NISKANEN CENTER

Comments submitted to the Department of Homeland Security in the Matter of:

APPREHENSION, PROCESSING, CARE, AND CUSTODY OF ALIEN MINORS AND UNACCOMPANIED CHILDREN

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INTRODUCTION

In 1985, advocates concerned about the treatment of children in immigration custody sued the federal government, ultimately leading to the formation of the 1997 Flores Settlement Agreement (FSA), a court-supervised settlement agreement that required the government to minimize the detention and length of detention of immigrant children, expedite their reunification with family members in the United States, detain children in the least restrictive settings, and implement thoughtful standards of care that prioritize the best interests of the child.

On September 7, 2018, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) issued a notice in the Federal Register (83 Fed. Reg. 45486-45534) proposing to amend regulations relating to the apprehension, processing, care, custody, and release of immigrant children and terminating the 1997 Flores Settlement Agreement (FSA), and requested comments on or by November 6, 2018.

The Niskanen Center respectfully submits comments for consideration.

Niskanen Center Interest

The Niskanen Center is a nonprofit, nonpartisan organization that works to promote the passage of pragmatic immigration reforms that make America a safer, more prosperous, and more welcoming nation. We approach immigration policy in a measured way, looking to occupy the space between the far-left and the far-right.

The Niskanen Center believes that regulations establishing criteria that allows for prolonged detention of children, that reduces the number of children who benefit from extra protections by virtue of status as unaccompanied minors, and that weakens standards for detention facilities runs contrary to the public interest and to the interest of the children in question. The president has tasked the Department of Homeland Security with protecting the interests of America and its laws; replacing the 1997 Flores Settlement Agreement (FSA) in this way is contrary to that objective.

The Niskanen Center appreciates the opportunity to comment and intends to (I) show that the proposed rule lacks the required justification pursuant to the Administrative Procedures Act (APA) and (II) that the proposed changes significantly reduces key protections for children in custody in violation of the Flores Settlement Agreement.

The Proposed Rule Lacks Required Justification

Under the Administrative Procedures Act (APA), courts may "hold unlawful and set aside agency action … found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[1] According to the Court's analysis in *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co*., the principle case that applied the reasoned decision making requirement to an agency's proposed rule, an agency must reasonably explain any changes in position the agency makes with a rational explanation, without which, a proposal constitutes an arbitrary and capricious action.[2]

To provide a rational explanation for its actions, the Department of Homeland Security (DHS) must acknowledge that the new regulation represents a change in agency policy. Here, the government's stated purpose of the action is to promulgate regulations that would implement the relevant and substantive terms of the Flores Settlement Agreement (FSA), the Homeland Security Act of 2002 (HSA), and the William Wilberforce Trafficking Victims and Protection Reauthorization Act of 2008 (TVPRA) as it relates to the detention of families and facility licensing schemes. Nothing in the purpose section of the proposed rule indicates the intention to change agency policy or an acknowledgement of changed policy.

But the proposed rule critically departs from the the FSA licensing requirements, and upends decades of well-documented procedures and protections. Substantively, the proposed rule suggest numerous changes to the policies surrounding the detention and treatment of children by the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS), including the length of detention of the children, licensing requirements and oversight, and standards of release and detention.

For example, the proposed rule announces the intention to allow Immigration and Customs Enforcement (ICE) to change "its current practice for parole determinations . . . which may result in fewer minors or their accompanying parent or legal guardian released on parole."[3] In these proposed changes to 8 CFR 212.5, parole "would generally be justified only on a case-by-case basis for 'urgent humanitarian reasons or 'significant public benefit'" [sic].[4] Under the amended 8 CFR 236.3(j), the proposed rule would also limit the release of minors from DHS custody. Together, these proposed rules constitute a considerable change in agency policy.[5] Despite obvious changes to current policy, the agency does not explicitly acknowledge those changes in the regulation, but continuously purports that the policies in the proposed rule only implement current law.

In addition to agency recognition of a change in policy, a departure from current law must be supported by agency findings, analysis, and the basis for the decision in order to comply with APA requirements. Here, there exists no such findings, nor a reasoned explanation for the government's changed position.[6]

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[1] 5 U.S.C. § 706 (2)(A).

[2] Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 42-43 (1983); see also Lisa Schultz Bressman, Procedures as Politics in Administrative Law, 107 Colum. L. Rev. 1749, 1778 (2007) (stating that in State Farm "the Court further elaborated the reasoned decision-making requirement and applied it to notice-and-comment rulemaking"). The reasoned decision-making requirement is also known as the hard look doctrine. See, e.g., id. at 1777. The requirement is generally justified because "it promotes rationality, deliberation, … accountability… . [and] encourages agencies to perform a thorough and logical analysis … ." Id. at 1778.

[3] 83 FR 45488.

[4] 83 FR 45524.

[5] 83 CFR 45528.

[6] It must be noted that simply because DHS has not provided a rational explanation for its change in position does not mean that agency cannot explain its actions in a future rule or alternate forum, but for the purposes of this rulemaking, such justification is impermissibly absent.

Presumably, it appears that one possible explanation is the government's recent, continued noncompliance with the FSA and well-documented acknowledgement that the government is finding it difficult to comply with the current rules. At this time, the government is holding approximately 350 separated children in federal custody who have yet to be reunited with their parents. Continued noncompliance with a long-standing policy and anticipated difficulty with future compliance is an insufficient justification and reason to replace current standards with significantly lower standards.

Notwithstanding the well-documented and ongoing noncompliance and the public comments on revealing the impetus for the rule, DHS has failed to acknowledge that the proposed rule changes current agency policy and has failed to justify the changes with a reasoned explanation in violation of the APA. As such, DHS should rescind the proposed rule.

The Proposed Rule Significantly Reduces Protections for Children

Grievously Reduces Protections for Vulnerable Children

The proposed regulations would lead to the indefinite detention of children and would directly contravene the core principle of the FSA: that immigrant children must be released from detention as expeditiously as possible. This regulation, however, would allow children to be detained with their parents through the entirety of their removal proceedings, and it strips protections inextricably tied to the purpose of FSA.

1. Requiring fingerprinting of sponsors and household members for purposes of enforcement is objectionable.

It is critical to ensure that a child in custody is released to individuals who will care for the child's safety and ensure their well-being. The Niskanen Center fervently supports fingerprinting potential sponsors and those who reside in the household. To that end, the proposed rule states an intention to continue to verify the identity of all potential sponsors and household members in accordance with the FSA and the law, with the express intent of ensuring the safety of a child.

However, it is ancillary to the purpose of the FSA and outside the scope of this proposed rule to allow that information to be shared with Immigration and Customs Enforcement (ICE) for the purposes of immigration enforcement; namely, to remove individuals who are in the United States without legal status. To do so merely chills the desire of potential sponsors to take custody of a minor child, and provides an excuse to keep children detained in government custody for longer periods of time. The final rule should explicitly prohibit sharing identity verification information with agencies that intend to use it for immigration enforcement purposes.

It is critical for DHS and HHS to use all tools at their disposal to ensure that children in custody are safe. To that end, Niskanen encourages the addition of the requirement of sworn affidavits of safe home conditions, in coordination with inspections and home visits for the purpose of assessing the safety of the home and well-being of the child. The affidavits should include statements ensuring the homes children are placed into comply with relevant minimum standards for child-placing agencies in the state.

At no point should the inspections solicit information about the immigration status of the sponsor or household members, or share information with immigration enforcement agencies.

If DHS, ORR, or HHS denies the release of a child to a prospective sponsor, the denial must accompany justification. There should be a review process by which a prospective sponsor can cure any shortcomings

and demonstrate proof thereof, and an opportunity to refute an incorrect finding or rationale for an agency denial.

An annual report should include the number of denials issued to prospective sponsors, in addition to relevant demographic information, but should strip identifying information.

2. *Discretion to suspend protections for children should be limited to narrow "emergency" cases.*

The FSA defines "emergency" to explain circumstances that allow the government more than three to five days to transfer a juvenile to a licensed facility. In 45 CFR 410.101, emergency is further clarified as "an act or event (including, but not limited to, a natural disaster, facility, fire, civil disturbance or medical or health concerns at one or more facilities." This allows DHS and HHS to delay transfer, placement, and other conditions for three to five days.

The proposed rule expands the list of permissible emergencies to include non-emergency situations like procuring a meal or snack for a child. This level of discretion and expansion of circumstances warranting dangerous departures from protocol are not explained, nor are they justified.

As such, we strongly recommend that DHS and HHS first justify changing the current protocols with explanation and evidence of need, and compile a comprehensive list of permissible emergency circumstances.

3. *Discretion to allow for continued detention and escalation to secure facility detention should be limited.*

The FSA also specifies that children are kept in non-secure facilities, and although the agreement does not define the term, it is meant to allow children to roam relatively freely and play outside.

The proposed rule suggests defining "non-secure" by defining what a secure facility *is not*. Provided the facility does not provide a 24-hour living setting that prohibits "delinquent" children from voluntary egress in the building through internal or exterior locks or from the premise through secure, perimeter fencing, it is non-secure.

This definition effectively (and impermissibly) allows the government significant latitude in type of facility they can legally detain children — who have committed no crime — within.

The proposed rule also provides that when detained as a family unit, children may also be subjected to secure facilities if they are "unacceptably disruptive," are an "escape risk," or for nonviolent offenses like vandalism or intimidating others.

For the purposes of clarity, DHS proposes not defining the list of offenses that might subject a child and their family to be detained in a secure facility. The new rule would also allow a child to remain in a secure facility if an alternative was not "available or appropriate," leaving open a number of questions about oversight and enforcement of standards. We strongly recommend that — for clarity — DHS lists a comprehensive list of what specific behaviors and evidence of those behaviors could land a child in a secure facility and what the protocols will be to ensure that families detained together remain so.

Further, the proposed rule provides DHS the authority to take a child back into custody after the child is released, provided there is a material change in circumstance, but is missing the critical requirement DHS *establish* the material change.

4. Replacing the right to a bond hearing with an administrative hearing is inadequate due process protection.

The proposed rule suggests a new administrative procedure for custody determinations of unaccompanied children in custody. The rationale for the new process is due to an arguable lack of clear authority on the part of the Department of Justice (DOJ) to conduct bond hearings. Despite this assertion, the authority is very clear.

In paragraph 24(A) of the FSA, it specifies that, "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge *in every case*, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing" (*emphasis added*). It is this authority that led to the bond hearing process in question, and it is this provision that requires DHS to continue to afford minor children a bond hearing, as opposed to an administrative process that lacks the substantive due process elements inherent to judicial proceedings.

Noticeably Lacks Undoubtedly Necessary Oversight Changes

Conspicuously absent from the rule are corrections to a system evidently[7] lacking in oversight and monitoring. DHS must propose additional guidelines to ensure auditing, oversight, and monitoring of all processes and interactions with children in government custody. There has been significant concern in the past about the conditions of ICE detention facilities, including allegations of physical and sexual assault, a lack of food and water, freezing and hot temperatures, and a lack of medical care.[8]

Most importantly, DHS should consider providing an additional mechanism that tracks individual children similar to the tracking system the United States uses for alien adults in custody. At any point, an attorney, parent, or authorized party should be able to access an online database that provides information about a child's current whereabouts and any pertinent information related to their health or well-being.

CONCLUSION

For the foregoing reasons, the Niskanen Center believes the proposed regulation could be revised to address the persistent concerns surrounding the detention of children and their families, but absent significant revision, we strongly encourage DHS not to replace the Flores Agreement with this regulation.

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[7] Protecting Unaccompanied Alien Children from Trafficking and Other Abuses: The Role of the Office of Refugee Resettlement, Staff Report, Permanent Subcommittee on Investigations, United States Senate. Available at: https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf.

[8] American Immigration Council, Failure to provide adequate medical and mental health care to individuals detained in the Denver Contract Detention Facility.. Available at: https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_demands_investigation_into_inadequate_medical_and_mental_health_care_condition_in_immigration_detention_center.pdf.