



Lutheran Immigration
and Refugee Service



WOMEN'S
REFUGEE
COMMISSION



KIDS IN NEED OF DEFENSE

Flores Settlement Agreement & DHS Custody

Flores History

The 1997 *Flores* Settlement Agreement (*Flores*) was the result of over a decade of litigation responding to the Immigration and Naturalization Service's (INS) detention policy towards an influx of unaccompanied migrant children in the 1980s.¹ The agreement set national standards regarding the detention, release, and treatment of all children in INS custody. It requires that juveniles be held in the least restrictive setting appropriate to their age and special needs, generally, in a non-secure facility licensed to care for dependent, as opposed to delinquent, minors. It also requires that juveniles be released from custody without unnecessary delay to a parent, legal guardian, adult relative, individual specifically designated by the parent, licensed program, or, alternatively, an adult seeking custody deemed appropriate by the responsible government agency. While *Flores* initially applied to the INS, today the settlement extends to Department of Homeland Security (DHS) and Health and Human Services' Office of Refugee Resettlement (ORR) after the INS was dissolved.

Applicability to DHS Custody

Today, migrant children may be in the custody of DHS Customs and Border Protection (CBP) if apprehended at or near a border; in DHS Immigration and Customs Enforcement (ICE) custody if an unaccompanied child (during transport to ORR or home country) or if detained together with a family member in family detention facilities; or in the custody of ORR if an unaccompanied child.

The *Flores* agreement clearly applies to all children apprehended by DHS, including those held with their parents in DHS family detention facilities or transferred to ORR custody. While plaintiffs consisted of unaccompanied minors taken into custody, the class certified encompassed “*all minors* who are detained in the legal custody of the INS.”² The settlement binds the INS and Department of Justice, as well as “their agents, employees, contractors, and/or successors in office.”³ When the Department of Homeland Security was created in 2002, INS authority and responsibilities for immigration custody were transferred to it.⁴ However, immigration custody of unaccompanied alien children was vested with the Director of the Office of Refugee Resettlement of the Department of Health and Human Services, where these responsibilities remain today.⁵ The HSA includes explicit “savings” provisions specifying that the settlement remains in effect as to the new agencies, *as if the transfer had not occurred*.⁶ The federal government has previously never disputed that the agreement remains binding on both the ORR and DHS.

¹ The *Flores* Settlement Agreement, Case No. CV 85-4544-RJK(Px); Available at: <http://web.centerforhumanrights.net:8080/centerforhumanrights/children/Document.2004-06-18.8124043749>. Some of the agreement's terms have been codified at 8 CFR §§236.3, 1236.3. For cases culminating in the settlement agreement, see *Flores v. Meese*, No. 85-4544-RJK(Px)(CD Cal. Nov. 30, 1987); *Flores v. Meese*, No. 85-4544-RJK(Px)(CD Cal. May 25, 1988); *Flores v. Meese*, 934 F.2d 991 (1990); *Flores v. Meese*, 942 F.2d 1352 (1992); *Reno v. Flores*, 507 U.S. 292 (1993).

² ¶ 1, 4, 10, *emphasis* added.

³ ¶ 1

⁴ Homeland Security Act, Pub. L. 107-296 (H.R. 5005). The HSA “transferred” the former INS's authority and responsibilities to the Department of Homeland Security (DHS). See § 202.

⁵ § 279(a), see *Bunikyte v. Chertoff*, 2007 WL 1074070, at 2 (W.D. Tex. 2007)

⁶ See §§ 462(f)(2), 1512(a)(1), 1512.

The broad applicability of *Flores* to all children, including those held in both DHS and ORR custody, has been formally accepted and acknowledged. For example,

- *In re Hutto Family Detention Center*, the court acknowledged the application of *Flores* to family detention and *Flores*'s continued binding scope.⁷
- Department of Homeland Security Appropriations Bill House Reports in the 110th Congress acknowledge that *Flores* is binding upon DHS, ICE and CBP and that they must enact policies of compliance.⁸
- INS Juvenile Protocol Manual, *Juvenile Aliens: A Special Population*, provides guidance to ICE agents on *Flores* and its application to juveniles and indicates how to apply *Flores* to children not being transferred to ORR.⁹
- The DHS Office of the Inspector General has also documented DHS's obligations to comply with *Flores* in *A Review of DHS Responsibilities to Juvenile Aliens* (OIG 2005).¹⁰
- Both the Fiscal Years 2005-2006 and the Fiscal Year 2007 annual reports to Congress on the Department of Homeland Security Office of Civil Rights and Civil Liberties (OCRCL) documented DHS's obligations under *Flores* to children who are accompanied or unaccompanied and in DHS custody.¹¹

For more information on *Flores* and Family Detention, you can contact:

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⁷ Case No. A-07-CA-164-ss (W.D. Texas 2007)

⁸ H.R. REP. 110-181, 43-344, 2008 and H.R. REP 110-862, 38, 2009

⁹ Issued March 1999 Detention and Removals, updated by John Pogash, ICE/National Juvenile Coordinator, November 2003

¹⁰ Available at: <http://www.dhs.gov/xlibrary/assets/crcl-fy0506annualreport.pdf>

¹¹ Available at: <https://www.dhs.gov/xlibrary/assets/crcl-fy07annualreport.pdf> and <http://www.dhs.gov/xlibrary/assets/crcl-fy0506annualreport.pdf>



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Key Flores Provisions & DHS Noncompliance

ICE's current policy of detaining children apprehended together with their mothers, or, in some cases, fathers – even where they do not pose a flight risk or security risk – is inconsistent with requirements for individualized assessments and best practices to release children from custody where family or community-based sponsors exist. As there is a parent, and primary caregiver, available to take custody and care of the child, DHS should release the mother and the child so that she can resume her primary caregiver role in accordance with the ICE's Parental Interest Directive.¹² Special consideration requirement for the child's unique vulnerability necessitates the release of the mother with the child.

The following analysis provides greater detail of the requirements DHS must meet in order to comply with the terms of the Flores agreement. It also provides an assessment of current compliance with Flores protections for children in DHS custody.

“GENERAL POLICY FAVORING RELEASE”

Flores requires DHS to pursue a policy favoring the release of a child from custody and reunification with family or other community-based sponsor with two narrow exceptions:

<i>Flores</i> exception to release	DHS Noncompliance
1. Where the detention of a particular child is required to secure his or her timely appearance before DHS/HHS or immigration court.	Data shows the vast majority of children appear for their court proceedings, as such accompanied children in family detention should be afforded release opportunities. ¹³
OR 2. Where the continued detention is required to ensure the child's safety or the safety of others.	Research overwhelmingly demonstrates that Central American children in DHS family detention facilities are fleeing human rights abuses and violence and do not pose any safety risk to their families' communities in the U.S. DHS's opposition to bond in these cases are misguided and incorrectly rely on national security arguments. DHS has argued for this national security justification for family detention misapplying the case <i>In re D-J</i> , in which the government argued that reports or rumors of successful entries could encourage further mass migration attempts and thereby endanger national security. ¹⁴ All of these children and families are not “successful entries” as they were apprehended or turned themselves in. Asylum-seeking migrants should never be deterred from seeking safety and punished by being placed in detention simply because other migrants from their country are pursuing their legal right to seek legal protection in another country. Furthermore, given the grave mental and medical health concerns surrounding the detention of children, release together with the parent should be seen as in the best interest of the child unless exceptional circumstances exist.

¹² August 23, 2013, U.S. Immigration and Customs Enforcement (ICE) issued the *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities Directive* (Parental Interests Directive), available at: http://www.ice.gov/doclib/detention-reform/pdf/parental_interest_directive_signed.pdf

¹³ *New Data on Unaccompanied Children in Immigration Court*, (Transactional Records Access Clearinghouse at Syracuse University July 15 2014) available at: <http://trac.syr.edu/immigration/reports/359/>

¹⁴ *In re D-J*, I. & N. Dec. 572 (BIA 2003)

If detention is not required for one or both of the above reasons, then DHS/HHS “shall release” a minor from its custody without unnecessary delay according to the following order of preference (§ 14) (*see also* 8 CFR 236.3(b)):

1. Parent
2. Legal guardian
3. Adult relative (brother, sister, aunt, uncle or grandparent)
4. An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor’s well-being through a declaration.
5. Licensed program willing to accept legal custody
6. An individual or entity willing to accept legal custody.

Flores Terms of Release for children in government custody include:

1. Affidavit of Support I-134 (§ 15)
2. Statement of care: that affirms proper provision for the child, assurance of child’s appearance at future proceedings, notification to INS of a change of address, and 5 days advance notification of departure from the US or initiation of dependency proceedings. (§ 15).
3. Termination of custody arrangement can be made by INS (§ 16).
4. Suitability assessment: *may be required* prior to the release of a minor (§ 17).
5. Family reunification efforts must continue for the duration of custody if a minor “is not immediately released to a relative” (§ 18).

There are effective procedures in place to ensure that children are released safely: DHS and DOJ have assurance of the child’s location, notice, and compliance with appearance in court.

RIGHTS OF CHILDREN IN DHS CUSTODY

Migrant children in DHS custody usually are first apprehended and placed in CBP short-term holding cells. If they are unaccompanied they are then transferred by ICE to ORR within the *Flores* 72-hour requirement (absent an emergency or unexpected influx of children). ICE may use some of their juvenile facilities during transportation to various ORR facilities. Children apprehended parents are typically not placed with the child welfare agency ORR. In the past DHS complied with *Flores* to the extent the agency considered children’s special vulnerabilities and the 72-hour requirement, and prioritized apprehended families for release or alternatives to detention pending their removal proceedings. Instead, DHS has created new ICE family detention facilities to incarcerate children apprehended with their mothers (and in some cases their fathers).

Rights of the Child in Short-Term Custody

Numerous research reports, human rights organizations and attorneys have documented systemic abuse by CBP, including violations of rights afforded to migrant children.¹⁵

¹⁵ See e.g., Betsy Cavendish and Maru Cortazar, Children at the Border (Appleseed Network, 2011)(reporting on a 2 year investigation documenting failed TVPRA screening by CBP and the need for child appropriate interviewing by qualified professionals); UNHCR, Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border (June 2014); Marc Rosenblum, Statement: Measuring Border Security: Hearing on the U.S. Border Patrol’s New Strategic Plan and the Path Forward Before the House Subcommittee on Border and Maritime Security, 112th Congress (2012); U.S. Government Accountability Office, Border Patrol Strategy: Progress and Challenges in Implementation and Assessment Efforts, No. 12-888T (May 8, 2012).

Per the *Flores* Settlement, children in CBP short-term custody are entitled to the following rights:

<i>Flores</i> Requirement	CBP Compliance
¶ 12: Safe and sanitary facilities with: toilets, sinks, drinking water, food, medical assistance in case of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors, and contact with family members who were arrested with the minor.	<i>Numerous complaints have been filed by unaccompanied and accompanied children and their families on CBP violations relating to these issues.¹⁶</i>
¶ 12: Segregation of minors from unrelated adults	<i>CBP has improved in segregating minors from unrelated adults, however, CBP does routinely separate related children from their parents or adult family members.</i>
¶ 11: Least restrictive setting appropriate to the child's age and special needs.	<i>CBP hold rooms are not appropriate for children, instead children are routinely placed in the most restrictive setting- secure hold rooms without any child appropriate accommodations.</i>
¶ 11: Treatment with dignity, respect and special concern for their particular vulnerability as children.	<i>Children in CBP custody are cared for by CBP enforcement agents rather than individuals with specific child welfare expertise; their treatment can range from special consideration to abusive treatment.</i>
¶ 24D: Right to notice of rights (Form I-770) (<i>see also</i> 8 CFR 236.3(h))	<i>CBP routinely only has a copy of the English, not Spanish, version of this form. This form is also often inadequately explained to children.</i>

Rights of the Child while in Long-Term ICE Custody

Children held with their mothers in ICE custody (family detention) are not guaranteed the rights outlined in the *Flores* Settlement Agreement. However, in ICE facilities that hold children alone ICE/Juvenile Family Residential Management Unit (JFMRU) has also complied with appropriately transferring unaccompanied children to ORR and using a spectrum of facilities and not just the most restrictive facilities for short term custody pending transfer or deportation.¹⁷ The below section describes ICE's compliance with *Flores* requirements in family detention settings (focusing on recent facilities).

Per the *Flores* Settlement, children in DHS/ICE family detention are entitled to these rights:

<i>Flores</i> Requirement	ICE Compliance
¶ 14 (<i>see</i> Policy Favoring Release): If there is no one to release minor to, then DHS may place a child temporarily in a licensed program (state agency the licenses custodial programs for dependent children) until release can be effectuated. An exception exists for licensure in cases of emergencies or influxes, but reunification and release efforts must continue.	<i>ICE does not follow this policy favoring release. Children instead remain in ICE custody and ICE fails to conduct reunification efforts. ICE also fails to obtain state child welfare licensing for family detention facilities.</i>

¹⁶ American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to Complaints of Abuse* (2014); Joint complaint filed by NIJC, Esperanza, AIJ, FIRR, and ACLU, "Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection," June 11, 2014.

¹⁷ *See Halfway Home: Unaccompanied Children in Immigration Custody*, Women's Refugee Commission (February 2009), at 5, 12-13, available at: <http://www.womensrefugeecommission.org/resources/download/196> (detailing ICE compliance and non-compliance with *Flores*). Subsequently in August of 2010, the Women's Refugee Commission revisited the Berks Juvenile Facility and found it in improved compliance with *Flores* in comparison to the conditions reported in the *Halfway Home* report (Visits conducted by Michelle Brane, Katharina Obser, Jessica Jones). JFMRU has also complied with using a spectrum of facilities and not just the most restrictive facilities.

¶ 11: Least restrictive setting appropriate to the minor's age and special needs	<i>ICE detains children apprehended with their mothers in secure facilities that are not licensed by an appropriate state agency and that are not the least restrictive setting appropriate to children's age and special needs.</i>
¶ 11: Treatment with dignity, respect and special concern for their particular vulnerability as children	<i>Experts have identified a systemic failure in the detention facilities to address the needs of children.¹⁸</i>
¶ 24D: Right to notice of rights (Form I-770), right to judicial review (Exhibit 6), and list of free legal services providers (<i>See also</i> 8 CFR 236.3 (h))	<i>Children are not provided with any notice or rights information. (This information is usually only provided to the parent).</i>
¶ 24A: Right to bond redetermination proceeding before an Immigration Judge	<i>Currently, ICE is implementing a 'no bond' or 'high bond' policy for families, often enforcing a 'not bond eligible' policy without individual considerations.¹⁹</i>
¶ 24B: Right to judicial review in order to contest placement "in a particular facility" before a federal district court if a child believes they have been improperly placed or have been treated improperly	<i>ICE is not complying with this Flores requirement.</i>
¶ 24B Exhibit 6: Right to notice of judicial review posted in facilities	<i>ICE is not complying with this Flores requirement.</i>
¶ 12: Right to separation from unrelated adults	<i>The nature of a family detention facility makes this impracticable and impossible for ICE to keep children separated from unrelated adults.</i>
Definition 6, ¶¶ 19 and 24C: Right to a placement in a state licensed child welfare facility	<i>ICE mistakenly applies the exception to the 72 hour transfer or release requirement during influxes and emergencies to mean they do not have to have a licensed facility at all. While ORR complies with this requirement for unaccompanied children, ICE has failed to get its facility licensed. Even if ICE did seek licensure, it is doubtful whether the facilities would even comply with state regulations on licensing facilities for children during emergencies or non-emergencies.</i>
Minimum Standards for Licensed Programs (FSA, Exhibit 1)	
¶ 1: Proper physical care and maintenance, suitable living conditions, food, appropriate clothing, and personal grooming items	<i>Children are held in restrictive, jail-like settings with little privacy and lack of culturally appropriate food, often leading to weight loss in children.²⁰</i>
¶ 2: Appropriate medical and dental care	<i>Most children are either unable to access medical services or have a lack of adequate treatment.²¹</i>
¶ 3: Individualized needs assessments (includes psycho-social, educational and family reunification resources).	<i>Children do not receive these psycho-social and educational assessments. Nor do they receive any family reunification screening.</i>
¶ 4: educational services in a classroom setting (Monday through Friday) focusing on academic competencies and English Language Training	<i>Education is limited at all recent facilities. For example, school only started at Artesia in October 2014 and none of the recent facilities have full-time, licensed education for children.²²</i>
¶ 5: Recreation and leisure time, including outdoor recreation	<i>In the recent facilities, children have inadequate opportunities for outdoor recreation time and reports indicate they are not allowed toys or playthings in their living quarters.²³</i>

¹⁸ *Locking Up Family Values, Again: A Report on the Inhumane Practice of Family Detention*, Lutheran Immigration and Refugee Service and the Women's Refugee Commission (October 2014) available at: lirs.org/familyvalues.

¹⁹ *Id.* at 18.

²⁰ *Id.* at 7

²¹ *Id.* at 8

²² *Id.* at 9

²³ *Id.* at 6,7

¶¶ 6, 7: One individual counseling session per week by trained social work staff and group counseling at least twice a week	<i>Children are not guaranteed counseling or mental health services. Most detention facilities have severely limited resources. One facility had psychiatric services only through video tele-conferencing or only male service providers.²⁴</i>
¶ 8: Acculturation and adaptation services	<i>ICE does not provide such services.</i>
¶ 9: Comprehensive orientation	<i>Children are not included in either the 'Know Your Rights' presentations or Legal Orientation Programs. Where these programs exist at family detention facilities, they are not adapted to children's particular needs.²⁵</i>
¶ 10: Access to religious services	<i>Children do not have access to religious services.</i>
¶ 11: Visitation and contact with family members	<i>Children have inadequate visitation access and lack of contact with family members who may be looking for them.²⁶</i>
¶ 12: Right to privacy (This includes the right to: a) wear own clothes, b) private space for storage of belongings, c) private conversations on phone, d) private visitation, e) receive and send uncensored mail)	<i>While ICE is complying with the first two, they routinely fail to provide privacy for private conversations for children, visitation, and uncensored mail. Children do not even have privacy when meeting with their attorneys.²⁷</i>
¶13: Family reunification services	<i>ICE seeks to keep children with their mothers in detention and does not permit family reunification²⁸</i>
¶ 14: Legal services	<i>Many children in family detention have an independent claim to asylum however lack resources to know their rights and lack access to legal representation.²⁹ Also, ICE has deported many families without proper hearings before an immigration judge, denying children due process.</i>

²⁴ *Id. at 13*

²⁵ *Id. at 15*

²⁶ *Id. at 6*

²⁷ Information from AILA, November 2014

²⁸ *Id. at 18.*

²⁹ *Id. at 15*