The International Refugee Assistance Project at the Urban Justice Center and Church World Service (CWS) welcome the opportunity to provide recommendations on the Notice of Proposed Rulemaking on the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, DHS Docket Number ICEB-2018-0002.

The International Refugee Assistance Project

The International Refugee Assistance Project (IRAP) organizes law students and lawyers to represent refugees and displaced persons who are fleeing persecution. Mobilizing direct legal aid, systemic policy advocacy, and litigation, IRAP serves the world’s most persecuted individuals and empowers the next generation of human rights leaders. IRAP works with Iraqis and Afghans at risk for their work with the U.S. military, children with medical emergencies, women who are survivors of domestic and sexual violence, religious and ethnic minorities, LGBTI individuals, and survivors of torture.

Church World Service

Church World Service (CWS) is a 72-year old humanitarian organization representing 37 Protestant, Anglican and Orthodox communions and 22 refugee resettlement offices across the country. CWS offices and affiliates offer newly arrived refugees basic needs support, case management, cultural orientation, health access assistance, and job preparation and placement help. CWS has helped more than 850,000 refugees, Cuban and Haitian entrants, and other immigrants rebuild their lives. Whether by serving the most vulnerable where they are or by fostering welcoming communities and networks of vitality, CWS has been at the forefront of refugee work since it first opened its doors in 1946.
Comment on the Notice of Proposed Rulemaking

In this Comment, IRAP and CWS submit their views on the Notice to 1) object to the Department of Homeland Security’s (DHS) proposed changes to parole in the name of family unity; 2) object to the Department of Health and Human Services’ (HHS) practice of sharing fingerprints and background check information of potential sponsors with Immigrations and Customs Enforcement (ICE) for the purposes of immigration enforcement; and 3) note that both agencies have failed completely to quantify the fiscal costs of the proposed regulatory changes or of any alternatives to the proposed changes.

I. To DHS: Changes to Parole in 8 CFR 212.5 in the Name of Family Unity are Inappropriate and Inhumane

The Notice inappropriately proposes to curb the availability of parole and claims thereby to promote family unity by detaining and deporting family members together. The Notice does not consider community-based alternatives to detention (ATDs), which have proven to be effective.

The Notice recounts Executive Order 13,841, which stated that it is the policy of the Trump Administration “to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources.” 83 FR 45503. The Notice reports that family unity provides benefits that include the interests of the child in being in the care of the parents, judicial efficiency, and removal of the family together. Despite the words of Executive Order 13,841, the Administration’s actions demonstrate that it has no policy of family unity and seeks to maintain family ties only to the extent that it facilitates detention and deportation of migrant families.

The Notice announces ICE’s intention to change “its current practice for parole determinations . . . which may result in fewer minors or their accompanying parent or legal guardian released on parole.” 83 FR 45488. In these proposed changes to 8 CFR 212.5, parole “would generally be justified only on a case-by-case basis for ‘urgent humanitarian reasons or ‘significant public benefit’” [sic]. 83 FR 45524. Under the amended 8 CFR 236.3(j), the Notice would also limit the release of minors from DHS custody. 83 CFR 45528. In other words, the Notice says, it is in the interests of the parent, child, and government to detain children with their parents to advance the Administration’s policy of family unity. The Notice claims to result in “the sound administration of the detention and custody of alien minors and UACs.”

A. It is Essential to Parole Children and Families from Detention.

The decision to sharply curtail parole from detention in the name of family unity is objectionable and should be rescinded because detention of children significantly harms children. The proposed rule states that paroling children from detention conflicts with the goal of immigration enforcement and that, at present, DHS must choose between releasing the child alone and paroling the entire family. Rather than limiting opportunities for minors to be released from detention, the Administration should make every effort to ensure that children, and as applicable, children with families, spend as little time in detention as possible. In the case of a minor who is
traveling with a family member, absent an indication of trafficking or unfitness on the part of the relative, it is in the best interest of the child to be paroled from detention with the relative.

Repeated studies across numerous jurisdictions have shown significant and lasting negative consequences from detention on children’s physical and mental well-being. Family incarceration is inhumane, immoral, and wrought with abuse. Reports have documented guards using family separation or the threat of separation as a method of discipline, as well as children experiencing signs of psychological and physical trauma. The American Association of Pediatrics found that family detention facilities do not meet the basic standards for the care of children in residential settings and “no child should be in detention centers or separated from parents.”

According to the American Academy of Pediatrics:

Studies of detained immigrants, primarily from abroad, have found negative physical and emotional symptoms among detained children, and posttraumatic symptoms do not always disappear at the time of release…Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children.

News reports have illustrated the traumatic—and potentially deadly—effect of detention on children, including that of a toddler who died after contracting a respiratory infection at the detention center.

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Dilley Detention Center. This summer, two doctors serving as medical and psychiatric subject-matter experts for the Department of Homeland Security’s Office of Civil Rights and Civil Liberties stated:

The fundamental flaw of family detention is not just the risk posed by the conditions of confinement—it’s the incarceration of innocent children itself. In our professional opinion, there is no amount of programming that can ameliorate the harms created by the very act of confining children to detention centers. Detention of innocent children should never occur in a civilized society, especially if there are less restrictive options, because the risk of harm to children simply cannot be justified.

In light of the negative effects of detention on children, it is unconscionable to see the Administration taking drastic efforts to significantly expand family incarceration.

The Flores Settlement Agreement requires the government to prioritize child welfare when it assumes custody to protect children from inappropriate and unsafe conditions. Children must be released from custody without delay, preferencing release to a parent, or, under certain circumstances, be held in the least restrictive and an appropriate setting, generally in a non-secure facility licensed by a child welfare entity. Flores protections are the minimum standard of care for immigrant children; it is the very baseline of our duty to children. Implementation of the proposed rule will only cause further harm to children and families.

B. The Notice Fails to Consider Successful Community-based Alternatives to Detention

Even if the Administration does not withdraw the proposal to curb the availability of parole, the Notice fails entirely to consider the possibility of community-based alternatives to detention (ATDs). Existing community-based ATDs, such as the Family Case Management Program (FCMP), which cost less, have high rates of compliance and effectiveness, and help families navigate the immigration and asylum process.

Helpfully, the Government Accountability Office recently released a report on outcomes in ATDs, and found that, to the extent that data has been tracked in ATDs, they were cost-effective

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and secured individuals’ appearances at immigration court dates, finding that “over 99 percent of foreign nationals with a scheduled court hearing appeared at their scheduled court hearings while participating in the ATD program. The court appearance rate dropped slightly to over 95 percent of foreign nationals with a scheduled final hearing appearing at their hearing.”

Community-based ATD programs were also successful in securing removals, a stated goal of DHS in limiting access to parole. To the extent that data is not available, it is due to ICE’s failure to collect data on a program that it managed: “ICE did not collect similar court compliance data for foreign nationals in the component of the ATD program that ICE was responsible for managing.”

While the Administration notes that family detention is required to secure immigration enforcement goals, the Administration has not so much as considered any other alternative that would better promote the best interests of the child while preserving family unity.

C. The Administration’s Claims to Promote Family Unity Do Not Withstand Scrutiny

IRAP and CWS also note that the Administration cannot credibly claim to have a policy of family unity. It can claim only to have a policy of family detention and family deportation.

President Trump has repeatedly expressed opposition to immigration processes that promote family unity. Beyond rhetoric, the Administration has sharply limited the ability of U.S. citizens and residents to reunite with family members. In January 27, 2017, President Trump signed an Executive Order that barred nationals from several countries from entering the United States indefinitely, even if they were seeking to reunite with parents, children, or even spouses currently in the United States. After extensive litigation and another Executive Order, President Trump issued Presidential Proclamation 9645, which continues to bar nationals of several countries indefinitely. Under internal guidance from the Department of State, the Proclamation is being implemented in extremely harsh ways that in essence mean that waivers will not be available to individuals who are seeking travel to the United States on the basis of family reunification. The Administration has aggressively increased immigration enforcement,

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14 Id. at 15.
15 Id. at 14.
17 Dara Lind, “Exclusive: Internal Documents Show how Hard it is for Some Immigrants to Get a Travel Ban Waiver,” Vox, Sept. 20, 2018, https://www.vox.com/2018/9/20/17622622/travel-ban-waiver-muslim-how ("But according to the internal guidance, people only fit in this category [of waiver eligibility] if they want to live with a spouse, parent, or unmarried child under the age of 21. Because a US citizen can’t actually apply for her parent to immigrate until she turns 21, this raises questions about who, exactly, would be able to apply for a visa on these grounds.")
including for immediate relatives of U.S. citizens and immediate relatives of U.S. military personnel.\(^\text{18}\)

This policy background demonstrates that family unity is not a goal for the Administration; rather, family detention and family deportation are the priorities of the Administration. Advancing the goal of family unity is best advanced, and children best protected, through a policy that would parole minors, with relatives as applicable, out of detention. Failing that, families that could be detained should be given access to alternatives to detention. Instead, the Administration has proposed the opposite approach, strictly narrowing parole and mandating family detention despite the harmful effects of this policy on children and the availability of cost-effective and successful alternatives.

The regulations themselves cite family detention as an “effective enforcement tool”—a clear admission that the Administration is focused not on protecting the basic safety and health of children under *Flores* but on carrying out draconian punishments on asylum-seeking families. Children do not belong behind bars. Replacing family separation with family incarceration will only subject children to more trauma and abuse.

II. To HHS: Information-Sharing of Fingerprinting of Potential Sponsors and Household Members with ICE for the Purposes of Immigration Enforcement is Highly Objectionable

IRAP and CWS reiterate their ongoing objections\(^\text{19}\) to HHS’s recent practice of sharing the fingerprints of potential sponsors and adult household members with ICE for the purposes of immigration enforcement.

The Notice states the intention of HHS to continue to fingerprint all adult members of the household of a prospective sponsor. 83 FR 45507. The proposed amendments to 45 CFR 410.302 would require a background check, including “verification of identity” and “further suitability assessment including fingerprint checks, for the potential sponsor and other adult residents of the sponsor’s home.” 83 CFR 45531.

IRAP and CWS do not object to the verification of the identity and criminal background of potential sponsors and other adult members of the household to protecting children’s safety. It is inappropriate, though, to share that information with ICE for immigration enforcement. Thus far, at least 41 individuals who stepped forward to take minor children out of custody have been arrested and taken into immigration detention for enforcement proceedings.\(^\text{20}\) This policy, like


\(^{19}\) IRAP and CWS have previously registered objections in Comments, including here: https://www.regulations.gov/document?D=DHS-2018-0014-0003.

many others of the Administration, serves to keep family members apart, has already prolonged the length of time children are in federal custody, and will leave children to face the harmful consequences of detention and separation from family.

III. To DHS and HHS: Consideration of this Proposed Rulemaking Without any Assessment of Fiscal Cost is Inappropriate

The Notice fails to provide any quantified assessment of the costs that these changes will impose or indication that alternatives to family detention were considered; this is unacceptable. Executive Orders 12866 and 13563 require agencies to consider the “costs and benefits of available regulatory alternatives” and “the importance of quantifying both costs of benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.”

First, it is unacceptable for the Agencies to fail to provide any estimate of increased costs. In its Executive Summary, the Notice admits that neither DHS nor HHS provides any quantified estimate of costs for these proposed changes. 83 FR 45488. With nothing more than a bald assertion that there are “many other variables,” DHS states that it is “unable to estimate the costs of this to the Government or to the individuals being detained.” 83 FR 45514. It requests comments on how to calculate costs, even though, of the variables being considered, many of them are under DHS’ control. Id. It also fails to provide any cost estimate for changes to HHS’s practice.

As mentioned above in Part I, the Notice also fails in its entirety to consider alternatives to family detention, which have been demonstrated to be effective in securing immigration enforcement objectives and significantly more cost-effective than detention. The failure to consider the costs adequately and to consider alternatives at all violates the letter and spirit of Executive Orders 12866 and 13563. The changes proposed in this Notice should not be implemented until a Notice that includes an estimate of the quantified costs can be provided.

Second, the changes proposed in the Notice will dramatically increase the costs of family detention. The Notice admits that it would “change current ICE practices for parole determinations . . . using its parole authorities under 8 CFR 235.3 sparingly,” thereby dramatically increasing the number of minors to be held in detention and the length of detention for minors being held. 83 FR 45519. It notes that there will be increased costs from extended detention, but “this incremental cost is not quantified.” 83 FR 45520. It is certain that the changes proposed will increase the costs imposed on the U.S. government to detain families and children. The proposed rules should not be allowed to proceed until those increased costs are known and provided to the public.

Conclusion

We would be pleased to discuss any of our recommendations further with your office should you have any additional questions or comments.
Thank you for your time and consideration.

Sincerely,

[Signature]

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