

The Flores Settlement

A Brief History and Next Steps

February, 2016

The Ninth Circuit is currently considering an appeal by the U.S. government of the 2015 ruling by the U.S. District Court for the Central District of California that the federal government violated a settlement agreement by detaining children in family immigration detention centers with their parents.

The Original Flores Settlement

In 1985, two organizations filed a class action lawsuit on behalf of immigrant children who had been detained by the former Immigration and Naturalization Service (INS) challenging procedures regarding the detention, treatment, and release of children. After many years of litigation, including an appeal to the United States Supreme Court, the parties reached a settlement in 1997.

The Flores Settlement Agreement (Flores) imposed several obligations on the immigration authorities, which fall into three broad categories:

1. The government is required to release children from immigration detention without unnecessary delay to, in order of preference, parents, other adult relatives, or licensed programs willing to accept custody.
2. If a suitable placement is not immediately available, the government is obligated to place children in the “least restrictive” setting appropriate to their age and any special needs.
3. The government must implement standards relating to the care and treatment of children in immigration detention.

According to advocates, as well as the Department of Justice Office of the Inspector General, the INS did not immediately comply with the terms of the Agreement. It was only after the Office of Refugee Resettlement (ORR) assumed responsibility for the care and custody of unaccompanied children in 2003—a product of years of advocacy on the part of human rights organizations, religious groups, and political leaders—that noticeable changes were implemented.

ORR, like the former INS and the Department of Homeland Security (DHS), has failed to issue regulations implementing the terms of the settlement, as required by the parties’ 2001 stipulation extending the agreement.

Accompanied Children

The situation of accompanied children, on the other hand, went largely under the radar (the legislation requiring the change in custody from INS to ORR only applied to unaccompanied children). One exception was a lawsuit challenging the deplorable conditions at the former T. Don Hutto facility in Texas, which detained accompanied children with their parents. The federal government agreed to close the controversial Hutto facility in 2009 and only one family detention center remained in the United States, in Berks County, Pennsylvania.

Increase of Families Seeking Protection at the Border

In June 2014, with the increase in the number of children and families seeking protection at the southern border, the federal government resurrected this nearly abandoned policy of sending families to detention centers. It now maintains three facilities.

- The South Texas Family Residential Center, in Dilley, Texas and operated by Corrections Corporation of America, has capacity to hold 2400 individuals, making it the largest immigration detention center in the country.
- The Karnes County Residential Center, operated by the GEO Group in Karnes City, Texas, has capacity for 850 individuals.
- The Berks County Residential Center, operated by the county, has capacity to hold 95 individuals, though the government has expressed its intention to double capacity to nearly 200.

Human rights advocates, faith leaders, bar associations, women's groups and child welfare organizations, as well as 136 members of Congress and 33 Senators called for an end to this misguided policy, which damages the mental health and development of children, obstructs access to counsel, and impedes asylum seekers' ability to pursue their claims.

Current Litigation

On July 24, 2015, in a momentous victory for children and families, the U.S. District Court for the Central District of California ruled that the federal government's family detention policy violated the terms of the settlement agreement by failing to release children promptly and by holding children in secure, unlicensed facilities. Specifically, the court ordered the government to implement the following six remedies by October 23, 2015:

1. The government must make and record prompt and continuous efforts toward family reunification and release of children.
2. The government must release children without unnecessary delay in accordance with the Flores order of preference, which begins with parents and also includes licensed programs willing to accept custody. The court clarified that parents who were apprehended with children would be considered in the first order of preference for these purposes (as further clarified in the fourth point, below).
3. In situations where a child cannot be released promptly to an adult family member or licensed program, the child may not be held in a secure or unlicensed program. The court defined "secure" as "a detention facility where individuals are held in custody and are not free to leave." The court also noted, referencing the government's own argument, that "there is no state licensing process available now—nor was there in 1997—for facilities that hold children in custody along with their parents or guardians." With these changes, family detention as we know it today is impossible to maintain legally. Further evidence of this is found with the Berks facility, the only facility to have held a state license, which expires on February 21, 2016. The Pennsylvania state licensing authority notified the Berks operators in October 2015 it would not renew the facility's operating license because it found the facility was operating contrary to its license in detaining "only refugee families," and "Pennsylvania law makes no provision for [Department of Human Services] to license family residential facilities."
4. The court explicitly requires that children's accompanying parents be released with them in a non-discriminatory manner. To the extent a parent may pose a flight risk or safety risk, the court notes that the government should mitigate

these risks through an appropriate bond or conditions of release.

5. The court required that the government propose standards to improve the conditions, which the court found to be “egregious,” at Border Patrol facilities, where children and families are temporarily held upon their apprehension by immigration enforcement authorities.
6. The court ordered that the government monitor its compliance with the court order and the settlement agreement and provide statistical information collected pursuant to Flores to counsel for the plaintiffs on a monthly basis.

The government maintains that it is in compliance with the remedies order of the court. However, families remain detained in facilities that are “secure” and “unlicensed.” Families at the Berks facility have also been detained for upwards of a month, with some detained for as long as five months as of February 2016.

Ninth Circuit Appeal and Next Steps

On December 1, 2015, counsel for the government filed a motion to expedite an appeal to the Ninth Circuit of the District Court’s July merits order. The government filed its brief on January 15, 2016, contending that it requires flexibility to detain families for more than 20 days—a benchmark it had previously proposed in briefing to the district court—to address “surges” of families arriving on the southern border. The government further contends that the Flores Settlement only applies to *unaccompanied* children, and that the District Court erred in including children who come to the United States with a parent in its ruling.

The brief for the appellees (on behalf of the families) was filed on February 15, 2016 with the Ninth Circuit and argues that it is clear that the Settlement Agreement, read along with extrinsic evidence, was intended to apply to *all* minors in ICE custody,

including those who came to the United States with a parent. The Ninth Circuit has not yet set a date for oral arguments in the appeal.

Given the clearly detrimental effect detention has on children and families and its contradictions to U.S. human rights and refugee protection obligations, the government should accept the district court’s ruling and begin to develop a plan to align its policies with the order. Specifically, ICE must develop a plan to ensure that children will be released with their accompanying parent within three to five business days, as provided in Flores. In circumstances where families would benefit from additional support, ICE should support an expansion of the community-based programs piloted in 2015 by Lutheran Immigration and Refugee Service and the U.S. Conference of Catholic Bishops’ Migration and Refugee Services, which provide holistic social services and appearance support to immigrants and immigrant families.

Family detention has been a stain on the Obama Administration’s legacy. The administration should abandon its appeal and implement the district court’s ruling, as further litigation will only deepen that stain and cause more hardship and suffering to refugee families.



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