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July 24, 2017

Sarah B. Fabian
Office of Immigration Litigation – District Court Section
P.O. Box 868, Ben Franklin Station
Washington, DC 20044

Via email.

Re: *Flores*, et al., *v. Sessions,* et al.*,* No. CV 85-4544 DMG (AGRx).

Dear Ms. Fabian:

Pursuant to your request, plaintiffs' immediate positions regarding implementation of the district court's order of January 20, 2017, are as follows:

1) Prompt hearings upon request.

Without waiving their right to insist upon full compliance with ¶ 24A in the future, plaintiffs provisionally agree that defendants need not secure affirmative waivers of bond hearings from class members, whether they are placed in licensed programs, staff-secure, or secure facilities.

Regardless of placement, however, defendants should promptly provide class members with hearings upon request, whether or not they have previously waived a hearing.[1]

Individuals detained pursuant to the INA are entitled to bond hearings at "the earliest possible date." Office of the Chief Immigration Judge, IMMIGRATION COURT PRACTICE MANUAL, § 9.3 (d), typically within a few days following arrest.

Defendants should accordingly provide bond hearings to class members upon request no less promptly than they do to other detainees, and in all events prior to transferring them to detention facilities located at great distances from their family and counsel.

[1] The policy appearing on ORR's web site as of July 18, 2017, was in accord. Office of Refugee Resettlement, Children Entering the United States Unaccompanied § 2.9, *available at* www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7 ("Even if waived, children may request a bond hearing at a later time." "A request for a bond hearing may be made by any child in ORR care ...").

On or before July 19, 2017, however, ORR inexplicably removed this language from its website. It should be restored.

Inasmuch as the TVPRA § 235(c)(2) requires that placement of a child in a secure facility must be reviewed, at a minimum, on a monthly basis to determine if such placement remains warranted, class members who are continued in detention on grounds of dangerousness or flight-risk should be entitled to request new hearings, during each additional month they remain in federal custody.

2) Notice to class members re: dangerousness and flight-risk.

ORR and ICE[2] should, within 48 hours following a juvenile's first post-arrest placement, advise class members and their legal services provider in writing whether it contends they should be continued in federal custody because they are dangerous or flight-risks. The written advisement should set out the evidence defendants believe supports their position. *Cf*. Settlement ¶¶ 12, 14, 24D; 8 C.F.R. § 287.3(d).

If ORR or ICE is prepared to release a class member upon locating a qualified custodian, it should so advise the detained juvenile and his or her legal services provider, again, within 48 hours of a youth's first post-arrest placement.

If ORR later forms an opinion, based on new, verifiable evidence, that a class member should be continued in federal custody on grounds of dangerousness or flight-risk, it should so advise the detained juvenile in writing within 48 hours of its determination. The advisement should describe the evidence defendants believe supports a finding of dangerousness or flight-risk.

Such advisements will minimize requests for hearings from class members whom defendants agree are neither dangerous nor unusual flight-risks.

3) Notice re: availability of custody hearings.

We are advised that ORR's overly simple, monlingual English hearing request form, and the efforts of facility staff to explain the form to detained children, are needlessly confusing and misleading class members.

Detention facility staff are neither qualified nor uniformly committed to ensuring that class members understand the legal ramifications of bond hearings.

In accordance with TVPRA § 235(c)(5), the task of advising detained youth about their rights under ¶ 24A is properly that of legal services providers contracted to serve youth in the facility in which a class member is placed. Legal services providers may notify detained youth of the availability of a hearing during "know your rights" presentations in their native language; youth who wish further clarification of their rights may ask to speak individually with a qualified legal counselor.

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[2] Plaintiffs are informed and believe that ICE regularly retains custody class members whom it deems "accompanied" notwithstanding that their parents are not immigration-related custody. The positions plaintiffs express herein apply as well to class members in ICE custody and whether or not they are subject to expedited removal.

We believe this would be a far more effective that the approach ORR is reportedly pursuing and, at a minimum, will reduce the likelihood that shelter staff will be called to task for the unauthorized practice of law.

4) Legal representation during bond proceedings.

TVPRA § 235(c)(5) requires ORR to "ensure, to the greatest extent practicable ... that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not [from contiguous countries] have counsel to represent them in legal proceedings or matters ..." Bond hearings clearly constitute "legal proceedings or matters."

ORR should accordingly direct the Vera Institute of Justice and sub-contracting legal services providers to ensure that class members receive legal representation in bond proceedings to the greatest extent practicable. ORR should make clear that providing such representation is wholly consistent with existing grants and contracts and will not jeopardize renewal of such grants or contracts.

Consistent with the above and the Freedom of Information Act, ORR should, promptly and in advance of a bond hearing, provide juveniles and, for represented juveniles, their counsel, with a complete, un-redacted copy of the juvenile's file.

5) Burden of proof re: dangerousness.

Plaintiffs disagree with defendants' position, set out both on ORR's 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. The vast majority of youth are not dangerous, and is illogical to presume that any given child is dangerous.

Further, both the TVPRA(c)(2)(A) and ¶ 14 the *Flores* Settlement place defendants under an affirmative obligation to minimize the detention of children and to promptly place them "in the least restrictive setting that is in the best interest of the child." It is incumbent on defendants to demonstrate they are discharging this affirmative duty in bond proceedings.

6) Effect of immigration judge's findings re: dangerousness and flight-risk.

If a qualified custodian is immediately available to receive a class member, an immigration judge's finding that a juvenile is neither dangerous nor an extraordinary flight-risk requires defendants to release such class member forthwith. ORR's policy should recognize as much.

With respect to placement, we think such a finding should, at a minimum, shift the burden to defendants to demonstrate that the class member is properly continued in a secure or staff-secure setting. Defendants should promptly provide the class member a complete, written explanation of why he or she is being detained 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 defendants at the time of the bond hearing.

7) Prompt completion of custodian or (sponsor) evaluations.

Under normal circumstances ORR should complete evaluation of an initial proposed custodian, especially if he or she is a parent, within 30 days. Settlement ¶ 18.

If ORR knows it will not timely complete evaluating an initial proposed custodian, it should so advise the class member and his or her counsel in writing, explaining the reason for the delay and asking whether it should begin evaluating alternative custodians.

Such notice will help ensure that class members' foregoing a bond hearing is informed and intelligent.[3]

Please advise once you have consulted with your clients so we may schedule a time to discuss the foregoing.

Thank you,

Carlos Holguín
One of the attorneys for plaintiffs

ccs: Holly Cooper
Leecia Welch
Poonam Juneja
Neha Desai
Peter Schey

[3] If ORR contends that a parent is unqualified to care for a class member, it should "refer the matter to appropriate state and local authorities." *Beltran v. Cardall*, 222 F. Supp. 3d 476, 489 (E.D. Va. 2016).