CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW

Foundation

256 S. OCCIDENTAL BOULEVARD LOS ANGELES, CA 90057
Telephone: (213) 388-8693 Facsimile: (213) 386-9484, ext. 309
http://www.centerforhumanrights.org
crholguin@centerforhumanrights.org

M E M O R A N D U M

To: Practitioners representing detained immigrant and refugee youth

Date: September 6, 2017

Re: Bond hearings for youth in immigration-related custody – Practice Advisory

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I Background

On January 20, 2017, the United States District Court for the Central District of California held that the national class action settlement in *Flores v. Sessions*, No. 85-4544 (C.D. Cal.) ("Settlement"), guarantees unaccompanied juveniles in ORR custody a custody or "bond redetermination" hearing before an immigration judge. On July 5, 2017, the Ninth Circuit affirmed. *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).[1]

In the aftermath of the Ninth Circuit's disposition, ORR and EOIR have adopted procedures for complying with the court's order. In too many respects, these procedures reflect a pinched view of the Government's duty under the Settlement and related statutes—particularly § 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act , 110 Pub. L. 457, 122 Stat. 5044—to place unaccompanied children in the least restrictive setting practicable and to treat them "with dignity, respect and special concern for their particular vulnerability as minors." Settlement ¶ 11.

In this practice advisory, plaintiffs' counsel analyze the Government's compliance procedures, suggest ways in which they arguably fall short of legal requirements, and offer suggestions for practitioners who wish to better utilize the legal tools the courts have recently placed at your disposal.

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[1] For a more extended discussion of the Ninth Circuit's opinion and its background, see www.ilrc.org/sites/default/files/resources/flores_v._sessions_practice_alert_final.pdf.

II What are ORR's and EOIR's Interim Procedures?

In the aftermath of the Ninth Circuit's opinion, both ORR and EOIR issued directives and forms purporting to bring themselves into compliance with ¶ 24A of the Settlement. Several of these documents—*e.g.*, ORR's form advising detained minors of their right to a bond hearing—appear on ORR's web site.[2] The Government has released others to class counsel, which are available under "Current Practice Documents" on this web page:

> www.centerforhumanrights.org/Unaccompanied%20Immigrant%20Minors/Flores%20Case.html

Of particular note are (1) ORR's interim guidance on implementing the district court's bond hearing order, and (2) a memorandum from the Chief Immigration Judge instructing immigration judges on scheduling and conducting hearings for youth in ORR custody.[3]

In summary, these documents describe the following procedure:

- ORR will automatically advise juveniles placed in secure or staff-secure facilities of their right to a bond hearing.[4] Children in licensed placements will be provided hearings upon request, but will not automatically be provided notice of their right to do so.

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[2] www.acf.hhs.gov/sites/default/files/orr/notice_of_right_to_a_bond_hearing.pdf; *see generally* www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7.

[3] The government released the documents discussed in the advisory to *Flores* counsel on August 9, 2017. However, nothing prevents ORR or EOIR from changing these procedures without notice. Practitioners should check ORR's and EOIR's websites for updates, though neither agency deems itself obliged to make such changes public. To the extent *Flores* counsel obtain updated documents, they will be available here: centerforhumanrights.org/Unaccompanied%20Immigrant%20Minors/Flores%20Case.html.

[4] ORR's form notice, in English and Spanish, is available here: www.acf.hhs.gov/sites/default/files/orr/notice_of_right_to_a_bond_hearing.pdf; www.acf.hhs.gov/sites/default/files/orr/notice_of_right_to_a_bond_hearing_07_07_2017sf.pdf

- When a juvenile indicates that s/he wishes a hearing, ORR will file a motion with the local immigration court asking that it calendar a hearing.[5]

- ORR, and not DHS, will represent the Government during bond hearings for children in ORR custody. Upon receiving a motion to set a bond hearing, immigration judges are supposed to grant ORR counsel leave to appear telephonically in all but exceptional cases.

- IJs are supposed to allow ORR "wide latitude" in setting deadlines to submit evidence or briefs.

- IJ are to review whether a detained juvenile is too dangerous or too much of a flight-risk to release, but not whether a proposed custodian is qualified to care for him or her.

- According to ORR and EOIR's Office of General Counsel, detained children have the burden of proving in bond hearings that they are not dangerous.

- IJs are supposed to use "standard bond orders," but should not require the posting of a money bond for a minor's release.

- An IJ's finding that a juvenile in ORR custody is neither too dangerous nor too likely to flee to release does not automatically result in release, but remains contingent on ORR's locating a suitable custodian.

- Both the detained juvenile and ORR may appeal an IJ's order to the Board of Immigration Appeals.

- A juvenile who is unsuccessful in a bond hearing may request a new hearing only upon a showing of changed circumstances.

- An IJ's finding that a juvenile in ORR custody may not be continued in detention on grounds of dangerousness or flight-risk is not controlling with respect to placement in a secure or staff-secure facility. Rather, it is "one factor" that ORR will take into

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[5] ORR's form motions for a bond hearing are available here: www.acf.hhs.gov/sites/default/files/orr/motion_requesting_bond_hearing_for_unaccompanied_children_in_secure_0.pdf (for secure and staff-secure detainees); www.acf.hhs.gov/sites/default/files/orr/motion_requesting_bond_hearing_for_unaccompanied_children_in_non_0.pdf (for juveniles in licensed placements).

account in deciding whether to continue a juvenile in secure or staff-secure placement.

III When should advocates consider requesting bond hearings?

A Juveniles in licensed (non-secure) placement

ORR's counsel, the Office of Immigration Litigation ("OIL"), has said that ORR does not consider juveniles in licensed placements either flight-risks or dangerous, and it will therefore release them as soon as a suitable custodian is located. OIL argues that a bond hearing for such juveniles would be superfluous because IJs are not empowered to pass on the suitability of proposed custodians.

OIL has repeatedly stated, including during oral argument before the Ninth Circuit, that ORR will not deny a juvenile's release on grounds of flight-risk, though likelihood to abscond does figure into ORR's placement decisions. *Flores* counsel have urged ORR to notify all class members promptly if it contends they may be continued in custody on grounds of dangerousness or flight-risk. *See* Letter to OIL re: ORR implementation of bond hearings, July 24, 2017. OIL has not said whether ORR will comply with that request.

We are recommending that attorneys for children in licensed placements request ORR to notify them promptly if it contends their clients may be denied release as dangerous or flight-risks. We also recommend requesting prompt access to clients' complete ORR files, which should reveal whether ORR thinks a juvenile too dangerous or likely to abscond to release.[6]

As a last resort, advocates may wish to consider requesting a bond hearing as a discovery device: that is, as a way of compelling ORR to divulge its reasons for not having released a client to an available qualified custodian. The downsides of doing so are discussed below.

B. Juveniles in secure or staff-secure facilities

As has been seen, ORR's nominal policy is to notify all juveniles in secure or staff-secure placement that they are entitled to bond hearings. Initial reports from advocates regarding this approach have been decidedly unfavorable.

First, as of this writing, ORR's form notice is woefully inadequate. *Flores* counsel have urged ORR to stop giving this notice to detained juveniles because it has only confused them, and

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[6] ORR's form and instructions for requesting a UC's file are available via this page: www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services.

facility staffers' efforts to answer children's questions have been both uneven and often just as confusing as ORR's notice. At OIL's invitation, *Flores* counsel drastically revised the notice, but we have not yet heard whether ORR will revise its notice accordingly, if at all.

Second, we have received reports that ORR has filed motions for bond hearings on behalf of represented juveniles without prior notice to their lawyers. In these cases, counsel should consider filing a notice with the immigration court advising that s/he represents the respondent, that ORR does not, and that ORR's motion is accordingly unauthorized.

Counsel should also consider advising ORR that its having filed the motion, particularly without advising counsel, is unlawful interference with your attorney-client relationship. If ORR's motion was not presented by a lawyer, counsel might also advise ORR and the court that the motion amounts to the unauthorized practice of law.

Counsel should then consider formally withdrawing the motion on behalf of her or his client, indicating that it is subject to re-noticing at a later date.

Third, juveniles who undergo bond hearings without the counsel have poor chances of success. *Flores* counsel have urged ORR to explicitly authorize Vera-funded legal services providers to represent detainees during bond hearings, but as of this writing Vera-funded legal services providers were instead advised as follows:

> "ORR has informed us that it considers representation in bond hearings to be outside the scope of our contract as written and that in order to provide representation to a child solely for purposes of a bond hearing, a modification to the contract would have to be done. As ORR continues to develop the infrastructure and process for bond hearings, it will consider making such changes in the future. For now, however, ***you may not initiate representation with a child solely for purposes of a bond hearing using Vera/ORR funding***. If you are representing a child in immigration proceedings using Vera funding, and determine that a bond hearing is also necessary as part of that representation, you may represent the child in the bond hearing (as an ancillary, related matter)."

Email from Anne Marie Mulcahy, July 31, 2017.

ORR's "advising" unrepresented juveniles of their right to a bond hearing guarantees that some such children will ill-advisedly request one. Counsel who later undertake representation of such juveniles should consider arguing that the initial hearing was not voluntary, knowing, and intelligent and should not, therefore, prejudice the client's right to a meaningful hearing in which s/he is represented by counsel.

Fourth, advocates should consider the potential prejudice to a client's placement and affirmative defenses to removal from going forward with a bond hearing. Evidence produced in the hearing might be placed in a client's A file and thus available to CIS adjudicators.[7]

Advocates should be prepared to vigorously object to the introduction into evidence of psychological assessments on the grounds of patient-client privilege. ORR's psychologists sometimes obtain waivers from children authorizing them to disclose reports to third parties. Counsel should carefully review psychologists' assessments to see if the child signed any such waiver; if so, counsel should consider arguing against the admission of psychological reports on the grounds any waiver was not knowing, voluntary, and intelligent. Counsel should still assess the risks of disclosure in the event the IJ permits unfavorable reports into the record.

This is inherently a case-by-case decision, in which relevant factors include the availability of a vetted custodian, the juvenile's history of behavioral problems in his or her country of origin and in the United States, and conduct during immigration-related custody. Counsel's reviewing a client's complete ORR should normally precede any decision to go forward with a bond hearing.

C "Accompanied" juveniles.

Technically, the district court's order protecting detained juveniles' right to bond hearings covers only those *Flores* class members who are in ORR custody. This is largely because IJs had never refused to re-determine the custody of accompanied minors, primarily those in family detention centers. *See, e.g.*, Order of Immigration Judge re: applicability of *Flores* Settlement to accompanied minor in family detention center, September 9, 2014.

Nonetheless, the Settlement, standing alone, has the force and effect of an injunction, and inasmuch as the Settlement clearly protects "accompanied" minors, *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016), it is binding insofar as accompanied juveniles are concerned regardless.

An amicus brief to the immigration court arguing that IJs must afford accompanied youth hearings is available here: http://www.centerforhumanrights.org/PDFs/IJ_Brief080417.pdf.

IV Relationship of bond hearings to secure and staff-secure placement.

As noted, ORR's and, by all appearances, EOIR's, current position is that an IJ's finding that a juvenile is not too dangerous to release is a factor ORR will consider in deciding whether to "step down" the minor from secure or staff-secure to a less secure placement.

[7] Advocates regularly report CIS's having access to clients' ORR files despite ORR's having stated that it does not share its files with CIS.

The Ninth Circuit's decision affirming the right of children in ORR custody to bond hearings suggests ORR would have a difficult time defending its keeping a juvenile in a secure placement despite an IJ's finding that s/he is not dangerous. *Flores v. Sessions*, 862 F.3d 863, ___ (9th Cir. 2017) ("For those minors in secure detention, bond hearings additionally provide an opportunity to contest the basis of such confinement. For example, the TVPRA allows children to be placed in secure detention facilities only if they pose a safety risk to themselves or others, or have committed a criminal offense. These are precisely the determinations made by an immigration judge at a bond hearing. Providing unaccompanied minors with the right to a hearing under Paragraph 24A therefore ensures that they are not held in secure detention without cause.").

Flores counsel have argued that an IJ's finding a juvenile not dangerous should, at a minimum, place the burden to ORR to demonstrate that he or she is properly continued in a secure or staff-secure setting. We have also argued that in such cases ORR should promptly provide the juvenile and his or her counsel with a complete, written explanation of why the juvenile is being continued in a secure or staff-secure setting contrary to an immigration judge's findings, as well as disclose any new evidence of dangerousness or flight-risk unavailable to ORR at the time of the bond hearing.

We encourage counsel representing juveniles in secure or staff-secure facilities to consider arguing similarly.

V Strategic considerations when representing juveniles in bond hearings.

A Preparation

As stated, practitioners should press ORR to disclose promptly whether it intends to continue a client in detention on account of dangerousness or flight-risk. If ORR indicates it does believe a client dangerous or a flight-risk, it should be pressed to disclose the evidence supporting its position. We also recommend seeking expedited access to a client's complete ORR file.

There are two methods for requesting the ORR file:

(1) Request a child's file through ORR's internal process www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information. Note that this process is not subject to the statutory protections the Freedom of Information Act (FOIA) affords.

(2) Request the child's file through FOIA. The agency's response to a FOIA request should indicate if ORR is withholding documents or information, and a FOIA request receives

more robust procedural protections should ORR delay or withhold access to a client's file.

B Scheduling

Contrary to EOIR OGC's position, practitioners should normally argue that ORR's lack of resources or representation are not valid grounds for delaying a detained juvenile's bond hearing. Such hearing should be scheduled as the Immigration Court Practice Manual prescribes: that is, upon being notified that a respondent wishes to be heard on the matter of his or her detention, "the Immigration Court schedules the hearing for the earliest possible date." *Id*. § 9.3(d).

C Burden and standard of proof

The government has stated it believes the children's bond procedures should be governed by INA 236(a) and its interpreting regulations. Under the framework of INA § 236(a), the detainee has the burden to prove by clear and convincing evidence that s/he is not a danger or flight risk. 8 C.F.R . § 1236.1(c)(3).

Flores counsel disagree with ORR's position, set out both on its web page and in its hearing request form, that a child placed in a secure setting or denied release on grounds of dangerousness must carry the burden of proving he or she is not dangerous.

First, *Flores'* bond hearing provision does not explicitly reference INA § 236(a)—the primary detention authorizing statute for noncitizens. Both the Ninth Circuit's decision in *Flores v. Sessions* and the *Flores* Settlement suggest the government should have the burden of production and burden of proof.

The Ninth Circuit found that at a bond hearing ORR would be compelled to "to provide its justifications and specific legal grounds for holding a given minor." *Flores*, No. 17-55208, 2017 U.S. App. LEXIS 11949, at *7. Further, the *Flores* Settlement and the TVPRA § 235(c)(2)(A) require the government to place detained children in the "least restrictive setting appropriate to the minor's age and special needs," and therefore to pursue a "general policy favoring release." *Flores Settlement* at ¶¶ 11, 14; § VI. Furthermore, most juvenile detention standards follow this basic principle. Thus, strong arguments exist to place the burden of production and proof on the government, and not the child.

D Re-hearing and reconsideration

As noted, the Government's position is that a detained juvenile is entitled to only one bond hearing unless he or she is able to show changed circumstances. This, of course, is the general

rule applicable to adult detainees who have lost initial bond redeterminations. *See* 8 C.F.R. § 1003.19(e). *Matter of Uluochoa*, 20 I. & N. Dec. 133 (BIA 1989).

However, TVPRA § 235(c)(2) requires ORR to review the placement of juveniles in secure facilities, at a minimum, on monthly to determine if such placement remains warranted. In effect, this requirement reflects Congress's view that a juvenile's have spent another 30 days in detention are changed circumstances that require a new assessment. We accordingly encourage practitioners to press ORR and EOIR to afford juveniles placed in secure or staff-secure facilities additional bond hearings after each additional month they remain in federal custody.

VI Contacts

On August 24, 2017, the U.S. District Court for the Central District of California approved the appointment of Henry A. Moak, Jr. and Deane Dougherty as Juvenile Coordinators for CBP and ICE respectively. Neither appointee, however, appears to serve as a point of contract for ORR, which has not named a juvenile coordinator under ¶ 12A of the *Flores* settlement.

In the event of difficulties or to report violations of the order enforcing ¶ 24A the *Flores* settlement, please contact plaintiffs' counsel:

Carlos Holguin
Center for Human Rights and Constitutional Law
256 S. Occidental Blvd.
Los Angeles, CA 90057
(213) 388-8693 ext. 309
crholguin@centerforhumanrights.org

Holly Cooper
University of California Davis School of Law
One Shields Ave. TB 30
Davis, California 95616
(530) 754-4833
hscooper@ucdavis.edu