Texas Catholic Conference of Bishops

THE PUBLIC POLICY VOICE OF THE CHURCH

November 6, 2018

Submitted via Email: *ICE.Regulations@ice.dhs.gov*

Ms. 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, Comments in Response to Proposed Rulemaking on "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children"

Dear Ms. Seguin,

As the public policy voice of the Catholic Bishops in Texas, the Texas Catholic Conference of Bishops ("TCCB") offers the comments below to the Department of Homeland Security ("DHS") regarding the Notice of Proposed Rulemaking ("proposed rule") which seeks to amend and implement the regulations relating to the apprehension, processing, care, custody, and release of migrant children which were established under the *Flores* Settlement Agreement ("FSA"). To provide the most assistance to DHS, these comments will proceed by referencing a specific portion of the proposed rule, explain the reason for any recommended change, and include reference to the FSA to support such recommended change.

Before we begin, we pause to thank you for your time and consideration of our comments, and to make one prefatory remark: Catholics in Texas have long worked to support immigrant families who journey to the United States of America. We see fathers and mothers who hope that their children will inherit peace and prosperity, but their home counties offer no inspiration that such an inheritance will ever be possible. In their hope, we see that the U.S. retains its inspirational power. Catholics minister to immigrants because Christ calls us to love our neighbors, especially the most vulnerable. We share in the treasured American heritage that welcomes the oppressed and persecuted of all nations.

Summary of comments. The TCCB is concerned with the proposed rule's provisions which are listed below, and our concerns affect the proposed rule's primary purpose, which is "to promulgate regulations that would ultimately lead to the termination of the FSA."[1] FSA paragraph 9 states: "The final regulations shall not be inconsistent with the terms of this Agreement."[2] Additionally, amended FSA paragraph 40 states: "All terms of this Agreement shall terminate 45 days following defendants' publication of final regulations implementing this Agreement."[3] In other words, not just any rulemaking terminates the FSA, but only one which is consistent with the FSA and implements the FSA. However, the proposed rules conflict with the FSA in the sections listed below.

- *Section 1*: 8 CFR § 236.3(b)(5) – DHS's definition of "Emergency" conflicts with FSA paragraph 12B.
- *Section 2*: 8 CFR § 236.3(b)(9) – DHS's definition of "Licensed Facility" conflicts with FSA paragraph 6, exhibit 1.
- *Section 3*: 8 CFR § 236.3(b)(11) – DHS's definition of "Non-Secure Facility" conflicts with FSA paragraph 6.
- *Section 4*: 8 CFR § 236.3(g)(2)(i) – DHS's proposal to house minors with unrelated adults contradicts FSA paragraph 12A.
- *Section 5*: 8 CFR § 236.3(i)(1)(i) – DHS's proposal to transfer certain minors to secure facilities conflicts with FSA paragraph 21A.
- *Section 6*: 8 CFR § 236.3(i)(4) – DHS's facility standards omit FSA paragraph 6, exhibit 1, sections B – F.
- *Section 7*: 8 CFR § 236.3(j) – DHS's provision of discretionary parole conflicts with FSA paragraphs 14 and 18.
- *Section 8*: 8 CFR § 236.3(o) – DHS's proposed statistical reports omit substantial data required under FSA paragraph 28A.

Section 1: 8 CFR § 236.3(b)(5) – DHS's definition of "Emergency" conflicts with FSA paragraph 12B.

Under FSA paragraph 12B, an emergency is any act or event that prevents the placement of minors in a licensed program within the time frame provided. DHS maintains that this definition is implemented by 8 CFR § 236.3(b)(5). However, in addition to the definition of emergency contained in FSA paragraph 12B, 8 CFR § 236.3(b)(5) adds that "emergency" means an act or event that "impacts other conditions provided by this section." This additional clause is profoundly vague and one implication has been illustrated by the United States Conference of Catholic Bishops (USCCB):

[1] 83 Fed. Reg. at 45494. cf. 45490, 45491, 45495.
[2] FSA paragraph 9. DHS notably omits FSA paragraph 9 and wholly neglects the quoted clause. (83 Fed. Reg. at 45515, Table 11)
[3] FSA paragraph 40. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85—4544—RJK(Px) (C.D. Cal. Dec. 7, 2001)

> From a public policy perspective, the proposed definition gives serious cause for concern. It provides DHS and HHS with broad discretion to define what constitutes an emergency. This is a fact that DHS admits in its justification, noting that the proposed definition "is flexible and designed to cover a wide range of possible emergencies."[4] Consequently, under the proposed definition, DHS could, in theory, define "emergency" to include lack of available staffing due to the flu. Because DHS's proposed rule also creates a new emergency exception excusing noncompliance with limitations for holding minors with unrelated adults,[5] it could then theoretically use its lack of staffing as an excuse for holding children with unrelated adults for more than 24 hours.[6]

DHS' vague definition of emergency conflicts with FSA paragraph 12B and establishes the condition under which subsequent contradictions with the FSA emerge.

Section 2: 8 CFR § 236.3(b)(9) – DHS's definition of "Licensed Facility" conflicts with FSA paragraph 6, exhibit 1.

Under FSA paragraph 6, a licensed program must have three attributes, the first of which is that the program must be licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children.[7] DHS maintains that this requirement is implemented by 8 CFR § 236.3(a)(9), which requires licensed facilities to comply with state child welfare laws and regulations. The section adds that DHS shall employ a third party to license a facility if no licensing scheme for family detention exists in either the state, county, or municipality in which a facility is located.[8]

8 CFR § 236.3(a)(9) conflicts with FSA paragraph 6 because the FSA required that program licensing be provided by "an appropriate" State agency; the proposed rule provides no such requirement for the local governmental entity to which DHS would defer.[9]

Section 3: 8 CFR § 236.3(b)(11) – DHS's definition of "Non-Secure Facility" conflicts with FSA paragraph 6.

Under FSA paragraph 6, a licensed program must have three attributes, the third of which is that the program must be non-secure, as required under state law, except that a facility for special needs minors may have a higher level of security. DHS maintains that this requirement is implemented by 8 CFR § 236.3(i)(3) and (i)(4), as informed by the definition of "non-secure" which is contained in 8 CFR § 236.3(b)(11).

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[4] 83 Fed. Reg. at 45496.
[5] Ibid. at 45526.
[6] cf. FSA paragraph 12A; TCCB Comment 4, below.
[7] Texas Human Resources Code, Ch. 42 § 041.
[8] By family detention, we refer to the detainment of minors accompanied by a parent or legal guardian.
[9] In contrast, the third party which DHS would employ under 8 CFR § 236.3(a)(9) in the absence of all other licensing is required to have "relevant audit experience."

In 8 CFR § 236.3(b)(11), the proposed rule defers to "the definition of non-secure in the state in which the facility is located." The text at 8 CFR § 236.3(b)(11) could be improved by shifting from implied to explicit deference to existing state law such that it would read: "*Non-Secure Facility* means a facility that meets the definition of non-secure under state law of ~~in~~ the state in which the facility is located." This clarification would render the text consistent with FSA paragraph 6, according to which all facilities operating licensed programs "shall be non-secure as required *under state law*."

Section 4: 8 CFR § 236.3(g)(2)(i) – DHS's proposal to house minors with unrelated adults contradicts FSA paragraph 12A.

Under FSA paragraph 12A, legacy INS "will segregate unaccompanied minors from unrelated adults. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours." The FSA thereby implies that causes including but not limited to emergencies may make segregation not immediately possible.[10] Nonetheless, in *all* cases, FSA paragraph 12A provides that UAC shall not be detained with an unrelated adult for more than 24 hours.

In contrast, proposed 8 CFR § 236.3(g)(2)(i) provides that UAC may be detained for more than 24 hours with an unrelated adult "in the case of an emergency or other exigent circumstances."

"Emergency" here is informed by proposed 8 CFR § 236.3(b)(5). As already discussed, the proposed rule seeks to redefine "Emergency" to broaden the definition provided under FSA paragraph 12B using vague and imprecise language, which alone would bring 8 CFR § 236.3(g)(2)(i) into contradiction with FSA paragraph 12A because the FSA provides *no exception* for housing minors with unrelated adults for longer than 24 hours. In further violation of the FSA's 24-hour limit, proposed 8 CFR § 236.3(g)(2)(i) adds that DHS may house UAC with unrelated adults for longer than 24 hours under "other exigent circumstances," which remains undefined in the proposed rule. In contrast, DHS maintained in 2014:

> It is DHS policy to keep children separate from unrelated adults whenever possible. To take into account, in part, the resulting settlement agreement between the legacy INS and plaintiffs from class action litigation, known as the *Flores v. Reno* Settlement Agreement (FSA), INS—and subsequently DHS—have put in place policies covering detention, release, and treatment of minors in the immigration system nationwide.[11]

[10] Under FSA paragraph 12B, such emergencies already explicitly include hurricanes or communicable disease outbreaks, but in the preamble to the proposed rule, DHS maintains that "emergencies or other exigent circumstances" includes hurricanes or an outbreak of communicable disease. (83 Fed. Reg. at 45500) One seeks the proposed rules in vain for new examples which justify the expansive redefinition of "emergencies" or the addition of vague "other exigent circumstances."

[11] 79 Fed. Reg. at 13114.

Nonetheless, proposed rule 8 CFR § 236.3(g)(2)(i) contradicts the requirements under FSA paragraph 12A such that DHS will depart from its current practice.[12]

Section 5: 8 CFR § 236.3(i)(1)(i) – DHS's proposal to transfer certain minors to secure facilities conflicts with FSA paragraph 21A.

Among other causes listed by FSA paragraph 21, paragraph 21A provides that a minor may be held in or transferred to a suitable state or county juvenile detention facility, a secure DHS facility, or a DHS contracted facility with accommodations for minors if a minor has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act. However, FSA paragraph 21A(i-ii) provides two exceptions for minors who would otherwise be eligible for secure detention.

The first exception under FSA paragraph 21A(i) disallows the transfer of a minor to secure detention under paragraph 21A for isolated offenses that are not within a pattern or practice of criminal activity and did not involve violence against a person nor the use or carrying of a weapon. FSA paragraph 21A(i) would be effectively implemented without conflict by proposed 8 CFR § 236.3(i)(1)(i-ii).

The second exception under FSA paragraph 21A(ii) disallows the transfer of a minor to secure detention under paragraph 21A for petty offenses, which are not—in any case—considered grounds for stricter means of detention. Proposed 8 CFR § 236.3(i)(1) omits this exception.

DHS interprets 8 CFR § 236.3(i)(1) to more expansively protect the liberty of minors than the FSA paragraph 21A(ii) because DHS reads the section as implying that minors who commit isolated petty offenses *or* isolated non-violent non-petty offenses provide insufficient cause to be transferred to a secure facility.[13] An exemption for non-violent, non-petty offenses offers more liberty to detained minors than the FSA requires. However, inasmuch as petty offenses *or* isolated non-violent non-petty offenses are chargeable as a crime that fits the pattern or practice of criminal activity, they may be construed as grounds for transfer to a secure facility. The proposed rule could be improved through direct adherence to FSA paragraph 21A.

Section 6: 8 CFR § 236.3(i)(4) – DHS's facility standards omit FSA paragraph 6, exhibit 1, sections B – F.

DHS interprets 8 CFR § 236.3(i)(4) to implement FSA paragraph 6, exhibit 1, "Minimum Standards for Licensed Programs,"[14] but omits sections B – F of paragraph 6, exhibit 1. To implement the FSA, the proposed rules cannot omit these sections, which pertain to service

[12] 83 Fed. Reg. at 45515, Table 11, section pertaining to paragraph 12(A) and proposed 8 CFR § 236.3(g)(2)(i).
[13] 83 Fed. Reg. at 45501.
[14] 83 Fed. Reg. at 45501.

delivery, program rules and discipline, an individualized care plan, confidentially of client records, and regular reporting.

Section 7: 8 CFR § 236.3(j) – DHS's provision of discretionary parole conflicts with FSA paragraphs 14 and 18.

FSA paragraph 14 provides that legacy INS "shall release" a minor from its custody without unnecessary delay if the agency finds that detention is not necessary to secure timely appearance before the agency or an immigration court, or to ensure the minor's safety or that of others. Proposed 8 CFR § 236.3(j) provides that, assuming the same findings by DHS, "the minor *may* be released, as provided under existing statutes and regulations, pursuant to the procedures set forth in this paragraph."

In the preamble, DHS acknowledges that FSA paragraph 14 has been interpreted to require application of the juvenile parole regulation to release during expedited removal proceedings but justifies holding minors without parole in this way: "this regulation is intended to permit detention in FRCs in lieu of release… in order to avoid the need to separate or release families in these circumstances."[15] In other words, DHS seeks to avoid family separation or release. However, this justification conflicts with the fact that, pursuant to the TVPRA and HSA, DHS lacks the authority to release a minor to anyone other than HHS or a parent or legal guardian.[16] In other words, under TVPRA and HSA, DHS would only transfer a minor from the care of family *who is in detention* to the care of a parent or guardian *who is not in detention* or to HHS.[17] DHS's justification is without merit.

Therefore, the proposed rule need not change the FSA's "shall" to "may" to comply with federal statute. Such a change provides expansive discretion to DHS.

Moreover, as a result of the deviation from FSA paragraph 14, the proposed 8 CFR § 236.3(j) subsequently conflicts with FSA paragraph 18, which requires legacy INS to "make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor." In contrast, proposed 8 CFR § 236.3(j) states: "DHS will make and record prompt and continuous efforts on its part toward the release of the minor." In doing so, the proposed rules omit "family reunification" as a goal for DHS, although reunification remains a goal under the proposed rules for HHS.[18]

DHS justifies omitting reunification by stating: "DHS only has custody of accompanied minors and so reunification is unnecessary."[19] Even though DHS acknowledges that minors can be

[15] 83 Fed. Reg. at 45494, note a. See *Flores v. Sessions*, Order at 23-27 (June 27, 2017).
[16] 83 Fed. Reg. at 45502.
[17] 83 Fed. Reg. at 45503.
[18] See 45 CFR 410.201(f) at 83 Fed. Reg. at 45530.
[19] 83 Fed. Reg. at 45515.

released to parents who are not detained through federal statutes in TVPRA and HSA, the proposed rules cast aside the FSA's goal of avoiding the detention of minors and seek expansive family detention.

Section 8: 8 CFR § 236.3(o) – DHS's proposed statistical reports omit substantial data required under FSA paragraph 28A.

FSA paragraph 28A requires legacy INS to monitor compliance with the FSA by maintaining up-to-date records of all minors who are placed in proceedings and remain in agency custody for longer than 72 hours. Statistical information "shall be collected weekly" and such "statistical information *will* include at least the following:" (1) biographical information; (2) date placed in INS custody; (3) each date placed, removed or released; (4) to whom and where placed, transferred, removed or released; (5) immigration status; and (6) hearing dates.

In contrast, proposed 8 CFR § 236.3(o)(2) states that CBP and ICE shall monitor compliance with the proposed rules by examining relevant statistical information of minors who are placed in proceedings and remain in agency custody for longer than 72 hours. The proposed rule continues: "statistical information *may* include:" (1) biographical information; (2) dates of custody; and (3) placements, transfers, removals, or releases from custody, including the reasons for a particular placement.

Whereas FSA paragraph 28A establishes the frequency of reporting statistical data and sets forth six categories of minimum content, proposed 8 CFR § 236.3(o)(2) conflicts with FSA paragraph 28A by rendering the data collection optional and thereby providing no specified minimum content.

Conclusion: DHS's proposed rules are not consistent with the FSA and they do not implement the FSA.

The TCCB is concerned with the proposed rule's provisions which are listed above, and our concerns affect the proposed rule's primary purpose, which is "to promulgate regulations that would ultimately lead to the termination of the FSA."[20] FSA paragraph 9 states: "The final regulations shall not be inconsistent with the terms of this Agreement."[21] Additionally, amended FSA paragraph 40 states: "All terms of this Agreement shall terminate 45 days following defendants' publication of final regulations implementing this Agreement."[22] In other words, not just any rulemaking terminates the FSA, but only one which is consistent with the FSA and implements the FSA. However, the proposed rules conflict with the FSA in the sections listed above. Without amendment, the proposed rules do not implement the FSA. As such, even if the

[20] 83 Fed. Reg. at 45494. cf. 45490, 45491, 45495.
[21] FSA paragraph 9. DHS notably omits FSA paragraph 9 and wholly neglects the quoted clause. (83 Fed. Reg. at 45515, Table 11)
[22] FSA paragraph 40. Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85—4544—RJK(Px) (C.D. Cal. Dec. 7, 2001)

proposed rules are adopted, the requisite requirements for the FSA to terminate under Paragraph 40 are not met and DHS must continue to act in accord with the FSA.

Respectfully submitted,

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