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Submitted via www.regulations.gov

Debbie Seguin
Assistant Director, Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Re: HS Docket No. ICEB-2018-0002 - Public Comment Opposing Proposed Rule

Dear Ms. Sequin,

On behalf of the Boston Bar Association (BBA), I respectfully submit these comments opposing the proposed regulations relating to the implementation of the *Flores* Settlement Agreement, DHS Docket No. ICEB-2018-0002. The BBA is a professional association with over 10,000 attorney members. Our mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, foster a diverse and inclusive professional community, and serve the community at large.

As an Association, we have a long history of supporting civil rights, and we believe that our profession has a unique responsibility to promote and uphold the rule of law as a fundamental principle of our nation's democracy. For years we have spoken in opposition to practices that threaten the rights and well-being of immigrants and in support of measures that ensure the just, humane, and fair treatment of all individuals within our borders. Most recently, we tasked a working group with establishing a framework to guide the Association in responding to immigration policies and developments. The resulting principles produced by the working group, and adopted by our board, are founded in the concepts of fundamental rights and human dignity, due process and equal protection, and the ability of all people to meaningfully exercise their rights and access justice through the legal system. It is imperative that our system of immigration laws, policies, and practices reflects such concepts.

In place now for over two decades, the Flores Agreement has played a role in upholding these basic tenets of democracy by offering crucial protections for immigrant children. Embodied in the Flores agreement is a requirement that all minors in government custody be treated with "dignity, respect and special concern for their particular vulnerability as minors."

We are therefore deeply concerned about the myriad ways the proposed regulation contravenes the purpose of the Flores Agreement and endangers the rights, liberty, and well-being of immigrants, including and especially immigrant children. We expound on the most troubling provisions below.

Indefinite Detention of Children

The BBA has spoken against the use of prolonged and unnecessary detention in immigration settings for years, calling for detention to be used only in extraordinary circumstances, such as when an individual presents a substantial flight risk or a threat to national security or public safety. For those detained while seeking an immigration remedy, the individual liberty interest at stake is grave, and the impacts of detention on children have been proven to be

especially harmful and long-lasting. The Supreme Court has made it clear that the constitutional right to due process is guaranteed to every person, regardless of immigration or citizenship status. These protections must reflect the gravity of what is at stake, so we are particularly concerned about the provisions in the proposed regulation that allow for the indefinite detention of families.

The Flores Agreement specifically mandates that minors be released from custody "without unnecessary delay," and yet the proposed regulations are designed to allow for the indefinite detention of children. As interpreted by the Courts, the Flores Agreement applies both to accompanied and unaccompanied minors, and government attempts to amend the agreement to allow for family detention have been struck down by the courts. The change in the proposed regulation could result in families being held together in detention for months, or even years. This not only raises significant due process concerns but is in direct conflict with the stated purpose and established interpretation of the Flores Agreement. The extensive and long-term social, mental, and physical harms experienced by minors held in prolonged detention are well-documented; allowing the indefinite detention of children would be in complete disregard of the "particular vulnerability" of youth recognized by—and at the core of—the Flores Agreement.

While we recognize the challenges the government faces in responding to the arrival of immigrant families, indefinite family detention, which would threaten the health, safety, and rights of individuals who, in many cases, have come to the United States fleeing circumstance of extreme hardship in their countries of origin, is simply not the answer. Proven alternatives do exist, and established release mechanisms and alternatives to pre-adjudication detention, such as community supervision and GPS monitoring, would be more consistent with justice and due process.

Detention Conditions and Oversight

In those instances when detention must occur, the BBA supports detention in the least restrictive setting possible and has long maintained that there must be policies in place to ensure that detention conditions are humane and that mechanisms exist to ensure proper oversight and accountability. The Flores Agreement specifically provides that minors must be held in facilities that are "safe and sanitary" and consistent with a "concern for the particular vulnerability of minors." We are, then, especially disturbed by those provisions that may threaten the proper treatment of minors, deteriorate the conditions of detention, and weaken oversight of detention facilities.

For example, the proposed regulations would remove the current state-licensure requirement that, when a parent or other family member is unavailable, the government release children to a facility licensed by a state child welfare agency program. These licensing requirements ensure that when minors must be held in custody, they receive proper treatment and adequate oversight from an agency with the particular expertise needed to properly consider the vulnerability of minors. Under the proposed rule, the government would be able to select its own auditors to review the conditions and treatment of facilities where children and parents are held together. The government lacks both the expertise that the state agencies bring and the impartiality necessary to ensure that proper oversight occurs. Again, the interests here, namely the proper care and custody of children and families in often-prolonged periods of detention, are simply too significant to allow the same entities tasked with detaining and holding these families to determine if they are doing so properly.

Additionally, the proposed regulations give much wider discretion to the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) to suspend critical protections for minors in cases of "emergency." Under the current regulation, an emergency situation may result in a delay in transfer, but the new proposal worryingly expands the scope of protections that may be suspended based on "DHS's recognition that emergencies may not only delay placement of minors but could also delay compliance with other provisions of this proposed rule, or excuse noncompliance on a temporary basis." The proposal lists delay of a meal as an example of one such provision that could be excused in the case of an emergency. The breadth and flexibility of the proposed definition is deeply concerning, given that it could legitimize the denial of basic necessities, such as food, to children. These proposed broad exceptions to provisions that are meant to ensure proper care and treatment of minors, coupled with the lack of proper oversight outlined above, are in direct contradiction to the purpose of the Flores Agreement. If such provisions were to be put in place, there would be no guarantee that facilities would be safe and sanitary or that minors would be treated with dignity and respect.

Continual UAC Status Redeterminations

The BBA has also been outspoken in support of strengthening and improving due process and other safeguards for those individuals determined to be an "unaccompanied alien child" (UAC), including measures that would prohibit revocation of a protected status awarded to a child without an affirmative finding of fraud or misrepresentation. "UAC" status comes with a number of important legal protections, including the ability to qualify for an exception to the one-year filing deadline for asylum and access to a hearing before an immigration judge. In past practice, this status has not been reconsidered once established, but the proposed regulation would codify continual redeterminations, providing that officials will make a determination of UAC status "each time they encounter the alien."

Ultimately, the additional protections provided to UACs are borne from the recognition of the unique context and resulting vulnerabilities that come when arriving as a minor, unaccompanied by an adult guardian. Consideration of the context of such arrival and the heightened attendant vulnerabilities to abuse, exploitation, violence, and lack of basic necessities, remains throughout the course of a legal proceeding involving the minor. Additionally, ensuring that the UAC status finding remains in place allows for consistency and predictability for both minors and the government throughout the legal process. The ability of the government to suddenly revoke significant safeguards, in the middle of a legal process that depends on the consistency of a previously recognized status, raises due process concerns and could incentivize intentional case delays to avoid granting the additional legal protections, or other unnecessary and intrusive tactics that would allow the government to continually reassess and re-determine a child's status.

Access to Bond Hearings

One of the key conclusions from the BBA's previously mentioned working group report was the necessity of providing every person "the full and meaningful ability to exercise their rights and to access justice through the legal system regardless of immigration or citizenship status, level of income, or economic circumstance." Specifically, that principle argues for access to a fair immigration process with independent judges. This crucial principle is embodied in the current Flores Agreement as it requires that any minor in a deportation proceeding be afforded a

hearing before an immigration judge unless the minor refuses such a hearing. This measure was reaffirmed in 2017, when the Ninth Circuit expressly rejected a claim that the DOJ does not have statutory authority to conduct a bond hearing under *Flores*.[1]

The proposed regulation provides that there is "not clear statutory authority for DOJ to conduct such hearings," and so instead institutes the dramatic change of removing the requirement for a bond hearing altogether. In its place, the proposal would introduce a new administrative proceeding by creating an HHS-run "independent hearing process" by which an HHS officer, rather than an immigration judge, would determine whether the child poses a danger to the community or a flight risk. Appeals from a Section 810 decision would not go to the Board of Immigration Appeals, as they do from an immigration judge decision, and instead would go directly to an executive branch appointee, the Assistant Secretary for the Administration for Children and Families. This approach would remove the due process requirements that accompany an immigration court proceeding, and give the same entity tasked with holding the minor in custody the ability to make determinations about the minor's release from custody, making it impossible to guarantee an independent process. The proposed provision thus flies in the face of the Flores Agreement's specific recognition that that the vulnerabilities of youth warrant a hearing before an immigration judge.

Additional Provisions of Concern

Standards for Release on Parole: The proposed regulation removes an internal cross reference to parole-related provisions in 8 CFR 235.3(b), which would mean that minors placed in expedited removal would be held to the same strict standards for release on parole as adults. The Flores Agreement has been interpreted to allow children subject to expedited removal to be considered for release on parole on a case-by-case basis for "urgent humanitarian reasons" or "significant public benefit," if the minor is not a security or flight risk. The proposed change would remove these additional protections for minors and allow release only for medical necessity or law enforcement need. Here, again, the proposed regulation fails to consider the particular vulnerability of youth as required by the Flores Agreement

Limits on Release: In addition, the proposal limits those adults to whom children can be released to a parent or legal guardian, despite the specific language of the Flores Agreement providing that a child in DHS custody can be released to a parent, a legal guardian, an adult relative, or an adult individual or entity designated by the parent or legal guardian. This proposed restriction, besides contravening the explicit language of the Flores Agreement, will interfere with the requirement that minors in custody be released "expeditiously" and "without unnecessary delay." Given the previously mentioned and well-documented harms experienced by children held in detention, it is improper for the proposal to create more barriers to release.

[1] "By their plain text, neither law [HSA nor TVPRA] explicitly terminates the bond-hearing requirement for unaccompanied minors. Moreover, the statutory framework enacted by the HSA and TVPRA does not grant ORR exclusive and autonomous control over the detention of unaccompanied minors. Rather, the statutes leave ample room for immigration judges to conduct bond hearings for these children. Additionally, holding that the HSA and TVPRA do not deny unaccompanied minors the right to a bond hearing under Paragraph 24A affirms Congress's intent in passing both laws. These statutes sought to protect a uniquely vulnerable population: unaccompanied children. In enacting the HSA and TVPRA, Congress desired to better provide for unaccompanied minors. Depriving these children of their existing right to a bond hearing is incompatible with such an aim." Flores v. Sessions, D.C. No. 2:85 – cv- 0544-DMG-AGR (2017).

Lack of proper standards for determining change in circumstances: The proposed regulation provides DHS the authority to take a child back into custody after having been released if there is a "material change in circumstances showing the child is an escape risk, danger to the community, or has a final order of removal." The absence of any requirement that the government carry the burden of proving a "material change" is of significant concern. The government should be required to offer some proof or reason for finding a material change in circumstances. In addition, given the Flores Agreement's "general policy favoring release," the appropriate burden is proof by clear and convincing evidence. Without imposing an adequate burden of proof on DHS, the process will be neither predictable nor fair, and could lead to the improper re-detention of minors with no meaningful way for them to challenge the decision.

Costs to the public of expanding family detention: Finally, we are further concerned that the Notice of Proposed Rule Making fails to properly weigh the costs and benefits related to the expansion of family detention. DHS claims that because it does not know how many more people will be detained or for how long, it is "unable to provide a quantified estimate of any increased…costs." This assertion, however, is difficult to credit, considering that DHS maintains full operational control over the detention system and should be able to offer reasonable estimates. For example, ICE estimated in its 2019 Congressional Budget Justification that the cost of one family detention bed was $318.79 per day, while in 2018 DHS estimated that the average cost of alternatives to detention was roughly $4.50 per person per day. In 2014, the Government Accountability Office found that the costs of alternatives to detention were less than 7% of the costs associated with detention. This suggests that not only are the proposed regulations inhumane and contrary to the purpose of the Flores Agreement, but they are also fiscally irresponsible given the existence of alternatives to detention that have been proven to be safe, effective, and affordable. The government has a duty to manage public funds in a responsible and transparent manner, and we believe that a cost-benefit analysis that justifies the expense of any enforcement action or policy pursued by DHS should be made available to the public.

In sum, the Boston Bar Association opposes the proposed regulations relating to the implementation of the Flores Agreement, DHS Docket No. ICEB-2018-0002, as it fails to fulfill the purpose of the Flores Agreement, raises serious due process concerns, is fiscally irresponsible, and will endanger the well-being and rights of immigrant children. Thank you for your consideration of these comments.

Sincerely,

Jonathan M. Albano
President, Boston Bar Association