PennState Law Center for Immigrants' Rights Clinic

Replacing the Flores Agreement: What You Need to Know

Updated October 18, 2019

1. **What does the rule say?** This rule seeks to modify the Flores Settlement Agreement ("FSA") with several changes to the procedures and policies in relation to the detention of children in immigration proceedings. Changes include, but are not limited to: the elimination of the 20-day cap on detaining immigrant children; elimination of state licensing requirements for detention facilities; the distinction between unaccompanied minors - legally referred to as Unaccompanied Alien Children ("UAC") - and minors accompanied by families; and the transition from bond hearings before an immigration judge to a hearing before an independent hearing officer. The rule allows for the release of minors to adult relatives other than a legal parent or guardian, but it also restricts access to release through parole. Under the new rule, minors in expedited removal must meet the same strict standard for parole as adults.

2. **Has the Flores rule been litigated?** The rule took effect 60 days after publication in the Federal Register but was blocked on September 27, 2019 by the Honorable Dolly M. Gee of the Central District of California, who is overseeing the FSA. The Court issued a permanent injunction, finding that the rule was inconsistent with the FSA because it eliminates the FSA's protections.

   For the administration to modify the FSA, which is a binding contract and consent decree, Judge Gee noted there must be either a change in law from Congress or compliance must be illegal or impossible due to a change in law or facts. The FSA provides for its own termination upon the publication of final regulations consistent with its terms.[i] A primary goal of the FSA was to protect minors in detention by favoring release and keeping minors in the least restrictive settings possible when in detention. The Court found that that the rule was not consistent with the FSA's terms or protections and therefore could not modify the FSA.

   In a second lawsuit, nineteen states and the District of Columbia filed a lawsuit challenging this rule on August 26, 2019.[ii] The lawsuit alleges that the rule is in violation of the Administrative Procedure Act and the due process clause of the Fifth Amendment.

3. **What is the Flores Settlement Agreement?** The FSA is a historic settlement establishing national standards for the detention, treatment, and release of all children in immigration detention.[iii] The guiding principle of the FSA is to treat all juveniles in government custody "with dignity, respect, and special concern for their particular vulnerability as minors."[iv] Additionally, the FSA established the licensing requirement for detention facilities housing children to comply with all applicable state child welfare laws and regulations.[v] In 2015, the FSA was challenged in *Flores v. Lynch* and the Ninth circuit expanded the scope of the settlement beyond unaccompanied minors to include *all* minors and set the 20-day cap on detention. In 2016, the U.S. Court of Appeals for the Ninth Circuit reaffirmed that the FSA applies to all children, regardless of accompaniment. Under paragraph 24(A) of the FSA, an unaccompanied minor has the right to a bond hearing before an immigration judge whose decisions are subject to independent review via appeal to the Board of Immigration Appeals ("BIA").

4. **Who will get bond hearings under the new rule?** Under this new rule, only accompanied minors, who are held in DHS custody, are required to have a bond hearing before an immigration judge, which is an interpretation of the FSA recently rejected by the Ninth Circuit in *Flores v. Sessions*. Unaccompanied minors are transferred to the custody of the Office of Refugee Resettlement ("ORR") and do not have the right to a bond hearing before an immigration judge under the rule.

5. **Will unaccompanied minors get a hearing?** Pursuant to the rule, an independent hearing officer process ("810 hearing") determines whether an unaccompanied minor is a danger to the community or a flight risk if released from ORR custody. This is a separate process and determination from bond hearings before an immigration judge who is an appointed delegate of the Attorney General housed in the Department of Justice ("DOJ"). The rule states that an independent administrative office will be established by the U.S. Department of Health and Human Services ("HHS") to conduct 810 hearings.

6. **Why is the rule significant?** This rule is significant because the administration's previous attempts to deviate from the FSA have been denied in court.[vi] The rule differs from the motions for relief previously sought by creating an alternative way for detention facilities to meet the "licensed facility" requirement and eliminating the 20-day detention cap, thereby potentially allowing the detention of minors to last indefinitely while immigrant families' cases are pending.

7. **What was the licensing requirement and why does this rule eliminate it?** Under the FSA, facilities that house children must be licensed "by an appropriate State agency to provide residential, group, or foster care services for dependent children."[vii] This rule eliminates the requirement that facilities be licensed by the states. Instead, they would be governed by the standards set by U.S. Immigration and Customs Enforcement ("ICE") to oversee family unit detention. The Department of Homeland Security ("DHS") intends to employ outside entities subject to third party audits as federal licensing providers when state licensing is not available. The administration alleges this federal licensing alternative is necessary because the relevant state licensing agencies apply to facilities housing unaccompanied minors but not to family unit detention facilities housing accompanied minors.

8. **How does this impact asylum seekers?** Before this rule, accompanied minors in detention subject to expedited removal (but not deemed dangerous nor a flight risk) could seek parole using the following justifications: the 20-day cap on minors in detention under *Flores*, "urgent humanitarian reasons" or a "significant public benefit."[viii] The rule now allows minors in expedited removal proceedings to seek parole only in cases of medical necessity or when there is a law enforcement need, as per the parole requirements for adults. Due to these stricter parole requirements, minor asylum seekers are likely to remain detained throughout the asylum process. Additionally, the rule sets forth age determination standards such as allowing HHS to re-determine the age of minors they suspect to be adults. If a child is determined to be an adult, the child loses crucial protections for minor asylum seekers including the right to have a claim heard by an asylum officer and an extension on the 1-year filing deadline.

9. **What does this mean for Pennsylvania's family detention center?** The Berks County Residential Center (BCRC) previously lost their childcare license from the state of Pennsylvania. A new licensing alternative may mean attaining a childcare license through the new, yet to be defined, standards. The BCRC license was temporarily re-instated by a state court due to pending litigation.[ix]

Where can I find more resources? More information can be found on the DHS website as well as the Penn State Law Center for Immigrants' Rights Clinic website. Additional information may also be found on the Congressional Research Service, Human Rights First, and AILA web pages.

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[i] Flores Settlement Agreement, paragraph 9 and 40.

[ii] The nineteen states include Connecticut, Delaware, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington.

[iii] The FSA arose from the 1997 class-action lawsuit, *Flores v. Reno*. The settlement requires the administration to release children "without unnecessary delay" and to keep immigrant children in custody in the "least restrictive conditions" possible. In 2008, Congress preserved certain rights for children by partially codifying Flores in the passing of the Trafficking Victims Protection Reauthorization Act (TVPRA).

[iv] 1997 Flores Settlement Agreement.

[v] Flores Settlement Agreement, paragraph 6.

[vi] In 2018, following Executive Order "Affording Congress an Opportunity to Address Family Separation," (June 20, 2018) the administration filed a motion to the Ninth Circuit seeking limited emergency relief from two FSA provisions: (1) paragraph 14's release provision and (2) paragraph 19's licensing requirements. The requested relief was to permit DHS to detain family units together for the pendency of their immigration proceedings. The court denied the motion on July 9, 2018 and denied reconsideration of the motion on November 5, 2018.

[vii] Flores Settlement Agreement, paragraph 6.

[viii] 8 C.F.R. § 212.5 (b), 8 C.F.R. § 235.3(b).

[ix] *In the Appeal of Berks Cty. Residential Ctr.*, Docket No. 061-15-0025 (Commonwealth of Pennsylvania Department of Human Services, Bureau of Hearings and Appeals filed November 23, 2015).