which the government failed to do and instead "unnecessarily dragged their feet."
- The government has failed to meet even the minimal standards of "safe and sanitary" conditions in some short-term detention facilities at the border. Conditions and treatment in temporary CBP custody violate *Flores* and should be monitored. Those apprehended at the border are routinely subjected to freezing conditions, lights on all the time, and little or no access to medical care or hygiene.

The Government's Approach to Family Detention

Prior to the Judge's August 2015 order, the government submitted a court-ordered response to her July 2015 order. The August 2015 DOJ response to the July ruling demonstrated legal, factual, and moral errors in their argument. The government's actions and interpretation of *Flores* continue to be misguided:

- ***A False Premise that it Must Expedite the Removal of Asylum Seekers:*** The government argues that because the INA grants the authority for Expedited Removal (ER), and ER requires mandatory detention, the Judge should not circumscribe its use of detention or pose limits on its free use of ER. **This argument ignores that it is not mandatory for the government to initiate Expedited Removal and that it can both comply with the INA and *Flores.*** The government could instead issue the family a notice to appear in immigration court, as was the practice prior to the summer of 2014. The fact that nearly all detained families are ultimately placed in proceedings before an immigration court anyway following the passing of an initial fear screening underscores that the additional step of detention under ER is unnecessary, inhumane, and costly. The government has clear discretion to initiate ER or issue a notice to appear; this discretion should be exercised based on individualized case factors rather than detention bed availability.
- ***A False Premise that It Must Either Detain the Family Together or Separate Members:*** The government argues that without family detention facilities, it will be forced to separate families or criminally prosecute families. **This argument ignores that the government could release families together, employing alternatives to detention (ATD) when necessary to mitigate significant risk factors, without resorting to detention.** Overwhelmingly, the families in detention are asylum-seekers who have ties to the community and a strong incentive for appearing in court. If the government chooses to separate families, it will do so only for arbitrary and insidious reasons. If the government chooses to criminally prosecute asylum-seekers, it will violate long-standing international law not to punish refugees when they express a credible fear of return.[4]
- ***Investing in Detention, Not Alternatives:*** The President's FY2017 budget prices family detention at $161.36 per person per day and holds that ICE maintain at least 960 family detention beds per day. In reality, family detention capacity remains much greater. Instead of costly detention, ICE should use community-based alternatives to detention (ATD) programs. Community based ATD models, which advocates have long sought, have high compliance rates in the past. Unfortunately, where ICE uses

[4] Article 31 of the Convention on the Status of Refugees and the 1967 Protocol. *See also,* Office of Inspector General, Streamline: Measuring its Effect on Illegal Border Crossing (May 15, 2015).

alternatives for families, it has often used the most onerous form possible and without individualized determinations to determine appropriateness. In September 2015, ICE did award a long-awaited contract for a **new Family Case Management Program (FCMP)** that emphasizes comprehensive case management and community support to facilitate access to housing, legal services, and an understanding of the immigration case process, to GEO Care, LLC, a subsidiary of the private prison contractor the GEO Group. This decision ignored the company's inexperience with a holistic case management model that serves this population. Importantly, **rather than replace family detention this pilot will be used in addition to current use of detention and ankle monitors, and will only serve a small number of families in limited geographical areas.**

- ***A Misguided Belief That Families Don't Appear:*** The government professes a need to detain because non-detained families were failing to appear for their court cases.[5] ICE has not adequately informed many released families of obligations to appear at future ICE appointments or court dates.[6] To enable families to meet their obligations, ICE must **provide clear oral and written notice in a language the family understands** prior to release, and should permit NGO legal service providers to orient those released from detention on the border and from family detention facilities on their obligations and how to find a lawyer.
- ***Dismissing the Harm Caused by Detention:*** Medical and mental health care in family detention facilities remains inadequate. Numerous complaints have been filed with the DHS Office for Civil Rights and Civil Liberties detailing cases of medical neglect and serious mental health concerns in family detention facilities.[7] A shorter processing time does not eliminate the harm and psychological trauma that detention causes.
- ***Justifying Prolonged Detention with Incomplete Statistics:*** In its August 2015 response, the government argued that roughly 60% of recently detained families were processed in 20 days. This means that 40 % - or several hundred women and children – were detained for longer. In addition, experts have found that even a few weeks of detention can have a harmful impact on mental and medical health.
- ***Ignoring Required Compliance with State and Local Child Welfare Laws:*** Even with shorter processing times, the government is still using facilities that are secure and unlicensed. Judge Gee found the use of these facilities for long-term detention violates the government's obligations under *Flores*.
- ***Seeking Licensure Without Compliance:*** The government is currently engaging in litigation battles for the licensure of all three detention facilities as child residential facilities without changing its practices to comply with child welfare standards. While theoretically the concept of licensure is an important mechanism to increase oversight and monitor conditions, in general**, there is no child welfare-based licensing model for the mass detention of parents and children together, and current family detention conditions could not meaningfully comply with existing standards. State licensing agencies should not modify their standards to accommodate facilities that were built without children's welfare in mind. Such detention facilities by their very nature of being large, secure facilities or "congregate care" facilities run antithetical to child welfare licensing policy.** The

[5] Decl. of Thomas Homan at ¶¶ 9, 30.

[6] See Letter to ICE Director Saldana, "Incarcerated Children and Mothers Denied Due Process and Critical Information Before Release," (CARA Project, July 27, 2015) at: http://www.aila.org/advo-media/aila-correspondence/letter-to-ice-recent-practices-dilley.

[7] Complaint, "The Psychological Impact of Family Detention on Mothers and Children Seeking Asylum" (Women's Refugee Commission, American Immigration Lawyers Association, and American Immigration Council, June 30, 2015); Complaint, "Deplorable Medical Treatment at Family Detention Centers Mothers Lodge Complaint with DHS Offices for Civil Rights and Civil Liberties and Inspector General," (Women's Refugee Commission, American Immigration Lawyers Association, and American Immigration Council, Catholic Legal Immigration Network, Inc., Immigrant Justice Corps and Refugee and Immigrant Center for Education and Legal Services, July 30, 2015); Complaint, "ICE's Continued Failure to Provide Adequate Medical Care to Mothers and Children Detained at the South Texas Family Residential Center," (CARA Project, July 30, 2015); Complaint, "CRCL Complaint Details How Family Detention Facility Endangers Incarcerated Mothers and Children (CARA Project, October 6, 2015); Complaint, "Ongoing Concerns Regarding the Detention and Fast-Track Removal of Detained Children and Mothers Experiencing Symptoms of Trauma," (CARA Project, March, 29, 2016).

Pennsylvania Department of Human Services informed ICE that Berks is not operating as a child residential facility and announced it would not renew and would revoke the license for Berks on January 25, 2016.[8] An appeal was filed against this decision, and Berks County Residential Facility continues to operate without a license. ICE also sought child welfare licensure by the Texas Department of Family and Protective Services (DFPS) that would provide an exception to certain child welfare standards for the Karnes and Dilley facilities.[9] DFPS issued a regulation to permit the licensure of the Texas facilities on February 10, 2016, and ultimately granted a license to Karnes on May 2, 2016.[10] Advocates sought to stop DFPS from issuing child care licenses to secure family detention facilities and succeeded in getting a temporary injunction from the 250th District Court for 6 months with respect to the Dilley facility.[11]

- ***Defending the Erroneous Policy of Detention to Deter Refugees:*** The government cites to current use of family detention facilities as "a critical tool for enforcing the immigration laws, which in turn dis-incentivizes future surges of families crossing the Southwest border."[12] The government has repeatedly claimed that it no longer uses detention as an attempt to deter, having been blocked from doing so by another federal judge, and yet continues to cite deterrence as justification to detain families.
- ***Failing to do Individualized Risk Assessments:*** Decisions to detain, release, or issue bond, and the level of that bond, have been arbitrary since the 2014 expansion of family detention. The absence of an individualized assessment violates *Flores*'s requirement to determine if there is a need to detain. The government purports to have a new policy on alternatives to detention and use of bond. **However, in practice, the government consistently still sets high bonds,** effectively preventing release and **by default enrolls families in onerous monitoring programs** requiring wearing of GPS ankle tracking devices regardless of demonstrated flight risk.[13]
- ***Failing to Account for Children's Special Vulnerability in CBP Custody:*** The government argues that Plaintiffs cannot demonstrate widespread failure to provide appropriate conditions in CBP custody. It cites recent GAO report findings that CBP generally provided for the care of children consistent with *Flores*. Yet the GAO prefaces this conclusion as relying solely on their observations because CBP routinely failed to document what care was provided to children. **CBP has no accurate record of services rendered to children in its custody.[14]** Additionally, GAO only found CBP to be compliant with the "least restrictive setting" because there was no alternative—ignoring the fact that the Central Processing Centers were constructed to be **as restrictive as possible**, contrary to what CBP reported to the Court.[15]

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[8] See Jan 27, 2016 letter from Pennsylvania Department of Human Services informing DHS that it would not renew and would revoke the operating license for the Berks County Residential Facility at: http://www.aila.org/infonet/letter-revoking-berks-county-residential-license?utm_source=Recent%20Postings%20Alert&utm_medium=Email&utm_campaign=RP%20Daily; National Immigrant Justice Center posted a copy of Berks contract from 2010 on their Immigration Detention Transparency and Human Rights Project site, found here: http://www.documentcloud.org/documents/1636098-berks-county-pa-igsa-modification.html.

[9] See October 13, 2015 letter by more than 140 organizations opposing the inappropriate licensing of the Karnes and Dilley facilities at http://grassrootsleadership.org/sites/default/files/uploads/press-releases/Final%20letter%20on%20Texas%20licensing%20for%20Karnes%20and%20Dilley.pdf. For a discussion on licensing during family detention at the Hutto and Berks facilities in 2007, see pp. 36-37 of Women's Refugee Commission and Lutheran Immigrant and Refugee Service, *Locking Up Family Values: the Detention of Immigrant Families*. February 2007. http://lirs.org/wp-content/uploads/2012/05/RPTLOCKINGUPFAMILYVALUES2007.pdf.

[10] http://www.nytimes.com/2016/05/03/us/texas-grants-child-care-license-to-migrant-detention-center.html

[11] http://grassrootsleadership.org/releases/2016/06/texas-court-issues-temporary-injunction-prohibiting-licensing-dilley-family

[12] Government's Response, *supra* n. 4 at page 17. *See also* Decl. of Robert Vitiello at ¶ 46 and Decl. of Thomas Homan at ¶¶ 29, 30.

[13] A One-Week Snapshot: Human Rights First at Dilley Family Detention Facility Post-Flores Ruling (August 6, 2015).

[14] Government Accountability Office, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody* (July 2015) at pages 43-44.

[15] *Supra* n. 6, Vitiello Decl. ¶33.

How should the government respond to the *Flores* court decision?

The government should take the following steps:

- **Comply with prompt and expeditious *Flores* release requirements.** All children in family detention are accompanied by a parent, and therefore can and should be released promptly with their parents, as per *Flores's* direction that reunification with parents is preferred before another caretaker or relative. DHS can release families after completion of processing by CBP and the issuance of a Notice to Appear (NTA) in accordance with immigration laws. DHS is not required to place families into expedited removal.
- **Release families together, and do not separate families.** DHS does not have to separate parents from their children, or detain parents while releasing children and retains discretion to release families once processed in order to maintain family unity while families pursue their immigration and protection claims.
- **If there is no one to whom a child can be released and they must remain in custody pending reunification with family, children can be held only in state-licensed, child-appropriate facilities.** These licensed facilities must abide by state child licensing regulations and protect children's best interests by providing a non-secure, home-like environment, which current facilities do not.
- **Whether a child (and his or her accompanying parent) poses a flight or security risk requires an individualized determination.** Detention, even if for a shorter period of time, should **only** be used as a last resort; where the government is concerned about risk based on a meaningful case-by-case assessment, it should turn to proven ATDs – that include case management and community support – to mitigate risk.
- **Where needed, the government should use the least restrictive alternatives to detention (ATDs) possible.** Some ATD programs may also violate *Flores* if they impact the child's freedom of movement in the community and are not the least restrictive setting. Release and use of alternatives to detention also saves money.[16] Family detention costs roughly $161 to $343 per person per day, and alternatives cost on average $5 for an entire family if only applied to a head of household.
- **DHS should implement short-term custody standards with oversight and accountability mechanisms.** DHS must implement enforceable custody standards to ensure its short-term holding facilities meet basic humanitarian standards. Although CBP recently issued the long-awaited Transport, Escort, Detention, and Search (TEDS) standards, these standards have not yet been implemented and will require strong external oversight and accountability mechanisms to ensure conditions in CBP facilities meet the basic "safe and sanitary" conditions required by *Flores*.

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[16] Department of Homeland Security *Budget-in-Brief Fiscal Year 2016* at pp. 54-55. http://www.dhs.gov/sites/default/files/publications/FY_2016_DHS_Budget_in_Brief.pdf