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Reviewing the Administration's Unaccompanied Children Program

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Chairwoman DeLauro and Ranking Member Cole, thank you for the opportunity to testify before the subcommittee today. My name is J. J. Mulligan. I am the clinical fellow at UC Davis School of Law's Immigration Law Clinic and I am honored to be here representing the Immigration Law Clinic.

The Immigration Law Clinic has been co-counsel in the *Flores* settlement agreement since 2016. We were asked to join the *Flores* legal team because of our expertise in working with detained immigrants and unaccompanied minors. The Immigration Law Clinic at UC Davis was one of the first of its kind in the United States and it remains one of the only clinics in the country dedicated to representing detained immigrants before immigration courts and challenging conditions of confinement in federal court. We are also located in very close proximity to a secure facility for unaccompanied minors, the Yolo County Juvenile Detention Facility (one of only two secure facilities in the entire country), and have worked extensively with unaccompanied minors detained at the Yolo facility.

The history of the *Flores* settlement agreement is unique and uniquely important in the legal field. In the 1980's, Jenny Flores and other immigrant youth were detained by the Immigration and Naturalization Service, the precursor to the Department of Homeland Security. They were held in a dilapidated former motel complex that had been enclosed with a chain link fence. It was, at best, a makeshift facility. Though I was not around to see the facility where Jenny Flores was held, it is not difficult to imagine: the physical setting described is similar in many ways to the one I saw recently in Homestead, Florida. In Jenny's situation, however, the government made no provisions at all for the special needs of children in its care. Inside the fence, Jenny co-mingled with unrelated

adults, no special services were provided to meet her health or educational needs, and strip searches were regularly conducted. All of these practices were, simply put, not in the best interest of the child. Yet, there was also no legal instrument governing the conditions of their confinement.

When the *Flores* case settled 13 years later in 1997, the settlement agreement that was created began applying to children who are detained by the federal government. The agreement applied many principles of child welfare law to the treatment of immigrant children in the government's custody. Importantly, it created a sort of bill of rights for detained immigrant children so that no one would again be subject to the conditions to which Jenny Flores had been. The settlement was also an acknowledgement by the federal government, most recently re-stated last December by Lynn Johnson, Assistant Secretary for Health and Human Services' Administration for Children and Families that "children should be home with their parents" because "the government makes lousy parents."¹ In other words, the federal government has no experience or expertise in providing foster care. For this reason, the agreement established first and foremost, that children should be with their families, not held in custody. The agreement requires the government to release children without unnecessary delay to a sponsor, generally a family member, unless detention is necessary for the child's safety or to ensure their appearance at an immigration proceeding. For those children who are detained, the agreement requires that they be placed in facilities licensed by the state in which they are located, to provide congregate care for children. In addition, the facilities must meet a detailed set of requirements regarding the provision of health, mental health, educational and legal services. The only exception to these requirements, which we have heard repeatedly from the

¹ John Burnett, "Several Thousand Migrant Children in U.S. Custody Could Be Released Before Christmas" Dec. 18, 2018 available at <https://www.npr.org/2018/12/18/677894942/several-thousand-migrant-children-in-u-s-custody-could-be-released-before-christ>

Trump Administration, is a brief grace period when there is an emergency or influx of children exceeding the number of available licensed placements.² Importantly, however, the *Flores* Settlement Agreement contains no exception for government fabricated emergencies or self-created influxes.

As part of *Flores* counsel's legal team, we have been granted access to any and all facilities where children are detained. This is important because Congressional or media tours of detention facilities rarely reveal the full story. By speaking with the detained immigrant children, we uncover information that is not visible to the naked eye. As our co-counsel from the National Center for Youth Law, Leecia Welch, put it: "We see a very different picture. We see extremely traumatized children, some of whom sit across from us and can't stop crying over what they're experiencing."³ This distinctive insight we obtain is the difference between believing a detention center is a "summer camp" and knowing that it is a house of horrors.⁴ Throughout the course of these visits to facilities, we have uncovered numerous violations of the *Flores* Settlement Agreement through our countless conversations with detained immigrant children, which have led us to file several successful Motions to Enforce. Most recently, on July 30, 2018, Judge Dolly Gee in the Central District of California ordered the federal government to not medicate immigrant children in its care with psychotropic drugs without parental consent or a court order.⁵ While these visits have long revealed issues with the implementation of *Flores*, in the Fall of 2017 we began to encounter

² See Exhibit 3 of the *Flores* Settlement Agreement, defining an emergency as "an act or event, such as a natural disaster...civil disturbance or medical emergency" and an influx as when the number of minors eligible for placement in licensed programs exceeds a certain number (which is to be determined each year).

³ Leecia Welch, quoted by John Burnett, "Florida Shelter Is Scrutinized for the Way it Handles Migrant Children," February 13, 2019.

⁴ Michael Garcia Bochenek, "US Family Detention Centers Not 'Like Summer Camp,'" August 1, 2018, Human Rights Watch.

⁵ *Flores v. Sessions*, No. 2:85-cv-04544-DMG-AGR (C.D. Cal. July 30, 2018) (ECF No. 470), at 23-24.

a new phenomenon. The children we interviewed described policies and practices that prolonged their detention—everything from requiring a backup sponsor in case the original sponsor is deported, to requiring entire households of roommates with no connection to the child to be fingerprinted. As one child told us, “Who is the federal government to decide if my parent is good enough or not?” Decisions regarding the fitness of a sponsor are often made informally by case workers, or else require final ORR director approval—a lengthy bureaucratic process. The decisions themselves are based on misguided policies that have rapidly expanded the population of detained immigration children, swelling to a record 15,000 in late 2018, before a policy change only requiring the fingerprints of the sponsor and not everyone in the home resulted in more than 4,000 children being released from ORR custody within a span of four weeks – the largest decrease in the program’s history. The change in policy also displayed a clear causal link to ORR policy: once fingerprints for every household member were no longer required, the Tornillo “influx” facility was no longer needed and promptly closed.

The results of these policies not only caused the growth of the detained population of unaccompanied minors, thereby self-creating an “emergency” or “influx,” but they also prolonged the detention of immigrant children, in some cases for well over a year. Prolonged detention of children, as I’m sure the distinguished doctor of psychiatry on the panel with me today will explain better than I can, causes irreparable harm to the developing minds of children. For the unaccompanied minors that we speak with specifically, these are children that have suffered intense trauma and abuse either in their home countries, on the journey here, or both. This is a population that has much in common with the forced child soldiers of civil wars past and the federal government is responding to their PTSD with steel cages, causing them to act out until they

are detained under ever-harsher conditions, creating a continuum of trauma that these children are ill-equipped to endure.

One child told us she wanted to live with her sister. She said “I don’t fully understand why ORR won’t let me live with my sister, but I think it is because ORR thinks she doesn’t have enough money. I would prefer to live with my sister or family over foster care, and I believe even poor families have the right to live together.”

Another child told us he was waiting to be reunited with his mother. “My mom has done everything the government has asked her to do My case manager has told me that they are waiting on the fingerprints for my brother to clear because he lives with my mother. It has been a month since they had the fingerprinting done.”

A mother told us that her son’s caseworker “kept asking me for more and more documents: among them, files from doctors to verify that my cancer would not hinder me from taking care of my son. These . . . Caused me great sorrow, and they did not seem necessary to have my son. I believe that a mother has the right to take care of her child even though she is incapacitated, although I am not. It occurred to me that they were looking for an excuse to deny me my son.”

Another mother said this about her daughter who was administered powerful psychotropic medication while in custody, without her mother’s consent: “Since last year, when my daughter became a prisoner, I have noticed that she is more and more depressed . . . She tells me that she doesn’t want to be in the detention center. When my daughter and I lived together in Honduras,

we never had mental problems. . . . In my opinion, detention is affecting her a lot, and she would quickly get better if they were to return her to me.”

In addition to these examples, we heard from sponsors who were told that children will not be released to their care unless they comply with the following requirements: that they move to a different neighborhood, move to a larger apartment or house, reduce the total number of children living in their home, produce a photo establishing a prior relationship with the child (despite the fact that many families do not have access to this technology), and that they show they can afford the psychotropic medications that the government has prescribed. Each additional requirement moved the finish line for sponsor approval and family reunification, thus prolonging detention. There is also the Memorandum of Agreement between ICE, CBP and ORR which provides for the information collected by ORR on potential sponsors to be shared with ICE. This has had a chilling effect on sponsors and has serious consequences: I spoke with one youth detained at Homestead whose father was picked up by ICE shortly after being fingerprinted by ORR and whose detention was being prolonged by his father’s own ICE detention. I cannot stress enough the courage and selflessness that it takes for an undocumented person to submit to fingerprinting under this administration.

Further, ORR “steps up” youth to more restrictive settings, from shelters to medium-secure, secure, and psychiatric facilities without the most rudimentary procedural fairness or transparency. Youth housed in shelters report being awakened in the small hours of the morning and soon thereafter finding themselves confined in juvenile halls or psychiatric facilities for months on end. Some are told they are being moved closer to their parents, only to be moved across the country in the

opposite direction. Once ORR steps up a youth to a residential treatment center (“RTC”), an RTC doctor must authorize release if they are “stable,” certifying that they are not a danger to themselves or others. In effect, the act of summarily dispatching a child to a psychiatric facility converts immigration-related custody into indefinite commitment. The irony, of course, is that the child’s mental distress is almost always due to their detention and separation from family, so that keeping them confined leads to further destabilization, perpetuating a circle of trauma that can take months and sometimes years to break.

Tornillo and likewise the Homestead facility are products of these policies that prolong detention, thereby manufacturing a “crisis.” The steadily increasing numbers of detained youth have exceeded the supply of licensed child care facilities to care for them, despite the fact that there has not been an increase in the number of arriving unaccompanied minors. In response to its inability to release children to their family members, ORR has established unlicensed temporary influx shelters, first in Tornillo, Texas, and now in Homestead, Florida. These facilities have held thousands of children. At Homestead, for example, when I visited earlier this month, 1,600 immigrant children were housed there. The director of the facility told us that it had the capacity to hold 2,350 children, even though some rooms already held over two hundred children in the same room. Both Tornillo and Homestead are unlicensed facilities that do not meet the standards of care in the states where they are located, nor do they comply with the *Flores* agreement. This includes the failure to perform basic background checks on facility staff, much less the onerous scrutiny to which they have been subjecting would be sponsors.

These unmet standards are the minimum necessary to provide a safe and healthy environment for children in the government's care. But the harm to children first at Tornillo and now at Homestead goes further and includes the denial of basic freedoms and the human contact vital to developing children. The treatment of detained immigrant youth at these facilities is not an issue of immigration law and policy, but of human dignity. Deterrence by mistreatment should no longer be the leading immigration policy of this administration.

The children I interviewed at Homestead commented on their inability to have any freedom of movement. All youth, including 17-year-olds, have to get escorted to go to the bathroom. Youth move throughout the campus walking in single file military-style lines led by a youth care worker. A girl held at Tornillo told us "There are about 31 girls in the tent with me. There is no privacy. We aren't allowed to hug each other or touch in any way. Every day I feel sad. I don't have freedom to leave here. All I want is to be with my family." We heard a similar story from a girl at Homestead. She said "I also get huge headaches because I feel like I can't cry here. I wish I could cry here but I can't cry comfortably. I have to hold my tears because if not they send me to the clinician. I don't want to go to the clinician because they don't want to help my case. When the youth counselors see me sad, they talk to me and try to calm me down. But they are not allowed to hug me. I also want to try to hug my girlfriends when they are crying, but [staff] won't let me." I spoke with brothers who were separated at Homestead, one living on the North Campus for 17-year-olds and the other on the South Campus for 13-16 year-olds. They could visit each other only once a week for one hour and a half. Each told me how much they missed the other.

Previous court rulings interpreting the *Flores* settlement have set the grace period for detaining children in unlicensed facilities at 20 days. According to ORR, the average length of detention at homestead is 69 days. I spoke with multiple youth, however, that had been at homestead for much longer than three months, including several who had been detained for over 7 months. Unlike someone in the criminal justice system who will usually know the length of their sentence and can “do their time,” immigrant children detained by ORR have been told they will be released in a week or two and that was three months ago.

Leaving aside the merits of describing an influx that has been happening at a consistent level for nearly five years as a temporary emergency, the harmful practice of detaining children in huge unlicensed facilities could be ended if ORR would simply abide by the *Flores* agreement and release children to sponsors without unnecessary delay. The constant calls to revoke the *Flores* agreement by those within the Trump Administration in order to “protect children” are misplaced and disingenuous. We would not tell a soldier in battle that they are safer without armor.

The *Flores* settlement agreement plays a critical role in protecting the safety and welfare of unaccompanied children in federal immigration custody. Compliance with the settlement has been an issue since its inception— and now the administration has indicated that it wants to get rid of the settlement entirely. While *Flores* counsel and other legal organizations will continue to investigate conditions of confinement and bring actions to enforce the letter and spirit of the *Flores* agreement, it is vital that Congress play its role to ensure that the government of the United States lives up to its legal and moral obligations to the children in its care.

Thank you.

