



November 6, 2018

*Submitted via email to ICE.Regulations@ice.dhs.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: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comment in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

Dear Ms. Seguin:

The Project On Government Oversight (POGO) submits the following comment in opposition to the proposed rule entitled “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children” submitted by the Department of Homeland Security (DHS) and the Department of Housing and Human Services (HHS) and published in the Federal Register on September 7, 2018.<sup>1</sup>

POGO is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. We champion reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles.

POGO is concerned because the proposed regulation relies on DHS to self-license facilities where children can be indefinitely detained. Based on our investigations into conditions of immigration detention, we have no confidence that DHS’s self-inspections, including those conducted by the agency’s chosen contractors, will adequately protect children’s welfare.

We are also concerned about false statements DHS Secretary Kirstjen Nielsen made to the public and to Members of Congress regarding DHS’s practices of detaining children, particularly in light of the agency’s unpreparedness for implementation of the zero tolerance policy.

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<sup>1</sup> Department of Homeland Security and Department of Health and Human Services, “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children,” *Federal Register*, Vol. 83, No. 174, Sept. 7, 2018. <https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf> (Downloaded Oct. 15, 2018) (Hereinafter Proposed Rulemaking)

Finally, we take issue with the fact that the proposed regulation does not include a cost analysis of the proposed changes.

## **1. The Department of Homeland Security Has a Poor Track Record of Accountability and Transparency with Respect to Immigration Detention Facilities**

The *Flores v. Reno* settlement agreement and the court decisions implementing it require that immigration detention facilities that hold children for more than twenty days be licensed by “an appropriate State agency” to meet certain standards of care.<sup>2</sup> Most states have not licensed facilities that would satisfy the *Flores* requirements because most have not had reason to detain children and adults together. As a result, DHS has had difficulty obtaining licenses for family detention centers, limiting the length of family detention in practice to the 20-day rule of *Flores*.

Under the proposed regulation, DHS would be able to detain children for prolonged periods in facilities that are not licensed by a state child welfare agency. The proposal would allow DHS to “employ an entity outside of DHS that has relevant audit experience to ensure compliance with the family residential standards established by ICE [Immigration and Customs Enforcement].”<sup>3</sup> DHS claims that this would provide “materially identical assurances about the conditions” of family detention centers while allowing longer periods of detention.<sup>4</sup> If implemented, the regulation would also end *Flores* class counsel’s access to DHS and HHS facilities that hold minors. It would also end ongoing reporting and monitoring requirements imposed by the court onto DHS.

Self-inspections by DHS and its contractors provide much weaker protections than *Flores* does. DHS’s record of oversight, transparency, and accountability with regard to immigration detention facilities is abysmal. This record demonstrates just how dangerous it would be to allow DHS to bypass independent, state certification standards for facilities that detain children.

### **A. Inadequate and Opaque Inspections of Family Residential Centers**

The proposed regulation strongly suggests that DHS does not intend to increase oversight of family detention centers as part of its new licensing authority. DHS asserts in its proposed regulation that “ICE currently meets the proposed licensing requirements” because it currently requires family detention facilities to comply with ICE’s detention standards and hires inspectors to monitor compliance, and therefore “DHS would not incur additional costs in fulfilling the requirements of the proposed alternative licensing scheme.”<sup>5</sup>

Since May 2015, DHS has contracted with a company called Danya International to inspect family detention centers (which ICE calls family residential centers, or FRCs) for compliance with ICE’s internal standards. According to court documents, Danya has conducted unannounced

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<sup>2</sup> *Flores v. Reno* Stipulated Settlement Agreement, Aug. 12, 1996, p. 4.  
[https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf)  
(Downloaded Oct. 15, 2018)

<sup>3</sup> Proposed Rulemaking, p. 45525. <https://www.gpo.gov/fdsys/pkg/FR-2018-09-07/pdf/2018-19052.pdf>  
(Downloaded Oct. 15, 2018)

<sup>4</sup> Proposed Rulemaking, p. 45488.

<sup>5</sup> Proposed Rulemaking, p. 45518.

monthly inspections of all three family residential centers since August 2015.<sup>6</sup> Only three reports from those inspections—one from each facility, as selected by ICE—are publicly available.<sup>7</sup>

With respect to the others, the only information available to the public is an assertion by an ICE official in a court declaration that “Danya has generally found the FRCs to be compliant with a majority” of standards, and “[w]here Danya observed individual issues of non-compliance, the facilities took corrective action as appropriate and achieved compliance although this is a continuous process.”<sup>8</sup> These vague descriptions provide very little information about what individual standards were violated, or how severe and prolonged those violations were. ICE denied requests by DHS’s own Advisory Committee on Family Residential Centers for access to the other Danya International inspection reports.<sup>9</sup> The three reviews that are available consist mainly of checklists of standards with limited further explanation of the findings, and no apparent input from detainees.

DHS’s Office of Civil Rights and Civil Liberties has conducted more in-depth inspections and investigations of family detention centers, but those documents and reports are likewise unavailable to the public. Two medical doctors who served as subject-matter experts for the Office of Civil Rights and Civil Liberties on family detention centers, Dr. Pamela McPherson and Dr. Scott Allen, recently reported to Congress that their investigations “frequently revealed serious compliance issues resulting in harm to children.” Drs. McPherson and Allen stated that family detention centers “still have significant deficiencies that violate federal detention standards,” including repeated violations of the standards for medical staffing, clinic space, timely access to medical care, and language access. In their report to Congress, the doctors gave detailed examples of cases when children have been harmed by inadequate medical care.<sup>10</sup>

## **B. Systematic Failings in Inspections of Adult Detention Centers**

More information is publicly available regarding DHS’s record on inspections of adult ICE detention centers—but that record provides further evidence that the agency’s self-inspections, including those that they contract out, are a poor substitute for the necessary layer of independence that state child-welfare agencies and court supervision provide. A DHS Office of Inspector General (OIG) investigation published in June found that because of the flaws in inspections of ICE detention facilities, deficiencies “remain uncorrected for years.”<sup>11</sup>

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<sup>6</sup> Declaration of Jon Gurule, ¶6, *Flores v. Holder*, No. CV 85-4544-DMG (C.D. Cal June 3, 2016) <https://www.clearinghouse.net/chDocs/public/IM-CA-0002-0030.pdf> (Downloaded Oct. 11, 2018) (Hereinafter Gurule Declaration)

<sup>7</sup> Gurule Declaration, exhibits 1, 2 and 3.

<sup>8</sup> Gurule Declaration, ¶6.

<sup>9</sup> *Report of the DHS Advisory Committee on Family Residential Centers*, Oct. 7, 2016, p. 93 <https://www.humanrightsfirst.org/sites/default/files/dhs-advisory-committee-on-family-residential-centers.pdf> (Downloaded Oct. 11, 2018)

<sup>10</sup> Letter from Dr. Scott Allen and Dr. Pamela McPherson of the Department of Homeland Security Office of Civil Rights and Civil Liberties, to Sens. Charles E. Grassley and Ron Wyden, Senate Whistleblowing Caucus, July 17, 2018 <https://www.wyden.senate.gov/imo/media/doc/Doctors%20Congressional%20Disclosure%20SWC.pdf> (Downloaded Oct. 11, 2018)

<sup>11</sup> Department of Homeland Security Office of Inspector General, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements: DHS OIG Highlights* (OIG-18-67),

The most frequent inspections of ICE facilities are conducted by a private contractor called the Nakamoto Group. The DHS OIG found that Nakamoto’s inspections were severely lacking. According to OIG, “typically, three to five inspectors have only 3 days to complete the inspection, interview 85 to 100 detainees, brief facility staff, and begin writing their inspection report for ICE.” An ICE employee told the OIG that this was not “enough time to see if the [facility] is actually implementing” required policies. Other ICE personnel described Nakamoto inspections as “very, very, very difficult to fail” and “useless.”<sup>12</sup>

For the inspections that DHS OIG observed, Nakamoto reported having conducted 85 to 100 detainee interviews. But contrary to what Nakamoto’s contract required, the conversations with detainees that OIG saw were not conducted in private, were conducted only in English, and OIG wrote that it “would not characterize them as interviews.”<sup>13</sup> (OIG found that inspections conducted by the Office of Detention Oversight were much more thorough, but occurred only once every three years on average, and ICE did not adequately follow up to ensure that problems were corrected.)<sup>14</sup>

A recent DHS OIG inspection report evaluating the Adelanto ICE Processing Center demonstrates the importance of independent and transparent facility inspections. Adelanto is a private detention center run by GEO Group, a major private prison company that contracts with the federal government. On conducting an unannounced inspection, the inspector general found serious issues that “not only constitute violations of ICE detention standards but also represent significant threats to the safety, rights, and health of detainees.”<sup>15</sup>

Investigators found what guards called illicit “nooses” made out of bed sheets in 15 out of the 20 male detainee cells they inspected. While most of the sheets were used for makeshift privacy within the cells, some functioned as literal nooses. One detainee reported that he saw several suicide attempts and that “the guards laugh at [those who attempt suicide] and call them ‘suicide failures’ once they are back from medical.”<sup>16</sup>

The OIG also found serious problems at the facility in regard to safety, detainee rights, and lax medical care that they deemed as requiring immediate attention by ICE.<sup>17</sup>

The Department of Homeland Security’s poor track record with respect to immigration detention facilities is obvious, based on the Inspector General report and few contractor inspection reports that are available to the public. Allowing DHS to self-license and contract out the inspection of

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June 26, 2018, p.12. <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf> (Downloaded Oct. 11, 2018) (Hereinafter OIG ICE Report)

<sup>12</sup> OIG ICE Report, pp. 6-7.

<sup>13</sup> OIG ICE Report, p. 8.

<sup>14</sup> OIG ICE Report, p. 10.

<sup>15</sup> Department of Homeland Security Office of the Inspector General, *Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California*, OIG-18-86, September 27, 2018, p. 2.

<https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-86-Sep18.pdf> (Downloaded October 31, 2018) (Hereinafter, OIG Adelanto Report)

<sup>16</sup> OIG Adelanto Report, p. 3.

<sup>17</sup> OIG Adelanto Report, p. 2.

facilities that detain children, as this proposed regulation suggests, is unthinkable given that DHS isn't even upholding its own standards under current practice. This proposed change will eliminate the little oversight that is occurring currently.

## **2. Inaccurate Statements by DHS Leadership and Poor Preparation for the Implementation of Zero Tolerance Demonstrate Lack of Accountability and Flagrant Disregard for Child Welfare**

The Secretary of Homeland Security has repeatedly made false statements to Congress and to the public about official DHS policies, and shown a disturbing indifference to child welfare. Based on this record, eliminating external oversight of DHS's treatment of children would be a major mistake.

Secretary of Homeland Security Kirstjen Nielsen testified before the Senate that DHS does not "have a policy to separate children from their parents"<sup>18</sup> and that deterrence was not one of the purposes of family separation.<sup>19</sup>

The Project On Government Oversight and Open the Government obtained an internal DHS policy memo through the Freedom of Information Act that is signed by Secretary Nielsen.<sup>20</sup> It demonstrates her foreknowledge of the creation of a family separation policy aimed at deterring immigrants from migrating before testifying in front of Members of Congress that no such policy existed.<sup>21</sup>

In a letter to Members of Congress, the Project On Government Oversight and Open the Government noted that "The memo does not discuss any plan for reuniting separated families, or the harmful effects of separation on children, nor does it reflect any input from the government agencies that would be responsible for caring for the separated children."<sup>22</sup> The DHS Office of Inspector General recently concluded in an investigation that DHS was not prepared to implement the zero-tolerance policy or deal with its after-effects; that it held children

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<sup>18</sup> Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Threats to the Homeland," Oct. 10, 2018 [Quote at 1:29:43]. <https://www.c-span.org/video/?452548-1/secretary-nielsen-fbi-director-wray-testify-homeland-security-threats&live&start=5375> (Downloaded Oct. 15, 2018)

<sup>19</sup> Testimony of Kirstjen Nielsen, Secretary of Homeland Security, before the Senate Committee on Homeland Security and Governmental Affairs on "Authorities and Resources Needed to Protect and Secure the United States," May 15, 2018. [Quote at 56:58]. <https://www.c-span.org/video/?445411-1/homeland-security-secretary-kirstjen-nielsen-testifies-senate-panel&start=3406> (Downloaded Oct. 15, 2018)

<sup>20</sup> Memorandum from Kevin K. McAleen, Commissioner of U.S. Customs and Border Protection; L. Francis Cissna, Director of U.S. Citizenship and Immigration Services; and Thomas D. Homan, Acting Director of Immigration and Customs Enforcement, to Department of Homeland Security Secretary Kirstjen Nielsen, regarding increasing immigration violation prosecution referrals, April 23, 2018. <https://www.documentcloud.org/documents/4936568-FOIA-9-23-Family-Separation-Memo.html>

<sup>21</sup> Letter from Danielle Brian and Lisa Rosenberg to Sens. Ron Johnson and Claire McCaskill, Oct. 2, 2018. [https://www.pogo.org/letter/2018/10/letter-to-senators-regarding-kirstjen-nielsens-inaccurate-testimony/\(Hereinafter Brian, Rosenberg Letter\)](https://www.pogo.org/letter/2018/10/letter-to-senators-regarding-kirstjen-nielsens-inaccurate-testimony/(Hereinafter%20Brian,%20Rosenberg%20Letter)); Department of Homeland Security Office of Inspector General, "Special Review—Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy, OIG-18-84, Sept. 27, 2018. <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> (Downloaded Oct. 12, 2018)

<sup>22</sup> Brian, Rosenberg Letter

for extended periods while separated from their parents in facilities meant for short-term detention; and that it struggled to “identify, track, and reunify families separated under zero-tolerance” due to a failure of DHS technology.<sup>23</sup> According to the report, DHS chose not to reunite many families after parents’ court appearance in order to avoid “additional paperwork.”<sup>24</sup>

A report by the Government Accountability Office also documented DHS’s failure to notify or consult with the Office of Refugee Resettlement (ORR) before family separation, although ORR was responsible for caring for the separated children. When ORR inquired about the increasing number of separated children being referred to them, DHS again falsely denied the existence of any policy to separate families.<sup>25</sup> DHS also failed to consult with its own Office of Civil Rights and Civil Liberties before deliberately separating families.<sup>26</sup>

During her most recent testimony to Congress, rather than correcting her past false statements, Secretary Nielsen added to them by claiming repeatedly that DHS does not detain children.<sup>27</sup> Of course, DHS does so every day, in both family detention centers and Border Patrol holding cells. Based on this record of indifference to child welfare, lack of transparency, and outright deception, the agency should not be afforded greater discretion over the licensing of facilities that detain children.

### 3. Agencies Have Not Provided a Cost Estimate on Proposed Changes

The proposed regulation does not provide any cost analysis for implementation of the proposed regulations or even an estimate as to proposed cost. The Center for American Progress calculated the estimated cost to DHS could range from \$2 billion to \$12.9 billion over a 10-year timeframe.<sup>28</sup>

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<sup>23</sup> Department of Homeland Security Office of Inspector General, *Special Review – Initial Observations Regarding Family Separation Issues Under the Zero Tolerance Policy*, OIG-18-84, September 27, 2018, p.1 <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf> (Downloaded October 31, 2018) (Hereinafter Zero Tolerance Report)

<sup>24</sup> Zero Tolerance Report, p. 15.

<sup>25</sup> United States Government Accountability Office, *Unaccompanied Children - Agency Efforts to Reunify Children Separated from Parents at the Border*, GAO-19-163, October, 2018, p. 12-13.

<https://www.gao.gov/assets/700/694918.pdf> (downloaded November 5, 2018). See also Katherine Hawkins, “Just Following Orders: Overdue Oversight and Unanswered Questions on Family Separations,” *Just Security*, August 8, 2018. <https://www.justsecurity.org/60190/orders-overdue-oversight-unanswered-questions-family-separations/> (Downloaded November 5, 2018)

<sup>26</sup> Scott Shuchart. “Careless cruelty - Civil servants said separating families was illegal. The administration ignored us,” *The Washington Post*, October 25, 2018.

[https://www.washingtonpost.com/news/posteverything/wp/2018/10/25/feature/civil-servants-said-separating-families-was-illegal-the-administration-ignored-us/?utm\\_term=.08c4eebe21eb](https://www.washingtonpost.com/news/posteverything/wp/2018/10/25/feature/civil-servants-said-separating-families-was-illegal-the-administration-ignored-us/?utm_term=.08c4eebe21eb) (Downloaded November 5, 2018)

<sup>27</sup> Women’s Refugee Commission, “Women’s Refugee Commission Responds to Department of Homeland Security Secretary (DHS) Kirstjen Nielsen’s Testimony that DHS Does Not Detain Children,” October 10, 2018.

<https://www.womensrefugeecommission.org/news/press-releases-and-statements/3287-wrc-responds-to-dhs-secretary-kirstjen-nielsen-testimony-that-dhs-does-not-detain-children> (Downloaded November 5, 2018); U.S. Senate Committee on Homeland Security and Governmental Affairs, Full Committee Hearing on “Threats To The Homeland,” October 10, 2018. <https://www.hsgac.senate.gov/hearings/10/01/2018/threats-to-the-homeland> (Downloaded November 5, 2018)

<sup>28</sup> Philip E. Wolgin, “The High Costs of the Proposed Flores Regulation,” *Center for American Progress*, October, 19, 2018. <https://www.americanprogress.org/issues/immigration/reports/2018/10/19/459412/high-costs-proposed-flores-regulation/> (Downloaded October 31, 2018) (Hereinafter The High Costs)

Prior to *Flores*, the average length of stay in a family residential facility was approximately 47 days. By superseding *Flores* and allowing indefinite detention, it is not unreasonable to think that the average length of detention would return to a similar figure pre-*Flores*. According to one analysis, this would mean an average additional annual detention cost of \$194 million to DHS.<sup>29</sup> While this independent estimate is helpful, the cost analysis of federal regulations should not be left to outside groups. Given that the regulation's intended purpose is to allow children and their families to be detained by DHS for longer periods, there is little question that it will increase detention costs.

DHS already exceeds its Congressionally set budget for detention beds, demonstrating that the agency is unreliable in making budget estimates and in allocating its taxpayer-funded budget.<sup>30</sup> Its unwillingness to present a cost estimate in this proposed regulation is an unacceptable and irresponsible usurpation of Congress' power of the purse.

#### 4. Conclusion

Given the abysmal track record of the Department of Homeland Security when it comes to adequate and transparent inspection of its adult and family detention facilities; DHS Secretary Kirstjen Nielsen's unwillingness to speak openly and honestly with Congress about agency policies; DHS's unwillingness to present a realistic cost estimate for additional funding based on the proposed rule change; and the obvious and immediate danger that all of these deficiencies would pose to children who currently have stronger protections pursuant to the *Flores* Settlement Agreement, the Project On Government Oversight stands in opposition to the proposed rule.

Sincerely,



Danielle Brian  
Executive Director

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<sup>29</sup> The High Costs

<sup>30</sup> Letter to Members of Congress from various national, state, and local organizations, about expanded immigration detention in FY 2019, September 5, 2018. [https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2018-09/FY19-CR-detention-funding-NGO-letter\\_Sept2018\\_Final.pdf](https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2018-09/FY19-CR-detention-funding-NGO-letter_Sept2018_Final.pdf) (Downloaded November 5, 2018); U.S. Department of Homeland Security, "FY 2018 Transfer and Reprogramming Notifications," p. 35 <https://www.documentcloud.org/documents/4829359-CHC-REQ-DHS-FY-2018-Transfer-and-Reprogramming.html#document/p35/a451665> (Downloaded November 5, 2018)