November 5, 2018

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,
Comments in Response to Proposed Rulemaking: Apprehension, Processing,
Care, and Custody of Alien Minors and Unaccompanied Alien Children
Submitted via www.regulations.gov

Dear Assistant Director Seguin:

Below please find comments submitted in response to the Department of Homeland
Security’s (DHS) and the Department of Health and Human Services (HHS) Notice of
Proposed Rulemaking (hereinafter “proposed rule”) published in the Federal Register on
September 7, 2018 on behalf of the Asian Pacific Institute on Gender-Based Violence
(API-GBV). The API-GBV is a national resource center on domestic violence, sexual
violence, trafficking, and other forms of gender-based violence in Asian and Pacific
Islander and immigrant communities. The API-GBV serves a national network of
advocates; community-based service programs; federal agencies; national and state
organizations; legal, health, and mental health professionals; researchers; policy
advocates; and activists from social justice organizations. It analyzes critical issues,
promotes culturally relevant evidence-informed intervention and prevention, provides
consultation, technical assistance and training; develops resources, conducts and
disseminates research, and impacts systems change through administrative advocacy and
policy analysis.

Based on our experience supporting victim services providers and in working directly
with immigrant survivors, we adamantly oppose the proposed rule. Indefinite detention of
survivors of domestic and sexual violence and their children is an inhumane and cruel
response to the families arriving at the border seeking safety and will further exacerbate
the trauma that survivors and their children have endured.

The Proposed Rule Disregards the Danger Facing Survivors of Domestic &
Sexual Violence in the Northern Triangle Region

Many women and children who flee to the United States have survived horrendous
violence such as domestic violence, child abuse, rape, sexual slavery, and human
trafficking, and seek to apply for asylum. There has been a five-fold increase in asylum
seekers from the Northern Triangle Countries of Guatemala, Honduras and El Salvador
from 2012 to 2015. National homicide rates in Guatemala, Honduras, and El Salvador from 2017 remain above the minimum number of homicides identified by the United Nations as constituting an epidemic of violence, and are among the top six highest homicide rates in Latin America, which itself is a region characterized by high levels of non-war-related violence. Physical and sexual violence against women and girls is generally committed by gang members and family members, but also by law enforcement and other governmental actors. Rape and other sexual violence is deeply embedded within gang culture and frequently used as a form of territorial domination. The United Nations has categorized this type of violence and the forced recruitment of girls and women as constituting a contemporary form of slavery. Domestic and family violence are also pervasive in all three countries. According to one local NGO in El Salvador, approximately 70 percent of sexual assault perpetrators know the victim and 20 percent are family members. All three countries have some of the highest rates of femicides in the world.

When women and girls are victimized, they are forced to migrate not solely because of the violence they experience, but also because they lack confidence in their authorities to investigate and prosecute these crimes or to take steps to protect them. Crimes of sexual and gender-based violence, in particular, have impunity rates of close to 98 percent. The institutions and law enforcement agencies meant to protect citizens do not have the capacity or resources to do so or are penetrated by corruption and organized crime, and often also serve as the perpetrators of human rights violations. Individuals will frequently move several times within the country in search of safety before migrating internationally due to an inability to escape threats and violence. Often, displacement is not the first time a person is threatened, but rather it is the culmination of multiple threats and violence.

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6 Fernández Aponte, “Left in the Dark”.
incidents of violence over time to an individual or family. Survivors and their families undertake hazardous journeys because their abusers are able to commit atrocities without accountability and government institutions fail to provide protections.

**Family Detention and Family Separation Are Inhumane Options with Long Term Detrimental Impacts**

The proposed rule endorses unnecessarily inhumane and cruel options to separate or detain families as the solutions to address the crisis at the Southern border. Health organizations like the American Psychological Association have noted the on harm of detention on survivors of trauma, in particular, that the longer the detention period, the greater the risk of depression and other mental health symptoms for immigrants who were previously exposed to interpersonal trauma."

The proposed rule’s unnecessarily strict standards for parole will further exacerbate the trauma that survivors have experienced. In practice, DHS will have broad discretion to apply the narrow new standard, leaving survivors and their children with minimal hope of release to recover and heal while awaiting lengthy adjudication of complex, evidence-driven asylum claims. DHS acknowledges in the NPRM that the new standard will lead to release of fewer families and increased taxpayer costs.

In addition, the American Academy of Pediatrics (AAP) has noted the long-term negative impacts of detention on children, such as high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems, with expert consensus that even brief detention can cause psychological trauma and induce long-term mental health risks for children.”

Furthermore, the conditions in detention undermine the ability of traumatized children and their parents to recover from the harm they have suffered. Detention facility restrictions and disciplinary rules limit the ability of nurturing parents to exercise their authority and weaken their ability to effectively parent their own children. The bond between parent and child is essential in building resilience in a child, even one growing

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13 83 FR 45495.

14 On average, immigration cases are heard within 1.5 - 2 years; wait times in several major cities are averaging almost 4 years as of June 2018; see “New Judge Hiring Fails to Stem Rising Immigration Court Backlog,” June 7, 2011, http://trac.syr.edu/immigration/reports/250/.

up in difficult circumstances. Attachment to a parent or caregiver in early childhood is one of the most important milestones in the life trajectory. Undermining this protective factor in children by detaining families who are trying to protect themselves will only serve to harm survivors’ and their children’s health and stability, both in the short term and the long term, with implications for not only them but their communities at large.

The Administration can utilize humane alternatives to detention, such as those that are community-based, operated by non-profit agencies, that allow survivors to access to the care and services that they need. These programs are more humane, and less costly than detaining families.16

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

DHS’ plan to “self-license” is inadequate, self-serving, and lacks the necessary oversight and review by an outside agency to measure compliance. Family Detention Centers have a long-established history of being unsuitable places for families.17 The conditions in family detention centers fail to provide vulnerable families with the support and access to services they need. Furthermore, a 2016 assessment made by a DHS-appointed advisory committee—concluded “DHS’s immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families – and that detention or the separation of families for purposes of immigration enforcement or management, or detention is never in the best interest of children.18

Family detention facilities are frequently situated in remote locations and have limited capacity to provide services to survivors of domestic and sexual violence, such as legal and mental health services. These services are critical for women and children recovering from trauma suffered in their home countries and on their journeys to the United States. Without these services, families in detention are vulnerable to re-traumatization and are more likely to be removed without adequate legal process, back to face further harm and possible death.

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

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licensed by “an appropriate State agency” to meet certain standards of care. Because most states have not licensed facilities to detain parents with their children, the Department of Homeland Security (DHS) has had difficulty obtaining licenses for family detention centers, limiting the length of family detention.

Under the proposed regulation that would supersede the Flores decree, DHS would be able to detain children for prolonged periods in facilities that are not licensed by a state child welfare agency while simultaneously ending ongoing reporting and monitoring oversight by the court in the Flores case. 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].” DHS claims that this would provide “materially identical assurances about the conditions” of family detention centers while allowing for longer periods of detention.

Self-inspections by DHS and its contractors are much weaker than the protections that Flores provides. 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 state certification standards for facilities that detain families with children.

### A. Gaps in Inspections of Family Residential Centers

The proposed regulations make clear 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.” Existing monitoring protocols conducted by a DHS contractor have been wholly inadequate, with vague descriptions that inadequate information and transparency about what individual standards that Family Residential Standards have violated, or how severe and prolonged those violations were. Requests from DHS’s own Advisory

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21 Id., p. 45488.

22 Id., p. 45518.
Committee on Family Residential Centers for access to inspection reports have been denied by ICE, demonstrating the shortfall of the proposal.

DHS’s Office of Civil Rights and Civil Liberties has conducted more complete 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, and gave detailed examples of cases when children have been harmed by inadequate medical care.

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 are a poor substitute for state child welfare agencies or court supervision. Despite evidence that sexual abuse of detainees is a significant problem in ICE facilities, DHS has failed to meaningfully assess compliance with Prison Rape Elimination Act (PREA) standards through its self-assessment process. 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.”

HHS’s and DHS’s Handling of Potential Sponsors’ Data Violates DHS’s Privacy Policies and the Privacy Rights of Potential Sponsors

The proposed rule codifying DHS’s use of information to remove parents and other relatives is also problematic because it violates DHS’s own commitments concerning the Fair Information Practice Principles (FIPPs), the privacy rights of potential sponsors, and

23 Report of the DHS Advisory Committee on Family Residential Centers, Oct. 7, 2016, p. 93
(Downloaded Oct. 11, 2018)

24 Letter from Dr. Scott Allen & 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


26 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), June 26, 2018
potentially violates the confidentiality protections afforded survivors of domestic violence, sexual assault and other crimes under 8 U.S.C §1367.

8 U.S.C §1367 prohibits the sharing of information about individuals which relates to victims protected under victim-related provisions in the immigration code at INA §101(a) (15)(T), (15)(U), or (51) or INA §240A(b)(2), recognizing the importance of confidentiality and privacy for victims. In addition, on April 27, 2017, DHS released a memorandum extending FIPPs protections to all persons regardless of citizenship or legal status.\(^\text{27}\) It requires, in pertinent part, that DHS adhere to the principles of use limitation and individual participation. These principles are designed to protect the privacy of data provided to the federal government, and potentially the confidentiality of victims. In seeking to codify engaging HHS in helping DHS violate the privacy rights of potential sponsors, DHS is flouting the FIPPS, undermining data privacy, and potentially risking the confidentiality of victims without affording them the opportunity to learn where their information is being shared.

DHS is violating the FIPPs principle of use limitation by using parents’ personal information for enforcement instead of suitability assessments. DHS’s adherence to the FIPPs means that a parent’s or relative’s personal data may only be used for purposes compatible with the purpose for which the information was originally collected.\(^\text{28}\) In addition, to the extent that information within DHS systems cover individuals who have or who are seeking status under INA §101(a) (15)(T), (15)(U), or (51) or INA §240A(b)(2), it is protected under 8 U.S.C §1367. According to HHS, the information collected from parents and relatives—and then shared with DHS—is being collected in order to assess whether a parent or other caregiver is, pursuant to the TVPRA, “capable of providing for the child's physical and mental well-being.”\(^\text{29}\)

Instead, DHS is using this information for a different, and fundamentally incompatible, purpose: immigration enforcement.\(^\text{30}\) Removing a parent from the United States makes an otherwise suitable parent incapable of caring for their child.\(^\text{31}\) DHS’s use of parents’ personal data violates the FIPPs because its use is fundamentally incompatible with the purpose for which the information was collected. And since HHS is the originator of this information, HHS is helping DHS engage in practices in violation of DHS’s own policies.

\(^{28}\) Id. at 4-5 (“must be compatible with the purposes for which the information was originally collected”).
\(^{29}\) 83 FR 45507
\(^{31}\) Id.
DHS is violating the FIPPs principle of individual participation by collecting parents’ personal data without obtaining meaningful consent. DHS’s adherence to the FIPPs means that a parent or relative’s personal data may only be used subject to the person’s consent “for the collection” or “use” or “dissemination” of the data.\(^{32}\) Meaningful consent is impossible because a parent is presented by HHS with a Hobson’s choice: Either consent to the release of your personal information to DHS and face possible deportation, or know that your child will suffer in detention.\(^{33}\) Under these conditions, free and meaningful consent is impossible, and HHS’s and DHS’s handling of parents’ data for enforcement purposes—besides violating basic standards of human compassion and decency—violates DHS’ own policies.

HHS and DHS are also violating parents’ privacy by failing to put sponsors on notice about DHS’s data practices. For survivors fleeing domestic violence, sexual assault, and stalking it is critical for them to determine where their information is going in order to engage in safety planning. When HHS collects and exchanges a parent’s personal data, the information is made available to ICE offices nationwide, potentially making it more likely that victim information will be disclosed.\(^{34}\) Furthermore, when a law enforcement agency requests information about a sponsor, the query is placed in an “Active Queue,”\(^{35}\) where it is possible that it may remain indefinitely. This may have significant adverse consequences.\(^{36}\) HHS and DHS have an obligation to notify parents and relatives about these practices before collecting and retaining their data. And in the absence of such notice, parents’ and relatives’ privacy is being seriously violated.

HHS and DHS also are violating potential sponsors’ privacy by collecting more information than necessary to assess sponsor suitability. HHS and DHS violate parents’ privacy when the agencies collect a parent’s or relative’s immigration status as part of a sponsor suitability assessment. HHS and DHS should not collect information unnecessary to HHS’s evaluation of a parent’s suitability to sponsor a child, thus immigration status inquiries are unrelated to the suitability of a parent to serve as a sponsor.\(^{37}\) In addition to violating DHS’ own privacy policy, DHS acknowledges in its own PIA that collecting

\(^{32}\) \textit{Id.}


\(^{34}\) \textit{Id.}

\(^{35}\) \textit{Id.}


unnecessary information about prospective sponsors is a privacy risk, in particular for survivors of domestic violence, sexual assault, and stalking. DHS and HHS are violating parents’ and relatives’ privacy and confidentiality by collecting unnecessary information.

Conclusion

For the foregoing reasons, the Asian Pacific Institute on Gender-Based Violence urges DHS and HHS to withdraw the proposed rule and to advance policies and guidance that protect the health, safety, and best interests of survivors of domestic violence, sexual assault, and other trauma and their families. Please contact me if you have any questions or concerns relating to these comments. Thank you.

Respectfully submitted,

ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE

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