Practice Advisory Series

FLORES ORDERS

2015 – Present

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Practice Advisory Forward

The Center for Human Rights and Constitutional Law is a non-profit, public interest legal foundation dedicated to furthering and protecting the civil, constitutional, and human rights of immigrants, refugees, children, prisoners, and the poor. Since its incorporation in 1980, under the leadership of a board of directors comprising civil rights attorneys, community advocates and religious leaders, the Center has provided a wide range of legal services to vulnerable low-income victims of human and civil rights violations and technical support and training to hundreds of legal aid attorneys and paralegals in the areas of immigration law, constitutional law, and complex and class action litigation.

The Center has achieved major victories in numerous major cases in the courts of the United States and before international bodies that have directly benefited hundreds of thousands of disadvantaged persons**.**

This practice advisory reviews Flores v. Sessions, a national class-action lawsuit the Center has been litigating since 1985. The case was settled in 1997, resulting in what has become known as the Flores Settlement. The Flores Settlement was an agreement between the United States and a class of "[a]ll minors who are detained in the legal custody of the INS," Settlement ¶ 10. It covers both unaccompanied and accompanied minors. The Settlement established nationwide standards for the "detention, release, and treatment of minors" by U.S. immigration authorities. Settlement ¶ 9. It "creates a presumption in favor of releasing minors and requires placement of those not released in licensed, non-secure facilities that meet certain standards." Flores I, 828 F.3d at 901. This practice advisory also discusses developments in Flores up to the present.

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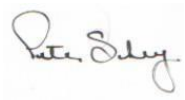

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Introduction and Background

The Flores Settlement Agreement was the first document to establish guidelines for the treatment of children in the immigration detention system. The case originated with Jenny Lisette Flores, a 15-year-old child from El Salvador who came to the United States in 1985. Jenny fled the violence of El Salvador to be reunited with her aunt, who was living in the United States; however, she never made it to her aunt's home. The INS placed Jenny in a facility that did not provide educational, nor many recreational opportunities. Furthermore, some of the minors in the facility had to share "bathrooms and sleeping quarters with unrelated adults of both sexes." Although Jenny had no criminal history, was not a flight risk, and was not a threat to anyone, the INS would not release Jenny to her aunt because the INS did not allow unaccompanied minors to be released to "third-party adults."

Upon remand from the United States Supreme Court, the parties reached a settlement agreement before the district court could make a final determination on the case. The resulting *Flores* Settlement Agreement established a "nationwide policy for the detention, release, and treatment of minors in the custody of the [former] INS." Stipulated Settlement Agreement, Flores v. Reno, Case No. CV85-4544-RJK (C.D. Cal. 1996) [hereinafter, "Flores Settlement"] at ¶ 9. The full text of the Flores Settlement is available at https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement.

ORDERS

I. July 24, 2015 Order [Doc. #177]

"The plain language of the Agreement clearly encompasses accompanied minors. First and most importantly, the Agreement defines the class as the following: "*All minors* who are detained in the legal custody of the INS." (*See* Agreement ¶ 10 (emphasis added).) The Agreement defines a "minor" as "any person under the age of eighteen (18) years who is detained in the legal custody of the INS." (*See id.* ¶ 4.)" (internal citations omitted) (p. 4).

Discussion

1. "Preference for Release" Provision

"Plaintiffs argue that Defendants' no-release policy—i.e., the policy of detaining all female-headed families, including children, for as long as it takes to determine whether they are entitled to remain in the United States—violates material provisions of the Agreement." (p.4).

a. The Agreement Encompasses Accompanied Minors

As a threshold matter, the parties dispute whether minors who are apprehended as part of a female-headed family are class members covered by the Agreement. The plain language of the Agreement clearly encompasses accompanied minors. First and most importantly, the Agreement defines the class as the following: "All minors who are detained in the legal custody of the INS." (See Agreement ¶ 10 (emphasis added).) The Agreement defines a "minor" as "any person under the age of eighteen (18) years who is detained in the legal custody of the INS." (p.5).

…The text of the Agreement provides further support for the finding that the Agreement encompasses all minors who are in custody, without qualification as to whether they are accompanied or unaccompanied. In Paragraph 9, for example, the parties describe the scope of the Agreement in the following way: "This Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS."...Finally, the Agreement expressly identifies those minors to whom the class definition would not apply—"an emancipated minor or an individual who has been incarcerated due to a conviction for a criminal offense as an adult" (see Agreement¶ 4)—an exclusion that does not mention accompanied minors. Had the parties to the Agreement intended to exclude accompanied minors from the Agreement, they could have done so explicitly when they set forth the definition of minors who are excluded from the Agreement. (p.5).

b. Defendants' No-Release Policy is a Material breach of the Agreement

"It is true that the Agreement does not contain any provision that explicitly addresses adult rights and treatment in detention. But ICE's blanket no-release policy with respect to mothers cannot be reconciled with the Agreement's grant to class members of a right to preferential release to a parent. (*See* Agreement ¶ 14.) Although Defendants argue that the provision could

be read to mean a child should be released to a parent only if that parent is already lawfully in the United States, Paragraph 15 clearly contemplates the possible release of a child to an adult who is not lawfully in the United States must already be lawfully in the United States." (p. 8).

"Finally, the existing regulatory framework, discussed *supra*, suggests that the parties would have contemplated releasing an accompanying relative. Whereas the regulation provides for the release of an accompanying relative only if no other suitable relative can be found, the Agreement, under the preference for release provision, would presumably release the accompanying parent first. Despite this difference between the regulation and the preference for release provision in the Agreement, the regulation provides contextual support for Plaintiffs' contention that the parties intended to allow for the release of the accompanying parent, so long as the release does not create a flight risk or safety risk." (p.9).

"In light of all the evidence, the Court agrees with Plaintiffs' interpretation of the preference for release provision, described in Paragraph 14 of the Agreement. As such, Defendants must release an accompanying parent as long as doing so would not create a flight risk or a safety risk. Since releasing the parent along with the child in this case would, in most instances, obviate Defendants' concern that releasing the child alone would endanger the child's safety, Defendants' argument that this policy falls within the safety risk exception as a blanket matter is unavailing.[5] Therefore, the Court finds that Defendants' blanket no-release policy with respect to minors accompanied by their mothers is a material breach of the Agreement." *Id.*

Motion to Amend

"Defendants' argument regarding the TVPRA misses the mark since the Agreement's provision controls release pending removal proceedings and does not interfere with the grounds for removal itself. Further, the Agreement does not interfere with the TVPRA's requirement that CBP transfer a minor to HHS custody within 72 hours of determining that she is an unaccompanied minor. Once CBP makes the determination that a minor is unaccompanied and transfers her to HHS custody, it is then HHS's responsibility to comply with the provisions cited supra. Defendants have not demonstrated that HHS has had any difficulty complying with the Agreement's provisions." (p.22).

Moreover, Plaintiffs have pointed to provisions in the TVPRA that are consistent with the Agreement's preference for release provision, such as the TVPRA's requirement that CBP find "[s]afe and secure placements" for children "in the least restrictive setting that is in the best interests of the child"—typically, "a suitable family member." 8 U.S.C. § 1235(c)(2). The same argument can be made that, similar to the Agreement's non-secure facilities provision, the TVPRA also mandates that "[a] child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." Id.

Finally, the TVPRA is simply inapplicable to accompanied children. The fact that the TVPRA requires HHS to decide whether unaccompanied children should be released or housed in secure facilities has little relevance to whether ICE is unable to do the same with accompanied children. (p.23).

Accordingly, Defendants have not met their burden of showing that a significant change in the law, such that complying with the Agreement would be impermissible, has occurred, thus requiring modification of the Agreement. See Miller, 530 U.S. at 347-48. (p.23).

Conclusion

Based on the foregoing, the Court finds that Defendants are in breach of the Agreement and GRANTS Plaintiffs' motion to enforce the Agreement. Defendants' motion to amend the Agreement is DENIED. Defendants are hereby ordered to show cause why the following remedies should not be implemented within 90 days.

1. As required by Paragraph 18 of the Agreement, Defendants, upon taking an accompanied class member into custody, shall make and record prompt and continuous efforts toward family reunification and the release of the minor pursuant to Paragraph 14 of the Agreement.
2. Unless otherwise required by the Agreement, Defendants shall comply with Paragraph 14A of the Agreement by releasing class members without unnecessary delay in first order of preference to a parent, including a parent who either was apprehended with a class member or presented herself or himself with a class member. Class members not released pursuant to Paragraph 14 of the Agreement will be processed in accordance with the Agreement, including, as applicable, Paragraphs 6, 9, 21, 22, and 23.
3. Accompanied class members shall not be detained by Defendants in unlicensed or secure facilities that do not meet the requirements of Paragraph 6 of the Settlement, or in appropriate cases, as set forth in the Agreement, in facilities that do not meet the requirements of Paragraphs 12A, 21, and 23. Defendants shall not selectively apply the "influx" provision of Paragraph 12C of the Agreement to house class members apprehended with a parent in facilities that do not comply with the Agreement.
4. To comply with Paragraph 14A of the Agreement and as contemplated in Paragraph 15, a class member's accompanying parent shall be released with the class member in a non-discriminatory manner in accordance with applicable laws and regulations unless after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security, and the flight risk or threat cannot be mitigated by an appropriate bond or conditions of release.
5. In consultation with Plaintiffs, Defendants shall propose standards, and procedures for monitoring compliance with such standards, for detaining class members in facilities that are safe and sanitary, consistent with concern for the particular vulnerability of minors, and consistent with Paragraph 12 of the Agreement, including access to adequate drinking water and food, toilets and sinks, medical assistance if the minor is in need of emergency services, temperature control, ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor. Defendants shall file such proposed standards within 90 days of the date of this Order. Plaintiffs shall file objections thereto, if any, 14 days thereafter.
6. Defendants shall monitor compliance with the Agreement and this Order and shall

provide Class Counsel on a monthly basis statistical information collected pursuant to Paragraph 28A of the Agreement. (p.24-25).

II. August 21, 2015 Order [Doc. #189]

- Ct ruled against government's motion for reconsideration. Also reiterated that *Flores* Agreement includes both accompanied and unaccompanied minors.

Because Defendants fail to meet the standard for a reconsideration motion by among other things, demonstrating the existence of new material facts or a change of law occurring after the time of the July 24, 2015 Order, the Court DENIES Defendants' motion for reconsideration. As such, the Court's July 24, 2015 Order stands, with some clarifications to the remedy. Defendants must implement the Court's remedies for their breach of the Agreement as set forth below by October 23, 2015. (p.2).

Conclusion

The Court orders Defendants to implement the following remedies by no later than October 23, 2015:
1. As required by Paragraph 18 of the Agreement, Defendants, upon taking an accompanied class member into custody, shall make and record prompt and continuous efforts toward family reunification and the release of the minor pursuant to Paragraph 14 of the Agreement.
2. Unless otherwise required by the Agreement or the law, Defendants shall comply with Paragraph 14A of the Agreement by releasing class members without unnecessary delay in first order of preference to a parent, including a parent who either was apprehended with a class member or presented herself or himself with a class member. Class members not released pursuant to Paragraph 14 of the Agreement will be processed in accordance with the Agreement, including, as applicable, Paragraphs 6, 9, 21, 22, and 23.
3. Subject to Paragraph 12A of the Agreement, accompanied class members shall not be detained by Defendants in unlicensed or secure facilities that do not meet the requirements of Paragraph 6 of the Settlement or, in appropriate cases, as set forth in the Agreement, in facilities that do not meet the requirements of Paragraphs 12A, 21, and 23. Defendants shall not selectively apply the "influx" provision of Paragraph 12C of the Agreement to house class members apprehended with a parent in facilities that do not comply with the Agreement.
4. To comply with Paragraph 14A of the Agreement and as contemplated in Paragraph 15, a class member's accompanying parent shall be released with the class member in accordance with applicable laws and regulations unless the parent is subject to mandatory detention under applicable law or after an individualized custody determination the parent is determined to pose a significant flight risk, or a threat to others or the national security, and the flight risk or threat cannot be mitigated by an appropriate bond or conditions of release.
5. As contemplated in Paragraph 28A of the Agreement, Defendants or their

Regional Juvenile Coordinator shall monitor compliance with their acknowledged standards and procedures for detaining class members in facilities that are safe and sanitary, consistent with concern for the particular vulnerability of minors, and consistent with Paragraph 12 of the Agreement, including access to adequate drinking water and food, toilets and sinks, medical assistance if the minor is in need of emergency services, temperature control, ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor. In the alternative, the parties may stipulate to the appointment of a special monitor for this purpose. 6. Defendants shall monitor compliance with the Agreement and this Order and shall provide Class Counsel on a monthly basis statistical information collected pursuant to Paragraph 28A of the Agreement. (14-15).

III. Flores v. Lynch (9th Cir. Cal., July 6, 2016)

- Ninth Circuit found that Flores Agreement applies both to minors who are accompanied and unaccompanied by their parents, and that lower ct correctly refused to amend the agreement to accommodate family detention. Also found that the lower court was incorrect in interpreting the agreement to provide an affirmative right to release for accompanying parents, but did not preclude such release and explicitly made no determination about whether DHS is making otherwise appropriate and individualized release determinations for parents. (p.5).

I. The Settlement Applies to Accompanied Minors

We agree with the district court that "[t]he plain language of the Agreement clearly encompasses accompanied minors."... Third, as the district court reasoned, "the Agreement expressly identifies those minors to whom the class definition would not apply"— emancipated minors and those who have been incarcerated for a criminal offense as an adult; "[h]ad the parties to the Agreement intended to exclude accompanied minors from the Agreement, they could have done so explicitly when they [**16] set forth the definition of minors who are excluded from the Agreement." See id. ¶ 4. (p.15).

The government correctly notes that the Settlement does not address the potentially complex issues involving the housing of family units and the scope of parental rights for adults apprehended with their children. (p.17).

But, the fact that the parties gave inadequate attention to some potential problems of accompanied minors does not mean that the Settlement does not apply to them. See Bunikyte, 2007 U.S. Dist. LEXIS 26166, 2007 WL 1074070, at *3 ("Though it is no defense that the Flores Settlement is outdated, it is apparent that this agreement did not anticipate the current emphasis on family detention. . . . Nonetheless, the Flores Settlement, by its terms, applies to all 'minors in the custody' of ICE and DHS, not just unaccompanied minors.") (quoting Settlement ¶ 9); id. ("Paragraph 19 sets out the foundation of the detention standards applicable to any [*907] minor in United States immigration custody, and there is no reason why its requirements should be any less applicable in a family detention context than in the context of unaccompanied minors.").

Settlement grants class members a right to preferential release to a parent over others does not mean that the government must also make a parent available; it simply means that, if available, a parent is the first choice.[ ] Because "the plain language of [the] consent decree is clear, we need not evaluate any extrinsic evidence to ascertain the true intent of the parties." See Nehmer v. U.S. Dep't of Veterans Affairs, 494 F.3d 846, 861 (9th Cir. 2007). In any case, the extrinsic evidence does not show that the parties intended to grant release rights to parents. "In fact, the context of the Flores Settlement argues against this result: the Settlement was the product of litigation in which unaccompanied minors argued that release to adults other than their parents was preferable to remaining in custody until their parents could come get them." Bunikyte, 2007 U.S. Dist. LEXIS 26166, 2007 WL 1074070 at *16. The regulation the district court relied upon at most shows that the parties might have thought about releasing adults when executing the Settlement, not that they agreed to do so in that document. And, there is no evidence that ICE once released most children and parents because of the Settlement, rather than for other reasons. (p.11).

…But, the district court plainly went further.[ ] A non-criminal alien detained during removal proceedings generally bears the burden of establishing "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." In re Guerra, 24 I. & N. Dec. 37, 38 (BIA 2006). (p.11).

In addition, the order requires a "significant flight risk" to justify detention, while the usual standard is merely "a risk of flight." Id. More importantly, parents were not plaintiffs in the Flores action, nor are they members of the certified classes. The Settlement therefore provides no affirmative release rights for parents, and the district court erred in creating such rights in the context of a motion to enforce that agreement. (p.11).

CONCLUSION

We hold that the Settlement applies to accompanied minors but does not require the release of accompanying parents. We therefore affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.5 (p.12).

IV. January 20, 2017 Order [Doc. #318]

- Found that ORR and DHS were in breach of the *Flores* Agreement by denying unaccompanied immigrant children the right to a bond hearing and granted our motion to enforce Paragraph 24A which states 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 that or she is refusing such a hearing.

A. Paragraph 24A of the *Flores* Agreement

Paragraph 24A of the Flores Agreement states: "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." Flores Agreement ¶ 24A. (p.2).

Discussion

A. Plain Language of Homeland Security and TVPRA

Defendants contend that because the TVPRA created an entirely new immigration framework for unaccompanied children—by, among other things, giving HHS the authority to evaluate custodial adults before releasing minors to them—it superseded Paragraph 24A, such that unaccompanied children in HHS/ORR custody need not be provided with bonding hearings. See id. (describing the "different, child-welfare related function" served by HHS that is "not a part of the immigration enforcement scheme"). (p. 5).

The problem with Defendants' argument is that the TVPRA (as well as the Homeland Security Act) is silent on the subject of bond hearings or whether the safety and placement provisions replace bond hearing requirements. This silence is in stark contrast to federal immigration laws and regulations, which explicitly reference bond hearings. See 8 USC § 1226(a)(2) (immigrant detainee may be released on "bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General"); 8 C.F.R. 1003.19 (describing applications for an "initial bond redetermination" and "for the exercise of authority to review bond determinations"); 8 C.F.R. 1236.1(d)(1) ("After an initial custody determination by the district director, including the setting of a bond, the respondent may . . . request amelioration of the conditions under which he or she may be released."). The Court will not presume Congress intended to silently abrogate the Flores Agreement's bond hearing provision in the absence of actual or express language relating to bonds. See Redmond-Issaquah R.R. Pres. Ass'n v. Surface Transp. Bd., 223 F.3d 1057, 1062 (9th Cir. 2000). (p.5-6).

In particular, Defendants hone in on the TVPRA provision requiring HHS to evaluate a proposed custodian's ability to provide for the child's physical and mental well-being before placing an unaccompanied child with that person or entity. Id. But identifying appropriate custodians and facilities for an unaccompanied child is not the same as answering the threshold question of whether the child should be detained in the first place—that is for an immigration judge at a bond hearing to decide. See 8 U.S.C. § 1226; 8 C.F.R. §§ 1003.19; 1236.1(d). Assuming an immigration judge reduces a child's bond, or decides he or she presents no flight risk or danger such that he needs to remain in HHS/ORR custody, HHS can still exercise its coordination and placement duties under the TVPRA.[5] The Court sees no conflict between the TVPRA's requirements and Paragraph 24A of the Flores Agreement.

In short, the bond hearing provision of the Flores Agreement was not superseded by operation of law because both the TVPRA and the Homeland Security Act are silent on the subject of bond hearings. Moreover, the Flores Agreement remains consistent with federal immigration laws requiring bond hearings for immigrant detainees, and poses no irreconcilable conflict with the TVPRA's safety and placement provisions. (p.7).

Conclusion

In light of the foregoing, the Court finds that Defendants are in breach of the Flores

Agreement by denying unaccompanied immigrant children the right to a bond hearing. Plaintiffs' motion to enforce Paragraph 24A of the Flores Agreement is GRANTED. Defendant Office of Refugee Resettlement of the Department of Health and Human Services shall forthwith comply with Paragraph 24A of the Flores Agreement. (p.8).

VII. Flores v. Sessions (June 27, 2017) [Doc. #363]

DISCUSSION

Plaintiffs argue that Defendants continue to detain class members in deplorable and unsanitary conditions in violation of the Agreement. Plaintiffs present voluminous testimony from class members in the form of declarations and deposition excerpts, which attest to the unsafe and unsanitary conditions at the CBP facilities in five different categories: (1) inadequate food; (2) inadequate access to clean drinking water; (3) inadequate hygiene (bathrooms, soap, towels, toothbrushes); (4) cold temperatures; and (5) inadequate sleeping conditions. (p.7).

[T]he Court limits its discussion of conditions and the scope of any resultant monitoring to those CBP facilities located within the RGV Sector, rather than the CBP facilities at the other sectors.[3] (p.8).

1. Access to Food

Despite the TEDS Manual standards and Paragraph 12A of the Agreement, many detainees attested to, among other things, not receiving hot, edible, or a sufficient number of meals during a given day spent at a CBP facility. (p.8).

In any event, to the extent some discrepancies exist between a detainee's claim regarding the frequency and quality of food and the corresponding e3DM log, Defendants only point to a small number of discrepancies.[6] See Def. Resp. at 11-12. This pales in comparison to the large volume of statements by detainees who described receiving inadequate food...
Given the above, the Court finds that Plaintiffs' have satisfied their burden of establishing Defendants' substantial non-compliance with the Agreement and GRANTS Plaintiffs' motion to enforce as to the RGV Sector on the issue of adequate access to food. (p.11).

2. Access to Clean Drinking Water

Under the CBP's standards, "[f]unctioning drinking fountains or clean drinking water along with clean drinking cups must always be available to detainees." TEDS Manual § 4.14. But Plaintiffs present testimony that recent detainees drank water that tasted dirty and did not have access to clean drinking cups. (p.11).

The Court therefore finds that Plaintiffs have satisfied their burden of establishing Defendants' substantial non-compliance with the Agreement and GRANTS Plaintiffs' motion to enforce as to the RGV Sector on the issue of inadequate access to water. (p.11-12).

3. Unsanitary Conditions

Recent detainees describe unsanitary conditions at the CBP facilities in the RGV Sector. According to CBP standards, "[a]ll facilities or hold rooms used to hold detainees must be regularly and professionally cleaned and sanitized"; detainees "must be provided with basic personal hygiene items, consistent with short term detention and safety and security needs"; "[d]etainees using the restroom will have access to toiletry items, such as toilet paper and sanitary napkins," and, whenever "operationally feasible," soap; and minors would be provided with clean bedding. TEDS Manual §§ 4.6, 4.11, 4.12. (p.12).

There is an apparent disconnect between the CBP's standards and class members' experiences, all of whom describe unsanitary conditions with respect to the holding cells and bathroom facilities, and lack of privacy while using the restroom, access to clean bedding, and access to hygiene products (i.e., toothbrushes, soap, towels). (p.12).

On the specific issue of hygiene products, Defendants argue that the Agreement does not require them to provide class members with soap, towels, showers, dry clothing, or toothbrushes. According to Defendants, "If Plaintiffs wish to . . . assert that certain hygiene items or clothing items must be provided, they must do so in a new lawsuit." Def. Sec. Supp. Resp. at 14. The Agreement certainly makes no mention of the words "soap," "towels," "showers," "dry clothing," or "toothbrushes." (p.13).

Nevertheless, the Court finds that these hygiene products fall within the rubric of the Agreement's language requiring "safe and sanitary" conditions and Defendants' own established standards. (p.13).

In light of the discussion above, the Court finds that, at a minimum, Plaintiffs have satisfied their burden of establishing Defendants' substantial non-compliance with the Agreement at all non-CPC-Ursula CBP stations located within the RGV sector and GRANTS Plaintiffs' motion to enforce the Agreement on the issue of unsanitary conditions as to those stations. Because there is some evidence, albeit to a lesser degree, of non-compliance at CPCUrsula—not just on the issue of unsanitary conditions but also other conditions identified by Plaintiffs—monitoring of that station is nonetheless warranted. Cf. Unknown Parties v. Johnson, 2016 WL 8188563, at *12 (D. Ariz. Nov. 18, 2016). (p. 15).

Cold Temperatures

Plaintiffs present evidence that recent child detainees experienced extremely cold temperatures at the CBP stations. Just like the declarants cited in the Court's July 24, 2015 Order, many continue to describe the CBP facilities as hieleras or "iceboxes." (p.15).

On this cold-temperature issue, Defendants once again rely upon the declaration or deposition testimony of chief patrol agents to describe their policies and practices. See, e.g., Padilla Decl. ¶ 67 ("Agents record if the temperature is within range (66–80 degrees Fahrenheit) or specifically note when the temperature is out of range."). The e3DM records also state entries for the temperature in some "comments" sections. See, e.g., Strange Decl., Ex. F ("temp 73"). But this evidence does not contradict the large volume of specific accounts by Plaintiffs'

witnesses that they experienced extreme discomfort with cold temperatures.
Accordingly, the Court finds that Plaintiffs have satisfied their burden of establishing Defendants' substantial non-compliance with the Agreement in the RGV Sector and GRANTS Plaintiffs' motion to enforce on the issue of adequate temperature controls at a reasonable and comfortable range. (p.16).

Sleeping Conditions

Finally, with regard to sleeping conditions, Plaintiffs introduce recent detainee testimony attesting to conditions at the CBP stations—cold temperatures, overcrowding, lack of proper bedding (i.e., blankets, mats), constant lighting—that together "force [class members] to endure sleep deprivation." Pl. Mot. at 10; see, e.g., Celina S. Decl. ¶

Nonetheless, whether Defendants have set up conditions that allow class members to sleep in the CBP facilities is relevant to the issue of whether they have acted in a manner that is consistent with "the INS's concern for the particular vulnerability of minors" as well as the Agreement's "safe and sanitary" requirement. See Agreement ¶ 12A; see also July 24, 2015 Order, 212 F. Supp. 3d at 880–82 (overcrowding at the CBP facilities, "which forced children to sleep standing up or not at all," contributed to finding that "Defendants have materially breached the Agreement's term that Defendants provide 'safe and sanitary' holding cells for class members while they are in temporary custody"). (p.17).

…her son "barely slept" because of overcrowding, having to sleep on the floor, and no blankets). In sum, the Court finds that Plaintiffs' have satisfied their burden of establishing
Defendants' substantial non-compliance with the Agreement at all non-CPC-Ursula CBP stations located within the RGV Sector on the issue of sleeping conditions. The Court therefore GRANTS Plaintiffs' motion to enforce the Agreement as to the sleeping conditions issue at non-CPC-Ursula stations within the RGV Sector. On the other hand, Plaintiffs have not met their burden of showing substantial non-compliance on this issue with respect to the CPC-Ursula station—in that limited respect, Plaintiffs' motion is DENIED. (p.18).

To the extent Plaintiffs contend that Defendants have failed to substantially comply with Paragraph 24D(a), the Court finds that Plaintiffs have not satisfied their burden. Not only do Plaintiffs fail to provide sufficient evidence that Defendants have failed to distribute the Form I-770 to class members, Plaintiffs fail to explain to the Court what the Form I-770 is.
Defendants concede that they failed to comply with Paragraph 24D(b) at the time Plaintiffs filed their motion. Defendants admit that "the precise notice provided in Exhibit 6 to the Agreement is not provided to juveniles in family residential centers." Def. Resp. at 34. (18-19).

As the Court stated in its prior order, "[e]ven assuming
Defendant's new policy complies with the Agreement, Defendants could easily revert to the former challenged policy as abruptly as they adopted the new one." (p.19).

Finally, with regard to Paragraph 24D(c), the Court finds that Plaintiffs have provided sufficient evidence of substantial non-compliance, namely declarations from class members (or their parents) stating that they never received a list of legal counsel or services. (p.19).

In summary, the Court GRANTS Plaintiff's motion to enforce Paragraph 24D with regard to the requirements that Defendants provide class members with a list of legal services and the Notice of Right of Judicial Review (Exhibit 6). The Court DENIES the motion with respect to the Form I-770 requirement for lack of evidence. (p.20).

Discretion to Release Minors in Expedited Removal

In this case, the issue is whether the statutes and accompanying regulations for detainees in expedited removal create an exception to the Flores Agreement's requirement that Defendants make and record prompt and continuous efforts toward the release of class members. The Court finds that they do not. (p.23).

Paragraph 14 and Regulations Governing Juvenile Release

Defendants argue that under "the plain terms of the Agreement, if detention of a minor is required to secure his or her appearance before ICE for removal, or before an immigration judge, ICE is not obligated to release the minor." Def. Sec. Supp. Resp. at 17. This goes to the flight risk issue and the Court agrees with Defendants' statement to that limited extent.
The Court disagrees with Defendants that class members' placement in expedited removal absolves them of their obligations under the Agreement to make individualized determinations regarding a minor's risk of absconding. See Agreement ¶ 14. While the expedited removal statute generally requires detention, 8 C.F.R. section 212.5 gives Defendants the discretion to release certain detainees on a case by case basis, including class members (juveniles), who are in various stages of the expedited-removal process.
Thus, the Agreement does not contravene the expedited removal statute.[15] Indeed, under both the Agreement and 8 C.F.R. section 212.5(b), part of the release/parole analysis includes a case-by-case assessment of whether the minor poses a flight risk. (p.24).
Congress "specified that detention [for minors in expedited removal] is required to secure the appearance of that individual" before ICE or an immigration judge. Def. Sec. Supp. Resp. at 17 (emphasis added). Nothing in the statute or the regulations suggests that Congress automatically deemed everyone in mandatory detention under 8 U.S.C. section 1225 a flight risk. Section 212.5(b) provides special guidelines for parole. It would make little sense to have rules specifically requiring that Defendants assess a potential parolee's flight risk if Congress intended to declare everyone in expedited removal to be a flight risk.[16] (p.24).

…the Agreement's general presumption of release and Paragraph 14 work in harmony with Defendants' discretionary-parol policy in another way: both provisions provide an order of preference for release of minors, beginning with adult relatives.[17] The two provisions do differ in certain ways. For instance, the discretionary-parole regulation prioritizes release of a minor to an adult relative not in detention whereas Paragraph 14 ranks a "legal guardian" above the non-parent adult relative. Nonetheless, the key factor is that Defendants' own regulations contemplate release of Class Members after an individualized assessment.[18] In fact, the ICE director who oversees operations relating to the case management of detainees at the Berks Family Residential Center states that "ICE has released minors (and their accompanying parents) from the BFRC where, for example, the minors are found to have a credible fear of persecution or where there is a medical

emergency regarding the child or parent warranting release." Declaration of Joshua Reid ("Reid Decl.") ¶ 3 (emphasis added) [Doc. # 299-2]. (p.23).

Thus, the Flores Agreement creates an affirmative obligation on the part of Defendants to individually assess each class members' release, while 8 C.F.R. section 212.5(b) allows for Defendants to do so—notwithstanding the general mandatory-detention practice—in cases involving minors in expedited removal. (p.25).

Defendants argue that "under 8 U.S.C. § 1252(f)(1), the Court cannot simply order that [class members'] detention be prohibited on a class-wide basis."[19] Def. Supp. Resp. at 13 [Doc. # 268]. The Court will issue no such order. To be clear, the Court will not dictate how Defendants must exercise their discretion to parole or release minors in every single case—instead, the Court will order Defendants to comply with the unambiguous charge of the Flores Agreement to make individualized determinations regarding a minor's flight risk rather than blanket determinations. See Flores, 828 F.3d at 903 ("The Settlement creates a presumption in favor of release and favors family reunification"). (p.25).

According to Gurule, ICE lacks the "institutional capacity or resources to assess whether an adult (other than a parent or guardian) seeking custody of a minor already detained with a parent is a suitable custodian who will house the minor in a suitable home environment." Id. ¶ 16. This failure to assess non-parent/guardian custodians flies in the face of the Flores Agreement. Third in the order of preferences under Paragraph 14 is an adult relative (brother, sister, aunt, uncle, or grandparent) of the minor. Paragraph 17 of the Agreement further states that a "positive suitability assessment may be required prior to release to any individual or program pursuant to Paragraph 14."[20] This assessment may include investigating the adult wishes and concerns. Agreement ¶ 17. (p.27).
Nonetheless, Gurule states that "ICE is not authorized to expend resources to conduct suitability analyses, and any resources devoted to such endeavors would no longer be available to process families as expeditiously as possible through [family residential centers]." Id. ¶ 16. ICE cannot simply release children to just any adult who claims custody of the child. For one, the Agreement requires that the proposed custodian execute an agreement with Defendants to, among other things, "provide for the minor's physical, mental, and financial well-being." Agreement ¶ 15. By failing to conduct suitability analyses of non-parent/guardian custodians seeking custody of class members, Defendants essentially concede to violating the Agreement. (p.27).

20 Day Detention Period

Even using Defendants' own numbers, a significant number of detainees still remained in detention for over 20 days during the 13-month period Defendants identified: approximately 2,447 individuals (five percent of 48,940). What is more, Defendants' length-of-stay statistics only account for individuals already released. See Deposition of Philip T. Miller ("Miller Depo.") at 141–143 (explaining that the length-of-stay is measured by "the difference between when you book into a [family residential center] and when you're released," and that "I can't tell you how long someone has stayed until they're no longer [detained]") [Doc. # 350]. Thus, it is unclear to the Court how many unreleased class members and their parents remained in detention at the family residential centers during the 13-month period from October 23, 2015 to

November 19, 2016. (p.30).

In light of these statistics, Plaintiffs' witness statements, the evidence that the family residential centers remain unlicensed, secure facilities, and the fact that use of the expedited removal procedure does not automatically render the Agreement's preference-for-release provision inapplicable, the Court finds Plaintiffs have established Defendants' substantial noncompliance with Paragraphs 12A and 14 of the Flores Agreement, notwithstanding the emergency-influx exception.
Accordingly, the Court GRANTS Plaintiffs' motion to enforce these paragraphs of the Agreement on the length-of-detention issue. (p.30).

Commingling of Minors with Adults

Paragraph 12A of the Agreement states that upon apprehension, Defendants "will segregate unaccompanied minors from unrelated adults." Here, Plaintiffs assert that Defendants "routinely commingle Class Member children with unrelated adults . . . . Young girls may even be detained with unrelated men." Pl. Mot. at 14–16.
Plaintiffs fail, however, to satisfy their burden of demonstrating Defendants' substantial non-compliance with this provision by a preponderance of the evidence. The Agreement's commingling provision applies only to unaccompanied class members. Plaintiffs' examples involve statements from accompanied class members (or their accompanying parents) who state that Defendants mixed them in with unrelated adults. See Pl. SUF at 110–117; e.g., Declaration of Yeslin L. ¶ 2 ("I am detained with my mother, my younger sister and my younger brother.") [Doc. # 202-1 at 62]. Plaintiffs' statements from various ICE directors also do not help: they involve statements regarding conditions at family residential centers, which house only accompanied minors and their families. Pl. SUF at 110–114; see also January 20, 2017 Order at 3–4 (describing how Congress transferred responsibility for the care and placement of unaccompanied minors from ICE to the Department of Health and Human Services) [Doc. # 318]. At other times, Plaintiffs' witness statements fail to differentiate whether the observed commingling involved accompanied or unaccompanied minors.
Accordingly, the Court DENIES Plaintiffs' motion to enforce Paragraph 12A of the Agreement on the issue of commingling class members with adults. (p.31).

To the extent Plaintiffs' motion to enforce is based on Defendants' failure to provide class members' counsel with advance notice regarding class members' transfers between ICE facilities pursuant to Paragraph 17 of the Agreement, the Court DENIES Plaintiffs' motion. Plaintiffs provide only one example where Defendants allegedly failed to give an attorney representing a group of class members notice of their relocation. See Pl. SUF at 143–44 (quoting from Declaration of Ed McCarthy, Esq.).

Appointment of a Monitor

It is unclear to the Court whether a Juvenile Coordinator has ever existed during the more than 20 years since the parties entered into the Flores Agreement—and if one did, whether he or she ever fulfilled any of the duties identified in Paragraph 24A. It is high time for Paragraph 24A to be meaningfully enforced.
Although Plaintiffs request the appointment of an independent monitor, the Court finds it

appropriate—at least at this juncture—to breathe life back into Paragraph 24A. To that end, the Court will order Defendants within 30 days of this Order to identify and propose to the Court the name of a Juvenile Coordinator and provide that person's curriculum vitae and his or her qualifications for the position. The Juvenile Coordinator will monitor compliance with those terms of the Flores Agreement, which this Court has found must be enforced and shall report directly to the Court regarding the status of Defendants' compliance. Once the Juvenile Coordinator has been designated, the Court shall establish a schedule for the Juvenile Coordinator's periodic written reports to the Court, as well as Plaintiffs' response to those reports. Within one year from the date of the Juvenile Coordinator's appointment, the Court shall assess whether Defendants are in substantial compliance with the Flores Agreement and whether the objectives of the Coordinator have been met. If the Court is not satisfied with the progress made within that time frame, it will reconsider Plaintiffs' renewed request for appointment of an independent monitor. (p.33).

VIII. *Flores v. Sessions* (9th Cir. 2017)

By their plain text, neither law explicitly terminates the bond-hearing requirement for unaccompanied minors. Moreover, the statutory framework enacted by the HSA and TVPRA does not grant ORR exclusive and autonomous control over the detention of unaccompanied minors. Rather, the statutes leave ample room for immigration judges to conduct bond hearings for these children. Additionally, holding that the HSA and TVPRA do not deny unaccompanied minors the right to a bond hearing under Paragraph 24A affirms Congress's intent in passing both laws. These statutes sought to protect a uniquely vulnerable population: unaccompanied children. In enacting the HSA and TVPRA, Congress desired to *better* provide for unaccompanied minors. Depriving these children of their existing right to a bond hearing is incompatible with such an aim. (p.867).

The bond hearing under Paragraph 24A is a fundamental protection guaranteed to unaccompanied minors under the *Flores* Settlement. As was true prior to the HSA and TVPRA, these proceedings do not afford unaccompanied minors the same rights that may be gained through an ordinary bond hearing. Specifically, they do not result in the setting of bail. Even if the immigration judge determines that the form of detention ORR has imposed is improper, the government must still identify a safe and secure placement into which the child can be released. As a result, a favorable finding in a hearing under Paragraph 24A does not entitle minors to release. (p.867).

However, such a hearing does provide minors with meaningful rights and practical benefits. The hearing is a forum in which a child has the right to be represented by counsel, and to have the merits of his or her detention assessed by an independent immigration judge. The hearing is also an opportunity for counsel to bring forth the reasons for the minor's detention, examine and rebut the government's evidence, and build a record regarding the child's custody. Without such hearings, these children have no meaningful forum in which to challenge ORR's decisions regarding their detention or even to discover why those decisions have been made. There are no procedures available to them that afford them the right to a hearing with counsel, an opportunity to examine adverse evidence, or a forum in which to refute the government's claims regarding the need for their custody. (p.867-68).

Providing unaccompanied minors with the right to a hearing under Paragraph 24A therefore ensures that they are not held in secure detention without cause. Finally, bond hearings help to

guide ORR in making its placement determinations for unaccompanied minors. By allowing an immigration judge to assess the merits of a child's ongoing detention, bond hearings provide ORR with valuable information that helps the agency determine the appropriate custody of unaccompanied minors in a fairer and less arbitrary manner. (p.868).

Paragraph 24A of the *Flores* Settlement provides 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.

Additionally, although the TVPRA grants ORR responsibility for the placement of unaccompanied minors, it does not give the agency exclusive control. Instead, like the HSA, the TVPRA directs ORR to consult with other government actors, and also requires that the agency assist unaccompanied minors in navigating the general immigration system. *Id.* § 1232(a)(1),(c)(1, 4-5). In passing these statutes, then, Congress did not intend to entirely remove unaccompanied minors from the auspices of authorities outside ORR. Rather, Congress provided for the welfare of unaccompanied minors by ensuring coordination and cooperation among diverse governmental agencies. Nonetheless, the government argues that the HSA and TVPRA terminated Paragraph 24A of the *Flores* Settlement with respect to the fundamental right it affords to unaccompanied minors. (p.874).

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Nothing in the text, structure, or purpose of the HSA or TVPRA renders continued compliance with Paragraph 24A, as it applies to unaccompanied minors, "impermissible." *See Flores v. Lynch*, 828 F.3d at 910. Nor does anything in the two statutes turn the *Flores* Settlement or any part of it into an "instrument of wrong." *See Wright*, 364 U.S. at 647. Not a single word in either statute indicates that Congress intended to supersede, terminate, or take away any right enjoyed by unaccompanied minors at the time of the acts' passage. Thus, we hold that the statutes have not terminated the *Flores* Settlement's bond-hearing requirement for unaccompanied minors. (p.881).

We therefore affirm the decision of the district court granting plaintiffs' motion to enforce Paragraph 24A of the *Flores* Settlement in its entirety. (p.881).

AFFIRMED.

IX. July 9, 2018 Order [Doc. #455]

On June 20, 2018, President Donald J. Trump issued an Executive Order requiring “[t]he Attorney General [to] promptly file a request with [this Court] to modify the [Flores Agreement], in a manner that would permit the Secretary [of Homeland Security], under present resource constraints, to detain alien families together throughout the pendency of criminal proceedings for improper entry or any removal or other immigration proceedings.” See Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13841, 83 Fed. Reg. 29435, 29435 (June 20, 2018) [hereinafter Exec. Order No. 13841]. On June 21, 2018, Defendants filed an Ex Parte Application seeking the following “limited” relief: (1) an

exemption from the Flores Agreement's release provisions so that Immigration and Customs Enforcement ("ICE") may detain alien minors who have arrived with their parent or legal guardian together in ICE family residential facilities, and (2) an exemption from the Flores Agreement's state licensure requirement. [Doc. # 435.] Defendants claim that such relief is warranted under Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6). See Ex Parte Appl.

After submitting their Ex Parte Application, Defendants filed a "Notice of Compliance[,]" wherein they contend that a preliminary injunction recently entered in Ms. L v. U.S. Immigration & Customs Enforcement, No. CV 18-0428 DMS (MDD), 2018 WL 3129486 (S.D. Cal. June 26. 2018), allows them to nullify the release and state licensure provisions of the Flores Agreement. See Notice of Compl. at 5–8 [Doc. # 447]. (p.4).

Defendants advance a tortured interpretation of the Flores Agreement in an attempt to show that the Ms. L preliminary injunction permits them to suspend the Flores release and licensure provisions. They claim that detaining Flores Class Members with their parents complies with Paragraph 14's command that Class Members be "release[d] from . . . custody without unnecessary delay" because separating a Class Member from a parent would violate the Ms. L Order. (p.5).

Absolutely nothing prevents Defendants from reconsidering their current blanket policy of family detention and reinstating prosecutorial discretion. See Exec. Order No. 13841, 83 Fed. Reg. at 29435; see also 8 U.S.C. § 1226(a)(2)(A). (p.5).

Further, detained parents who are entitled to reunification under the Ms. L Order may "affirmatively, knowingly, and voluntarily decline[] to be reunited" with their children, see Ms. L., 2018 WL 3129486, at *11, and all parties admit that these parents may also affirmatively waive their children's rights to prompt release and placement in state-licensed facilities, see Notice of Compl. at 9. (p.6).

Lastly, Defendants have known for years that there is "no state licensing readily available for facilities that house both adults and children." See Defs.' Motion to Amend at 32 (filed on Feb. 27, 2015) [Doc. # 120]. Yet, Defendants have not shown that they made any efforts to resolve this issue since July 2015, let alone 1997, nor have they demonstrated that any such attempt would be futile. (p.6).

It is apparent that Defendants' Application is a cynical attempt, on an ex parte basis, to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate. In sum, Defendants have not shown that applying the Flores Agreement "prospectively is no longer equitable[,]" see Fed. R. Civ. P. 60(b)(5), or that "manifest injustice" will result if the Agreement is not modified, see United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993). Of course, the parties are always free to meet and confer regarding any contractual amendments on which they can mutually agree. This is basic contract law. In light of the foregoing, the Court DENIES the Ex Parte Application because it is procedurally improper and wholly without merit. (p.7).

X. July 30, 2018 Order [Doc. #470]

Plaintiffs claim that the Office of Refugee Resettlement ("ORR") has breached the Flores Agreement by implementing policies and/or practices that fall within three general categories: (1) placing Class Members in Residential Treatment Centers ("RTCs"), staff-secure facilities, and secure facilities; (2) administering psychotropic drugs to Class Members without first obtaining a court order or the informed consent of a person authorized by state law to approve such decisions; and (3) unnecessarily prolonging Class Members' detention in ORR facilities. (p.1).

Both sides apparently fail to comprehend this Court's role in these proceedings. Plaintiffs seek extracontractual remedies for alleged constitutional violations in the context of a motion to enforce the consent decree, whereas Defendants urge the Court to abdicate its responsibility to redress violations of the Agreement's explicit terms. It is therefore unsurprising that the Court GRANTS IN PART and DENIES IN PART Plaintiffs' motion to enforce. (p.2).

A. The Court's Remedial Power for Breach of Contract

Plaintiffs seek certain procedural remedies that are not set forth in the Flores Agreement, including an order requiring ORR to: provide notice and an opportunity to be heard by an immigration judge before a Class Member may be transferred to an RTC, staff-secure facility, or secure facility; obtain a court order or informed written consent prior to the administration of psychotropic drugs to a Class Member; and release a Class Member to a proposed sponsor or refer the proposed sponsor's suitability determination to a state juvenile authority within 30 days of receiving a complete family reunification packet. See Plaintiffs' Proposed Order at 3–5 [Doc. # 422-1]. Plaintiffs contend that this Court has the authority to provide them such relief in the context of the instant motion to enforce. See Mot. to Enforce at 8–9. The Court concludes that, on this motion to enforce, Plaintiffs are entitled to only such relief as is explicitly or implicitly authorized by the Flores Agreement. (p.3).

Plaintiffs further argue that the Flores Agreement creates substantive rights that are protected by the Due Process Clause. See Mot. to Enforce at 8–9. According to Plaintiffs, "[c]onstitutional principles of due process" require the imposition of more robust procedural protections to mitigate the risk… (p.5).

Plaintiffs also contend that although Paragraph 24B allows a minor to obtain judicial review of his or her placement in a particular type of facility, see Flores Agreement at ¶ 24B [Doc. # 101], that option is not a "viable remedy." (p.5).

Despite the fact that the Court cannot afford Plaintiffs much of the extracontractual relief they seek, the Court does have the authority to determine whether Defendants have breached the Agreement by, inter alia, failing to adhere to "all applicable state child welfare laws and regulations." See Flores Agreement, Ex. 1 at ¶ A [Doc. # 101]. The remainder of this Order addresses that question. (p.7).

B. The TVPRA Did Not Supersede the *Flores* Agreement's Placement and Suitability Provisions

[T]he Court concludes that the TVPRA did not supersede the placement and suitability provisions of the Flores Agreement because the two can be easily reconciled and Congress did not explicitly abrogate Class Members' rights under the Agreement. See Flores, 862 F.3d at 875 ("[A] basic canon of statutory construction requires that we presume Congress does not silently abrogate existing law."). Therefore, a motion to enforce is an appropriate means by which Plaintiffs can challenge alleged violations of those aspects of the Agreement. (p.9).

C. ORR's Placement of Class Members in Staff-Secure Facilities, Secure Facilities, and RTCs

Plaintiffs have shown that the level of security at Shiloh RTC in Manvel, Texas violates the Flores Agreement because it is a locked facility with 24-hour surveillance and monitoring. See Isabella M. Decl. at ¶ 2, Pls.' Ex. 10 [Doc. # 421-1]; Gloria P. Decl. at ¶ 2, Pls.' Ex. 41 [Doc. # 421-4]; Gabriela N. Decl. at ¶ 3, Pls.' Ex. 19 [Doc. # 421-1].[16] Although it is possible that a Class Member who has been placed in an RTC possesses "a psychiatric or a psychological issue that cannot be addressed in an outpatient setting,"… (p.13).

Moreover, because ORR policy does not allow a Class Member to be transferred to an RTC unless "ORR has determined that [he or she has] a psychiatric or psychological issue that cannot be addressed in an outpatient setting," (internal citations omitted) placement in an RTC does not necessarily run afoul of the Flores Agreement's requirement that special needs minors be housed with other children "whenever possible." See Flores Agreement at ¶ 7 (emphasis added) [Doc. # 101].

Accordingly, the Court ORDERS Defendants to transfer all Class Members out of Shiloh RTC unless a licensed psychologist or psychiatrist has determined or determines that a particular Class Member poses a risk of harm to self or others. See Flores Agreement, ¶ 6 ("a facility for special needs minors may maintain that level of security permitted under state law which is necessary for the protection of a minor or others . . . ."). Class Members who do not fall within that exception shall be placed "in the least restrictive setting appropriate to [each Class Member's] age and special needs, provided that such setting is consistent with [Defendants'] interests to ensure the [Class Member's] timely appearance before [Defendants] and the immigration courts and to protect the [Class Member's] well-being and that of others." See Flores Agreement at ¶ 11 [Doc. # 101]. Defendants are further ORDERED to cease employing at Shiloh RTC any security measures that are not necessary for the protection of minors or others, such as the denial of access to drinking water. Additionally, the Court ORDERS Defendants to permit Class Members at Shiloh RTC to "talk privately on the phone, as permitted by the house rules and regulations." See Flores Agreement, Ex. 1 at ¶ A12 [Doc. # 101]. (p.14).

Detaining a Class Member in a restrictive setting for three or four months without informing the minor of the reasons for placement amounts to a failure to provide written notice within a reasonable time. Furthermore, Plaintiffs believe that the form "exists only in English," see Mot. to Enforce at 12, a notion that Defendants do not dispute. See Opp'n re Motion to Enforce 9–10 (arguing instead that the Notice of Placement otherwise satisfies the Agreement). Since the purpose of the notice of reasons is to permit judicial review, the Flores Agreement impliedly requires ORR to provide notice in a language that the Class Member can understand. See, e.g., Carlos A. Decl. at

¶ 2 ("I speak Spanish and only a few words of English.") [Doc. # 421-4]. Therefore, Defendants have breached the Flores Agreement by failing to provide these Class Members with a notice of reasons in a language that they can understand within a reasonable period of time. (p.17).

A Class Member may be placed in a secure facility if he or she "is chargeable" with a crime, not if he "may be chargeable" with one. See Flores Agreement at ¶ 21A [Doc. # 101]. For instance, a Class Member's gang membership does not necessarily establish that he or she is chargeable with a delinquent act or offense, or that any of the other criteria of Paragraph 21 have been satisfied. On the other hand, to the extent the italicized criteria contribute to Defendants' probable cause determination that a Class Member has engaged in a pattern or practice of criminal conduct or committed a violent crime, then Paragraph 21 explicitly authorizes detention of that Class Member in a secure facility. Therefore, Defendants have breached the Flores Agreement insofar as ORR has placed Class Members in secure facilities solely on the basis of one or more of the italicized portions of the Notice of Placement form and absent probable cause to believe that the individual has committed a specified offense.

Accordingly, the Court ORDERS Defendants to comply with Paragraph 24C by providing each Class Member with a written notice of reasons for placing him or her in a secure facility, staff-secure facility, or an RTC within a reasonable time of ORR's placement decision. Any such notice of reasons shall be in a language that the Class Member understands. For the reasons discussed in this section, the Court finds that Defendants have breached Paragraphs 6 and 9 and Exhibit 1 of the Flores Agreement in the course of administering psychotropic medications at Shiloh RTC. The Court ORDERS Defendants to comply with all Texas child welfare laws and regulations governing the administration of psychotropic drugs to Class Members at Shiloh RTC. Most importantly, Defendants shall do the following before disclosure required by 26 Texas Administrative Code section 748.2253 to a "person legally authorized to give medical consent" as that term is defined in 26 Texas Administrative Code section 748.43(47), and (2) obtain the written consent of that person in accordance with 26 Texas Administrative Code sections 748.2001 and 748.2253. If Defendants are not able to obtain such informed written consent, then they may not administer the psychotropic medication to the Class Member unless they obtain a court order authorizing them to do so under Texas law or there is an "emergency" as that term is defined in Texas Family Code section 266.009 and 26 Texas Administrative Code section 748.2257. If Defendants administer psychotropic medication on an emergency basis, then Defendants shall adhere to all of the notification and documentation requirements imposed by Texas Family Code section 266.009 and 26 Texas Administrative Code section 748.2257. (p.24).

ORR's Policies and Practices Regarding the Release of Class members to Sponsors

1. **ORR's Alleged "Extreme Vetting" and Its Purported Prolonged Detention of Class Members in RTCs**

ORR does not violate the Flores Agreement merely because it unilaterally determines the suitability criteria for potential sponsors. Because Paragraph 17 provides a non-exhaustive list of considerations relevant to ORR's "positive suitability" assessments, it impliedly gives ORR the authority to prescribe additional factors. See Flores Agreement at ¶ 17 (listing "components" that a suitability assessment "may include") [Doc. # 101]. Of course, ORR's adoption of certain criteria may violate the Flores Agreement's other provisions. (p.25).

The Court therefore ORDERS Defendants to cease requiring ORR Director or designee approval prior to release of Class Members who: (1) were previously placed in secure or staffsecure facilities but have since been transferred to less restrictive settings; (2) prevailed on their Flores bond hearings; and/or (3) were placed in secure or staff-secure facilities based on incomplete, inaccurate, or erroneous information. (p.29).

3.Requiring Post-Release Services to Be in Place Prior to Release

The Court concludes that ORR's blanket rule requiring that post-release services are in place before releasing a Class Member to a sponsor for whom home study services were conducted violates Paragraph 14 and 18's bar on unnecessarily delaying the release of Class Members. Accordingly, the Court ORDERS Defendants to cease uniformly requiring post-release services to be in place before the release of a Class Member to a sponsor. Such detention shall be permitted if and only if ORR conducts an individualized assessment and determines that, given the particularized needs of the Class Member, the sponsor would not be a suitable custodian if such post-release services were not in place prior to release. See id. at ¶ 17. Otherwise, the continued detention of a Class Member pursuant to this blanket policy amounts to unnecessary delay. See id. at ¶¶ 14, 18. (p.30).

XI. September 27, 2019 Order [Doc. #688]

Court concludes that the New Regulations do not have the effect of terminating the Flores Agreement, Defendants have not met their burden to demonstrate an alternative reason to terminate the Agreement, and Defendants must be enjoined from implementing the New Regulations. Accordingly, Plaintiffs' Motion to Enforce is GRANTED insofar as it seeks such relief, and Defendants' Motion to Terminate is DENIED. (p.3).

Therefore, this new regulatory definition of "licensed facility" would effectively authorize DHS to place class members in ICE detention facilities that are not monitored by state authorities, but are instead audited by entities handpicked by DHS to "ensure compliance with the family residential standards established by ICE." See 84 Fed. Reg. at 44,526 (emphasis added). This is more than a minor or formalistic deviation from the provisions of the Flores Agreement, as "[t]he purpose of the licensing provision is to provide class members the essential protection of regular and comprehensive oversight by an independent child welfare agency." See Order re Pls.' Mot to Enforce at 14 (emphasis added) [Doc. # 177]. Thus, revised 8 C.F.R. section 236.3(b)(9) is patently inconsistent with a substantive term of the Agreement. (p.9).

DHS's new definition of "non-secure facility" is also inconsistent with the Flores Agreement. Although the Flores Agreement does not explicitly define that term, the Court previously explained that "'[s]ecure' in this context refers to a detention facility where individuals are held in custody and are not free to leave[,]" whereas "'non-secure' facilities are those where individuals are not held in custody." See Order re Pls.' Mot. to Enforce at 2 n.3 [Doc. # 177]. The Court has also found that the Karnes FRC is a secure facility principally because it is a large block building that has only one means of ingress and egress, which includes

a sally port in which all persons exiting and entering the building are subject to security screening by ICE officials. (p.10).

This new regulatory definition's supposed carve-out for state law definitions of "nonsecure" is vacuous, as DHS admits that this provision is intended to allow ICE to place class members in its various FRCs, including Karnes, notwithstanding the fact that the Court has already held that Karnes is a secure facility. In Kafkaesque fashion, the New Regulations declare that FRCs are non-secure (and always have been), regardless of whether they are or ever have been, in fact, non-secure. (p.10).

In sum, DHS's New Regulations on the parole of class members, the definition of licensed facilities, and the definition of non-secure are irreconcilable with Paragraphs 6, 14, 18, and 19 of the Flores Agreement, and cannot be reasonably characterized as regulations "implementing this Agreement." Dec. 7, 2001 Stipulation at 71 [Doc. # 516]. (p.11).

3.The New Regulations' Elimination of Certain Mandatory Protections in the *Flores* Agreement

Plaintiffs correctly point out that "many of the [Flores Agreement's] core provisions use the verb 'shall' to posit a mandatory, non-discretionary obligation." See Pls.' Mot. to Enforce at 25 [Doc. # 516]; see also Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 1977 (2016). (p. 14).

This is the mandatory sense that drafters typically intend and that courts typically uphold. Only [this] sense . . . is acceptable under strict standards of drafting."). The New Regulations replaced many of these protections with statements that merely describe the manner in which Defendants purportedly treat class members in their custody. (p.14).

…the New Regulations fail to use mandatory, nondiscretionary language regarding release. Flores Agreement at ¶ 14 (emphasis added); see 84 Fed. Reg. at 44,525 (providing that "[m]inors may be released" under certain circumstances under 8 C.F.R. section 212.5(b)) (emphasis added); 84 Fed. Reg. at 44,532 (providing that "ORR releases a[n unaccompanied alien child] to an approved sponsor without unnecessary delay" under 45 C.F.R. section 410.301) (emphasis added). (p.15).

Finally, despite the Ninth Circuit's conclusion that "the Settlement unambiguously applies both to accompanied and unaccompanied minors," Flores v. Lynch, 828 F.3d at 901, the New Regulations insist that the Agreement does not govern the treatment of accompanied minors. (p.23).

XII. Flores v. Barr, 934 F.3d 910 (9th Cir. 2019)

The district court's interpretation of the Agreement is consistent with the ordinary meaning of the language of paragraph 12A, which does provide a standard sufficiently clear to be enforced. The court found, among other things, that minors (1) were "not receiving hot, edible, or a sufficient number of meals during a given day," (2) "had no adequate access to clean drinking water," (3) experienced "unsanitary conditions with respect to the holding cells and bathroom facilities," (4) lacked "access to clean bedding, and access to hygiene products (i.e., toothbrushes, soap, towels),"

and (5) endured "sleep deprivation" as a result of "cold temperatures, overcrowding, lack of proper bedding (i.e., blankets, mats), [and] constant lighting." After so finding, the district court concluded that these conditions fall short of paragraph 12A's requirement that facilities be "safe and sanitary," especially given "the particular vulnerability of minors." Those determinations reflect a commonsense understanding of what the quoted language requires. Assuring that children eat enough edible food, drink clean water, are housed in hygienic facilities with sanitary bathrooms, have soap and toothpaste, and are not sleep-deprived are without doubt essential to the children's safety. The district court properly construed the Agreement as requiring such conditions rather than allowing the government to decide whether to provide them. (p.915-16).

Moreover, contrary to the government's assertions, the district court did not incorporate into the Agreement a particular set of standards, Customs and Border Protection's "National Standards on Transport, Escort, Detention, and Search" (or "TEDS"), with respect to food during detention. We doubt that the TEDS requirements—that minors "be offered a snack upon arrival and a meal at least every six hours thereafter," have food that is "in edible condition (not frozen, expired, or spoiled)," and "have regular access to snacks, milk, and juice,"—extend beyond what paragraph 12A requires. But in any event, in context, the district court referred to TEDS not to interpret the Agreement as incorporating the TEDS standards specifically, but to confirm that the government's inattention to ensuring that children were being adequately fed was egregious, as the government was not even complying with its own standards. (p.916).

In short, the district court's explanation of its enforcement of paragraph 12A regarding the conditions at Border Patrol stations concerned only requirements unarguably within the terms of the Agreement. As a result, the portion of the court's order enforcing paragraph 12A did not constitute an "[i]nterlocutory order[] . . . modifying [an] injunction[], or refusing to . . . modify [an] injunction[]." 28 U.S.C. § 1292(a)(1). We therefore lack jurisdiction over this claim. (p.916).

The government next argues that the district court modified the Agreement by concluding that it requires the government to consider releasing class members subject to expedited removal. The government contends that this interpretation of the Agreement is inconsistent with the Immigration and Nationality Act (INA) and related regulations—primarily with the expedited removal provisions, which provide that noncitizens in expedited removal proceedings "shall be detained for further consideration of the[ir] application[s] for asylum." 8 U.S.C. § 1225(b)(1)(B)(ii). (p.916).

Further, expedited removal does *not* require mandatory detention for minors. The INA provides that, even for noncitizens in expedited removal, "the Attorney General may . . . in his discretion parole into the United States temporarily" any noncitizen applying for admission "under such conditions as he may prescribe." 8 U.S.C. § 1182(d)(5)(A). The government has promulgated two regulations that pertain to parole into the United States of noncitizens in expedited removal proceedings. One provides that such noncitizens "shall be detained pending determination and removal, except that parole of such alien . . . may be permitted only when the Attorney General determines, in the exercise of discretion, that parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective." 8 C.F.R. § 235.3(b)(2)(iii). A second provides that all noncitizens subject to removal—specifically including, by cross-reference, those in expedited removal—may be paroled "on a case-by-case basis for 'urgent humanitarian reasons' or 'significant public benefit,' provided the [noncitizens] present neither a security risk nor a risk of absconding." *Id.* § 212.5(b). Among the groups eligible for parole under this regulation are

"[a]liens who are defined as juveniles in § 236.3(a) of this chapter," who may be paroled under "the guidelines set forth in § 236.3(a) of this chapter and paragraphs (b)(3)(i) through (iii) of this section." *Id.* § 212.5(b)(3). (p.917).

Both regulations expressly cover noncitizens in expedited removal proceedings; nothing in section 235.3(b) negates section 212.5(b). The more specific regulatory provision providing an exception for minors governs, not the general expedited removal provisions. *See Karczewski v. DCH Mission Valley LLC*, 862 F.3d 1006, 1015-16 (9th Cir. 2017) (applying the interpretive canon that "the specific governs over the general" to regulations). (p.917).

XIII. Flores v. Barr District Ct Order April 24, 2020 [Doc. #784]

[T]he issue is whether Plaintiffs have shown by a preponderance of the evidence that under any of the challenged policies, ORR has failed to release minors without any unnecessary delay. (p. 7).

The Court does not fault ORR for exercising caution during the initial days of the pandemic. Plaintiffs have provided no current evidence that a blanket ban exists on releasing Class Members to or from certain States that would violate the FSA. Because ORR appears to have rectified any noncompliant blanket ban on releasing minors from facilities in States hardest-hit by COVID-19, Plaintiffs' requested relief relating to such a ban is now moot. (p.20).

ii. **Ban of releasing Class Members with exposure to COVID-19 or to sponsor households with confirmed cases of COVID-19**

Besides Sualog's non-specific declarations, there is no evidence in the record indicating that medical professionals actually make case-by-case determinations of a minor's eligibility for release, and Plaintiffs have submitted at least some evidence to the contrary. The Court does not find fault with the April 6 ORR Guidance [*24] in theory, but its implementation must be monitored as part of the Independent Monitor's and Juvenile Coordinator's regular monitoring duties to ensure that this policy timely facilitates, rather than obstructs, ORR's ability to meet the FSA requirement of release without unnecessary delay. (p.23-24).

For similar reasons as stated above, however, continued monitoring of this policy's implementation remains necessary to ensure expeditious but safe release of minors to sponsor households. (p.24).

iv. Migrant Protection Protocols

The Court sees no reason why, if removal is not "ready to take place," ORR should not release minors whose removal orders under the MPP are under appeal. Thus, ORR's opaque policies surrounding removal orders under the MPP violate Paragraphs 14 and 18 of the FSA. (p.34).

2. ICE

i. Class Members awaiting decisions in expedited removal proceedings

Given the length of detention of these minors, Defendants have also failed to demonstrate actual

individualized evaluations of flight risk, or refusals of parents to waive their right to remain detained with their children, or other explanations for prolonged detention of Class Members awaiting IJ or USCIS determinations. The only direct evidence before the Court of the existence of these individualized inquiries are the declarations of ICE officials. (p.38).

Because ICE has not submitted evidence on individualized release assessments for Class Members awaiting asylum decisions, much less evidence that ICE makes and records individual assessments in a prompt and continuous manner, the Court finds ICE in violation of the FSA's Paragraph 18 (as well as the Court's prior June 27, 2017 Order) with regard to Class Members in expedited removal proceedings who are "pending IJ hearing/decision" or "pending USCIS response." Because unnecessary delay has resulted from this apparent failure to make individualized paroleassessments, ICE is also in violation of Paragraph 14. (p.40).

i. Class Members under final orders of Removal

Its cursory evidentiary showings of those assessments raise serious concerns that ICE is not adequately assessing minors' flight risk, according to the FSA's general policy favoring release, or communicating with parents about the option of waiver of rights. The Court reiterates that ICE may consider a minor's flight risk, under Paragraph 14 of the FSA and federal regulations, but a final order of deportation cannot be the dispositive consideration if removal is not "imminent," as discussed above in relation to final orders of removal under the MPP, and there are no other indicia of a minor's flight risk. (p.43-44).

Accordingly, Plaintiffs have shown by a preponderance of the evidence that ICE is in breach of its Paragraph 14 and 18 duties and past Court Orders with regard to minors subject to final orders of removal, including those issued under the MPP and/or stayed by participation in federal litigation. (p.44-45).
1. ORR and ICE shall continue to make every effort to promptly and safely release Class Members who have suitable custodians in accordance with Paragraphs 14 and 18 of the FSA and the Court's prior orders, including those categorized as "MPP," participants in class litigation, "pending IJ hearing/decision" or "pending USCIS response," [*45] absent a specific and individualized determination that they are a flight risk or a danger to themselves or others, or a proper waiver of Flores rights (see, e.g., July 24, 2015 Order [Doc. # 177], June 27, 2017 Order [Doc. # 363], July 9, 2018 Order [Doc. # 455], July 30, 2018 Order [Doc. # 470]). (p.44-45).

2. For the duration of shelter-in-place orders and fingerprinting location closures due to the COVID-19 pandemic, ORR shall institute provisional release of Class Members with Category 2B and Category 3 sponsors whose name-only background checks yield no red flags and for whom fingerprinting is unavailable, provided that these sponsors agree to submit fingerprints as soon as practicable after the release of the minor and within a reasonable time frame specified by ORR. ORR may continue to require fingerprints prior to release of a minor during the pandemic if fingerprinting is readily available in the relevant locale or it conducts an individualized assessment and determines that fingerprinting is necessary to address a documented risk of safety to the minor. (p.45).

3. The Independent Monitor, Andrea Ordin, may in the exercise of her monitoring duties

request such further information regarding safe and sanitary conditions and/or Defendants' continuous efforts at release as she deems appropriate pursuant to her authority under Paragraph B(1)(c)(iii) of the October 5, 2018 Order appointing her, and in consideration of the concerns outlined in this Order and the Court's June 27, 2017 Order regarding minors in prolonged detention at any stage of expedited removal proceedings. [Doc. ## 363, 494.] If the Monitor believes that sharing that information with Plaintiffs' counsel on a case by case basis, subject to the protective order, would assist her in resolving individualized questions of prolonged detention, she may do so in the exercise of her discretion. (p.45-46).

4. The Juvenile Coordinators shall continue to perform their duties under Paragraphs 28A and 28B of the FSA. Pursuant to the Court's July 27, 2018 Order [Doc. # 469], the Juvenile Coordinators shall file their next annual compliance report by July 1, 2020, including an assessment of ICE and ORR compliance with CDC guidelines for detention facilities. Given the exigencies of the current pandemic, however, the Court hereby orders interim written reports to be filed by the 15th of each month starting in May 2020, and continuing for [*47] each month thereafter for the duration of the pandemic. (p.46-47).

a. The additional monitoring and interim reports by Aurora Miranda-Maese, the ORR Juvenile Coordinator, shall cover the following topics, among others chosen by her:

i. Measures taken to expedite the release of Class Members to suitable custodians during the COVID-19 health emergency, including the status of fingerprinting and home study policies and practices, in compliance with this Order, and provide census data as to any minors who remain in custody due to lack of fingerprinting or home studies;

ii. Identify the location of any ORR facility that has had any individual, whether detainee or staff member, test positive for COVID-19, and provide a status report and census of those infected at that facility during the reporting period;

iii. With respect to minors placed at congregate facilities in which either a detainee or staff member has tested positive for COVID-19, identify the specific reason the minors located there have not been released or transferred to a non-congregate setting;

iv. Describe any policies and/or practices aimed at identifying and protecting minors who are at heightened risk of serious illness or death should [*48] they contract COVID-19;… (p.47-48).

XIV. Flores v. Barr District Court Order June 26, 2020 [Doc. #833]

In light of the foregoing, the Court ORDERS the following:

1. By July 17, 2020, ICE shall transfer Class Members who have resided at the FRCs for more than 20 days to non-congregate settings through one of two means:

(1) releasing minors to available suitable sponsors or other available COVID-free non-congregate settings with the consent of their adult guardians/parents; or

(2) releasing the minors with their guardians/parents if ICE exercises its discretion to release the adults or another Court finds that the conditions at these facilities warrant the transfer of the adults to non-congregate settings. If it is deemed necessary, ICE may apply location monitoring devices to those who are released.

2. While the above efforts shall be undertaken with all deliberate speed, in the meantime, ICE shall urgently enforce its existing COVID-19 protocols, particularly in the following areas:

a. Social distancing: More effective use of the available space in the FRCs

should be implemented such that living quarters, bathroom facilities, eating areas, and other communal areas are compatible with optimal social distancing protocols. Spaced residential assignments, staggered bathing and eating schedules, and sequenced use of other facility locations should be implemented to permit greater distancing among residents.
b. Masking: Recommended masking protocols need to be enforced at all times. Enhanced training regarding mask usage for all staff may be necessary and oversight and documentation of compliance with these protocols are indicated.
c. Enhanced testing: Greater use of testing should be implemented for staff, new entrants, and residents as indicated by evolving CDC and local health department guidelines for congregate care facilities. (p.4).

XV. Flores v. Barr District Court Order Sept 4, 2020 [Doc. #974]

If Title 42 precludes compliance with the Flores Agreement requirement to place minors in licensed programs, then it would also preclude compliance with the TVPRA. The Court need not force a construction that would render the Agreement and the TVPRA incompatible with Title 42 when a perfectly reasonable interpretation that harmonizes them is available. See Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). (p. 10).

B. Title 42 Custody's Compliance with the *Flores* Agreement

Defendants cannot seriously argue in good faith that flouting their contractual obligation to place minors in licensed programs is necessary to mitigate the spread of COVID-19. Therefore, the Court finds Defendants have materially breached their duty under Paragraphs 12 and 19 to place minors in licensed facilities as expeditiously as possible. (p.30).

Access to Counsel

As the legal services providers' experiences demonstrate, this process is woefully inadequate and not substantially compliant with Paragraph 32. The Agreement contemplates attorneys having near-unfettered access to minors in custody, provided they meet certain well-established protocols. DHS instead puts the entire onus on the minor to seek out counsel, requiring children to have the wherewithal to put their one phone call a day towards retaining a lawyer. This is exactly the scenario the Flores Agreement intended to avoid. Paragraph 32 is straightforward in requiring that Plaintiffs' counsel be allowed to access the facilities and contact the minors, even [*39] if they do not yet know the identity of a specific minor. (p.38-39).

Conclusion

Since March 2020, Title 42 has largely replaced the Title 8 framework at the southwest border. See August 26 Interim Report at 9-10 (showing sharp increase in Title 42 expulsions correlating with decline in Title 8 apprehensions). This Court is sensitive to the exigencies created by COVID-19

and recognizes that the pandemic may require temporary, emergency modifications to the immigration system to enhance public safety. But that is no excuse for DHS to skirt the fundamental humanitarian protections that the Flores Agreement guarantees for minors in their custody, especially when there is no persuasive evidence that hoteling is safer than licensed facilities. While the legality of the Closure Order generally is beyond the scope of this Court's jurisdiction, the Court is obligated to ensure that minors in DHS custody are not left in a legal no-man's land, where no enforceable standards apply. Defendants may not exploit Title 42 to send children in their legal custody "off into the night." Flores v. Sessions, 862 F.3d at 878 n.17 (quoting Reno v. Flores, 507 U.S. 292, 295 (1993)). (p.39-40).

XVI. Flores v. Bar District Court Order Sept 18, 2020 [Doc. #987]

> For the reasons stated below, the Court GRANTS in part Plaintiffs' Motion to Enforce the FSA and ORDERS ICE to disseminate to Class Members a Notice of Rights, as revised by the Court, and to issue to its employees an updated policy or instruction regarding the FSA. The Court DENIES in part Plaintiffs' motion to the extent it seeks to provide a specific Release Protocol to ICE employees or Release Decision Worksheet to Class Members and their parents.
>
> **A. Breach of Contract**
> **1. Release without unnecessary delay and make and record prompt and continuous efforts toward family reunification and the release of the minor (Paragraphs 14 and 18)**

The Court informed Defendants that "[e]ven if the Court takes Defendants at their word that in the majority of cases, accompanied minors should stay with a parent in detention, that still leaves the rest of the potentially significant numbers of children who could be released to a custodian but for the Defendants' inability to screen." Id. Accordingly, in order to comply with the FSA and the Court's prior Order, ICE should already have in place procedures for evaluating the suitability of non-parent custodians for accompanied minors and releasing the minors to those custodians, provided there is parental consent and ICE will not exercise its discretion to release the parent. (p.13).

To be sure, in light of ICE's exercise of discretion or statutory mandates not to release certain adults, the ultimate result of ICE's good faith and well ordered efforts to make individualized release inquiries for each Class Member and provide notices of rights may be that some Class Members—even some who have not been deemed a flight risk or a danger to self or others—will remain in detention due to lack of parental consent to separate release. If that is the case, the Court may accept that ICE has substantially complied with the FSA as to those Class Members. That outcome is consistent with the Court's previous observations that "'where the mother chooses to stay in the detention facility or has been deemed a flight or safety risk,'" Defendants may be justified "'as a practical matter . . . in detaining both mother and child in that case,'" [*23] but it "may be the case that 'in order to effectuate the least restrictive form of detention for the child, Defendants must follow an order of preference for the minor's release to an available adult [not in detention] under Paragraph 14 of the Agreement.'" June 27, 2017 Order, 394 F. Supp. 3d at 1067 (quoting first July 24, 2015 Order, 212 F. Supp. 3d at 875 n.5, then August 21, 2015 Order, 212 F. Supp. 3d at 913 n.5). The Court thus reiterates ICE's continuous duty under the FSA to make and note individualized inquiries into the availability of release for each Class Member. **(p.22-23).**

Conclusion

While certainly not ideal, providing a Notice of Rights in accordance with Paragraph 12.A to give Class Members and their detained parents the ability to consent, if they so choose, to the separate expeditious release of the child to another family member or other vetted sponsor, will help ICE to remedy its violations under Paragraph 14 and 18 and allow parents to decide what is in the best interest of their child, particularly during the ongoing pandemic. As the Court has previously noted, "[Class Members'] best interests should be paramount," and for the children's sake, the Court urges the parties to work together to finalize the language [*29] of the Notice of Rights, implement the know-your-rights procedure, and facilitate on a case-by-case basis any Class Members and their parents who seek to consent to the exercise of Flores release rights. July 9, 2018 Order at 7 [Doc. # 45].

XVII. Flores v. Barr District Court Order September 21, 2020 [Doc. #990]

In brief, Defendants point no authority to support their position that the Flores Agreement—document fundamentally about the care and welfare of children—defines "legal custody" as the source of legal authority to detain the child, rather than the well-established definition under family law...Or for the notion that hoteling is a lawful means of processing minors "as expeditiously as possible" when the program makes no good faith effort to actually place minors in licensed facilities. See id. at 12-13. (p.4).

XVIII. Flores v. Barr (9th Cir. Oct. 4, 2020)

We must determine whether, as the government contends, the district court's orders have functionally modified the Flores Agreement or whether, on the other hand, they simply enforce the existing consent decree. Deciding that question requires us to review the parties' arguments on the merits issues of whether the Agreement applies to minors detained under Title 42 and whether the district court's orders require the government to take actions beyond those required by the Agreement. Cf.
Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983) (holding that a court may address jurisdictional and substantive issues concurrently if they are "intertwined"). (p 6).

The independent monitor's August 2020 report indicated that 25 percent of minors housed in hotels from March 24, 2020, to July 31, 2020, were held for three days or less. The independent monitor also reported that a total of 577 unaccompanied minors were held in hotels during that time period. If 75 percent of those minors had been referred to ORR, an average of 24 minors would have been referred each week. Even assuming, as the government's declarations suggest, that apprehensions have increased, the government does not explain how it has determined that 60 to 140 unaccompanied minors are likely to be referred to ORR each week instead of being held in hotels. That estimate is even more inexplicable given the assertion of another government declarant that, as of September 17, 2020, "no minors are being held in hotels as part of the Title 42 program." (p.8).

Nor has the government offered testimony from any public health official explaining why holding minors in hotels, which are open to the public, presents less risk of COVID-19 exposure

and spread, both to the minors and to the public, than holding them in licensed facilities. Finally, if any of the problems prophesied by the government show signs of materializing, the district court's orders give the government the option of "alert[ing] Plaintiffs and the Independent Monitor" that "exigent circumstances . . . necessitate . . . hotel placements" and "providing good cause for why such unlicensed placements are necessary." Sept. 4 Order, 2020 WL 5491445, at *10. (p.8).

Because the issues on appeal are well developed in the parties' briefing of the government's emergency motion and the present panel will decide the merits of this appeal, the parties are not required to file further briefs in this case. Any party wishing to file a nonrepetitive brief addressing points not already discussed in the stay briefing may do so on the schedule previously established. (p.9).

XIX. October 26, 2020 Court Order [Doc. 1015]

In accordance with those provisions, as well as Paragraphs 12A and 29 of the FSA, the Court ordered ICE to disseminate to Class Members and their parents or guardians a Notice of Rights, as revised by the Court, and to issue to its employees an updated policy or instruction regarding the FSA. Sept. 18, 2020 Order at 3–4 [Doc. # 987]. (p. 1).

In light of the foregoing, the Court ORDERS the following:

1. Defendants shall continue to release Class Members from their custody without unnecessary delay in a manner consistent with the FSA and the Court's prior Orders, and consistent with concern for the particular vulnerability of minors, especially during the pandemic. FSA at ¶¶ 11, 14 [Doc. # 101]. (p.4).

2. The Court will e-mail to the parties and Amici the Court's additional edits to the draft Notice of Rights and to the ICE Directive, having considered the parties' proposed revisions. With the Independent Monitor Ms. Ordin presiding, the parties and Amici shall meet and confer regarding the Court's edits/comments to the proposed Notice of Rights and the ICE Directive and attempt to finalize the language in both. The parties shall file a Joint Status Report regarding the Notice of Rights and ICE Directive by November 30, 2020. (p.4).

…

a. The ICE Juvenile Coordinator shall also provide:
i. Specific explanations for the continued detention of each minor detained at an FRC beyond 20 days, which the Juvenile Coordinator will review with the Independent Monitor, Andrea Ordin, before submitting the updated report to the Court;
ii. Specific updates on the status of the FRC licensing regulations in the State of Texas and Defendants' efforts to obtain licensing of the FRCs in Texas, if available; and
iii. Updates on the implementation of the new ICE COVID-19 protocol, particularly in light of the Independent Monitor's forthcoming interim report on "safe and sanitary" conditions at the FRCs.
b. The ORR Juvenile Coordinator shall also identify the ORR facilities where any Class Member has contracted COVID-19 while already housed at the facility, rather than being diagnosed with COVID-19 at intake. c. Plaintiffs, Defendants, and Amici may file

responses, if any, to these interim reports by November 23, 2020, after first meeting and conferring regarding areas of dispute and attempting to achieve resolution.

4. The parties shall continue to meet and confer on the areas on which they agreed to further discussions in their October 9, 2020 Joint Status Report. [Doc. # 1002.] Those areas include: (1) preparation of a poster or other methods by which to disseminate the Notice of Rights and other suggestions of Amici for notice process; (2) video conference interviews with Class Members and video inspections of the FRCs; (3) provision of information of the reasons for placement of Class Members in a particular detention facility.

XX. Flores v. Rosen (9th Cir. Dec. 29, 2020)

In 2019, the Department of Homeland Security ("DHS") and the Department of Health and Human Services ("HHS") issued a final rule [represented as implementing, and thus terminating, the Settlement], entitled "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children ("Final Rule"), which comprises two sets of regulations: one issued by DHS and one by HHS.

As to the HHS regulations relating to unaccompanied minors, the panel held that the provisions are generally consistent with the Agreement, and may take effect, with two exceptions. First, the panel concluded that the provision allowing the Office of Refugee Resettlement ("ORR") to place an unaccompanied minor in a secure facility (*e.g.*, a state or county juvenile detention facility) if the minor is "otherwise a danger to self or others" is inconsistent with the Agreement. The panel explained that the relevant statutory provision states that a minor shall not be placed in a secure facility "*absent* a determination that the child poses a danger to self or others," not that ORR may place a minor in a secure facility whenever it makes that determination. Second, the panel concluded that the portion of the bond hearing regulations providing a hearing to unaccompanied minors held in secure or staff-secure placements *only if* they request one is inconsistent with the Agreement, which provides unambiguously for a bond hearing "unless the minor indicates . . . that he or she refuses such a hearing."

As to the DHS regulations regarding initial apprehension, processing, and custody of both unaccompanied and accompanied minors, the panel held that some of the provisions are consistent with the Agreement and may take effect: namely, the provisions regarding transfer of unaccompanied minors from DHS to HHS and those regarding DHS custodial care immediately following apprehension.

However, the panel held that the remaining regulations relating to accompanied minors depart from the Agreement in two principal, related ways: (1) they limit the circumstances in which accompanied minors may be released, and (2) they provide for the detention of families together in facilities licensed not by states but by Immigration and Customs Enforcement itself. The panel explained that these departures undermine the Agreement's core "presumption in favor of releasing minors" and its requirement that those not released be placed in "licensed, non-secure facilities that meet certain standards." Explaining that these regulations dramatically increase the likelihood that accompanied minors will remain in government detention indefinitely, the panel observed that effecting this change was one of the principal features of the Final Rule, and that the government

strongly disagrees with the court's holding in *Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016) ("*Flores I*"), that the Agreement encompasses accompanied minors.

Because the panel concluded that the differences between the regulations and the Agreement are substantial and affect the central protections afforded by the Agreement, the panel rejected the government's argument that the Agreement terminated by its own terms.

Finally, the panel held that the district court did not abuse its discretion in denying the government's motion to terminate the Agreement as to accompanied minors, as the government had not demonstrated that changed circumstances justified termination. First, the panel rejected the government's contention that, by codifying the Agreement's protections for unaccompanied minors, Congress had signaled it was leaving the treatment of accompanied minors to DHS's discretion. The panel explained that it had already held to the contrary in *Flores I*, where the court determined that the creation of statutory rights for *unaccompanied* minors does not make application of the Agreement to *accompanied* minors impermissible.

Second, addressing the government's contention that the Final Rule is a fundamental change in law justifying termination of the Agreement, the panel rejected the notion that the executive branch can unilaterally create the change that it then offers as the reason it should be excused from compliance. Although the Agreement contemplates termination upon the promulgation of *consistent* regulations, the panel explained it does not follow that the executive branch could bring about termination through the promulgation of *inconsistent* regulations.

Third, the panel rejected the government's argument that an unprecedented increase in family migration warrants termination of the Agreement. The government has three primary options when DHS encounters an accompanied minor: (1) release all family members, (2) detain the parent(s) or legal guardian(s) and release the minor to a parent or legal guardian, or transfer the minor to HHS as an unaccompanied minor, or (3) detain the family together at an appropriate family detention center. The panel observed that the government prefers the third option, but that the Agreement flatly precludes that approach. The panel explained that, if the only problem were a lack of licensed facilities to hold accompanied minors, then modification of the Agreement might be warranted, but the government sought a much more comprehensive change by jettisoning the Agreement's release mandate for accompanied minors except in narrow circumstances.

Fourth, the panel rejected the government's contention that flaws in the certified class of Plaintiffs constitute changed circumstances warranting termination of the Agreement. Observing that *Flores I* held that the government waived its ability to challenge the class certification when it settled the case and did not timely appeal the final judgment, the panel explained that the government cited no authority supporting its suggestion that the evolution of class certification standards warrants termination, particularly when the government has never moved to decertify or modify the class.

XXI. June 2021 Interim Report Filed by Special Master/ Independent Monitor Andrea Sheridan Ordin (June 22, 2021) [Doc. 1137]

1. INTRODUCTION

This Report is focused solely upon progress made by ORR Emergency Intake Sites ("EIS") since the Monitor's and Dr. Wise's last Interim Report, dated April 2, 2021. [Doc. #1103].

2. SUMMARY

The dramatic influx of minors in the Rio Grande Valley Sector ("RGV"), which was noted in the Monitor's April 2021 Interim Report [Doc. #1103], continues. As noted in that Report, the number of minors entering CBP continues to require an unprecedented response and the rapid development of emergency holding facilities, which are primarily located in Texas and California. ORR has operated the following EISs on a temporary basis to meet the influx and eliminate severe overcrowding, reduce the length of stay for minors in CBP, as well as provide safe and timely discharge or transfer to licensed ORR facilities.

There are two noteworthy developments. First, the availability of the EISs has eliminated the severe overcrowding in CBP facilities. For example, as of April 26, 2021, at the CBP facility in Donna, Texas, approximately 600 unaccompanied children ("UAC") were in custody. Although still overcrowded at 600 during a public health crisis, Donna I was home to more than 3,000 UACs a month earlier. As of May 19, 2021, the total number of minors in the RGV Sector, including the Donna I facility, was down to 463, and the June 2021 figures show that capacity remains well below maximum occupancy, with average time in custody at less than 72 hours.

Second, the length of stay in CBP custody has decreased, with average times falling below 72 hours. In the month of April 2021, 3,567 minors were in CBP custody for longer than 72 hours, with 331 minors in CBP facilities for one week or more. Comparatively, in May 2021, 906 minors were in CBP custody for more than 72 hours with only 16 minors at CBP facilities for one week or more.

3. ORR EMERGENCY INTAKE SITES

The monitored EISs are providing basic custodial services, including food, shelter, sanitary services, and medical care. All sites are designed to include educational, recreational, and mental wellness services, although the level of services varies from site to site.

4. FINDINGS AND RECOMMENDATIONS

A. Findings

❖ Finding One: Reduction in Overcrowding and Time in CBP Custody

❖ Finding Two: Length of Stay at Emergency Intake Sites

The EIS strategy is also directed at transferring children out of temporary EIS facilities in a safe and timely manner, either via family reunification or transfer to a licensed shelter. Accordingly, the number of children in EIS facilities has fallen, as has the time in EIS custody. The rate at which children are being discharged or transferred to a licensed shelter has also improved recently, with 4 of the 10 operational EISs reporting a discharge rate of over 4 minors per 100 discharged daily.

These are useful metrics and reflect intensive ORR efforts to reduce the time children spend in EIS facilities.

Despite these promising indicators, there are too many children who remain in EIS facilities beyond an appropriate length of time. It is difficult to assess the precise number of days at which EIS custody becomes inappropriate. The level of crowding, the nature of services, and age of children in the EISs vary significantly. In addition, children's vulnerabilities and resilience can be equally diverse.

❖ Finding Three: Impact on Minors from Length of Stay

Direct observations in the largest EISs, interviews with detained children and EIS staff, and consultations with child mental health experts, suggest that the risk of significant psychological and emotional harm becomes considerable after two to three weeks in EIS care.

As previously noted in this Report, almost half of all children in the EISs have been in EIS care for more than 20 days; approximately 1 in 3 children have been in EIS care for more than a month; 1 in 16 children have been in EIS care for more than two months.

It is important to recognize that some categories of children are more difficult to reunify than others. Accordingly, concentrating on elevating the cases of children residing in EISs for longer than two or three weeks and identifying early the more vulnerable and/or difficult to place categories of children could amplify the performance of the EISs in meeting their goal of rapid discharge or transfer.

There are also important approaches to reducing the risk of significant psychological trauma in EIS care, many of which ORR has implemented. Among the most important is minors' early and frequent contact with appropriately vetted family or sponsors while in EIS custody. It is encouraging to see the policy at the San Diego EIS has been revised to facilitate earlier phone contact. Early and regular contact between minors, case managers, and youth workers is also a critical component to reducing risk to the minors' well-being.

B. Recommendations

In this Report, we expand upon three of the recommendations drawn from the Monitor's last Interim Report filed in April of 2021. [Doc. #1103.]

❖ Recommendation One: Standards for Emergency Intake Sites

Continue to prioritize development of custodial, medical, and processing standards specific to EISs to ensure health and safety of the minors awaiting reunification or transfer to licensed shelters...In addition, a protocol for oversight to ensure the implementation of the case management requirements set forth in the May 24, 2021 ORR case management guidances should be considered.

❖ Recommendation Two: Case Management at Emergency Intake Sites

As stated in the Monitor's last Interim Report, dedicated case management personnel at EISs are critical to expeditious reunification with family or sponsors and to ensure safe housing for minors. Continue to upgrade the contracted case management services in order to achieve this goal. Engage additional senior, seasoned ORR personnel to provide oversight, training, and accountability.

❖ Recommendation Three: Medical Capabilities

ORR has successfully transferred its medical capabilities from a Federal Emergency Management Agency ("FEMA") disaster posture and should now concentrate on expanding access to medical and mental health services designed for the unique population at the EISs.

XXII. Flores v. Garland (9th Cir. June 30, 2021)

In March 2020, the Centers for Disease Control ("CDC") issued an order temporarily suspending the introduction into the United States of persons traveling from Canada or Mexico who would otherwise be introduced into a congregate setting. The order's stated purpose was to protect the public health from COVID-19, and it was issued under Title 42, which authorizes the Surgeon General to prohibit introduction of persons to protect against communicable disease. In October 2020, the order was replaced by the now-operative order, which is substantially the same ("Title 42 Order").

In July 2020, the Agreement's independent monitor reported that DHS was using hotels to house unaccompanied and accompanied minors pending expulsion under Title 42. Plaintiffs moved to enforce the Agreement, maintaining, among other contentions, that the hoteling program violated the Agreement's requirement that DHS ordinarily transfer minors within three days to a program licensed to provide residential, group, or foster care service. The district court issued an order on September 4, 2020, requiring DHS to stop placing minors at hotels, absent certain exceptions. On appeal, this panel denied the government's motion for a stay pending appeal. The district court then denied the government's stay motion but issued a modified order requiring DHS to stop placing minors at hotels, except for brief hotel stays (not more than 72 hours) as necessary and in good faith to alleviate bottlenecks in intake processes ("September 21 Order").

In February 2021, the CDC temporarily excepted unaccompanied minors from expulsion under Title 42. The government filed a status report with this Court stating that it was not expelling accompanied minors under the Title 42 Order, it had generally stopped using hotels for accompanied minors, and did not anticipate expanding its use of hotels. Nonetheless, the government could not state that it would not use hotels for custody in the future.

The panel concluded that this appeal was not moot, explaining that a defendant claiming that voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. In light of the government's recent representations, the panel concluded that that burden was not met here.

Next, the panel concluded that the district court's orders were consistent with the Agreement. First, the panel rejected the government's argument that minors held under Title 42 are in the custody of the CDC, rather than DHS, and therefore the district court erred in applying the Agreement here. Looking to the ordinary meaning of "legal custody" in family law, the California Family Code, and

the DHS's own regulations assertedly implementing the Agreement, the panel concluded that DHS has legal custody over minors held under Title 42 because it maintains physical control and exercises decision-making authority over such minors.

Second, the panel rejected the government's contention that the district court erred in applying a "strict three-day transfer rule." The panel concluded that the district court's orders in fact are not strict, noting flexibility to address exigent circumstances and the exception to alleviate bottlenecks.

Finally, the panel rejected the government's contention that the risk of harm to the United States and the public necessitates reversing the district court's orders. The panel explained that its prior holding, in denying the stay motion, that the government had not demonstrated irreparable harm was strengthened by the CDC's decision to except unaccompanied minors from expulsion under Title 42 and by the government's recent representations. The panel observed that, should the government seek to use hotels for custody related to Title 42 in the future, it may move to modify the consent decree and, if the district court denies the government's motion, this Court will have jurisdiction to review the denial under 28 U.S.C. § 1292(a)(1).

XXIII. Plaintiffs' Memorandum in Support of Motion to Enforce Settlement Re Emergency Intake Sites (Aug. 9, 2021) [Doc. 1161]

Since March 2021, the Department of Health and Human Services' Office of Refugee Resettlement ("ORR") has detained thousands of unaccompanied children in unlicensed detention facilities dubbed "emergency intake sites" ("EIS").

ORR's use of EISs is unprecedented: During past unexpected "influxes," ORR detained children it could not accommodate in licensed facilities in "influx care facilities," which, although not licensed to care for dependent children, were at least nominally required to meet minimum child welfare standards.

EISs, in contrast, need not meet even those minimum standards ORR has determined necessary during prior influxes. Rather, the agency has issued "guidance" positing EIS standards that are in crucial regards merely aspirational. *See, e.g., id.* at 3–4 ("*[T]o the extent practicable*, EIS *should seek to provide* the following services: Case management services for safe and timely release; A reasonable access to privacy, . . . Educational services; and Daily Recreational/Leisure time . . ." (emphasis added)); *id.* at 4 ("EIS facilities provide access to emergency health care. Additional health services are *site specific* and *may* include a limited initial medical exam . . . ." (emphasis added)).

Predictably, several EISs, most notably the Fort Bliss and Pecos EISs, have become notorious for failing to provide vulnerable children even minimum safety, care, and conditions[.]

Sadly, during interviews with Plaintiffs' counsel, children corroborated the foregoing accounts of deplorable conditions and treatment at the Pecos and Fort Bliss EISs. Yet ORR has continued to detain children at Fort Bliss and Pecos despite having hundreds of beds available at licensed facilities, the Carrizo Springs influx facility, and even at far better EISs, including the Pomona EIS.

Plaintiffs appreciate that the current number of children in ORR custody may require the use of EISs for some months more given Defendants' myopic focus on building up the EIS system to the detriment of the licensed shelter system. Plaintiffs do not, at this time, ask that the Court order the immediate closure of EISs in light of the absence of adequate alternatives to care for the thousands of children currently placed in them. But that does not excuse the agency's placing particularly vulnerable children at its worst EISs while licensed beds, influx beds, and even beds at better EISs, remain available. There are many vulnerable children at Fort Bliss and Pecos the Court can and should protect now, and Defendants must be held accountable for ensuring that EISs do not, by default, supplant the Settlement's fundamental requirement that children be placed as expeditiously as possible in licensed dependent care programs. *See* Exs. in Support of Motion to Enforce Settlement, February 3, 2015 [Doc. # 101], Ex. 1 ("FSA"), ¶¶ 1, 10.

Settlement ¶ 12 requires ORR to "hold minors in facilities that are safe and sanitary and that are consistent with [its] concern for the particular vulnerability of minors." But the Pecos and Fort Bliss EISs have not met even this standard and, given Defendants' refusal to prescribe mandatory standards for EISs, they are unlikely to do so without Court intervention. The Court should accordingly issue an order requiring Defendants to issue mandatory EIS standards without further delay.

XXIV. Plaintiffs' Response to ICE and CBP Juvenile Coordinators' Reports (Nov. 5, 2021) [Doc. 1198]

I. ICE JUVENILE COORDINATOR'S REPORT

The Immigration and Customs Enforcement (ICE) Juvenile Coordinator October 2021 Report (Doc. #1192-1) ("ICE Report") states in part that as of February 26, 2021, all families had been released from Berks and there have been no families housed there since. ICE Report at 1. Plaintiffs welcome this development and the fact that Berks has not been recommissioned for family detention.

The South Texas Family Staging Center and Karnes County Family Staging Center are being used as "short-term" residential/staging centers for family units, with the goal of "releasing families within 72 hours." *Id.* at 2. Plaintiffs welcome this development and in particular ICE's goal of releasing family units within 72 hours.

ICE also reports that due to an unprecedented increase in irregular migrant flows to the southwest border, including greater numbers of family units, existing infrastructure "cannot hold this number of individuals in a way that fully complies with the FSA and other requirements" and ICE therefore continues to secure the use of hotels to temporarily house and process family units for release. *Id.* at 4.

Plaintiffs remain concerned with the use of hotels unless Class Members detained in such facilities are promptly released and are provided with the services and care required by the FSA. Plaintiffs plan to conduct monitoring and Class Member interviews at several hotels to assess whether conditions and length of detention are in compliance with the Settlement and prior Court Orders.

ICE reports that as of October 22, 2021, there were 126 Class Members at the ICE FSCs, 198 in hotels, and one in secure juvenile detention, for a total of 325 Class Members in ICE custody, down from the 562 detained as of the Juvenile Coordinator's last report. *Id.*

ICE further reports that as of October 22, 2021, Class Members at Karnes were detained an average of four (4) days, Class Members at the South Texas Facility were detained an average of 4 days, and Class Members in hotels were detained an average of three (3) days.

Overall, these numbers are far less than the numbers of Class Members previously detained by ICE and the length of their detention has been significantly reduced. Plaintiffs welcome the fact that it appears that the speed with which Class Members and their accompanying parent(s) or legal guardian(s) are being processed and released from ICE custody has increased significantly.

ICE reports that the FSCs and hotels that house Class Members continue to follow the COVID-19 mitigation practices set forth in the ERO PRR for social distancing, shift staggering, sick leave policies, vaccination access, and other measures to ensure continuity of operations. Subject to further monitoring, at present Plaintiffs have no further recommendations with regards measures to prevent and slow the spread of COVID-19 within ICE facilities.

Finally, ICE reports that between August 24, 2021, and October 18, 2021, it did not house any Class Members pending expulsion under Title 42 processes at an ICE facility or hotel. *Id.* at 9.

II. CBP JUVENILE COORDINATOR'S REPORT

The CBP Juvenile Coordinator's October 29, 2021 Report ("CBP Report") (Doc. # 1192-3) indicates that family unit (FMU) encounters, including both adults and children, decreased by 25.7%, and unaccompanied children (UCs) encounters decreased by 23.7% across the SWB. *Id.* at 2. On average, in September 2021, there were 772 UCs in CBP custody per day, compared to August 2021 when there were an average of 1,435 UCs in custody per day. *Id.*

The Report indicates that as of October 14, 2021, there were 575 UC's in custody in the Southwest Border and 290 in the RGV Sector. At the same time, there were 1.210 FMU minors in custody in the Southwest Border, and 771 in the RGV Sector.

Plaintiffs are pleased to see that the average time in CBP custody has decreased somewhat for both FMU minors and UCs.

Plaintiffs are concerned and suggest the Court inquire at the next status conference, if the CBP Juvenile Coordinator knows or can determine prior to the next status conference –

• Why as of October 14, 2021, in the RGV Sector where UC's were detained an average 19.70 hours, were minors in FMUs detained an average of 50.58 hours, two and a half times longer than UCs?

• Why as of October 14, 2021, in the Southwest Border, where UC's were detained an average 22.63 hours, were minors in FMUs detained an average of 48.82 hours, more than twice the length of time UCs were detained?

• What, if any, plans does CBP have in the Southwest Border and in the RGV Sector to speed up the release of FMU minors?

• Similarly, what, if any, steps is CBP taking in the Southwest Border and in the RGV Sector to speed up the release of FMU minors?

CBP next reports that it conducts health intake interviews, including COVID-19 considerations and temperature checks, on individuals in custody upon entry into CBP facilities. If Class Members entering CBP custody display COVID-19 symptoms or are suspected of having COVID-19, CBP reports that they are taken from the CBP facility to a local health care facility for medical care, COVID-19 testing (if appropriate), and treatment. *Id.* at 4.

Plaintiffs suggest that the Court inquire and the CBP Juvenile Coordinator explain at the next status conference –

• Does CBP maintain data on the number of class members who are suspected of having COVID-19 and taken from a CBP facility to a local health care facility for medical care and are tested positive for COVID-19?

• If the CBP does maintain such data, can it be shared with the Court or Class Counsel?

• If the CBP does not maintain such data, could it start doing so in order to better asses show many Class Members it detains actually are infected with COVID-19 while in CBP custody?

• Other than distributing face masks, and encouraging social distancing, what steps, if any, is CBP currently taking to avoid the spread of COVID-19 among detained Class Members?

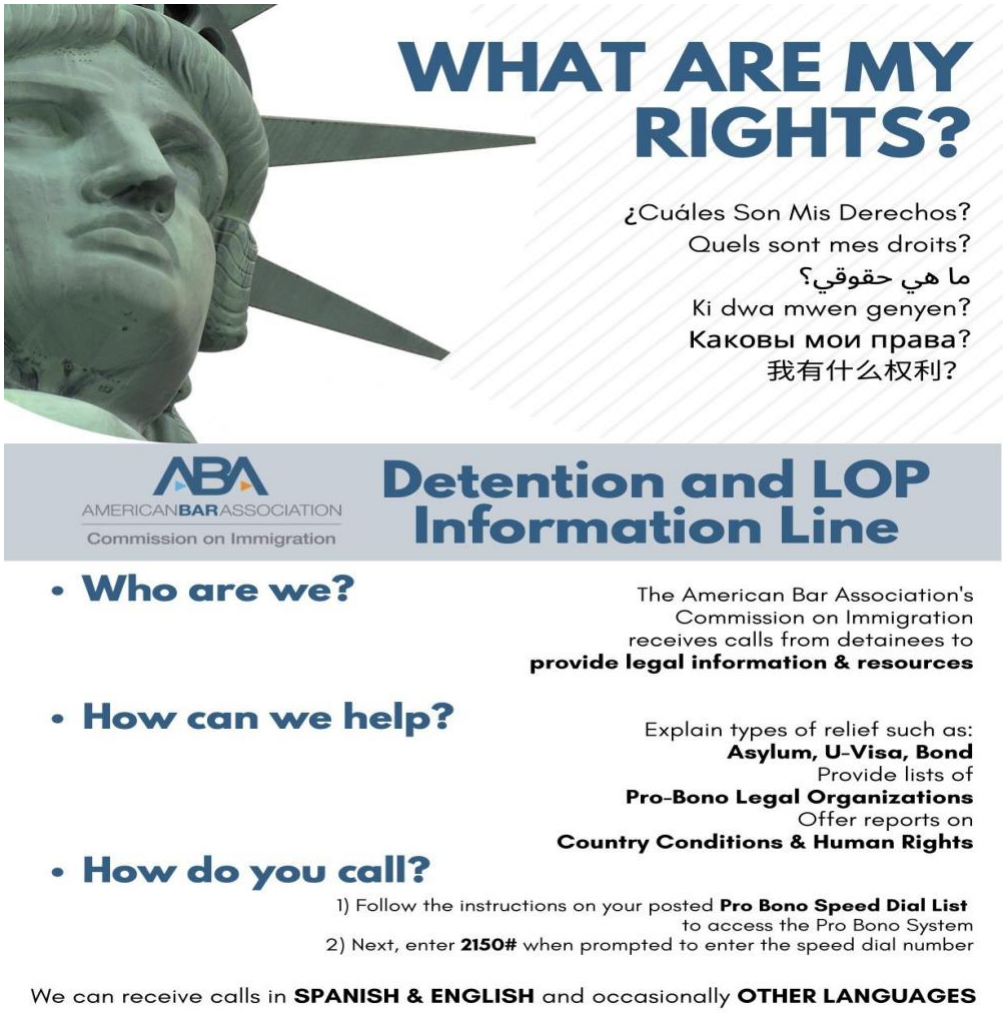
• Has CBP taken any steps, and if so, what steps, to permit FMUs and UCs to engage in social distancing while detained by CBP in the SW Border or in the El Paso and RGV Sectors?

While Class Counsel remain concerned with the length of detention of Class Members at CBP facilities and the conditions of detention, Plaintiffs can report that efforts to arrive at a settlement of Plaintiffs' request for a Temporary Restraining Order and Preliminary Injunction (ECF No. 572) seeking to enforce compliance with the Settlement regarding conditions and processing of Class Members at CBP facilities in the Rio Grande Valley and El Paso Sectors have resumed and in Class Counsel's opinion continue to make substantial progress.

If finalized and approved by the Court, the new agreement will for the first time set detailed standards, protocols, and independent medical monitoring at CBP facilities in the Rio Grande Valley and El Paso Border Patrol Sectors aimed at enhancing the safety and well-being of Class Members in CBP custody and ensuring CBP compliance with the *Flores* Settlement and the Court's prior Orders.

EXHIBITS

Exhibit A: What Are My Rights?



¿CUÁLES SON MIS DERECHOS?

What are my rights?
Quels sont mes droits?
ما هي حقوقي؟
Ki dwa mwen genyen?
Каковы мои права?
我有什么权利?

AMERICANBARASSOCIATION
Commission on Immigration

LÍNEA DIRECTA DE AYUDA PARA DETENIDOS

- **¿Quienes somos?**

La American Bar Association
Comisión de Inmigración
Recibe llamadas de detenidos para
Proporcionarles información y materiales legales

- **¿Cómo ayudamos?**

Explicamos diferentes formas de remedio de inmigración, tales como **el asilo, la visa U y las fianzas**

Proporcionamos listas de **organizaciones legales pro bono**
Ofrecemos reportes de **derechos humanos en su país**

- **¿Cómo llamarnos?**

1) Siga las instrucciones publicadas en su lista de *Pro Bono Speed Dial* para acceder al Sistema Pro Bono
2) Siguiente, marca **2150#** cuando se solicite marcar el número del Speed Dial

Podemos recibir llamadas en **español e inglés** y a veces en **otros idiomas.**