

**UNACCOMPANIED IMMIGRANT AND REFUGEE
CHILDREN:**

**A Working Paper Prepared for the Office of
Refugee Resettlement**

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I INTRODUCTION

The transfer of responsibility for the care, housing, and release of unaccompanied minors detained pending removal proceedings offers a historic opportunity to reconsider past policies and practices that have often failed to afford vulnerable children with appropriate treatment and services.

In this paper, counsel for plaintiff children in *Flores v. Ashcroft* set out a number of concerns regarding the INS's implementation of the *Flores* settlement and, more generally, regarding the INS's treatment of children generally. By examining past policies and practices children have experience from the time they are arrested to the time they are removed, we hope to provide a framework for discussing policy options during future meetings between *Flores* counsel and the ORR.

II TRANSFER TO AND FROM ORR; TRANSPORTATION

A Identification of juveniles

Flores counsel periodically receive reports alleging that the INS has erroneously placed minors in adult facilities. If the INS makes an erroneous determination that a particular arrestee is an adult, it will likely not transfer custody to ORR.

In close cases, the INS often relies on dental examinations or similarly questionable methods to decide whether an individual is a minor. It is generally accepted that dental examinations yield at best an estimated age with a margin of error of approximately 2 years on either side of the estimate.

Even in cases where the individual produces a birth or baptismal certificate proving a detainees' minority within the margin of error, the INS has insisted on using the dental exam estimate as a bright-line indicator of minority.

The *Flores* settlement provides only that an individual may not be treated as a minor with respect to release and an adult with respect to placement.

Flores counsel nevertheless encourage ORR to offer an administrative remedy to individuals who disagree with the DHS's initial determination that they are adults. Such review would proceed on the basis of all available evidence and resolve whether an arrestee is a minor or not in accordance with the preponderance of evidence.

B Post-arrest custody and transfer to ORR

The *Flores* settlement provides that minors will generally be placed in licensed facilities within 72 hours of arrest. We nevertheless encourage ORR and DHS to adopt procedures that will reduce the time minors spend in DHS facilities below the 72 hours permitted under the *Flores* settlement.

Under present practice, the majority of minors apprehended by the INS are likely not detained for 72 hours, but are removed either summarily or pursuant to agreements to voluntarily depart. The INS's securing voluntary departure agreements from young unaccompanied and unrepresented minors has been a point of contention in the past.

See *Perez-Funez v. District Director, INS*, 611 F. Supp. 990 (C.D. Cal. 1984) (unrepresented minors must be generally afforded an opportunity to consult with adult advisor prior to signing voluntary departure form); *Johns v. United States Department of Justice*, 624 F.2d 522, 524 (5th Cir. 1980) ("denial of due process to hold proceedings to deport an unrepresented infant incapable of representing herself").

Flores counsel believe that minors should not be subject to expedited removal, nor should they be asked to voluntarily depart unless they are first afforded an opportunity to consult with counsel. See generally, *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 187 (1972) (waivers of rights must be explicit, knowing, voluntary, and must not undermine the relevant public interest). Affording minors these procedural protections argues in favor of transferring all minors to ORR custody prior to removal.

If it is not feasible to provide all minors, then we would encourage ORR and DHS to provide them to minors who are 14 years of age or younger, as well as to minors of any age who are mentally or physically impaired or who express fear that they would suffer abuse or persecution upon being returned to their countries of origin.

C Custody proximate to physical removal

1 During 90-day removal period

In 1996, shortly before the court approved the *Flores* settlement, Congress amended the INA to provide for a period of mandatory detention for all persons against whom a final order of removal (deportation) is entered.

8 U.S.C. § 1231(a)(1) establishes a 90-day "removal period," which commences on the date an order of removal becomes "administratively final" or upon a circuit court of appeals' judgment if the court affirmatively stays removal. 8 U.S.C. § 1231(a)(2) provides that during this removal period "the Attorney General shall detain the alien." 8 U.S.C. § 1231(a). The same subsection further provides: "Under no circumstances during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3) [relating to criminal aliens] or deportable under section 1227(a)(2) or 1227(a)(4)(B) [relating to terrorists] of this title."

If, following the 90-day removal period, the INS has not effected removal, the agency is generally directed to release individuals "under supervision." 8 U.S.C. § 1231(a)(3). See generally, *Zadvydas v. INS*, _ U.S. _; 121 S.Ct. 2491; 150 L.Ed.2d 653 (2001).

Flores counsel believe that this prior legislation does not supersede later, contrary provisions of the *Flores* settlement. See *Environmental Defense Fund v. Costle*, 636 F.2d 1229, 1240-41 (D.C. Cir. 1980) (whether subsequent legislation supersedes consent decree a matter of congressional intent). Further, the second sentence of 8 U.S.C. § 1231(a)(2) specifically prohibits release during the 90-day removal period only of criminals and terrorists. Minors who have been released to parents and other custodians and who are neither criminals nor terrorists should accordingly not be returned to custody except for purposes of actual physical removal.

2 When physical removal impracticable

In the past, it has proved difficult, if not impossible, to deport minors who are nationals of certain countries: e.g., Iraq, Afghanistan, and, in some instances, the People's Republic of China.

Under current INS practice, once a minor released to a parent or other custodian becomes subject to a final order of removal, he or she is taken back into custody while the INS attempts to obtain permission to return the minor. In some cases, it is known beforehand that the minor's country will not issue travel documents permitting the minor's return. In others, it is known that obtaining travel documents will take weeks or months to obtain.

Flores counsel believe minors' custody arrangements should not be disturbed until the DHS has obtained travel documents for the minor's physical removal.

D Use of mechanical restraints during transport and as disciplinary tool.

The *Flores* settlement recognizes that the psychological well-being of non-delinquent minors in INS custody mandates that they not be shackled or handcuffed without justification. The settlement states that "[m]inors shall not be subjected to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living" Agreement, Exhibit 1 ¶ C.

Nonetheless, under current practice, INS officers and local law enforcement personnel enjoy broad discretion to handcuff and shackle minors while transporting them to and from detention facilities. Minors also report extended periods of confinement in handcuffs, restraints used as discipline, as well as officials who handcuff and threaten them with transfer and extended imprisonment.

Flores counsel believe that minors should not be subjected to routine handcuffing or shackling during transportation. Such mechanical restraints should be applied only (a) when an individual minor is out of control and poses a serious, evident and immediate danger to himself or others and less restrictive means of controlling the minor's behavior have failed, or (b) during transportation outside the facility when the use of mechanical restraints are necessary for public safety.

III RELEASE

A Roles of ORR and DHS

Congress's decision to transfer responsibility for the custody of detained minors to the ORR suggests that ORR will enjoy primary authority to determine when a minor should be released to relatives or other appropriate non-governmental custodians.

The *Flores* settlement explicitly declares that minors should in most circumstances be released to family members or other suitable custodians and that continued government

custody is generally disfavored. *Flores* counsel encourage the ORR to minors whenever release so doing is consistent with their safety and well-being.

B Administrative review

The *Flores* settlement contemplates that in cases where release is denied, a detained minor would have the right to have an immigration judge or federal court review that decision. Given the barriers to an unaccompanied minor's exercising those rights, very few decisions denying release are ever reviewed by an immigration court or federal judge.

Flores counsel accordingly encourage the ORR to provide a path for administrative review of decisions denying release. Administrative appeal procedures should be designed to afford unaccompanied minors with a viable, easily exercised right to administrative review of adverse custody decisions.

D Standards

1 Release to non-preferred custodians

The *Flores* settlement sets out a list of potential custodians, in order of preference, to whom minors will generally be released. The INS has interpreted this to permit it to detain minors unless the custodian who appears highest on the list appears to take custody of the minor. If the preferred custodian refuses to appear, the minor remains in custody.

The *Flores* settlement, however, does not permit extending a child's detention because his or her parents or other relatives refuse to appear. Rather the settlement provides for release in an order of preference to *available* custodians.

Flores counsel encourage ORR to end the INS's practice of refusing to release children to available qualified caregivers merely because a preferred custodian is known to be in the United States.

2 Home studies

Under the *Flores* settlement, the INS is authorized to conduct a home study prior to releasing a minor to any non-governmental custodian. *Flores* counsel regularly receive complaints of excessive delays in the INS's initiating home studies and in releasing minors once the home studies have been completed.

Flores counsel encourage ORR to establish targets for completing home studies and for releasing minors once such studies are completed.

3 Release of "at-risk" groups: Chinese, Indians

Under current policy and practice, Chinese and Indian minors experience inordinately long periods of detention before being released to parents or other non-governmental

custodians. The INS believes that alien smugglers are particularly aggressive in searching out and retaliating against such minors following release.

Flores counsel recognize that releasing such minors does present exceptional risks, but these risks are not addressed effectively merely by extending a minor's detention in all cases where the minor belongs to a peculiarly at-risk group. We would urge ORR to establish specific procedures to expedite the release of such minors.

4 Release on bond or recognizance

Existing law permits the INS to require that a minor post a bond as a condition of release. Under current practice, however, the INS releases most minors on their own recognizance.

As a practical matter, very few unaccompanied minors have the ability to post even a modest appearance bond, and *Flores* counsel accordingly believe the ORR should not require an appearance bond except where there is a serious risk that a particular minor would otherwise fail to appear.

IV IN-CUSTODY PLACEMENTS

A Of the general population

1 Juvenile detention facilities

Flores counsel urge ORR to eliminate or greatly reduce the INS's use of secure facilities to house children in immigration proceedings. Currently, a third of children in INS custody are housed in juvenile jails for periods ranging from a few days to more than a year. These facilities are fundamentally inappropriate for the vast majority of the children in question. They are ill-equipped to meet the needs of children who have not committed a criminal offense and are often traumatized by displacement and past experiences in their home countries. A child should be placed in such a facility only after an individualized determination that secure confinement is absolutely necessary and that less restrictive placements are inappropriate.

2 Group homes

About two-thirds of current INS bed space for children is in shelter care facilities existing specifically to house children in immigration proceedings. These facilities vary both in quality and the level of security in place.

Although any future program will likely also incorporate a shelter care component, *Flores* counsel urge ORR to minimize the use of such facilities in favor of release to family or foster care.

For some children who cannot be released or for whom foster care is deemed inappropriate, placement in a shelter or group home may be the best option throughout the duration of their proceedings. However, shelter care should generally be used only

on a short-term basis and should be designed to provide as home-like an environment as possible.

3 Foster care

Foster care is best-suited to meet the needs of the majority of unaccompanied children in immigration proceedings who are not released to relatives or other suitable caretakers. We urge ORR to utilize foster care for unaccompanied minors who are wherever possible. Foster care should be culturally appropriate and involve families that are able to provide a safe and stable home to the child.

B Of special populations

1 Influx

Approximately 36 percent of minors currently placed in secure facilities are so placed because the INS purports to have no bed for them in a licensed facility. *Flores* counsel believe that improved release procedures and flexible network of foster homes could substantially reduce resort to secure facilities to house unaccompanied children in immigration proceedings. However, we would also encourage the ORR to develop sufficient foster care placements to accommodate realistic projections concerning the actual number of minors who will require such placements.

2 Family units

In the past, the INS has operated a number of detention facilities in which it housed family units. However, to our knowledge the INS presently has no facility in which to house families with young children. The trauma to a young child who is separated from his or her parents needs no elaboration. *Flores* counsel believe that ORR should work with DHS so as to keep family units together during custody.

3 Delinquents

The *Flores* agreement provides that a minor may not be placed in a juvenile detention or secure INS detention facility for delinquency if the act at issue was either an isolated incident in the child's history or a minor offense for which a juvenile would not be detained. Nonetheless, the INS regularly places children in secure confinement based upon the child's having any arrest record whatsoever and regardless of the severity of the alleged behavioral offense.

Although we oppose commingling the general population of detained immigrant and refugee minors with delinquents, *Flores* counsel nevertheless believe the ORR should carefully evaluate the seriousness of a child's background of delinquency before opting for secure confinement.

C Disciplinary policy and practice

Minors detained by the INS in secure facilities (including non-delinquent minors) indicate that an alarming number of them are subject to solitary confinement, during which they are denied access to outdoor recreation, leisure activities, education and even meals outside their cell.

This treatment of minors violates both the letter and the spirit of the *Flores* settlement, which provides that the INS shall treat “all minors in its custody with dignity, respect and special concern for their particular vulnerability of minors.” Settlement Agreement ¶ 11. The settlement goes on to stipulate: “Every effort must be taken to ensure that the safety and well-being of the minors detained in these facilities are satisfactorily provided for by the staff.” Settlement Agreement ¶ 12.A. The settlement further requires that minors be provided:

Activities according to a recreation and leisure time plan which shall include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session.

Settlement Agreement Exhibit 1, ¶ A.5.

The settlement specifically prohibits “... corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living such as eating or sleeping.” Settlement Agreement, Exhibit 1, ¶ C.

In view of the foregoing, *Flores* counsel believe the ORR should develop a policy against confining children in a room during daylight hours except upon a written finding that the class member constitutes a serious and evident danger to himself or others. When room confinement is necessary, policy should provide that children will nevertheless experience living conditions and privileges approximating those available to the general juvenile population, except upon a written finding that providing the class member such living conditions and privileges would present a serious and evident danger to the child or others.

V GUARDIANS AD LITEM; APPOINTED COUNSEL

The Homeland Security Act requires ORR to (i) develop a plan to ensure that children in immigration proceedings receive the assistance of qualified and independent counsel; and (ii) to identify sources of guardian services for such children.

Flores counsel believe such services are critical to the ability of children to understand and successfully navigate the immigration proceedings in which they are placed. We hope that ORR will work with the legal and social services community, as well as the Executive Office for Immigration Review, to ensure competent and consistent representation for all unaccompanied children, including those released to family. To

the extent possible, such services would be greatly facilitated if foster care and shelter care facilities were concentrated in communities in which such services are more readily available.

At a minimum, minors who are 14 years of age or younger, as well as minors of any age who are mentally or physically impaired or who express fear that they would suffer abuse or persecution upon being returned to their countries of origin, should be provided both guardians ad litem and appointed counsel.

VI STATISTICS AND MONITORING

The INS's collection of data on children in immigration proceedings is currently inadequate. We urge ORR to develop a data collection system that identifies age, gender, nationality, case type and disposition, placement, and length of custody. Such information will greatly facilitate the government's ability to design and implement a humane and effective system of care for children.