

CURRENT DEVELOPMENTS

CHILDREN IN CAGES: A LEGAL AND PUBLIC HEALTH CRISIS

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Donald Trump has been one of the most assertive chief executives in modern America when it comes to immigration policies.¹ Since 2017, his administration has continued to push forward an apparently hate-seeped, tough-on-law immigration agenda through limiting legal immigration,² reducing the number of refugees allowed into the United States,³ imposing travel bans,⁴ and arresting over 458,000 families at the border,⁵ among others.⁶ The government's recent policies have maintained this agenda. It has endangered the health of children by separating families and children from

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1. Sarah Pierce, *Immigration Related Policy Changes in the First Two Years of Trump*, MIGRATION POLICY INST. 1 (2019).

2. See Inadmissibility on Pub. Charge Ground, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248); IMMIGRANT LEGAL RES. CTR., Pub. Charge (2019), <https://www.ilrc.org/public-charge> (changing the definition of public charge to "a person who receives any number of public benefits for more than an aggregate of 12 months over any 36-month period of time," thereby making the process harder for immigrants seeking green card); see also Jesus Krogstad & Ana Gonzalez-Barrera, *Key Facts About U.S. Immigration Policies & Proposed Changes*, PEW RESEARCH CTR. (2019), <https://www.pewresearch.org/fact-tank/2019/05/17/key-facts-about-u-s-immigration-policies-and-proposed-changes/> (estimating permanent residents to decline to one-third under Trump administration).

3. See Krogstad, *supra* note 2 (highlighting the fiscal cap of 2019 refugee admissions to be at 30,000 in comparison to 84,995 in 2016).

4. See Exec. Order No. 13780, Protecting the Nation from Foreign Terrorist Entry into the U.S., 82 Fed. Reg. 13,209 (Mar. 9, 2017).

5. See U.S. CUSTOMS BORDER AND PROT., Sw. Border Migration FY 2019, <https://www.cbp.gov/newsroom/stats/sw-border-migration>; Nicole Narea, *The Trump Administration Will Start Sending Most Immigrant Families Arrested at the Border Back to Mex.*, VOX (Sep. 24, 2019), <https://www.vox.com/2019/9/24/20882070/immigrant-families-mexico-catch-release>.

6. See generally Pierce, *supra* note 1.

each other,⁷ caging children in unsanitary and unsafe conditions, and has proposed detaining children indefinitely.⁸ As a means to achieve these health-harming immigration policies, the Trump administration has repeatedly attacked the *Flores* settlement;⁹ fortunately, active public outcry and judicial involvement have played an important role in defeating the administration.¹⁰

The *Flores* settlement dictates “a nationwide policy for the detention, release, and treatment of minors” detained in Immigration and Naturalization Service (INS) custody.¹¹ One of the broad purposes of this settlement is to ensure that children are not held in detention for long periods and are released without unnecessary delay.¹² This is not surprising. Extensive research by health experts shows that long-term detention for children leads to chronic stress and trauma, deteriorating mental health, and substantial and detrimental impacts on early child development.¹³ According to the 2017 American Academy of Pediatrics report, detained immigrant children experience high levels of anxiety, depression, and post-traumatic stress disorder (PTSD) both during and after detention.¹⁴ Health experts across the world agree that neglecting children, especially in institutional settings, is extremely harmful to their health, wellbeing, and development.¹⁵ This is because, when

7. The Department of Human Services (HHS) estimated about 2,637 children separated from their parents in its care in June 2018; however, “thousands” more children may have been separated. See U.S. DEP’T OF HEALTH AND HUMAN SERVICES (HHS) OFFICE OF INSPECTOR GEN., *Separated Children Placed in Office of Refugee Resettlement Care* (Jan. 2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.

8. See Pierce, *supra* note 1 at 20; see also *Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019); Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392 (Aug. 23, 2019) (to be codified at 8 C.F.R. pts. 212 and 236); Jaclyn Kelley-Widmer, *A Federal Judge Blocked a Trump Administration Rule That Would Allow Children to be Detained Indefinitely. Here’s What You Need to Know*, THE WASH. POST (Sep. 28, 2019), <https://www.washingtonpost.com/politics/2019/08/24/new-trump-administration-rule-allows-children-be-detained-indefinitely-heres-what-you-need-know/>.

9. *Flores v. Reno*, Stipulated Settlement Agreement (hereinafter “*Flores Agreement*”) (1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf.

10. See *Flores*, 934 F.3d 910; *Flores v. Barr*, 2019 WL 4781312, at *915–16, fn. 6 (C.D. Cal. Sept. 27, 2019); see also *Flores v. Sessions*, CTR. FOR HUM. RIGHTS & CONST. L., <https://www.centerforhumanrights.org/Unaccompanied%20Immigrant%20Minors/Flores%20Case.html>; *Documents Relating to Flores v. Reno Settlement Agreement on Minors in Immigration Custody*, AM. IMMIGR. LAW. ASS’N (Sept. 27, 2019), <https://www.aila.org/infonet/flores-v-reno-settlement-agreement>.

11. *Flores*, 934 F.3d 910 at 912.

12. A twenty-day detention period falls within this agreement. See *Flores v. Sessions*, 394 F. Supp. 3d 1041, 1062 (C.D. Cal. 2017), *appeal dismissed*, No. 18-55063, 2018 WL 3472723 (9th Cir. Apr. 27, 2018), and *appeal dismissed sub nom. Flores v. Barr*, 934 F.3d 910 (9th Cir. 2019).

13. See Kelley-Widmer, *supra* note 8; *What Research Shows About Long-Term Psychological Damage of Immigrant Children Being Detained Indefinitely*, KAISER HEALTH NEWS (Aug. 23, 2019), <https://khn.org/morning-breakout/what-research-shows-about-long-term-psychological-damage-of-immigrant-children-being-detained-indefinitely/>; Rhitu Chatterjee, *Lengthy Det. of Migrant Children May Create Lasting Trauma, Say Researchers*, NPR (Aug. 28, 2019, 1:48 PM), <https://www.npr.org/sections/health-shots/2019/08/23/753757475/lengthy-detention-of-migrant-children-may-create-lasting-trauma-say-researchers> (explaining that chronic stress and adversity “affects regions of the brain and functions that have to do with cognition, intellectual process, with judgment, self-regulation, social skills . . . and there will be thousands and thousands of children who will be scarred for life.”).

14. Julie Linton et al., *Detention of Immigrant Children*, 139 AM. ACAD. PEDIATRICS 1, 6 (2017).

15. Laura Santhanam, *How Detention Causes Long-Term Harm to Children*, PBS NEWS HOUR: HEALTH (Aug. 22, 2019, 6:18 PM), <https://www.pbs.org/newshour/health/how-detention-causes-long->

neglected, “children lose out on stimulating activities to promote how they think and learn, [and] their health and happiness. Out of fear and anxiety, their stress hormone cortisol surges and obstructs new neural connections and breaks down old ones, [thereby] causing long-term psychological and physical damage.”¹⁶

Despite these public health concerns, the Trump administration believes that making detention “aggressive” will help deter people from crossing the border.¹⁷ However, years of research show that such deterrence policies rarely work.¹⁸ In light of this evidence, these long and cruel detentions appear especially inhumane and unnecessary. Predictably, the court in *Flores* placed a permanent injunction on this proposed rule of detaining children indefinitely on the basis that it is inconsistent with the substantive and relevant terms of the underlying agreement.¹⁹

Another mandate of the *Flores* settlement requires the government to provide the following basic needs to detained children: “safe and sanitary facilities, toilets and sinks, drinking water and food, medical assistance, temperature control, supervision, and contact with family members, among other requirements.”²⁰ The absence of access to water and sanitation leads to poor hygiene, and has lasting impacts on children’s health and social development.²¹ Additionally, several studies show that food plays a critical role in brain development, learning, physical growth, positive mental health, and a robust immune system, especially for young children.²²

term-harm-to-children (comparing mental health and experiences of children placed in neglecting orphanages in Romania with migrant detention camps).

16. *Id.* (quoting Pia Rebello Britto, the chief of early childhood development for UNICEF).

17. See Veronica Stracquialursi, *Trump Immigration Official Says New Rule Detaining Families Indefinitely is a ‘Deterrent.’* CNN POLITICS (Aug. 23, 2019, 10:27 AM), <https://www.cnn.com/2019/08/23/politics/ken-cuccinelli-flores-settlement-cnntv/index.html>; see also Eleanor Emery, *Asylum Seekers I Meet Flee Something Even Worse Than Trump’s Unethical Immigration Agenda*, USA TODAY (Sep. 24, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/voices/2019/09/24/flores-settlement-immigration-detention-asylum-trump-column/2417906001/> (explaining that “the principle of deterrence is based on the idea that . . . if you are able to increase the associated negative outcomes, then you may ultimately reach a tipping point where it is no longer in the actor’s best interests to perform the act.”).

18. See Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE (Mar. 2019), <https://www.stanfordlawreview.org/online/detention-as-deterrence/>; Tom Wong, *Do Family Separation and Det. Deter Immigration?*, CTR. FOR AM. PROGRESS (Jul. 24, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/>; Anna Oltman, *Does Separating Families at the Border Discourage Immigration? Here’s What the Research Says*, WASH. POST (May 31, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/05/31/does-separating-families-at-the-border-discourage-immigration-heres-what-the-research-says/>.

19. See *Flores v. Barr*, 2019 WL 4781312, at *16 (C.D. Cal. Sept. 27, 2019) (“Defendants cannot simply ignore the dictates of the consent decree merely because they no longer agree with its approach as a matter of policy.”).

20. *Flores Agreement*, *supra* note 11 at ¶ 12A.

21. See *Sanitation Fact Sheet*, WORLD HEALTH ORG. (“WHO”) (June 14, 2019), <https://www.who.int/news-room/fact-sheets/detail/sanitation> (explaining that lack of sanitation and proper hygiene leads to major diseases such as cholera, schistosomiasis, trachoma, diarrhea); see also WHO, *Poor Sanitation Threatens Pub. Health* (2008) (highlighting that more than 800 children die as a result of diarrheal diseases, which are linked to poor hygiene).

22. See generally AM. PSYCHOLOGICAL ASS’N, *What are the Psychological Effects of Hunger on Children*, <https://www.apa.org/advocacy/socioeconomic-status/hunger.pdf>.

As Judges Gee and Berzon opined, access to basic necessities such as food, water, and basic hygienic items, like toothbrushes and soap, is common-sense for the safety of children.²³ Yet, the administration argued that children were not entitled to “toothbrushes, soap, and water,”²⁴ despite rich medical and public health evidence and many firsthand testimonies and reports detailing the unsafe and unsanitary nature of the detention facilities.²⁵ In 2019 alone, the detention facility in Clint, Texas saw outbreaks of scabies, shingles, and chickenpox—diseases linked with overcrowding, poor sanitation, and poor hygiene.²⁶ In the McAllen, Texas facility, thirty-two migrants tested positive for influenza, and one detainee died of it.²⁷ Testimonies highlighted that children were being locked in cells and cages all day long and were not being provided proper treatment when they were contracted the flu or other illnesses.²⁸ About 155 detainees were observed standing on toilets “to make room and gain breathing space,” in a facility that can only hold thirty-five people.²⁹ Children were sleep-deprived, underfed and hungry, as they tried to fill their bellies with instant oats, instant noodles, and frozen burritos,³⁰ while girls were left out to sit in their menstrual blood because they were allowed only one sanitary pad per day.³¹ The court understandably ruled that when children are forced to “sleep in concrete floors, with no bedding aside from pieces of thin polyester foil and are subjected to cold temperatures, serious overcrowding, and constant lighting” it is neither safe nor sanitary.³² Especially in light of imagining masked and armed guards watching

23. Flores v. Barr, 2019 WL 4781312, at *914 (C.D. Cal. Sept. 27, 2019).

24. See Oral Argument at 33:57–34:09, Flores v. Barr, No. 17- 56297 (9th Cir. Jun. 18, 2019), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015907; see also Manny Fernandez, *Lawyer Draws Outrage for Defending Lack of Toothbrushes in Border Det.*, N.Y. TIMES (Jun. 25, 2019), <https://www.nytimes.com/2019/06/25/us/sarah-fabian-fabian-migrant-lawyerdoj.html?action=click&module=RelatedCoverage&pctype=Article®ion=Footer>.

25. See, e.g., Clara Long, *Written Testimony: Kids in Cage: Inhuman Treatment at the Border*, HUMAN RIGHTS WATCH (Jul. 11, 2019), <https://www.hrw.org/news/2019/07/11/written-testimony-kids-cages-inhumane-treatment-border>; Dahlia Lithwick, *Some Did Not Have Socks. Their Hair Was Dirty*, SLATE (Jul. 1, 2019), <https://slate.com/news-and-politics/2019/07/kids-at-clint-border-crisis-immigration-lawyer-weighs-in.html>.

26. See Christina Potter, *Outbreaks in Migrant Det. Facilities*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Jul. 11, 2019), <https://www.outbreakobservatory.org/outbreakthursday-1/7/11/2019/outbreaks-in-migrant-detention-facilities>.

27. *Id.*

28. See Caitlin Dickerson, *‘There is a Stench’: Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (Jun. 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html?module=inline>; see also Nicole Acevedo, *Migrant Children Face More Serious Health Risks With Longer Det.*, GROUPS WARN, NBC NEWS (Aug. 21, 2019), <https://www.nbcnews.com/news/latino/migrant-children-face-more-serious-health-risks-longer-detentions-groups-n1045031> (highlighting that at least three children died of infectious diseases such as flu while being held in the detention facilities).

29. See Dickerson, *supra* note 28.

30. *Id.*

31. See Alanna Vagianos, *Menstruating Migrant Girls’ ‘Visibly’ Bleeding Through Pants While Detained, Lawsuit Says*, HUFFPOST (Aug. 30, 2019), https://www.huffpost.com/entry/migrant-girls-border-detention-menstruating-bleedingpads_n_5d694102e4b02bc6bb38d026?fbclid=IwAR3mySgbh17kDkfooAjTOSuxGE4QXB5XlaX2SUHgREUWa7bXtZjYZJmO7YQ.

32. See Flores v. Barr, 934 F.3d 910, 915 (9th Cir. 2019).

over these harmful conditions, these vivid examples hardly seem “safe and sanitary.”³³

To justify withholding basic necessities from detained children, the government argued that the “safe and sanitary conditions” in the mandate was too vague to be enforced.³⁴ However, the court highlighted that the *Flores* requirements of providing safe and sanitary conditions can be interpreted within its ordinary meaning using common sense.³⁵ Moreover, beyond the *Flores* “safe and sanitary” language, the government’s own Customs and Border Protection (CBP) policies hardly seem vague.³⁶ According to the CBP’s “National Standards on Transport, Escort, Detention, and Search” (“TEDS”), detained children must “be offered a snack upon arrival and a meal at least every six hours thereafter,” food that is “not frozen, expired, or spoiled,” and “clean drinking water along with clean drinking cups.”³⁷ Additionally, the policies also mandate access to basic personal hygiene items, including access to clean bedding, showers, soap, and a clean towel.³⁸ These CBP policies seem to reflect more of the “common-sense” understanding of what is “safe and sanitary” at issue in *Flores*.

In light of the extensive public health research related to detaining children and denying their access to basic necessities, it is fortunate that the government has not succeeded in their argument against providing “safe and sanitary” conditions in keeping with the *Flores* settlement. Yet, the scary implication of the desired policies of the Trump administration, regarding treatment of child immigrants, is that it is clear that their sought-after detention conditions would have negative and long-lasting impacts on the health and development of children. Consequently, it is concerning that these detained children appear to merely be pawns in a hate-seeped immigration agenda.

33. See Dickerson, *supra* note 28.

34. See Oral Argument at 33:57–34:09, *Flores v. Barr*, No. 17- 56297 (9th Cir. Jun. 18, 2019).

35. See *Flores*, 934 F.3d at 915–16.

36. *Id.*

37. *Id.*; U.S. CUSTOMS AND BORDER PROT., *Nat’l Standards on Transport, Escort, Det., and Search* (“TEDS”) at 18 (Oct. 2015).

38. U.S. CUSTOMS AND BORDER PROT., *supra* note 37 at 16.