



Nothing about us without us!

November 6th, 2018

Debbie Seguin, Assistant Director, Office of Policy, U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Re: DHS Docket No. ICEB-2018-0002, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children (published Sep. 7, 2018, 83 Fed Reg. 45486)

The Autistic Self Advocacy Network (ASAN)¹ appreciates the opportunity to offer comments on the proposed rule amending regulations relating to the detention of immigrant children by the Department of Homeland Security (DHS) and the Department of Human Services (DHS).

ASAN opposes this proposed rule, as it improperly terminates the *Flores* Settlement Agreement (FSA) without incorporating provisions of that agreement that protect the safety and well-being of immigrant children, including children with disabilities, into its regulations. As noted by our statement, “ASAN Condemns Family Separation,”² ASAN has a long history of opposition towards the inherent cruelty and abuse resulting from institutionalization in all its forms, including the institutionalization and unjust incarceration of children. ASAN has worked, in conjunction with organizations both national and international, to reduce institutionalization and expand the use of services that keep people in their communities.

We cannot condone policies which could lead to the long-term incarceration of vulnerable youth and the separation of those youth from their families. We outline our concerns in further detail below.

¹ ASAN, a 501(c)(3), non-profit organization, is the nation’s leading self-advocacy organization by and for autistic people ourselves. Our mission is to advance the social and civil rights of Autistic people and other individuals with disabilities. For more information on ASAN, go to <http://autisticadvocacy.org/>

² Autistic Self Advocacy Network, *ASAN Condemns Family Separation* (June 18, 2018), <http://autisticadvocacy.org/2018/06/asan-condemns-family-separation/>.

ASAN opposes the provisions of the proposed rule which appear to promote the placement of children and families together in family residential centers (FRCs), institutions known to have deleterious effects on the welfare of children.

FRCs are prison-like or institution-like containment facilities, where mothers are housed with immigrant children.³ The FSA provides immigrant children with basic protections from the negative impact of such detention by requiring, if they are not released to immediate family members, that they be interned only in facilities licensed by the state to care for children.⁴ FRCs are not such facilities. State facilities must, under the *Flores* Settlement Agreement, provide children with healthcare, educational, and counseling services appropriate to their age and situation.⁵ Due to subsequent court rulings relating to the implementation of the FSA, in fact, minors generally are not to be held at FRCs for longer than 20 days.⁶

The proposed rule states repeatedly that it proposes to reduce or eliminate the rules restricting the government's use of FRCs for the purposes of "family unity."⁷ The government indicates, without any reference to available alternatives, that the FSA makes it more difficult for the government to place children and their families together.⁸ One of the primary provisions of the proposed rule creates a system of federal licensing for FRCs.⁹ The proposed rule, by licensing all FRCs, would allow the Departments to place parents and children together at FRCs until the immigration proceedings for both are concluded, which can take months.¹⁰

³ See Emily Kassie and Eli Hager, Inside Family Detention, Trump's Big Solution, The Marshall Project, News (June 22, 2018, 12:30PM), <https://www.themarshallproject.org/2018/06/22/inside-family-detention-trump-s-big-solution> (describing a facility with conditions very similar to those in a prison or institution).

⁴ *Jenny Lisette Flores et. al. v. Janet Reno, Attorney General of the United States*, Case No. CV-85-4544-RJK (Px), Stipulated Settlement Agreement, https://cliniclegal.org/sites/default/files/attachments/flores_v_reno_settlement_agreement_1.pdf.

⁵ *Id.*

⁶ *Jenny Lisette Flores et. al. v. Janet Reno, Attorney General of the United States*, Case No. CV-85-4544-RJK (Px), Order Re Response to Order to Show Cause, <https://www.aila.org/File/Related/14111359p.pdf> (C.D. Cal., August 22, 2015).

⁷ Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45486, 45493, 45500 (proposed September 7, 2018) (to be codified at 45 C.F.R. § 410, 8 C.F.R. § 212, and 8 C.F.R § 236).

⁸ 83 Fed. Reg. at 45493-494.

⁹ *Id.* at 45495.

¹⁰ *Id.* at 45493 ("This rule would allow for detention at FRCs for the pendency of immigration proceedings (subject to all applicable statutes and regulations governing their detention or release) in order to permit families to be detained together and parents not be separated from their children"); Nick Miroff and Maria Sachetti, *Trump administration to circumvent court limits on detention of child migrants*, The Washington Post (September 6, 2018), https://www.washingtonpost.com/world/national-security/trump-administration-to-circumvent-court-limits-on-detention-of-child-migrants/2018/09/06/181d376c-b1bd-11e8-a810-4d6b627c3d5d_story.html?utm_term=.8b208f8ab16b ("...it seeks the authority to hold migrant children and their parents until their cases have been adjudicated, a process that could take months").

Detaining families together in FRCs is not a solution to the problem of family separation. In fact, it would cause more problems than it solves. Immigrants previously detained in the South Texas Family Residential Center in Dilley, for example, report abhorrent conditions and poor-quality medical treatment.¹¹ There are a number of credible reports of abuse by FRC staff.¹² In addition, FRCs, as a prison-like environment, inflict the ills of detention on vulnerable children. All forms of detention are known to disrupt child development, and they increase the likelihood that the child will experience adverse mental health effects, such as depression and symptoms of post-traumatic stress disorder.¹³

ASAN itself is well aware of many of these effects of institutionalization as a result of its work as a disability rights organization. Historically, children and adults with disabilities were confined to institutions. Children with disabilities today are sometimes confined in settings very similar to institutions because of their disabilities, such as residential treatment centers for troubled youth and some assisted living centers and intentional communities. This confinement inflicts the same harm on children with disabilities that it does to all other children: it damages our mental health and ability to learn, grow, and develop independent living and self-advocacy skills.

Many immigrant children entering the United States may have a diverse variety of disabilities themselves. Aside from stating that minors will be detained in “the least restrictive setting appropriate to the minor’s age and special needs,” and noting that “unaccompanied alien children” (UACs) who are “special needs minors” will be placed “whenever possible” in the same setting as other UACs (but a setting “which provides services and treatment for such special needs”), the proposed rule barely mentions disability.¹⁴ In fact, when determining whether a child will be placed in a secure facility (which under the proposed rule means a juvenile detention or juvenile detention-like facility) on the basis of having committed a crime or being likely to cause harm to self or others, the proposed rule barely considers the impact of a child’s disability at all.¹⁵ In fact the only disability-related alteration is placement of UACs in a residential treatment center if a licensed psychologist or psychiatrist determines the child is at risk of harming

¹¹ Sharon Lerner, *Mother’s Day in an ICE Detention Center*, *The Intercept* (May 14, 2017, 8:43 a.m.), <https://theintercept.com/2017/05/14/mothers-day-in-an-ice-detention-center/>; Ed Pilkington, ‘Soul-destroying’: one migrant mother’s story of life at Dilley detention center, *The Guardian* (May 22, 2015, 7:00AM), <https://www.theguardian.com/us-news/2015/may/22/immigrant-mothers-dilley-family-detention-center-texas>.

¹² Stuart Anderson, *What Happens to the Children Now?* *Forbes* (June 21, 2018, 1:07AM), <https://www.forbes.com/sites/stuartanderson/2018/06/21/what-happens-to-the-children-now/#3428c1705632>.

¹³ Anne Lorek et al., *The Mental and Physical Health Difficulties of Children Held Within a British Immigration Detention Center: A Pilot Study*, 33 *Child Abuse and Neglect* 573 (2009); Rachel Kronick et al., *Asylum-seeking Children’s Experiences of Detention in Canada: A Qualitative Study*, 85 *Am. J. Orthopsychiatry* 287 (2015).

¹⁴ 83 Fed. Reg. at 45526, 45531.

¹⁵ 83 Fed. Reg. at 45527 (circumstances under which a minor who is not a UAC can be held in or transferred to a “secure facility”); 83 Fed. Reg. at 45529 (definition of “secure facility” for UAC-related regulations); 83 Fed. Reg. at 45530 (circumstances under which UACs can be transferred to a “secure facility”).

themselves or others.¹⁶ The proposed rule's licensing scheme for FRCs is therefore likely to harm children with disabilities and will not meet their needs.

The proposed system of federal licensing does nothing to resolve these broader systemic issues with FRCs. While the Proposed Rule would incorporate provisions in the *Flores* Settlement Agreement that act as minimum standards any facility housing children must meet, application of these standards to the FRCs is not enough to ameliorate the profound negative impact of detention itself.¹⁷ ASAN strongly condemns this effort by the Administration to take a stance that harms vulnerable children and families.

The proposed rule does not mention or acknowledge alternatives to detention, which would better serve the health of immigrant children, DHS' stated goal of "family unity," and would successfully ensure compliance with immigration proceedings.

Alternatives to detention in secure facilities include electronic monitoring of movements via ankle bracelets¹⁸ and other tracking devices, programs designed to reduce use of detention), such as the Intensive Supervision Appearance Program, and monetary incentives to appear in court (such as bonds).¹⁹ These alternatives have proven no less effective at ensuring immigrants comply with immigration proceedings in court than detention. In fact, according to the American Civil Liberties Union, the company running the Intervention Supervision Appearance Program reported that in 2013 99.6% of Full-Service participants show up for their immigration court hearings and 79.4% complied with removal orders.²⁰ The Family Case Management Program, a pilot program for asylum seekers and their families, allowed those families to live in the country with supervision from a case worker while their immigration cases were pending.²¹ The Family Case Management Program was canceled even though it was more cost-effective than family

¹⁶ 83 Fed. Reg. at 45530.

¹⁷ 83 Fed. Reg. at 45487-488.

¹⁸ There are significant problems with the use of ankle bracelets to keep track of immigrants (such as in the Intensive Supervision Appearance Program), as these devices may be unnecessarily punitive, treat the immigrants as equivalent to criminals, and may have a negative psychological impact. However, they are superior to the use of detention facilities.

¹⁹ Alex Nowrasteh, *Alternatives to Detention Are Cheaper than Universal Detention*, The Cato Institute, Cato At Liberty (June 2018), <https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention>; American Civil Liberties Union, *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up* (January 2014), <https://www.aclu.org/other/aclu-fact-sheet-alternatives-immigration-detention-atd> [hereinafter "American Civil Liberties Union."]

²⁰ American Civil Liberties Union at 2.

²¹ Jane C. Timm, *This Obama-era pilot program kept asylum-seeking migrant families together. Trump canceled it*, NBC News (June 24, 2018, 8:02 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896>.

detention and, according to the Inspector General, its participants had a high rate of compliance with immigration proceedings.²²

The proposed rule does not mention these available models for alternatives to detention anywhere. Instead, it appears to treat detention as the only option available to the Departments. ASAN condemns the apparent lack of investigation into alternatives available to the Departments and the consequent emphasis on unnecessarily punitive measures.

ASAN condemns the wholesale adoption of improper terminology for people with intellectual and developmental disabilities (I/DD) in these regulations which, while present in the FSA, is entirely inappropriate for use and offensive to people with I/DD.

The word “retardation” is used twice within these regulations, in the definition of the term “special needs minor” on pgs. 45529 and 45525 of these regulations. This term for people with I/DD is not only obsolete but offensive. The term’s derivations are in regular use as a slur that dehumanizes, demeans, and does very real emotional harm to people with I/DD. Advocates with I/DD and allies have long fought to eliminate the word in all its forms from public discourse.

The proposed rule states that it is “proposing to adopt” the definition of “special needs minor” included in the FSA. While the definition in the proposed rule is indeed identical to the definition contained within the FSA, reuse of the harmful term in a modern proposed regulation only serves to legitimize it, and thereby the tremendous harm it has done to people with I/DD. ASAN, in the strongest possible terms, condemns this careless adaptation of the FSA terminology.

ASAN calls upon the Departments to rescind this Proposed Rule and to seek alternatives to detention that better protect the health and welfare of immigrant families, including those who have members with disabilities. For more information on ASAN’s positions with respect to immigration and the welfare of immigrants with disabilities please contact Samantha Crane, Director of our Legal and Public Policy Team, at scrane@autisticadvocacy.org.

²² *Id.*