

The Flores Settlement and Family Incarceration: A Brief History and Next Steps

The Flores Settlement Agreement is a court settlement, in place for over two decades, that has set limits on the length of time and conditions under which children can be incarcerated in immigration detention. In September 2018, the Trump Administration proposed regulations that seek to terminate the Flores Settlement Agreement's legal safeguards for children, including the provision that children must be transferred to a non-secure, licensed facility within three to five days of apprehension, which has been interpreted to allow for an extension of up to 20 days in times of "emergency" or "influx." The proposed regulations include a number of policies which, if implemented, would allow the government to incarcerate more families for even longer periods of time.

This factsheet presents a brief history of the 1997 Flores Settlement Agreement as it relates to children incarcerated in family detention centers with an accompanying parent or legal guardian. Following an overview of recent developments under the Trump Administration, Human Rights First offers recommendations for upholding the rights of children and their parents whom the government seeks to incarcerate for indefinite and prolonged periods of time.

The Original Flores Settlement

In 1985, two organizations filed a class action lawsuit on behalf of immigrant children detained by the former Immigration and Naturalization Service (INS) challenging procedures regarding the detention, treatment, and release of children. After many years of litigation, including an appeal to the United States Supreme Court, the parties reached a settlement in 1997.

The Flores Settlement Agreement imposed several obligations on the immigration authorities, which fall into three broad categories:

- The government is required to release children from immigration detention without unnecessary delay in order of preference beginning with parents and including other adult relatives as well as licensed programs willing to accept custody.
- With respect to children for whom a suitable placement is not immediately available, the government is obligated to place children in the "least restrictive" setting appropriate to their age and any special needs.
- The government is required to implement standards relating to the care and treatment of children in immigration detention.

According to advocates, as well as the Department of Justice Office of the Inspector General, the INS did not immediately comply with the terms of the Agreement. It was only after the Office of Refugee Resettlement (ORR) assumed responsibility for the care and custody of unaccompanied children in 2003—a product of years of advocacy on the part of human rights organizations, religious groups, and political leaders—that significant changes were implemented.

Accompanied Children

Because the 2003 legislation requiring the transfer of custody from INS to ORR only applied to unaccompanied children, the situation of children who arrive with a parent or legal guardian—“accompanied” children—remained largely under the radar in the first decade of the Agreement. One exception was a lawsuit challenging the deplorable conditions at the former T. Don Hutto facility in Texas, which housed accompanied children with their parents. The federal government agreed to close the Hutto facility in 2009, leaving only one family detention center in Berks County, Pennsylvania.

Family Detention Under the Obama Administration

In June 2014, the federal government responded to the increase in the number of children and families seeking protection at the southern border by expanding the nearly abandoned policy of family incarceration. The Department of Homeland Security (DHS) increased the number of family detention beds from 90 to 3,700 in one year. The families were incarcerated in four facilities. One of these facilities, a federal law enforcement training center in Artesia, New Mexico, was hastily erected as a temporary detention camp to incarcerate families but soon closed due to litigation. The other facilities, listed below, are still in operation today:

- ☑ The South Texas Family Residential Center in Dilley, Texas, operated by CoreCivic, has capacity to incarcerate 2400 individuals, making it the largest immigration detention center in the country.
- ☑ The Karnes County Residential Center in Karnes City, Texas, operated by the GEO Group, has capacity to incarcerate 1158 individuals.
- ☑ The Berks County Residential Center in Leesport, Pennsylvania, operated by Berks County, is currently licensed to incarcerate 96 individuals but has expanded its bed space to have capacity to incarcerate nearly 200 individuals.

For over a year, the Obama Administration pursued an aggressive policy of incarcerating thousands of families while also attempting to block their release on bond or parole. Beginning in 2015, two court orders required the administration to scale down the number of incarcerated families. First, as described below, the U.S. District Court for the Central District of California ruled, and the Ninth Circuit later affirmed, that the Flores Settlement Agreement applies to children accompanied by their parents. Second, the U.S. District Court for the District of Columbia in *RILR v. Johnson* preliminarily enjoined the government’s policy of blanket detention to deter Central American families from coming to the United States to seek asylum. The injunction was dissolved after the government agreed that it would no longer use deterrence as a factor in custody determinations involving families.

Flores Settlement Litigation

2015: U.S. District Court for the Central District of California rules that the federal government’s family detention policy violated the terms of the Flores Settlement Agreement.

In accordance with the Flores Settlement Agreement’s guiding principles favoring the release of children from detention and their placement in the least restrictive setting, DHS is required to release children to an appropriate adult or transfer them to a non-secure, licensed facility within three to five days of apprehension. A 2015 order from the U.S. District Court, Central District of California found that, under certain extenuating circumstances where the government faces an “emergency” or “influx” of minors, a *de minimis* extension of the transfer period—

up to 20 days—may not violate this requirement if the government acts in good faith and with due diligence to screen the family for release. That 2015 order also required the government to:

- ☑ Make prompt and continuous efforts toward family reunification;
- ☑ Release children without unnecessary delay in accordance with the Flores order of preference, which begins with parents and also includes licensed programs willing to accept custody;
- ☑ In situations where a child may cannot be released promptly to an adult family member or licensed program, detain children in appropriate facilities that are unsecure and licensed. The court established that children may not be held in a “secure” facility, defined as “a detention facility where individuals are held in custody and are not free to leave”;
- ☑ The court also noted, referencing the government’s own argument, that “there is no state licensing process available now—nor was there in 1997—for facilities that hold children in custody along with their parents or guardians.” With these changes, family detention as we know it today is impossible to maintain legally;
- ☑ Release accompanying parents upon release of children, unless they pose a safety or flight risk, which the government should mitigate through appropriate bond or conditions of release;
- ☑ Monitor detention conditions and propose standards to improve the “egregious” conditions at Border Patrol facilities;
- ☑ Provide monthly statistical information to counsel for the plaintiffs.

The government immediately appealed the district court’s decision that the Flores Settlement Agreement applies to accompanied minors, the requirement that detained parents be released with children, and the denial of its alternative motion to modify the agreement.

2016: U.S. Court of Appeals for the Ninth Circuit affirms that the Flores Agreement applies to accompanied minors in addition to unaccompanied minors.

On July 6, 2016 the U.S. Court of Appeals for the Ninth Circuit agreed in part and overruled in part the district court’s 2015 order.

- ☑ First, the Ninth Circuit affirmed the portion of the District Court’s ruling stating that the Flores Agreement “unambiguously applies to accompanied minors” as well as unaccompanied children. In this respect, the Ninth Circuit’s ruling was a momentous victory for children and families as it clarified that protections for unaccompanied children apply to children incarcerated with their parents. Namely, the ruling made clear all children must be placed in the least restrictive setting possible and be transferred to a non-secure, licensed facility within five days of arrest, or “as expeditiously as possible,” in the event of an emergency or influx.
- ☑ Second, the Ninth Circuit reversed the district court’s finding that the Flores Settlement Agreement provides a right to release for parents incarcerated with their children, finding that accompanying parents are only entitled to the same individualized custody determination as adults traveling without children.
- ☑ Finally, the Ninth Circuit upheld the district court’s denial of the government’s alternative motion to modify the Flores Agreement, finding that the government failed to establish that any change in the law made the agreement impermissible.

2017: The District Court finds that the government is failing to comply with its obligations under the Flores Agreement.

In June 2017, the district court found that the government was failing to comply with its obligations under the Flores Settlement Agreement. Some children and their parents were incarcerated in secure, unlicensed facilities for up to eight months—well beyond the five-day time limit or the exception of 20 days previously authorized in times of emergency or influx. Additionally, the district court found that the government had failed to meet other obligations regarding Border Patrol facility conditions, including:

- ☑ inadequate provision of food;
- ☑ inadequate access to clean drinking water;
- ☑ unsanitary and unsafe conditions;
- ☑ freezing temperatures, and;
- ☑ inadequate sleeping conditions.

The district court therefore ordered the government to appoint a Juvenile Coordinator to oversee compliance with the Agreement. Additionally, the order established that if conditions had not improved to reach substantial compliance with the Flores Settlement Agreement one year after the appointment of the Juvenile Coordinator, the judge would reconsider the plaintiff's request to appoint an Independent Monitor.

2018: Judge Gee denies the government's request to modify the Flores Agreement and appoints an Independent Monitor to oversee compliance.

On July 9, 2018, the U.S. District Court denied another request by the government to modify the Flores Settlement Agreement. The government sought to allow Immigration and Customs Enforcement (ICE) to detain children together with their parents and exempt family detention centers from the requirement that facilities detaining children be licensed by an appropriate state agency, in violation of the Flores Agreement and previous court rulings. The request came shortly after President Trump issued his June executive order directing Secretary of Homeland Security Kirstjen Nielsen to incarcerate migrant families in family detention to the maximum extent permitted by law. In rejecting the government's application, the district court stated that the government's motion was a "cynical attempt [...] to shift responsibility to the Judiciary for over 20 years of Congressional inaction and ill-considered Executive action that have led to the current stalemate."

Finally, the District Court noted "persistent problems" with the government's compliance with the Flores Settlement. As a result, on July 27, 2018 the district court issued a motion calling for the appointment of a Special Master/Independent Monitor. On October 5, 2018, the court appointed Andrea Sheridan Ordin as the Independent Monitor tasked with ensuring that the government complies with the district court's June 2017 and July 2018 orders, among other oversight tasks.

Family Incarceration Under the Trump Administration

The Trump Administration has sought to expand and entrench the use of family incarceration. Two executive orders by President Trump, issued in January 2017 and in June 2018, called for the incarceration of asylum seekers and migrants for the pendency of their immigration cases. In signing the 2018 order in the wake of the administration's failed family separation policy, the president asked Attorney General Jeff Sessions to request a modification to the Flores Settlement Agreement that would increase the amount of time that children can be

incarcerated in detention facilities. As described below, this request was made by the government in June 2018 and denied by a district court the following month.

Now, the Department of Justice is attempting to bypass limitations on family incarceration as set out by the Flores Settlement Agreement by proposing regulations intended to allow the government to incarcerate families for indefinite periods of time.

Proposed Regulations and Next Steps

In September 2018, DHS issued a Notice of Proposed Rulemaking, proposing regulations that purport to terminate the Flores Agreement. Under a 2001 stipulation, the Flores Settlement Agreement terminates 45 days after the government publishes regulations implementing its terms. However, instead of implementing the terms of the Agreement, the proposed regulations seek to implement modifications that the district court expressly rejected.

The proposed regulatory changes include: eliminating any time limitation on incarceration by eliminating the requirement that family detention centers be licensed by an appropriate state agency and instead allowing DHS to self-license their own facilities; eliminating certain child safety and welfare standard for family detention centers; and further limiting release options for children incarcerated in family detention who have not yet passed a credible fear interview.

Currently, individual members of the public as well as local and national immigrants' rights groups, advocacy organizations, doctors, social workers, and interfaith groups are submitting comments opposing the proposed regulations. Written comments must be received by November 6, 2018, after which date the agencies are required to review the comments before deciding on whether to proceed with a final rule.

Human Rights First opposes the adoption of the regulations as they violate the Flores Settlement Agreement and would eliminate legal safeguards that protect children in immigration custody. The incarceration of families harms the physical and mental health and development of children. Expanding the policy of family incarceration ignores the warnings of medical professionals, including the American Academy of Pediatrics, which established that, "even short periods of detention can cause psychological trauma and long-term mental health risks for children." Studies reveal extensive emotional harm resulting from detention, including: depression and anxiety, self-harm, suicidal ideation, developmental and behavioral regressions, post-traumatic stress disorder, lack of appetite, weight loss, and frequent infections and gastrointestinal symptoms. The AAP has also warned that detention is "no place for a child, even if they are accompanied by their families."

Rather than expand the use of family incarceration, the government should increase funding for legal representation for immigrant families. Families with legal counsel overwhelmingly appear at their immigration court proceedings, with studies showing that 97 percent of represented mothers attended their court hearings. In circumstances where families would benefit from additional support, the government should also employ effective and cost-efficient case management and appearance support programs. The Family Case Management Plan, which was implemented by ICE between 2016 and 2017, not only provided families with much-needed social and medical support services but also led to 99.3% attendance at ICE check-ins and appointments and 100% attendance at court hearings.

Family incarceration is cruel, inhumane, and unnecessary. DHS should reverse course and refrain from issuing its proposed regulations that run counter to U.S. law, the Flores Settlement Agreement, and U.S. legal obligations under international treaties.