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Child Migrants at the Border: The *Flores* Settlement Agreement and Other Legal Developments

A specific body of law—a 1997 settlement agreement, federal statutes, and regulations enacted that partially implement that agreement—governs the care and custody of alien minors who seek to enter and be admitted to the United States. This framework distinguishes arriving minors who are unaccompanied by immediate family (commonly known as unaccompanied alien children [UACs]) from those arriving at a U.S. border or port of entry with a family unit.

The *Flores* Settlement Agreement

In 1985, a class action lawsuit filed in the U.S. District Court for the Central District of California challenged procedures for the detention and release of alien minors by immigration authorities. After more than a decade of litigation, the parties negotiated a settlement agreement commonly known as the *Flores* Settlement Agreement (FSA). The FSA was entered as a consent decree in 1997, and the district court continues to monitor compliance with its terms. Under a 2001 stipulation, the FSA is binding until the government promulgates final implementing regulations.

The FSA sets forth a "nationwide policy for the detention, release, and treatment of minors" in immigration custody—applying to UACs and accompanied minors alike. It also announces a general policy favoring release of apprehended minors and requiring the government to place them in "the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with" protecting the minor's well-being and ensuring the minor's presence for immigration proceedings. Detained minors are to be held in "safe and sanitary" facilities and cannot be housed with unrelated adults for more than 24 hours. Under the FSA, within three to five days of a minor's apprehension and detention, the government must generally either (1) release the minor to a parent, legal guardian, adult relative, or other "capable and willing" designated adult or entity or (2) place the minor in a nonsecure facility "licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children." Minors may be placed in secure juvenile facilities in limited cases, such as when charged with a crime. This detention period of three to five days may be relaxed in the event of an emergency or an influx of minors into the United States so long as immigration authorities place all minors in nonsecure, licensed facilities "as expeditiously as possible." An alien minor not released from detention is entitled to a bond hearing before an immigration judge.

Implications for UAC Arrivals

The treatment and processing of UACs is largely controlled by the interplay of the FSA, federal statutes enacted following the entry of the FSA as a consent decree, and federal regulations.

The Homeland Security Act and the Trafficking Victims Protection Reauthorization Act

Two federal laws establish the main framework for the treatment of UACs. The Homeland Security Act of 2002 (HSA) defines an *unaccompanied alien child* as one who (1) lacks lawful immigration status in the United States, (2) is under 18 years old, and (3) is either without a parent or legal guardian in the country or without a parent or legal guardian in the country who is available to provide care and physical custody. The HSA also transferred most immigration functions from the former Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS). Functions related to the care of UACs were transferred from INS to the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS).

Congress enacted the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) to address the treatment of UACs comprehensively. The TVPRA generally requires that a child in government custody be transferred to ORR within 72 hours after the minor is determined to be a UAC. ORR must promptly place the minor "in the least restrictive setting that is in the best interest of the child." A UAC "shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense." Besides establishing a framework for the detention, treatment, and release of UACs, the TVPRA sets forth special rules for their removal. While most aliens encountered at the border without valid entry documents undergo a streamlined, expedited removal process, UACs are placed in standard removal proceedings that offer greater procedural protections. UACs from Canada or Mexico may also be given the option to return voluntarily to their home country rather than being placed in removal proceedings. Furthermore, UACs are subject to special asylum processing rules.

Federal Regulations

The parties in *Flores* stipulated in 2001 that the FSA would terminate "45 days following defendants' publication of final regulations implementing" the FSA's terms. In 2019, DHS and HHS issued a joint final rule to implement the FSA "in a manner that is workable in light of subsequent statutory, factual, and operational changes." The HHS

sections of the rule—which generally tracked the FSA—addressed the care and custody of UACs. The DHS sections—which diverged more substantially from the FSA—addressed the apprehension and processing of all minors, including the care and custody of accompanied minors not covered by HHS regulations.

In the 2020 decision *Flores v. Rosen*, the U.S. Court of Appeals for the Ninth Circuit reviewed a challenge brought by the plaintiffs to aspects of the 2019 rule. The district court had concluded that the new regulations were inconsistent with the FSA. Accordingly, the district court held that the new regulations did not terminate the federal government's obligations under the FSA, and the court enjoined the government from implementing the new regulations. On appeal, the Ninth Circuit upheld aspects of the DHS sections of the rule concerning the initial care and processing of UACs and accompanied minors as consistent with the FSA. The court held that two components of the DHS sections—which are generally relevant to accompanied minors rather than UACs—impermissibly differed from the FSA in that they (1) limited the circumstances in which accompanied minors may be released and (2) provided for the detention of families in facilities licensed by federal authorities—not state-licensed facilities. Regarding the HHS regulations, the Ninth Circuit held that the provisions were generally consistent with the FSA except for two provisions. First, the court ruled that a "catch all" provision in the HHS regulations allowing the placement of a minor in a secure facility upon an agency determination that the minor is "otherwise a danger to self or others" impermissibly deviated from the FSA. Second, the court struck down an HHS regulation providing that a minor can "opt-in" to receive a bond redetermination hearing concerning a custody placement decision, as opposed to the FSA's "opt-out" right to a hearing. The Ninth Circuit held that the district court did not abuse its discretion in denying the government's motion to terminate the FSA in full, leaving the lower court's ruling in effect. The appeals court observed that the government could still move to terminate those portions of the FSA covered by the regulations not struck down by the court.

In a separate lawsuit, a group of states sought to enjoin the 2019 Final Rule. The parties ultimately entered into settlement negotiations, and HHS stipulated in 2022 that it would engage in future rulemaking that would replace the 2019 Rule as to HHS, which had never gone into effect because of the district court's order permanently enjoining the implementation of the HHS regulations.

HHS's new rule—"Unaccompanied Children Program Foundational Rule"—was finalized on April 30, 2024, and went into effect on July 1, 2024. The rule purports to "codify policies, standards, and protections for the [Unaccompanied Children] Program, consistent with the HSA and TVPRA, and to implement the substantive requirements of the FSA as they pertain to ORR." On June 28, 2024, the district court overseeing the FSA—finding the 2024 HHS rule partially implements the FSA—"conditionally and partially terminate[d]" the FSA as to HHS. The court held that the FSA's terms continue to apply with "full force and effect" to DHS. The district court further held that it "retains jurisdiction to modify the Agreement or this Order should further changed circumstances make it appropriate."

Implications for Accompanied Minors and Their Family Units

While federal statutes and regulations specifically address the treatment of UACs, the FSA is the main source governing accompanied minors. Rules for the custody and care of accompanied minors may also implicate their family units. The FSA does not establish any affirmative release rights for the parents of the minor. However, it does require the placement of minors in nonsecure, state-licensed facilities within days of apprehension, potentially leading to those minors' separation from family units that remain housed by immigration authorities. In certain extenuating circumstances, an extension of the transfer period may be permissible. (The court overseeing the FSA found that in certain circumstances a 20-day transfer period might be consistent with the agreement.) With the FSA in place, the executive branch has, in effect, three options for the detention of families pending the outcome of removal proceedings: (1) release family units as a group; (2) detain family units in a family detention center, provided those facilities comply with the FSA; or (3) detain the parents and release only the minors.

Congressional Considerations

There are a few avenues through which the FSA's effect may be modified. Under Federal Rule of Civil Procedure 60(b), the government could file a motion before the court overseeing the consent decree to modify the FSA if changed factual circumstances so warrant. The government filed such a motion and prevailed in the court order issued on June 28, 2024, when the court found cause to modify the FSA's state licensure requirement to allow for an alternative federal oversight scheme in the event a state declines to license ORR-funded facilities. Additionally, if Congress were to pursue legislation that potentially impacted the application of the FSA, such a change in law may warrant a modification of the consent decree by the presiding court.

Congress may consider legislation to address the treatment of alien minors comprehensively. For example, the Secure the Border Act of 2023 (H.R. 2) would amend federal statute to permit the detention of a UAC for up to 30 days. The bill would also provide that the detention of an alien minor who does not qualify as a UAC would be governed by generally applicable statutory provisions on detention "irrespective of any other provision of law, judicial determination, consent decree, or settlement agreement."

Some lawmakers have introduced legislation in opposition to the 2024 HHS rule on UACs, including companion resolutions that would provide for congressional disapproval of the rule (S.J.Res. 94/H.J.Res. 171) and a proposed amendment to legislation providing appropriation that would have barred the use of funds in carrying out the rule.

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