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***Jenny L. Flores, et al. v. Jefferson B. Sessions, III, et al.*, Case No. CV 85-4544 DMG (AGRx)**

To: Advocates for immigrant children

Fm: Peter Schey & Carlos Holguin, *Flores* Class Counsel

Re:
1. Developments re Administration plans to charge immigrant parents with crimes;
2. US District Court Order regarding right of immigrant minors to be released by DHS (set-back for Trump EO to detain children) and right to humane conditions in border patrol facilities in the Rio Grand Valley (vast majority of apprehensions)

Date June 29, 2017

Sources indicate that ICE is considering or has recently adopted an initiative likely involving an interagency short-term operation aimed at arresting and criminally charging those involved in smuggling minors or facilitating their being smuggled into the country, including parents and family members who engaged human smugglers. The policy intends to place an emphasis on prosecuting parents and families, rather than the operators of smuggling operations. Investigation will start with every unaccompanied minor encounter. Minors (with no legal representation) will be interrogated in an effort to obtain information that can be used against their parents or sponsors. Agents will promptly interview the child's parent or sponsor, database checks conducted, and administrative and criminal arrests made. The rational for the policy is primarily to serve as a deterrent for complying with U.S. laws. The enforcement efforts may be lead by Homeland Security Investigations (HIS) agents, in conjunction with ICE agents from Enforcement and Removal Operations (ERO) and ICE Field Offices, with help from the HIS intelligence program. Since the 2014 surge in apprehensions of unaccompanied minors, about 90% have been released to family members under the combined requirements of the *Flores* settlement and the TVPRA. In our capacity as *Flores* class counsel, we will seek information about current DHS policies and share with advocates anything we learn.

In what may be a setback to President Trump's plans to implement harsh pro-detention and pro-deportation policies for apprehended Central American children and their mothers,[1] this week (June 27, 2017), US District Judge Dolly Gee issued a 34-page decision in the class action case of *Flores v. Sessions*. *Download the decision at this link*. The *Flores* class includes *all* unaccompanied and accompanied minors in DHS custody nationwide. Here are the key provisions of the court Order:

[1] See January 25, 2017, Executive Order 13767 directing DHS to end its "catch and release" policy with regards apprehended children and mothers, and the President's plan to convert "unaccompanied" minors to "accompanied" status allowing their placement in expedited removal once united with a parent. For details see a separate memorandum we're distributing today entitled: Trump Admin Executive Order and Resulting DHS Memorandum Dealing with Children.

- The court Order issued June 27 states that DHS (including ICE and CBP) may *not* detain immigrant children by simply placing them into "expedited removal" proceedings and then arguing they are subject to "mandatory detention." This detention policy violates the 1997 *Flores* nationwide settlement that sets out a *presumption of release for minors – i.e. minors must be released unless there is substantial evidence they are a danger to themselves or others or a flight risk*. While federal law enacted in 1996 states that most immigrants in expedited removal proceedings are subject to mandatory detention, in the 1997 *Flores* settlement the Government agreed to individually assess each apprehended minor for release and to release minors unless a minor is a flight or safety risk. Judge Gee makes clear that DHS cannot legally and consistent with the *Flores* settlement hold minors in so-called "mandatory detention."

  From the time a minor is taken into custody, DHS and the Office of Refugee Resettlement with jurisdiction over unaccompanied minors, must take steps aimed at release to any available parents, other relatives, adults designated by a parent, or licensed group homes.

- The court ordered that DHS's treatment of children in border patrol stations in the Rio Grand Sector are inhumane and violate the settlement. The Court ordered DHS to provide adequate space for children to sleep, to provide soap, towels, showers and other hygiene products to children, to keep air temperatures at moderate levels, to provide clean water and to provide adequate food.

  The court rejected the DHS's argument that none of these remedies are required by the terms of the *Flores* settlement. The court ruled that providing detained children with these minimally humane conditions is required by the settlement's language that DHS must treat children with concern for the "particular vulnerability of minors," as well as the settlement's requirement that conditions of detention be "safe and sanitary."

- The Court also decided that for children detained beyond the time required to process them for possible release, DHS's only three family detention centers (Karnes Tx., Dilley Tx., Berks PA)) operate in violation of the settlement because they are not licensed. The settlement requires that all minors not released be housed in facilities licensed for the care of dependent children.

- The court rejected two concerns raised by plaintiffs: Interference with access of class members to pro bono counsel who seek to represent minors at detention centers. The court ruled that nowhere does the *Flores* settlement guarantee class members a right of access to counsel. Interference with counsel if significant may be addressed in a separate suit. Second, the Court ruled that the settlement's prohibition against "commingling" minors with unrelated adults applies only to *unaccompanied* class members. Plaintiffs' examples involved *accompanied* class members who stated that the Government mixed them in with unrelated adults.

- The court ordered DHS to nominate someone to fill the position of "Juvenile Coordinator," a DHS employee provided for by the *Flores* settlement but not filled for many years by the

Government. The Order states that the Juvenile Coordinator "will monitor compliance with those terms of the *Flores* Agreement, which this Court has found must be enforced and shall report directly to the Court regarding the status of Defendants' compliance." Once the court approves a monitor, it will flush out in more detail what it wants monitored and how it wants to receive monitoring reports. Plaintiffs had requested an outside monitor. The Court stated that if the Juvenile Monitoring doesn't help bring DHS into compliance with the settlement, appointment of an independent monitor will be considered.

These are the next steps in defense of apprehended and released immigrant minors we are considering and be glad to get feedback and ideas from stakeholders and class members:

1. *Pro bono* law firm assistance with detention site inspections: To monitor the *Flores* settlement, we are seeking *pro bono* law firms to visit and inspect detention facilities operated by the border patrol and by ICE. Under the settlement class counsel and lawyers we designate are permitted access to all detention centers for "inspections" and to interview all class members and their mothers at the sites inspected. We are required to designate the attorneys, legal assistants and translators who will participate in these inspections every six months. We are now recruiting legal services attorneys and pro bono law firms and attorneys interested in joining detention site inspections. For more information, contact pschey@centerforhumanrights.org and crholguin@centerforhumanrights.org

3. Letter requesting updated information from DHS: We will shortly submit a letter to DHS requesting information about its recent policies and practices regarding detained class members. Under the *Flores* settlement, class counsel may request information relating to all aspects of compliance with the terms of the settlement. Feel free to forward us ideas about information we should seek regarding current policies and practices.

4. Litigation and strategies in response to Trump policies: We welcome *pro bono* assistance and participation in litigation by legal services lawyers involved in defending immigrant minors. These are the areas in which litigation is possible:

A. Appeal of June 27, 2017 Order: We assume the Government will appeal the district court's June 27, 2017, *Flores* Order to the Ninth Circuit Court of Appeals. It is unclear whether the Government will seek a stay of the district court's decision. We will defend the district court's decision and oppose any application for a stay.

B. ORR refusal to provide bond redetermination hearings for minors in its custody: We challenged ORR's refusal to provide bond redetermination hearings before Immigration Judges for minors not released. Recently we won a nationwide Order in the district court. The Government appealed to the U.S. Court of Appeals for the Ninth Circuit. The matter has been briefed and argued and we expect a decision shortly. If the Court of Appeals upholds the district court's Order, minors in ORR custody not released will be entitled to have their custody status reviewed by an Immigration Judge, and the Immigration Judge's decision may be reviewed by the Board of Immigration Appeals.

C. Converting unaccompanied minors to accompanied minors when released to a parent: Several groups are researching this issue and litigation is likely. First, we believe the Administration may be required to comply with the notice and comment provisions of the APA before

changing its policies regarding defining who is and who is not an unaccompanied minor. It also appears that federal law assigns the decision of whether a minor is accompanied or unaccompanied to HHS, not to DHS. Third, the reclassification effort may violate the TVPRA, which sets unaccompanied minors on a statutory course, including *inter alia* release and formal deportation hearings. These rights would be irrationally withdrawn the minute a minor was reclassified as being accompanied. We've made no decision about litigation, but are researching and monitoring this issue.

D. Threatened criminal charges and deportation of parents of apprehended and released minors: We are pursuing document requests to DHS and DOJ about these issues and will assess the records released. Further discussions are needed to determine ideas advocates and parents have involving practical steps to be taken to avoid unlawful arrests, deportations or charges being brought against parents, the provision of technical support for public defenders likely to represent family members charged with crimes, research into the elements that must be proved to convict parents and defenses under federal and any applicable state laws, and identifying lawyers available to represent parents who may be placed in removal proceedings.

5. Conference call – we will shortly circulate email regarding a conference call to discuss the recent significant developments in the *Flores* case and possibly some of the related issues discussed above.

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