Comments on New Rules for the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children
ICEB–2018–0002

Children’s Rights appreciates this opportunity to provide comments to the Department of Homeland Security (DHS) and the Department of Health and Human Services (DHHS). Children’s Rights opposes DHS’s and DHHS’s proposed rules. Through this rulemaking, DHS purportedly seeks to implement the settlement agreement between the parties in Flores v. Reno.¹ To that end, DHS, in its proposed rules at times slavishly mimics the language of the Flores agreement and at times ignores it completely. DHS does not, however, consider essential factors that concern the detention of children and their families—like potential harms, readily available alternatives, or the financial cost of its actions.

In particular, DHS’s regulations fundamentally change the way the release of a child from immigration detention is decided. Under current rules, a child is released from custody unless detention is required for safety or to ensure court attendance.² Under DHS’s proposed changes, however, a child will remain in detention unless the child’s family meets the more stringent and discretionary requirements of “bond or parole” that apply to adults.³ DHS itself anticipates that this change will result in the lengthened detention of thousands of children.⁴

The Administrative Procedure Act prohibits DHS from unconstitutional, “arbitrary,” and “capricious” decision-making.⁵ To make the changes it proposes, the agency must thus “examine the relevant data and articulate a satisfactory explanation for its action including

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² 8 C.F.R. § 236.3(b)(1)(iii).
³ 83 Fed. Reg. at 45493. The proposed changes thus entirely undermine the letter and spirit of the Flores settlement, which minimizes the time children spend in detention.
⁴ 83 Fed. Reg. at 45518-19. DHS’s estimate that 2,787 children will stay longer in Family Residential Centers is clearly an undercount. DHS does not include, for example, the over two thousand children that DHS separated from their parents but who will now be detained to “maintain family unity” under proposed § 236.3(h). Id. at 45526.
⁵ 5 U.S.C. § 706(2)(A) and (B).
a 'rational connection between the facts found and the choices made.'

DHS in proposing these rules does not meet this standard, and the rules must therefore be rejected. DHS justifies its decision to detain families on a need to deter migrants from seeking refuge in the United States. This justification is unconstitutional and all the available evidence points to detention being an ineffective deterrent. Further, DHS's attempt to solve its self-created problem of separating migrant families by increasing its use of detention facilities will do immeasurable and unnecessary harm to those it affects—many of whom are legitimate asylum seekers. Detaining these families will also undoubtedly cost the American taxpayer millions of additional dollars—money that might be saved if DHS invested in any of its readily available and more effective alternatives. But DHS fails to address the harm its rules will cause and these alternatives in its proposed rulemaking.

DHS cannot promulgate rules solely to end a settlement agreement. If DHS wishes to change the rules it applies to the detention of children it must do so in a reasoned way that fairly considers the relevant evidence. DHS has not done so here.

I. DHS justifies its proposed rules on deterrence—a constitutionally impermissible basis lacking factual support

DHS's sole justification for the proposed rules that would expand DHS's ability to detain children is that releasing them with their families may "incentivize" others to migrate to the United States. The law, however, prohibits DHS from grounding its decision to detain migrants on the need to deter them from seeking entry into the United States. Even more, DHS's justification ignores the clear weight of evidence demonstrating that detention is an ineffective deterrent.

A. DHS's deterrence rationale is unconstitutional

The Due Process Clause of the Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The Due Process Clause's guarantee applies to all people in the United States, regardless of their immigration status. At the "heart" of this guarantee is the "[f]reedom from imprisonment—from

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7 83 Fed. Reg. at 45493. DHS also mentions that keeping families together is a purpose of the rule, but as noted above, DHS not explain why releasing families on parole, bond, or to an alternative form of detention does not satisfy this purpose.
8 State Farm Mut. Automobile Ins. Co., 463 U.S. at 43 (explaining that an agency may not offer "an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view").
9 U.S. Const., amend. V.
government custody, detention, or other forms of physical restraint.”

Detention during the pendency of civil proceedings, like the immigration proceedings at issue in these proposed rules, thus has only ever been permissible in “special and ‘narrow’ nonpunitive circumstances” where “a special justification, such as harm-threatening mental illness, outweighs the individual’s ‘interest in avoiding physical restraint.’” Deterrence is not such a justification.

The courts have generally limited acceptable justifications for civil detention to circumstances in which the detained individual poses a threat to himself or the public and situations in which limited detention is necessary to ensure that an individual complies with court or administrative process. Deterrence has never been a sufficient justification for civil detention generally. In the context of immigration, a federal district court specifically addressed the constitutionality of deterrence as a justification for “custody determinations.” The court in that case issued a preliminary injunction enjoining ICE’s policy because there was a “significant likelihood” that it violated “constitutional constraints.”

Even if deterrence were a permissable justification for civil immigration detention, it is not “sufficiently strong” to support the authority DHS seeks to claim. DHS seeks to alter its rules to give immigration officers the discretion to detain both children who have entered the United States illegally and those lawfully seeking admission to the United States. A significant number of the recent migrants to this country from Latin America are asylum seekers with legitimate claims. As an initial matter, it is unclear from DHS’s explanation of its proposed rule whether DHS is seeking to deter both legal and illegal migration to the United States. The government, however, has no legitimate interest in using incarceration to deter lawful activity, like seeking asylum, which is specifically authorized by Congress. DHS cannot therefore lawfully detain children seeking entry because of a perceived need to deter others from “entering the United States illegally.” And if DHS is seeking to deter illegal entry, this approach is overbroad and ineffective: the government already has at its disposal a far more targeted approach—the ability to criminally prosecute aliens who

14 Kansas v. Crane, 534 U.S. 407, 412 (2002) (explaining that civil detention may not “become ‘a mechanism for retribution or general deterrence’—functions properly those of criminal law, not civil commitment”).
18 Ingrid Engly, et al., Detaining Families: A Study of Asylum Adjudication in Family Detention, 106 Cal. L. Rev. 785, 846 (2018) (finding that 49% of families released from detention and represented by counsel and 37% of those that remained detained were successful in their asylum claims).
illegally enter the United States.\textsuperscript{20}

B. Detention does not deter immigration

DHS, in relying on its deterrence rationale, also ignores the substantial body of evidence demonstrating that detention does not deter migrants. Careful analyses of border control measures have shown that restrictive measures like detention “do not have a lasting impact on the number of arrivals.”\textsuperscript{21} Rather, these measures tend to change the way migrants cross the border in ways that make the journey more dangerous.\textsuperscript{22} This is in part because migrants have a “very limited...understanding” of the immigration policies in the country to which they are immigrating.\textsuperscript{23} And individuals decide to leave their country and decide where to go based on a complex set of factors. These factors include the political, social, and economic circumstances that they are escaping from and the availability of jobs and family in their destination country, most of which have nothing to do with detention policies.\textsuperscript{24} As one important study found, “no empirical evidence is available to give credence to the assumption that the threat of being detained deters irregular migration, or more specifically, discourages persons from seeking asylum.”\textsuperscript{25}

DHS, however, does not address any of this evidence in its proposed rulemaking. Instead, DHS relies on a single drop in apprehensions at the Southwest Border between 2014 and 2015 to claim that changes in family detention policy led to the decrease and that the court’s decision in Flores, requiring the release of children, led to the explosion in family apprehensions from 2016 – 2018.\textsuperscript{26} But this conclusion cannot be supported by the facts.

First, in 2015 and 2016 there were similar decreases and increases in all apprehensions, individuals and families, at the Southwest border (and in all apprehensions generally), suggesting that changes in the flow of migrants were not caused by changes in family detention policy.\textsuperscript{27} Second, the Trump administration’s “Zero Tolerance” and family separation policies were in effect in 2017 and 2018 yet family apprehensions at the Southwest border are still at an all-time high.\textsuperscript{28} Third, DHS’s statistics say nothing about what proportion of these apprehensions are related to migrants illegally entering the U.S as opposed to migrants lawfully seeking admission. DHS’s apprehension statistics thus do not

\textsuperscript{20} 8 U.S.C. § 1325.
\textsuperscript{21} Int’l Detention Coalition, Does Detention Deter? 3 (April 2015) (collecting studies).
\textsuperscript{22} Int’l Detention Coalition, Does Detention Deter? 3 (April 2015).
\textsuperscript{23} Int’l Detention Coalition, Does Detention Deter? 4 (April 2015).
\textsuperscript{24} Int’l Detention Coalition, Does Detention Deter? 3-4 (April 2015).
\textsuperscript{26} 83 Fed. Reg. at 45493.
support the conclusion that failing to detain children has led to a spike in illegal immigration.

In brief, DHS rests its proposed rule changes on an unconstitutional basis and fails to address the evidence showing that its decision runs counter to the available evidence. As a result, DHS's proposed rules must be rejected.

II. The Proposed Regulations Fail to Consider Alternatives to Detention that are Cheaper and Less Harmful to Children and Families

A. DHS fails to consider the harms caused by detaining children and families

A large and growing body of evidence demonstrates that detaining a child and her family damages the mental and physical health of every member of the family.\(^\text{29}\) Children are particularly vulnerable to the dangers of detention. Studies have found that detained children suffer from "heightened rates of suicide," "mental disorder," and a host of developmental maladies including "insomnia, nightmares, mutism, and bed-wetting."\(^\text{30}\) The detention of children, whether with their families or otherwise, also impedes a child's educational development.\(^\text{31}\) For children, "even brief detention can cause psychological trauma and induce long-term mental health risk for children."\(^\text{32}\) As the American Academy of Pediatrics has explained, "there is no evidence that any time in detention is safe for children."\(^\text{33}\)

Parents too suffer in detention. Studies show that detained adults face increased risk of physical ailments like "musculoskeletal, gastrointestinal, respiratory, and neurologic symptoms."\(^\text{34}\) They also suffer increased risks of mental health ailments like posttraumatic


\(^\text{30}\) Int'l Detention Coalition, Never in a child's best interests 2(June 2017).


stress disorder, depression, and self-harming.\textsuperscript{35} And detention undermines the parental role itself by undermining parental authority and leading to difficulty with relationships.\textsuperscript{36}

The negative impact of detaining children and families is further amplified by the traumatic experiences family members suffer before arriving in the United States.\textsuperscript{37} More than 95% of the migrant families crossing our Southwest border are from Central America, particularly Guatemala, Honduras, and El Salvador.\textsuperscript{38} These families are fleeing violence and instability as evidenced by the fact that 90% are found to have a credible fear of persecution if they are returned.\textsuperscript{39} Further, the journey itself is a harrowing one with families often experiencing additional trauma during the journey - a fact that even DHS acknowledges.\textsuperscript{40} It is well-documented that this history of traumatic experiences makes children and their families more vulnerable to the dangers inherent in detention.\textsuperscript{41}

All of these injuries are further compounded by the substandard conditions that families find when in DHS’s detention facilities. As ICE’s own Advisory Committee on Family Residential Centers (FRC) found, “[t]he FRCs’ problems are longstanding and much-noted.”\textsuperscript{42} At its core, DHS’s management of family detention centers is “premised upon criminal justice models.”\textsuperscript{43} This leads to inappropriate punitive conditions in facilities that are meant to care for “families with minor children, many of them seeking asylum—not of


\textsuperscript{37} Report of the ICE Advisory Committee on Family Residential Centers 11-12 (Oct. 7, 2016).


\textsuperscript{39} Am. Immigration Lawyers Assoc., Due Process Denied: Central Americans Seeking Asylum and Legal Protection in the United States 13 (June 16, 2016).

\textsuperscript{40} 83 Fed. Reg. at 45493 (discussing “the dangerous overland journey to the border with juveniles, a practice that puts juveniles at significant risk of harm”).


\textsuperscript{42} Report of the ICE Advisory Committee on Family Residential Centers 38 (Oct. 7, 2016).

\textsuperscript{43} Report of the ICE Advisory Committee on Family Residential Centers 25 (Oct. 7, 2016).
criminal defendants and convicted inmates.”44 As one would expect, the results have been horrifying.

In 2009, for example, DHS was forced to close its then-largest family detention center after revelations of abuses were made public concerning the separation of children from their families at night, inadequate food, and inadequate physical and medical care.45 And as recently as 2014, DHS closed its family detention center in Artesia, New Mexico after very similar reports surfaced of DHS’s failure to provide educational services, adequate healthcare, and adequate food.46 Since then, independent non-governmental organizations have continued to find that DHS fails to provide even basic care at its detention facilities.47 For example, in lieu of providing rudimentary medical care, staff at FRCs have been directing mothers and children to “drink more water.”48 At the Dilley FRC, a nurse told a child who had been suffering from diarrhea for over two weeks to drink water.49 Similarly, at the Berks FRC, rather than providing medical care to a toddler who was vomiting blood, staff told him to drink hot or cold water.50

Family detention also violates long-standing, internationally accepted human rights, including the child’s right to have her best interests govern her treatment and the child’s right to be free of arbitrary detention.51 These principles are also enshrined in United

48 Am. Immigration Council et al. to DHS re: ICE’s Failure to Provide Adequate Medical Care to Mothers and Children in Family Detention Facilities (July 20, 2015).
49 Am. Immigration Council et al. to DHS re: ICE’s Failure to Provide Adequate Medical Care to Mothers and Children in Family Detention Facilities (July 20, 2015). The child had to wait in line for 6-7 hours a day for 7 days in a row to receive this advice.
50 Am. Immigration Council et al. to DHS re: ICE’s Failure to Provide Adequate Medical Care to Mothers and Children in Family Detention Facilities (July 20, 2015).
51 Convention on the Rights of the Child, G.A. Res. 44/25, Art. 3 (Nov. 20, 1989), www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx (“In all actions concerning children . . . the best interests of the child shall be a primary consideration.”) and Art. 37(b) (“No child shall be deprived of his or her liberty . . . arbitrarily. The arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time.”).
States law. As the Committee on the Rights of the Child—the body charged with monitoring the implementation of the convention—has explained, the child’s best interests must supersede state aims like “general migration control.” And “[d]etention cannot be justified solely on the basis of the child’s migratory or residence status” a principle independent of whether the child is migrating as part of a family unit.

Virtually every authority to consider the issue has found that the child’s interest in being free from detention implies the right of the child’s family to be free from detention with the child. The Inter-American Court of Human Rights, for example, declares that “the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.” Similarly, the UN Special Rapporteur on Torture has found that the detention of families with children because of the “parents’ migration status” “exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.”

ICEs Advisory Committee on Family Residential Centers thus recommended in 2016 that DHS discontinue its use of Family Residential Centers:

DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families—and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children. DHS should discontinue the general use of family detention, reserving it for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release.

But DHS, in proposing these new rules, ignores this recommendation (along with all of the

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52 See, e.g., 42 U.S.C. § 671(e), (g); § 675; § 675a; 8 U.S.C. § 1232(c) (best interest of the child); Zadovydas v. Davis, 533 U.S. 678, 690 (2001) (freedom from arbitrary detention).
53 UN Committee on the Rights of the Child, General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRC/GC/2005/6, ¶ 86.
54 UN Committee on the Rights of the Child, supra note 53, ¶ 61.
55 See Int’l Detention Coalition, Never in a child’s best interest 5 (June 2017) (citing the Committee on the Rights of the Child; the UN Special Rapporteur on the Human Rights of Migrants; the UN Special Rapporteur on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment; and the Inter-American Court of Human Rights).
Committee's other recommendations) and the massive body of evidence demonstrating that the detention of children and families is always harmful and violates basic human rights. Indeed, despite the tremendous harm that the proposed rules are poised to do, not one word of DHS's rulemaking addresses the human cost of detaining children and families.

B. DHS fails to provide any evidence that detaining families is necessary to enforce the immigration laws

DHS's failure to consider the human cost of detaining children and families is especially troubling because DHS has at its disposal alternatives to incarceration that would allow it to enforce immigration law. Yet, here again, DHS fails to address any of these viable and cheaper alternatives in proposing its new rules.

As an initial matter, the available evidence shows that there is no need to detain most of the migrant families entering the United States. As one recent study found, 86% of all released family members and 96% of all asylum seekers attended all their immigration court hearings.59 Thus for most families, a quick determination whether the family “pose[s] a danger to property or persons” and whether the family members are “likely to appear for any future proceeding” would be sufficient to release the family.60 And for those that DHS determines need additional inducement, DHS has the option of requesting bond.61

In support of its decision to use detention facilities, DHS points to immigration law that it claims mandates detention in some instances.62 But this is largely a problem of DHS's own creation. The statute identifies only a few narrow categories of migrants, for example, those who have committed crimes, for which detention during their immigration proceeding is absolute.63 DHS is detaining many families, however, under discretionary policies including the Trump administration's "Zero Tolerance" policy of prosecuting border-crossers and DHS's choice to place families in expedited removal proceedings.64 The administration could

59 8 C.F.R. § 236.1(c)(8).
64 8 U.S.C. § 1225(b)(1). The statute provides that migrants who are fraudulently seeking admission and migrants without valid documentation must be placed in expedited removal proceedings and thus also detention. But the statute also gives DHS the discretion to use expedited removal for additional groups—discretion that the government has used. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); Memorandum from John Kelly, Secretary of Homeland Security, to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Protection et al., re: Implementing the President’s Border Security and Immigration Enforcement Improvements Policies
begin reversing these policies tomorrow and end the unnecessary detention of thousands of families.\textsuperscript{66}

Doing so would likely yield large cost savings to the American taxpayer. As noted above, most migrant families need no supervision to ensure that they attend immigration court hearings. Further, scaling back the rate at which families are detained will likely save the American taxpayer hundreds of millions of dollars. DHS estimates that family detention centers will cost the United States government \$290.9 million in FY 2019.\textsuperscript{67} That estimate is based on historical costs, calculated before DHS accounts for the increase in number of detainees and increased time spent in detention under the proposed rules.\textsuperscript{68} Taking discretionary steps to slash detention levels could allow these funds to be put to more appropriate uses.

For those families that DHS must detain, DHS has alternatives to detention facilities that are cheaper and less restrictive than the Family Residential Centers it seeks to use through the proposed regulations. In recent years, DHS has experimented with two alternative forms of detention—case management programs and the Intensive Supervision Appearance Program (ISAP). Both programs have proven to be effective and cheaper than detention; neither is currently being considered as an alternative to Family Residential Centers.\textsuperscript{69}

Case management programs connect families with case managers who ensure that the family understands and complies with their immigration obligations, have transportation to court hearings, and are connected to community-based services. Since 2000, DHS (and its predecessor agency) have examined several viable case management programs. For example, ICE ran a Family Case Management Program from FY 2016 to FY 2017, which served at least 781 families.\textsuperscript{70} And the Vera Institute of Justice implemented a case


\textsuperscript{68}As noted above, DHS does not estimate the cost of it proposed rule changes.


\textsuperscript{70}Office of Inspector General, DHS, U.S. Immigration and Customs Enforcement’s Award of the
management program that ended in 2000 and served over 500 families.\textsuperscript{71} These programs have been shown to lead to participants' near perfect compliance with immigration obligations.\textsuperscript{72} Further, case management programs cost a fraction of family detention in FRCs. DHS estimates that it spends an average of $318.79 per person per day to detain family members in an FRC.\textsuperscript{73} In contrast, the Family Case Management Program that ICE terminated in FY 2017 reportedly cost $36 per day per family.\textsuperscript{74}

DHS also currently implements a program called the Intensive Supervision Appearance Program that uses a mixture of technological and human means to monitor participants.\textsuperscript{75} This program is more restrictive than case management and is only appropriate for individuals that would otherwise be candidates for secure detention.\textsuperscript{76} But it is still less harmful than the incarceration of families. It is also cheaper. DHS estimates that the program costs a mere $4.04 per day per participant.\textsuperscript{77}


\textsuperscript{72} The Vera institute program had a 90% success rate; 100% of participants in the Lutheran Immigration and Refugee Service program complied; and 100% of participants in the ICE's Family Case Management Program attended all of their court hearings. Eileen Sullivan, Vera Inst. of Justice, \textit{Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program} at ii (Aug. 1, 2000); Lutheran Immigration and Refugee Service, \textit{Family Placement Alternatives: Promoting Compliance with Compassion and Stability through Case Management Services} 13, http://lirs.org/wp-content/uploads/2016/04/LIRS_FamilyPlacementAlternativesFinalReport.pdf; Office of Inspector General, DHS, \textit{U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program} 5 (Nov. 30, 2017).


\textsuperscript{74} Am. Immigration Law Center et al., \textit{The Real Alternatives to Detention} *2, https://justiceforimmigrants.org/2016site/wp-content/uploads/2017/07/The-Real-Alternatives-to-Detention-FINAL-06.27.17.pdf; see also Alex Nowrasteh, CATO Institute, \textit{Alternatives to Detention are Cheaper than Universal Detention} (June 20, 2018), https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention.

\textsuperscript{75} Office of Inspector General, DHS, \textit{U.S. Immigration and Customs Enforcement's Alternatives to Detention} (Revised) 3-4 (Feb. 4, 2015).

\textsuperscript{76} Am. Immigration Law Center et al., \textit{The Real Alternatives to Detention} *2, https://justiceforimmigrants.org/2016site/wp-content/uploads/2017/07/The-Real-Alternatives-to-Detention-FINAL-06.27.17.pdf.

Yet, despite the copious evidence at DHS's disposal concerning effective and cheaper methods of enforcing the immigration laws, DHS's proposed regulations fail to even consider these as alternatives to detaining families.

In sum, DHS's proposed rules are unconstitutional, ineffective, punitive, and poorly considered. They will do tremendous harm to children and families trying to escape violence and hardship whose only crime is to believe that they will have an opportunity for a better life here. And all the available evidence implies that the rules will not even accomplish their purported goals of deterring illegal immigration. DHS's proposed rules must thus be rejected.

Sincerely,

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