IMMIGRATION

3 Reasons Why the New *Flores* Rule Does Not Pass Legal Muster

By Philip E. Wolgin | Posted on August 22, 2019, 2:18 pm

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A young migrant girl lies on the floor of a bus depot as her father, recently released from federal detention with other Central American asylum-seekers, obtains a ticket in McAllen, Texas, June 2019.

After weeks of speculation, acting Secretary of Homeland Security Kevin McAleenan announced yesterday that the Trump administration was publishing its final rule to overturn the 1997 *Flores* settlement, a long-standing legal agreement that sets out commonsense standards for the care of children in immigration detention. The

settlement came out of litigation challenging the U.S. Immigration and Naturalization Service's horrific treatment of Central American children fleeing violence and civil war.

Overturning *Flores* would allow the administration to get around the settlement's limitations on holding children in unlicensed, secure facilities and allow it to indefinitely incarcerate children and families—and do so in inadequate conditions. As the Center for American Progress has argued in the past, "Spending any amount of time in detention threatens children's healthy development." Put simply, this rule would harm children and families.

But beyond the basic harm that the rule would inflict on vulnerable children, it has fatal legal flaws. Here are three reasons why the *Flores* rule is unlikely to pass legal muster.

1. It is inconsistent with the underlying *Flores* settlement

Under the terms of the settlement and a 2001 stipulation by the parties, the only way that the government can dissolve *Flores* is through a regulation that is "not … inconsistent with the terms of this Agreement." Yet in a number of key ways, the administration's rule dramatically differs from the underlying agreement.

First and foremost, Section VI of the settlement stipulates to a "general policy favoring release." In other words, unless detention is necessary for a child's safety or to ensure that they make their court appearances, the government must "release a minor from its custody without unnecessary delay." However, the administration's new rule would grant the U.S. Department of Homeland Security (DHS) the ability to detain children with their families for prolonged periods of time. Prolonged detention is in opposition to a basic tenant of the agreement, and DHS did not adequately address this in the final rule.

Second, under the settlement, children can only be detained in facilities that are licensed by "an appropriate State agency." The new rule would eviscerate this essential requirement by allowing DHS to set up its own self-licensing system, with no oversight from state licensing bodies. As recently as June of this year, the DHS Office of Inspector General expressed grave concerns over how U.S. Immigration and Customs Enforcement (ICE) adheres to its own current standards for detention facilities, finding "nooses in detainee cells, overly restrictive segregation, inadequate medical care, unreported security incidents, and significant food safety issues." These violations raise serious red flags about DHS' ability to enforce basic standards for children in detention in lieu of the *Flores* settlement.

Just last week, the 9th U.S. Circuit Court of Appeals dismissed the government's appeal in which it argued that the *Flores* settlement's requirement that children be held in safe and sanitary conditions should not be interpreted to specifically require children to have access to basic hygienic products such as soap and toothpaste or to receive adequate sleep. It is not credible to believe that this administration would treat children more humanely without the *Flores* requirements and the independent court oversight that it provides.

2. The courts have ruled against deterrence as a justification for detention

In announcing the rule, acting Secretary McAleenan argued that removing the *Flores* protections is necessary to "eliminat[e] the incentive to make the journey to the United States as a family." CAP research has shown that neither family separation nor family detention has been, or is likely to be, a deterrent to further children and families seeking protections at U.S. borders. Likewise, CAP research has found that the 2015 ruling that confirmed the *Flores* protection applied to both unaccompanied and accompanied children did not increase the number of families coming to the border. And although DHS responded to this research in its final rule by saying that the goal of the rule was simply to codify the *Flores* settlement, given acting Secretary McAleenan's comments, the underlying reason for putting out this rule seems clear: to deter future migration.

The idea of jailing families to deter future asylum-seekers from coming to the United States has not been looked upon kindly by the courts. In early 2015, the American Civil Liberties Union sued the Obama administration for its use of family incarceration as a deterrent to asylum-seekers. In *RILR v. Johnson,* the U.S. District Court for the District of Columbia ruled that the policy likely violated the law and thus enjoined the administration from the practice. More recently, in July 2015, Judge Dolly Gee—who is overseeing the *Flores* settlement and will ultimately be the first to decide whether the new rule is consistent with the "relevant and substantive terms" of the agreement—rejected the government's claims that releasing families from detention provides an "incentive" for further families to come to the United States. And just last year, Judge Gee rejected this argument a second time when the administration asked her to let it out of the settlement.

3. Failing to account for the high costs of the rule renders it arbitrary and capricious

As CAP laid out in an October 2018 issue brief, a plain reading of the new *Flores* rule finds that DHS would incur drastic new costs—both to detain more families for longer than currently allowed under the law and to build or acquire new facilities to incarcerate these families. Over a decade, the annualized costs of the rule would range from at least $201 million to nearly $1.3 billion each year.

Late last year, CAP released a public comment on the proposed rule detailing the math behind these high costs. CAP also met with the U.S. Office of Management and Budget (OMB) in a 12866 consultation meeting prior to the final rule being issued to convey directly to the Trump administration why DHS should take into account these high costs in order to accurately assess the effects of the rule. Yet even following the public comment and the 12866 meeting, DHS and OMB failed to sufficiently account for the massive new governmental costs in the final rule.

In direct response to CAP's analysis, DHS tries to discount the possibility of new costs by stating: "Expanding [family detention] capacity would require additional appropriations. This regulation alone is not sufficient." However, over the course of the Trump administration, ICE has routinely spent more money on immigration

detention than Congress has allocated, and then simply gone back to Congress to demand more funding. This claim does not hold up.

Additionally, DHS argues in the final rule that while it may incur costs above the $100 million threshold—which it, again, maintains it could not effectively gauge despite acknowledging that commenters made such estimates based on DHS' own data—nothing in the rule itself forces the department to detain more people, detain people for longer, or acquire new bed space. As DHS states in the final rule, "This regulation does not represent a decision on whether and in which circumstances to detain families for longer periods of time, though it does allow for such a decision to be made." As such, though the department—following CAP's public comment—did deem the rule significant under the terms of Executive Order 12866, it argues that "it does not appear *likely* that this rule will result in an economic impact of $100 million or more."

While it is true that DHS is not compelled under the rule change to hold more families, to detain them for longer, or to acquire new bed space, the many statements of the Trump administration—including an April 9, 2018, presidential memorandum entitled "Ending 'Catch and Release' at the Border"—illustrate that its goal is to detain as many families as possible for as long as necessary to complete their proceedings. Accordingly, the authority granted under this rule would lead to more families being detained, for longer, and at a higher cost. Failing to properly account for and consider these probable costs likely renders this law "arbitrary and capricious," which would mean it fails to comply with the requirements of the Administrative Procedures Act (APA).

Conclusion

Absent legal action, the final rule is slated to go into effect in late October. Before then, Judge Gee will hear arguments on whether it meets the terms of the settlement; other lawsuits are likely to be filed as well. Given just how much the rule differs from the *Flores* settlement itself, and the serious APA issues it faces—not to mention the significant harms that would come to children and families—the courts must step in and stop it from moving forward.

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