FRAMEWORK FOR
CONSIDERING THE BEST INTERESTS
OF UNACCOMPANIED CHILDREN

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Subcommittee on Best Interests of the Interagency Working Group on Unaccompanied and Separated Children

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Participants in the Subcommittee included the Department of Homeland Security (DHS), Department of Justice (DOJ), Department of Health and Human Services (HHS), and Department of State (DOS); non-governmental organizations including American Friends Service Committee, Center for Gender and Refugee Studies at UC Hastings, International Social Service (ISS-USA), Kids in Need of Defense (KIND), Lutheran Immigration and Refugee Service, National Immigrant Justice Center, Public Counsel, South Texas Pro Bono Asylum Representation Project (ProBAR), U.S. Conference of Catholic Bishops, and the Women’s Refugee Commission; law school-based immigration practitioners; and staff of the UNHCR Regional Office for the United States.

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I. SUBCOMMITTEE: PURPOSE AND METHODOLOGY

A. The Interagency Working Group on Unaccompanied and Separated Children

Interagency Working Group on Unaccompanied and Separated Children (“Interagency Working Group”) has summarized its role and responsibility as follows:

In April 2007, key U.S. Government representatives and experts from non-governmental organizations formed the Interagency Working Group on Unaccompanied and Separated Children to provide a forum for discussion on topics concerning refugee children, trafficked children, orphans, child soldiers, and children in U.S. immigration proceedings, as well as issues relating to repatriation. These discussions culminated in the October 2008 Conference on the Protection of Unaccompanied and Separated Children at George Mason University. More recently, the Working Group has met regularly to discuss topics relating to unaccompanied and separated alien children, including trends within this population, care and custody issues, and family reunification.1

B. Subcommittee on Best Interests of the Interagency Working Group

In late 2011, the Interagency Working Group “invited members to participate on a subcommittee to develop a framework and recommendations for integrating the best interests of the child into decisions concerning [unaccompanied children].”2 The Young Center for Immigrant Children’s Rights agreed to staff the Subcommittee, convene meetings of the Subcommittee members, and prepare recommendations for the full Interagency Working Group. In late 2012, the Young Center secured a grant from the John D. and Catherine T. MacArthur Foundation to undertake and complete the project. Participants in the Subcommittee included the Department of Homeland Security (DHS), Department of Justice (DOJ), Department of Health and Human Services (HHS), and Department of State (DOS); non-governmental organizations (NGOs) included American Friends Service Committee, Center for Gender and Refugee Studies at UC Hastings, International Social Service (ISS-USA), Kids in Need of Defense (KIND), Lutheran Immigrant and Refugee Service, National Immigrant Justice Center, Public Counsel, South Texas Pro Bono Asylum Representation Project (ProBAR), U.S. Conference of Catholic Bishops, and the Women’s Refugee Commission; law school-based immigration practitioners; and staff of the UNHCR Regional Office for the United States.

From 2012 to 2014, Subcommittee members communicated and exchanged ideas at three in-person meetings, written correspondence, and telephone conversations. Prior to each meeting, the Young Center circulated ideas, questions, concerns, best practices, and recommendations proposed by members of the Subcommittee. Members had an opportunity to participate and comment on this exchange of ideas before, during and after each meeting, after which the draft framework and factors were further modified. Each of the meetings was moderated by Professor Andrew Schoenholtz of Georgetown University Law Center.
In February 2015, the full Interagency Working Group met to review and discuss a final draft of the Subcommittee’s recommendations. Everyone who attended the meeting as well as those who attended prior meetings of the Working Group or the Subcommittee were invited to provide final recommendations and comments before this report was completed.

C. Scope and Purpose of this Document

The Framework for Considering the Best Interests of Unaccompanied Children (“Framework”) is the result of this extended exchange of ideas. It is intended to be a practical guide for considering a child’s best interests as part of any decision about that child, in a manner that is consistent with existing immigration law.3

The document envisions that each decision maker would consider a child’s best interests as part of each decision along the continuum of a child’s care—from apprehension, to custody, to release, to a decision on the child’s legal claim, including the possibility of repatriation—and articulates specific factors to address as part of those decisions.

The Framework also contemplates systemic changes that would require adaptations to agency-wide policies, procedures and training.

What follows in this report is:
- a Framework for considering children’s best interests, which is envisioned as a continuum of decisions from the moment of apprehension until a child’s immigration case is fully resolved;
- factors to be applied in considering the best interests of a child within this framework, applying universally accepted best interests principles.

The Framework and factors are presented from two perspectives. The first considers possible agency-wide changes in procedure or policy. For example, Subcommittee members discussed whether DHS could create a centralized office or mechanism for permitting a “best interests” review of cases in which children were unsuccessful in pursuing relief but who expressed a fear of return to their countries of origin. The centralized review would allow a child, through counsel, to petition DHS officials to consider specific best interests factors before deciding whether to exercise discretion in the child’s case.

The second perspective centers on individual actors. Subcommittee members repeatedly expressed the concern, “what would a decision maker do in an individual case?” The final pages of this document offer specific questions for decision makers considering a child’s best interests as part of a decision, in the form of questions and agency- and action-specific checklists.
Some recommendations in the Framework already exist, whether on an agency-wide level, or as a part of formal or informal procedures adopted by individual offices within an agency or individual decision makers. Notwithstanding the different mandates of the governmental members of the Subcommittee—law enforcement (DHS), adjudication (DOJ and DHS), custody, care and release (HHS and DHS), safe repatriation (DHS, DOJ, HHS, DOS)—all of the agencies recognize that children are different from adults, and each agency has already established some procedures that recognize these differences. One goal of the Subcommittee was to place these existing procedures within a comprehensive and rigorous, child-protective Framework for considering the best interests of vulnerable children in all decisions along the continuum.

Of note, the inclusion of any recommendation in this document does not indicate that it received support from all members, or any particular member of the Subcommittee. The recommendations reflect the range of ideas proposed and discussed over a multi-year period. Some garnered wide support; some reflect existing practices; some were identified as easily-implementable; others garnered support from NGOs but met resistance from an agency or agencies, often due to resource allocation, capacity concerns, or conflicting mandates (e.g., law enforcement); and in some cases, there was debate over which agency or agencies could or should have responsibility if the recommendation was implemented. The authors of this report endeavored to include the broadest possible range of recommendations, so long as they could be implemented under existing law. Concerns about any given recommendation based solely on cost or available resources did not preclude its inclusion in this document.

D. Moving Forward

This Framework is intended to offer concrete and implementable ideas for public and private actors. Participants in the process consistently voiced an expectation that the Framework would serve as a resource in subsequent efforts to craft policies and procedures for the treatment of, and decision-making about unaccompanied children. We hope that in answering the questions, “What does it mean to consider a child’s best interests?” and “How can best interests factors be part of decisions about a child’s apprehension, custody, release, legal relief or repatriation?” we have demonstrated that it is both possible and practical to thoughtfully consider children’s safety and well-being in every decision. As practice and policies develop based on this Framework, we will be better able to ensure that unaccompanied children receive the treatment they deserve.
II. FRAMEWORK FOR CONSIDERING CHILDREN’S BEST INTERESTS

The best interests principle has deep roots in U.S. law. Every state has laws requiring courts to consider the best interests of children separated from their parents or legal guardians. These laws are applied in courts designed to consider and protect the particular vulnerabilities of children. In large part, the work of this Subcommittee is to bring these well-established U.S. norms to bear in decisions affecting immigrant children, where there is often no explicit requirement to consider best interests, but where children are no less deserving of protection and solicitude.

As a signatory to the UN Convention on the Rights of the Child (CRC), the U.S. government cannot act in contravention of the principles articulated in the CRC. All other nations, now including Somalia, have ratified the Convention and are state parties. The CRC establishes that the “best interest of the child” shall be a primary consideration in all actions regarding children, including unaccompanied children. The CRC imposes this obligation on governments as well as private entities, courts of law and administrative authorities.

Although the Immigration and Nationality Act (INA) does not contain an explicit obligation for federal decision makers to consider the best interests of immigrant children in every decision, members of the Interagency Working Group recognized that consideration of a child’s best interests was both important and could be consistent with the requirements of the INA. With the passage of the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA), the “best interests” principle now appears multiple times in immigration law, both with respect to placement decisions by the Office of Refugee Resettlement, an agency within HHS, and with respect to the role of the child advocate, which is to advocate for the best interests of the child. The INA also applies the “best interest” standard in its definition of a special immigrant juvenile. The TVPRA thus clearly envisions consideration of the best interests of the child when making decisions about vulnerable, unaccompanied children.

The Framework developed by the Interagency Working Group seeks to ensure consideration of the best interests of unaccompanied immigrant children while recognizing the government’s interests in protecting public safety and ensuring the fair and just application of the law. It is important to note that the Framework sets forth a practical guide for taking into consideration the best interests of the child. It does not in any way prohibit government officials from considering other important factors, for example safety to the community or national security concerns. Those and many other factors are, and will continue to be, incorporated into the decision-making process.

The Framework is primarily focused on the government actors who have authority over most decisions made regarding unaccompanied immigrant children. However, the Framework also is intended to guide the decisions of non-government actors to the extent they are responsible for the care or custody of, or delivery of services to, unaccompanied children, with the exception of attorneys for the child, who represent the child’s expressed interests.
A. Best Interests Factors: Universally Accepted Best Interests Principles

The “best interests of the child” is the foundational principle of child protection and is central to all U.S. state court proceedings involving children, particularly when separation from family is at issue. Similarly, the CRC requires all public and private institutions, courts and administrative bodies to consider the best interests of the child.12

Best interests is a term of art that is sometimes, but not often, defined as a matter of law. The most widely accepted elements of best interests include:

- safety and well-being;13
- the child’s expressed interests, in accordance with the child’s age and maturity;14
- health;15
- family integrity;16
- liberty;17
- development (including education);18 and
- identity.19

Consideration of the child’s views, even in the context of adversarial immigration proceedings, is an integral element of any best interests analysis.

Any decision that does not take into account the child’s views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.

The fact that the child is very young or in a vulnerable situation (e.g., has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child’s views in determining his or her best interests.20

Finally, children should at all times be treated with “dignity, respect, and special concern for their particular vulnerability” as children.21 They should also be protected at all times from discrimination.22 Authorities must recognize and address the long-accepted principle that children experience situations differently from adults.23

WIDELY ACCEPTED BEST INTERESTS PRINCIPLES:

Safety and Well-being
Child’s Expressed Interests
Health
Family Integrity
Liberty
Development
Identity
B. The Framework: Decision Making Continuum

This Framework envisions consideration of the best interests of the child from the moment the child is identified by federal officials as unaccompanied until there is a durable solution, i.e., the child is granted the right to remain permanently in the United States or is safely repatriated to the child’s country of origin. The Subcommittee found it helpful to think about consideration of children’s best interests by using this decision-making continuum, which identifies the points at which federal agencies make “particularly important decisions” about unaccompanied children. These include:

- apprehension;
- placement, transfer and services within government custody;
- release from government custody;
- proceedings in immigration court and before USCIS;
- substantive relief; and
- safe repatriation and reintegration.

Some federal agencies have exclusive control over certain decisions along this continuum: for example, the Department of Homeland Security has exclusive authority over decisions to apprehend unaccompanied children. Other decisions are the responsibility of multiple agencies: for example, both DHS and the Department of Health & Human Service’s Office of Refugee Resettlement (ORR) make decisions about children’s custody, transfer and release. What follows is a brief summary of the agencies’ roles along the continuum of decision making.
1. APPREHENSION

The majority of unaccompanied children continue to be apprehended by the Department of Homeland Security (DHS) Customs and Border Protection (CBP) along the U.S.-Mexico border.25 In general, the facilities at which these children are initially processed are not designed for children and are not staffed by law enforcement officials with specialized training in working with children, child welfare, or trauma.

Children are also apprehended internally, after living for a period of time (days, weeks, months or years) in the United States. Typically, these children come into the custody of DHS's Immigration & Customs Enforcement (ICE) after an encounter with local law enforcement; for example, after an arrest, after a juvenile delinquency proceeding, or upon release from a state juvenile detention center. Officials within ICE must decide whether to take custody of the child from a state agency, release the child directly to a parent or legal guardian, designate the child as an unaccompanied minor and arrange for the child’s safe transfer to the Office of Refugee Resettlement (ORR), and issue and serve a Notice to Appear (NTA), a document charging the child with being in the country without permission and requiring the child to appear in immigration court.

Children apprehended by DHS are entitled to due process, including the right to know the reasons for their apprehension and detention. Federal law requires DHS to provide each child with a Notice of Rights and Request for Disposition through Form I-770 (hereinafter the “Form I-770 Notice of Rights”).26 If a child is less than 14 years of age or unable to understand the notice, the notice must be read and explained to the child in a language he or she understands.27

The current version of the Form I-770 Notice of Rights requires that the arresting officer explain three basic rights to the apprehended child: the right to use the telephone to call a parent, adult relative or adult friend; the right to be represented by an attorney who can fully explain the child’s rights; and the right to a hearing before the immigration judge who will decide whether the child must leave or whether the child may stay in the United States.28 DHS regulations require that the rights must be explained to the child in a language he or she understands in order to waive rights.29

Pursuant to Section 235(a)(2) of the TVPRA, DHS must also individually screen unaccompanied Mexican children within 48 hours of apprehension to determine that they are not victims of trafficking or at risk of being trafficked, do not have credible fear of persecution, and are able to make an independent decision to withdraw admission (i.e., are to make an independent decision to return to Mexico).30

DHS is also responsible for identifying unaccompanied alien children. Pursuant to federal law, an unaccompanied alien child is any child who is: 1) under the age of 18; 2) has no parent or legal guardian in the United States available to provide care and physical custody; and 3) has no lawful immigration status in the United States.31 Children identified as unaccompanied alien children must be transferred to the care and custody of ORR, within HHS, within 72 hours of that determination.32
2. PLACEMENT AND TRANSFER WITHIN CUSTODY

The Office of Refugee Resettlement (ORR) has responsibility for the care and custody of unaccompanied immigrant children and is required to care for them in the least restrictive setting while in government custody. ORR has developed a hierarchy of placements for unaccompanied children, ranging from the least restrictive (short-term, community-based foster care) to the most restrictive (state juvenile detention facilities). ORR also contracts with therapeutic and residential treatment facilities to serve children with special needs. Children are entitled to all of the following services, pursuant to the *Flores v. Reno* settlement agreement.

- Proper physical care and maintenance
- Appropriate routine medical and dental care, family planning services, and emergency health care services, appropriate immunizations and appropriate mental health interventions
- An individualized needs assessment
- Educational services
- Daily outdoor activity, daily large-muscle activity, and daily structured leisure time
- Weekly individual counseling sessions by trained social work staff
- Group counseling sessions
- Acculturation and adaptation services
- Comprehensive orientation
- Access to religious services of the child’s choice
- Visitation and contact with family members, with respect for the child’s privacy
- Right to privacy, including the right to wear his or her own clothes when available; a private space for the storage of personal belongings; private conversations on the phone; private visitation with guests; and uncensored mail
- Family reunification services
- Legal services information

Additionally, the TVPRA directs HHS to “ensure, to the greatest extent practicable” and consistent with provisions of the Immigration and Nationality Act that all unaccompanied children in the custody of HHS or DHS “have counsel to represent them in legal proceedings or matters and to protect them from mistreatment, exploitation, and trafficking.” The TVPRA also authorizes HHS to appoint “independent child advocates” to advocate for the best interests of child trafficking victims and other vulnerable, unaccompanied children.
3. RELEASE FROM GOVERNMENT CUSTODY

Pursuant to federal law, children shall be released to sponsors with preference given to: 1) a parent; 2) a legal guardian; 3) an adult relative; 4) an adult individual or entity designated by the parent or legal guardian; 5) a licensed program willing to accept legal custody; or 6) an adult individual or entity seeking custody when it appears there is no other likely alternative to long-term detention.37

ORR follows specific procedures to determine whether a child may be released. The agency “takes into consideration the unique nature of each child's situation and incorporates child welfare principles when making placement, clinical, case management, and release decisions that are in the best interest of the child.”38 The TVPRA requires that ORR conduct a home study prior to the release of certain children in ORR custody.39 Home studies allow ORR to obtain more information about a prospective sponsor and the child’s safety upon release. Additionally, children who undergo a home study prior to release are eligible for “post-release services” after their release, which vary based on the child’s and sponsor’s needs.

4. PROCEEDINGS IN IMMIGRATION COURT AND BEFORE USCIS

Multiple agencies have a role in identifying and considering the best interests of children in their individual immigration proceedings. Children placed in removal proceedings appear in the immigration courts of the Executive Office for Immigration Review (EOIR), within the Department of Justice. In these adversarial proceedings, the government is represented by trial attorneys from the Office of the Chief Counsel of Immigration and Customs Enforcement, within the Department of Homeland Security. Some children may pursue relief from removal by applying for immigration benefits from U.S. Citizenship and Immigration Services (USCIS), a separate agency within the Department of Homeland Security.

The 2008 TVPRA established the right of children seeking asylum to apply first with USCIS, rather than before the immigration judge, despite being placed in removal proceedings prior to their application.40 Thus USCIS has initial jurisdiction over children’s asylum claims, and also adjudicates children’s petitions for Special Immigrant Juvenile Status (SIJS, for abused, neglected, or abandoned children), T and U nonimmigrant statuses (for crime victims and victims of trafficking, respectively), self-petitions under the Violence Against Women Act (VAWA), and in some cases, children’s petitions to adjust to lawful permanent resident status.

Nevertheless, most children continue to appear in immigration court. Recently, EOIR established juvenile dockets for unaccompanied children, both detained and released, so that children’s cases are now, for the most part, heard separately from adult cases. In some jurisdictions, EOIR has allowed immigration practitioners to establish programs in the building where children and sponsors can participate in a “Know Your Rights” session, be screened for legal relief, and secure a “friend of the court” representative for a single proceeding, or even secure legal representation. EOIR also provides a legal orientation program (an “LOPC”) for the sponsors of unaccompanied children in several locations and offers access to a national call center for children’s sponsors in other locations.
5. SUBSTANTIVE RELIEF

In almost every case, decisions by an immigration judge or a USCIS official to grant or deny relief are discretionary. While children must establish the required statutory criteria to demonstrate their eligibility for relief, considerations of the child’s best interests—safety, expressed interests, family integrity, liberty, and ability to develop (as described below)—may be relevant both to statutory factors and to the exercise of discretion. Information about a child’s best interests—for example, the lack of a place where she could live in safety upon return to her country—could inform multiple elements of an asylum claim, from the state’s ability or willingness to protect her, to her ability to safely relocate. Similarly, the likelihood that a child’s repatriation would separate her from her only caregiver—for example, a grandparent with temporary protected status residing in the United States—and put her at risk of homelessness and living on the streets in her home country, could be relevant to an application for Special Immigrant Juvenile Status or asylum. Alternatively, consideration of the child’s best interests may provide an important counter to negative discretionary factors. Finally, best interests considerations could also inform an immigration judge’s decision to ask the government to exercise prosecutorial discretion, or to administratively close a child’s case.

In those cases where a child cannot establish eligibility for relief from removal, consideration of the child’s best interests may be particularly relevant to the decision to order the child removed, or for DHS to consider exercising discretion in favor of the child.

Within the last year, both DOJ and HHS have established programs to significantly expand the number of children receiving government-funded representation in immigration proceedings. Additionally, HHS has increased funding for, and the number of, child advocate programs to identify and advocate for the best interests of particularly vulnerable children. It is important to note that the role of the attorney in immigration proceedings is to represent the expressed interests of the child. When an attorney believes that a child’s desire threatens the child’s safety, the attorney may counsel the child as to his or her options, but ultimately, the attorney must represent the child’s expressed interests. The role of the child advocate is to identify and advocate for the child’s best interests.41
6. SAFE REPATRIATION AND REINTEGRATION

The TVPRA creates a clear expectation that vulnerable children not be returned to unsafe or inhumane situations in their countries of origin. The TVPRA calls upon federal agencies to “Ensure[e] the Safe Repatriation of Children” as part of the statute’s stated goal of combating child trafficking. The Secretaries of State, Health and Human Services and Homeland Security, together with nongovernmental organizations, are required to create a pilot program to “develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.” The Secretary of Homeland Security is required to “consult the Department of State’s Country Reports on Human Rights Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.” Congress also required the same federal agencies to report on how, when and why children are repatriated, with particular attention to “the steps taken to ensure that such children were safely and humanely repatriated,” and a description of the immigration relief sought and denied to such children.

The Subcommittee has recognized that ensuring a child’s safe repatriation and reintegration requires:

- inquiry into the child’s best interests;
- disclosure to the decision maker of information relevant to the best interests inquiry; and
- consideration of the information gathered during the best interests inquiry as part of the decision whether to grant voluntary departure or to order removal, and as part of the actions taken to effectuate the child’s removal or voluntary departure.

Subcommittee members repeatedly raised concerns about the lack of sufficient and sufficiently-funded programs in countries of origin to facilitate children’s safe reintegration, as well as the need for more sustained, interdisciplinary and intra-governmental collaborations to develop such programs.
C. Precedent for Considering Best Interests in Removal Proceedings

No fewer than three federal agencies are responsible for making decisions about unaccompanied children. Each agency has developed some policies and procedures specific to children. Whether implicit or explicit, a concern for children’s safety, their ability to express themselves, their separation from family, their liberty interests, and their ability to develop—in other words, their best interests—underlies these existing policies.

For nearly 20 years, DHS (and its predecessor agency, the Immigration and Naturalization Service or INS), has recognized the unique situation of children appearing in immigration proceedings designed for adults. In 1998, the INS promulgated Guidelines for Children’s Asylum Claims which adopt the “best interests of the child” as a “useful measure” for appropriate interview procedures for child asylum seekers. The Guidelines establish procedures for children that closely track well-established best interests principles in the adjudication of children’s claims, such as permitting the presence of a trusted adult; requiring interviews conducted by Asylum Officers with “specialized training in child refugee issues;” facilitating awareness of the emotions or cultural considerations that may affect certain responses from children; and engaging in “child-sensitive questioning” that is “tailored to the child’s age, stage of language development, background, and level of sophistication.”

More recently, in 2011, DHS addressed the exercise of prosecutorial discretion with respect to children, by its agents. ICE Deputy Assistant Secretary John Morton indicated that “minors” and “individuals present in the United States since childhood” require “prompt particular care and consideration” in the exercise of prosecutorial discretion.

The Obama administration’s program for the Deferred Action of Childhood Arrivals (DACA) reinforces the idea that it is not always in the best interests of a child to be placed in removal proceedings.

As noted supra, pursuant to federal law, ORR is required to place unaccompanied children in their custody in “the least restrictive setting that is in the best interest of the child.” The statute then prescribes “best interests” as the standard for child advocacy, requiring that “[a] child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child.” ORR’s interpretation of that statute with regard to age determination procedures indicates a similar orientation toward the best interests of the child, requiring the resolution of “ambiguous, debatable, or borderline results” from medical age determination procedures “in favor of determining the alien as a minor.”

In recent years, federal agencies have considered the “best interests of the child” standard through a wide lens. In its 2013 Parental Interest Directive, the Department of Homeland Security specifically addressed the need for special measures when persons subject to removal proceedings are the parents of minor children. This policy directs DHS agents to consider how their decisions will impact the parent-child relationship and requires affirmative steps to ensure that removal proceedings do not lead to the termination of that relationship.

Consideration of the best interests of the child also appears in Department of Justice memoranda. In 2007, EOIR issued guidelines for unaccompanied children in immigration courts. The agency describes the “best interest” principle as a factor that relates to the immigration judge’s discretion in taking steps to ensure that a “child-appropriate” hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim. In its memo, EOIR contemplated a framework in which the INA and its regulations can be exercised with best interest considerations in mind:

By carefully controlling how the proceedings are conducted, immigration judges can effectively discharge their obligation under the INA and the regulations in a way that takes full account of the best interest of the unaccompanied alien child.
III. APPLYING THE BEST INTERESTS FRAMEWORK IN AGENCY DECISION MAKING

A. Opportunities to Incorporate Best Interests Considerations into Agency Policy

In its meetings and discussions to develop this Framework, the Subcommittee on Best Interests shared ideas, discussed existing agency practices, reviewed current law, regulations and policies as well as resource limitations, and explored policies and practices from domestic child welfare and law enforcement systems. One outcome of this process was the identification of opportunities to develop agency-wide policies and practices that would ensure individual decision makers have the authority and tools to apply the best interests Framework and factors. What follows in this section are strategies—some of which already exist, others which have been tried in discrete locations, others which are common practice in juvenile courts, and some of which are necessary because of existing failures to consider best interests in all decisions involving unaccompanied children.

1. DEPARTMENT OF HOMELAND SECURITY

Multiple components within DHS make decisions about children. The Subcommittee directed its attention to U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) officials with regard to the apprehension and custody of children; to attorneys within Immigration and Customs Enforcement’s Office of Chief Counsel, who pursue removal proceedings against children; and to asylum officers and other officials within U.S. Citizenship and Immigration Services (USCIS) who adjudicate children’s petitions for affirmative asylum and other immigration benefits.

It is in children’s best interests to be safe at all times.

It is in children’s best interests for CBP and ICE officers apprehending, detaining, questioning, transporting, or otherwise interacting with children to ensure that children are safe at all times and have their physical, medical and psycho-social needs attended to and met. Children should not be subjected to procedures or facilities designed for adults when those procedures or facilities put their safety or well-being at risk.

It is in children’s best interests for ICE trial attorneys to promote fundamentally fair proceedings for children, which take into account the particular age, vulnerability and developmental abilities of children; to refrain from proceeding with a child’s case while barriers exist to the child’s ability to understand the proceeding or to express his or her interests; and to ask questions about and consider the child’s safety and well-being during and after the proceedings, before making any requests of the immigration judge or any decision about the child. Additionally, before making any decision relevant to a child’s request for relief—including whether to file a “Notice to Appear,” whether to challenge or join a child’s claim for relief, and whether to grant a child’s request for the exercise of discretion—DHS officials should consider the child’s best interests, as an element of determining how to exercise agency discretion.
It is in children’s best interests for USCIS officials to ensure fair proceedings, in which barriers to a child’s ability to understand the proceedings and to express his or her interests are resolved before the child’s claim(s) for relief is considered, and in which the agency—through asylum officers, other adjudicators, and supervisory officials—considers the child’s safety and well-being before making any decision. USCIS officials, before making any decision on an affirmative application but in a timely manner, should consider the child’s best interests in deciding whether to exercise the agency’s discretion to provide the requested benefit.

When a child requests voluntary departure or removal, it is in a children’s best interests for DHS officials to disclose to the immigration judge any information indicating that a child has expressed a fear of return to home country, or indicating that the child would be unsafe upon repatriation; such disclosures are also necessary elements of a fundamentally fair proceeding. When a child is granted voluntary departure or ordered removed, DHS must ensure the child’s safety. DHS officials should take affirmative steps to ensure that a child returning to his or her country of origin will be safely and humanely transported and received by an adult who is willing and capable of caring for the child. These actions serve to protect children, but they can also promote re-integration instead of re-migration.

GENERAL RECOMMENDATIONS

• Designate a senior official within DHS Headquarters, along with a point person from each of the three components—CBP, USCIS, and ICE—to review all policies and procedures affecting unaccompanied children.

• Issue the regulations required by the TVPRA.

RECOMMENDATIONS FOR APPREHENSION AND CUSTODY

• Ensure children are not separated from parents in DHS custody, such that DHS action renders the children “unaccompanied.”

• Establish designated areas in all CBP facilities where children can be screened or interviewed in a safe, private and child-appropriate manner; alternatively, create child-appropriate spaces in designated facilities, where children can be moved in a safe and timely manner.

• Create safe spaces (in individual facilities, or at designated, regional facilities) in which children: can remain with siblings or other family members (for family integrity purposes); are separated from unrelated adults (for child protection purposes); are provided with privacy for purpose of medical evaluations; and have privacy in using the bathroom.

• Collaborate with child welfare experts to develop revised tools to aid CBP and ICE when screening children, training officers, and developing pilot or model projects.

• Contract with child welfare professionals who are trained in trauma-informed interviewing skills to conduct TVPRA screenings (without divesting DHS of final decision-making authority regarding whether the child meets any of the three criteria established by the TVPRA).

• Develop policies to allow parents of children apprehended internally to pursue release directly from DHS prior to their child’s designation as an unaccompanied minor.

• Develop policies to evaluate whether a child is prima facie eligible for asylum, SIJS, T or U non-immigrant status, or any other form of relief or prosecutorial discretion before issuing an NTA.
• Develop policies to determine whether children referred from delinquency or state child welfare authorities are a priority for enforcement, and for the appropriate consideration of delinquency adjudications (particularly for alleged gang activity for children under the age of 16).

• Consider a child’s best interests (in conjunction with existing decision making priorities) before placing a detainer on a child in state custody.

• Contract/partner with local Child Advocacy Centers equipped with child-appropriate rooms and staff for screening.

**RECOMMENDATIONS FOR PROCEDURES IN IMMIGRATION COURT**

• Streamline or automate the Change of Venue process for unaccompanied children while in custody and upon their release.

• Develop and provide all children and sponsors with materials that explain common forms of relief and the children’s rights (these forms could be drafted by USCIS in collaboration with NGOs).

• Develop policies to ensure that agency officials understand and abide by state confidentiality laws for juvenile court proceedings when seeking information or records from juvenile courts.

• Develop policies to prohibit any court-related enforcement (e.g., issuing NTA’s) against an unaccompanied child’s parent, family member or sponsors unless such person presents a serious threat to national security or community safety.

**RECOMMENDATIONS FOR PROCEDURES FOR USCIS INTERVIEWS**

• Establish procedures or guidance for USCIS officials that reduce the need to ask questions of children that may invite or induce the re-visiting of traumatic events (e.g., accepting declarations of a trauma history in advance of the interview, and limiting further questions unless there is a need to clarify or there is a concern about credibility; or accepting transcripts of interviews conducted at Child Advocacy Centers to establish facts whose re-telling may be traumatizing for the child).

• Provide space for legal services providers and child advocates to meet with children during designated interview days to facilitate representation and child advocate services.

• Establish additional mechanisms to refer children to pro bono or low cost counsel if they appear for an interview unrepresented.

• Develop forms and instructions that are tailored to children’s general stages of development to ensure that children—particularly those who are unrepresented—are able to seek protection for which they are eligible.

• Develop scripts for asylum officers and other officers that are tailored to children’s general stages of development, to ensure that children—particularly those who are unrepresented—understand and have access to fundamentally fair proceedings.

• Develop advisories for state courts, child welfare, and law enforcement agencies on USCIS-adjudicated forms of relief for children.

• Create a mechanism for USCIS officials to recommend the appointment of a child advocate if they are concerned about the child’s safety (e.g., that the child is in the custody of a trafficker) or believe the child is particularly vulnerable.
**RECOMMENDATIONS REGARDING DECISIONS TO GRANT OR DENY RELIEF FROM REMOVAL IN IMMIGRATION COURT**

- Incorporate “the best interests of the child” as an explicit criterion in policies regarding the exercise of prosecutorial discretion.
- Develop policies that require the agency to consider the child’s safety in home country and other best interests factors before the agency takes a position on a child’s request for voluntary departure or removal.
- Develop policies to ensure the department does not inhibit the child’s ability to be represented by counsel, and which recognize that representation is necessary to ensure the child’s express wishes are heard and that the child is not pressured into revealing information that could negatively impact the child’s case.
- Develop specialized training for ICE trial attorneys on the following subjects:
  - the forms of relief available to children and children’s unique experiences and needs relevant to these forms of relief;
  - child- and culturally-appropriate questioning techniques;
  - children’s development and the impact of trauma on children; and
  - the differences between delinquency and criminal proceedings.
- Designate and train Points of Contact for children’s cases in each ICE Office of Chief Counsel.
- Develop procedures to refer vulnerable children for the appointment of a child advocate.

**RECOMMENDATIONS REGARDING DECISIONS TO GRANT OR DENY RELIEF IN USCIS PROCEEDINGS**

- Develop specialized training for asylum officers on the following subjects:
  - children’s asylum claims;
  - child- and culturally-appropriate questioning techniques;
  - children’s development and the impact of trauma on children; and
  - the differences between delinquency and criminal proceedings.
- Develop specialized training for USCIS officials involved in the adjudication of children’s petitions for SIJS and adjustment of status on the following subjects:
  - the forms of relief available to children and children’s unique experiences and needs relevant to these forms of relief;
  - child- and culturally-appropriate questioning techniques;
  - children’s development and the impact of trauma on children; and
  - the differences between delinquency and criminal proceedings.
- Develop corps of specially-trained asylum officers for children’s cases.
- Designate and train Points of Contact for children’s cases in each USCIS office.
SAFE REPATRIATION RECOMMENDATIONS

- Establish a designated unit within DHS to accept referrals of cases—from attorneys, from immigration judges, or from children—where there is no relief or relief was denied, but there are clear safety concerns or a fear of return, so that the agency can consider exercising its discretion (deferred action/administrative closure).
- Establish policies encouraging trial attorneys to actively participate in, and not object to, inquiries into the child’s safety when a child requests voluntary departure, as outlined below.
- Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.
- Collaborate with other government agencies, including the Department of Health and Human Services, the Department of State and United States Agency for International Development (USAID) to develop relationships with public or private agencies in the receiving countries so that children can be referred for appropriate services prior to the child’s return.
- Continue to participate and engage in regional, bilateral dialogue on children’s migration.

2. DEPARTMENT OF JUSTICE—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

The role of immigration judges is to ensure fundamentally fair proceedings. To do so, immigration judges should not consider a child’s claims on the merits without first resolving barriers that impede a child’s ability to understand the proceedings and to express his or her interests, including access to counsel. It is in children’s best interests for all stakeholders, including immigration judges, to ask questions about and consider the child’s safety, well-being and family integrity before making any decisions. Immigration judges should consider whether the child will be safe upon return to his or her country of origin before ruling on DHS’s request for a removal order and consider a child advocate’s best interests recommendation before ordering a child’s removal.

It is in children’s best interests for the government to ensure fundamentally fair proceedings for children.

GENERAL RECOMMENDATIONS

- Establish separate dockets for released children in all jurisdictions, with frequency aligned to case volume, where children are recognized as children and where the immigration judge can implement child-protective measures in a more efficient manner.
- Develop a corps of specially-trained immigration judges who oversee children’s dockets (multiple judges in each jurisdiction).
- Develop procedures whereby immigration judges who have concerns about a child’s capacity can refer the child for appointment of a child advocate where such programs exist, and/or can refer the child to an expert for a competency evaluation.
• Develop training for all immigration judges overseeing children’s dockets on the following subjects:
  – the forms of relief available to children and children’s unique experiences and needs relevant to these forms of relief;
  – the differences between delinquency and criminal proceedings;
  – child- and culturally-appropriate questioning techniques; and
  – children’s development and the impact of trauma on children.
• Develop training for all interpreters working with children.
• Collaborate with state juvenile courts and NGOs to develop training and tools for immigration judges on children’s development, capacity and vulnerability.
• Issue the regulations required by the TVPRA of 2008.

RECOMMENDATIONS FOR PROCEDURES IN IMMIGRATION COURT

• Develop procedures to ensure children are represented by counsel in immigration proceedings.
• Develop and provide all children and sponsors with materials that explain common forms of relief and the children’s rights (these could be drafted by EOIR in collaboration with NGOs).
• Provide space for legal services providers, child advocates, and other service providers to meet with children during children’s (detained & released) dockets.
• Develop scripts for immigration judges that are tailored to children’s stages of development, to ensure that children—particularly those who are unrepresented—understand and have access to fundamentally fair proceedings.
• Provide full, simultaneous interpretation for children appearing at master calendar and merits hearings.
• Develop procedures to ensure consideration of best interests recommendations submitted by child advocates.
• Expand pilot program postponing initial master calendar hearing for detained children.
• Collaborate with DHS to develop an automatic change of venue procedure for detained children who are released.

SAFE REPATRIATION RECOMMENDATIONS

• Develop procedures requiring immigration judges to make specific inquiries of all parties about a child’s safety when a child requests voluntary departure or removal, including:
  – to whom the child will return;
  – whether there is a parent, guardian, traditional caregiver or agency willing and able to take custody of and care for the child;
  – whether the child has previously expressed any fear of return to home country; and
  – what the child believes will happen upon his or her return (e.g., whether or what kind of harm the child could experience upon return).
• Develop procedures (through a new Operating Policies and Procedures Memorandum, or OPPM) allowing the immigration judge to take the following steps when a child requests voluntary departure or removal and there are concerns about the child’s safety upon return, including:
  – ensuring the child has representation before proceeding, so that the child understands all of his or her rights and to ensure the child’s express wishes are zealously represented;
  – referring the child for appointment of a child advocate to provide a recommendation regarding the child’s best interests;
  – considering the child advocate’s best interests recommendation prior to making a decision on the child’s request, and affording the opportunity for inquiries from all parties, and particularly the child, of information contained in the recommendation;
  – referring the child for an independent mental health examination if there are concerns about the child’s competency; and
  – in the face of evidence that the child will be unsafe if returned to his or her country or origin, continuing the case or denying the child’s request for voluntary departure and instead referring the case to DHS for consideration of whether the case merits the exercise of prosecutorial discretion.

• Modify current EOIR guidance to recognize that children frequently change their mind, particularly in situations of great stress, and encourage immigration judges to take these concerns into account when adjudicating an unaccompanied child’s motion to reopen after a grant of voluntary departure. An immigration judge may grant a motion to reopen on the basis of a child deciding to pursue relief after having requested voluntary departure.

3. DEPARTMENT OF HEALTH AND HUMAN SERVICES—OFFICE OF REFUGEE RESETTLEMENT (ORR)

The Department of Health and Human Services is required by statute to place unaccompanied children in the least restrictive placement that is in their best interests; to provide children with access to attorneys to “the greatest extent practicable;”63 and may appoint child advocates for child trafficking victims and other vulnerable children.

It is in children’s best interests to receive age- and developmentally-appropriate care at all times and to be released expeditiously to a parent or to another sponsor determined to be able to provide a safe home.

Children should receive the educational, health and mental health services necessary to ensure their safety and well-being while in custody, be referred to such services in their communities where they are released, and have access to mechanisms to seek help if these necessary services break down after their release.
**Recommendations for Custody and Release**

- Establish short-term foster care or small group home care as primary model for care of children; eliminate large (50+ beds) facilities.
- Collaborate with outside experts to demonstrate cost-effectiveness of short-term foster care.
- Focus on developing or expanding facilities in resource-rich, metropolitan areas where there are more pro bono services providers (legal, health and therapeutic service providers).
- Develop policies for children’s placement and transfer that require consideration of children's proximity to U.S.-based family; their access to counsel; and their access to state, federal and immigration court.
- Prioritize the transfer of children likely to turn 18 while in custody to a location close to family or other support services.
- Create a mechanism to evaluate whether post-release services should continue past the initially-recommended period for services.
- Provide post-release, follow-up services to expanded categories of children.
- Establish a mechanism where released children, or attorneys, child advocates or other stakeholders serving released children, can seek help from ORR if the placement is or becomes unsafe.

**Safe Repatriation Recommendations**

- Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.
- Continue to ensure that all children requesting voluntary departure or removal while in custody are represented by counsel.
- When a child or others have disclosed reliable information indicating the child will be unsafe in home country and the child indicates intention to request voluntary departure or removal, request appointment of a child advocate.
- Provide information regarding the child’s safety in home country to the child’s attorney and the appointed child advocate (e.g., if family in home country have disclosed threats to the child or family to ORR officials, this information should be provided to the child’s attorney and child advocate).
- Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.
- Collaborate with other government agencies, including the Department of Homeland Security, Department of State and USAID, to develop relationships with public or private agencies in the receiving countries, so that children can be referred for appropriate services prior to their return.
4. DEPARTMENT OF STATE AND USAID

SAFE REPATRIATION RECOMMENDATIONS

• Pursuant to the TVPRA, identify and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied immigrant children.

• Collaborate with other agencies, including the Department of Health and Human Services, the Department of Homeland Security and United States Agency for International Development (USAID) to develop relationships with public or private agencies in receiving countries so that children can be referred for and connected to appropriate services prior to their return.

• Engage in dialogue and foster collaboration with the governments and civil society of the primary countries of origin and countries of transit for unaccompanied children, to develop designated safe spaces in which children repatriated from the United States can meet with family members or child welfare authorities upon their return.

• Engage in dialogue and foster collaboration with the governments and civil society of the primary receiving countries for unaccompanied children to build support for agencies and nongovernmental organizations that serve the immediate needs of repatriated children, with attention to shelter, nutrition, abuse prevention, access to medication, mental health, educational and legal services.

• Engage in dialogue and foster collaboration with the governments and civil society of the primary receiving countries for unaccompanied children to build support for agencies and nongovernmental organizations that provide long-term reintegration support for at-risk children, or children who have returned from the United States with English-language and other skills, such as counseling and child-appropriate job training, vocational training and skill-building.

• Engage in dialogue and foster collaboration with the governments and civil society of the primary receiving countries for unaccompanied children to ensure that children’s families receive transportation assistance to meet returning children and ensure their safe passage home.

• Incorporate children’s rights and child-specific harms that relate to children’s asylum claims and other forms of relief in State Department Reports on country conditions and human trafficking.

• Continue to participate and engage in regional, bilateral dialogue on children’s migration.
5. ATTORNEYS OF RECORD, BIA-ACCREDITED REPRESENTATIVES

GENERAL

• Zealously advocate for and ensure that children’s express wishes are communicated to the court and decision makers.

• Develop strategies to address representation of the full range of a child’s express legal interests including conditions of custody, placement, and release.

• Ensure that the child understands all of his or her rights and has an opportunity to discuss decisions with the adults of his or her choosing before making a decision.

• Ensure the child is free from coercion or external factors that a child may view as coercive, to the greatest extent possible.

• Ensure that counsel has experience and/or receives training representing children in immigration proceedings and addressing legal issues relating to the detention of unaccompanied children.

• Provide training to counsel on:
  – the forms of relief available to children and the unique experiences of children, and the needs relevant to these forms of relief;
  – child- and culturally-appropriate questioning techniques;
  – children’s development and the impact of trauma on children; and
  – the differences between delinquency and criminal proceedings.

• Develop resources so that individual counsel can seek out experts to help children address untreated trauma or other physical or mental health needs.

• Seek appointment of a child advocate if the child is particularly vulnerable or there are safety concerns.
6. TVPRA-APPOINTED CHILD ADVOCATES

GENERAL

• Develop procedures to ensure full and fair consideration of a child’s best interests, with particular emphasis on the child’s safety and the child’s express wishes, consistent with domestic child welfare law and the Convention on the Rights of the Child.

• Develop policies to conduct Best Interests Determination (BID) panels of independent experts from different backgrounds, consistent with UNHCR protocols, in cases involving the risk of permanent separation of a parent and child against the parent’s or child’s will; cases where children lack capacity to express their own wishes, e.g., due to extreme tender age or mental disability or developmental delays; or cases where the best interests recommendation is likely to conflict with the child’s express wishes, e.g., cases where a child seeking asylum suddenly requests voluntary departure despite known risks to the child’s life.

• Develop policies to protect the confidentiality of information pursuant to the TVPRA.

• Ensure that each best interests recommendation is reviewed with the child before it is provided to government decision makers (if the child lacks capacity to understand the specific recommendation, ensure the child is aware of the underlying facts included in the recommendation, consistent with the child’s age and developmental stage).

• Ensure that all best interests recommendations are reviewed by an attorney with expertise in immigration law before they are provided to government decision makers.

• Ensure all procedures account for the adversarial nature of immigration proceedings.

• Develop a grievance mechanism for children or stakeholders to submit complaints about a child advocate.

SAFE REPATRIATION

• Establish procedures to determine whether the child will be safe upon return to his or her country of origin, including:
  – whether there is an adult who can, and will, care for the child;
  – whether the child will have adequate food and shelter;
  – whether the child will be free from immediate violence or coercion (for example, gang threats, trafficking or forced labor); and
  – whether the child will be able to access services critical to maintain the child’s physical and mental health.
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**CHECKLIST #1**

**Action: Apprehending and Taking Custody of Child / Agency: DHS - CBP**

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<table>
<thead>
<tr>
<th>BEST INTERESTS FACTORS</th>
<th>CONSIDERATIONS</th>
<th>COMMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safety</td>
<td>Will the child’s urgent physical and mental health needs be addressed?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be separated from unrelated adults?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be provided with food and water?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be provided with warm/dry clothing, menstrual supplies and personal hygiene necessities?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be provided with a blanket and a quiet, safe place to sleep?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child requires a medical examination, will the examination be limited to the child, the physician/medical professional, and if necessary a non-law-enforcement interpreter?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>Will the child be kept with siblings?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>Will the child be allowed to remain with adult family members, such as grandparents?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Will the child be interviewed in a child-appropriate environment?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Will the child be interviewed by a trained child welfare expert?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Will the child be interviewed in the language of his or her choice?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Will the child be permitted as many phone calls as necessary to reach a parent, legal services provider, and consular official?</td>
<td></td>
</tr>
</tbody>
</table>
This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

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<tr>
<td>Safety</td>
<td>Will the child’s urgent physical and mental health needs be addressed?</td>
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<tr>
<td>Safety</td>
<td>Will the child be separated from unrelated adults?</td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be provided with food and water, warm/dry clothing, a blanket and a quiet, safe place to sleep, and personal hygiene necessities?</td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be designated an unaccompanied alien child if s/he meets the statutory definition, despite any allegations or confirmation of delinquency or criminal history?</td>
</tr>
<tr>
<td>Safety</td>
<td>If the child requires a medical examination, will the examination be limited to the child, the physician/medical professional, and if necessary a non-law-enforcement interpreter?</td>
</tr>
<tr>
<td>Family Integrity</td>
<td>Is the child’s parent or guardian given sufficient time to secure the child’s release prior to the child’s designation as an unaccompanied alien child?</td>
</tr>
<tr>
<td>Family Integrity/Development</td>
<td>Would a detainer against a child in state custody risk the child’s separation from family, school or community?</td>
</tr>
<tr>
<td>Liberty</td>
<td>If a detainer is placed on a child in state custody will ICE take custody within the required timeframe?</td>
</tr>
<tr>
<td>Liberty</td>
<td>Is it necessary for ICE to take custody of the child? If the child is determined to be an enforcement priority, can the child be charged without entering DHS custody?</td>
</tr>
</tbody>
</table>
**CHECKLIST #3**

**Action:** Screening Mexican Child Pursuant to the TVPRA / **Agency:** DHS - CBP

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

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<th>BEST INTERESTS FACTORS</th>
<th>CONSIDERATIONS</th>
<th>COMMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safety</td>
<td>Will the child be screened in a safe and private environment, separated from other adults and from other children whose interests might be adverse to the child?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will a child welfare expert screen the child?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Are the child’s urgent health needs addressed prior to the screening?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Are the child’s physical needs—food, water, sleep, warm/dry clothing and personal hygiene—met prior to the screening?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has the screening official received training on issues of age, language, maturity, gender, culture, trauma and non-discrimination with respect to children?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the screening officer using child-sensitive materials designed to elicit relevant information?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the child able to request a female screening officer?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the child screened in his or her best language?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Does the child have sufficient time to understand and respond to the questions?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>If a child thinks of information after the screening, will s/he have the opportunity to meet with the official again and convey that information?</td>
<td></td>
</tr>
</tbody>
</table>
# Checklist #4

**Action:** Issuing the Notice of Rights  
**Agency:** DHS - CBP/ICE

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<table>
<thead>
<tr>
<th>Best Interests Factors</th>
<th>Considerations</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safety/Expressed Interests</td>
<td>Have DHS officials ensured that each child understands the I-770 and waiver of his or her rights?</td>
<td></td>
</tr>
<tr>
<td>Safety/Expressed Interests</td>
<td>Have DHS officials provided the I-770 to children in a setting in which they can make independent decisions?</td>
<td></td>
</tr>
<tr>
<td>Safety/Expressed Interests</td>
<td>If the child is apprehended internally, did the child receive the I-770 before they are interviewed by ICE officials and before the ICE interview is used to issue an NTA?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Was the form read to the child in the child’s best language?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Have DHS officials made efforts to determine the child’s literacy level and ability to read the I-770 if it is not read to the child?</td>
<td></td>
</tr>
</tbody>
</table>
CHECKLIST #5

Action: Placing or Transferring Child within ORR Custody / Agency: HHS - ORR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

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<th>BEST INTERESTS FACTORS</th>
<th>CONSIDERATIONS</th>
<th>COMMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safety</td>
<td>Does the placement have appropriate food, shelter, medical and dental care?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child receive mental health services, counseling, and therapy?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child have uninhibited access to an attorney, unless there are concerns the attorney presents a safety risk (e.g., was hired by a trafficker)?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child is particularly vulnerable, has a child advocate been appointed?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has the agency considered the child’s expressed wishes regarding placement with family, release from custody, or transfer to another facility?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Can the agency accommodate the child’s wishes for a particular placement, or type of placement, or location of placement, without risking the child’s safety or well-being or the safety of another?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has the child’s attorney been informed of the transfer or placement decision in advance and been given an opportunity to consult with and advise the child?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Will the child be placed or transferred to a setting where at least one staff member speaks the child’s language; or in the case of rare dialects or languages, to a program with other children who speak the language or dialect or a program that can provide regular access to an interpreter through a language line?</td>
<td></td>
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<tbody>
<tr>
<td>Liberty</td>
<td>Is the child placed in the least restrictive setting?</td>
<td></td>
</tr>
<tr>
<td>Liberty</td>
<td>Will transfer adversely impact the child's access to an attorney, or ability to attend an immigration or other court proceeding?</td>
<td></td>
</tr>
<tr>
<td>Liberty</td>
<td>Will the child have daily outdoor access opportunities for play and exercise?</td>
<td></td>
</tr>
<tr>
<td>Liberty</td>
<td>Will the child have access to religious services of the child's choice?</td>
<td></td>
</tr>
<tr>
<td>Liberty</td>
<td>Have all efforts been made to transfer the child to the least restrictive setting long before the child turns 18?</td>
<td></td>
</tr>
<tr>
<td>Liberty and Family Integrity</td>
<td>Will the child be afforded a right to privacy, including the right to wear his or her own clothes when available, private visits with approved family or sponsors?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>Will the child be placed or transferred as close to family as possible, unless proximity poses a threat to the child’s safety or proximity to family is contrary to the child’s wishes?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>Will the placement or transfer inhibit the child’s access to siblings, extended family members or others the child considers similar to family?</td>
<td></td>
</tr>
<tr>
<td>Development</td>
<td>Will the child have access to public school, or if prior schooling in US or 90+ days in custody, coursework that will count toward public school requirements?</td>
<td></td>
</tr>
</tbody>
</table>
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</thead>
<tbody>
<tr>
<td>Safety</td>
<td>Has the release been determined to be safe and in the best interests of the child?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If there are any concerns for the child’s safety upon release, will post-release services be provided to the child to monitor and address safety concerns?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Can a released child seek help from the agency if a sponsor subsequently poses a threat to the child’s safety?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child’s physical and mental health needs be adversely affected if the child is not released prior to his or her 18th birthday but is instead transferred to ICE custody?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child is particularly vulnerable, has a child advocate been appointed?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has the agency considered the child’s expressed wishes regarding release from custody?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has the child’s attorney been informed of release, transfer or placement decisions in advance and been given an opportunity to consult with and advise the child?</td>
<td></td>
</tr>
<tr>
<td>Liberty</td>
<td>If a sponsor or community agency can care for the youth, is there a compelling public safety or flight justification for not releasing the child prior to his or her 18th birthday?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>If the agency is denying or delaying release to a parent, has the agency considered the parent’s or legal guardian’s constitutional rights in making those decisions?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>Was the parent’s socio-economic status improperly factored into release decisions?</td>
<td></td>
</tr>
<tr>
<td>Development</td>
<td>Is the child’s need for additional post-release services evaluated at the end of initially-recommended time period?</td>
<td></td>
</tr>
</tbody>
</table>
**CHECKLIST #7**

**Action: Convening Immigration Court Proceedings / Agency: DOJ - EOIR**

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

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<tbody>
<tr>
<td>Safety / Expressed Interests</td>
<td>Is the child represented by an attorney or accredited representative?</td>
<td></td>
</tr>
<tr>
<td>Safety / Expressed Interests</td>
<td>Is a pre-hearing conference used to discuss case, limit scope of hearing, and discuss capacity and evidentiary concerns?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Has ICE shared the child’s A-file with the child’s legal representative in order to facilitate adjudication of case?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child is particularly vulnerable, is there a child advocate or has the immigration judge referred the child for the appointment of a child advocate?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If there is a child advocate, has the best interests recommendation been received and considered?</td>
<td></td>
</tr>
<tr>
<td>Safety / Expressed Interests</td>
<td>Is the proceeding private?</td>
<td></td>
</tr>
<tr>
<td>Safety / Expressed Interests</td>
<td>Does the child have access to full and simultaneous interpretation of the proceedings in the child’s best language?</td>
<td></td>
</tr>
<tr>
<td>Safety / Expressed Interests</td>
<td>If there are indications that the child lacks capacity, is there an evaluation of the child’s capacity?</td>
<td></td>
</tr>
<tr>
<td>Safety / Development</td>
<td>Can the child’s appearance be excused?</td>
<td></td>
</tr>
<tr>
<td>Safety / Family Integrity</td>
<td>Are continuances granted so that the child can reunify with family and to find an attorney or for other protection purposes?</td>
<td></td>
</tr>
<tr>
<td>Safety / Family Integrity</td>
<td>Are Changes of Venue easily sought and liberally granted when children are transferring or leaving ORR custody?</td>
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</table>
| Safety / Expressed Interests | Did the immigration judge implement child-protective evidentiary considerations, including:  
  • Limiting questioning or sustaining objections to harmful questions?  
  • Considering the child’s age, developmental stage, cognitive concerns and history of trauma when evaluating the child’s credibility?  
  • Considering the developmental, physical, emotional or psychological factors that may affect a child’s testimony?  
  • Removing barriers to a child presenting evidence?  
  • Accepting testimony/report from Child Advocacy Centers to avoid re-traumatizing child?  
  • Drawing inferences in child’s favor?  
  • Carefully considering the circumstances under which an unrepresented child made statements to a law enforcement or custodial agency?  
  • Allowing parents or other witnesses to testify without fear that their testimony will be used against them, except in cases involving national security or other extreme threats to community safety? |          |
| Expressed Interests | Has the immigration judge implemented child-friendly procedures? |          |
| Expressed Interests | Does the immigration judge use instructions that take into account the child’s age? |          |
| Expressed Interests | Is case continued for child to locate and submit evidence? |          |
| Safety / Family Integrity | Has ICE limited court-related apprehension of child’s family to cases involving national security or other threats to community safety? |          |
**CHECKLIST #8**

**Action: Adjudicating Child’s Case within USCIS / Agency: DHS - USCIS**

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

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<tr>
<td>Safety / Expressed Interests</td>
<td>Is the child represented by an attorney or accredited representative?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child is particularly vulnerable, is there a child advocate or has USCIS referred the child for the appointment of a child advocate?</td>
<td></td>
</tr>
<tr>
<td>Safety / Expressed Interests</td>
<td>Has the USCIS official limited the scope of questions posed to the child so that the child is not unnecessarily required to re-visit traumatic events?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the child permitted to bring a trusted adult to the interview?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the child scheduled for an interview on a day or at a time designated for children?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests / Safety</td>
<td>Has USCIS accommodated a child’s request to be interviewed by a person of a particular gender?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Does USCIS select adjudicators for children’s cases who have particular expertise in interviewing children with trauma histories?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the proceeding explained in developmentally-appropriate language?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Does the interview begin promptly?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the child given breaks—whether to eat, drink or use the restroom, or because the child is scared, nervous or upset, or simply because of the child’s age or stage of development?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has USCIS granted child’s request to extend/reschedule to submit evidence or to address a child’s emotional or developmental needs (e.g., counseling for trauma)?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Upon a child’s request, will officials reschedule an interview for a child with other pending applications for relief?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has USCIS developed forms, instructions and explanations for children that take into account a child’s age and stage of development?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has USCIS waived the in-person SIJS or adjustment interview for any child under 14 or where there are other extenuating circumstances, e.g., if the child has a disability or lives far from a field office?</td>
<td></td>
</tr>
</tbody>
</table>
### CHECKLIST #9

**Action:** Responding to Child’s Request for Voluntary Departure or Removal, or the Immigration Judge’s Order of Removal  /  **Agency:** DHS - ICE

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

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<tbody>
<tr>
<td>Safety / Expressed Interests</td>
<td>Is the child represented by an attorney or accredited representative?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the agency has information that the child may be unsafe upon return, has the agency considered this information in deciding whether to file or withdraw a Notice to Appear?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the agency has information that the child may be unsafe upon return, has the agency considered whether any other form of agency discretion in the case is appropriate?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the agency has information that the child may be unsafe upon return, has the agency disclosed this information to the immigration judge and the child's legal representative?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Has the agency consulted the Department of State Country Condition Reports and Trafficking in Persons reports before deciding how to proceed in the case?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Could DHS join a Motion to Reopen filed on behalf of a child who previously requested and was granted voluntary departure, but has changed his or her mind, or who was ordered removed while unrepresented?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>If child is unrepresented when requesting voluntary departure or facing removal, has DHS notified child of right to an attorney?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>If child is unrepresented when requesting voluntary departure or facing removal, has DHS confirmed that the child had an opportunity to consult with an attorney?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>If child is unrepresented when requesting voluntary departure or facing removal, has DHS confirmed that the child had an opportunity to consult with a trusted adult?</td>
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<tbody>
<tr>
<td>Expressed Interests</td>
<td>If child is unrepresented when requesting departure or facing removal, has DHS afforded the child every opportunity to identify an attorney or request the appointment of attorney (e.g., by not objecting to the child’s request for a continuance)?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>When communicating with the child, has DHS identified the child’s best language (particularly languages other than Spanish, including indigenous languages and dialects) and provided the child with access to a qualified interpretation service?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Are there any concerns that the child is not competent to make a reasoned and informed decision about returning to his or her home country? If so, has DHS referred the child for a mental health assessment and referred the child to the Department of Health and Human Services for the appointment of a child advocate?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity/Development</td>
<td>Is the child’s separation from family members—in the United States or in the home country—contributing to the child’s decision to seek voluntary departure? Has DHS carefully considered this issue before presenting arguments to the immigration judge?</td>
<td></td>
</tr>
</tbody>
</table>
### CHECKLIST #10

**Action:** Adjudicating Child’s Petition for Voluntary Departure or Request for Removal /

**Agency:** DOJ - EOIR

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</thead>
<tbody>
<tr>
<td>Safety / Expressed Interests</td>
<td>Is the child represented by an attorney or accredited representative?</td>
<td></td>
</tr>
</tbody>
</table>
| Safety | Has the Immigration Judge inquired where and with whom the child will reside upon returning to his or her country of origin? This inquiry would include:  
  - Whether there is there an adult—specifically, a parent, close relative, or previous caregiver whom the child has not accused of abuse, abandonment or neglect, or a functioning child welfare agency—who is willing and able to take custody of the child?  
  - Whether any federal agency has spoken with this adult to confirm that this person will, in fact, receive and take custody of the child upon the child’s return? | |
| Safety | Has the immigration judge conducted further inquiry to determine whether repatriation would place the child at risk of trafficking, persecution, return to a previously abusive or neglectful parent or no parent at all, or other safety concerns that threaten the child’s safety and well-being? Has the immigration judge consulted the State Department’s Trafficking in Persons and Country Conditions reports? | |
| Safety / Liberty | When an immigration judge undertakes a “best interests inquiry” pursuant to these recommendations, is the information gathered limited to use during that inquiry, so that it cannot be used in later or subsequent proceedings to establish the truth of allegations or charges against the alien, or to establish ineligibility for relief? | |
| Safety | Has the immigration judge allowed the child, if unrepresented, liberal continuances in order to secure counsel or for other purposes related to the child’s protection? | |

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<tbody>
<tr>
<td>Safety</td>
<td>If the child is particularly vulnerable, or there are any concerns about the child’s safety, has the immigration judge referred the child for the appointment of a child advocate, and continued the proceedings in order for the child advocate to provide a best interests recommendation to the court?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has the child had an opportunity to consult with a trusted adult?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>If the child wishes to speak with an adult or family member about a decision to request voluntary departure, has the immigration judge briefly continued the proceeding in order to allow the child to have this conversation?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Is the child being pressured by a trafficker, smuggler, or other person (including a family member)? Has the immigration judge considered whether that person poses a threat to the child’s safety and well-being?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has the immigration judge identified the child’s best language (particularly languages other than Spanish, including indigenous languages and dialects) and provided the child with access to a qualified interpretation service?</td>
<td></td>
</tr>
<tr>
<td>Safety / Expressed Interests</td>
<td>Are there concerns about the child’s competency to participate in the court proceeding?</td>
<td></td>
</tr>
<tr>
<td>Safety / Expressed Interests</td>
<td>If there are concerns about the child’s competency:</td>
<td></td>
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<td></td>
<td>• Has the court had the opportunity to examine mental health or other records regarding the child’s competency?</td>
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<td></td>
<td>• Has the court referred the child to an independent expert to examine the child and provide a recommendation on the child’s competency?</td>
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<tr>
<td></td>
<td>• Has the immigration judge referred the child for the appointment of a child advocate?</td>
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CHECKLIST #11

Action: Responding to Child’s Intention to Request Voluntary Departure or Removal  
Agency: HHS - ORR

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<tr>
<td>Safety</td>
<td>Are there any conditions of custody or of a foster care placement—for example, the child’s desire for more contact with family, the child’s desire to attend school outside of detention, separation from a prior attorney, lengthy custody, isolation from children who speak the child’s language, or conflict with staff or another child—that may be contributing to the child’s decision?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If so, can these conditions be remedied, giving the child an opportunity to reconsider his or her decision in a less restrictive environment?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Does the agency have reason to believe the child will not be safe upon returning to his or her country of origin?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Is there an adult—specifically, a parent, close relative, or previous or trusted caregiver, or a functioning child welfare agency—who is willing and able to take custody of the child? Has ORR designated someone to speak with this adult to confirm that this person will receive and take custody of the child upon the child’s return?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Are there known or suspected factors such as prior trauma history, pregnancy, parenthood, tender age, mental or physical disability, prior coercion by gangs or traffickers, which render the child particularly vulnerable? If so, has the agency referred the child for appointment of a child advocate (if a request has not already been received) or approved the appointment of a child advocate?</td>
<td></td>
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| Expressed Interests    | If the child is not yet represented by counsel, has ORR/its care provider contacted the local legal services provider to request that an attorney or accredited representative meet with the child prior to the child’s next court date? |          |

continued:
### CHECKLIST #11 (CONTINUED)
**ACTION:** RESPONDING TO CHILD’S INTENTION TO REQUEST VOLUNTARY DEPARTURE OR REMOVAL  /  **AGENCY:** ORR

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<tr>
<td>Expressed Interests</td>
<td>Has ORR and its contracted staff identified the child’s best language (particularly languages other than Spanish, including indigenous languages and dialects) and provided the child with access to a qualified interpretation service for communications with ORR/contracted staff?</td>
<td></td>
</tr>
<tr>
<td>Expressed Interests</td>
<td>Has ORR required staff at contracted facilities to meet with children within 48 hours of any court appearances to update them on the status of their family reunification efforts, and allow children to speak with approved family members and their attorneys?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>Is it likely that a delay in release to a parent or other sponsor, or a particular placement (in a location far from family, community or other services) is contributing to the child’s request to return to home country?</td>
<td></td>
</tr>
<tr>
<td>Family Integrity</td>
<td>If so, can the process for reunification with family be expedited, or the child transferred to a facility closer to family or prior community?</td>
<td></td>
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</tbody>
</table>
CHECKLIST #12

Action: Safely Repatriating Child to Country of Origin / Agency: DHS

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

<table>
<thead>
<tr>
<th>BEST INTERESTS FACTORS</th>
<th>CONSIDERATIONS</th>
<th>COMMENTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safety / Family Integrity</td>
<td>Has DHS confirmed that the child will have a safe place to return and an adult—specifically, a parent, close relative, or previous caregiver or a functioning child welfare agency—to provide appropriate care for him or her upon repatriation?</td>
<td></td>
</tr>
<tr>
<td>Safety / Family Integrity</td>
<td>Has DHS or another federal agency spoken with this adult or agency to confirm that they will, in fact, receive and take custody of the child upon the child’s return and have made all necessary arrangements to promptly reunify the child with a family member?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If there is no adult willing and able to take custody of the child, and there is no child welfare agency available and equipped to address the child’s basic needs, and the child does not wish to return to his or her country of origin, has DHS carefully evaluated whether the child’s removal is consistent with agency enforcement priorities, and whether it would be more appropriate to terminate proceedings or grant the child deferred action?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the answer to the previous question is negative, has the child’s removal been suspended until such time as those conditions are met?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child’s removal must be suspended, has DHS informed the child’s attorney and the immigration court to ensure the child’s grant of voluntary departure does not convert to an order of removal?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the decision is to remove the child, has DHS confirmed that the child’s consulate has notified child welfare authorities in the receiving country of the child’s return no less than 72 hours prior to the child’s return?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Has DHS confirmed, through the consulate, that child welfare authorities in the receiving country have designated an appropriate location for the child’s return and agreed to be present at the specified time and location?</td>
<td></td>
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<tr>
<td>Safety</td>
<td>Will the child be returned to his or her country of origin during daylight hours, separate from unrelated adults and anyone affiliated with a gang or trafficking cartel, and accompanied by an agency official trained in principles of child welfare?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If multiple children are returning to the same location, are there sufficient agency personnel, appropriately trained in child welfare, accompanying the group?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Has DHS notified the child, the child’s attorney, the child advocate and any U.S.-based organizations providing safe return &amp; repatriation services of the date, time and location of the child’s return, at least 72 hours in advance of the child’s return?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be returned to the port-of-entry closest to his or her ultimate destination?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Has DHS ensured that the child has identity documents showing that he or she is a citizen or national of that country before transporting the child?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Will the child be provided food, beverages, warm clothing, necessary medications, and access to personal items during the journey?</td>
<td></td>
</tr>
<tr>
<td>Liberty / Family Integrity</td>
<td>If the child will be in custody for an extended period after a grant of voluntary departure or order of removal, the child has a viable sponsor, does not present a threat to the community and is not a particular flight risk, has DHS agreed to not oppose the child’s release to the sponsor until arrangements can be made for the child’s return?</td>
<td></td>
</tr>
</tbody>
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### CHECKLIST #13

**Action:** Facilitating the Safe Repatriation of Child to Country of Origin  
**Agency:** HHS - ORR

This checklist was compiled from recommendations solicited from all members of the Interagency Subcommittee on Best Interests. Significantly, some components of the checklist already are in place and are being implemented. Others would require changes to agency policy or procedures, adaptations to existing training, or other resources.

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<tr>
<td>Safety</td>
<td>If the child is in ORR custody, has ORR/its contracted agencies worked closely with other agencies to confirm that a parent, an adult family member, prior caregiver or functioning child welfare agency will receive, take custody of the child and provide appropriate care of the child upon his or her return, and that the adult can be present at the date and time of the child’s arrival or that an agency in the country of origin has made all necessary arrangements to promptly reunify the child with a family member?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child is in ORR custody, has the child received an adequate supply of prescription medication, instructions on use/consumption of the medication, and information regarding the continued use or discontinuation of the medicine in the child’s best language, and is that information also provided to the child’s parent or guardian in the child’s country of origin?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>If the child has special needs, including but not limited to a diagnosis of a physical or mental illness, medication, behavioral concerns, abuse, neglect or trauma, a delinquency or criminal history, has the family received information about the child’s condition in advance of the child’s return? Has ORR identified service providers in the home country?</td>
<td></td>
</tr>
<tr>
<td>Safety</td>
<td>Has the child received documentation of all medical care (including vaccinations, medications) and education (school records) the child has received while in ORR custody?</td>
<td></td>
</tr>
<tr>
<td>Safety / Family Integrity</td>
<td>Has ORR allowed the child to maintain regular contact with approved family members in the United States and in the country of origin prior to the child’s departure, unless such contact threatens the child’s safety?</td>
<td></td>
</tr>
<tr>
<td>Safety / Development</td>
<td>Has ORR referred the child to an existing “safe return and reintegration” program through which children are connected to in-country resources (for example, public and private agencies providing education, nutrition, and other services)?</td>
<td></td>
</tr>
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<tr>
<td>Liberty / Family Integrity</td>
<td>If the child will be in custody for an extended period after a grant of voluntary departure or order of removal, and the child has a viable sponsor, does not present a threat to the community and is not a particular flight risk, has the child been released to the sponsor pursuant to the family reunification process until arrangements can be made for the child’s return?</td>
<td></td>
</tr>
</tbody>
</table>
ENDNOTES

1 Fact Sheet: Protection of Unaccompanied Children Alien Children in the United States (est. 2013), available through the Executive Office for Immigration Review Office of Legal Access Programs. The Fact Sheet further explains:

The Working Group is not an advisory committee, and in hosting regular meetings, the U.S. Government does not request comments specific to any policy or regulation. There is no formal membership process to join the Working Group, which is open to interested individuals who want to contribute their ideas and share their experiences. Any recommendations produced as a result of these discussions do not have any official status.

2 Id.

3 Implementing some aspects of the Framework would require additional resources or changes in existing policies or procedures; such changes should not contravene existing law. For additional ideas on implementing a “best interests of the child” standard, see JENNIFER NAGDA & MARIA WOLTJEN, BEST INTERESTS OF THE CHILD STANDARD: BRINGING COMMON SENSE TO IMMIGRATION DECISIONS (2015).


6 “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” CRC, supra note 4, art. 3.


8 8 U.S.C. § 1232(c)(6). The Young Center developed the first program in the United States to provide child advocates (best interests guardians ad litem) for unaccompanied alien children in removal proceedings, served as the model for Section 235(c)(6) of the TVPRA, and has developed procedures to identify and advocate for the best interests of children with federal agencies, attorneys, and other service providers making decisions on behalf of unaccompanied children. See THE YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS, http://www.theyoungcenter.org.

9 8 U.S.C. § 1101(a)(27)(J) (eligibility for Special Immigrant Juvenile Status depends in part on a finding that returning the child to his/her home country is not in the “best interest” of the child).
The Subcommittee’s work focused on unaccompanied children as defined by 6 U.S.C. § 279(g). However, committee members recognized that many of the recommendations are applicable to any child who is a respondent in removal proceedings, or who is a principal applicant for relief or an immigration benefit.

Pursuant to the Model Rules of Professional Conduct, attorneys—including those representing unaccompanied children—are obligated to represent their clients’ expressed interests. MODEL RULES OF PROF'L CONDUCT R. 1.2 ("[A] lawyer shall abide by a client’s decisions concerning the objectives of representation…"). See also, ABA Comm. on Immigr., Standards For the Custody, Placement and Care; Legal Representation; And Adjudication of Unaccompanied Alien Children In the United States, § V.A.1.b (2004), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf. [hereinafter, “ABA Comm”] ("The Attorney shall provide the Child with legal advice and zealously advocate the Child’s legal interests, as directed by the Child’s expressed wishes.") To the extent that an attorney representing a child believes that the child’s expressed interests conflict with the child’s best interests, the attorney may seek the appointment of a child advocate to represent the child’s best interests, or in some cases may seek to withdraw his or her representation of the child. MODEL RULES OF PROF'L CONDUCT R. 1.14(b) ("When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.").

Although the United States has not yet ratified the Convention, the U.S. Supreme Court has recognized its “nearly universal” acceptance. See Roper v. Simmons, 543 U.S. 551, 576–78 (2005) (noting that the universal ratification of the CRC demonstrates international agreement with the laws contained therein). The Court has also recognized its persuasive authority. See id. at 578 (“The opinion of the world community, while not controlling…does provide respected and significant confirmation…”).


Although there is no standard definition of ‘best interests of the child,’ the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. ‘Best Interests’ determinations are generally made by considering a number of factors related to the child’s circumstances and the parent or caregiver’s circumstances and capacity to parent, with the child’s ultimate safety and well-being the paramount concern.

Id. at 2 (emphasis added). See also CRC, supra note 4, at art. 3 (declaring that “in all actions concerning children…the best interests of the child shall be a primary consideration” and that “State parties undertake to ensure the child such protection and care as is necessary for his or her well-being”); U.N. Comm. on the Rights of the Children, Gen. Comment No. 14: On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, 62nd Sess., Jan. 14-Feb. 1 (2013), ¶ 71, U.N. Doc.
Craig: Framework for considering the best interests of unaccompanied children (May 29, 2013) [hereinafter Comm. on the Rights of the Children, Gen. Comment No. 14] (“When determining the best interests of a child…the obligation of the State to ensure the child such protection and care is necessary for his or her well-being should be taken into consideration. The terms ‘protection and care’ must also be read in a broad sense…in relation to the comprehensive ideal of ensuring the child’s ‘well-being’ and development.”)(citations omitted); id. at ¶ 73 (“Assessment of the child’s best interests must also include consideration of the child’s safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse, sexual harassment, peer pressure, bullying, degrading treatment, etc., as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflict, etc.”)(citations omitted).

14 See CHILD WELFARE INFORMATION GATEWAY, supra note 13, at 4-5; see also ABA Comm., supra note 11, at III.D.2 (“A determination of the best interests of the Child shall take into account…the Child’s expressed interests.”); CRC, supra note 4, art. 12 (“State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”); U.N. High Commissioner for Refugees, A Framework for the Protection of Children, (in order for children to achieve durable solutions in their best interests, their views must be given “due weight in accordance with their age and level of maturity); Comm. on the Rights of the Children, Gen. Comment No. 14, supra note 13, at ¶53 (“Any decision that does not take into account the child’s views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.”); id. at ¶54 (“The fact that the child is very young or in a vulnerable situation…does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child’s views in determining his or her best interests.”).

15 See CRC, supra note 4, at art. 24; Comm. on the Rights of Children, Gen. Comment No. 14, supra note 13, at ¶ 77 (“The child’s right to health and his or her health condition are central in assessing the child’s best interest.”)(citations omitted).

16 See Stanley v. Illinois, 405 U.S. 645, 651 (1972) (“The integrity of the family unity has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”) (internal citations omitted)); CHILD WELFARE INFORMATION GATEWAY, supra note 13, at 2 (identifying “the importance of family integrity and preference for avoiding removal of the child from his/her home” as “one of the most frequently stated guiding principles” of best interests determinations in state statutes); id. at 5 (citing “the importance of maintaining sibling and other close family bonds” as factors that courts commonly take into consideration in making best interests determinations); CRC, supra, note 4 at art. 8 (“State parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”); id. at art. 9 (“State parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine…that such separation is necessary for the best interests of the child.”); id. at art. 10 (“A child whose parents reside in different States shall have the right to maintain on a regular basis…personal relations and direct contacts with both parents.”); Comm. on the Rights of Children, Gen. Comment No. 14, supra note 13, at ¶ 58 (“[I]t is indispensable to carry out the assessment and determination of the child’s best interests in the context of potential separation of a child from his or her parents.”); id. at ¶ 61 (“[S]eparation [of a child from his or her parents] should only occur as a last resort measure, as when the child is in
danger of experiencing imminent harm or when otherwise necessary.”); id. at ¶66 (“When the child’s relations with his or her parents are interrupted by migration…preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.”); Comm. on the Rights of the Child, Gen. Comment No. 6, supra note 5, at ¶ 20 (“A determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.”).

17 ABA Comm., supra note 11, at VI.A.1 (“There is a presumption that release from a Detention Facility and family reunification are in the best interests of the Child and that a Child should be so reunified and/or so released.”); id. at III.D.2 (“A determination of the best interests of the child shall take into account…the impact on the Child of continued detention versus immediate release to a parent, other Adult Family Member, or legal guardian.”) 42 U.S.C.A. § 671 (requiring that “reasonable efforts” are “made to preserve and reunify families (i) prior to the placement of the child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to return safely to the child’s home.”). The Subcommittee recognizes that the right to liberty may sometimes be in tension with immigration control efforts, but stresses that children must nevertheless be recognized as children, rather than adults-in-miniature. This may afford them greater rights to liberty, with appropriate safeguards for public safety, than adults enjoy.

18 See, e.g., CHILD WELFARE INFORMATION GATEWAY, supra note 13 at 2 (listing “the assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult” as “among the most frequently stated guiding principles” in state laws governing best interests determinations.); CRC, supra note 4, at art. 6 (“State parties shall ensure to the maximum extent possible the survival and development of the child.”); id. at art. 27 (“State parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”); European Union: Council of the European Union, Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: http://www.refworld.org/docid/51d29db54.html (accessed 18 March 2015) (noting that member states must provide unaccompanied minors with schooling, the protection of mental and physical health, and an adequate standard of living). Regarding education, see 42 U.S.C.A. § 675(1)(G) (requiring “assurances that each placement of the child in foster care takes into account the appropriateness of the current educational setting and the proximity to the school in which the child is enrolled at the time of placement” and “if remaining in such school is not in the best interests of the child, assurances by the State agency and the local educational agencies to provide immediate and appropriate enrollment in a new school”); and Comm. on the Rights of the Children, Gen. Comment No. 14, supra note 13, (“It is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge.”); id. (requiring that in the best interests assessment, decision-makers “should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child’s development, and analyse [sic] them in the short and long term.”)
19 Comm. on the Rights of the Child, Gen. Comment No. 14, *supra* note 13, at ¶ 55 (“[t]he identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality.”); ¶ 56 (“when considering a…placement for the child, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background, and the decision-maker must take into consideration this specific context when assessing and determining the child’s best interests.”) (citation omitted).


21 ABA Comm., *supra* note 11, at III.B. (citing Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997), other Immigration & Naturalization Services documents and the CRC.); see also CRC, *supra* note 4, at Preamble (noting that, “in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance”); id. at art. 37 (“Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.”).

22 ABA Comm., *supra* note 11, at III.E. (“Right to Non-Discrimination”); CRC, *supra* note 4, at art. 2 (“State Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind…”).

23 *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (explaining that youth lack maturity, have “an underdeveloped sense of responsibility” and “are more vulnerable or susceptible to negative influences”); J.D.B. v. N. Carolina, 131 S. Ct. 2394, 2398-99 (2011) (“It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave.”); Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (finding a 14-year-old boy cannot be compared to an adult with knowledge of the consequences of his admissions); Kristin Henning, *Juvenile Justice After Graham v. Florida: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 Wash. U. J.L. & Pol’y 17, 47 (2012) (stating that youth are “particularly vulnerable to poor decision-making in coercive, on-the-scene encounters with the police”).

24 The U.N. High Commissioner for Refugees calls for a formal process, with “stricter procedural safeguards” to determine the child’s best interests whenever there is a “particularly important decision[ ] affecting the child…” U.N. High Comm’r for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, 23 (May 2008).


26 8 C.F. R. § 236.3(h) (West 2010). The regulation in full reads:

> When a juvenile alien is apprehended, he or she must be given a Form I–770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I–770 shall be given to, and signed by the juvenile.
27 Id.

28 Form I-770 (08/01/07).

29 8 C.F. R. § 236.3(h).


37 Id. at §VI, ¶14.


39 8 USC § 1232(c)(3).


41 8 U.S.C. § 1232(c)(6) (“a child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child”). See also ABA Comm., supra note 11, § III (I) (“[t]he Advocate for Child Protection is distinct from the Attorney, and his role is to ensure that the Child’s best interests are identified, expressed, and advocated, and that the Child’s views are expressed.”).


43 Id. at § 1232(a)(5)(A) (emphasis added).

44 Id. at § 1232(a)(5)(B) (emphasis added).
Id. at § 1232(a)(5)(C) (requiring the report to include “statistical information and other data on unaccompanied alien children as provided for in section 279(b)(1)(F) of Title 6.”). Congress’s concern for children’s safe repatriation extended beyond U.S. borders, requiring the government to provide support for “best interests determinations for unaccompanied and separated children who come to the attention of United Nations High Commissioner for Refugees, its partner organizations, or any organization that contracts with the Department of State in order to identify child trafficking victims and to assist their safe integration, reintegration, and resettlement.” 22 U.S.C. § 7105(a)(1)(F)(ii).


Id. at 5-6.

Id. at 6.

Id. at 7-10.

Id. at 10.


Id. at 5.


See U.S. Dep’t of Health and Human Services Office of Refugee Resettlement, “Age Determinations Of Aliens in Custody of HHS and DHS,” (Sept. 15, 2010) at 1-2 (acknowledging that the TVPRA of 2008 requires that age determination procedures must take into account multiple forms of evidence and stating that “[a]mbiguous, debatable or borderline results” from medical age determination procedures “will be resolved in favor of determining the alien as a minor”). See also ABA Comm., supra note 11, at VI.C.4. (“The Custodial Agency should resolve all doubts about age in favor of a finding that the individual is under 18.”); Comm. on the Rights of the Child, Gen. Comment No. 6, supra note 5, at ¶ 31 (stating that an age “assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of the violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such.”).

58 See id. at §§ 5.4(1), 5.5(1), 5.6(1).


60 Id. at 4.

61 Id. at 6.

62 Subcommittee members proposed specific questions, which could include:

• Why do you want to go back?
• Are you afraid of going back?
• Where will you live? Who lives there? How old are they? How do you know them?
• Will you go to school?
• Is there anyone who wants to hurt you, or who has hurt you in the past?
• Would you try to return to the United States, and if so why?

63 TVPRA § 235(c)(5); 8 U.S.C. § 1232(c)(5).


65 TVPRA §235(c)(6); 8 U.S.C. § 1232(c)(6).
COMMISSION ON IMMIGRATION

FAMILY IMMIGRATION DETENTION:
Why the Past Cannot Be Prologue
July 31, 2015
ACKNOWLEDGEMENTS

On behalf of the American Bar Association Commission on Immigration, I acknowledge, with deep gratitude, the dedicated leaders of this project, Commission Members Denise Gilman and Dr. Dora Schriro, who inspired and guided our work, contributed their significant and exceptional expertise and authorship, and without whom this report would not have been possible. They and the team of attorneys from the law firm of O’Melveny & Myers LLP, who assisted the Commission in this effort, deserve special recognition for their outstanding work in developing, researching, and drafting this report on a pro bono basis over a very short time period.

This report and its recommendations build on the Commission’s work directing the ABA’s efforts to ensure fair and unbiased treatment and full due process rights for immigrants and refugees within the United States and its longstanding concerns regarding the serious issues raised by family detention, in particular the detention of mothers and children.

The entire team at O’Melveny & Myers LLP applied steadfast effort, professionalism and expert comprehension to the production of this report. We especially recognize David Lash, Darcy Meals, Lauren Moore, and Greta Lichtenbaum for their leadership. Additionally, we recognize and thank Walter Dellinger, supervising partner on the report, and attorneys Jonathan Fombonne, Janiece Jenkins, Jeff Jensen, Mackie Jimbo, Nora Kahn, and Andy Trafford. We are also sincerely appreciative of the work of Paralegal Steven Segal, and we also thank summer associates, Bhavreet Gill, Katie Gosewehr, Nathalie Farad, and Annie Woodworth.

Finally, I thank Commission members Eleanor Acer, Linus Chan, and Holly Cooper for their contributions as well as COI Special Advisor Karen Grisez for her support and work. I also thank the entire Commission on Immigration staff, Director and Associate Director, Meredith Linsky and Tanisha Bowens-McCatty, and staff members Robert Lang, Karen Castillo and Renee Lynn Minor. Very special appreciation is due to Tanisha Bowens-McCatty for her dedicated effort in achieving final production of this report.

Christina A. Fiflis
Chairperson, 2012-2015
ABA Commission on Immigration
July 31, 2015
2014-2015 COMMISSION ON IMMIGRATION

COMMISSION*

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† Commissioner Myers Wood did not participate in the preparation of this Report or its Conclusions and Recommendations.
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* Affiliations listed are for identification purposes only.
EXECUTIVE SUMMARY

This report examines the United States Government’s response to the increase in arrivals of Central American mothers with young children at our southwestern border during the summer of 2014. Although it touches briefly on the causes of this migration and the resulting claims for protection the families are making, the report concentrates primarily on the decision by the federal government to engage in large-scale detention of parents and their children in prison-like facilities, and the initially-stated rationale of deterrence as support for that action.

The report reviews the history of family detention, acknowledging Native American and Japanese internment and the operation of Ellis and Angel Islands, as well as the development of the Hutto family immigration detention facility in Texas in 2006. The report describes the current use of family detention in Karnes City and Dilley, Texas and Berks County, Pennsylvania. The report demonstrates that periodic migration of families is not new but wholly predictable and that detention of families in penal settings has been rejected previously by both courts and policymakers, as recently as the abandonment of family detention at the Hutto facility in 2009. It concludes that the return to family detention in Artesia, New Mexico, last year and as it exists today in the remaining three “Family Residential Centers” violates applicable laws, standards, and human rights norms.

The report does not focus on current conditions in family detention, which are of grave concern but about which much has been written elsewhere. Rather, this report concentrates on the government's decision as a policy matter to detain women and children fleeing to the United States to seek protection. It concludes that the dramatic build-up of family detention centers and the practice of detaining families in jail-like settings are at odds with the presumption of liberty that should apply and the limited permissible goals of civil detention. Additionally, detention necessarily impinges on the families’ due process right to access to counsel for legal information and representation, and in turn negatively impacts their ability to pursue legal relief based on the merits of their claims.

This report concludes by urging the U.S. Government, and the Department of Homeland Security in particular, to carry out the Department’s core mission of national emergency planning and preparedness by better anticipating and equipping itself to cope with inevitable migration exigencies whenever they recur without resorting to unnecessary detention. It reminds us that detention should be imposed only as a last resort and under the least restrictive means possible, particularly for vulnerable populations such as families with children most of whom are asylum seekers.

This report recommends that the government undertake several key reforms, including the following: 1) Immediately release families held at the Berks, Dilley, and Karnes family detention facilities, cease expansion of the facilities, and do not renew their contracts for family detention; 2) Permanently abandon deterrence-based detention policies; 3) Adopt a presumption against detention and treat release into the community as the general rule, particularly in the case of families, children, and asylum seekers; 4) When release into the community alone is insufficient, employ an objective risk assessment to identify the least restrictive means of achieving the goals of ensuring appearance at hearings and protection of the community, using electronic monitoring and cash bonds only where demonstrably necessary in individual cases; 5) Establish and adhere to clear standards of care that include unique provisions for families and children that do not follow a penal model; and 6) Ensure meaningful access to legal information and representation for all families subjected to detention at every stage of their immigration proceedings. Full detailed recommendations are found at the end of this report.
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On July 24, 2015, as this report was being finalized, the Hon. Dolly Gee of the United States District Court for the Central District of California, ruled that the family immigration detention practices at the facilities located in Karnes City and Dilley, Texas, as well as in Berks County, Pennsylvania, violated the settlement agreement reached in 1997 in the case of Flores v. Meese (described below). The court held that the continued detention of immigrant children was improper and that accompanying mothers should be released to secure the rights of the children to be free from detention, absent a finding that the women posed a danger or a likelihood of fleeing the jurisdiction of the immigration court. Judge Gee ordered the United States Government to show cause why the court’s order should not take effect within 90 days, a result that could largely end current family detention practices. The court found government practices, conditions of confinement, and failure to abide by the terms of the 18 year old settlement to be “deplorable.” While we note the importance of this late-breaking development, we consider the issues, analysis and recommendations laid out in this report to be as relevant as before Judge Gee’s ruling.

During the summer of 2014, scores of children traveled north from Central America, often with their mothers and often fleeing horrific gang-sponsored and intimate family violence against which their governments had failed to provide protection. As gang-perpetrated murders and violence against women and children proliferated in Central America, thousands of family units came to the southwest border of the United States seeking protection in this country.1 In

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1 Under U.S. law, most of the families could apply for protection in the form of asylum while others would qualify only to apply for a related form of relief known as “withholding of removal.” See INA §§ 208, 241(b)(3)(B). In either case, the applicant for relief must meet the international law definition of “refugee” to receive legal recognition of their need for protection and the right to remain in the United States indefinitely. See INA §§ 101(a)(42)(A), 208(b)(1), 241(b)(3)(B). The international refugee definition is set forth in the U.N. Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (hereinafter “Refugee Convention”), extended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter “Refugee Protocol”), which entered into force for the United States on Nov. 1, 1968, through accession to the Refugee Protocol. “Refugee” status requires a showing of persecution on account of race, religion, nationality, political opinion or membership in a particular social group. For purposes of this report, we will refer to individuals seeking asylum or related relief as “asylum-seekers,” whether they are technically applying for asylum or withholding of removal, except in the few instances where the distinction between the two forms of relief is relevant. We will also refer to asylum claims and the law of asylum, rather than making distinctions between the various related forms of relief unless specifically relevant. It should be noted that some of the children and/or their parents may qualify for other forms of relief as well, such as U visas for victims of certain crimes committed in the United States and
federal fiscal year 2014 alone, the U.S. Border Patrol apprehended 68,445 children and parents traveling together at the United States-Mexico border. ²

Dubbing this humanitarian crisis a threat to national security, the U.S. Government responded swiftly and severely against the new entrants. Rather than deliberating on the range of strategies available for addressing the challenges presented, the government hastily adopted a response focused on detention and speedy deportation. Among other measures, the Department of Homeland Security (“DHS”) dramatically expanded its practice of family detention, in lockdown facilities, with the explicit goal of sending a “message” that would deter future migration. ³ Almost as swiftly, the legal community, advocates, and others galvanized in an effort to meet the needs of the thousands of women and children now being held in prison-like detention centers, all of them in rural locations and all but one in the southwest United States. Despite these efforts, the legal and humanitarian rights of the detained children and their parents, and their access to legal representation have been compromised by the government’s policy and practice of family detention.

This report examines the trajectory of family detention between the summer of 2014 and the summer of 2015. While numerous concerns have been raised about the conditions of detention in the family facilities, including serious deficiencies in the provision of health care and nutrition, as well as harsh and dehumanizing treatment by staff and even sexual abuse, ⁴ this

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report does not address the conditions of detention. Instead, the report focuses on the policy and practice of detaining families in secure settings and the consequences of this detention by addressing: (1) the origins of family detention; (2) its expanded use to deal with the 2014 humanitarian crisis; (3) serious concerns about the compatibility of family detention with basic constitutional and international human rights norms as well as ABA standards; (4) the violations of fundamental due process rights of detained women and children implicated in this practice; and (5) the legal community’s response, as well as the continued need for additional measures to ensure meaningful access to justice for detained families.

I. The History of Family Detention

While the government renewed and expanded its use of family detention in response to the 2014 crisis, the policy of detaining children and their parents during the pendency of their immigration proceedings is not new. It is important to understand the history of family detention in the United States to evaluate its current use.

A. First Family Detention Facilities

The U.S. Government has a long and painful history of detaining families. Examples include the internment of Native American families, the detention of immigrant families on Ellis and Angel Islands, interments of families of U.S. citizens and immigrants during World War I and World War II, and the detention of Cuban and Haitian immigrant families in Florida and Guantánamo Bay.

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The report offers only a brief description of the models that developed for delivery of pro bono legal services at the facilities, as these efforts are not the focus of this report and are well documented elsewhere. See, e.g., Stephen Manning, Ending Artesia (Jan. 2015), https://innovationlawlab.org/the-artesia-report/.

Native American families were interned in military forts during the removal of 1838-39. The Native American experience is also relevant to the immigrant experience, because many Native Americans were not recognized by the U.S. as citizens until the 1924 Indian Citizenship Act. See Exploring the Trail of Tears, http://pages.cs.wisc.edu/~fish/final115%28drip%29.swf; Library of Congress, Indian Citizenship Act, http://memory.loc.gov/ammem/today/jun02.html.


The most directly relevant portion of the story of family detention practices in the United States begins in the 1980s during increased refugee flows from Cuba, Haiti and Central America. During this period, the number of unaccompanied and accompanied children from Central America seeking asylum in the United States dramatically increased. The government generally responded by releasing children to a parent or legal guardian and then holding any remaining children in border detention facilities and tent shelters, without access to education, health care, or legal services.\(^\text{10}\) For a time, entire families of Central American migrants were housed in large-scale American Red Cross shelters along the Texas-Mexico border while immigration officials prohibited them from leaving the border region, leading to harsh criticism of government policy.\(^\text{11}\)

In 1997, the *Flores v. Meese* lawsuit, involving the rights of children in immigration custody, resulted in a settlement stipulating that children waiting for a determination of removal or relief be placed in the “least restrictive setting.”\(^\text{12}\) This agreement was intended to protect the rights of minors in immigration custody and ensure their well-being.\(^\text{13}\) Under the settlement, unaccompanied minors were to be released to the care of their parents or other family members whenever possible, and if not, they were to be placed in foster homes or licensed facilities. These purportedly child-friendly licensed facilities were to be operated in accord with age-appropriate policies and programs.\(^\text{14}\) Subsequently, the care of unaccompanied minors was transferred legislatively to the Office of Refugee Resettlement within the Department of Health and Human Services.\(^\text{15}\) Following implementation of the settlement, detained family units composed of children and parents were generally released together on their own recognizance, pending a hearing before an immigration judge. These practices were consistent with both the prior practice favoring release of children to their parents and the terms of the *Flores* settlement.\(^\text{16}\)

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\(^\text{14}\) Id.


\(^\text{16}\) *Flores Stipulated Settlement Agreement*, supra note 12; *Reno v. Flores*, 507 US 292, 295 (1993); 8 C.F.R. § 1236.3(b)(2).
In 1996, through enactment of the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, Congress made significant changes to U.S. immigration law. Among other amendments adversely affecting families, these changes included creation of an “expedited removal” process and expansion of the categories of persons subject to mandatory detention. One measure taken by immigration authorities to increase available detention space under the new legislative framework was to convert a county nursing home in Berks County, Pennsylvania, into the Berks County Family Residential Center (“Berks”) in March 2001. The 84-bed facility was intended to temporarily detain migrant families undergoing administrative immigration proceedings and those subject to mandatory detention. The facility is owned and operated by Berks County pursuant to the terms of a contract with the federal government’s immigration agencies.

Berks held both parents and their minor children, arguably to encourage parental contact with their children. This objective was undercut by governmental policy that regulated the adults’ authority to parent their children while detained and by decision-making regarding releases and the unavailability of legal counsel, which contributed to longer stays. At the same time, the facility also had a number of beneficial attributes for short-term stays, including a physical plant and programs that supported the nutritional, health care, educational, and recreational needs of the residents.

B. Detention Policy Changes After 9/11

In the aftermath of the September 11, 2001 terrorist attacks, the U.S. Government once again fortified immigration law enforcement, resulting in further changes to family detention policies. Congress passed the Homeland Security Act in 2002, creating the Department of Homeland Security (“DHS”) and establishing Immigration and Customs Enforcement (“ICE”) as a new entity within DHS charged with immigration enforcement. Expedited removal proceedings were soon expanded to apply to certain asylum-seekers crossing U.S. land borders, among others. In addition, detention became the preferred management strategy. These changes in policies and practices disproportionately impacted families.

The pre-9/11 policy that favored release whenever possible for families who had been apprehended together, or, alternatively, to detain the adults and their children together as a family unit when release was not feasible, was largely abandoned. Increasingly, in its place, parents were separated from their children as well as from one another and detained by ICE. The children, including infants and toddlers, were sent to facilities operated by the Department of Health and Human Services’ Office of Refugee Resettlement. The involuntary separation of

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19 Interview with Dora Schriro, based on her field notes as former Senior Advisor to DHS Secretary Napolitano (on file with the authors).
parents from their children had the effect of rendering the children “unaccompanied” for legal purposes.  

Ultimately, some in Congress came to focus on these harsh practices. In 2005, the House Appropriations Committee noted the negative impacts and directed DHS to stop separating families, stating:

The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervised Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.

C. The Berks and Hutto Family Detention Centers

Despite the Congressional directive, DHS did not release more families or increase its use of alternatives to detention. Instead, DHS expanded its secure capacity to detain more families together. In May 2006, ICE opened a second and much larger facility for families, the 512-bed T. Don Hutto Family Residential Center (“Hutto”) in Taylor, Texas. The facility held mothers and fathers and their children. Neither its physical plant and programs nor its policies and practices were family-friendly. Movement was limited within the facility and access to the outdoors curtailed. Initially children received only one hour of education a day. Furthermore, there were reoccurring reports of medical and mental health issues, notably sustained weight loss and depression.

Congress quickly concluded that Hutto, a former medium security prison for adult male inmates, had continued to operate like an adult correctional facility, contrary to the House Appropriations Committee’s prior instruction. Congress criticized both Berks and Hutto, noting that although Berks was more “homelike” than Hutto, it also failed to afford the least restrictive setting, as required for children by the Flores settlement.

In March 2007, the ACLU and other parties challenged ICE’s enforcement practices, arguing that the use of the Hutto facility to detain children and families violated the rights of the detained minors. The lawsuit charged that children were being separated impermissibly from

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their parents, detained illegally, and treated as prisoners, contrary to the January 1997 settlement agreement in *Flores v. Meese.* 27 The plaintiffs further alleged that ICE’s actions conflicted with Congress’s repeated instructions to DHS to: (1) keep immigrant families together whenever possible; and (2) either release the families or use various alternatives to detention. Finally, the action sought to enforce the policy that when detention was absolutely necessary, detained families were to be placed together in normalized settings. In August 2007, ICE entered into a settlement agreement with the plaintiffs. 28 Among a number of measures, ICE agreed to utilize Hutto as a placement of last resort, improve the physical plant and its policies and procedures so it was less like a prison, professionalize the workforce, regularly review detainees’ eligibility for reassignment to less restrictive settings, and adopt transparent operating standards.

Late in 2007, ICE promulgated Family Residential Standards for the operation of both the Berks and Hutto facilities. 29 These standards were intended to create uniform guidelines for many aspects of detention, including safety, security, education, staff training and hiring, and medical care. Although these standards were issued after some input from immigration and civil rights advocates, they continued to be based on correctional assumptions. 30 Personal possessions remained limited in number and were kept in communal areas. Movement within the facility and on the grounds remained restricted. ICE did not directly monitor for compliance at Berks and Hutto; instead, ICE contracted for that function as well. The compliance assessments were further impacted by the fact that the standards and scores were subject to manipulation. Critically, the limited protections that ICE put into place through adoption of the standards were advisory only, and there were no penalties for non-compliance.

As advocate, media and congressional attention continued to increase, DHS undertook a comprehensive assessment of detention policy and practices early in 2009, with the goals of reducing reliance on detention and improving the efficiency and effectiveness of ICE. 31 Among the first steps taken was the removal of all families from Hutto. As many as possible were released; the rest were transferred to Berks. After the last of the families were transferred in September 2009, Hutto was re-commissioned as an all-female, adults-only facility. 32

### D. Reforms to Detention Policy and Practice in 2009

The findings of the system-wide assessment of detention policy and practice were summarized in a report that DHS released in October 2009. The report also included recommendations that laid the groundwork for a number of reforms that DHS announced around the time of its release. These positive reforms were directed to all immigration detainees,

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27 Compl. for Declaratory and Injunctive Relief at 2-4, *In re Hutto Family Detention Ctr.,* No. 07-cv-164-SS.
32 Id.
including special populations, most notably, women, children, families, asylum-seekers, the aged, ill and infirm, and other vulnerable individuals.\(^{33}\)

The report’s principal findings emphasized the importance of: (1) premising the detention system upon the likelihood of eligibility for relief and a presumption of release into the community as the rule rather than the exception, with objective risk assessment leading to the use of the least restrictive means to achieve compliance with attendance at immigration proceedings in cases where release alone was insufficient; (2) where detention is required, establishing clear standards of care that include unique provisions for special populations, including families, that do not follow a penal model, and with systematic independent monitoring of conditions for compliance; (3) ensuring meaningful access to legal materials and counsel to inform and expedite decision-making; and (4) acknowledging the probability of periodic influxes in migrant families seeking status resulting in a need to develop viable plans and preparedness to accommodate changes by means other than detention or release with stringent supervision requirements.

Through its response to the increased migration of children and families in 2014, as explained below, the government’s advancements made in 2009 have been largely eroded. Those who “cannot remember the past are condemned to repeat it.”\(^{34}\)

II. Challenges Presented by Migrant Families Arriving at the Southwestern U.S. Border in Summer 2014

The significant increase in the number of children and families arriving at the southwest border from Central America in 2014, labeled a “surge” by some in the U.S. Government and the media, garnered national attention and an immediate governmental response.\(^{35}\) Overall, unlawful crossings at the southwestern border were at an historic low, but the increased number of children and families presented unique challenges. In addition, for the first time since record-keeping began in 1992, less than half of the arrivals were natives of Mexico.\(^{36}\) Instead, many of the women and children were fleeing violence in Central America’s Northern Triangle, consisting of Honduras, Guatemala, and El Salvador, and were seeking safety and protection in the United States.\(^{37}\)

A. Reasons for the Increase in Migrants from Central America in Summer 2014

The increase in border crossings by mothers arriving with children, as well as by unaccompanied minors, from the Northern Triangle arose from three major factors: (1) increased gang and other violence; (2) extreme poverty; and (3) a desire for family

\(^{33}\) Id.

\(^{34}\) This quote is attributed to George Santayana, who was born in Madrid, Spain in 1863 and died in Rome, Italy in 1952. He was a philosopher, essayist, poet and novelist.

\(^{35}\) Preston & Archibold, supra note 3.


\(^{37}\) U.S. Border Patrol, Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 Compared to FY 13, supra note 2.
reunification. Violence seemed the single most important motivation, even for those who also cited one of the other factors. Those who traveled to reunite with family members already in the United States often reported that the growing violence at home influenced their decision to make the journey during that particular year. In interviews with unaccompanied children from El Salvador who were apprehended in Mexico and deported, 61% of boys and 58% of girls cited crime, gang threats, or violence as a reason for leaving home. Notably, there has been no significant pattern of arrivals to the United States of families from Nicaragua, which has not experienced the same level of violence as the countries of the Northern Triangle, despite its geographic proximity to those troubled nations and even higher levels of poverty.

Gangs in the Northern Triangle are known for engaging in forced recruitment, extortion and kidnapping, and sexual violence. Children and adolescents are particularly at risk, as gangs target young boys for involuntary recruitment and young girls to be gang-member “girlfriends,” frequently resulting in instances of sexual assault. Thus, many families made the decision to seek safety in the United States when the mothers concluded that they no longer could protect their children at home. Other mothers and their children were fleeing domestic and gender-based persecution, which is common in the Northern Triangle, and often linked to gang and societal violence. In Guatemala, the second most common category of crime is violence against women. Abuse and “femicide,” defined as murder for gender-related motives, occurs frequently as a result of misogyny, as part of gang rituals, and within intimate relationships. Homicide rates in the Northern Triangle are among the highest in the world, with Guatemala, El Salvador, and Honduras consistently reporting three of the five highest national murder rates.

Propelled by this horrific violence, families and children left Central America in increasingly larger numbers during 2014. By the end of the federal fiscal year on September 30, 2014, more than 68,000 women and children, traveling as families, had been apprehended by U.S. authorities at the border between the United States and Mexico, not infrequently after
turning themselves in to the authorities immediately after crossing into the United States.\(^49\) The influx of families slowed after the summer of 2014 and is down 55% in federal fiscal year 2015 as compared with the same time period in 2014.\(^50\) The drop-off in the number of women and children entering the United States through its border with Mexico was likely caused by a number of factors including cyclical trends, a public relations campaign in Central America intended to deter immigration, and an increase in deportations by Mexico of transiting migrants.\(^51\) However, the government has continued to maintain and expand its family detention capacity. Since the summer of 2014, more than five thousand women and children, most with asylum claims, have been detained in family detention centers while awaiting immigration proceedings to determine their right to remain in the country.\(^52\)

\[\text{\textbf{B. The Administration’s Response}}\]

In the summer of 2014, the White House designated the Federal Emergency Management Agency (“FEMA”), an agency of DHS, to organize and coordinate a federal response to the increase in arrivals of unaccompanied children and families at the U.S.-Mexico border.\(^53\) Because so many of the arriving children and families potentially were entitled to asylum and related protection under U.S. law, the Administration faced the difficult prospect of responding to calls to stop unlawful migration while at the same time addressing the rapidly-unfolding humanitarian crisis on the southwestern border of the United States.

President Barack Obama asked Congress for emergency funds of almost $4 billion to address the situation.\(^54\) The Administration intended to use part of the proposed funding to expedite deportation proceedings by increasing the capacity of the immigration courts to quickly adjudicate claims.\(^55\) In addition, the Administration planned to dedicate a significant portion of


\(^{55}\) Fact Sheet, White House, Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border (July 8, 2014),
the proposed supplemental funding to accommodate increased detention of migrant families. While the Administration did not receive the requested funding, it nonetheless proceeded to implement widespread detention of families of Central American asylum-seekers. Simultaneously, the Vice President of the United States invited more than 50 attorneys from major private law firms, legal services organizations, and advocacy groups to the White House to discuss the legal community’s response to the immigration crisis evolving at the United States-Mexico border. As DHS moved quickly toward large-scale detention and swift deportation of Central American families, the Vice President urged the legal community to increase its collective efforts to provide counsel to Central American migrants, focusing particularly on unaccompanied children. Several weeks earlier the Vice President had delivered a similar message in a small meeting at the White House to a group of attorneys from the Association of Pro Bono Counsel (“APBCo”). No government funding or other support was made available to facilitate pro bono representation of Central American families.

1. Changes at Berks

As part of the Administration’s response—and in a change from the policies in place before the summer of 2014—ICE began to use the existing Berks facility to hold families in detention for prolonged periods. After initially opening in 2001, as described above, the Berks facility was moved to a larger building on the same grounds in 2012, and the capacity was increased from 84 to 96 beds. The building is currently undergoing renovation, and its capacity is scheduled to double to almost 200 beds in fall 2015. It continues to hold children and their parents of either gender.

2. The Opening and Closing of Artesia

At the end of June 2014, ICE opened the Artesia Family Detention Center in the southeast corner of New Mexico to supplement the existing family detention capacity at the Berks facility. The Artesia facility was redesigned to house close to 700 family members in repurposed federal law enforcement training barracks on federally-owned land. The facility was managed and operated by the federal government. It held only children and their mothers; no fathers were permitted at Artesia.


57 Manning, supra note 5.


59 McClery, supra note 58.
According to immigration officials, Artesia was opened with the goal of quickly moving Central American families through the removal process and ensuring deportation if ordered at the end of that process.\footnote{John Burnett, \textit{Immigrant Advocates Challenge the Way Mothers are Detained}, NPR (Oct. 15, 2014), http://www.npr.org/2014/10/15/356419939/immigrant-advocates-challenge-way-mothers-are-detained; Llorca, \textit{supra} note 3.} Within five weeks of opening, more than 200 women and children had been deported back to the Northern Triangle.\footnote{Hylton, \textit{supra} note 4.}

Artesia quickly faced an onslaught of criticism.\footnote{Jeremy Redmon, \textit{ICE to close controversial immigration detention center in New Mexico}, ATLANTA J.-CONST., Nov. 18, 2014, http://www.ajc.com/news/news/state-regional-govt-politics/ice-to-close-controversial-immigration-detention-center-nm/9F9T9.} The first pro bono lawyers arriving at Artesia described it as “ground zero for the evisceration of due process.”\footnote{Interview with Christina Fiflis (July 2015) (on file with the authors).} Those attorneys reported that critical government screening interviews, the essential predicate to proceeding with an asylum claim rather than facing immediate deportation, were conducted by government officials at a pace of no fewer than 20 interviews a day, seven days a week.\footnote{Sharita Gruberg, \textit{Inside a Converted New Mexico Detention Center, ‘Swift Process’ May Mean Asylum Claims Overlooked} (July 30, 2014), http://thinkprogress.org/immigration/2014/07/30/3465639/inside-a-converted-new-mexico-detention-center-swift-process-may-mean-asylum-claims-overlooked-2/.} This process was so rapid that the only government-approved on-site provider of legal orientation programs, and the few early-arriving pro bono attorneys, could not present basic legal information quickly and often enough to help the many families who needed that background before going into the government screening interviews.

There were no immigration lawyers in Artesia when the family detention facility opened. The nearest attorneys were a 3.5 hour drive away. Exacerbating the situation, the families had no access to telephone land lines. The handbook furnished to the detained women stated that they “should have access to flip phones held by guards three times a day,” but families reported that they were “only allowed one 3-5 minute call each day and that if the children misbehaved, everyone lost access to phones.”\footnote{\textit{Id.}} Attorneys were prohibited from bringing phones into the lone trailer where they could meet with clients, which had no telephone lines either.\footnote{Manning, \textit{supra} note 5, at ch. VI.} Legal volunteers who made it to the facility faced the challenging task of assisting hundreds of families despite the availability of little funding and no infrastructure. Lawyers volunteering at the center voiced concerns that the Administration was manipulating the system to quickly deport every family without regard to eligibility for asylum.\footnote{\textit{Id.} at ch. III.} They pointed to the passage rate for credible fear screening interviews, which was significantly below the national
Meanwhile, for those receiving a bond, bond amounts were set at five times the national average.\textsuperscript{69} The facility was referred to as a “deportation mill.”\textsuperscript{70}

Within six months of operation, amidst increasing publicity about serious due process and conditions problems at the facility, Artesia was closed on December 15, 2014.\textsuperscript{71} ICE officials stated that the center had been opened on a temporary basis and indicated that, with fewer families entering the country, it was the appropriate time to transition to less isolated and better designed facilities.\textsuperscript{72} The families still detained at Artesia at the time of its closure were sent to the facilities in either Karnes City, Texas, or in Dilley, Texas.\textsuperscript{73}

3. \textit{The Conversion of Karnes Civil Detention Center to a Family Facility and its Expansion}

At the beginning of August 2014, DHS began to utilize a large immigration detention facility located in Karnes City, Texas, to hold families. The facility previously had been used to detain men in immigration proceedings, usually asylum-seekers.\textsuperscript{74} DHS rapidly repurposed the facility to hold families.\textsuperscript{75} As with Artesia, the Karnes facility holds only children and their mothers; no fathers are detained there. DHS changed the official name of the facility from Karnes Civil Detention Center to Karnes Residential Center (“Karnes”), but little else changed.

The facility is a secure lockdown detention center run with a rigid schedule, including set meal times, wake-up and lights-out times, and multiple body counts and room checks during the day and night. The facility is not licensed for the care of children, and the guards are not trained to address either the needs of mothers and children seeking asylum or trauma survivors.\textsuperscript{76}

ICE made the arrangements to detain migrants at Karnes, first adults and then families, through a contractual agreement with the Karnes County Commission. The facility is managed

\textsuperscript{70} Burnett, supra note 60.
\textsuperscript{71} Manning, supra note 5, at ch. II.
\textsuperscript{72} Redmon, supra note 62.
\textsuperscript{73} David McCabe, \textit{Administration to close immigration detention center at month's end}, THE HILL.COM (Nov. 18, 2014), http://www.huffingtonpost.com/2014/10/06/immigrant-detention-center-new-mexico_n_5939596.html.
\textsuperscript{74} Burnett, supra note 60.
\textsuperscript{75} Manning, supra note 5, at ch. II.
\textsuperscript{76} Redmon, supra note 62.
\textsuperscript{77} David McCabe, \textit{Administration to close immigration detention center at month's end}, THE HILL.COM (Nov. 18, 2014), http://www.huffingtonpost.com/2014/10/06/immigrant-detention-center-new-mexico_n_5939596.html.
by GEO Group, Inc., the country’s second largest private prison corporation, also through a contract with the county.\textsuperscript{77}

The Karnes facility had space to detain 532 women and children when it began holding families.\textsuperscript{78} In December 2014, after a contentious debate, the Karnes County Commission approved an expansion of the facility by an additional 626 beds, increasing its capacity to 1,158 women and children. Construction currently is underway as of the writing of this report, and the expanded facilities are scheduled to open soon.\textsuperscript{79}

4. The Development of Dilley

In December 2014, in the small Texas town of Dilley, the government opened a third and ultimately even larger detention center, which now has the capacity to hold up to 2,400 mothers and children. Officially named the South Texas Family Residential Center ("Dilley"), the Dilley facility was built to replace Artesia.\textsuperscript{80} Like Artesia and Karnes, Dilley holds only children and their mothers; no fathers are detained there. The Administration stated that Dilley would “provide invaluable surge capacity should apprehensions of adults with children once again surge.”\textsuperscript{81}

Critics point out that the name “Family Residential Center” belies the fact that Dilley is in fact a detention facility. Others have observed that Dilley is reminiscent of Japanese internment camps used during World War II.\textsuperscript{82} The facility was built and is operated by the Corrections Corporation of America, the country’s largest for-profit prison operator.\textsuperscript{83}

C. Family Detention Custody Policies and the Deterrence Rationale

The opening of the new facilities corresponded to a change in the Administration’s policy concerning the detention of women and children awaiting the outcome of the immigration process. In the years immediately prior to the summer of 2014, almost all families arriving at the U.S. border seeking asylum were released to live in the community while their immigration

\textsuperscript{77} Press Release, supra note 74.
\textsuperscript{78} Press Release, supra note 75.
\textsuperscript{79} Press Release, The GEO Group, The GEO Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas (Dec. 19, 2014), http://finance.yahoo.com/news/geo-group-announces-626-bed-133500147.html;_ylt=A0LEViq9uYxV4TUAFiwPANT.:_ylu=X3oDMTEzJhMDZrBHNIYwNzcgRwb3MDMQRj b2xvA2JmMQR2dGlkA0ZGR0UwMl8x.
\textsuperscript{81} Id.
hearings moved forward to determine whether the families would be granted asylum or related relief allowing them to remain in the United States. In June 2014, however, the Administration implemented a policy of wide-scale detention of mothers and children for the express purpose of deterring other families from seeking asylum in the United States. Concerning this “no-release” policy, Secretary of Homeland Security Jeh Johnson told Congress, “[o]ur message is clear to those who try to illegally cross our borders: you will be sent back home,” noting that “[w]e are building additional space to detain these groups and hold them until their expedited removal orders are effectuated.” Johnson further described this policy as “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”

As a result of this policy, instead of being released, families apprehended at the border and sent to one of the family detention centers were generally put into expedited proceedings. These proceedings can result in quick deportation. Individuals placed in expedited proceedings, however, still must be allowed to bring an asylum claim before an Immigration Judge if they pass a government screening interview, demonstrating that they have a viable chance of success on the merits of their claim, thereby giving them the right to remain in the United States. Those individuals placed into removal proceedings are detained at least until they pass the screening interview, called a “credible fear interview” or “reasonable fear interview,” depending on the circumstances. Once they are placed in removal proceedings to pursue their asylum claims, such individuals are eligible for release from detention. The same eligibility for release applies to those families whom DHS never placed into expedited proceedings, which became a relatively common practice in the summer of 2015. For families eligible for release, ICE makes an initial custody determination. Subsequently, most but not all detained families may have a custody redetermination hearing before an Immigration Judge. ICE, and the Immigration Judges where jurisdiction applies, have authority under the law to order: (1) release without requirement of any bond payment; (2) release with payment of a bond;

84 Decl. of Barbara Hines ¶ 8, R.L.L-R v. Johnson, No. 1:15-cv-0011 (D.D.C.). A few families were held at the Berks facility for short periods of time.
85 Johnson Statement, supra note 3.
86 Id. Declarations of high-ranking immigration officials filed in court proceedings confirmed that implementation of “no bond” or “high bond” policies were intended to reduce the migration of Guatemalans, Hondurans, and Salvadorans to the United States. See Department of Homeland Security’s Submission of Documentary Evidence, AILA InfoNet Doc. No. 14080799, Aug. 7, 2014, http://www.aila.org/infonet/dhs-blanket-policy-no-release.
87 Only in the summer of 2015 did the government begin to place some detained families immediately into full-fledged proceedings before the immigration courts immediately rather than placing them into expedited removal. These proceedings are termed “expedited removal” under Immigration and Nationality Act (“INA”) Section 235 and “reinstatement of removal” under INA Section 241 for individuals with prior deportation orders.
88 INA §§ 235(b)(1), 241(b)(3).
89 Individuals entering the proceedings without any prior immigration order undergo a credible fear screening interview, and individuals in reinstatement of removal proceedings because of a prior deportation order undergo a reasonable fear interview that, if passed, allows them to apply for withholding of removal only. See supra notes 1, 88; INA §§ 235, 241.
90 Individuals in reinstatement of removal do not have the ability to seek redetermination of their custody status before an Immigration Judge under current interpretation of the law. See INA 241(a)(2). Also, arriving aliens—individuals who present themselves to officials at a port of entry such as a bridge or airport—do not have the ability to seek review of custody by an Immigration Judge. 8 C.F.R. § 1003.19(h)(2).
or (3) continued detention. If ordering release in its initial custody determination, ICE may also impose non-monetary conditions, such as enrollment in a supervision program.

Relying on its deterrence rationale, DHS insisted on continued detention during proceedings even after families received a favorable decision following the government screening interviews. Between June 2014 and February 2015, ICE denied release to nearly all detained families in its initial custody determination, even those who had passed their screening interviews. When families sought review of the decision to continue detention before the Immigration Judges, ICE attorneys opposed release aggressively and argued that a “no bond” or “high bond” policy was necessary to “significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadorans.” ICE invoked a 2003 ruling of the Attorney General, issued in the aftermath of the September 11, 2001 terrorist attacks, which authorized immigration authorities to consider deterrence considerations in making detention decisions. Notwithstanding ICE’s position, for those families fortunate enough to secure counsel and proceed to a full bond hearing in court, Immigration Judges often ordered that bond be set at a level that would enable families to achieve release. However, the ICE policy of detaining for deterrence led to additional weeks and months of detention for families—even after they established viable asylum claims—while they sought review of their custody in the face of ICE’s insistence on detention.

In December 2014, the ACLU and the University of Texas Law School Immigration Clinic, with pro bono co-counsel from the law firm of Covington & Burling LLP, brought class-action litigation challenging the categorical detention of asylum-seeking families for the purpose of deterring future migrants. On February 20, 2015, Judge Boasberg of the United States District Court for the District of Columbia issued a preliminary injunction prohibiting DHS from using deterrence as a rationale for detaining families or as a factor in custody determinations. The court reaffirmed the long-standing constitutional mandate that immigration detention is civil in nature and so must be justified by some legitimate government interest other than punishment. The judge held that depriving a family of liberty so as to deter another potential migrant likely was an impermissible use of detention. Nor, the court held, was deterrence likely to be effective at addressing any national security threat.

Shortly after the decision, DHS announced that it would abide by the preliminary injunction and would engage in individualized custody determination decisions rather than using

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94 INA § 236(a); 8 C.F.R. §§ 1236.1(c)(8), 212.5, 241.4.
95 8 C.F.R. § 1236.1(d).
100 Id.
across-the-board deterrence rationales for detention. Several months later, the agency made a formal announcement that, consistent with the preliminary injunction, it would not invoke a deterrence rationale in making detention decisions. The Administration has nonetheless continued to maintain that DHS should have the legal authority to detain for deterrence purposes in the future. In addition, as described in the attached chart, ICE continued to detain most families after their favorable screening interviews for at least some period of time and sometimes throughout their case. The agency did so by imposing high bonds as a condition for release throughout most of the last year and by refusing release altogether to certain families who were not entitled to seek review of their custody before the immigration courts. As a result, the length of detention remained significant for many families. Furthermore, the expansive buildup of family detention facilities carried out to effectuate the deterrence policy has not been dismantled.

D. Demographics of the Family Detention Population

The family detention facilities opened by DHS beginning in the summer of 2014 were large-scale immigration detention facilities. They succeeded in increasing total nationwide capacity for detention of families from under 100 beds to approximately 3,000 beds, with additional plans to expand further. As noted above, since June 2014, approximately 5,000 children and mothers have been held together in U.S. immigration detention centers for families. Since the summer of 2014, most women and children were held for at least a month and some were held for a year or more. During federal fiscal year 2014, more than half the children in family detention were six years old or younger. Some have been breastfeeding infants, while many others have been toddlers.

The majority of the family detention population has consisted of women and children asylum-seekers fleeing recent violence in El Salvador, Guatemala, and Honduras who have

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103 Id.
104 Press Release, U.S. Dep’t of Homeland Sec., South Texas ICE Detention Facility to House Adults with Children (July 31, 2014), http://www.dhs.gov/news/2014/07/31/south-texas-ice-detention-facility-house-adults-children (stating that repurposing of Karnes to house families was part of “‘DHS’ sustained and aggressive campaign to stem the tide of illegal migration from Central America”); Press Release, U.S. Immigration and Customs Enforcement, ICE’s New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december (stating that the Dilley facility was part of a policy aimed at “deterring others from taking the dangerous journey and illegally crossing into the United States”).
105 Stop Detaining Families, supra note 52; see also supra Part II.B.
106 Id.
107 ELEANOR ACER & OLGA BYRNE, HUMAN RIGHTS FIRST, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE YEAR UPDATE at 1 (June 2015), http://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf (noting that some women and children were held for nearly a year); see also Hylton, supra note 4 (“refugees who surrender this spring may spend more than a year at Dilley before their asylum hearings can be scheduled”); Bus Station Exit Interview Field Notes (July 4, 2015) (on file with the authors).
109 Hylton, supra note 4 (reporting on refugee accounts of detained mothers and infants).
viable asylum claims. According to the latest data from the U.S. Citizenship and Immigration Services Asylum Division, 88% of the families detained across the government’s three family detention facilities are found to have established a “significant possibility” of success on their asylum claims.

Most of these detained women and children asylum-seekers have family ties in the United States. They have no criminal history and instead have often fled violent crime. As such, they present no threat to the United States and have strong incentives for appearing at their immigration hearings in order to pursue asylum status in the United States. In fact, the limited available data suggests that released families are appearing at high rates for subsequent proceedings in their cases.

E. Family Detention: Changes from 2014 to 2015

The following chart summarizes the changes in the detention and treatment of detained migrant families from just prior to the summer of 2014 to July 2015.

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110 Stop Detaining Families, supra note 52; see, e.g., Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014) (establishing viability of domestic violence asylum claims); Matter of M-E-V-G-, 26 I&N Dec. 227, 251 (BIA 2014) (noting that gang-based claims may be viable on a case-by-case analysis); Crespin-Valladares v. Holder, 632 F.3d 117, 120 (4th Cir. 2011) (recognizing asylum based on gang violence directed at a family who had provided testimony against gang activities).


112 The Detention of Immigrant Families, supra note 108.

113 See, e.g., MARK NOFERI, AMERICAN IMMIGRATION COUNCIL, A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVES TO DETENTION FOR ASYLUM SEEKERS (July 2015), http://immigrationpolicy.org/sites/default/files/docs/a_humane_approach_can_work_the_effectiveness_of_alternatives_to_detention_for_asylum_seekers_final.pdf (citing several studies establishing that asylum-seekers are “predisposed to comply with processes”).

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<tr>
<td><strong>Expedited Removal?</strong></td>
<td>No; families generally not placed in expedited removal.</td>
<td>Yes; female-headed families often placed in expedited removal; some families still released after brief Customs and Border Protection (CPB) detention without placement in expedited removal</td>
<td>Yes; female-headed families often placed in expedited removal; smaller numbers released after brief CBP detention, without placement in expedited removal</td>
<td>Yes; female-headed families often placed in expedited removal; smaller numbers released after brief CBP detention, without placement in expedited removal – fewer families arriving and greater detention capacity</td>
<td>Yes but less frequent; some female-headed families placed in expedited removal while others are placed directly into immigration court proceedings to pursue asylum claims but are nonetheless detained for some period; a few families still released immediately after brief CBP detention without placement in expedited removal</td>
</tr>
<tr>
<td><strong>Mandatory Detention?</strong></td>
<td>No; release after brief CBP detention</td>
<td>Yes; if expedited removal, mandatory detention until favorable screening (Credible Fear Interview (CFI) or Reasonable Fear Interview (RFI))</td>
<td>Yes; if expedited removal, mandatory detention until favorable screening (CFI or RFI)</td>
<td>Yes; if expedited removal, mandatory detention until favorable screening (CFI or RFI)</td>
<td>Yes but for fewer; if expedited removal, mandatory detention until favorable screening (CFI or RFI)</td>
</tr>
<tr>
<td><strong>ICE Custody Decision Resulting in Release (after any period of mandatory detention)?</strong></td>
<td>Reside in community with family during proceedings</td>
<td>Generally no; after favorable CFI or RFI, ICE ordered continued detention (“no bond”) in all cases</td>
<td>Generally no; after favorable CFI or RFI, ICE custody determination – • D.C. District Court prohibited ICE from considering deterrence in making determination • ICE imposed high and often categorical bonds leading to continued detention for most ($7,500 and up; $7,500 or $10,000 specifically at Karnes)</td>
<td>Yes in some cases; after favorable CFI or RFI, ICE custody determination – • ICE imposes variable bonds but they often appear arbitrary and many are still high (usually $4,000 and up) • Some families obtain release by paying ICE bond; others remain detained because of inability to pay • ICE release of some arriving and withholding-only families after extended detention periods</td>
<td>Yes in most cases; after favorable CFI or RFI or for those not placed in expedited removal, ICE custody determination results in release– • Recent announcement by DHS allows for many families to be released • Many women are not required to pay bond but are required to wear electronic monitoring devices • Some women still required to pay bond if no placement of an electronic monitoring device</td>
</tr>
</tbody>
</table>
| **Immigration Judges (IJ s) Custody Review Results in Release?** | Generally no role for IJs in custody determination in most cases since no detention or very short detention. | • IJ custody review for eligible cases – release on bond allowed (often high amounts initially)  
• No IJ review or release for RFI cases (prior deportation order)  
• No IJ review or release for “arriving aliens” (presenting at a port of entry) | • Release on bond generally allowed once IJ intervened in cases eligible for review – usually $2500 to $8000; some released by IJ on recognizance  
• No IJ review or release for RFI cases (prior deportation order)  
• No IJ review or release for “arriving aliens” (presenting at a port of entry) | • In cases eligible for IJ review, IJs set reasonable bonds – from recognizance to $5000 in most cases  
• No IJ review for RFI cases (prior deportation order)  
• No IJ review for “arriving aliens” (presenting at a port of entry) | • IJ custody review less common even where eligible, because DHS custody determination often results in release  
• Where DHS sets a high bond, IJs continue to lower bonds in many cases  
• No IJ review for RFI cases (prior deportation order)  
• No IJ review for “arriving aliens” (presenting at a port of entry) |

| **Detention Centers** | Very little family detention after 2006-2009; small facility in PA only with fewer than 100 beds | Artesia, New Mexico opened as large family detention facility and length of detention at Berks increased; then opening of Karnes (August 2014) and Dilley (December 2014) | Dilley expanding rapidly; Karnes and Berks scheduled to expand and construction underway; Artesia closed in December 2014 | Detention of approximately 3000 mothers and children with additional expansion underway | Detention centers at lower capacity but no announcement regarding planned expansions of Berks and Karnes which are nearing completion |
III. Fundamental Incompatibility of Large-Scale Family Detention with Constitutional Principles and ABA and Human Rights Standards

DHS’s widespread use of detention for women and children seeking asylum in privately-run secure facilities is fundamentally incompatible with constitutional principles, basic international human rights protections, the ABA Civil Immigration Detention Standards ("the ABA Standards"), and other ABA guidelines. Since the summer of 2014, continued detention of families after apprehension was the norm for those sent to family detention centers rather than an exceptional circumstance, and it was applied for deterrence purposes rather than to meet legitimate governmental goals after consideration of other alternatives. The manner of detention is evocative of criminal detention, which is unjustified for civil detainees. And the detention of families offers inadequate recognition of the special protections due to vulnerable populations, including women, children, and asylum-seekers, who have made up a majority of the detained family population.

A. Presumption Against Detention

The Supreme Court has held that civil detention should be an exception to the general principle of liberty and has established that such detention is therefore legitimate only where shown to be necessary in an individual case. In *Zadvydas v. Davis*, the Supreme Court confirmed that immigration detention must be understood to be civil detention and managed as such, because it is a deprivation of liberty that does not result from a criminal conviction. The Supreme Court has thus held that liberty is the rule and government detention of immigrants violates the Due Process Clause of the U.S. Constitution unless a special justification, usually prevention of flight risk or danger, outweighs the “individual’s constitutionally protected interest in avoiding physical constraint.” Detention must also bear a close relation to that special purpose based on an individualized determination. Under these same principles, the *Flores* settlement also imposes a binding obligation on the government to prioritize the possibility for release from detention where children are involved. DHS’s own standards incorporate a presumption of release from detention for at least some asylum-seekers unless there is an individualized concern of flight risk or danger that requires detention. Deterrence has not

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115 The United States has ratified the relevant treaties that establish these standards and so has accepted binding legal obligations under international human rights law. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996). International human rights law norms also have moral force, particularly given the United States’ leadership in promoting human rights norms worldwide.


118 *Zadvydas*, 533 U.S. 678.

119 *Zadvydas*, 533 U.S. at 690 (quotation marks and citation omitted); see also *Demore v. Kim*, 538 U.S. 510 (2003) (Kennedy, concurring) (detention is permissible only “to facilitate deportation, or to protect against risk of flight or dangerousness”); *Doan v. INS*, 311 F.3d 1160, 1162 (9th Cir. 2002) (“[S]erious questions may arise concerning the reasonableness of the amount of [a] bond if it has the effect of preventing an alien’s release.”).

120 *Flores* Stipulated Settlement Agreement, *supra* note 12.

been accepted as a valid governmental purpose that could overcome the presumption of liberty to justify immigration or other civil detention.\textsuperscript{122}

The U.S. presumption against detention is consistent with prevailing international human rights and refugee standards, which also require a presumption against detention of migrants, particularly asylum-seekers, and permit detention only where necessary in an individual case to meet legitimate non-punitive governmental objectives.\textsuperscript{123} The United Nations Refugee Convention prohibits nations from penalizing asylum-seekers and unnecessarily restricting their movement, including through the use of immigration detention.\textsuperscript{124} The International Covenant on Civil and Political Rights also prohibits arbitrary detention, as does the American Declaration of the Rights and Duties of Man.\textsuperscript{125}

The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has explicitly concluded that detention of asylum-seekers should “normally be avoided.”\textsuperscript{126} UNHCR has also promulgated Detention Guidelines, which further specifically state that “detention is an exceptional measure and can only be justified for a legitimate purpose,” such as to protect public order, public health, or national security.\textsuperscript{127} The Guidelines additionally direct that “detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country” and admonish against the “use of prisons, jails, and facilities designed or operated as prisons or jails.”\textsuperscript{128} Finally, the UNHCR Detention Guidelines specifically establish that “detention policies aimed at deterrence are generally unlawful under international human rights law.”\textsuperscript{129}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{122} See R.I.L-R, 2015 U.S. Dist. LEXIS 20441.
\item \textsuperscript{123} See, e.g., UNHCR Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, Guideline 4.1.4 (2012) (hereinafter “UNHCR Guidelines”), http://www.unhcr.org/505b10ee9.html (“Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country”); Inter-American Comm’n on Human Rights, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II., Doc.78/10, ¶ 38 (Dec. 30, 2010) (“In the case of immigration detention, the standard for the exceptionality of pre-trial detention must be even higher because immigration violations ought not to be construed as criminal offenses.”).
\item \textsuperscript{124} Refugee Convention, supra note 1, at arts. 31(1)-(2), 26.
\item \textsuperscript{126} U.N. High Comm’r for Refugees, Detention of Refugees and Asylum-Seekers, Conclusion No. 44 (Oct. 13, 1986). The UNHCR’s Executive Committee is its governing body and is made up of members, largely representatives of U.N. member states including the United States.
\item \textsuperscript{127} UNHCR Guidelines, supra note 123, at Guideline 4.1.
\item \textsuperscript{128} Id. at Guidelines 4.1.4, 8.
\item \textsuperscript{129} Id. at Guideline 7.
\end{itemize}
\end{footnotesize}
The Inter-American Commission on Human Rights similarly maintains that “pre-trial detention is an exceptional measure” that is appropriate only if there is no other means to “ensure the purposes of the process and when it has been demonstrated that less damaging measures would be unsuccessful to such purposes.” The United Nations Human Rights Committee also has held that immigration detention “could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight or interference with evidence.”

The ABA, too, has long opposed civil immigration detention except in extraordinary circumstances. It has additionally adopted policies specifically recommending against detention of asylum-seekers. Where release alone is not possible, the ABA supports alternatives to detention, such as release on reasonable bond or supervised release.

Consistent with these views, the ABA has developed standards for civil immigration detention that include the presumption against detention. The ABA Standards, adopted in August 2012 and amended in 2014, were developed by the ABA Commission on Immigration with assistance from various experts, including a former INS Commissioner, the Commissioner of the New York City Department of Correction, as well as leading authorities from the corrections, medical, academic, and other related fields. The ABA Standards are grounded in the ABA’s experience in advocacy and monitoring of civil immigration detention over many years.

Because immigration detention is civil and must not be punitive, a guiding principle of the ABA Standards is that a “noncitizen should only be detained based upon an objective

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130 The Inter-American Commission on Human Rights is an independent organ of the Organization of American States. The Organization of American States is an association of all 35 independent countries of the Americas and has the goal of promoting democracy, human rights, security, and development. See What is the IACHR?, Inter-American Comm’n on Human Rights (last viewed July 9, 2015), http://www.oas.org/en/iachr/mandate/what.asp.
134 ABA Resolution, Report No. 131, supra note 133.
135 ABA CIVIL IMMIGRATION DETENTION STANDARDS, supra note 116, at 4.
136 Id. at vii.
137 While there are no strict criteria governing when the ABA will adopt formal standards, they are generally enacted as a distinct form of policy closer to codes of conduct or regulatory provisions than general principles embodied in other policy resolutions.
determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision.\textsuperscript{138} Even when detention is appropriate, the ABA Standards call for regular review of decisions to begin or continue detention so as to ensure that civil detention is not used as punishment and is used only to further DHS/ICE’s goals of ensuring the migrants appear in immigration court or are removed after a final deportation decision.\textsuperscript{139} The ABA Standards thus do not recognize deterrence as a permissible justification for detention. Furthermore, “any restrictions or conditions placed on noncitizens . . . should be the least restrictive, non-punitive means necessary to further these goals.”\textsuperscript{140} Because they recognize that immigration detention is non-punitive and civil in nature, the ABA Standards reject the use of a criminal detention model.\textsuperscript{141}

\section*{B. Special Standards for Vulnerable Populations}

U.S. law and DHS’s own standards establish further special considerations regarding the detention of mothers, children, and other vulnerable migrants. The \textit{Flores} settlement contains legal obligations requiring the U.S. to ensure special treatment of children.\textsuperscript{142} In addition, DHS policy requires heightened consideration of custody cases involving women who are caregivers or who are nursing their very young children.\textsuperscript{143}

International human rights law and ABA policy also call for heightened protections for women, children, and other vulnerable groups, recognizing that such groups have special needs and are more likely to suffer trauma as a result of detention.\textsuperscript{144} The ABA Standards start from the premise that “minors and pregnant or nursing women should not be detained.”\textsuperscript{145} The ABA Standards also provide that ICE should not detain children except as a last resort.\textsuperscript{146}

The ABA Standards are consistent with U.N. standards for the treatment of women and children asylum-seekers. The UNHCR Guidelines proscribe detention for pregnant women and

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\textsuperscript{138} ABA \textsc{Civil Immigration Detention Standards}, \textit{supra} note 116, at 4.  \\
\textsuperscript{139} Id.  \\
\textsuperscript{140} Id.  \\
\textsuperscript{141} Id.  \\
\textsuperscript{142} See \textit{Flores} Stipulated Settlement Agreement, \textit{supra} note 12.  \\
\textsuperscript{144} \textsc{Human Rights First, U.S. Detention of Families Seeking Asylum: A One Year Update}, \textit{supra} note 107, at 9-10 (discussing several medical and mental health studies that concluded that “immigration detention is harmful to asylum seekers and in particular to children and families, even over relatively short periods of time”).  \\
\textsuperscript{145} ABA \textsc{Civil Immigration Detention Standards}, \textit{supra} note 116, at 4.  \\
\textsuperscript{146} Id. Other ABA standards also recommend special care for children. For example, the UAC Standards emphasize the importance of treating children “with dignity, respect and special concern” for their particular vulnerabilities. UAC Standards, \textit{supra} note 133, at 9. The UAC Standards require custodial agencies and all other immigration enforcement agencies to hold as their primary concern the best interests of the child in all actions and decisions concerning the child and to treat children with dignity and respect. \textit{Id.} at 12. Where detention is warranted, the UAC Standards recommend that immigration enforcement agencies keep children and their family members “together as a unit and place them in the least restrictive setting appropriate to families.” \textit{Id.} at 44.
\end{flushleft}
nursing mothers. Instead, the Guidelines recommend alternatives to detention that “take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation.” If women must be detained, the facilities and materials should meet women’s specific hygiene needs and promote the use of female guards and wardens. The UNHCR Guidelines further state that children “should in principle not be detained at all” and establish that detention of children should only be used as a last resort. The Guidelines also mandate that “the best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking . . . children,” even where some restriction on liberty becomes necessary.

C. Compatibility of DHS Family Detention Practices with Civil Detention Principles

DHS’s current family detention practices do not comport with ABA policy or basic constitutional and international human rights principles. The dramatic build-up of a large-scale detention system for families over the last year, based on a deterrence rationale, stands in fundamental contradiction to the principles consistently prohibiting deterrence as a justification for detention and requiring that any use of detention for immigration purposes hew closely to a legitimate non-punitive governmental objective. Even more generally, the widespread and vastly expanded use of detention for families over the last year runs directly counter to a presumption of liberty and the use of detention only in exceptional limited circumstances determined on an individual basis.

As has been repeatedly demonstrated, since the expansion of family detention in 2014, DHS policy has treated detention of families as the norm, rather than the exception. This policy was initially based on an impermissible deterrence rationale. Even once it disavowed that deterrence rationale, the government has not made individual objective determinations in these cases that the families in detention presented a flight risk, or constituted a danger, before they were detained. Once a family was placed in detention, until only recently, ICE did not consider the possibility of prompt release but instead insisted on continued detention for at least some period, by denying bond altogether or imposing a high or arbitrary bond. Beginning in

147 UNHCR Guidelines, supra note 123, at Guideline 9.3.
148 Id.
149 Id.
150 Id. at Guideline 9.2.
151 Id.; see also Inter-American Comm’n on Human Rights, Report on Immigration in the United States: Detention and Due Process, supra note 123, at ¶ 15 (explaining that “the Inter-American Court adopted the principle of the ‘best interests of the child’”).
152 Moreover, DHS regulations suggest a presumption in favor of detention by placing the evidentiary burden on the detainee to demonstrate to officers that their release “would not pose a danger to property or persons and that the [detainee] is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8).
154 Lawyers: Detained Immigrant Families in Texas Offered Bonds, N.Y. TIMES, Feb. 27, 2015, http://www.nytimes.com/aponline/2015/02/27/us/ap-us-immigration-overload-bonds.html?_r=0 (reporting that most bonds were set by ICE at $7500 or higher). One estimate suggests that the mean bond for women released from the
the summer of 2015, ICE has permitted release without payment of bond in some cases but usually only when intrusive electronic monitoring is imposed. The imposition of electronic monitoring has not been based on individualized determinations that such restriction is necessary or that no other less-restrictive alternatives are available.155 The government’s practices also continue to ignore the call to give special consideration before detaining women, children, and asylum-seekers, imposing detention only as an exceptional last resort.

The government additionally has failed to engage in individualized consideration of the necessity of detention given the likelihood that a majority of families would appear for further proceedings.156 Most families could be released without any supervision given the incentives they have to appear. Where release alone is insufficient, family detention policies also have failed adequately to consider less restrictive alternatives to detention.157 Community-based case management and reporting systems have been shown to serve as highly effective alternatives to detention, and the Government Accountability Office reported that more than 99% of aliens in ICE’s formal “Alternative to Detention” (ATD) monitoring program appeared at their scheduled immigration court hearings.158 Yet, immigration officials have only recently considered release of families from detention through such alternative programs and still have failed to consider the full range of available alternatives, instead using cumbersome and unnecessary electronic monitoring devices for virtually all families released by ICE without payment of bond when other less restrictive alternatives would be sufficient if assessed and applied on an individual basis.


155 See U.S. Dep’t of Homeland Sec., U.S. Immigration and Customs Enforcement’s Alternatives to Detention 3, OIG-15-22 (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf (explaining that ICE uses the Intensive Supervision Appearance Program II (“ISAP II”), which involves technology and case management, “in conjunction with the less restrictive release conditions associated with payment of a bond, or having to report periodically to an ERO field office”).

156 Notably, data from the Executive Office for Immigration Review shows that a large majority of noncitizen adults with children—approximately two-thirds—appear for their initial hearings. See Jordan, supra note 114. Moreover, research has shown that when aliens are represented by counsel, they are even more likely to return for future proceedings. Id.; IMMIGRATION POLICY CENTER, supra note 114 (finding that in 2014, 54.1% of non-represented children and 99.8% of represented children appeared for immigration proceedings).


158 U.S. GOVT. ACCOUNTABILITY OFFICE, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 30 (Nov. 2014), http://www.gao.gov/assets/670/666911.pdf. Data from the Executive Office for Immigration Review further shows that a large majority of noncitizen adults with children—approximately two-thirds—appear for their initial hearings. Jordan, supra note 114. Moreover, research has shown that when aliens are represented by counsel, they are more likely to return for future proceedings. Id.; see also IMMIGRATION POLICY CENTER, supra note 114 (finding that in 2014, 54.1% of non-represented children and 99.8% of represented children appeared for immigration proceedings).
In addition, for those who require detention, the Standards “presume use of the least restrictive means available to prevent flight and otherwise to meet the limited underlying purpose of detention.” Yet, the conditions at the detention centers are not minimally restrictive. Indeed, ICE’s own Family Residential Standards adopted in 2007 are based on a criminal detention model and are not enforced adequately where they provide some minimal protections.

Adding to the prison-like atmosphere of the detention centers, the government contracts for the use and operation of many of the facilities with the same for-profit companies that operate private prisons. The Corrections Corporation of America manages DHS’s detention center in Dilley, Texas, and the GEO Group, Inc. manages DHS’s detention center in Karnes County, Texas. It is unsurprising, then, that residents of those facilities live in prison-like conditions. In the Karnes facility, the walls are painted cinderblocks and the families are held behind heavy locked doors. Upon entrance visitors must pass through x-rays and security protocols and non-lawyers are allowed only very limited visitation time. Guards give disciplinary write-ups to families for infractions of rigid institutional rules and conduct several body counts each day. Karnes, Dilley, and Berks are all large secure facilities that do not permit families to leave and re-enter.

The centers also fail to provide appropriate protections to women and children asylum-seekers. The conditions are not adequate for the care of young children and their mothers, some of whom are nursing, and there have been incidents of sexual abuse within the facilities.

Given their unique needs and higher likelihood of suffering abuse and trauma as a result of prolonged detention, women and children asylum-seekers are considered vulnerable groups that should be afforded heightened legal protections against detention. Thus, the current

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159 ABA CIVIL IMMIGRATION DETENTION STANDARDS, supra note 116, at 7.
163 See id.
165 See REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER, supra note 162, at 11.
166 See Testimony of Marisa Bono, supra note 4; Long Shorts and Baggy Shirt, supra note 4.
practice of engaging in widespread detention of those groups in large secure facilities is incompatible with domestic law standards as well as ABA and international human rights norms.

IV. Due Process and Fundamental Fairness Concerns

Current policies and practices regarding the detention of families are also inconsistent with the basic due process and access to asylum principles set out in the United States Constitution, the ABA Civil Immigration Detention Standards and human rights norms. The rights implicated include the right to access counsel and the right to a fair proceeding.

A. Impact of Detention on Right to Due Process and Access to Asylum

Violations of the right to due process and access to asylum proceedings are implicated by the government’s family detention policies, in part because detention makes it exceedingly difficult for a family to prepare an asylum case. It is undeniable that the release of a family from detention before a final hearing greatly affects the chances of establishing the merits of an asylum claim, as release allows for more time to prepare the claim and better and more frequent access to lawyers, witnesses, experts, and translators who can help prepare and document the case. It also offers the possibility for the traumatized family to heal sufficiently in order to recall and recount their experiences in a manner that will best support an asylum claim through written and oral testimony. Families cannot engage in this process adequately in a restrictive detention setting. Indeed, one study found that even for represented detainees, the success rate of obtaining relief was 18%, compared with a 74% success rate for those immigrants who are represented but not detained. Accordingly, policies that result in the continued detention of asylum-seeking families significantly threaten their ability to prepare their cases and thus place at significant risk their due process right to have the case fairly and adequately heard.

Karnes…. The impacts of detention are exacerbated by the fact that families have already experienced serious trauma in their home countries and in the course of their journey to the United States.”).

168 See Zadvydas, 533 U.S. at 693 (holding that constitutional due process applies to all persons within the United States, including migrants, regardless of lawful status); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); see also Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–598 & n. 5 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

169 See Robert A. Katzmann, Bench, Bar and Immigrant Representation: Meeting an Urgent Need, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 585, 593 (2012) (reporting comprehensive study results which show detention to be one of the two most important variables determining success in immigration court, with representation being the other variable); Andrew I. Schoenholtz & Hamutal Bernstein, Improving Immigration Adjudications Through Competent Counsel, 21 GEO. J. LEGAL ETHICS 55, 55-56 (2008) (pointing out that detainees are more limited than non-detained migrants in obtaining counsel and representation is the “single most important non-merit factor” determining outcomes in immigration proceedings).

B. Access to Counsel

Another primary due process right compromised by family detention practices is the right of access to counsel. Restrictions on access to legal representation are particularly concerning, because they undermine a family’s right to meaningfully access the complicated asylum process. Access to counsel is particularly crucial in the detention setting where unrepresented asylum-seeking families face virtually insurmountable limitations on their ability effectively to pursue their claims for release from detention and relief on the merits.

Legal representation is often a deciding factor in whether a detained asylum-seeker passes a credible or reasonable fear interview and ultimately obtains asylum. A recent study conducted in the New York immigration courts found that 74% of immigrants who are represented and not detained have successful outcomes. However, only 3% of those who are unrepresented and remain in detention have successful outcomes. Data collected at the Karnes facility clearly shows that detained mothers are more likely to pass their credible and reasonable fear interviews when first given the opportunity to consult with legal counsel. For example, from August through December 2014, prior to the expansion of pro bono attorney programs focused on preparing families for credible fear interviews, the average rate at which asylum-seekers at Karnes were found to have a credible fear (the “fear found rate”) was 71%. In contrast, from January through March 2015, after access to counsel became more widely available for these early interviews through pro bono programs, that average rate increased dramatically to 91%. Similarly, the passage rate in reasonable fear interviews at Karnes increased from an average 62% between August and December, 2014, to an average 81% from January through March, 2015. A comparable, notable increase in passage rates for the screening interviews occurred at Artesia as pro bono attorneys arrived at the facility in greater numbers.

The numbers make plain that having representation and securing release pending a final determination can inalterably change the lives of affected families. The role of counsel has also been crucial in obtaining release from detention for detained families and in obtaining asylum and related relief on the merits. Yet only approximately 30% of families who were detained

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171 One study found that legal representation is “the single most important factor affecting the outcome of [an asylum-seeker’s] case.” Jaya Ramji-Nogales, Andrew L. Schoenholtz, & Phillip G. Schrag, Refugee Roulette: Disparities in Asylum Adjudication, 60 STAN. L. REV. 295, 340 (2007).
172 See TRAC Immigration Report, Representation is Key in Immigration Proceedings Involving Women with Children (Feb. 18, 2015), http://trac.syr.edu/immigration/reports/377/.
176 See July 2014-January 2015 Credible/Reasonable Fear Report, supra note 68 (showing an increase in approval rates for credible fear interviews from 40.6% in July 2014 to a high of 86.7% in October 2014).
177 See generally, Symposium, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, supra note 170, at 363–64.
for any length of time have been able to secure legal representation, and the percentage is likely lower for those who have remained detained.178

The relevant legal standards establish that the detained families have a right to counsel even if counsel is not provided at government expense.179 At a minimum, courts have recognized that basic due process principles require that the government not impede access to counsel and meaningful representation for immigration detainees.180 In line with these norms, international human rights law also establishes the importance of ensuring that immigration detainees have effective means of accessing and communicating with counsel.181 The ABA has similarly recommended that detainees be afforded “meaningful and timely access to legal personnel” and has opposed restrictions that have been placed on counsel at detention facilities, such as prohibitions on laptop computers and cellphones, and the imposition of lengthy wait times before meetings because of the negative impact on counsel’s preparation of a case.182

I. Systemic Difficulties with Access to Counsel for Detained Families

Despite the importance of access to counsel and the right to be represented by counsel, families at the Karnes, Dilley, and Berks detention centers have faced numerous challenges in obtaining adequate legal services. As an initial matter, the size and location of the family detention centers has made it very difficult for families to secure the paid or pro bono legal services to which they are entitled. Attorneys and other legal volunteers must drive over an hour to reach Karnes from San Antonio and two hours from Austin, those cities being the nearest metropolitan centers.183 Similarly, Dilley is more than 70 miles and over an hour driving time

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178 See TRAC Immigration Report, supra note 172.
180 In Haitian Centers Council, Inc. v. Sale, a New York district court found that “screened in” refugees—those who had passed the credible fear test—had a due process right to counsel (but not public counsel) under the Fifth Amendment. 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993). Similarly, in Orantes-Hernandez v. Smith, the court enjoined the government practice of coercing asylum-seekers to sign voluntary departure agreements without notifying them of their right to effective assistance of counsel and right to file an asylum application. 541 F. Supp. at 380-81.
181 UNHCR Guidelines, supra note 123, at Guideline 7 (“Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting.”); Inter-American Comm’n on Human Rights, Report on Immigration in the United States: Detention and Due Process, supra note 123, at ¶ 436(c), (d) (recommending that detention facilities “provide adequate space for confidential meetings with attorneys and mental health practitioners, so that these meetings can happen in an efficient and timely manner” and that immigration detainees should be permitted “to have confidential phone conversations with their attorneys”).
182 ABA CIVIL IMMIGRATION DETENTION STANDARDS, supra note 116.
183 Google Maps, http://www.googlemaps.com (directions from Karnes County Residential Center to San Antonio and Austin).
from San Antonio, and more than 150 miles and two-and-a-half hours from Austin.\textsuperscript{184} These remote locations make it very difficult for the detained women and children to meet in person with their legal representatives on any regular basis, which in turn significantly impedes their ability to prepare for their credible or reasonable fear interviews and their court hearings. The need to engage in time-consuming travel and logistics to provide representation means that attorneys must accept fewer cases for consultation and representation, limiting the number of families that will obtain counsel.

In addition, the sheer number of individuals at the facilities, combined with the minimal number of attorneys in close enough proximity to work with them, presents an insurmountable problem. Despite very serious efforts, it is simply impossible for the legal community to provide representation to all detained families who require legal assistance to present their claims effectively in rapidly-moving, complicated proceedings. As a result, many families are forced to face immigration proceedings without legal assistance.\textsuperscript{185}

2. \textbf{Specific Difficulties in Providing Legal Representation}

Further specific impediments to legal representation exist even when counsel is willing to take on representation. These barriers fall into two categories: impediments to paid and pro bono counsel (together with supporting professionals such as interpreters and paralegals) accessing their clients, and the inability of counsel to adequately prepare for their clients’ immigration proceedings due to seemingly arbitrary and unnecessary restrictions placed on counsel’s activities at detention centers. Each of these constraints threatens the families’ due process rights to legal representation.

The family detention facilities have adopted informal, often non-transparent and inconsistently-enforced policies that have made attorney-client communications and consultations difficult and time consuming. The constantly changing conditions for visitation violate the ICE Family Detention Standards requirement that each facility “provide notification of the rules and hours for legal visitation.”\textsuperscript{186} For example, ICE employees have insisted that law students entering Karnes and Dilley obtain security clearance\textsuperscript{187} even though ICE’s own Family Residential Standards do not require such clearance.\textsuperscript{188} Similarly, legal personnel at both facilities have, at times, been denied access when they do not provide 24-hour advance notice of the specific detainees they would like to meet.\textsuperscript{189} Berks also now requires advance notice of the

\begin{footnotes}
\item[184] Id. (directions from South Texas Family Residential Center in Dilley, Texas to San Antonio and Austin).
\item[185] WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, supra note 22, at 14-15.
\item[186] ICE Family Residential Standards, supra note 29, at Visitation, ¶ 10(b).
\item[187] See, e.g., Barbara Hines, Notes on Access to Counsel at 2 ("hereinafter Hines Notes") (on file with the authors); Letter from S. Schulman to S. Saldana, “Re: Access for Pro Bono Volunteers at Karnes, Dilley and Berks Family Detention Centers,” at 2 (Apr. 20, 2015) (hereinafter “Schulman Letter”) (on file with the authors).
\end{footnotes}
exact time of a planned visit and the specific detainee(s) that the attorney will meet. The ICE Family Detention Standards do not require such advance notice. In another instance, law students working with and supervised by attorneys were informed that they could not enter Karnes without a supervising attorney present, even though they had previously been approved for entry and, in many cases, had previously entered without a supervising attorney being present. Attorneys, students, and legal assistants cannot adequately prepare for visitation with detainees when the “rules” for such visitation are subject to such frequent, unexplained change and unreasonably stringent, inconsistent protocol.

Telephonic communications cannot effectively substitute for in-person meetings. Face-to-face interaction is far more productive, particularly considering language barriers. But even this less effective telephonic option is not always available. Legal representatives at Karnes and Dilley have faced difficulties setting up telephone conferences with their clients, even though such conferences are available in theory.

Even when legal personnel are given physical access, arbitrary conditions imposed by facility management make it very difficult for attorneys and other legal representatives to have productive meetings with their clients. For example, on one occasion at Karnes, the GEO staff refused to allow a team of pro bono attorneys from Elon University Law School to have any food or water in the visitor room and then further stated that if the team left to get food, they would not be permitted to re-enter that day. The team spent 11 hours without food or water in order to finish their work with the detainees. In a similar situation, University of Texas law students were denied the option to eat during a prolonged client interview when they were told they would not be allowed to return the same day if they left the facility even briefly. In another case at Karnes, the staff refused to allow a detainee to use the bathroom in the visitor room even though the bathroom was very clearly designated for detainee use. Instead, the detainee was forced to leave the area, return to her quarters to use the bathroom, and then return to the visitor area, thereby wasting valuable, limited time. At Dilley, the volunteers meet with their clients in a small “visitation trailer.” The CCA personnel at the facility insist, without any basis in the fire code or the facility contract, that the trailer can only accommodate 60 people at a time, including guards, family members or other visitors, detained women and children, and any legal volunteers. And at Berks, attorneys recount that the meeting rooms are insufficiently private and quiet as the walls are thin, which allows noise such as music to travel into the room and for

190 See Notes, National Stakeholder Coordination Call on Border Child & Family Cases, June 5, 2015, at 1-2 (hereinafter “National Stakeholder Coordination Call Notes”) (on file with the authors).
191 See generally ICE Family Residential Standards, supra note 29, at Visitation, ¶ 10; see also ICE Performance-Based National Detention Standards 2011, supra note 188, at Sec. 5.7.
193 See, e.g., Alvarez Memorandum, supra note 192, at 5; WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, supra note 22, at 14.
194 See Alvarez Memorandum, supra note 192, at 5-6.
195 See, e.g., Email from D. Gilman to D. Achim, “clinic student access to Karnes for representation” (Mar. 27, 2015) (on file with the authors) (hereinafter “Gilman Email”); Alvarez Memorandum, supra note 192, at 5.
196 See Alvarez Memorandum, supra note 192, at 7.
conversations potentially to be heard outside, thereby jeopardizing the attorney-client privilege.\textsuperscript{198}

In certain cases at Karnes, ICE and facility management have gone as far as banning particular legal services providers without reasonable justification. In March 2015, a paralegal working for an Austin-based immigration attorney was denied access to Karnes after writing an article for the Texas Observer magazine titled “Seeking Asylum in Karnes City.” Although she was told that she was banned because she had improperly entered the facility in January 2015 as a paralegal when her initial access had been granted as an interpreter, the timing of her denial and other comments suggest that the paralegal was banned due to her publicizing the conditions at the facility, rather than the stated alleged technical violation.\textsuperscript{199}

In another case from March 2015, a legal assistant with the Refugee and Immigrant Center for Education and Legal Services (RAICES) was banned from entering Karnes. She was responsible for conducting intakes for pro bono referrals and for visiting detainees in order to obtain their signatures on necessary forms on behalf of pro bono attorneys living too far away to visit the facility with any frequency. The legal assistant had been visiting families at Karnes for this purpose since the summer of 2014 without issue, until ICE suddenly accused the legal assistant of helping the detained mothers coordinate a hunger strike. There was no evidence that ICE completed any investigation into the matter before banning the legal assistant, and the assistant denied such involvement in a sworn statement. Her exclusion created major logistical issues for pro bono attorneys, many of whom are located across the state and relied on the assistant to interact in-person with clients on their behalf.\textsuperscript{200}

In addition to the described physical difficulties in accessing counsel and other legal representatives, detained families’ due process rights are threatened by policies that make it unnecessarily difficult for legal personnel to help them prepare for their immigration proceedings. These policies include restrictions on technology use, access to experts and interpreters, access to various records, and interference with the attorney-client relationship.

With respect to technology, ICE and/or facility management have placed arbitrary, often-changing restrictions on the devices that legal personnel can bring into the facilities. Cell phones are vitally important for developing a detainee’s case because they allow the detainee to communicate with an interpreter as well as with family members, friends, and other witnesses who can help establish the detainee’s fear of persecution.\textsuperscript{201} Likewise laptops and Wi-Fi hotspots enable legal service providers to conduct on-the-spot research and communication, and

\textsuperscript{198} See National Stakeholder Coordination Call Notes, supra note 190, at 2.
\textsuperscript{201} See Schulman Letter, supra note 187, at 3
keep electronic notes of their meetings with each client. Although cellphones, laptops, and Wi-Fi hotspot devices are critical to case preparation and are not restricted under the ICE Family Residential Standards, legal personnel often are told that they are prohibited from bringing these items into the centers. These arbitrary policies deny detainees the benefits of the full scope of available services that are available to non-detained clients of the same attorneys.

In Karnes, volunteer legal representatives were given oral permission by the facility director to bring cell phones and laptops into the center, but facility staff sometimes deny law students and attorneys entry with this equipment. As with the restrictions on access, the rules pertaining to technology change for every visit: sometimes legal representatives are allowed in with laptops, sometimes they are not; other times, only one legal representative in a group is allowed to bring a laptop. The same is true for Wi-Fi hotspot devices. Due to these widespread inconsistencies, legal volunteers find it difficult to comply with restrictions, thereby making access to needed technology so inconsistent as to be a hurdle to adequate representation.

Detainees at Dilley and Berks have faced similar problems. Those facilities have banned the use of cell phones, making it impossible for attorneys and clients to communicate and for the detainees to contact potential witnesses in some cases.

Families and their legal counsel have also had difficulty accessing interpreters, which makes it very difficult for counsel to communicate with their clients and thus to adequately prepare the clients for their asylum cases. Not only do the restrictions on technology make accessing interpreters more difficult, but there are also conflicting standards on the clearance requirements for interpreters who can physically visit the centers. Notably, in-person meetings with interpreters are strongly preferred to virtual ones, as all parties communicate better when the interpreter is in the same room with the clients. Unfortunately, in some cases, interpreters are told that they need to be cleared prior to every visit, which is time-consuming, while others have been advised that a clearance determination is good for six months. These inconsistent requirements make it difficult for attorneys to comply with requirements for interpreter access and therefore often result in interpreters being denied physical access to the facilities.

Legal representatives are further impeded in their work by their inability to obtain various records. These records, including initial interviews with detainees after they are detained, identity documents, and medical records, are all critical in helping establish a case for asylum, but in many cases access to the documents is restricted for no apparent reason. For example, in one instance at Karnes, facility management refused to provide a detainee with a copy of a psychological evaluation she received when she was first admitted. In response to requests by a pro bono attorney, the facility agreed to release the information if certain paperwork was filed.

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202 Id.
203 See, e.g., Hines Notes, supra note 187, at 2-3.
204 Id.; see also Gilman Email, supra note 195; Alvarez Memorandum, supra note 192, at 5; Schulman Letter, supra note 187, at 3.
205 See, e.g., Hines Notes, supra note 187, at 2-3; Alvarez Memorandum, supra note 192, at 6; Schulman Letter, supra note 187, at 3.
206 See Schulman Letter, supra note 187, at 3; National Stakeholder Coordination Call Notes, supra note 190, at 1-2.
207 Hines Notes, supra note 187, at 3.
but then required the detainee to sign three different forms, each time stating that the wrong form had been submitted. The facility then asserted that the records could not be released without verbal confirmation from the detained mother, but the medical records manager refused to set a date and time to speak with the detainee about the matter. In other instances, ICE has confiscated identity documents upon apprehension and refused to provide the families or their attorneys with these documents. These burdensome paperwork requirements resulted in increased bond amounts, delayed or denied release, and limited travel upon release.

Finally, ICE personnel and facility staff at the family detention centers have interfered with attorney-client relationships in other ways, including by improperly offering legal advice to detained families. For example, an ICE official at Karnes incorrectly indicated to a detained mother that her legal representatives had made a “mistake” in the manner in which her release from detention was requested. The officer’s statement to the mother about the proper legal strategy constituted improper legal advice and damaged her relationship with her legal counsel. In other cases, officials at Berks and Karnes have claimed knowledge about and influence over the immigration court proceedings and have told detained families that disciplinary problems at the facilities will affect their cases before the courts. At Dilley, ICE officials have discouraged families from consulting with counsel during the custody determination process, insisting that the families will be in the best position if they accept the ICE custody determination without review. ICE officials have also inquired, on several occasions, about the purpose of visits by certain pro bono legal representatives and organizations. This practice is not permitted by the Family Residential Standards and hinders the confidentiality and efficacy of the attorney-client relationship.

In sum, the unwarranted restrictions and bureaucratic hurdles impede the ability of attorneys and other legal volunteers to help the families prepare their asylum cases. By denying access to needed technology, language assistance, and relevant documents, and by interfering with attorney-client relationships in other ways, ICE and facility management hinder meaningful representation and may even prevent success on the merits for valid asylum or protection claims.

C. Fairness of Proceedings and Access to Asylum

Due process also requires that the immigration proceedings themselves provide individuals a “full and fair hearing of [their] claims and a reasonable opportunity to present

208 See Alvarez Memorandum, supra note 192, at 4; Schulman Letter, supra note 187, at 5.
210 Id.
211 See Schulman Letter, supra note 187.
212 Id.
214 See E-mail Communication from ICE San Antonio Field Office to NYU Immigration Clinic (April 8, 2015) (on file with the authors).
evidence on [their] behalf.”215 This right is echoed in the statute and regulations governing immigration proceedings, which provide that the respondent in a removal proceeding shall be advised of her right to representation, of the availability of free legal services, and of the right to a reasonable opportunity to examine and object to the evidence against her, present evidence on her own behalf, and cross-examine the government’s witnesses.216 International human rights law and ABA policy similarly emphasize the importance of the ability of individuals to present a claim, particularly an asylum claim.217

Unfortunately, the families currently in detention centers have faced a variety of unfair practices from the moment they are apprehended, many of which threaten basic due process rights and their ability to present an asylum claim. These practices exacerbate the many hurdles to meaningful participation in legal proceedings that the families already face as a result of their detention and the previously described limitations on access to counsel.

Families are often forced to participate in the various stages of asylum proceedings without adequate interpretation services, even though such services are legally required and the Office of the United Nations High Commissioner for Refugees has characterized “the services of a competent interpreter” as a fundamental requirement.218 The problems with translation and interpretation begin at the very first stage of the proceedings, during the initial interviews conducted by the inspections officers who apprehend the families. Even though regulations require adequate interpretation services to be provided, some women are not provided with access to such services, particularly those women who speak indigenous languages.219 This problem repeats itself during the next stage of the proceedings, the credible or reasonable fear interviews, when the women frequently do not receive the adequate interpretation services to which they are legally entitled.220

Besides violating their legal rights, these language barriers make it significantly more difficult for the women to establish their fear of persecution in order to meet the requirements for an asylum claim and avoid deportation. As one court has recognized, “[i]t is difficult to imagine

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216 See INA § 240(b)(4); 8 C.F.R. § 1240.10.


219 8 C.F.R. § 235.3(b)(2).

220 8 C.F.R. § 208.30(d)(5); see, e.g., Washington, supra note 154, at 4 (recounting the difficulties of telephonic communication with an interpreter for a credible fear interview, during which the interpreter and interviewee repeatedly had difficulty hearing each other and the interpreter misinterpreted the testimony on several occasions).
how any bona fide refugee, with little or no knowledge of English, could ever spontaneously convey a ‘well-founded fear of persecution’ to an asylum officer.” Not only do the women have difficulty communicating the persecution they face if inadequate interpretation services are the only available means of communication, but allegedly “conflicting” or false information given to the inspection officers and/or credible fear interviewers is often used against the women in later proceedings before the immigration courts, even though such discrepancies often are attributable to language barriers. For those women who speak indigenous languages, immigration authorities frequently skip the credible fear interview altogether, moving directly to the merits determination. But without a positive credible fear determination, judges are hesitant to grant release pending conclusion of the proceedings, thereby further prolonging detention.

This type of procedural unfairness continues throughout the proceedings in the immigration courts, even after the women pass their credible or reasonable fear interviews, because the families must attend their hearings virtually through video-conferencing. As a result, the interpreter is often not in the same location as either the asylum-seeker or the judge, significantly impeding the ability of the interpreter to understand the detainee and increasing the probability of inaccurate communication that affects procedural due process rights. The virtual hearings present further fairness problems. The distance between the judge and the asylum-seeking family creates difficulties when presenting the merits of the asylum claims. The immigration judge adjudicating the claim cannot observe the women in person as they tell their stories. That separation makes it more difficult for the judge to assess the asylum applicant’s credibility and the extent of the persecution she faced in her home country. Emotional testimony and visible scars or other indicia of injury may not be observable on video despite their importance in the adjudication of the asylum claim. Similarly, due to the remote location of the detention centers, often the attorney is not in the same location as the detainee, making it unduly difficult for the attorney to act as an intermediary and adequately represent a detained family during the proceedings.

The logistics created by long-distance hearings seriously complicate effective representation as well. The difficulties are particularly notable with families held at the Dilley facility. Judges sitting in the Denver and Miami Immigration Courts have heard the cases from

221 Marincas v. Lewis, 92 F.3d 195, 204 (3d Cir. 1996).
225 See WRC & LIRS, Locking Up Family Values, Again, supra note 22, at 16 (noting the judges’ inability “to hear a detainee and see a detainee’s facial expressions during [video or telephone] testimony”).
226 Rusu v. INS, 296 F.3d 316, 321-22 (4th Cir. 2002) (noting that video hearings in asylum cases have the potential to violate due process in some cases).
Dilley. As a result, detained families currently do not even share a time zone with the judges hearing their cases. It is not possible for an attorney to work with a family at the detention center and then appear in person before the judge given the physical distance between the two sites. Even filing pleadings, evidence and applications is a difficult task, since the attorney will often need signatures or statements from the client in one state, which must be filed on a short time frame in the court in another state.

In another area of concern, the policies and practices of the government do not always guarantee that children have an opportunity to present an asylum claim independent of their mother’s claim. This is true even when a child’s claim cannot, by law, be derivative of her mother’s claim because, for instance, the mother is subject to a prior deportation order and is in withholding-only proceedings. At least initially, DHS was not interviewing children separately to determine if they had asylum claims independent of those of their mothers. This omission denies the children—a notably vulnerable population—their right to present their own claims.

Finally, there is concern that the fairness of the asylum process may be compromised by suggestions from high-level government officials that they consider most Central American asylum claims to be invalid, even in the face of agency and court determinations granting asylum in a significant number of cases. In this context, DHS’s instruction to immigration officers to err on the side of screening out detainees with possible asylum claims during the credible fear interview, rather than screening them in, is troubling. Specifically, in February 2014, DHS released a Memorandum emphasizing that the standard for passing the credible fear interview—the “significant possibility” standard—requires an applicant to “demonstrate a substantial and realistic possibility of succeeding.” In releasing the Memorandum, DHS sought to clarify that standard amid concerns that it had “lately been interpreted to require only a minimal or mere

228 See REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER, supra note 162.
230 See 8 C.F.R. § 208.30(e)(2) (“An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act.”).
possibility of success." The Memorandum and the timing of its release seemed to be designed to encourage immigration officials to reduce the number of applicants passing interviews, raising the concern that some interviewers will overlook applicants with credible fears of persecution to further DHS policy and the statistics used in support of that policy. The pattern of government officials apparently looking for ways to exclude rather than admit asylum-seekers creates a real risk that women and children with a genuine fear of persecution will be improperly returned to violent circumstances in the countries from which they fled.

V. **Pro Bono Response to the Increase in Migration in 2014 and the Use of Long Term Family Detention**

Despite the inordinate obstacles, in substance and volume, encountered by members of the legal community working to respond to family detention, members of that community have made extraordinary efforts to assist. Lawyers have travelled from all over the country to the detention centers. New pro bono projects have developed to address the needs of the thousands of detained mothers and children, and national coordination among the participants has been critical. While obtaining some successes, these nationwide efforts can never be sufficient to overcome the overwhelming need for legal representation. The many hurdles created by DHS practices, the expertise and language skills necessary to provide competent counsel, and the sheer number of clients requiring assistance have created a crisis of ever growing proportions.

Efforts to provide legal assistance to detained families have been undertaken by a full network of legal service providers ranging from nonprofit organizations to small and large private law firms, from university law clinics to bar associations, all attempting to provide a full array of services from preparation for credible and reasonable fear interviews to representation in custody determination proceedings and on the merits of asylum claims to post-release placement and representation. An initial rapid response by pro bono attorneys grew into a structured services program with the support of the specialized immigration bar, university law clinics and non-profit organizations, which attracted even broader interest and large law firm support. Non-lawyer volunteers, including paraprofessionals and interpreters, among others, added to the effort and met critical needs as well. In turn, legal volunteers who provided representation joined with law firms and organizations working at the national level to engage in advocacy for policy improvements. We cannot do justice in this report to the legal community’s valiant response to the crisis, but we do include an appendix (see, Appendix, below) with a partial description of the laudatory efforts of the legal community, which may serve as a point of reference for delivery of legal services to immigrants in the future.

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232 *Id.*


VI. Conclusions and Recommendations

A. Conclusions

The core mission of the Department of Homeland Security is national emergency planning and preparedness. It is essential that DHS be able to anticipate, and be prepared to address, periodic increases in the migration of individuals and families seeking asylum. Waves of people arriving in the United States, seeking safety and freedom in the arms of our democracy, have occurred periodically over the history of our country, particularly given our tradition as a nation of immigrants. History teaches that these instances are sure to happen again, meaning that fair and humane policies need to be in place beforehand. Dealing with those situations demands anticipation, effective solutions, significant reform, and hard work.

The policy of detaining immigrant children together with their parents during the pendency of their immigration proceedings is not a new response to such challenges, the situation having arisen several times in just the past 20 years. As with previous iterations, the problems encountered in the most current round of family detention are myriad. Now is the time to address the legal and humanitarian issues that inherently accompany these historical realities so that our country is ready to meet the consequent demands that seem certain to occur again and again, today and tomorrow.

As is well acknowledged, a legion of problems was presented by the expansion of family detention that occurred over the last year. Yet, DHS vigorously defended the response for most of that period.\(^{236}\) Recently, in the summer of 2015, ICE reaffirmed its commitment to detention as its preferred strategy one day, only to be followed by DHS the next day disavowing its prior unyielding support of family detention and resolving to release quickly as many families as possible.\(^{237}\) When DHS began releasing families pursuant to this reversal, the releases were done chaotically and the process has been handled through means employed by the criminal justice system, notably monetary bond and electronic monitoring. Failure to accept the civil nature of immigration detention is still the rule.

Simply, immigration detention is not criminal incarceration. There are important distinctions between the characteristics of the immigration detention population in ICE custody and the administrative purposes underlying their detention. Immigration detention is intended to hold individuals only as long as necessary, when necessary, and to process and prepare them for removal or relief. Criminal incarceration, on the other hand, necessarily is punitive in its purposes and goals.\(^{238}\) In 2009, a system-wide governmental study of immigration detention

\(^{238}\) IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, \textit{supra} note 31.
underscored the opportunity for ICE, in coordination with stakeholders, to design and implement a new system premised upon civil, rather than criminal, principles. Those notions rest upon the foundational precepts that migrants are not to be detained as punishment. Indeed, many in immigration detention qualify under the law for relief from removal. Consequently the process must be governed by the presumption that release to the community is the rule and not the exception; an objective risk assessment must be made requiring the use of the least restrictive means necessary to ensure attendance at mandated immigration proceedings in cases where release alone is insufficient. This assessment recognizes that monetary bond and electronic monitoring are not minimally restrictive alternative means for ensuring appearance of migrants at their proceedings. These precepts can no longer be ignored.

By resorting to family detention practices without regard to these foundational principles, indiscriminately labeling families as threats, and refusing to determine and utilize the least restrictive means of achieving compliance with immigration proceedings, DHS has not met its emergency preparedness, legal or fairness goals. These failures have left in their wake a population of traumatized children and their parents, struggling with the consequences of unnecessary detention. As a result, adjudication of asylum claims has become haphazard and unfair, and legal services have been redirected and depleted. Looking towards the future, DHS must be prepared for the inevitable, periodic influxes of migrant families seeking status. This requires the advanced development, and fair implementation, of viable plans to accommodate these marked changes by means other than detention, or release to the community with excessive supervision requirements, and accelerated deportation proceedings lacking in due process.

B. Recommendations

Based on the foregoing analysis, we urge the U.S. Government take the following actions to the extent it has not already done so.

Specific Remedies: Karnes, Dilley and Berks Family Detention Centers

1. Immediately cease the expansion of family detention capacities at the Karnes, Dilley, and Berks family residential centers and expeditiously release families currently held in detention.

2. Provide timely notice to the Karnes, Dilley and Berks facility providers that their contracts for family residential housing and services will not be renewed.

3. Pursue placements in small-sized group homes sufficient in number to humanely address detention where exceptional circumstances preclude other less restrictive means.

Reform of Detention Policies and Practices impacting Families and Children

4. Permanently abandon deterrence-based detention policies.
5. Adopt a presumption against detention, particularly in the case of families, children, and asylum seekers.

6. Where detention is required, it must not be lengthy. Every effort must be taken by government to satisfactorily address impediments to the release of families and children.

7. Revise detention policies and practices consistent with the presumption that detention, when necessary, must be for the briefest time possible.

8. Establish and adhere to clear standards of care that include unique provisions for families and children that do not follow a penal model.

9. Establish a system of informed immigration enforcement, which includes management tools and informational systems capable of building and maintaining a continuum of care for those taken into ICE custody. These systems shall give priority to community placements whenever feasible and detention strategies consistent with objectively and individually assessed risk as necessary, utilizing the least restrictive means to achieve compliance.

10. Provide meaningful federal oversight of detention operations, through an on-site presence at facilities of federal officials authorized to intercede quickly and as often as necessary, and ensure that effective complaint mechanisms are in place. Track performance and outcomes and make reliable information readily available to the public. Put into place enforcement mechanisms to ensure accountability.

11. Adopt a presumption of release into the community as the rule rather than the exception.
    Prioritize release of families into the community on parole (without the requirement of a parole bond) or on recognizance in all possible cases.

12. When release alone into the community is insufficient, an objective risk assessment shall be employed to identify the least restrictive means, such as community-based supervision, to achieve compliance with attendance at immigration proceedings. More restrictive alternatives to detention, including electronic monitoring and cash bond, shall be used only where demonstrably necessary in an individual case.

13. In those limited cases where a specific flight risk or danger has been established and payment of a financial bond is the least restrictive means of addressing such risks, set the bond amount at an attainable level based on individual circumstances.
14. For families placed in expedited removal proceedings, provide an individualized custody assessment immediately after a credible or reasonable fear finding, taking into account the family’s individual circumstances and particular vulnerabilities as well as the specific likelihood that they pose a flight risk or danger to the community.

15. Conduct systematic independent monitoring for compliance of administration of bonds and assignments to community supervision and detention in addition to detention conditions.

16. Ensure meaningful access to legal representation and legal information for all families subjected to detention at every stage of the immigration proceedings. Meaningful access must also include the removal of geographic and policy hurdles that impede the involvement of pro bono attorneys, and a stated priority supporting the continual and consistent accommodation of the needs of attorneys seeking to represent clients.

17. Guarantee legal representation for all families subjected to detention, through private or pro bono counsel, legal services organizations funded for this purpose by the federal government or counsel appointed by the government.

18. Develop emergency preparedness plans in order to effectively respond to periodic increases in border arrivals and crossings by means other than detention, and continuously assess and improve its activities and operations.
A. The Work of Pro Bono Representation Projects

Given the threat of immediate deportation through an expedited removal process, access to experienced immigration counsel very quickly became critical for the women and children detained in Artesia in late June 2014. It was clear that any meaningful legal representation program would most effectively be built in partnership with experienced legal services providers. The pro bono community relied heavily on the screenings and evaluations conducted by volunteers from specialized professional organizations, such as the American Immigration Lawyers Association, and local expert legal services organizations with access to the detained families. Those legal services organizations were already working at or above capacity, the economic downturn of the past several years having reduced the sizes of some staffs. The Administration had provided no additional funding for the provision of legal services to detained families, although it had offered limited financial support for representation of unaccompanied minors. Despite this reality, the pro bono community expanded its efforts to try to meet the increasing demand for legal services. Several key initiatives were launched to address the crisis.

i. First Responders in Artesia, New Mexico

When the Artesia site first opened, there were no immigration attorneys in the region, and the list of free legal service providers given to the detainees consisted exclusively of lawyers located three and a half hours away. Even if the detained women wanted to consult with counsel remotely, there were no phones available in the facility other than ICE agent cell phones. Early access to pro bono counsel was non-existent, and yet five asylum officers were churning through dozens of credible fear interviews every day.

Two private lawyers retained by two of the detainees’ family members sent a desperate plea to a listserv of immigration attorneys, seeking pro bono representation. Five practitioners responded immediately, three of them providing remote support, and the other two traveling to Artesia to help organize a response, their trunks full of as much content from their law libraries as they could transport. For a week, there were only two pro bono attorneys on the ground.

On July 22, 2014, the Center for American Progress, Human Rights First, the ACLU, and a number of human rights and other organizations toured the Artesia facility. Several of the detained women approached the tour group, begging for representation and giving their names to the tour group lawyers on pink post-it notes. Those post-it notes became “The List” of clients seeking attorneys. Using that list, the early volunteers were able to connect detained women to counsel for the first time.
ii. The AILA-AIC Pro Bono Project

By July 24, 2014, ten days after the first wave of deportations, just over a dozen lawyers arrived in Artesia. While a handful of stipends were available, most came as volunteers, leaving their private practices and paying their own transportation and lodging costs. There were already between 400 and 500 women and children in detention, none of whom had been screened by attorneys to evaluate their cases. With no funding and no infrastructure, the volunteers promised to represent anyone who wanted an attorney, without weeding out difficult cases.

Amid these challenges, the AILA-AIC Pro Bono Project (“Project”), a partnership between the American Immigration Lawyers Association (AILA) and AILA’s sister organization, the American Immigration Council (AIC), was born. AILA marshalled 6-8 volunteers per week, eventually hiring one of those volunteer lawyers, at a very meager salary, to work full-time in Artesia. AILA members and other small firm and solo practitioners with immigration expertise responded in significant numbers. Large law firms, such as Jones Day, also contributed volunteers and other support. Using a cloud-based database developed by immigration attorney Stephen Manning of the Innovation Law Lab, volunteers uploaded documents and tracked information to try to create continuity of representation and streamline case development as teams of volunteers shifted in and out of the facility week-to-week. Facing overwhelming demand, the Project was intended to quickly increase access to pro bono representation. Rather than a single attorney handling a single case, volunteer attorneys would instead spend up to a week in Artesia and each handle up to twenty or more cases, handing off the files at the end of the week to the rotating, incoming team of volunteers. The on-the-ground team met with the clients and conducted the initial interviews, collecting information about their claims, which was then shared with remote volunteers who investigated further, contacted family members, and located supporting documentation. The remote volunteers then drafted and filed pleadings. By the time the Artesia detention center closed in December 2014, the Project had involved approximately 300 lawyers, paralegals, interpreters, and translators working on the ground and remotely.

iii. The Karnes Pro Bono Network

When the Karnes facility became a family facility at the beginning of August 2014, a few well-respected private immigration attorneys, the law firm of Akin Gump, and the University of Texas Law School Immigration Clinic began to take cases on a pro bono basis, mainly pursuing release on bond for families facing the government’s no-release policy. A pro bono network of volunteer attorneys soon developed, and dozens of San Antonio and Austin area attorneys became involved, handling the direct representation of clients throughout their proceedings. In the fall of 2014 alone, volunteer attorneys with the network won the release of almost 100 families in bond proceedings. As described further below, Akin Gump Strauss Hauer & Feld LLP played a crucial role in providing initial support and structure for the pro bono network, and then RAICES (Refugee and Immigrant Center for Education and Legal Services) took over much of the coordinating work. Volunteers with the Karnes pro bono network continue to represent clients in seeking release and in merits proceedings. Of the small number of cases for which merits hearings have been held, pro bono attorneys from the network have obtained relief for at least a half dozen families.
iv. The CARA Pro Bono Project

Building on the models developed in Artesia and Karnes, the pro bono community quickly mobilized to provide services at the new detention facility in Dilley, Texas. Volunteer team leaders arrived each week, which AILA subsidized, but it soon became clear that there would need to be consistent leadership on the ground. AILA worked with the Catholic Legal Immigration Network, Inc. (CLINIC), AIC, and RAICES to form the CARA Pro Bono Project. Each organization took on funding responsibility for an element of the effort: equipment and supplies, a supervising attorney, and a volunteer coordinator.

The work of the AILA-AIC Pro Bono Project and the CARA lawyers and volunteers reveals a level of dedication illustrative of many who responded to the crisis. These individuals have provided counsel under very challenging logistical conditions, often at significant personal and economic sacrifice. For example, the lead attorney for CARA on the ground in Dilley, funded by CLINIC, also volunteered in Artesia and then moved from Ohio to south Texas to take on this work. A small staff oversees weekly teams of anywhere from three to fifteen volunteers, including attorneys, paralegals, interpreters, graduate students, law students, and clergy.

The volunteers pay their own airfare and lodging, and dedicate an average of 19 hours a day for a full week. The volunteers, as a group, see as many as 80 to 100 clients a day. Volunteers, whose knowledge of asylum law varies widely, are trained for 3.5 hours before entering the facility and are then thrust into the role of decision-maker, acting as the primary representative for a given client, going through the intake interview, uploading relevant documents to the database, and preparing affidavits, motions, bond documents, and letters of support, all while struggling with slow Wi-Fi hotspots, a sluggish printer/scanner, and no cell phone access. The volunteers have also lost valuable time hauling files and supplies in and out of the facility in a Radio Flyer wagon at the beginning and end of each day because there is no secure on-site attorney workspace.

The CARA project currently assists clients in preparing for credible fear and reasonable fear interviews, review of credible/reasonable fear determinations, full intake interviews following positive credible/reasonable fear findings, and custody redetermination hearing preparations. A single volunteer will work as many as 40 to 50 cases in a week before passing the load to the incoming group. All of the work product and supporting documentation are centralized in the database, so that, as one volunteer put it, if anyone is bitten by a rattlesnake, someone else can easily pick up where the last volunteer left off. As time passes and some of the women reach their merits hearings, former CARA volunteers have offered to continue to represent the clients they saw while in south Texas. The network of former volunteers, having dispersed back to their home offices, continues to play a role in representing the detained women and children, either in using the database to remotely access files, draft motions, and file documents before the Immigration Judge, or in providing assistance to women who make bond and are released pending their merits hearing. There is a remote bond team coordinated out of Connecticut, a translation team coordinated out of Los Angeles, and a private practitioner in Miami who prints and files court documents every day. Despite these challenges, this network
of remote attorneys, facing overwhelming logistical and economic hurdles, and compelled by the
difficult and worsening conditions detainees face, is growing.

v. American Gateways

American Gateways conducts the Legal Orientation Program at both Karnes and Dilley. The organization has been involved with providing know-your-rights presentations at detention facilities in South Texas for many years. When the new family detention centers opened, the Department of Justice needed to expand its programming to those sites, and American Gateways began providing general legal orientation to the new arrivals. Staff attorneys provide a general overview of the immigration process, put on pro se workshops focused on bond hearings, merits hearings, asylum issues, and more. The attendees can also request short, individual sessions with the American Gateways attorneys, at which time the detainees are screened for possible pro bono referral. Most of those screened referrals are directed to the CARA attorneys. Some are directed to private pro bono attorneys in San Antonio and Austin with whom American Gateways works. Dozens of orientations have taken place both at Karnes and Dilley. More than 1400 detainees have attended the LOP sessions at Karnes and Dilley since the surge of border-crossings began last summer. American Gateways has a staff of just 20 people, yet between their various programs they serve facilities with more than 5000 detainees.

vi. Human Rights First

In working with national law firms, Human Rights First recognized the outstanding need to coordinate nationally among the various efforts beginning around the country. The organization learned from various stakeholders that there was a need for facilitation of communication and coordination among the national law firms, bar associations and legal services providers that were striving to expand their efforts to address the representation gaps facing families with children. As initiated by the Association of Pro Bono Counsel (APBCo), Human Rights First launched weekly national stakeholder teleconference calls which have grown to include more than 90 participants. Out of this effort, as well as a detailed letter to Vice President Biden outlining the numerous hurdles to engaging in the same pro bono representation he specifically called for in last year’s White House meeting, grew regular meetings with the White House Office of Public Engagement. These meetings provide a reliable forum at which the legal community’s now-coordinated voice can raise issues with representatives from the White House, the Department of Homeland Security, the Department of Justice, the Executive Office for Immigration Review, and others. Chaired by Human Rights First, these meetings have proven to be a valuable opportunity to discuss ways to overcome the many hurdles to pro bono representation.

Human Rights First also quickly raised funds to expand its capacity to provide pro bono representation to non-detained families and children through its offices in New York, Houston and Washington DC. The organization hired a total of nine new staff members, including three attorneys, three paralegals, and three social workers. With this new staff, Human Rights First is providing direct representation and also recruiting, training, and mentoring pro bono attorneys. Human Rights First has sent legal staff to Artesia, Karnes, Dilley and Berks to assist with legal
counsel and representation, and its family clients include some who were held at family detention facilities as well as some who were released by CBP at the border.

B. The Response of Large Private Law Firms

Major private law firms have also been involved in meeting the growing demand for representation of detained families. Despite many obstacles, numerous firms have launched significant efforts to respond effectively to family detention. A few firms have initiated major pro bono representation projects.

The national law firm of Jones Day rented a small office in Artesia and began sending teams of five lawyers per week, adding to the ongoing pro bono representation being provided by the AILA-AIC Project. Their initial charge was to help with screening, but the mission soon turned to full representation of some of the families screened by AILA volunteers. A retired firm partner came out of his retirement to manage the effort, working closely with the firm’s pro bono partner/APBCo member and an administrative assistant who was instrumental in collecting the data included in the Innovation Law Labs database. When the Artesia facility closed, Jones Day transferred the focus of its efforts largely to the women and children detained in Dilley. One attorney worked full-time for eight months on the cases accepted for representation. Teams were formed to share responsibilities on many additional files. In all, Jones Day has taken on more than 100 clients either detained at, or after release from, the detention facilities in Artesia, Dilley, and Karnes. The firm has shouldered large out-of-pocket expenses to have teams on the ground in south Texas and to send attorneys to Miami, where the Dilley cases are now being heard. At the urging of firm leadership, Jones Day continues to accept new matters on a weekly basis. To date, the firm has litigated six cases to final status, prevailing for their clients in each instance.

With an office in San Antonio, the firm of Akin Gump was in a unique position to respond to the family detention crisis. Focusing its efforts on Karnes, the firm began to pursue release from detention for its new clients there and to support a larger network of pro bono attorneys handling custody cases. The firm rented office space near the facility and assigned a recently admitted lawyer to work full-time at the Karnes detention center. Under the direction of the firm’s pro bono partner/APBCo member, the young associate worked at the facility for four months, helping dozens of women prepare for their credible fear interviews and matching many cases with pro bono attorneys who would represent them in custody redetermination hearings before the immigration courts, challenging ICE decisions denying release. The influx of attorneys handling bond hearings, and the success rate attendant to that representation, helped the court in San Antonio effectively streamline the bond proceedings and make the process far more efficient. Akin Gump’s on-the-ground associate was eventually replaced by a newly designated staff attorney at RAICES, and Akin Gump then funded a two-year Equal Justice Works fellow to work at RAICES. Akin Gump continues to be a key player in the national pro bono effort, leading efforts to deal with ICE, DHS, and White House officials to address the challenges on a systemic level.

Fried Frank, a New York based firm, has also allocated a significant portion of time to working on these efforts. Its Washington, D.C./APBCo member pro bono counsel travelled to Artesia, and working with AILA, has helped locate pro bono representation for women with
children who are released from custody and who then disperse to cities around the country where their families reside. Senior attorneys at the firm, including APBCo members, have also devoted substantial time and effort to policy work relating to family detention, and the firm’s New York office is a key part of the screening program being overseen by Human Rights First.

Many additional law firms around the country are providing further pro bono assistance. Through APBCo, several firms toured the various detention facilities and are representing individual families as those detainees are released and dispersed to cities in every region of the nation. Other firms are involved in White House meetings. Still more are helping to staff the accelerated family dockets in other parts of the country. Several have sent attorneys to Dilley and Karnes to work for limited periods of time. Others are working with their local immigration legal services providers to represent former detainees in post-release proceedings around the country. Firms such as Chadbourne & Park are coordinating over-crowded immigration dockets, working to represent, or find representation for, the hundreds of immigrants in their home courtrooms in desperate need of assistance. In California, several firms are coordinating clinics to assist families with the timely filing of initial pleadings and applications for relief.
COMMISSION ON IMMIGRATION

FAMILY IMMIGRATION DETENTION:
Why the Past Cannot Be Prologue
July 31, 2015
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This report and its recommendations build on the Commission’s work directing the ABA’s efforts to ensure fair and unbiased treatment and full due process rights for immigrants and refugees within the United States and its longstanding concerns regarding the serious issues raised by family detention, in particular the detention of mothers and children.

The entire team at O’Melveny & Myers LLP applied steadfast effort, professionalism and expert comprehension to the production of this report. We especially recognize David Lash, Darcy Meals, Lauren Moore, and Greta Lichtenbaum for their leadership. Additionally, we recognize and thank Walter Dellinger, supervising partner on the report, and attorneys Jonathan Fombonne, Janiece Jenkins, Jeff Jensen, Mackie Jimbo, Nora Kahn, and Andy Trafford. We are also sincerely appreciative of the work of Paralegal Steven Segal, and we also thank summer associates, Bhavreet Gill, Katie Gosewehr, Nathalie Farad, and Annie Woodworth.

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July 31, 2015
2014-2015 COMMISSION ON IMMIGRATION

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EXECUTIVE SUMMARY

This report examines the United States Government’s response to the increase in arrivals of Central American mothers with young children at our southwestern border during the summer of 2014. Although it touches briefly on the causes of this migration and the resulting claims for protection the families are making, the report concentrates primarily on the decision by the federal government to engage in large-scale detention of parents and their children in prison-like facilities, and the initially-stated rationale of deterrence as support for that action.

The report reviews the history of family detention, acknowledging Native American and Japanese internment and the operation of Ellis and Angel Islands, as well as the development of the Hutto family immigration detention facility in Texas in 2006. The report describes the current use of family detention in Karnes City and Dilley, Texas and Berks County, Pennsylvania. The report demonstrates that periodic migration of families is not new but wholly predictable and that detention of families in penal settings has been rejected previously by both courts and policymakers, as recently as the abandonment of family detention at the Hutto facility in 2009. It concludes that the return to family detention in Artesia, New Mexico, last year and as it exists today in the remaining three “Family Residential Centers” violates applicable laws, standards, and human rights norms.

The report does not focus on current conditions in family detention, which are of grave concern but about which much has been written elsewhere. Rather, this report concentrates on the government's decision as a policy matter to detain women and children fleeing to the United States to seek protection. It concludes that the dramatic build-up of family detention centers and the practice of detaining families in jail-like settings are at odds with the presumption of liberty that should apply and the limited permissible goals of civil detention. Additionally, detention necessarily impinges on the families’ due process right to access to counsel for legal information and representation, and in turn negatively impacts their ability to pursue legal relief based on the merits of their claims.

This report concludes by urging the U.S. Government, and the Department of Homeland Security in particular, to carry out the Department’s core mission of national emergency planning and preparedness by better anticipating and equipping itself to cope with inevitable migration exigencies whenever they recur without resorting to unnecessary detention. It reminds us that detention should be imposed only as a last resort and under the least restrictive means possible, particularly for vulnerable populations such as families with children most of whom are asylum seekers.

This report recommends that the government undertake several key reforms, including the following: 1) Immediately release families held at the Berks, Dilley, and Karnes family detention facilities, cease expansion of the facilities, and do not renew their contracts for family detention; 2) Permanently abandon deterrence-based detention policies; 3) Adopt a presumption against detention and treat release into the community as the general rule, particularly in the case of families, children, and asylum seekers; 4) When release into the community alone is insufficient, employ an objective risk assessment to identify the least restrictive means of achieving the goals of ensuring appearance at hearings and protection of the community, using electronic monitoring and cash bonds only where demonstrably necessary in individual cases; 5) Establish and adhere to clear standards of care that include unique provisions for families and children that do not follow a penal model; and 6) Ensure meaningful access to legal information and representation for all families subjected to detention at every stage of their immigration proceedings. Full detailed recommendations are found at the end of this report.
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On July 24, 2015, as this report was being finalized, the Hon. Dolly Gee of the United States District Court for the Central District of California, ruled that the family immigration detention practices at the facilities located in Karnes City and Dilley, Texas, as well as in Berks County, Pennsylvania, violated the settlement agreement reached in 1997 in the case of Flores v. Meese (described below). The court held that the continued detention of immigrant children was improper and that accompanying mothers should be released to secure the rights of the children to be free from detention, absent a finding that the women posed a danger or a likelihood of fleeing the jurisdiction of the immigration court. Judge Gee ordered the United States Government to show cause why the court’s order should not take effect within 90 days, a result that could largely end current family detention practices. The court found government practices, conditions of confinement, and failure to abide by the terms of the 18 year old settlement to be “deplorable.” While we note the importance of this late-breaking development, we consider the issues, analysis and recommendations laid out in this report to be as relevant as before Judge Gee’s ruling.

During the summer of 2014, scores of children traveled north from Central America, often with their mothers and often fleeing horrific gang-sponsored and intimate family violence against which their governments had failed to provide protection. As gang-perpetrated murders and violence against women and children proliferated in Central America, thousands of family units came to the southwest border of the United States seeking protection in this country. In

1 Under U.S. law, most of the families could apply for protection in the form of asylum while others would qualify only to apply for a related form of relief known as “withholding of removal.” See INA §§ 208, 241(b)(3)(B). In either case, the applicant for relief must meet the international law definition of “refugee” to receive legal recognition of their need for protection and the right to remain in the United States indefinitely. See INA §§ 101(a)(42)(A), 208(b)(1), 241(b)(3)(B). The international refugee definition is set forth in the U.N. Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (hereinafter “Refugee Convention”), extended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (hereinafter “Refugee Protocol”), which entered into force for the United States on Nov. 1, 1968, through accession to the Refugee Protocol. “Refugee” status requires a showing of persecution on account of race, religion, nationality, political opinion or membership in a particular social group. For purposes of this report, we will refer to individuals seeking asylum or related relief as “asylum-seekers,” whether they are technically applying for asylum or withholding of removal, except in the few instances where the distinction between the two forms of relief is relevant. We will also refer to asylum claims and the law of asylum, rather than making distinctions between the various related forms of relief unless specifically relevant. It should be noted that some of the children and/or their parents may qualify for other forms of relief as well, such as U visas for victims of certain crimes committed in the United States and
federal fiscal year 2014 alone, the U.S. Border Patrol apprehended 68,445 children and parents traveling together at the United States-Mexico border.\footnote{2}

Dubbing this humanitarian crisis a threat to national security, the U.S. Government responded swiftly and severely against the new entrants. Rather than deliberating on the range of strategies available for addressing the challenges presented, the government hastily adopted a response focused on detention and speedy deportation. Among other measures, the Department of Homeland Security ("DHS") dramatically expanded its practice of family detention, in lockdown facilities, with the explicit goal of sending a “message” that would deter future migration.\footnote{3} Almost as swiftly, the legal community, advocates, and others galvanized in an effort to meet the needs of the thousands of women and children now being held in prison-like detention centers, all of them in rural locations and all but one in the southwest United States. Despite these efforts, the legal and humanitarian rights of the detained children and their parents, and their access to legal representation have been compromised by the government’s policy and practice of family detention.

This report examines the trajectory of family detention between the summer of 2014 and the summer of 2015. While numerous concerns have been raised about the conditions of detention in the family facilities, including serious deficiencies in the provision of health care and nutrition, as well as harsh and dehumanizing treatment by staff and even sexual abuse,\footnote{4} this
report does not address the conditions of detention. Instead, the report focuses on the policy and practice of detaining families in secure settings and the consequences of this detention by addressing: (1) the origins of family detention; (2) its expanded use to deal with the 2014 humanitarian crisis; (3) serious concerns about the compatibility of family detention with basic constitutional and international human rights norms as well as ABA standards; (4) the violations of fundamental due process rights of detained women and children implicated in this practice; and (5) the legal community’s response, as well as the continued need for additional measures to ensure meaningful access to justice for detained families.

I. The History of Family Detention

While the government renewed and expanded its use of family detention in response to the 2014 crisis, the policy of detaining children and their parents during the pendency of their immigration proceedings is not new. It is important to understand the history of family detention in the United States to evaluate its current use.

A. First Family Detention Facilities

The U.S. Government has a long and painful history of detaining families. Examples include the internment of Native American families, the detention of immigrant families on Ellis and Angel Islands, interments of families of U.S. citizens and immigrants during World War I and World War II, and the detention of Cuban and Haitian immigrant families in Florida and Guantánamo Bay.


The report offers only a brief description of the models that developed for delivery of pro bono legal services at the facilities, as these efforts are not the focus of this report and are well documented elsewhere. See, e.g., Stephen Manning, Ending Artesia (Jan. 2015), https://innovationlawlab.org/the-artesia-report/.

Native American families were interned in military forts during the removal of 1838-39. The Native American experience is also relevant to the immigrant experience, because many Native Americans were not recognized by the U.S. as citizens until the 1924 Indian Citizenship Act. See Exploring the Trail of Tears, http://pages.cs.wisc.edu/~fish/final115%28drip%29.swf; Library of Congress, Indian Citizenship Act, http://memory.loc.gov/ammem/today/jun02.html.


The most directly relevant portion of the story of family detention practices in the United States begins in the 1980s during increased refugee flows from Cuba, Haiti and Central America. During this period, the number of unaccompanied and accompanied children from Central America seeking asylum in the United States dramatically increased. The government generally responded by releasing children to a parent or legal guardian and then holding any remaining children in border detention facilities and tent shelters, without access to education, health care, or legal services.\(^\text{10}\) For a time, entire families of Central American migrants were housed in large-scale American Red Cross shelters along the Texas-Mexico border while immigration officials prohibited them from leaving the border region, leading to harsh criticism of government policy.\(^\text{11}\)

In 1997, the \textit{Flores v. Meese} lawsuit, involving the rights of children in immigration custody, resulted in a settlement stipulating that children waiting for a determination of removal or relief be placed in the “least restrictive setting.”\(^\text{12}\) This agreement was intended to protect the rights of minors in immigration custody and ensure their well-being.\(^\text{13}\) Under the settlement, unaccompanied minors were to be released to the care of their parents or other family members whenever possible, and if not, they were to be placed in foster homes or licensed facilities. These purportedly child-friendly licensed facilities were to be operated in accord with age-appropriate policies and programs.\(^\text{14}\) Subsequently, the care of unaccompanied minors was transferred legislatively to the Office of Refugee Resettlement within the Department of Health and Human Services.\(^\text{15}\) Following implementation of the settlement, detained family units composed of children and parents were generally released together on their own recognizance, pending a hearing before an immigration judge. These practices were consistent with both the prior practice favoring release of children to their parents and the terms of the \textit{Flores} settlement.\(^\text{16}\)
In 1996, through enactment of the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, Congress made significant changes to U.S. immigration law. Among other amendments adversely affecting families, these changes included creation of an “expedited removal” process and expansion of the categories of persons subject to mandatory detention. One measure taken by immigration authorities to increase available detention space under the new legislative framework was to convert a county nursing home in Berks County, Pennsylvania, into the Berks County Family Residential Center (“Berks”) in March 2001. The 84-bed facility was intended to temporarily detain migrant families undergoing administrative immigration proceedings and those subject to mandatory detention. The facility is owned and operated by Berks County pursuant to the terms of a contract with the federal government’s immigration agencies.

Berks held both parents and their minor children, arguably to encourage parental contact with their children. This objective was undercut by governmental policy that regulated the adults’ authority to parent their children while detained and by decision-making regarding releases and the unavailability of legal counsel, which contributed to longer stays. At the same time, the facility also had a number of beneficial attributes for short-term stays, including a physical plant and programs that supported the nutritional, health care, educational, and recreational needs of the residents.

B. Detention Policy Changes After 9/11

In the aftermath of the September 11, 2001 terrorist attacks, the U.S. Government once again fortified immigration law enforcement, resulting in further changes to family detention policies. Congress passed the Homeland Security Act in 2002, creating the Department of Homeland Security (“DHS”) and establishing Immigration and Customs Enforcement (“ICE”) as a new entity within DHS charged with immigration enforcement. Expedited removal proceedings were soon expanded to apply to certain asylum-seekers crossing U.S. land borders, among others. In addition, detention became the preferred management strategy. These changes in policies and practices disproportionately impacted families.

The pre-9/11 policy that favored release whenever possible for families who had been apprehended together, or, alternatively, to detain the adults and their children together as a family unit when release was not feasible, was largely abandoned. Increasingly, in its place, parents were separated from their children as well as from one another and detained by ICE. The children, including infants and toddlers, were sent to facilities operated by the Department of Health and Human Services’ Office of Refugee Resettlement. The involuntary separation of

19 Interview with Dora Schriro, based on her field notes as former Senior Advisor to DHS Secretary Napolitano (on file with the authors).
parents from their children had the effect of rendering the children “unaccompanied” for legal purposes.  

Ultimately, some in Congress came to focus on these harsh practices. In 2005, the House Appropriations Committee noted the negative impacts and directed DHS to stop separating families, stating:

The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervised Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.  

C. The Berks and Hutto Family Detention Centers

Despite the Congressional directive, DHS did not release more families or increase its use of alternatives to detention. Instead, DHS expanded its secure capacity to detain more families together. In May 2006, ICE opened a second and much larger facility for families, the 512-bed T. Don Hutto Family Residential Center (“Hutto”) in Taylor, Texas. The facility held mothers and fathers and their children. Neither its physical plant and programs nor its policies and practices were family-friendly. Movement was limited within the facility and access to the outdoors curtailed. Initially children received only one hour of education a day. Furthermore, there were recurring reports of medical and mental health issues, notably sustained weight loss and depression.

Congress quickly concluded that Hutto, a former medium security prison for adult male inmates, had continued to operate like an adult correctional facility, contrary to the House Appropriations Committee’s prior instruction. Congress criticized both Berks and Hutto, noting that although Berks was more “homelike” than Hutto, it also failed to afford the least restrictive setting, as required for children by the Flores settlement.

In March 2007, the ACLU and other parties challenged ICE’s enforcement practices, arguing that the use of the Hutto facility to detain children and families violated the rights of the detained minors. The lawsuit charged that children were being separated impermissibly from

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their parents, detained illegally, and treated as prisoners, contrary to the January 1997 settlement agreement in *Flores v. Meese*.\(^{27}\) The plaintiffs further alleged that ICE’s actions conflicted with Congress’s repeated instructions to DHS to: (1) keep immigrant families together whenever possible; and (2) either release the families or use various alternatives to detention. Finally, the action sought to enforce the policy that when detention was absolutely necessary, detained families were to be placed together in normalized settings. In August 2007, ICE entered into a settlement agreement with the plaintiffs.\(^{28}\) Among a number of measures, ICE agreed to utilize Hutto as a placement of last resort, improve the physical plant and its policies and procedures so it was less like a prison, professionalize the workforce, regularly review detainees’ eligibility for reassignment to less restrictive settings, and adopt transparent operating standards.

Late in 2007, ICE promulgated Family Residential Standards for the operation of both the Berks and Hutto facilities.\(^{29}\) These standards were intended to create uniform guidelines for many aspects of detention, including safety, security, education, staff training and hiring, and medical care. Although these standards were issued after some input from immigration and civil rights advocates, they continued to be based on correctional assumptions.\(^{30}\) Personal possessions remained limited in number and were kept in communal areas. Movement within the facility and on the grounds remained restricted. ICE did not directly monitor for compliance at Berks and Hutto; instead, ICE contracted for that function as well. The compliance assessments were further impacted by the fact that the standards and scores were subject to manipulation. Critically, the limited protections that ICE put into place through adoption of the standards were advisory only, and there were no penalties for non-compliance.

As advocate, media and congressional attention continued to increase, DHS undertook a comprehensive assessment of detention policy and practices early in 2009, with the goals of reducing reliance on detention and improving the efficiency and effectiveness of ICE.\(^{31}\) Among the first steps taken was the removal of all families from Hutto. As many as possible were released; the rest were transferred to Berks. After the last of the families were transferred in September 2009, Hutto was re-commissioned as an all-female, adults-only facility.\(^{32}\)

### D. Reforms to Detention Policy and Practice in 2009

The findings of the system-wide assessment of detention policy and practice were summarized in a report that DHS released in October 2009. The report also included recommendations that laid the groundwork for a number of reforms that DHS announced around the time of its release. These positive reforms were directed to all immigration detainees,

\(^{27}\) Compl. for Declaratory and Injunctive Relief at 2-4, *In re Hutto Family Detention Ctr.*, No. 07-cv-164-SS.


\(^{32}\) Id.
including special populations, most notably, women, children, families, asylum-seekers, the aged, ill and infirm, and other vulnerable individuals.\textsuperscript{33}

The report’s principal findings emphasized the importance of: (1) premising the detention system upon the likelihood of eligibility for relief and a presumption of release into the community as the rule rather than the exception, with objective risk assessment leading to the use of the least restrictive means to achieve compliance with attendance at immigration proceedings in cases where release alone was insufficient; (2) where detention is required, establishing clear standards of care that include unique provisions for special populations, including families, that do not follow a penal model, and with systematic independent monitoring of conditions for compliance; (3) ensuring meaningful access to legal materials and counsel to inform and expedite decision-making; and (4) acknowledging the probability of periodic influxes in migrant families seeking status resulting in a need to develop viable plans and preparedness to accommodate changes by means other than detention or release with stringent supervision requirements.

Through its response to the increased migration of children and families in 2014, as explained below, the government’s advancements made in 2009 have been largely eroded. Those who “cannot remember the past are condemned to repeat it.”\textsuperscript{34}

\section*{II. Challenges Presented by Migrant Families Arriving at the Southwestern U.S. Border in Summer 2014}

The significant increase in the number of children and families arriving at the southwest border from Central America in 2014, labeled a “surge” by some in the U.S. Government and the media, garnered national attention and an immediate governmental response.\textsuperscript{35} Overall, unlawful crossings at the southwestern border were at an historic low, but the increased number of children and families presented unique challenges. In addition, for the first time since record-keeping began in 1992, less than half of the arrivals were natives of Mexico.\textsuperscript{36} Instead, many of the women and children were fleeing violence in Central America’s Northern Triangle, consisting of Honduras, Guatemala, and El Salvador, and were seeking safety and protection in the United States.\textsuperscript{37}

### A. Reasons for the Increase in Migrants from Central America in Summer 2014

The increase in border crossings by mothers arriving with children, as well as by unaccompanied minors, from the Northern Triangle arose from three major factors: (1) increased gang and other violence; (2) extreme poverty; and (3) a desire for family

\textsuperscript{33} Id.

\textsuperscript{34} This quote is attributed to George Santayana, who was born in Madrid, Spain in 1863 and died in Rome, Italy in 1952. He was a philosopher, essayist, poet and novelist.

\textsuperscript{35} Preston & Archibold, supra note 3.


\textsuperscript{37} U.S. Border Patrol, Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY 14 Compared to FY 13, supra note 2.
reunification. Violence seemed the single most important motivation, even for those who also cited one of the other factors. Those who traveled to reunite with family members already in the United States often reported that the growing violence at home influenced their decision to make the journey during that particular year. In interviews with unaccompanied children from El Salvador who were apprehended in Mexico and deported, 61% of boys and 58% of girls cited crime, gang threats, or violence as a reason for leaving home. Notably, there has been no significant pattern of arrivals to the United States of families from Nicaragua, which has not experienced the same level of violence as the countries of the Northern Triangle, despite its geographic proximity to those troubled nations and even higher levels of poverty.

Gangs in the Northern Triangle are known for engaging in forced recruitment, extortion and kidnapping, and sexual violence. Children and adolescents are particularly at risk, as gangs target young boys for involuntary recruitment and young girls to be gang-member “girlfriends,” frequently resulting in instances of sexual assault. Thus, many families made the decision to seek safety in the United States when the mothers concluded that they no longer could protect their children at home. Other mothers and their children were fleeing domestic and gender-based persecution, which is common in the Northern Triangle, and often linked to gang and societal violence. In Guatemala, the second most common category of crime is violence against women. Abuse and “femicide,” defined as murder for gender-related motives, occurs frequently as a result of misogyny, as part of gang rituals, and within intimate relationships. Homicide rates in the Northern Triangle are among the highest in the world, with Guatemala, El Salvador, and Honduras consistently reporting three of the five highest national murder rates.

Propelled by this horrific violence, families and children left Central America in increasingly larger numbers during 2014. By the end of the federal fiscal year on September 30, 2014, more than 68,000 women and children, traveling as families, had been apprehended by U.S. authorities at the border between the United States and Mexico, not infrequently after

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38 ELIZABETH KENNEDY, AMERICAN IMMIGRATION COUNCIL, NO CHILDHOOD HERE: WHY CENTRAL AMERICAN CHILDREN ARE FLEEING THEIR HOMES 1 (July 1, 2014), http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf.
40 Id.
41 Kennedy, supra note 38.
43 Kennedy, supra note 38.
46 Id. at 117.
47 Id.
turning themselves in to the authorities immediately after crossing into the United States. The influx of families slowed after the summer of 2014 and is down 55% in federal fiscal year 2015 as compared with the same time period in 2014. The drop-off in the number of women and children entering the United States through its border with Mexico was likely caused by a number of factors including cyclical trends, a public relations campaign in Central America intended to deter immigration, and an increase in deportations by Mexico of transiting migrants. However, the government has continued to maintain and expand its family detention capacity. Since the summer of 2014, more than five thousand women and children, most with asylum claims, have been detained in family detention centers while awaiting immigration proceedings to determine their right to remain in the country.

B. The Administration’s Response

In the summer of 2014, the White House designated the Federal Emergency Management Agency (“FEMA”), an agency of DHS, to organize and coordinate a federal response to the increase in arrivals of unaccompanied children and families at the U.S.-Mexico border. Because so many of the arriving children and families potentially were entitled to asylum and related protection under U.S. law, the Administration faced the difficult prospect of responding to calls to stop unlawful migration while at the same time addressing the rapidly-unfolding humanitarian crisis on the southwestern border of the United States.

President Barack Obama asked Congress for emergency funds of almost $4 billion to address the situation. The Administration intended to use part of the proposed funding to expedite deportation proceedings by increasing the capacity of the immigration courts to quickly adjudicate claims. In addition, the Administration planned to dedicate a significant portion of

55 Fact Sheet, White House, Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border (July 8, 2014),
the proposed supplemental funding to accommodate increased detention of migrant families. While the Administration did not receive the requested funding, it nonetheless proceeded to implement widespread detention of families of Central American asylum-seekers. Simultaneously, the Vice President of the United States invited more than 50 attorneys from major private law firms, legal services organizations, and advocacy groups to the White House to discuss the legal community’s response to the immigration crisis evolving at the United States-Mexico border. As DHS moved quickly toward large-scale detention and swift deportation of Central American families, the Vice President urged the legal community to increase its collective efforts to provide counsel to Central American migrants, focusing particularly on unaccompanied children. Several weeks earlier the Vice President had delivered a similar message in a small meeting at the White House to a group of attorneys from the Association of Pro Bono Counsel (“APBCo”). No government funding or other support was made available to facilitate pro bono representation of Central American families.

1. Changes at Berks

As part of the Administration’s response—and in a change from the policies in place before the summer of 2014—ICE began to use the existing Berks facility to hold families in detention for prolonged periods. After initially opening in 2001, as described above, the Berks facility was moved to a larger building on the same grounds in 2012, and the capacity was increased from 84 to 96 beds. The building is currently undergoing renovation, and its capacity is scheduled to double to almost 200 beds in fall 2015. It continues to hold children and their parents of either gender.

2. The Opening and Closing of Artesia

At the end of June 2014, ICE opened the Artesia Family Detention Center in the southeast corner of New Mexico to supplement the existing family detention capacity at the Berks facility. The Artesia facility was redesigned to house close to 700 family members in repurposed federal law enforcement training barracks on federally-owned land. The facility was managed and operated by the federal government. It held only children and their mothers; no fathers were permitted at Artesia.


57 Manning, supra note 5.
59 McCleery, supra note 58.
According to immigration officials, Artesia was opened with the goal of quickly moving Central American families through the removal process and ensuring deportation if ordered at the end of that process.60 Within five weeks of opening, more than 200 women and children had been deported back to the Northern Triangle.61

Artesia quickly faced an onslaught of criticism.62 The first pro bono lawyers arriving at Artesia described it as “ground zero for the evisceration of due process.”63 Those attorneys reported that critical government screening interviews, the essential predicate to proceeding with an asylum claim rather than facing immediate deportation, were conducted by government officials at a pace of no fewer than 20 interviews a day, seven days a week.64 This process was so rapid that the only government-approved on-site provider of legal orientation programs, and the few early-arriving pro bono attorneys, could not present basic legal information quickly and often enough to help the many families who needed that background before going into the government screening interviews.

There were no immigration lawyers in Artesia when the family detention facility opened. The nearest attorneys were a 3.5 hour drive away. Exacerbating the situation, the families had no access to telephone land lines. The handbook furnished to the detained women stated that they “should have access to flip phones held by guards three times a day,” but families reported that they were “only allowed one 3-5 minute call each day and that if the children misbehaved, everyone lost access to phones.”65 Attorneys were prohibited from bringing phones into the lone trailer where they could meet with clients, which had no telephone lines either.66

Legal volunteers who made it to the facility faced the challenging task of assisting hundreds of families despite the availability of little funding and no infrastructure. Lawyers volunteering at the center voiced concerns that the Administration was manipulating the system to quickly deport every family without regard to eligibility for asylum.67 They pointed to the passage rate for credible fear screening interviews, which was significantly below the national

61 Hylton, supra note 4.
63 Interview with Christina Fiflis (July 2015) (on file with the authors).
65 Id.
66 Manning, supra note 5, at ch. VI.
67 Id. at ch. III.
Meanwhile, for those receiving a bond, bond amounts were set at five times the national average. The facility was referred to as a “deportation mill.”

Within six months of operation, amidst increasing publicity about serious due process and conditions problems at the facility, Artesia was closed on December 15, 2014. ICE officials stated that the center had been opened on a temporary basis and indicated that, with fewer families entering the country, it was the appropriate time to transition to less isolated and better designed facilities. The families still detained at Artesia at the time of its closure were sent to the facilities in either Karnes City, Texas, or in Dilley, Texas.

3. The Conversion of Karnes Civil Detention Center to a Family Facility and its Expansion

At the beginning of August 2014, DHS began to utilize a large immigration detention facility located in Karnes City, Texas, to hold families. The facility previously had been used to detain men in immigration proceedings, usually asylum-seekers. DHS rapidly repurposed the facility to hold families. As with Artesia, the Karnes facility holds only children and their mothers; no fathers are detained there. DHS changed the official name of the facility from Karnes Civil Detention Center to Karnes Residential Center (“Karnes”), but little else changed.

The facility is a secure lockdown detention center run with a rigid schedule, including set meal times, wake-up and lights-out times, and multiple body counts and room checks during the day and night. The facility is not licensed for the care of children, and the guards are not trained to address either the needs of mothers and children seeking asylum or trauma survivors.

ICE made the arrangements to detain migrants at Karnes, first adults and then families, through a contractual agreement with the Karnes County Commission. The facility is managed

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70 Burnett, supra note 60.
71 Manning, supra note 5, at ch. II.
72 Redmon, supra note 62.
by GEO Group, Inc., the country’s second largest private prison corporation, also through a contract with the county.\(^{77}\)

The Karnes facility had space to detain 532 women and children when it began holding families.\(^{78}\) In December 2014, after a contentious debate, the Karnes County Commission approved an expansion of the facility by an additional 626 beds, increasing its capacity to 1,158 women and children. Construction currently is underway as of the writing of this report, and the expanded facilities are scheduled to open soon.\(^{79}\)

4. **The Development of Dilley**

In December 2014, in the small Texas town of Dilley, the government opened a third and ultimately even larger detention center, which now has the capacity to hold up to 2,400 mothers and children. Officially named the South Texas Family Residential Center (‘‘Dilley’’), the Dilley facility was built to replace Artesia.\(^{80}\) Like Artesia and Karnes, Dilley holds only children and their mothers; no fathers are detained there. The Administration stated that Dilley would “provide invaluable surge capacity should apprehensions of adults with children once again surge.”\(^{81}\)

Critics point out that the name “Family Residential Center” belies the fact that Dilley is in fact a detention facility. Others have observed that Dilley is reminiscent of Japanese internment camps used during World War II.\(^{82}\) The facility was built and is operated by the Corrections Corporation of America, the country’s largest for-profit prison operator.\(^{83}\)

C. **Family Detention Custody Policies and the Deterrence Rationale**

The opening of the new facilities corresponded to a change in the Administration’s policy concerning the detention of women and children awaiting the outcome of the immigration process. In the years immediately prior to the summer of 2014, almost all families arriving at the U.S. border seeking asylum were released to live in the community while their immigration

\(^{77}\) Press Release, supra note 74.

\(^{78}\) Press Release, supra note 75.

\(^{79}\) Press Release, The GEO Group, The GEO Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas (Dec. 19, 2014), http://finance.yahoo.com/news/geo-group-announces-626-bed-133500147.html; _ylt=A0LEViq9uYxV4TUAFiwPxQt.; _ylu=X3oDMTEzZjJhMDZrBHNIYwNzcgRwb3MDMQRj b2xvA2JmMQR2dGlkA0ZGR0UwMl8x.


\(^{81}\) Id.


hearings moved forward to determine whether the families would be granted asylum or related relief allowing them to remain in the United States. In June 2014, however, the Administration implemented a policy of wide-scale detention of mothers and children for the express purpose of deterring other families from seeking asylum in the United States. Concerning this “no-release” policy, Secretary of Homeland Security Jeh Johnson told Congress, “[o]ur message is clear to those who try to illegally cross our borders: you will be sent back home,” noting that “[w]e are building additional space to detain these groups and hold them until their expedited removal orders are effectuated.” Johnson further described this policy as “an aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”

As a result of this policy, instead of being released, families apprehended at the border and sent to one of the family detention centers were generally put into expedited proceedings. These proceedings can result in quick deportation. Individuals placed in expedited proceedings, however, still must be allowed to bring an asylum claim before an Immigration Judge if they pass a government screening interview, demonstrating that they have a viable chance of success on the merits of their claim, thereby giving them the right to remain in the United States. Those individuals placed into removal proceedings are detained at least until they pass the screening interview, called a “credible fear interview” or “reasonable fear interview,” depending on the circumstances. Once they are placed in removal proceedings to pursue their asylum claims, such individuals are eligible for release from detention. The same eligibility for release applies to those families whom DHS never placed into expedited proceedings, which became a relatively common practice in the summer of 2015. For families eligible for release, ICE makes an initial custody determination. Subsequently, most but not all detained families may have a custody redetermination hearing before an Immigration Judge. ICE, and the Immigration Judges where jurisdiction applies, have authority under the law to order: (1) release without requirement of any bond payment; (2) release with payment of a bond;

84 Decl. of Barbara Hines ¶ 8, R.L.L-R v. Johnson, No. 1:15-cv-0011 (D.D.C.). A few families were held at the Berks facility for short periods of time. 85 Johnson Statement, supra note 3. 86 Id. Declarations of high-ranking immigration officials filed in court proceedings confirmed that implementation of “no bond” or “high bond” policies were intended to reduce the migration of Guatemalans, Hondurans, and Salvadorans to the United States. See Department of Homeland Security’s Submission of Documentary Evidence, AILA InfoNet Doc. No. 14080799, Aug. 7, 2014, http://www.aila.org/infonet/dhs-blanket-policy-no-release. 87 Only in the summer of 2015 did the government begin to place some detained families immediately into full-fledged proceedings before the immigration courts immediately rather than placing them into expedited removal. 88 These proceedings are termed “expedited removal” under Immigration and Nationality Act (“INA”) Section 235 and “reinstatement of removal” under INA Section 241 for individuals with prior deportation orders. 89 INA §§ 235(b)(1), 241(b)(3). 90 Individuals entering the proceedings without any prior immigration order undergo a credible fear screening interview, and individuals in reinstatement of removal proceedings because of a prior deportation order undergo a reasonable fear interview that, if passed, allows them to apply for withholding of removal only. See supra notes 1, 88; INA §§ 235, 241. 91 See INA §§ 236(a), 212(d)(5), 241(a)(3), 241(b)(3); 8 C.F.R. § 1236.1(c)(8); Matter of X-K-, 23 I&N Dec. 731 (BIA 2005). 92 8 C.F.R. §§ 1236.1(c)(8), 212.5, 241.4. 93 Individuals in reinstatement of removal do not have the ability to seek redetermination of their custody status before an Immigration Judge under current interpretation of the law. See INA 241(a)(2). Also, arriving aliens—individuals who present themselves to officials at a port of entry such as a bridge or airport—do not have the ability to seek review of custody by an Immigration Judge. 8 C.F.R. § 1003.19(h)(2).
or (3) continued detention. If ordering release in its initial custody determination, ICE may also impose non-monetary conditions, such as enrollment in a supervision program.

Relying on its deterrence rationale, DHS insisted on continued detention during proceedings even after families received a favorable decision following the government screening interviews. Between June 2014 and February 2015, ICE denied release to nearly all detained families in its initial custody determination, even those who had passed their screening interviews. When families sought review of the decision to continue detention before the Immigration Judges, ICE attorneys opposed release aggressively and argued that a “no bond” or “high bond” policy was necessary to “significantly reduce the unlawful mass migration of Guatemalans, Hondurans, and Salvadorans.” ICE invoked a 2003 ruling of the Attorney General, issued in the aftermath of the September 11, 2001 terrorist attacks, which authorized immigration authorities to consider deterrence considerations in making detention decisions. Notwithstanding ICE’s position, for those families fortunate enough to secure counsel and proceed to a full bond hearing in court, Immigration Judges often ordered that bond be set at a level that would enable families to achieve release. However, the ICE policy of detaining for deterrence led to additional weeks and months of detention for families—even after they established viable asylum claims—while they sought review of their custody in the face of ICE’s insistence on detention.

In December 2014, the ACLU and the University of Texas Law School Immigration Clinic, with pro bono co-counsel from the law firm of Covington & Burling LLP, brought class-action litigation challenging the categorical detention of asylum-seeking families for the purpose of deterring future migrants. On February 20, 2015, Judge Boasberg of the United States District Court for the District of Columbia issued a preliminary injunction prohibiting DHS from using deterrence as a rationale for detaining families or as a factor in custody determinations. The court reaffirmed the long-standing constitutional mandate that immigration detention is civil in nature and so must be justified by some legitimate government interest other than punishment. The judge held that depriving a family of liberty so as to deter another potential migrant likely was an impermissible use of detention. Nor, the court held, was deterrence likely to be effective at addressing any national security threat.

Shortly after the decision, DHS announced that it would abide by the preliminary injunction and would engage in individualized custody determination decisions rather than using

94 INA § 236(a); 8 C.F.R. §§ 1236.1(c)(8), 212.5, 241.4.
95 8 C.F.R. § 1236.1(d).
100 Id.
across-the-board deterrence rationales for detention. Several months later, the agency made a formal announcement that, consistent with the preliminary injunction, it would not invoke a deterrence rationale in making detention decisions. The Administration has nonetheless continued to maintain that DHS should have the legal authority to detain for deterrence purposes in the future. In addition, as described in the attached chart, ICE continued to detain most families after their favorable screening interviews for at least some period of time and sometimes throughout their case. The agency did so by imposing high bonds as a condition for release throughout most of the last year and by refusing release altogether to certain families who were not entitled to seek review of their custody before the immigration courts. As a result, the length of detention remained significant for many families. Furthermore, the expansive buildup of family detention facilities carried out to effectuate the deterrence policy has not been dismantled.

D. Demographics of the Family Detention Population

The family detention facilities opened by DHS beginning in the summer of 2014 were large-scale immigration detention facilities. They succeeded in increasing total nationwide capacity for detention of families from under 100 beds to approximately 3,000 beds, with additional plans to expand further. As noted above, since June 2014, approximately 5,000 children and mothers have been held together in U.S. immigration detention centers for families. Since the summer of 2014, most women and children were held for at least a month and some were held for a year or more. During federal fiscal year 2014, more than half the children in family detention were six years old or younger. Some have been breastfeeding infants, while many others have been toddlers.

The majority of the family detention population has consisted of women and children asylum-seekers fleeing recent violence in El Salvador, Guatemala, and Honduras who have

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103 Id.
104 Press Release, U.S. Dep’t of Homeland Sec., South Texas ICE Detention Facility to House Adults with Children (July 31, 2014), http://www.dhs.gov/news/2014/07/31/south-texas-ice-detention-facility-house-adults-children (stating that repurposing of Karnes to house families was part of "‘DHS’ sustained and aggressive campaign to stem the tide of illegal migration from Central America’’"); Press Release, U.S. Immigration and Customs Enforcement, ICE’s New Family Detention Center in Dilley, Texas to Open in December (Nov. 17, 2014), https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december (stating that the Dilley facility was part of a policy aimed at “deterring others from taking the dangerous journey and illegally crossing into the United States”).
105 Stop Detaining Families, supra note 52; see also supra Part II.B.
106 Id.
107 ELEANOR ACER & OLGA BYRNE, HUMAN RIGHTS FIRST, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE YEAR UPDATE at 1 (June 2015), http://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf (noting that some women and children were held for nearly a year); see also Hylton, supra note 4 ("refugees who surrender this spring may spend more than a year at Dilley before their asylum hearings can be scheduled"); Bus Station Exit Interview Field Notes (July 4, 2015) (on file with the authors).
109 Hylton, supra note 4 (reporting on refugee accounts of detained mothers and infants).
viable asylum claims.110 According to the latest data from the U.S. Citizenship and Immigration Services Asylum Division, 88% of the families detained across the government’s three family detention facilities are found to have established a “significant possibility” of success on their asylum claims.111

Most of these detained women and children asylum-seekers have family ties in the United States.112 They have no criminal history and instead have often fled violent crime. As such, they present no threat to the United States and have strong incentives for appearing at their immigration hearings in order to pursue asylum status in the United States.113 In fact, the limited available data suggests that released families are appearing at high rates for subsequent proceedings in their cases.114

E. Family Detention: Changes from 2014 to 2015

The following chart summarizes the changes in the detention and treatment of detained migrant families from just prior to the summer of 2014 to July 2015.

110 Stop Detaining Families, supra note 52; see, e.g., Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014) (establishing viability of domestic violence asylum claims); Matter of M-E-V-G-, 26 I&N Dec. 227, 251 (BIA 2014) (noting that gang-based claims may be viable on a case-by-case analysis); Crespin-Valladares v. Holder, 632 F.3d 117, 120 (4th Cir. 2011) (recognizing asylum based on gang violence directed at a family who had provided testimony against gang activities).
112 The Detention of Immigrant Families, supra note 108.
113 See, e.g., MARK NOFERI, AMERICAN IMMIGRATION COUNCIL, A HUMANE APPROACH CAN WORK: THE EFFECTIVENESS OF ALTERNATIVES TO DETENTION FOR ASYLUM SEEKERS (July 2015), http://immigrationpolicy.org/sites/default/files/docs/a_humane_approach_can_work_the_effectiveness_of_alternatives_to_detention_for_asylum_seekers_final.pdf (citing several studies establishing that asylum-seekers are “predisposed to comply with processes”).
<table>
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<th>Family Detention Changes 2014-2015</th>
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<td><strong>Pre-2014</strong></td>
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<td>Expedited Removal?</td>
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<td>Mandatory Detention?</td>
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| ICE Custody Decision Resulting in Release (after any period of mandatory detention)? | Generally no; after favorable CFI or RFI, ICE ordered continued detention (“no bond”) in all cases | Generally no; after favorable CFI or RFI, ICE custody determination –  
- D.C. District Court prohibited ICE from considering deterrence in making determination  
- ICE imposed high and often categorical bonds leading to continued detention for most ($7,500 and up; $7,500 or $10,000 specifically at Karnes) | Yes in some cases; after favorable CFI or RFI, ICE custody determination –  
- ICE imposes variable bonds but they often appear arbitrary and many are still high (usually $4,000 and up)  
- Some families obtain release by paying ICE bond; others remain detained because of inability to pay  
- ICE release of some arriving and withholding-only families after extended detention periods | Yes in most cases; after favorable CFI or RFI or for those not placed in expedited removal, ICE custody determination results in release–  
- Recent announcement by DHS allows for many families to be released  
- Many women are not required to pay bond but are required to wear electronic monitoring devices  
- Some women still required to pay bond if no placement of an electronic monitoring device |
|                                   | Reside in community with family during proceedings | | | |
| **Immigration Judges (IJ)**<br>Custody Review Results in Release? | Generally no role for IJs in custody determinations in most cases since no detention or very short detention. | • IJ custody review for eligible cases – release on bond allowed (often high amounts initially)<br>• No IJ review or release for RFI cases (prior deportation order)<br>• No IJ review or release for “arriving aliens” (presenting at a port of entry)<br>• Release on bond generally allowed once IJ intervened in cases eligible for review – usually $2500 to $8000; some released by IJ on recognizance<br>• No IJ review or release for RFI cases (prior deportation order)<br>• No IJ review or release for “arriving aliens” (presenting at a port of entry)<br>• In cases eligible for IJ review, IJs set reasonable bonds – from recognizance to $5000 in most cases<br>• No IJ review for RFI cases (prior deportation order)<br>• No IJ review for “arriving aliens” (presenting at a port of entry)<br>• J custody review less common even where eligible, because DHS custody determination often results in release<br>• Where DHS sets a high bond, IJs continue to lower bonds in many cases<br>• No IJ review for RFI cases (prior deportation order)<br>• No IJ review for “arriving aliens” (presenting at a port of entry) | | **Detention Centers** | Very little family detention after 2006-2009; small facility in PA only with fewer than 100 beds | Artesia, New Mexico opened as large family detention facility and length of detention at Berks increased; then opening of Karnes (August 2014) and Dilley (December 2014)<br>Dilley expanding rapidly; Karnes and Berks scheduled to expand and construction underway; Artesia closed in December 2014 | Detention of approximately 3000 mothers and children with additional expansion underway | Detention centers at lower capacity but no announcement regarding planned expansions of Berks and Karnes which are nearing completion |
III. **Fundamental Incompatibility of Large-Scale Family Detention with Constitutional Principles and ABA and Human Rights Standards**

DHS’s widespread use of detention for women and children seeking asylum in privately-run secure facilities is fundamentally incompatible with constitutional principles, basic international human rights protections,\(^{115}\) the ABA Civil Immigration Detention Standards\(^{116}\) ("the ABA Standards"), and other ABA guidelines. Since the summer of 2014, continued detention of families after apprehension was the norm for those sent to family detention centers rather than an exceptional circumstance, and it was applied for deterrence purposes rather than to meet legitimate governmental goals after consideration of other alternatives. The manner of detention is evocative of criminal detention, which is unjustified for civil detainees. And the detention of families offers inadequate recognition of the special protections due to vulnerable populations, including women, children, and asylum-seekers, who have made up a majority of the detained family population.

### A. Presumption Against Detention

The Supreme Court has held that civil detention should be an exception to the general principle of liberty and has established that such detention is therefore legitimate only where shown to be necessary in an individual case.\(^{117}\) In *Zadvydas v. Davis*, the Supreme Court confirmed that immigration detention must be understood to be civil detention and managed as such, because it is a deprivation of liberty that does not result from a criminal conviction.\(^{118}\) The Supreme Court has thus held that liberty is the rule and government detention of immigrants violates the Due Process Clause of the U.S. Constitution unless a special justification, usually prevention of flight risk or danger, outweighs the “individual’s constitutionally protected interest in avoiding physical constraint.”\(^{119}\) Detention must also bear a close relation to that special purpose based on an individualized determination. Under these same principles, the *Flores* settlement also imposes a binding obligation on the government to prioritize the possibility for release from detention where children are involved.\(^{120}\) DHS’s own standards incorporate a presumption of release from detention for at least some asylum-seekers unless there is an individualized concern of flight risk or danger that requires detention.\(^{121}\) Deterrence has not

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\(^{115}\) The United States has ratified the relevant treaties that establish these standards and so has accepted binding legal obligations under international human rights law. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996). International human rights law norms also have moral force, particularly given the United States’ leadership in promoting human rights norms worldwide.


\(^{118}\) *Zadvydas*, 533 U.S. 678.

\(^{119}\) *Zadvydas*, 533 U.S. at 690 (quotation marks and citation omitted); see also *Demore v. Kim*, 538 U.S. 510 (2003) (Kennedy, concurring) (detention is permissible only “to facilitate deportation, or to protect against risk of flight or dangerousness”); *Doan v. INS*, 311 F.3d 1160, 1162 (9th Cir. 2002) ("[S]erious questions may arise concerning the reasonableness of the amount of [a] bond if it has the effect of preventing an alien’s release.").

\(^{120}\) Flores Stipulated Settlement Agreement, supra note 12.

been accepted as a valid governmental purpose that could overcome the presumption of liberty to justify immigration or other civil detention.\footnote{See \textit{R.I.L-R}, 2015 U.S. Dist. LEXIS 20441.}

The U.S. presumption against detention is consistent with prevailing international human rights and refugee standards, which also require a presumption against detention of migrants, particularly asylum-seekers, and permit detention only where necessary in an individual case to meet legitimate non-punitive governmental objectives.\footnote{See, e.g., \textit{UNHCR Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention}, Guideline 4.1.4 (2012) (hereinafter “UNHCR Guidelines”), http://www.unhcr.org/505b10ee9.html (“Furthermore, detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country”); \textit{Inter-American Comm’n on Human Rights, Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II., Doc.78/10, ¶ 38 (Dec. 30, 2010) (“In the case of immigration detention, the standard for the exceptionality of pre-trial detention must be even higher because immigration violations ought not to be construed as criminal offenses.”)); \textit{Organization of American States (OAS), American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. I, OEA/Serv.L.V./II.23 (May 12, 1948) (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”); \textit{OAS Charter (as amended through 1993), art. 31(1)-(2), 2 U.S.T. 2394, 119 U.N.T.S. 3., ratified by the United States in 1951}; \textit{Workman v. United States}, Case 12.261, Inter-Am. Comm’n H.R., Report No. 33/06, OEA/Ser.L.V./II.127 Doc. 4 rev. ¶ 70 (2007).}

The United Nations Refugee Convention prohibits nations from penalizing asylum-seekers and unnecessarily restricting their movement, including through the use of immigration detention.\footnote{Refugee Convention, \textit{supra} note 1, at arts. 31(1)-(2), 26.} The International Covenant on Civil and Political Rights also prohibits arbitrary detention, as does the American Declaration of the Rights and Duties of Man.\footnote{See \textit{Int’l Covenant on Civ. and Political Rights}, art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171, ratified by the United States in 1992 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”); \textit{Organization of American States (OAS), American Declaration of the Rights and Duties of Man, OAS Res. XXX, art. I, OEA/Serv.L.V./II.23 (May 12, 1948) (“Every human being has the right to . . . liberty.”); \textit{id.} at art. XXV (entitling section “Right of protection from arbitrary arrest.”). Through its membership in the OAS and ratification of the legally binding OAS Charter, the United States accepted obligations to protect the human rights set forth in the American Declaration. \textit{See OAS Charter (as amended through 1993), art. 3(1), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3., ratified by the United States in 1951}; \textit{Workman v. United States}, Case 12.261, Inter-Am. Comm’n H.R., Report No. 33/06, OEA/Ser.L.V./II.127 Doc. 4 rev. ¶ 70 (2007).}

The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) has explicitly concluded that detention of asylum-seekers should “normally be avoided.”\footnote{U.N. High Comm’r for Refugees, \textit{Detention of Refugees and Asylum-Seekers}, Conclusion No. 44 (Oct. 13, 1986). The UNHCR’s Executive Committee is its governing body and is made up of members, largely representatives of U.N. member states including the United States.} UNHCR has also promulgated Detention Guidelines, which further specifically state that “detention is an exceptional measure and can only be justified for a legitimate purpose,” such as to protect public order, public health, or national security.\footnote{UNHCR Guidelines, \textit{supra} note 123, at Guideline 4.1.} The Guidelines additionally direct that “detention is not permitted as a punitive – for example, criminal – measure or a disciplinary sanction for irregular entry or presence in the country”) and admonish against the “use of prisons, jails, and facilities designed or operated as prisons or jails.”\footnote{Id. at Guidelines 4.1.4, 8.} Finally, the UNHCR Detention Guidelines specifically establish that “detention policies aimed at deterrence are generally unlawful under international human rights law.”\footnote{Id. at Guideline 7.}
The Inter-American Commission on Human Rights similarly maintains that “pre-trial detention is an exceptional measure” that is appropriate only if there is no other means to “ensure the purposes of the process and when it has been demonstrated that less damaging measures would be unsuccessful to such purposes.” The United Nations Human Rights Committee also has held that immigration detention “could be considered arbitrary if it is not necessary in all circumstances of the case, for example to prevent flight or interference with evidence.”

The ABA, too, has long opposed civil immigration detention except in extraordinary circumstances. It has additionally adopted policies specifically recommending against detention of asylum-seekers. Where release alone is not possible, the ABA supports alternatives to detention, such as release on reasonable bond or supervised release.

Consistent with these views, the ABA has developed standards for civil immigration detention that include the presumption against detention. The ABA Standards, adopted in August 2012 and amended in 2014, were developed by the ABA Commission on Immigration with assistance from various experts, including a former INS Commissioner, the Commissioner of the New York City Department of Correction, as well as leading authorities from the corrections, medical, academic, and other related fields. The ABA Standards are grounded in the ABA’s experience in advocacy and monitoring of civil immigration detention over many years.

Because immigration detention is civil and must not be punitive, a guiding principle of the ABA Standards is that a “noncitizen should only be detained based upon an objective

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130 The Inter-American Commission on Human Rights is an independent organ of the Organization of American States. The Organization of American States is an association of all 35 independent countries of the Americas and has the goal of promoting democracy, human rights, security, and development. See What is the IACHR?, Inter-American Comm’n on Human Rights (last viewed July 9, 2015), http://www.oas.org/en/iachr/mandate/what.asp.
134 ABA Resolution, Report No. 131, supra note 133.
135 ABA CIVIL IMMIGRATION DETENTION STANDARDS, supra note 116, at 4.
136 Id. at vii.
137 While there are no strict criteria governing when the ABA will adopt formal standards, they are generally enacted as a distinct form of policy closer to codes of conduct or regulatory provisions than general principles embodied in other policy resolutions.
determination that he or she presents a threat to national security or public safety or a substantial flight risk that cannot be mitigated through parole, bond, or a less restrictive form of custody or supervision.”138 Even when detention is appropriate, the ABA Standards call for regular review of decisions to begin or continue detention so as to ensure that civil detention is not used as punishment and is used only to further DHS/ICE’s goals of ensuring the migrants appear in immigration court or are removed after a final deportation decision.139 The ABA Standards thus do not recognize deterrence as a permissible justification for detention. Furthermore, “any restrictions or conditions placed on noncitizens . . . should be the least restrictive, non-punitive means necessary to further these goals.”140 Because they recognize that immigration detention is non-punitive and civil in nature, the ABA Standards reject the use of a criminal detention model.141

B. Special Standards for Vulnerable Populations

U.S. law and DHS’s own standards establish further special considerations regarding the detention of mothers, children, and other vulnerable migrants. The Flores settlement contains legal obligations requiring the U.S. to ensure special treatment of children.142 In addition, DHS policy requires heightened consideration of custody cases involving women who are caregivers or who are nursing their very young children.143

International human rights law and ABA policy also call for heightened protections for women, children, and other vulnerable groups, recognizing that such groups have special needs and are more likely to suffer trauma as a result of detention.144 The ABA Standards start from the premise that “minors and pregnant or nursing women should not be detained.”145 The ABA Standards also provide that ICE should not detain children except as a last resort.146

The ABA Standards are consistent with U.N. standards for the treatment of women and children asylum-seekers. The UNHCR Guidelines proscribe detention for pregnant women and

138 ABA CIVIL IMMIGRATION DETENTION STANDARDS, supra note 116, at 4.
139 Id.
140 Id.
141 Id.
142 See Flores Stipulated Settlement Agreement, supra note 12.
144 HUMAN RIGHTS FIRST, U.S. DETENTION OF FAMILIES SEEKING ASYLUM: A ONE YEAR UPDATE, supra note 107, at 9-10 (discussing several medical and mental health studies that concluded that “immigration detention is harmful to asylum seekers and in particular to children and families, even over relatively short periods of time”).
145 ABA CIVIL IMMIGRATION DETENTION STANDARDS, supra note 116, at 4.
146 Id. Other ABA standards also recommend special care for children. For example, the UAC Standards emphasize the importance of treating children “with dignity, respect and special concern” for their particular vulnerabilities. UAC Standards, supra note 133, at 9. The UAC Standards require custodial agencies and all other immigration enforcement agencies to hold as their primary concern the best interests of the child in all actions and decisions concerning the child and to treat children with dignity and respect. Id. at 12. Where detention is warranted, the UAC Standards recommend that immigration enforcement agencies keep children and their family members “together as a unit and place them in the least restrictive setting appropriate to families.” Id. at 44.
nursing mothers. Instead, the Guidelines recommend alternatives to detention that “take into account the particular needs of women, including safeguards against sexual and gender-based violence and exploitation.”

If women must be detained, the facilities and materials should meet women’s specific hygiene needs and promote the use of female guards and wardens. The UNHCR Guidelines further state that children “should in principle not be detained at all” and establish that detention of children should only be used as a last resort. The Guidelines also mandate that “the best interests of the child shall be a primary consideration in all actions affecting children, including asylum-seeking . . . children,” even where some restriction on liberty becomes necessary.

C. Compatibility of DHS Family Detention Practices with Civil Detention Principles

DHS’s current family detention practices do not comport with ABA policy or basic constitutional and international human rights principles. The dramatic build-up of a large-scale detention system for families over the last year, based on a deterrence rationale, stands in fundamental contradiction to the principles consistently prohibiting deterrence as a justification for detention and requiring that any use of detention for immigration purposes hew closely to a legitimate non-punitive governmental objective. Even more generally, the widespread and vastly expanded use of detention for families over the last year runs directly counter to a presumption of liberty and the use of detention only in exceptional limited circumstances determined on an individual basis.

As has been repeatedly demonstrated, since the expansion of family detention in 2014, DHS policy has treated detention of families as the norm, rather than the exception. This policy was initially based on an impermissible deterrence rationale. Even once it disavowed that deterrence rationale, the government has not made individual objective determinations in these cases that the families in detention presented a flight risk, or constituted a danger, before they were detained. Once a family was placed in detention, until only recently, ICE did not consider the possibility of prompt release but instead insisted on continued detention for at least some period, by denying bond altogether or imposing a high or arbitrary bond. Beginning in

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147 UNHCR Guidelines, supra note 123, at Guideline 9.3.
148 Id.
149 Id.
150 Id. at Guideline 9.2.
151 Id.; see also Inter-American Comm’n on Human Rights, Report on Immigration in the United States: Detention and Due Process, supra note 123, at ¶ 15 (explaining that “the Inter-American Court adopted the principle of the ‘best interests of the child’”).
152 Moreover, DHS regulations suggest a presumption in favor of detention by placing the evidentiary burden on the detainee to demonstrate to officers that their release “would not pose a danger to property or persons and that the [detainee] is likely to appear for any future proceeding.” 8 C.F.R. § 236.1(c)(8).
154 Lawyers: Detained Immigrant Families in Texas Offered Bonds, N.Y. TIMES, Feb. 27, 2015, http://www.nytimes.com/aponline/2015/02/27/us/ap-us-immigration-overload-bonds.html?_r=0 (reporting that most bonds were set by ICE at $7500 or higher). One estimate suggests that the mean bond for women released from the
the summer of 2015, ICE has permitted release without payment of bond in some cases but usually only when intrusive electronic monitoring is imposed. The imposition of electronic monitoring has not been based on individualized determinations that such restriction is necessary or that no other less-restrictive alternatives are available.155 The government’s practices also continue to ignore the call to give special consideration before detaining women, children, and asylum-seekers, imposing detention only as an exceptional last resort.

The government additionally has failed to engage in individualized consideration of the necessity of detention given the likelihood that a majority of families would appear for further proceedings.156 Most families could be released without any supervision given the incentives they have to appear. Where release alone is insufficient, family detention policies also have failed adequately to consider less restrictive alternatives to detention.157 Community-based case management and reporting systems have been shown to serve as highly effective alternatives to detention, and the Government Accountability Office reported that more than 99% of aliens in ICE’s formal “Alternative to Detention” (ATD) monitoring program appeared at their scheduled immigration court hearings.158 Yet, immigration officials have only recently considered release of families from detention through such alternative programs and still have failed to consider the full range of available alternatives, instead using cumbersome and unnecessary electronic monitoring devices for virtually all families released by ICE without payment of bond when other less restrictive alternatives would be sufficient if assessed and applied on an individual basis.


155 See U.S. Dep’t of Homeland Sec., U.S. Immigration and Customs Enforcement’s Alternatives to Detention 3, OIG-15-22 (Feb. 4, 2015), https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf (explaining that ICE uses the Intensive Supervision Appearance Program II (“ISAP II”), which involves technology and case management, “in conjunction with the less restrictive release conditions associated with payment of a bond, or having to report periodically to an ERO field office”).

156 Notably, data from the Executive Office for Immigration Review shows that a large majority of noncitizen adults with children—approximately two-thirds—appear for their initial hearings. See Jordan, supra note 114. Moreover, research has shown that when aliens are represented by counsel, they are even more likely to return for future proceedings. Id.; IMMIGRATION POLICY CENTER, supra note 114 (finding that in 2014, 54.1% of non-represented children and 99.8% of represented children appeared for immigration proceedings).


158 U.S. GOVT. ACCOUNTABILITY OFFICE, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 30 (Nov. 2014), http://www.gao.gov/assets/670/666911.pdf. Data from the Executive Office for Immigration Review further shows that a large majority of noncitizen adults with children—approximately two-thirds—appear for their initial hearings. Jordan, supra note 114. Moreover, research has shown that when aliens are represented by counsel, they are more likely to return for future proceedings. Id.; see also IMMIGRATION POLICY CENTER, supra note 114 (finding that in 2014, 54.1% of non-represented children and 99.8% of represented children appeared for immigration proceedings).
In addition, for those who require detention, the Standards “presume use of the least restrictive means available to prevent flight and otherwise to meet the limited underlying purpose of detention.”159 Yet, the conditions at the detention centers are not minimally restrictive. Indeed, ICE’s own Family Residential Standards adopted in 2007 are based on a criminal detention model and are not enforced adequately where they provide some minimal protections.160

Adding to the prison-like atmosphere of the detention centers, the government contracts for the use and operation of many of the facilities with the same for-profit companies that operate private prisons. The Corrections Corporation of America manages DHS’s detention center in Dilley, Texas, and the GEO Group, Inc. manages DHS’s detention center in Karnes County, Texas.161 It is unsurprising, then, that residents of those facilities live in prison-like conditions. In the Karnes facility, the walls are painted cinderblocks and the families are held behind heavy locked doors. Upon entrance visitors must pass through x-rays and security protocols and non-lawyers are allowed only very limited visitation time. Guards give disciplinary write-ups to families for infractions of rigid institutional rules and conduct several body counts each day. Karnes, Dilley, and Berks are all large secure facilities that do not permit families to leave and re-enter.164

The centers also fail to provide appropriate protections to women and children asylum-seekers. The conditions are not adequate for the care of young children and their mothers, some of whom are nursing,165 and there have been incidents of sexual abuse within the facilities.166

Given their unique needs and higher likelihood of suffering abuse and trauma as a result of prolonged detention, women and children asylum-seekers are considered vulnerable groups that should be afforded heightened legal protections against detention.167 Thus, the current

159 ABA CIVIL IMMIGRATION DETENTION STANDARDS, supra note 116, at 7.
163 See id.
165 See REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER, supra note 162, at 11.
166 See Testimony of Marisa Bono, supra note 4; Long Shorts and Baggy Shirt, supra note 4.
IV. Due Process and Fundamental Fairness Concerns

Current policies and practices regarding the detention of families are also inconsistent with the basic due process and access to asylum principles set out in the United States Constitution, the ABA Civil Immigration Detention Standards and human rights norms. The rights implicated include the right to access counsel and the right to a fair proceeding.

A. Impact of Detention on Right to Due Process and Access to Asylum

Violations of the right to due process and access to asylum proceedings are implicated by the government’s family detention policies, in part because detention makes it exceedingly difficult for a family to prepare an asylum case. It is undeniable that the release of a family from detention before a final hearing greatly affects the chances of establishing the merits of an asylum claim, as release allows for more time to prepare the claim and better and more frequent access to lawyers, witnesses, experts, and translators who can help prepare and document the case. It also offers the possibility for the traumatized family to heal sufficiently in order to recall and recount their experiences in a manner that will best support an asylum claim through written and oral testimony. Families cannot engage in this process adequately in a restrictive detention setting. Indeed, one study found that even for represented detainees, the success rate of obtaining relief was 18%, compared with a 74% success rate for those immigrants who are represented but not detained.

168 See Zadvydas, 533 U.S. at 693 (holding that constitutional due process applies to all persons within the United States, including migrants, regardless of lawful status); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (“[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”); see also Plyler v. Doe, 457 U.S. 202, 210 (1982); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596–598 & n. 5 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

169 See Robert A. Katzmann, Bench, Bar and Immigrant Representation: Meeting an Urgent Need, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 585, 593 (2012) (reporting comprehensive study results which show detention to be one of the two most important variables determining success in immigration court, with representation being the other variable); Andrew I. Schoenholtz & Hammuel Bernstein, Improving Immigration Adjudications Through Competent Counsel, 21 GEO. J. LEGAL ETHICS 55, 55-56 (2008) (pointing out that detainees are more limited than non-detained migrants in obtaining counsel and representation is the “single most important non-merit factor” determining outcomes in immigration proceedings).

B. Access to Counsel

Another primary due process right compromised by family detention practices is the right of access to counsel. Restrictions on access to legal representation are particularly concerning, because they undermine a family’s right to meaningfully access the complicated asylum process. Access to counsel is particularly crucial in the detention setting where unrepresented asylum-seeking families face virtually insurmountable limitations on their ability effectively to pursue their claims for release from detention and relief on the merits.

Legal representation is often a deciding factor in whether a detained asylum-seeker passes a credible or reasonable fear interview and ultimately obtains asylum.\footnote{One study found that legal representation is “the single most important factor affecting the outcome of [an asylum-seeker’s] case.” Jaya Ramji-Nogales, Andrew I. Schoenholtz, & Phillip G. Schrag, \textit{Refugee Roulette: Disparities in Asylum Adjudication}, 60 STAN. L. REV. 295, 340 (2007).} A recent study conducted in the New York immigration courts found that 74\% of immigrants who are represented and not detained have successful outcomes. However, only 3\% of those who are unrepresented and remain in detention have successful outcomes.\footnote{\textit{See TRAC Immigration Report, Representation is Key in Immigration Proceedings Involving Women with Children} (Feb. 18, 2015), http://trac.syr.edu/immigration/reports/377/.} Data collected at the Karnes facility clearly shows that detained mothers are more likely to pass their credible and reasonable fear interviews when first given the opportunity to consult with legal counsel. For example, from August through December 2014, prior to the expansion of pro bono attorney programs focused on preparing families for credible fear interviews, the average rate at which asylum-seekers at Karnes were found to have a credible fear (the “fear found rate”) was 71\%.\footnote{\textit{See July 2014-January 2015 Credible/Reasonable Fear Report, supra note 68.}} In contrast, from January through March 2015, after access to counsel became more widely available for these early interviews through pro bono programs, that average rate increased dramatically to 91\%.\footnote{\textit{See July 2014-January 2015 Credible/Reasonable Fear Report, supra note 68; 2015 Credible/Reasonable Fear Report, supra note 174.}} Similarly, the passage rate in reasonable fear interviews at Karnes increased from an average 62\% between August and December, 2014, to an average 81\% from January through March, 2015.\footnote{\textit{See July 2014-January 2015 Credible/Reasonable Fear Report, supra note 68; 2015 Credible/Reasonable Fear Report, supra note 174.}} A comparable, notable increase in passage rates for the screening interviews occurred at Artesia as pro bono attorneys arrived at the facility in greater numbers.\footnote{\textit{See generally} Symposium, \textit{Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings}, supra note 170, at 363–64.}

The numbers make plain that having representation and securing release pending a final determination can inalterably change the lives of affected families. The role of counsel has also been crucial in obtaining release from detention for detained families and in obtaining asylum and related relief on the merits.\footnote{\textit{See} Symposium, \textit{Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings}, supra note 170, at 363–64.} Yet only approximately 30\% of families who were detained...
for any length of time have been able to secure legal representation, and the percentage is likely lower for those who have remained detained.\textsuperscript{178}

The relevant legal standards establish that the detained families have a right to counsel even if counsel is not provided at government expense.\textsuperscript{179} At a minimum, courts have recognized that basic due process principles require that the government not impede access to counsel and meaningful representation for immigration detainees.\textsuperscript{180} In line with these norms, international human rights law also establishes the importance of ensuring that immigration detainees have effective means of accessing and communicating with counsel.\textsuperscript{181} The ABA has similarly recommended that detainees be afforded “meaningful and timely access to legal personnel” and has opposed restrictions that have been placed on counsel at detention facilities, such as prohibitions on laptop computers and cellphones, and the imposition of lengthy wait times before meetings because of the negative impact on counsel’s preparation of a case.\textsuperscript{182}

1. Systemic Difficulties with Access to Counsel for Detained Families

Despite the importance of access to counsel and the right to be represented by counsel, families at the Karnes, Dilley, and Berks detention centers have faced numerous challenges in obtaining adequate legal services. As an initial matter, the size and location of the family detention centers has made it very difficult for families to secure the paid or pro bono legal services to which they are entitled. Attorneys and other legal volunteers must drive over an hour to reach Karnes from San Antonio and two hours from Austin, those cities being the nearest metropolitan centers.\textsuperscript{183} Similarly, Dilley is more than 70 miles and over an hour driving time

\textsuperscript{178} See TRAC Immigration Report, \textit{supra} note 172.


\textsuperscript{180} In \textit{Haitian Centers Council, Inc. v. Sale}, a New York district court found that “screened in” refugees—those who had passed the credible fear test—had a due process right to counsel (but not public counsel) under the Fifth Amendment. 823 F. Supp. 1028, 1042 (E.D.N.Y. 1993). Similarly, in \textit{Orantes-Hernandez v. Smith}, the court enjoined the government practice of coercing asylum-seekers to sign voluntary departure agreements without notifying them of their right to effective assistance of counsel and right to file an asylum application. 541 F. Supp. at 380-81.

\textsuperscript{181} UNHCR Guidelines, \textit{supra} note 123, at Guideline 7 (“Lawyers need to have access to their client, to records held on their client, and be able to meet with their client in a secure, private setting.”); Inter-American Comm’n on Human Rights, \textit{Report on Immigration in the United States: Detention and Due Process}, \textit{supra} note 123, at ¶ 436(c), (d) (recommending that detention facilities “provide adequate space for confidential meetings with attorneys and mental health practitioners, so that these meetings can happen in an efficient and timely manner” and that immigration detainees should be permitted “to have confidential phone conversations with their attorneys”).

\textsuperscript{182} ABA \textit{CIVIL IMMIGRATION DETENTION STANDARDS}, \textit{supra} note 116.

\textsuperscript{183} Google Maps, http://www.googlemaps.com (directions from Karnes County Residential Center to San Antonio and Austin).
from San Antonio, and more than 150 miles and two-and-a-half hours from Austin. These remote locations make it very difficult for the detained women and children to meet in person with their legal representatives on any regular basis, which in turn significantly impedes their ability to prepare for their credible or reasonable fear interviews and their court hearings. The need to engage in time-consuming travel and logistics to provide representation means that attorneys must accept fewer cases for consultation and representation, limiting the number of families that will obtain counsel.

In addition, the sheer number of individuals at the facilities, combined with the minimal number of attorneys in close enough proximity to work with them, presents an insurmountable problem. Despite very serious efforts, it is simply impossible for the legal community to provide representation to all detained families who require legal assistance to present their claims effectively in rapidly-moving, complicated proceedings. As a result, many families are forced to face immigration proceedings without legal assistance.  

2. Specific Difficulties in Providing Legal Representation

Further specific impediments to legal representation exist even when counsel is willing to take on representation. These barriers fall into two categories: impediments to paid and pro bono counsel (together with supporting professionals such as interpreters and paralegals) accessing their clients, and the inability of counsel to adequately prepare for their clients’ immigration proceedings due to seemingly arbitrary and unnecessary restrictions placed on counsel’s activities at detention centers. Each of these constraints threatens the families’ due process rights to legal representation.

The family detention facilities have adopted informal, often non-transparent and inconsistently-enforced policies that have made attorney-client communications and consultations difficult and time consuming. The constantly changing conditions for visitation violate the ICE Family Detention Standards requirement that each facility “provide notification of the rules and hours for legal visitation.” For example, ICE employees have insisted that law students entering Karnes and Dilley obtain security clearance even though ICE’s own Family Residential Standards do not require such clearance. Similarly, legal personnel at both facilities have, at times, been denied access when they do not provide 24-hour advance notice of the specific detainees they would like to meet. Berks also now requires advance notice of the

184 Id. (directions from South Texas Family Residential Center in Dilley, Texas to San Antonio and Austin).
185 WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, supra note 22, at 14-15.
186 ICE Family Residential Standards, supra note 29, at Visitation, ¶ 10(b).
187 See, e.g., Barbara Hines, Notes on Access to Counsel at 2 (“hereinafter Hines Notes”) (on file with the authors); Letter from S. Schulman to S. Saldana, “Re: Access for Pro Bono Volunteers at Karnes, Dilley and Berks Family Detention Centers,” at 2 (Apr. 20, 2015) (hereinafter “Schulman Letter”) (on file with the authors).
exact time of a planned visit and the specific detainee(s) that the attorney will meet.\textsuperscript{190} The ICE Family Detention Standards do not require such advance notice.\textsuperscript{191} In another instance, law students working with and supervised by attorneys were informed that they could not enter Karnes without a supervising attorney present, even though they had previously been approved for entry and, in many cases, had previously entered without a supervising attorney being present.\textsuperscript{192} Attorneys, students, and legal assistants cannot adequately prepare for visitation with detainees when the “rules” for such visitation are subject to such frequent, unexplained change and unreasonably stringent, inconsistent protocol.

Telephonic communications cannot effectively substitute for in-person meetings. Face-to-face interaction is far more productive, particularly considering language barriers. But even this less effective telephonic option is not always available. Legal representatives at Karnes and Dilley have faced difficulties setting up telephone conferences with their clients, even though such conferences are available in theory.\textsuperscript{193}

Even when legal personnel are given physical access, arbitrary conditions imposed by facility management make it very difficult for attorneys and other legal representatives to have productive meetings with their clients. For example, on one occasion at Karnes, the GEO staff refused to allow a team of pro bono attorneys from Elon University Law School to have any food or water in the visitor room and then further stated that if the team left to get food, they would not be permitted to re-enter that day. The team spent 11 hours without food or water in order to finish their work with the detainees.\textsuperscript{194} In a similar situation, University of Texas law students were denied the option to eat during a prolonged client interview when they were told they would not be allowed to return the same day if they left the facility even briefly.\textsuperscript{195} In another case at Karnes, the staff refused to allow a detainee to use the bathroom in the visitor room even though the bathroom was very clearly designated for detainee use. Instead, the detainee was forced to leave the area, return to her quarters to use the bathroom, and then return to the visitor area, thereby wasting valuable, limited time.\textsuperscript{196} At Dilley, the volunteers meet with their clients in a small “visitation trailer.” The CCA personnel at the facility insist, without any basis in the fire code or the facility contract, that the trailer can only accommodate 60 people at a time, including guards, family members or other visitors, detained women and children, and any legal volunteers.\textsuperscript{197} And at Berks, attorneys recount that the meeting rooms are insufficiently private and quiet as the walls are thin, which allows noise such as music to travel into the room and for

\textsuperscript{190} See Notes, National Stakeholder Coordination Call on Border Child & Family Cases, June 5, 2015, at 1-2 (hereinafter “National Stakeholder Coordination Call Notes”) (on file with the authors).
\textsuperscript{191} See generally ICE Family Residential Standards, supra note 29, at Visitation, ¶ 10; see also ICE Performance-Based National Detention Standards 2011, supra note 188, at Sec. 5.7.
\textsuperscript{192} See, e.g., Memorandum from E. Alvarez to D. Gilman, “Re: Memorandum Concerning Issues at Karnes,” at 6 (Apr. 26, 2015) (“hereinafter Alvarez Memorandum”) (on file with the authors); Hines Notes, supra note 187, at 2.
\textsuperscript{193} See, e.g., Alvarez Memorandum, supra note 192, at 5; WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, supra note 22, at 14.
\textsuperscript{194} See Alvarez Memorandum, supra note 192, at 5-6.
\textsuperscript{195} See, e.g., Email from D. Gilman to D. Achim, “clinic student access to Karnes for representation” (Mar. 27, 2015) (on file with the authors) (hereinafter “Gilman Email”); Alvarez Memorandum, supra note 192, at 5.
\textsuperscript{196} See Alvarez Memorandum, supra note 192, at 7.
conversations potentially to be heard outside, thereby jeopardizing the attorney-client privilege.\textsuperscript{198}

In certain cases at Karnes, ICE and facility management have gone as far as banning particular legal services providers without reasonable justification. In March 2015, a paralegal working for an Austin-based immigration attorney was denied access to Karnes after writing an article for the Texas Observer magazine titled “Seeking Asylum in Karnes City.” Although she was told that she was banned because she had improperly entered the facility in January 2015 as a paralegal when her initial access had been granted as an interpreter, the timing of her denial and other comments suggest that the paralegal was banned due to her publicizing the conditions at the facility, rather than the stated alleged technical violation.\textsuperscript{199}

In another case from March 2015, a legal assistant with the Refugee and Immigrant Center for Education and Legal Services (RAICES) was banned from entering Karnes. She was responsible for conducting intakes for pro bono referrals and for visiting detainees in order to obtain their signatures on necessary forms on behalf of pro bono attorneys living too far away to visit the facility with any frequency. The legal assistant had been visiting families at Karnes for this purpose since the summer of 2014 without issue, until ICE suddenly accused the legal assistant of helping the detained mothers coordinate a hunger strike. There was no evidence that ICE completed any investigation into the matter before banning the legal assistant, and the assistant denied such involvement in a sworn statement. Her exclusion created major logistical issues for pro bono attorneys, many of whom are located across the state and relied on the assistant to interact in-person with clients on their behalf.\textsuperscript{200}

In addition to the described physical difficulties in accessing counsel and other legal representatives, detained families’ due process rights are threatened by policies that make it unnecessarily difficult for legal personnel to help them prepare for their immigration proceedings. These policies include restrictions on technology use, access to experts and interpreters, access to various records, and interference with the attorney-client relationship.

With respect to technology, ICE and/or facility management have placed arbitrary, often-changing restrictions on the devices that legal personnel can bring into the facilities. Cell phones are vitally important for developing a detainee’s case because they allow the detainee to communicate with an interpreter as well as with family members, friends, and other witnesses who can help establish the detainee’s fear of persecution.\textsuperscript{201} Likewise laptops and Wi-Fi hotspots enable legal service providers to conduct on-the-spot research and communication, and

\textsuperscript{198} See National Stakeholder Coordination Call Notes, \textit{supra} note 190, at 2.
\textsuperscript{201} See Schulman Letter, \textit{supra} note 187, at 3
keep electronic notes of their meetings with each client. Although cellphones, laptops, and Wi-Fi hotspot devices are critical to case preparation and are not restricted under the ICE Family Residential Standards, legal personnel often are told that they are prohibited from bringing these items into the centers. These arbitrary policies deny detainees the benefits of the full scope of available services that are available to non-detained clients of the same attorneys.

In Karnes, volunteer legal representatives were given oral permission by the facility director to bring cell phones and laptops into the center, but facility staff sometimes deny law students and attorneys entry with this equipment. As with the restrictions on access, the rules pertaining to technology change for every visit: sometimes legal representatives are allowed in with laptops, sometimes they are not; other times, only one legal representative in a group is allowed to bring a lap top. The same is true for Wi-Fi hotspot devices. Due to these widespread inconsistencies, legal volunteers find it difficult to comply with restrictions, thereby making access to needed technology so inconsistent as to be a hurdle to adequate representation.

Detainees at Dilley and Berks have faced similar problems. Those facilities have banned the use of cell phones, making it impossible for attorneys and clients to communicate and for the detainees to contact potential witnesses in some cases.

Families and their legal counsel have also had difficulty accessing interpreters, which makes it very difficult for counsel to communicate with their clients and thus to adequately prepare the clients for their asylum cases. Not only do the restrictions on technology make accessing interpreters more difficult, but there are also conflicting standards on the clearance requirements for interpreters who can physically visit the centers. Notably, in-person meetings with interpreters are strongly preferred to virtual ones, as all parties communicate better when the interpreter is in the same room with the clients. Unfortunately, in some cases, interpreters are told that they need to be cleared prior to every visit, which is time-consuming, while others have been advised that a clearance determination is good for six months. These inconsistent requirements make it difficult for attorneys to comply with requirements for interpreter access and therefore often result in interpreters being denied physical access to the facilities.

Legal representatives are further impeded in their work by their inability to obtain various records. These records, including initial interviews with detainees after they are detained, identity documents, and medical records, are all critical in helping establish a case for asylum, but in many cases access to the documents is restricted for no apparent reason. For example, in one instance at Karnes, facility management refused to provide a detainee with a copy of a psychological evaluation she received when she was first admitted. In response to requests by a pro bono attorney, the facility agreed to release the information if certain paperwork was filed.

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202 Id.
203 See, e.g., Hines Notes, supra note 187, at 2-3.
204 Id.; see also Gilman Email, supra note 195; Alvarez Memorandum, supra note 192, at 5; Schulman Letter, supra note 187, at 3.
205 See, e.g., Hines Notes, supra note 187, at 2-3; Alvarez Memorandum, supra note 192, at 6; Schulman Letter, supra note 187, at 3.
206 See Schulman Letter, supra note 187, at 3; National Stakeholder Coordination Call Notes, supra note 190, at 1-2.
207 Hines Notes, supra note 187, at 3.
but then required the detainee to sign three different forms, each time stating that the wrong form had been submitted. The facility then asserted that the records could not be released without verbal confirmation from the detained mother, but the medical records manager refused to set a date and time to speak with the detainee about the matter.  

In other instances, ICE has confiscated identity documents upon apprehension and refused to provide the families or their attorneys with these documents. These burdensome paperwork requirements resulted in increased bond amounts, delayed or denied release, and limited travel upon release.

Finally, ICE personnel and facility staff at the family detention centers have interfered with attorney-client relationships in other ways, including by improperly offering legal advice to detained families. For example, an ICE official at Karnes incorrectly indicated to a detained mother that her legal representatives had made a “mistake” in the manner in which her release from detention was requested. The officer’s statement to the mother about the proper legal strategy constituted improper legal advice and damaged her relationship with her legal counsel. In other cases, officials at Berks and Karnes have claimed knowledge about and influence over the immigration court proceedings and have told detained families that disciplinary problems at the facilities will affect their cases before the courts.

At Dilley, ICE officials have discouraged families from consulting with counsel during the custody determination process, insisting that the families will be in the best position if they accept the ICE custody determination without review. ICE officials have also inquired, on several occasions, about the purpose of visits by certain pro bono legal representatives and organizations. This practice is not permitted by the Family Residential Standards and hinders the confidentiality and efficacy of the attorney-client relationship.

In sum, the unwarranted restrictions and bureaucratic hurdles impede the ability of attorneys and other legal volunteers to help the families prepare their asylum cases. By denying access to needed technology, language assistance, and relevant documents, and by interfering with attorney-client relationships in other ways, ICE and facility management hinder meaningful representation and may even prevent success on the merits for valid asylum or protection claims.

C. Fairness of Proceedings and Access to Asylum

Due process also requires that the immigration proceedings themselves provide individuals a “full and fair hearing of [their] claims and a reasonable opportunity to present
evidence on [their] behalf.”215 This right is echoed in the statute and regulations governing immigration proceedings, which provide that the respondent in a removal proceeding shall be advised of her right to representation, of the availability of free legal services, and of the right to a reasonable opportunity to examine and object to the evidence against her, present evidence on her own behalf, and cross-examine the government’s witnesses.216 International human rights law and ABA policy similarly emphasize the importance of the ability of individuals to present a claim, particularly an asylum claim.217

Unfortunately, the families currently in detention centers have faced a variety of unfair practices from the moment they are apprehended, many of which threaten basic due process rights and their ability to present an asylum claim. These practices exacerbate the many hurdles to meaningful participation in legal proceedings that the families already face as a result of their detention and the previously described limitations on access to counsel.

Families are often forced to participate in the various stages of asylum proceedings without adequate interpretation services, even though such services are legally required and the Office of the United Nations High Commissioner for Refugees has characterized “the services of a competent interpreter” as a fundamental requirement.218 The problems with translation and interpretation begin at the very first stage of the proceedings, during the initial interviews conducted by the inspections officers who apprehend the families. Even though regulations require adequate interpretation services to be provided, some women are not provided with access to such services, particularly those women who speak indigenous languages.219 This problem repeats itself during the next stage of the proceedings, the credible or reasonable fear interviews, when the women frequently do not receive the adequate interpretation services to which they are legally entitled.220

Besides violating their legal rights, these language barriers make it significantly more difficult for the women to establish their fear of persecution in order to meet the requirements for an asylum claim and avoid deportation. As one court has recognized, “[i]t is difficult to imagine

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216 See INA § 240(b)(4); 8 C.F.R. § 1240.10.


219 8 C.F.R. § 235.3(b)(2).

220 8 C.F.R. § 208.30(d)(5); see, e.g., Washington, supra note 154, at 4 (recounting the difficulties of telephonic communication with an interpreter for a credible fear interview, during which the interpreter and interviewee repeatedly had difficulty hearing each other and the interpreter misinterpreted the testimony on several occasions).
how any bona fide refugee, with little or no knowledge of English, could ever spontaneously convey a ‘well-founded fear of persecution’ to an asylum officer.”\(^{221}\) Not only do the women have difficulty communicating the persecution they face if inadequate interpretation services are the only available means of communication, but allegedly “conflicting” or false information given to the inspection officers and/or credible fear interviewers is often used against the women in later proceedings before the immigration courts, even though such discrepancies often are attributable to language barriers.\(^{222}\) For those women who speak indigenous languages, immigration authorities frequently skip the credible fear interview altogether, moving directly to the merits determination. But without a positive credible fear determination, judges are hesitant to grant release pending conclusion of the proceedings, thereby further prolonging detention.\(^{223}\)

This type of procedural unfairness continues throughout the proceedings in the immigration courts, even after the women pass their credible or reasonable fear interviews, because the families must attend their hearings virtually through video-conferencing. As a result, the interpreter is often not in the same location as either the asylum-seeker or the judge, significantly impeding the ability of the interpreter to understand the detainee and increasing the probability of inaccurate communication that affects procedural due process rights.\(^{224}\)

The virtual hearings present further fairness problems. The distance between the judge and the asylum-seeking family creates difficulties when presenting the merits of the asylum claims. The immigration judge adjudicating the claim cannot observe the women in person as they tell their stories. That separation makes it more difficult for the judge to assess the asylum applicant’s credibility and the extent of the persecution she faced in her home country.\(^{225}\) Emotional testimony and visible scars or other indicia of injury may not be observable on video despite their importance in the adjudication of the asylum claim. Similarly, due to the remote location of the detention centers, often the attorney is not in the same location as the detainee, making it unduly difficult for the attorney to act as an intermediary and adequately represent a detained family during the proceedings.\(^{226}\)

The logistics created by long-distance hearings seriously complicate effective representation as well. The difficulties are particularly notable with families held at the Dilley facility. Judges sitting in the Denver and Miami Immigration Courts have heard the cases from

\(^{221}\) *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).


\(^{225}\) See WRC & LIRS, LOCKING UP FAMILY VALUES, AGAIN, supra note 22, at 16 (noting the judges’ inability “to hear a detainee and see a detainee’s facial expressions during [video or telephone] testimony”).

\(^{226}\) *Rusu v. INS*, 296 F.3d 316, 321-22 (4th Cir. 2002) (noting that video hearings in asylum cases have the potential to violate due process in some cases).
As a result, detained families currently do not even share a time zone with the judges hearing their cases. It is not possible for an attorney to work with a family at the detention center and then appear in person before the judge given the physical distance between the two sites. Even filing pleadings, evidence and applications is a difficult task, since the attorney will often need signatures or statements from the client in one state, which must be filed on a short time frame in the court in another state.

In another area of concern, the policies and practices of the government do not always guarantee that children have an opportunity to present an asylum claim independent of their mother’s claim. This is true even when a child’s claim cannot, by law, be derivative of her mother’s claim because, for instance, the mother is subject to a prior deportation order and is in withholding-only proceedings. At least initially, DHS was not interviewing children separately to determine if they had asylum claims independent of those of their mothers. This omission denies the children—a notably vulnerable population—their right to present their own claims.

Finally, there is concern that the fairness of the asylum process may be compromised by suggestions from high-level government officials that they consider most Central American asylum claims to be invalid, even in the face of agency and court determinations granting asylum in a significant number of cases. In this context, DHS’s instruction to immigration officers to err on the side of screening out detainees with possible asylum claims during the credible fear interview, rather than screening them in, is troubling. Specifically, in February 2014, DHS released a Memorandum emphasizing that the standard for passing the credible fear interview—the “significant possibility” standard—requires an applicant to “demonstrate a substantial and realistic possibility of succeeding.” In releasing the Memorandum, DHS sought to clarify that standard amid concerns that it had “lately been interpreted to require only a minimal or mere

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228 See REPORT REGARDING GRAVE RIGHTS VIOLATIONS IMPLICATED IN FAMILY IMMIGRATION DETENTION AT THE KARNES COUNTY DETENTION CENTER, supra note 162.


230 See 8 C.F.R. § 208.30(e)(2) (“An alien will be found to have a credible fear of persecution if there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, the alien can establish eligibility for asylum under section 208 of the Act or for withholding of removal under section 241(b)(3) of the Act.”).

possibility of success.” The Memorandum and the timing of its release seemed to be designed to encourage immigration officials to reduce the number of applicants passing interviews, raising the concern that some interviewers will overlook applicants with credible fears of persecution to further DHS policy and the statistics used in support of that policy. The pattern of government officials apparently looking for ways to exclude rather than admit asylum-seekers creates a real risk that women and children with a genuine fear of persecution will be improperly returned to violent circumstances in the countries from which they fled.

V. Pro Bono Response to the Increase in Migration in 2014 and the Use of Long Term Family Detention

Despite the inordinate obstacles, in substance and volume, encountered by members of the legal community working to respond to family detention, members of that community have made extraordinary efforts to assist. Lawyers have travelled from all over the country to the detention centers. New pro bono projects have developed to address the needs of the thousands of detained mothers and children, and national coordination among the participants has been critical. While obtaining some successes, these nationwide efforts can never be sufficient to overcome the overwhelming need for legal representation. The many hurdles created by DHS practices, the expertise and language skills necessary to provide competent counsel, and the sheer number of clients requiring assistance have created a crisis of ever growing proportions.

Efforts to provide legal assistance to detained families have been undertaken by a full network of legal service providers ranging from nonprofit organizations to small and large private law firms, from university law clinics to bar associations, all attempting to provide a full array of services from preparation for credible and reasonable fear interviews to representation in custody determination proceedings and on the merits of asylum claims to post-release placement and representation. An initial rapid response by pro bono attorneys grew into a structured services program with the support of the specialized immigration bar, university law clinics and non-profit organizations, which attracted even broader interest and large law firm support. Non-lawyer volunteers, including paraprofessionals and interpreters, among others, added to the effort and met critical needs as well. In turn, legal volunteers who provided representation joined with law firms and organizations working at the national level to engage in advocacy for policy improvements. We cannot do justice in this report to the legal community’s valiant response to the crisis, but we do include an appendix (see, Appendix, below) with a partial description of the laudatory efforts of the legal community, which may serve as a point of reference for delivery of legal services to immigrants in the future.

232 Id.
234 See, e.g., Hylton, supra note 4.
VI. Conclusions and Recommendations

A. Conclusions

The core mission of the Department of Homeland Security is national emergency planning and preparedness. It is essential that DHS be able to anticipate, and be prepared to address, periodic increases in the migration of individuals and families seeking asylum. Waves of people arriving in the United States, seeking safety and freedom in the arms of our democracy, have occurred periodically over the history of our country, particularly given our tradition as a nation of immigrants. History teaches that these instances are sure to happen again, meaning that fair and humane policies need to be in place beforehand. Dealing with those situations demands anticipation, effective solutions, significant reform, and hard work.

The policy of detaining immigrant children together with their parents during the pendency of their immigration proceedings is not a new response to such challenges, the situation having arisen several times in just the past 20 years. As with previous iterations, the problems encountered in the most current round of family detention are myriad. Now is the time to address the legal and humanitarian issues that inherently accompany these historical realities so that our country is ready to meet the consequent demands that seem certain to occur again and again, today and tomorrow.

As is well acknowledged, a legion of problems was presented by the expansion of family detention that occurred over the last year. Yet, DHS vigorously defended the response for most of that period. Recently, in the summer of 2015, ICE reaffirmed its commitment to detention as its preferred strategy one day, only to be followed by DHS the next day disavowing its prior unyielding support of family detention and resolving to release quickly as many families as possible. When DHS began releasing families pursuant to this reversal, the releases were done chaotically and the process has been handled through means employed by the criminal justice system, notably monetary bond and electronic monitoring. Failure to accept the civil nature of immigration detention is still the rule.

Simply, immigration detention is not criminal incarceration. There are important distinctions between the characteristics of the immigration detention population in ICE custody and the administrative purposes underlying their detention. Immigration detention is intended to hold individuals only as long as necessary, when necessary, and to process and prepare them for removal or relief. Criminal incarceration, on the other hand, necessarily is punitive in its purposes and goals. In 2009, a system-wide governmental study of immigration detention

238 IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS, supra note 31.
underscored the opportunity for ICE, in coordination with stakeholders, to design and implement a new system premised upon civil, rather than criminal, principles. Those notions rest upon the foundational precepts that migrants are not to be detained as punishment. Indeed, many in immigration detention qualify under the law for relief from removal. Consequently the process must be governed by the presumption that release to the community is the rule and not the exception; an objective risk assessment must be made requiring the use of the least restrictive means necessary to ensure attendance at mandated immigration proceedings in cases where release alone is insufficient. This assessment recognizes that monetary bond and electronic monitoring are \textit{not} minimally restrictive alternative means for ensuring appearance of migrants at their proceedings. These precepts can no longer be ignored.

By resorting to family detention practices without regard to these foundational principles, indiscriminately labeling families as threats, and refusing to determine and utilize the least restrictive means of achieving compliance with immigration proceedings, DHS has not met its emergency preparedness, legal or fairness goals. These failures have left in their wake a population of traumatized children and their parents, struggling with the consequences of unnecessary detention. As a result, adjudication of asylum claims has become haphazard and unfair, and legal services have been redirected and depleted. Looking towards the future, DHS must be prepared for the inevitable, periodic influxes of migrant families seeking status. This requires the advanced development, and fair implementation, of viable plans to accommodate these marked changes by means other than detention, or release to the community with excessive supervision requirements, and accelerated deportation proceedings lacking in due process.

\textbf{B. Recommendations}

Based on the foregoing analysis, we urge the U.S. Government take the following actions to the extent it has not already done so.

\textbf{Specific Remedies: Karnes, Dilley and Berks Family Detention Centers}

1. Immediately cease the expansion of family detention capacities at the Karnes, Dilley, and Berks family residential centers and expeditiously release families currently held in detention.

2. Provide timely notice to the Karnes, Dilley and Berks facility providers that their contracts for family residential housing and services will not be renewed.

3. Pursue placements in small-sized group homes sufficient in number to humanely address detention where exceptional circumstances preclude other less restrictive means.

\textbf{Reform of Detention Policies and Practices impacting Families and Children}

4. Permanently abandon deterrence-based detention policies.
5. Adopt a presumption against detention, particularly in the case of families, children, and asylum seekers.

6. Where detention is required, it must not be lengthy. Every effort must be taken by government to satisfactorily address impediments to the release of families and children.

7. Revise detention policies and practices consistent with the presumption that detention, when necessary, must be for the briefest time possible.

8. Establish and adhere to clear standards of care that include unique provisions for families and children that do not follow a penal model.

9. Establish a system of informed immigration enforcement, which includes management tools and informational systems capable of building and maintaining a continuum of care for those taken into ICE custody. These systems shall give priority to community placements whenever feasible and detention strategies consistent with objectively and individually assessed risk as necessary, utilizing the least restrictive means to achieve compliance.

10. Provide meaningful federal oversight of detention operations, through an on-site presence at facilities of federal officials authorized to intercede quickly and as often as necessary, and ensure that effective complaint mechanisms are in place. Track performance and outcomes and make reliable information readily available to the public. Put into place enforcement mechanisms to ensure accountability.

11. Adopt a presumption of release into the community as the rule rather than the exception. Prioritize release of families into the community on parole (without the requirement of a parole bond) or on recognizance in all possible cases.

12. When release alone into the community is insufficient, an objective risk assessment shall be employed to identify the least restrictive means, such as community-based supervision, to achieve compliance with attendance at immigration proceedings. More restrictive alternatives to detention, including electronic monitoring and cash bond, shall be used only where demonstrably necessary in an individual case.

13. In those limited cases where a specific flight risk or danger has been established and payment of a financial bond is the least restrictive means of addressing such risks, set the bond amount at an attainable level based on individual circumstances.
14. For families placed in expedited removal proceedings, provide an individualized custody assessment immediately after a credible or reasonable fear finding, taking into account the family’s individual circumstances and particular vulnerabilities as well as the specific likelihood that they pose a flight risk or danger to the community.

15. Conduct systematic independent monitoring for compliance of administration of bonds and assignments to community supervision and detention in addition to detention conditions.

16. Ensure meaningful access to legal representation and legal information for all families subjected to detention at every stage of the immigration proceedings. Meaningful access must also include the removal of geographic and policy hurdles that impede the involvement of pro bono attorneys, and a stated priority supporting the continual and consistent accommodation of the needs of attorneys seeking to represent clients.

17. Guarantee legal representation for all families subjected to detention, through private or pro bono counsel, legal services organizations funded for this purpose by the federal government or counsel appointed by the government.

18. Develop emergency preparedness plans in order to effectively respond to periodic increases in border arrivals and crossings by means other than detention, and continuously assess and improve its activities and operations.
APPENDIX

PRO BONO RESPONSE TO DETENTION OF CENTRAL AMERICAN FAMILIES
COMMENCING IN SUMMER OF 2014

A. The Work of Pro Bono Representation Projects

Given the threat of immediate deportation through an expedited removal process, access to experienced immigration counsel very quickly became critical for the women and children detained in Artesia in late June 2014. It was clear that any meaningful legal representation program would most effectively be built in partnership with experienced legal services providers. The pro bono community relied heavily on the screenings and evaluations conducted by volunteers from specialized professional organizations, such as the American Immigration Lawyers Association, and local expert legal services organizations with access to the detained families. Those legal services organizations were already working at or above capacity, the economic downturn of the past several years having reduced the sizes of some staffs. The Administration had provided no additional funding for the provision of legal services to detained families, although it had offered limited financial support for representation of unaccompanied minors. Despite this reality, the pro bono community expanded its efforts to try to meet the increasing demand for legal services. Several key initiatives were launched to address the crisis.

i. First Responders in Artesia, New Mexico

When the Artesia site first opened, there were no immigration attorneys in the region, and the list of free legal service providers given to the detainees consisted exclusively of lawyers located three and a half hours away. Even if the detained women wanted to consult with counsel remotely, there were no phones available in the facility other than ICE agent cell phones. Early access to pro bono counsel was non-existent, and yet five asylum officers were churning through dozens of credible fear interviews every day.

Two private lawyers retained by two of the detainees’ family members sent a desperate plea to a listserv of immigration attorneys, seeking pro bono representation. Five practitioners responded immediately, three of them providing remote support, and the other two traveling to Artesia to help organize a response, their trunks full of as much content from their law libraries as they could transport. For a week, there were only two pro bono attorneys on the ground.

On July 22, 2014, the Center for American Progress, Human Rights First, the ACLU, and a number of human rights and other organizations toured the Artesia facility. Several of the detained women approached the tour group, begging for representation and giving their names to the tour group lawyers on pink post-it notes. Those post-it notes became “The List” of clients seeking attorneys. Using that list, the early volunteers were able to connect detained women to counsel for the first time.
ii. The AILA-AIC Pro Bono Project

By July 24, 2014, ten days after the first wave of deportations, just over a dozen lawyers arrived in Artesia. While a handful of stipends were available, most came as volunteers, leaving their private practices and paying their own transportation and lodging costs. There were already between 400 and 500 women and children in detention, none of whom had been screened by attorneys to evaluate their cases. With no funding and no infrastructure, the volunteers promised to represent anyone who wanted an attorney, without weeding out difficult cases.

Amid these challenges, the AILA-AIC Pro Bono Project (“Project”), a partnership between the American Immigration Lawyers Association (AILA) and AILA’s sister organization, the American Immigration Council (AIC), was born. AILA marshalled 6-8 volunteers per week, eventually hiring one of those volunteer lawyers, at a very meager salary, to work full-time in Artesia. AILA members and other small firm and solo practitioners with immigration expertise responded in significant numbers. Large law firms, such as Jones Day, also contributed volunteers and other support. Using a cloud-based database developed by immigration attorney Stephen Manning of the Innovation Law Lab, volunteers uploaded documents and tracked information to try to create continuity of representation and streamline case development as teams of volunteers shifted in and out of the facility week-to-week. Facing overwhelming demand, the Project was intended to quickly increase access to pro bono representation. Rather than a single attorney handling a single case, volunteer attorneys would instead spend up to a week in Artesia and each handle up to twenty or more cases, handing off the files at the end of the week to the rotating, incoming team of volunteers. The on-the-ground team met with the clients and conducted the initial interviews, collecting information about their claims, which was then shared with remote volunteers who investigated further, contacted family members, and located supporting documentation. The remote volunteers then drafted and filed pleadings. By the time the Artesia detention center closed in December 2014, the Project had involved approximately 300 lawyers, paralegals, interpreters, and translators working on the ground and remotely.

iii. The Karnes Pro Bono Network

When the Karnes facility became a family facility at the beginning of August 2014, a few well-respected private immigration attorneys, the law firm of Akin Gump, and the University of Texas Law School Immigration Clinic began to take cases on a pro bono basis, mainly pursuing release on bond for families facing the government’s no-release policy. A pro bono network of volunteer attorneys soon developed, and dozens of San Antonio and Austin area attorneys became involved, handling the direct representation of clients throughout their proceedings. In the fall of 2014 alone, volunteer attorneys with the network won the release of almost 100 families in bond proceedings. As described further below, Akin Gump Strauss Hauer & Feld LLP played a crucial role in providing initial support and structure for the pro bono network, and then RAICES (Refugee and Immigrant Center for Education and Legal Services) took over much of the coordinating work. Volunteers with the Karnes pro bono network continue to represent clients in seeking release and in merits proceedings. Of the small number of cases for which merits hearings have been held, pro bono attorneys from the network have obtained relief for at least a half dozen families.
iv. The CARA Pro Bono Project

Building on the models developed in Artesia and Karnes, the pro bono community quickly mobilized to provide services at the new detention facility in Dilley, Texas. Volunteer team leaders arrived each week, which AILA subsidized, but it soon became clear that there would need to be consistent leadership on the ground. AILA worked with the Catholic Legal Immigration Network, Inc. (CLINIC), AIC, and RAICES to form the CARA Pro Bono Project. Each organization took on funding responsibility for an element of the effort: equipment and supplies, a supervising attorney, and a volunteer coordinator.

The work of the AILA-AIC Pro Bono Project and the CARA lawyers and volunteers reveals a level of dedication illustrative of many who responded to the crisis. These individuals have provided counsel under very challenging logistical conditions, often at significant personal and economic sacrifice. For example, the lead attorney for CARA on the ground in Dilley, funded by CLINIC, also volunteered in Artesia and then moved from Ohio to south Texas to take on this work. A small staff oversees weekly teams of anywhere from three to fifteen volunteers, including attorneys, paralegals, interpreters, graduate students, law students, and clergy.

The volunteers pay their own airfare and lodging, and dedicate an average of 19 hours a day for a full week. The volunteers, as a group, see as many as 80 to 100 clients a day. Volunteers, whose knowledge of asylum law varies widely, are trained for 3.5 hours before entering the facility and are then thrust into the role of decision-maker, acting as the primary representative for a given client, going through the intake interview, uploading relevant documents to the database, and preparing affidavits, motions, bond documents, and letters of support, all while struggling with slow Wi-Fi hotspots, a sluggish printer/scanner, and no cell phone access. The volunteers have also lost valuable time hauling files and supplies in and out of the facility in a Radio Flyer wagon at the beginning and end of each day because there is no secure on-site attorney workspace.

The CARA project currently assists clients in preparing for credible fear and reasonable fear interviews, review of credible/reasonable fear determinations, full intake interviews following positive credible/reasonable fear findings, and custody redetermination hearing preparations. A single volunteer will work as many as 40 to 50 cases in a week before passing the load to the incoming group. All of the work product and supporting documentation are centralized in the database, so that, as one volunteer put it, if anyone is bitten by a rattlesnake, someone else can easily pick up where the last volunteer left off. As time passes and some of the women reach their merits hearings, former CARA volunteers have offered to continue to represent the clients they saw while in south Texas. The network of former volunteers, having dispersed back to their home offices, continues to play a role in representing the detained women and children, either in using the database to remotely access files, draft motions, and file documents before the Immigration Judge, or in providing assistance to women who make bond and are released pending their merits hearing. There is a remote bond team coordinated out of Connecticut, a translation team coordinated out of Los Angeles, and a private practitioner in Miami who prints and files court documents every day. Despite these challenges, this network
of remote attorneys, facing overwhelming logistical and economic hurdles, and compelled by the
difficult and worsening conditions detainees face, is growing.

v. American Gateways

American Gateways conducts the Legal Orientation Program at both Karnes and Dilley. The
organization has been involved with providing know-your-rights presentations at detention
facilities in South Texas for many years. When the new family detention centers opened, the
Department of Justice needed to expand its programming to those sites, and American Gateways
began providing general legal orientation to the new arrivals. Staff attorneys provide a general
overview of the immigration process, put on pro se workshops focused on bond hearings, merits
hearings, asylum issues, and more. The attendees can also request short, individual sessions with
the American Gateways attorneys, at which time the detainees are screened for possible pro bono
referral. Most of those screened referrals are directed to the CARA attorneys. Some are directed
to private pro bono attorneys in San Antonio and Austin with whom American Gateways works.
Dozens of orientations have taken place both at Karnes and Dilley. More than 1400 detainees
have attended the LOP sessions at Karnes and Dilley since the surge of border-crossings began
last summer. American Gateways has a staff of just 20 people, yet between their various
programs they serve facilities with more than 5000 detainees.

vi. Human Rights First

In working with national law firms, Human Rights First recognized the outstanding need
to coordinate nationally among the various efforts beginning around the country. The
organization learned from various stakeholders that there was a need for facilitation of
communication and coordination among the national law firms, bar associations and legal
services providers that were striving to expand their efforts to address the representation gaps
facing families with children. As initiated by the Association of Pro Bono Counsel (APBCo),
Human Rights First launched weekly national stakeholder teleconference calls which have
grown to include more than 90 participants. Out of this effort, as well as a detailed letter to Vice
President Biden outlining the numerous hurdles to engaging in the same pro bono representation
he specifically called for in last year’s White House meeting, grew regular meetings with the
White House Office of Public Engagement. These meetings provide a reliable forum at which
the legal community’s now-coordinated voice can raise issues with representatives from the
White House, the Department of Homeland Security, the Department of Justice, the Executive
Office for Immigration Review, and others. Chaired by Human Rights First, these meetings
have proven to be a valuable opportunity to discuss ways to overcome the many hurdles to pro
bono representation.

Human Rights First also quickly raised funds to expand its capacity to provide pro bono
representation to non-detained families and children through its offices in New York, Houston
and Washington DC. The organization hired a total of nine new staff members, including three
attorneys, three paralegals, and three social workers. With this new staff, Human Rights First is
providing direct representation and also recruiting, training, and mentoring pro bono attorneys.
Human Rights First has sent legal staff to Artesia, Karnes, Dilley and Berks to assist with legal
counsel and representation, and its family clients include some who were held at family
detention facilities as well as some who were released by CBP at the border.

**B. The Response of Large Private Law Firms**

Major private law firms have also been involved in meeting the growing demand for
representation of detained families. Despite many obstacles, numerous firms have launched
significant efforts to respond effectively to family detention. A few firms have initiated major
pro bono representation projects.

The national law firm of Jones Day rented a small office in Artesia and began sending
teams of five lawyers per week, adding to the ongoing pro bono representation being provided by
the AILA-AIC Project. Their initial charge was to help with screening, but the mission soon
turned to full representation of some of the families screened by AILA volunteers. A retired firm
partner came out of his retirement to manage the effort, working closely with the firm’s pro bono
partner/APBCo member and an administrative assistant who was instrumental in collecting the
data included in the Innovation Law Labs database. When the Artesia facility closed, Jones Day
transferred the focus of its efforts largely to the women and children detained in Dilley. One
attorney worked full-time for eight months on the cases accepted for representation. Teams were
formed to share responsibilities on many additional files. In all, Jones Day has taken on more
than 100 clients either detained at, or after release from, the detention facilities in Artesia, Dilley,
and Karnes. The firm has shouldered large out-of-pocket expenses to have teams on the ground
in south Texas and to send attorneys to Miami, where the Dilley cases are now being heard. At
the urging of firm leadership, Jones Day continues to accept new matters on a weekly basis. To
date, the firm has litigated six cases to final status, prevailing for their clients in each instance.

With an office in San Antonio, the firm of Akin Gump was in a unique position to
respond to the family detention crisis. Focusing its efforts on Karnes, the firm began to pursue
release from detention for its new clients there and to support a larger network of pro bono
attorneys handling custody cases. The firm rented office space near the facility and assigned a
recently admitted lawyer to work full-time at the Karnes detention center. Under the direction of
the firm’s pro bono partner/APBCo member, the young associate worked at the facility for four
months, helping dozens of women prepare for their credible fear interviews and matching many
cases with pro bono attorneys who would represent them in custody redetermination hearings
before the immigration courts, challenging ICE decisions denying release. The influx of
attorneys handling bond hearings, and the success rate attendant to that representation, helped the
court in San Antonio effectively streamline the bond proceedings and make the process far more
efficient. Akin Gump’s on-the-ground associate was eventually replaced by a newly designated
staff attorney at RAICES, and Akin Gump then funded a two-year Equal Justice Works fellow to
work at RAICES. Akin Gump continues to be a key player in the national pro bono effort,
leading efforts to deal with ICE, DHS, and White House officials to address the challenges on a
systemic level.

Fried Frank, a New York based firm, has also allocated a significant portion of time to
working on these efforts. Its Washington, D.C./APBCo member pro bono counsel travelled to
Artesia, and working with AILA, has helped locate pro bono representation for women with
children who are released from custody and who then disperse to cities around the country where their families reside. Senior attorneys at the firm, including APBCo members, have also devoted substantial time and effort to policy work relating to family detention, and the firm’s New York office is a key part of the screening program being overseen by Human Rights First.

Many additional law firms around the country are providing further pro bono assistance. Through APBCo, several firms toured the various detention facilities and are representing individual families as those detainees are released and dispersed to cities in every region of the nation. Other firms are involved in White House meetings. Still more are helping to staff the accelerated family dockets in other parts of the country. Several have sent attorneys to Dilley and Karnes to work for limited periods of time. Others are working with their local immigration legal services providers to represent former detainees in post-release proceedings around the country. Firms such as Chadbourne & Park are coordinating over-crowded immigration dockets, working to represent, or find representation for, the hundreds of immigrants in their home courtrooms in desperate need of assistance. In California, several firms are coordinating clinics to assist families with the timely filing of initial pleadings and applications for relief.
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNY LISETTE FLORES, et al., ) Case No. CV 85-4544-RJK(Px)
Plaintiffs, ) Stipulated Settlement Agreement

-vs- )

JANET RENO, Attorney General )
of the United States, et al., )

Defendants.
Plaintiffs' Additional Counsel

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STIPULATED SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs have filed this action against Defendants, challenging, *inter alia*, the constitutionality of Defendants' policies, practices and regulations regarding the detention and release of unaccompanied minors taken into the custody of the Immigration and Naturalization Service (INS) in the Western Region; and

WHEREAS, the district court has certified this case as a class action on behalf of all minors apprehended by the INS in the Western Region of the United States; and

WHEREAS, this litigation has been pending for nine (9) years, all parties have conducted extensive discovery, and the United States Supreme Court has upheld the constitutionality of the challenged INS regulations on their face and has remanded for further proceedings consistent with its opinion; and

WHEREAS, on November 30, 1987, the parties reached a settlement agreement requiring that minors in INS custody in the Western Region be housed in facilities meeting certain standards, including state standards for the housing and care of dependent children, and Plaintiffs' motion to enforce compliance with that settlement is currently pending before the court; and

WHEREAS, a trial in this case would be complex, lengthy and costly to all parties concerned, and the decision of the district court would be subject to appeal by the losing parties with the final outcome uncertain; and

WHEREAS, the parties believe that settlement of this action is in their best interests and best serves the interests of justice by avoiding a complex, lengthy and costly trial, and subsequent appeals which could last several more years;

NOW, THEREFORE, Plaintiffs and Defendants enter into this Stipulated Settlement Agreement
(the Agreement), stipulate that it constitutes a full and complete resolution of the issues raised in this action, and agree to the following:

I  DEFINITIONS

As used throughout this Agreement the following definitions shall apply:

1. The term "party" or "parties" shall apply to Defendants and Plaintiffs. As the term applies to Defendants, it shall include their agents, employees, contractors and/or successors in office. As the term applies to Plaintiffs, it shall include all class members.

2. The term "Plaintiff" or "Plaintiffs" shall apply to the named plaintiffs and all class members.

3. The term "class member" or "class members" shall apply to the persons defined in Paragraph 10 below.

4. The term "minor" shall apply to any person under the age of eighteen (18) years who is detained in the legal custody of the INS. This Agreement shall cease to apply to any person who has reached the age of eighteen years. The term "minor" shall not include an emancipated minor or an individual who has been incarcerated due to a conviction for a criminal offense as an adult. The INS shall treat all persons who are under the age of eighteen but not included within the definition of "minor" as adults for all purposes, including release on bond or recognizance.

5. The term "emancipated minor" shall refer to any minor who has been determined to be emancipated in an appropriate state judicial proceeding.

6. The term "licensed program" shall refer to any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors. A licensed program must also meet those standards for licensed programs set forth in
Exhibit 1 attached hereto. All homes and facilities operated by licensed programs, including facilities for special needs minors, shall be non-secure as required under state law; provided, however, that a facility for special needs minors may maintain that level of security permitted under state law which is necessary for the protection of a minor or others in appropriate circumstances, e.g., cases in which a minor has drug or alcohol problems or is mentally ill. The INS shall make reasonable efforts to provide licensed placements in those geographical areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.

7. The term "special needs minor" shall refer to a minor whose mental and/or physical condition requires special services and treatment by staff. A minor may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness or retardation, or a physical condition or chronic illness that requires special services or treatment. A minor who has suffered serious neglect or abuse may be considered a minor with special needs if the minor requires special services or treatment as a result of the neglect or abuse. The INS shall assess minors to determine if they have special needs and, if so, shall place such minors, whenever possible, in licensed programs in which the INS places children without special needs, but which provide services and treatment for such special needs.

8. The term "medium security facility" shall refer to a facility that is operated by a program, agency or organization licensed by an appropriate State agency and that meets those standards set forth in Exhibit 1 attached hereto. A medium security facility is designed for minors who require close supervision but do not need placement in juvenile correctional facilities. It provides 24-hour awake supervision, custody, care, and treatment. It maintains stricter security measures, such as intensive staff supervision, than a facility operated by a licensed program in order to control problem behavior and to prevent escape. Such a facility may have a secure perimeter but shall not be equipped internally with
major restraining construction or procedures typically associated with correctional facilities.

II SCOPE OF SETTLEMENT, EFFECTIVE DATE, AND PUBLICATION

9. This Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS and shall supersede all previous INS policies that are inconsistent with the terms of this Agreement. This Agreement shall become effective upon final court approval, except that those terms of this Agreement regarding placement pursuant to Paragraph 19 shall not become effective until all contracts under the Program Announcement referenced in Paragraph 20 below are negotiated and implemented. The INS shall make its best efforts to execute these contracts within 120 days after the court's final approval of this Agreement. However, the INS will make reasonable efforts to comply with Paragraph 19 prior to full implementation of all such contracts. Once all contracts under the Program Announcement referenced in Paragraph 20 have been implemented, this Agreement shall supersede the agreement entitled Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention (hereinafter "MOU"), entered into by and between the Plaintiffs and Defendants and filed with the United States District Court for the Central District of California on November 30, 1987, and the MOU shall thereafter be null and void. However, Plaintiffs shall not institute any legal action for enforcement of the MOU for a six (6) month period commencing with the final district court approval of this Agreement, except that Plaintiffs may institute enforcement proceedings if the Defendants have engaged in serious violations of the MOU that have caused irreparable harm to a class member for which injunctive relief would be appropriate. Within 120 days of the final district court approval of this Agreement, the INS shall initiate action to publish the relevant and substantive terms of this Agreement as a Service regulation. The final regulations shall not be inconsistent with the terms of this Agreement. Within 30 days of final court approval of this
Agreement, the INS shall distribute to all INS field offices and sub-offices instructions regarding the processing, treatment, and placement of juveniles. Those instructions shall include, but may not be limited to, the provisions summarizing the terms of this Agreement, attached hereto as Exhibit 2.

III CLASS DEFINITION

10. The certified class in this action shall be defined as follows: "All minors who are detained in the legal custody of the INS."

IV STATEMENTS OF GENERAL APPLICABILITY

11. The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors. The INS shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others. Nothing herein shall require the INS to release a minor to any person or agency whom the INS has reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.

V PROCEDURES AND TEMPORARY PLACEMENT FOLLOWING ARREST

12.A. Whenever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights, including the right to a bond redetermination hearing if applicable. Following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to
protect minors from others, and contact with family members who were arrested with the minor. The 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. If there is no one to whom the INS may release the minor pursuant to Paragraph 14, and no appropriate licensed program is immediately available for placement pursuant to Paragraph 19, the minor may be placed in an INS detention facility, or other INS-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. However, minors shall be separated from delinquent offenders. 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. The INS will transfer a minor from a placement under this paragraph to a placement under Paragraph 19, (i) within three (3) days, if the minor was apprehended in an INS district in which a licensed program is located and has space available; or (ii) within five (5) days in all other cases; except:

1. as otherwise provided under Paragraph 13 or Paragraph 21;
2. as otherwise required by any court decree or court-approved settlement;
3. in the event of an emergency or influx of minors into the United States, in which case the INS shall place all minors pursuant to Paragraph 19 as expeditiously as possible; or
4. where individuals must be transported from remote areas for processing or speak unusual languages such that the INS must locate interpreters in order to complete processing, in which case the INS shall place all such minors pursuant to Paragraph 19 within five (5) business days.

B. For purposes of this paragraph, the term "emergency" shall be defined as any act or event that prevents the placement of minors pursuant to Paragraph 19 within the time frame provided. Such
emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil
disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors). The
term "influx of minors into the United States" shall be defined as those circumstances where the INS
has, at any given time, more than 130 minors eligible for placement in a licensed program under
Paragraph 19, including those who have been so placed or are awaiting such placement.

C. In preparation for an "emergency" or "influx," as described in Subparagraph B, the INS shall
have a written plan that describes the reasonable efforts that it will take to place all minors as
expeditiously as possible. This plan shall include the identification of 80 beds that are potentially
available for INS placements and that are licensed by an appropriate State agency to provide residential,
group, or foster care services for dependent children. The plan, without identification of the additional
beds available, is attached as Exhibit 3. The INS shall not be obligated to fund these additional beds on
an ongoing basis. The INS shall update this listing of additional beds on a quarterly basis and provide
Plaintiffs' counsel with a copy of this listing.

13. If a reasonable person would conclude that an alien detained by the INS is an adult despite
his claims to be a minor, the INS shall treat the person as an adult for all purposes, including
confinement and release on bond or recognizance. The INS may require the alien to submit to a
medical or dental examination conducted by a medical professional or to submit to other appropriate
procedures to verify his or her age. If the INS subsequently determines that such an individual is a
minor, he or she will be treated as a minor in accordance with this Agreement for all purposes.

VI GENERAL POLICY FAVORING RELEASE

14. Where the INS determines that the detention of the minor is not required either to secure his
or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that
of others, the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to:

A. a parent;
B. a legal guardian;
C. an adult relative (brother, sister, aunt, uncle, or grandparent);
D. an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion, the affiant's paternity or guardianship;
E. a licensed program willing to accept legal custody; or
F. an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

15. Before a minor is released from INS custody pursuant to Paragraph 14 above, the custodian must execute an Affidavit of Support (Form I-134) and an agreement to:

A. provide for the minor's physical, mental, and financial well-being;
B. ensure the minor's presence at all future proceedings before the INS and the immigration court;
C. notify the INS of any change of address within five (5) days following a move;
D. in the case of custodians other than parents or legal guardians, not transfer custody of the minor to another party without the prior written permission of the District Director;
E. notify the INS at least five days prior to the custodian’s departing the United States of such departure, whether the departure is voluntary or pursuant to a grant of voluntary departure or order of deportation; and

F. if dependency proceedings involving the minor are initiated, notify the INS of the initiation of such proceedings and the dependency court of any immigration proceedings pending against the minor.

In the event of an emergency, a custodian may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 72 hours. For purposes of this paragraph, examples of an "emergency" shall include the serious illness of the custodian, destruction of the home, etc. In all cases where the custodian, in writing, seeks written permission for a transfer, the District Director shall promptly respond to the request.

16. The INS may terminate the custody arrangements and assume legal custody of any minor whose custodian fails to comply with the agreement required under Paragraph 15. The INS, however, shall not terminate the custody arrangements for minor violations of that part of the custodial agreement outlined at Subparagraph 15.C above.

17. A positive suitability assessment may be required prior to release to any individual or program pursuant to Paragraph 14. A suitability assessment may include such components as an investigation of the living conditions in which the minor would be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit. Any such assessment should also take into consideration the wishes and concerns of the minor.
18. Upon taking a minor into custody, the INS, or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor pursuant to Paragraph 14 above. Such efforts at family reunification shall continue so long as the minor is in INS custody.

VII INS CUSTODY

19. In any case in which the INS does not release a minor pursuant to Paragraph 14, the minor shall remain in INS legal custody. Except as provided in Paragraphs 12 or 21, such minor shall be placed temporarily in a licensed program until such time as release can be effected in accordance with Paragraph 14 above or until the minor's immigration proceedings are concluded, whichever occurs earlier. All minors placed in such a licensed program remain in the legal custody of the INS and may only be transferred or released under the authority of the INS; provided, however, that in the event of an emergency a licensed program may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 8 hours.

20. Within 60 days of final court approval of this Agreement, the INS shall authorize the United States Department of Justice Community Relations Service to publish in the Commerce Business Daily and/or the Federal Register a Program Announcement to solicit proposals for the care of 100 minors in licensed programs.

21. A minor may be held in or transferred to a suitable State or county juvenile detention facility or a secure INS detention facility, or INS-contracted facility, having separate accommodations for minors whenever the District Director or Chief Patrol Agent determines that the minor:

A. 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; provided, however, that this provision shall not apply to any minor
whose offense(s) fall(s) within either of the following categories:

i. Isolated offenses that (1) were not within a pattern or practice of criminal activity
and (2) did not involve violence against a person or the use or carrying of a weapon
(Examples: breaking and entering, vandalism, DUI, etc. This list is not
exhaustive.);

ii. Petty offenses, which are not considered grounds for stricter means of detention in
any case (Examples: shoplifting, joy riding, disturbing the peace, etc. This list is
not exhaustive.);

As used in this paragraph, "chargeable" means that the INS has probable cause to
believe that the individual has committed a specified offense;

B. has committed, or has made credible threats to commit, a violent or malicious act
(whether directed at himself or others) while in INS legal custody or while in the
presence of an INS officer;

C. has engaged, while in a licensed program, in conduct that has proven to be unacceptably
disruptive of the normal functioning of the licensed program in which he or she has been
placed and removal is necessary to ensure the welfare of the minor or others, as
determined by the staff of the licensed program (Examples: drug or alcohol abuse,
stealing, fighting, intimidation of others, etc. This list is not exhaustive.);

D. is an escape-risk; or

E. must be held in a secure facility for his or her own safety, such as when the INS has
reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.

22. The term "escape-risk" means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to, whether:

A. the minor is currently under a final order of deportation or exclusion;

B. the minor's immigration history includes: a prior breach of a bond; a failure to appear before the INS or the immigration court; evidence that the minor is indebted to organized smugglers for his transport; or a voluntary departure or a previous removal from the United States pursuant to a final order of deportation or exclusion;

C. the minor has previously absconded or attempted to abscond from INS custody.

23. The INS will not place a minor in a secure facility pursuant to Paragraph 21 if there are less restrictive alternatives that are available and appropriate in the circumstances, such as transfer to (a) a medium security facility which would provide intensive staff supervision and counseling services or (b) another licensed program. All determinations to place a minor in a secure facility will be reviewed and approved by the regional juvenile coordinator.

24. A. A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.

B. Any minor who disagrees with the INS's determination to place that minor in a particular type of facility, or who asserts that the licensed program in which he or she has been placed does not comply with the standards set forth in Exhibit 1 attached hereto, may seek judicial review in any
United States District Court with jurisdiction and venue over the matter to challenge that placement determination or to allege noncompliance with the standards set forth in Exhibit 1. In such an action, the United States District Court shall be limited to entering an order solely affecting the individual claims of the minor bringing the action.

C. In order to permit judicial review of Defendants’ placement decisions as provided in this Agreement, Defendants shall provide minors not placed in licensed programs with a notice of the reasons for housing the minor in a detention or medium security facility. With respect to placement decisions reviewed under this paragraph, the standard of review for the INS’s exercise of its discretion shall be the abuse of discretion standard of review. With respect to all other matters for which this paragraph provides judicial review, the standard of review shall be de novo review.

D. The INS shall promptly provide each minor not released with (a) INS Form 1-770, (b) an explanation of the right of judicial review as set out in Exhibit 6, and (c) the list of free legal services available in the district pursuant to INS regulations (unless previously given to the minor).

E. Exhausting the procedures established in Paragraph 37 of this Agreement shall not be a precondition to the bringing of an action under this paragraph in any United District Court. Prior to initiating any such action, however, the minor and/or the minors’ attorney shall confer telephonically or in person with the United States Attorney’s office in the judicial district where the action is to be filed, in an effort to informally resolve the minor’s complaints without the need of federal court intervention.

VIII TRANSPORTATION OF MINORS

25. Unaccompanied minors arrested or taken into custody by the INS should not be transported by the INS in vehicles with detained adults except:

A. when being transported from the place of arrest or apprehension to an INS office, or
B. where separate transportation would be otherwise impractical.

When transported together pursuant to Clause B, minors shall be separated from adults. The INS shall take necessary precautions for the protection of the well-being of such minors when transported with adults.

26. The INS shall assist without undue delay in making transportation arrangements to the INS office nearest the location of the person or facility to whom a minor is to be released pursuant to Paragraph 14. The INS may, in its discretion, provide transportation to minors.

IX TRANSFER OF MINORS

27. Whenever a minor is transferred from one placement to another, the minor shall be transferred with all of his or her possessions and legal papers; provided, however, that if the minor's possessions exceed the amount permitted normally by the carrier in use, the possessions will be shipped to the minor in a timely manner. **No minor who is represented by counsel shall be transferred without advance notice to such counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or where counsel has waived such notice, in which cases notice shall be provided to counsel within 24 hours following transfer.**

X MONITORING AND REPORTS

28A. An INS Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation shall monitor compliance with the terms of this Agreement and shall maintain an up-to-date record of all minors who are placed in proceedings and remain in INS custody for longer than 72 hours. Statistical information on such minors shall be collected weekly from all INS district offices and Border Patrol stations. Statistical information will include at least the following: (1)
biographical information such as each minor's name, date of birth, and country of birth, (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. The INS, through the Juvenile Coordinator, shall also collect information regarding the reasons for every placement of a minor in a detention facility or medium security facility.

B. Should Plaintiffs' counsel have reasonable cause to believe that a minor in INS legal custody should have been released pursuant to Paragraph 14, Plaintiffs' counsel may contact the Juvenile Coordinator to request that the Coordinator investigate the case and inform Plaintiffs' counsel of the reasons why the minor has not been released.

29. On a semi-annual basis, until two years after the court determines, pursuant to Paragraph 31, that the INS has achieved substantial compliance with the terms of this Agreement, the INS shall provide to Plaintiffs' counsel the information collected pursuant to Paragraph 28, as permitted by law, and each INS policy or instruction issued to INS employees regarding the implementation of this Agreement. In addition, Plaintiffs' counsel shall have the opportunity to submit questions, on a semi-annual basis, to the Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation with regard to the implementation of this Agreement and the information provided to Plaintiffs' counsel during the preceding six-month period pursuant to Paragraph 28. Plaintiffs' counsel shall present such questions either orally or in writing, at the option of the Juvenile Coordinator. The Juvenile Coordinator shall furnish responses, either orally or in writing at the option of Plaintiffs' counsel, within 30 days of receipt.

30. On an annual basis, commencing one year after final court approval of this Agreement, the INS Juvenile Coordinator shall review, assess, and report to the court regarding compliance with the
terms of this Agreement. The Coordinator shall file these reports with the court and provide copies to the parties, including the final report referenced in Paragraph 35, so that they can submit comments on the report to the court. In each report, the Coordinator shall state to the court whether or not the INS is in substantial compliance with the terms of this Agreement, and, if the INS is not in substantial compliance, explain the reasons for the lack of compliance. The Coordinator shall continue to report on an annual basis until three years after the court determines that the INS has achieved substantial compliance with the terms of this Agreement.

31. One year after the court’s approval of this Agreement, the Defendants may ask the court to determine whether the INS has achieved substantial compliance with the terms of this Agreement.

XI ATTORNEY-CLIENT VISITS

32.A. Plaintiffs’ counsel are entitled to attorney-client visits with class members even though they may not have the names of class members who are housed at a particular location. All visits shall occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs’ counsel’s arrival at a facility for attorney-client visits, the facility staff shall provide Plaintiffs’ counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs’ counsel, Plaintiffs’ counsel must file a notice of appearance with the INS prior to any attorney-client meeting. Plaintiffs’ counsel may limit any such notice of appearance to representation of the minor in connection with this Agreement. Plaintiffs’ counsel must submit a copy of the notice of appearance by hand or by mail to the local INS juvenile coordinator and a copy by hand to the staff of the facility.

B. Every six months, Plaintiffs’ counsel shall provide the INS with a list of those attorneys who
may make such attorney-client visits, as Plaintiffs’ counsel, to minors during the following six month period. Attorney-client visits may also be conducted by any staff attorney employed by the Center for Human Rights & Constitutional Law in Los Angeles, California or the National Center for Youth Law in San Francisco, California, provided that such attorney presents credentials establishing his or her employment prior to any visit.

C. Agreements for the placement of minors in non-INS facilities shall permit attorney-client visits, including by class counsel in this case.

D. Nothing in Paragraph 32 shall affect a minor’s right to refuse to meet with Plaintiffs’ counsel. Further, the minor’s parent or legal guardian may deny Plaintiffs’ counsel permission to meet with the minor.

XII FACILITY VISITS

33. In addition to the attorney-client visits permitted pursuant to Paragraph 32, Plaintiffs’ counsel may request access to any licensed program’s facility in which a minor has been placed pursuant to Paragraph 19 or to any medium security facility or detention facility in which a minor has been placed pursuant to Paragraphs 21 or 23. Plaintiffs’ counsel shall submit a request to visit a facility under this paragraph to the INS district juvenile coordinator who will provide reasonable assistance to Plaintiffs’ counsel by conveying the request to the facility’s staff and coordinating the visit. The rules and procedures to be followed in connection with any visit approved by a facility under this paragraph are set forth in Exhibit 4 attached, except as may be otherwise agreed by Plaintiffs’ counsel and the facility’s staff. In all visits to any facility pursuant to this Agreement, Plaintiffs' counsel and their associated experts shall treat minors and staff with courtesy and dignity and shall not disrupt the normal functioning of the facility.
XIII TRAINING

34. Within 120 days of final court approval of this Agreement, the INS shall provide appropriate guidance and training for designated INS employees regarding the terms of this Agreement. The INS shall develop written and/or audio or video materials for such training. Copies of such written and/or audio or video training materials shall be made available to Plaintiffs' counsel when such training materials are sent to the field, or to the extent practicable, prior to that time.

XIV DISMISSAL

35. After the court has determined that the INS is in substantial compliance with this Agreement and the Coordinator has filed a final report, the court, without further notice, shall dismiss this action. Until such dismissal, the court shall retain jurisdiction over this action.

XV RESERVATION OF RIGHTS

36. Nothing in this Agreement shall limit the rights, if any, of individual class members to preserve issues for judicial review in the appeal of an individual case or for class members to exercise any independent rights they may otherwise have.

XVI NOTICE AND DISPUTE RESOLUTION

37. This paragraph provides for the enforcement, in this District Court, of the provisions of this Agreement except for claims brought under Paragraph 24. The parties shall meet telephonically or in person to discuss a complete or partial repudiation of this Agreement or any alleged non-compliance with the terms of the Agreement, prior to bringing any individual or class action to enforce this Agreement. Notice of a claim that a party has violated the terms of this Agreement shall be served on plaintiffs addressed to:

/ / /
XVII PUBLICITY

38. Plaintiffs and Defendants shall hold a joint press conference to announce this Agreement. The INS shall send copies of this Agreement to social service and voluntary agencies agreed upon by the parties, as set forth in Exhibit 5 attached. The parties shall pursue such other public dissemination of information regarding this Agreement as the parties shall agree.

XVIII ATTORNEYS’ FEES AND COSTS

39. Within 60 days of final court approval of this Agreement, Defendants shall pay to Plaintiffs the total sum of $374,110.09, in full settlement of all attorneys' fees and costs in this case.
XIX TERMINATION

40. All terms of this Agreement shall terminate the earlier of five years after the date of final court approval of this Agreement or three years after the court determines that the INS is in substantial compliance with this Agreement, except that the INS shall continue to house the general population of minors in INS custody in facilities that are licensed for the care of dependent minors.

XX REPRESENTATIONS AND WARRANTY

41. Counsel for the respective parties, on behalf of themselves and their clients, represent that they know of nothing in this Agreement that exceeds the legal authority of the parties or is in violation of any law. Defendants' counsel represent and warranty that they are fully authorized and empowered to enter into this Agreement on behalf of the Attorney General, the United States Department of Justice, and the Immigration and Naturalization Service, and acknowledge that Plaintiffs enter into this Agreement in reliance on such representation. Plaintiffs' counsel represent and warranty that they are fully authorized and empowered to enter into this Agreement on behalf of the Plaintiffs, and acknowledge that Defendants enter into this Agreement in reliance on such representation. The undersigned, by their signatures on behalf of the Plaintiffs and Defendants, warrant that upon execution of this Agreement in their representative capacities, their principals, agents, and successors of such principals and agents shall be fully and unequivocally bound hereunder to the full extent authorized by law.

For Defendants:  Signed: [Signature]  Title: Commissioner, INS

Dated: 9/16/94

For Plaintiffs:  Signed: per next page  Title:  

Dated:  

22
The foregoing stipulated settlement is approved as to form and content:

CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
Carlos Holguin
Peter Schey

NATIONAL CENTER FOR YOUTH LAW
Alice Bussiere
James Morales

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
Mark Rosenbaum
Sylvia Argueta

STEICH LANG
Susan G. Boswell
Jeffery Willis

Date: 11/13/97
By

Date: 11/13/96
By
EXHIBIT 1

MINIMUM STANDARDS FOR LICENSED PROGRAMS

A. Licensed programs shall comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes and shall provide or arrange for the following services for each minor in its care:

1. Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items.

2. Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the minor was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Center for Disease Control; administration of prescribed medication and special diets; appropriate mental health interventions when necessary.

3. An individualized needs assessment which shall include: (a) various initial intake forms; (b) essential data relating to the identification and history of the minor and family; (c) identification of the minors' special needs including any specific problem(s) which appear to require immediate intervention; (d) an educational assessment and plan; (e) an assessment of family relationships and interaction with adults, peers and authority figures; (f) a statement of religious preference and practice; (g) an assessment of the minor's personal goals, strengths and weaknesses; and (h) identifying information regarding immediate family members, other relatives, godparents or friends who may be
residing in the United States and may be able to assist in family reunification.

4. Educational services appropriate to the minor's level of development, and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program shall provide minors with appropriate reading materials in languages other than English for use during the minor's leisure time.

5. 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.

6. At least one (1) individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing the minor's progress, establishing new short term objectives, and addressing both the developmental and crisis-related needs of each minor.

7. Group counseling sessions at least twice a week. This is usually an informal process and takes place with all the minors present. It is a time when new minors are given the opportunity to get acquainted with the staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak.

Daily program management
is discussed and decisions are made about recreational activities, etc. It is a time for staff and minors to discuss whatever is on their minds and to resolve problems.

8. Acculturation and adaptation services which include information regarding the development of social and interpersonal skills which contribute to those abilities necessary to live independently and responsibly.

9. Upon admission, a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations and the availability of legal assistance.

10. Whenever possible, access to religious services of the minor's choice.

11. Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. The staff shall respect the minor's privacy while reasonably preventing the unauthorized release of the minor.

12. A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house rules and regulations; and (e) receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

13. Family reunification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the minor.

14. Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to a deportation or
exclusion hearing before an immigration judge, the right to apply for political asylum or to request voluntary departure in lieu of deportation.

B. Service delivery is to be accomplished in a manner which is sensitive to the age, culture, native language and the complex needs of each minor.

C. Program rules and discipline standards shall be formulated with consideration for the range of ages and maturity in the program and shall be culturally sensitive to the needs of alien minors. Minors shall not be subjected to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping. Any sanctions employed shall not: (1) adversely affect either a minor's health, or physical or psychological well-being; or (2) deny minors regular meals, sufficient sleep, exercise, medical care, correspondence privileges, or legal assistance.

D. A comprehensive and realistic individual plan for the care of each minor must be developed in accordance with the minor's needs as determined by the individualized need assessment. Individual plans shall be implemented and closely coordinated through an operative case management system.

E. Programs shall develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which preserves the confidentiality of client information and protects the records from unauthorized use or disclosure.

F. Programs shall maintain adequate records and make regular reports as required by the INS that permit the INS to monitor and enforce this order and other requirements and standards as the INS may determine are in the best interests of the minors.
These instructions are to advise Service officers of INS policy regarding the way in which minors in INS custody are processed, housed and released. These instructions are applicable nationwide and supersede all prior inconsistent instructions regarding minors.

(a) Minors. A minor is a person under the age of eighteen years. However, individuals who have been “emancipated” by a state court or convicted and incarcerated for a criminal offense as an adult are not considered minors. Such individuals must be treated as adults for all purposes, including confinement and release on bond.

Similarly, if a reasonable person would conclude that an individual is an adult despite his claims to be a minor, the INS shall treat such person as an adult for all purposes, including confinement and release on bond or recognizance. The INS may require such an individual to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If the INS subsequently determines that such an individual is a minor, he or she will be treated as a minor for all purposes.

(b) General policy. The INS treats, and will continue to treat minors with dignity, respect and special concern for their particular vulnerability. INS policy is to place each detained minor in the least restrictive setting appropriate to the minor’s age and special needs, provided that such setting is consistent with the need to ensure the minor’s timely appearance and to protect the minor’s well-being and that of others. INS officers are not required to release a minor to any person or agency whom they have reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.

(c) Processing. The INS will expeditiously process minors and will provide a Form I-770 notice of rights, including the right to a bond redetermination hearing, if applicable.

Following arrest, the INS will hold minors in a facility that is safe and sanitary and that is consistent with the INS’s concern for the particular vulnerability of minors. Such facilities will have access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor. The INS will separate unaccompanied minors from unrelated adults whenever possible. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours.

If the juvenile cannot be immediately released, and no licensed program (described below) is available to care for him, he should be placed in an INS or INS-contract facility that has separate accommodations for minors, or in a State or county juvenile detention facility that separates minors in
INS custody from delinquent offenders. The INS will make every effort to ensure the safety and well-being of juveniles placed in these facilities.

(d) Release. The INS will release minors from its custody without unnecessary delay, unless detention of a juvenile is required to secure her timely appearance or to ensure the minor's safety or that of others. Minors shall be released, in the following order of preference, to:

(i) a parent;

(ii) a legal guardian;

(iii) an adult relative (brother, sister, aunt, uncle, or grandparent);

(iv) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer, or (ii) such other documentation that establishes to the satisfaction of the INS, in its discretion, that the individual designating the individual or entity as the minor’s custodian is in fact the minor’s parent or guardian;

(v) a state-licensed juvenile shelter, group home, or foster home willing to accept legal custody; or

(vi) an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

(e) Certification of custodian. Before a minor is released, the custodian must execute an Affidavit of Support (Form I-134) and an agreement to:

(i) provide for the minor's physical, mental, and financial well-being;

(ii) ensure the minor's presence at all future proceedings before the INS and the immigration court;

(iii) notify the INS of any change of address within five (5) days following a move;

(iv) if the custodian is not a parent or legal guardian, not transfer custody of the minor to another party without the prior written permission of the District Director, except in the event of an emergency;

(v) notify the INS at least five days prior to the custodian's departing the United States of such departure, whether the departure is voluntary or pursuant to a grant of voluntary departure or order of deportation; and
(vi) if dependency proceedings involving the minor are initiated, notify the INS of the initiation of such proceedings and the dependency court of any deportation proceedings pending against the minor.

In an emergency, a custodian may transfer temporary physical custody of a minor prior to securing permission from the INS, but must notify the INS of the transfer as soon as is practicable, and in all cases within 72 hours. Examples of an "emergency" include the serious illness of the custodian, destruction of the home, etc. In all cases where the custodian seeks written permission for a transfer, the District Director shall promptly respond to the request.

The INS may terminate the custody arrangements and assume legal custody of any minor whose custodian fails to comply with the agreement. However, custody arrangements will not be terminated for minor violations of the custodian's obligation to notify the INS of any change of address within five days following a move.

(f) Suitability assessment. An INS officer may require a positive suitability assessment prior to releasing a minor to any individual or program. A suitability assessment may include an investigation of the living conditions in which the minor is to be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit. The assessment will also take into consideration the wishes and concerns of the minor.

(g) Family reunification. Upon taking a minor into custody, the INS, or the licensed program in which the minor is placed, will promptly attempt to reunite the minor with his or her family to permit the release of the minor under Paragraph (d) above. Such efforts at family reunification will continue as long as the minor is in INS or licensed program custody and will be recorded by the INS or the licensed program in which the minor is placed.

(h) Placement in licensed programs. A "licensed program" is any program, agency or organization licensed by an appropriate state agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors. Exhibit I of the Flores v. Reno Settlement Agreement describes the standards required of licensed programs. Juveniles who remain in INS custody must be placed in a licensed program within three days if the minor was apprehended in an INS district in which a licensed program is located and has space available, or within five days in all other cases, except when:

(i) the minor is an escape risk or delinquent, as defined in Paragraph (i) below;

(ii) a court decree or court-approved settlement requires otherwise;

(iii) an emergency or influx of minors into the United States prevents compliance, in which case all minors should be placed in licensed programs as expeditiously as possible; or

(iv) the minor must be transported from remote areas for processing or speaks an unusual
language such that a special interpreter is required to process the minor, in which case the minor must be placed in a licensed program within five business days.

(i) Secure and supervised detention. A minor may be held in or transferred to a State or county juvenile detention facility or in a secure INS facility or INS-contracted facility having separate accommodations for minors, whenever the District Director or Chief Patrol Agent determines that the minor —

(i) 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, unless the minor’s offense is

(a) an isolated offense not within a pattern of criminal activity which did not involve violence against a person or the use or carrying of a weapon (Examples: breaking and entering, vandalism, DUI, etc.); or

(b) a petty offense, which is not considered grounds for stricter means of detention in any case (Examples: shoplifting, joy riding, disturbing the peace, etc.);

(ii) has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;

(iii) has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc.);

(iv) is an escape-risk; or

(v) must be held in a secure facility for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.

“Chargeable” means that the INS has probable cause to believe that the individual has committed a specified offense.

The term "escape-risk" means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to, whether:

(a) the minor is currently under a final order of deportation or exclusion;
(b) the minor's immigration history includes: a prior breach of a bond; a failure to appear before the INS or the immigration court; evidence that the minor is indebted to organized smugglers for his transport; or a voluntary departure or a previous removal from the United States pursuant to a final order of deportation or exclusion;

(c) the minor has previously absconded or attempted to abscond from INS custody.

The INS will not place a minor in a State or county juvenile detention facility, secure INS detention facility, or secure INS-contracted facility if less restrictive alternatives are available and appropriate in the circumstances, such as transfer to a medium security facility that provides intensive staff supervision and counseling services or transfer to another licensed program. All determinations to place a minor in a secure facility will be reviewed and approved by the regional Juvenile Coordinator.

(j) Notice of right to bond redetermination and judicial review of placement. A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing. A juvenile who is not released or placed in a licensed placement shall be provided (1) a written explanation of the right of judicial review as set out in Exhibit 6 of the Flores v. Reno Settlement Agreement, and (2) the list of free legal services providers compiled pursuant to INS regulations (unless previously given to the minor).

(k) Transportation and transfer. Unaccompanied minors should not be transported in vehicles with detained adults except when being transported from the place of arrest or apprehension to an INS office or where separate transportation would be otherwise impractical, in which case minors shall be separated from adults. INS officers shall take all necessary precautions for the protection of minors during transportation with adults.

Whenever a minor is to be released, the INS will assist him or her in making transportation arrangements to the INS office nearest the location of the person or facility to whom a minor is to be released. The INS may, in its discretion, provide transportation to such minors.

Whenever a minor is transferred from one placement to another, she shall be transferred with all of her possessions and legal papers; provided, however, that if the minor's possessions exceed the amount permitted normally by the carrier in use, the possessions must be shipped to the minor in a timely manner. No minor who is represented by counsel should be transferred without advance notice to counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or where counsel has waived notice, in which cases notice must be provided to counsel within 24 hours following transfer.

(l) Periodic reporting. Statistical information on minors placed in proceedings who remain in INS custody for longer than 72 hours must be reported to the Juvenile Coordinator by all INS district offices and Border Patrol stations. Information will include: (a) biographical information, including the minor's name, date of birth, and country of birth, (b) date placed in INS custody, (c) each date placed, removed or released, (d) to whom and where placed, transferred, removed or released, (e) immigration
status, and (f) hearing dates. INS officers should also inform the Juvenile Coordinator of the reasons for placing a minor in a medium-security facility or detention facility as described in paragraph (i).

**(m) Attorney-client visits by Plaintiffs’ counsel.** The INS will permit the lawyers for the *Flores v. Reno* plaintiff class to visit minors, even though they may not have the names of minors who are housed at a particular location. A list of Plaintiffs’ counsel entitled to make attorney-client visits with minors is available from the district Juvenile Coordinator. Attorney-client visits may also be conducted by any staff attorney employed by the Center for Human Rights & Constitutional Law of Los Angeles, California, or the National Center for Youth Law of San Francisco, California, provided that such attorney presents credentials establishing his or her employment prior to any visit.

Visits must occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs’ counsel’s arrival at a facility for attorney-client visits, the facility staff must provide Plaintiffs’ counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs’ counsel, Plaintiffs’ counsel must file a notice of appearance with the INS prior to any attorney-client meeting. Plaintiffs’ counsel may limit the notice of appearance to representation of the minor in connection with his placement or treatment during INS custody. Plaintiffs’ counsel must submit a copy of the notice of appearance by hand or by mail to the local INS juvenile coordinator and a copy by hand to the staff of the facility.

A minor may refuse to meet with Plaintiffs’ counsel. Further, the minor’s parent or legal guardian may deny Plaintiffs’ counsel permission to meet with the minor.

**(n) Visits to licensed facilities.** In addition to the attorney-client visits, Plaintiffs’ counsel may request access to a licensed program’s facility (described in paragraph (h)) or to a medium-security facility or detention facility (described in paragraph (i)) in which a minor has been placed. The district juvenile coordinator will convey the request to the facility’s staff and coordinate the visit. The rules and procedures to be followed in connection with such visits are set out in Exhibit 4 of the *Flores v. Reno* Settlement Agreement, unless Plaintiffs’ counsel and the facility’s staff agree otherwise. In all visits to any facility, Plaintiffs’ counsel and their associated experts must treat minors and staff with courtesy and dignity and must not disrupt the normal functioning of the facility.
EXHIBIT 3

CONTINGENCY PLAN

In the event of an emergency or influx that prevents the prompt placement of minors in licensed programs with which the Community Relations Service has contracted, INS policy is to make all reasonable efforts to place minors in programs licensed by an appropriate state agency as expeditiously as possible. An "emergency" is an act or event, such as a natural disaster (e.g. earthquake, fire, hurricane), facility fire, civil disturbance, or medical emergency (e.g. a chicken pox epidemic among a group of minors) that prevents the prompt placement of minors in licensed facilities. An "influx" is defined as any situation in which there are more than 130 minors in the custody of the INS who are eligible for placement in licensed programs.

1. The Juvenile Coordinator will establish and maintain an Emergency Placement List of at least 80 beds at programs licensed by an appropriate state agency that are potentially available to accept emergency placements. These 80 placements would supplement the 130 placements that the INS normally has available, and whenever possible, would meet all standards applicable to juvenile placements the INS normally uses. The Juvenile Coordinator may consult with child welfare specialists, group home operators, and others in developing the List. The Emergency Placement List will include the facility name; the number of beds potentially available at the facility; the name and telephone number of contact persons; the name and telephone number of contact persons for nights, holidays, and weekends if different; any restrictions on minors accepted (e.g. age); and any special services that are available.

2. The Juvenile Coordinator will maintain a list of minors affected by the emergency or influx, including (1) the minor's name, (2) date and country of birth, (3) date placed in INS custody, and (4)
place and date of current placement.

3. Within one business day of the emergency or influx the Juvenile Coordinator or his or her
designee will contact the programs on the Emergency Placement List to determine available
placements. As soon as available placements are identified, the Juvenile Coordinator will advise
appropriate INS staff of their availability. To the extent practicable, the INS will attempt to locate
emergency placements in geographic areas where culturally and linguistically appropriate community
services are available.

4. In the event that the number of minors needing emergency placement exceeds the available
appropriate placements on the Emergency Placement List, the Juvenile Coordinator will work with the
Community Relations Service to locate additional placements through licensed programs, county social
services departments, and foster family agencies.

5. Each year the INS will reevaluate the number of regular placements needed for detained
minors to determine whether the number of regular placements should be adjusted to accommodate an
increased or decreased number of minors eligible for placement in licensed programs. However, any
decision to increase the number of placements available shall be subject to the availability of INS
resources. The Juvenile Coordinator shall promptly provide Plaintiffs’ counsel with any reevaluation
made by INS pursuant to this paragraph.

6. The Juvenile Coordinator shall provide to Plaintiffs’ counsel copies of the Emergency
Placement List within six months after the court’s final approval of the Settlement Agreement.
EXHIBIT 4

AGREEMENT CONCERNING FACILITY VISITS UNDER PARAGRAPH 33

The purpose of facility visits under paragraph 33 is to interview class members and staff and to observe conditions at the facility. Visits under paragraph 33 shall be conducted in accordance with the generally applicable policies and procedures of the facility to the extent that those policies and procedures are consistent with this Exhibit.

Visits authorized under paragraph 33 shall be scheduled no less than seven (7) business days in advance. The names, positions, credentials, and professional association (e.g., Center for Human Rights and Constitutional Law) of the visitors will be provided at that time.

All visits with class members shall take place during normal business hours.

No video recording equipment or cameras of any type shall be permitted. Audio recording equipment shall be limited to hand-held tape recorders.

The number of visitors will not exceed six (6) or, in the case of a family foster home, four (4), including interpreters, in any instance. Up to two (2) of the visitors may be non-attorney experts in juvenile justice and/or child welfare.

No visit will extend beyond three (3) hours per day in length. Visits shall minimize disruption to the routine that minors and staff follow.
EXHIBIT 5

LIST OF ORGANIZATIONS TO RECEIVE INFORMATION RE: SETTLEMENT AGREEMENT

Eric Cohen, Immig. Legal Resource Center, 1663 Mission St. Suite 602, San Francisco, CA 94103

Cecilia Munoz, Nat'l Council Of La Raza, 810 1st St. NE Suite 300, Washington, D.C. 20002

Susan Alva, Immig. & Citiz. Proj Director, Coalition For Humane Immig Rights of LA, 1521 Wilshire Blvd., Los Angeles, CA 90017

Angela Cornell, Albuquerque Border Cities Proj., Box 35895, Albuquerque, NM 87176-5895

Beth Persky, Executive Director, Centro De Asuntos Migratorios, 1446 Front Street, Suite 305, San Diego, CA 92101

Dan, Kesselbrenner, National Lawyers Guild, National Immigration Project, 14 Beacon St.,#503, Boston, MA 02108

Lynn Marcus, SWRRP, 64 E. Broadway, Tucson, AZ 85701-1720

Maria Jimenez, American Friends Service Cmte., ILEMP, 3522 Polk Street, Houston, TX 77003-4844

Wendy Young, U.S. Cath. Conf., 3211 4th St. NE, Washington, DC, 20017-1194

Miriam Hayward, International Institute Of The East Bay, 297 Lee Street, Oakland, CA 94610

Emily Goldfarb, Coalition For Immigrant & Refugee Rights, 995 Market Street, Suite 1108, San Francisco, CA 94103

Jose De La Paz, Director, California Immigrant Workers Association, 515 S. Shatto Place, Los Angeles, CA, 90020

Annie Wilson, LIRS, 390 Park Avenue South, First Asylum Concerns, New York, NY 10016

Stewart Kwoh, Asian Pacific American Legal Center, 1010 S. Flower St., Suite 302, Los Angeles, CA 90015

Warren Leiden, Executive Director, AILA, 1400 Eye St., N.W., Ste. 1200, Washington, DC, 20005


Reynaldo Guerrero, Executive Director, Center For Immigrant's Rights, 48 St. Marks Place, New York, NY 10003
Charles Wheeler, National Immigration Law Center, 1102 S. Crenshaw Blvd., Suite 101, Los Angeles, CA 90019


Stanley Mark, Asian American Legal Def.& Ed.Fund, 99 Hudson St, 12th Floor, New York, NY 10013

Sid Mohn, Executive Director, Travelers & Immigrants Aid, 327 S. LaSalle Street, Suite 1500, Chicago, IL, 60604

Bruce Goldstein, Attorney At Law, Farmworker Justice Fund, Inc., 2001 S Street, N.W., Suite 210, Washington, DC 20009

Ninfa Krueger, Director, BARCA, 1701 N. 8th Street, Suite B-28, McAllen, TX 78501

John Goldstein, Proyecto San Pablo, PO Box 4596, Yuma, AZ 85364

Valerie Hink, Attorney At Law, Tucson Ecumenical Legal Assistance, P.O. Box 3007, Tucson, AZ 85702

Pamela Mohr, Executive Director, Alliance For Children's Rights, 3708 Wilshire Blvd. Suite 720, Los Angeles, CA 90010

Pamela Day, Child Welfare League Of America, 440 1st St. N.W., Washington, DC 20001

Susan Lydon, Esq., Immigrant Legal Resource Center, 1663 Mission St. Ste 602, San Francisco, CA 94103

Patrick Maher, Juvenile Project, Centro De Asuntos Migratorios, 1446 Front Street, # 305, San Diego, CA 92101

Lorena Munoz, Staff Attorney, Legal Aid Foundation of LA-IRO, 1102 Crenshaw Blvd., Los Angeles, CA 90019

Christina Zawisza, Staff Attorney, Legal Services of Greater Miami, 225 N.E. 34th Street, Suite 300, Miami, FL 33137

Miriam Wright Edelman, Executive Director, Children's Defense Fund, 122 C Street N.W. 4th Floor, Washington, DC 20001

Rogelio Nunez, Executive Director, Proyecto Libertad, 113 N. First St., Harlingen, TX 78550
EXHIBIT 6
NOTICE OF RIGHT TO JUDICIAL REVIEW

“The INS usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.”
PROOF OF SERVICE BY MAIL

I, Sonia Fuentes, declare and say as follows:

1. I am over the age of eighteen years and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 South Occidental Boulevard, Los Angeles, California 90057, in said county and state.

2. On January __, 1997, I served the attached STIPULATED SETTLEMENT AGREEMENT on defendants in this proceeding by placing a true copy thereof in a sealed envelope addressed to their attorneys of record as follows:

   Mr. Michael Johnson
   Assistant U.S. Attorney
   300 N. Los Angeles St. #7516
   Los Angeles, CA 90012

   and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the mail at Los Angeles, California; that there is regular delivery of mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this ___th day of January, 1997, at Los Angeles, California.

[Signature]

///
CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
Carlos Holguin
Peter A Schey
Charles Song
256 South Occidental Boulevard
Los Angeles, CA 90057
Telephone: (213) 388-8693; Fax: (213) 386-9484

LATHAM & WATKINS
Steven Schulman
555 Eleventh St., NW, Suite 1000
Washington, DC 20004
Telephone: (202) 637-2184

Of counsel:

YOUTH LAW CENTER
Alice Bussiere
417 Montgomery Street, Suite 900
San Francisco, CA 94104
Telephone: (415) 543-3379 x 3903

Attorneys for plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNY LISETTE FLORES, et al., ) Case No. CV 85-4544-RJK(Px)
) ) STIPULATION EXTENDING
) ) SETTLEMENT AGREEMENT AND FOR
) ) OTHER PURPOSES; AND ORDER
) ) THEREFORE

-vs-

JANET RENO, Attorney General )
) of the United States, et al.

Plaintiffs

Defendants

/ /
IT IS HEREBY STIPULATED by and between the parties as follows:

1. Paragraph 40 of the Stipulation filed herein on January 17, 1997, is modified to read as follows:

   "All terms of this Agreement shall terminate the earlier of five years after the date of final court approval of this Agreement or three years after the court determines that the INS is in substantial compliance with this Agreement, 45 days following defendants' publication of final regulations implementing this Agreement except that Notwithstanding the foregoing, the INS shall continue to house the general population of minors in INS custody in facilities that are state-licensed for the care of dependent minors."

// //
2. For a period of six months from the date this Stipulation is filed, plaintiffs shall not initiate legal proceedings to compel publication of final regulations implementing this Agreement. Plaintiffs agree to work with defendants cooperatively toward resolving disputes regarding compliance with the Settlement. The parties agree to confer regularly no less frequently than once monthly for the purpose of discussing the implementation of and compliance with the settlement agreement. However, nothing herein shall require plaintiffs to forebear legal action to compel compliance with this Agreement where plaintiff class members are suffering irreparable injury.


CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
Carlos Holguin
Peter A. Schey

LATHAM & WATKINS
Steven Schulman

YOUTH LAW CENTER
Alice Bussiere

Carlos Holguin, for plaintiffs.

Arthur Strathern
Office of the General Counsel
U.S. Immigration & Naturalization Service.

Arthur Strathern, for defendants
Per fax authorization

IT IS SO ORDERED

Dated: December ____ 2001

UNITED STATES DISTRICT JUDGE
2 For a period of six months from the date this Stipulation is filed, plaintiffs shall not initiate legal proceedings to compel publication of final regulations implementing this Agreement. Plaintiffs agree to work with defendants cooperatively toward resolving disputes regarding compliance with the Settlement. The parties agree to confer regularly no less frequently than once monthly for the purpose of discussing the implementation of and compliance with the settlement agreement. However, nothing herein shall require plaintiffs to forebear legal action to compel compliance with this Agreement where plaintiff class members are suffering irreparable injury.


Arthur Strathern
Office of the General Counsel
U.S. Immigration & Naturalization Service

_Arthur Strathern, for defendants_
Per fax authorization

Carlos Holguin, for plaintiffs

IT IS SO ORDERED

Dated: December 7, 2001

UNITED STATES DISTRICT JUDGE
PROOF OF SERVICE BY MAIL.

I, Carlos Holguin, declare and say as follows:

1. I am over the age of eighteen years and am not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 South Occidental Boulevard, Los Angeles, California 90057, in said county and state.

2. On December 7, 2001, I served the attached STIPULATION on defendants in this proceeding by placing a true copy thereof in a sealed envelope addressed to their attorneys of record as follows:

   Arthur Strathern
   Office of the General Counsel
   U.S. Immigration & Naturalization Service
   425 I St. N.W.
   Washington, DC 20536

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the mail at Los Angeles, California, that there is regular delivery of mail between the place of mailing and the place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of December, 2001, at Los Angeles, California.
**Ms. L Settlement Agreement Process for Released & Reunified Children and Parents**

**Parent released w/ NTA (positive CFI or IJ review)**
- NTA not filed
  - *Parent can likely file [affirmative asylum application w/ USCIS before ICE files NTA]
- NTA filed w/ EOIR
  - Both Parent & Child stay in 240 Proceedings and seek [defensive asylum in Immigration Court]
- Child will stay in 240 Proceedings (Imm. Ct.)
  - *(Unknown): Parent gets CFI > Child gets NTA canceled & placed in Expedited Removal

**Parent released w/o NTA**
- No CFI conducted before parent was released
  - Parent: Gets CFI review under SA
    - Positive: Both Parent & Child get placed in 240 Proceedings
    - Negative: Child gets separate CFI (placed in 240 proceedings only if child gets positive CFI)
  - Child: gets NTA canceled, and placed in Expedited Removal w/ parent
    - Positive: Both Parent & Child get placed in 240 Proceedings
    - Negative: Child stays in 240 Proceedings only if parent does not seek review
  - Negative for both: Removal Order
- Negative CFI, not yet reviewed under SA
  - Negative CFI, pending IJ Review
    - Negative IJ Review: Child stays in 240 Proceedings only if parent does not seek review
    - Parent seeks review: Child gets placed in Expedited Removal (same process as above)

**Reunified Child has NTA (in 240 Proceedings)**
- NTA filed w/ EOIR
  - Both Parent & Child stay in 240 Proceedings and seek [defensive asylum in Immigration Court]

**Note:** Children reunified with parents who are NOT class members are NOT subject to the terms of SA for parents. Thus, if the child is already in 240 Proceedings, the child will remain in those proceedings.

- Examples of Parents who are NOT class members:
  - Not continuously present in the US since June 26, 2018; Not in custody on (released prior to) June 26, 2018
  - Not an adult (underage parent); Did not enter US w/ child
  - Determination that they were unfit or danger to the child; Had criminal history, communicable disease, or encountered at the Interior of US (100 miles from border)
Ms. L Settlement Agreement for Released Children

- **Released Child**
  - Reunited w/ Separated Parent
  - NOT reunited w/ Separated Parent (e.g. deported or detained parent)

**Consider Parent’s Procedural Posture (see next chart)**

- UAC procedures apply (apply affirmatively as UAC for asylum w/ USCIS), regardless of NTA or 240 Proceedings
- If child gets reunited w/ parent after being released, then Reunited procedures apply

**Parent has NTA filed (e.g. Scheduled for MCH, Hearing Notice, appears on EOIR hotline)**

- Ordinary 240 Removal Proceedings (apply for asylum in court)
- *Be prepared for Case Consolidation

**Parent has NTA issued by ICE, but not filed w/ EOIR**

- Parent Applies for asylum affirmatively w/ USCIS (child derivative)

**Parent NOT in 240 proceedings AND w/ Outstanding Expedited Removal Order (negative RFI/CFI or none given)**

- Settlement Agreement procedures: de novo review of negative CFI/RFI, child reverts to 235 proceedings
The Young Center serves as the federally-appointed best interests guardian ad litem (Child Advocate) for vulnerable unaccompanied children in government custody as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA). We are a national program and serve hundreds of children in eight locations across the United States every year. Our independent Child Advocates accompany children in federal custody and advocate for their safe placement, release to family, appropriate treatment and services in custody, and a permanent outcome that is in their best interests. We also run a policy program to advance changes in federal law and policy that protect the safety and well-being of immigrant children. The Young Center must match 25% of each dollar in federal funding for Child Advocate services. Support from foundations and other private donors allows us to serve more children, conduct international home studies, and operate our policy program.

In 2018, pre-school-aged sisters Deisy and Alma* were separated from their mother under the Administration’s zero-tolerance policy. Their mother was deported within days, without the chance to take her daughters with her. The girls were placed into a temporary foster home and a Young Center Child Advocate was appointed to their case. The girls expressed deep love for their mother and the desire to be with her, but they also clearly enjoyed the comforts of their foster home. When immigration attorneys asked if they would tell a judge that they wanted to return to home country, the girls hesitated. As a result, the attorneys were reluctant to go to court, where each sister would have to ask for the “benefit” of returning home (known as “voluntary departure”). The sisters thus faced prolonged time in “temporary” government custody. But our Child Advocate was able to identify each child’s most pressing desire—to be with her mother, regardless of location. Our Child Advocate shared this information with the Immigration Judge, including images the girls had created showing their hopes for reunification with their mother, and the Immigration Judge immediately granted the sisters’ return to home country, where they joyfully reunified with their mother. *Pseudonyms

REFERRAL AND APPOINTMENT OF CHILD ADVOCATES
The TVPRA authorizes the Secretary of Health and Human Services to appoint Young Center Child Advocates. Any person working with an unaccompanied child may refer that child for appointment of a Child Advocate, including Immigration Judges, agency officials (DHS and ORR), care providers, legal services providers, and ICE trial attorneys. These referrals are submitted through a secure portal: https://www.clienttrack.net/TYC/portal.
ROLE OF CHILD ADVOCATES
Our volunteer Child Advocates meet individually with children each week and accompany them to hearings or appointments at immigration court or the asylum office so that they are not alone. Young Center staff—atorneys and masters-level social workers—work behind the scenes to gather information about each child’s case and to develop best interests recommendations (BIRs) grounded in domestic and international child welfare law. We then submit written recommendations to agency officials, Immigration Judges, Asylum Officers, attorneys and others. The recommendations may address whether the child should be transferred to a different placement, released to a sponsor, receive legal representation, or safely repatriate, and the child’s need for medical, mental health, or other services in care or upon release.

INDEPENDENCE
As mandated by the TVPRA, Young Center Child Advocates are independent. They do not play any other role in the system for unaccompanied children, meaning that the organization does not provide direct legal representation, residential services or traditional post-release social services. Our sole responsibility is to advocate for the best interests of the child in each decision made about that child. Child Advocates are not decisionmakers, but rather make reasoned, fact-based recommendations grounded in best interests law. A 2016 report by the independent General Accounting Office found that our recommendations are followed by federal agencies more than 70% of the time. The Young Center also leverages private funding and pro bono experts to conduct international home studies in select cases involving a risk of unsafe repatriation. In particularly complex cases, the Young Center convenes Best Interests Determination (BID) panels of interdisciplinary experts in child welfare and migration pursuant to guidelines promulgated by the U.N. High Commissioner for Refugees to make recommendations in a child’s case.

A CHILD’S RIGHTS PARADIGM
To recognize children’s rights as set forth under the Convention on the Rights of the Child and to minimize the risk that bias, stereotypes and subjective values influence our recommendations, the Young Center uses a paradigm based on child welfare and international law to evaluate each child’s best interests. This paradigm takes into account widely-accepted best interests principles of safeguarding a child’s safety and well-being and expressed interests, as well as the child’s rights to health, family integrity, liberty, development, and identity. The paradigm mirrors recommendations set forth by the federal Interagency Working Group on Unaccompanied and Separated Children’s 2016 Framework for Considering the Best Interests of Unaccompanied Children, which can be found on our website.

The Young Center is working to create a system in which unaccompanied and separated children are recognized and treated first as children, where they are met at each step by adults who are trained in child development and the impact of trauma, and where they have a fair opportunity to tell their stories—after reuniting with family, recovering from trauma, and working with counsel and a Child Advocate.