Where We Stand: A 20-Year Retrospective of the Unaccompanied Children's Program in the United States

By Jenny Rodriguez

CHAPTER TWO: THE *FLORES* SAGA

The U.S. Committee for Refugees and Immigrants (USCRI) and The Children's Village present chapter two of *Where We Stand: A 20-Year Retrospective of the Unaccompanied Children's Program in the United States*. The retrospective will review the Unaccompanied Children's Program from the passage of the Homeland Security Act (HSA) of 2002 until today. It assesses 20 years of legislation, policies, litigation, and, most importantly, the U.S. federal government's care of unaccompanied migrating children, with a view toward the next steps and improvements for the years ahead. The second chapter looks at the *Flores* settlement agreement and features interviews with government staff and *Flores* counsel. In this chapter, we will not give a complete history of *Flores* but rather highlight actions that were most critical to the Unaccompanied Children's Program. It covers three main areas: background on *Flores v. Garland*, the *Flores* enforcement action of 2004, and the current state of *Flores*.

"In 1985, a fifteen-year-old unaccompanied girl was housed in the Mardi Gras Motel – a makeshift jail used to house ''detainees.'' She was mixed with adults of both sexes. She shared sleeping quarters with seven other children and five adult women, none of whom were related to her. She was given no right to educational instruction, medical care, recreation, or visitation. Her name was Jenny Lissette Flores, and she was under the care and custody of the former Immigration and Naturalization Services (INS). Jenny Flores was the lead plaintiff for the *Flores* settlement agreement originally filed in 1985, and I would call her the Rosa Parks of the civil rights movement for immigrant children," Peter Schey said. Schey and Carlos Holguín from the Center for Human Rights and Constitutional Law and the National Center for Youth Law filed the original *Flores v. Reno* lawsuit.

At the time of the original filing of the *Flores* class-action lawsuit, the INS took in approximately 5,000 children annually.[1] The children ranged in age from toddlers to

[1] Testimony of Stuart Anderson, Executive Associate Commissioner, United States Immigration and Naturalization Service, Washington, D.C. "The Unaccompanied Alien Child Protection Act," Hearing before the Subcommittee on Immigration, 107th Cong.

teenagers. Many fled their home countries due to human rights abuses, such as forced marriages, child labor, military recruitment, and armed conflicts. Others fled their homes due to neglect, abuse, or abandonment from a parent or guardian. The responsibility of the INS was to carry out and enforce the country's immigration laws, including those that pertained to children.

Immigration and Naturalization Service Detention Policy

On September 6, 1984, to manage the influx of unaccompanied children arriving in California, Harold W. Ezell, Commissioner of the Western Region of the INS, implemented a policy for unaccompanied children.[2] It detained immigrant children and limited their release to a parent or legal guardian, except in unusual and extraordinary cases, to a responsible individual who agreed to provide care and be responsible for the welfare and well-being of the child.[3] This policy resulted in the lengthy or indefinite detention of immigrant children. Moreover, the detention conditions during this time were poor: children were strip-searched, held with unrelated adults, and denied educational and recreational opportunities.[4]

> According to Schey: "The INS created this policy of detaining minors to hold them as bait, to force their parents who were undocumented to surrender themselves. Once the parent appeared to get custody of their child, the INS wanted to place both the parent and child into deportation proceedings."

Flores v. Reno

The litigation history of the *Flores* settlement agreement originated in 1985 in the class-action lawsuit filed by the Center for Human Rights and Constitutional Law (CHRCL) and the National Center for Youth Law (NCYL).[5] The suit was filed against the former INS, challenging the detention, treatment, and release of immigrant children in federal custody.[6] Over many years, the case made its way through the courts, including an appeal to the U.S. Supreme Court, until the parties settled in 1997.[7] The settlement agreement required the government to release children from immigration detention without unnecessary delay. It provided an order of

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[2] 83 Fed. Reg. at 45489.
[3] *Id.*
[4] *Id.*
[5] Holguin, C., & Schey, P. A. (1986). Challenging INS Detention of Minors. *In Defense of the Alien*, *9*, 152–164. http://www.jstor.org/stable/23140910.
[6] *Id.*
[7] *Id.*

preference of the individuals to whom children could be released to, beginning with parents and including other caregivers such as aunts, grandparents, and adult siblings. The settlement also instructed that children must be placed in the least restrictive setting appropriate to their age and special needs, as well as detailed standards for the children's care and services.[8]

The *Flores* settlement agreement was built on the notion that the INS must treat children in its custody with dignity, respect, and concern for their vulnerability as minors. With the goal of applying child welfare protections to vulnerable immigrant children, the settlement set national minimum standards for the detention and humane treatment as well as prompt release of all children under federal immigration custody. In 2001, the parties agreed to a modification of the settlement agreement, providing that the settlement agreement would continue until the INS published regulations implementing provisions in the settlement agreement. However, the INS never published implementing regulations. Although it had a regulation governing the release of minors, it never fully incorporated the *Flores* settlement agreement requirements into its regulation.[9] *Flores* was first assigned to Judge Robert J. Kelleher and, after his passing, was assigned to Judge Dolly M. Gee of the District Court of the Central District of California, who still presides over *Flores*.

Flores Enforcement Action 2004

The *Flores* settlement agreement has been invoked in numerous enforcement actions and individual petitions. On January 15, 2004, the first *Flores* enforcement action was filed. In the first enforcement action, which occurred shortly after the transfer of the program from the former INS to the Office of Refugee Resettlement (ORR), *Flores* counsel alleged violations of the settlement's guarantee of safe conditions and prompt release of children. First, they alleged that the release of children to their parents was more time-consuming under ORR than under INS. Second, they alleged that children were being unnecessarily detained in secure detention facilities and were not receiving the appropriate medical care and educational and social services. The Office of Immigration Litigation and the U.S. Attorney's Office for the Central District of California handled the case.

> "The *Flores* counsel was given the ability to bring motions to enforce the settlement in front of the district court. In 2004, we filed the first motion to enforce. We [*Flores* counsel] argued that children were not being placed in the least restrictive environment.

[8] Stipulated Settlement Agreement, *Flores v Reno*, No. CV 85-4544- RJK(Px) (CD Cal 1997).
[9] 8 CFR Part 236 (1998).

> Children were not being provided with adequate education and mental health services, denied access to legal counsel, subjected to arbitrary solitary confinement, and strip-searched. We also challenged the fact that if a child were under removal by an immigration judge, they would often take that child back into custody, even though it could take weeks, months, or years before removal is implemented. At the time, Judge Robert Kelleher required the federal government to file status reports detailing how they were compliant with *Flores*. The defendants provided additional status reports, but these reports didn't solve the problems, and the first enforcement never got resolved. Nothing came out of the first enforcement except the government filing these reports," Schey said

After invoking the first *Flores* enforcement action, the *Flores* counsel withdrew the action due to a lack of evidence of their claims. The government continued to file status reports detailing its compliance with *Flores*. According to a government attorney who worked on the case: "The program had just been transferred from the INS to ORR, and although ORR did not have the best record-keeping at the time, it was clear that ORR's intention was to provide care in the best interests of the children. There was a major shift in the type of facilities being used to house children – from county jails under INS to shelter care homes under ORR. Visits to shelters at the time showed improvements in programming. There was a slightly longer stay in ORR care because the agency was attempting to ensure that releases to sponsors were safe. And taking the agency's focus away from the children and onto an enforcement action was not ideal at the time."[10]

Family Detention Under the Obama Administration

In 2014, there was an increase in Central American mothers and their children crossing the U.S. border to seek protection. In response to this influx, the federal government expanded the family incarceration policy.[11] The Department of Homeland Security (DHS) raised the number of family detention beds from 90 to 3,700 in one year.[12] The Obama administration continued the Bush administration's policy of keeping families detained after their credible

[10] Personal correspondence with government official.
[11] Schrag, Philip G. *Baby Jails: The Fight to End the Incarceration of Refugee Children in America*. University of California Press, 2020.
[12] *Flores v. Lynch*, Case No. CV 85-4544-DMG (AGRx) (C.D. Cal. August 21, 2015).

fear interviews. The Obama administration was accused of adopting a "no release" policy as an aggressive deterrence strategy.[13]

> "In 2015, we brought a motion to enforce the terms of the settlement. We argued that the no-release policy violated the terms of the settlement and violated Supreme Court precedent. The *Flores* counsel determined that children were not being properly released to relatives who were able to provide safe and secure housing for the child. The conditions of detention during this period were not in compliance with the terms of the settlement," Schey said.

The American Civil Liberties Union (ACLU) filed two class-action lawsuits on behalf of Central American immigrant children and argued that the Obama administration's mandatory detainment policy of Central American asylum seekers was being used as a deterrence strategy that violated the *Flores* settlement agreement.[14] The Obama administration argued that the *Flores* settlement agreement pertained only to unaccompanied children; thus, the settlement's "preference to release" did not apply to families. The government also argued that the "no-release policy" was necessary to manage the humanitarian situation taking place at the border. In 2015, the U.S. District Court Judge Dolly Gee for the Central District of California ruled that the federal government's detention policy violated the terms of the *Flores* settlement agreement.

Accompanied v. Unaccompanied Children

In 2016, the U.S. Court of Appeals for the Ninth Circuit affirmed that the *Flores* settlement agreement applies to accompanied as well as unaccompanied children.[15] This ruling meant that *Flores* protections applied to children incarcerated with their parents. The ruling made it clear that all children in federal immigration custody, whether accompanied or unaccompanied, must be placed in the least restrictive setting possible and be transferred to a non-secure, licensed facility within five days of arrest or "as expeditiously as possible," in the event of an emergency or influx.[16]

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[13] U.S. Department of Homeland Security, "Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants," November 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[14] *Id.*

[15] *Flores* V. Lynch (United States Court of Appeals for the Ninth Circuit July 6, 2016).

[16] *Id. at 7.*

Government Obligations Failing Under the *Flores* Settlement Agreement

In 2017, the U.S. Central District Court of California again found that DHS and its subordinate entities, the U.S. Immigration and Customs Enforcement (ICE) and the Customs and Border Protection (CBP), failed to comply with their obligations under the *Flores* settlement agreement.[17] DHS was incarcerating children and their parents in unlicensed facilities; some were being held for up to eight months, which was beyond the five-day time limit previously authorized in times of emergency influxes.[18] The district court also found that DHS had failed to meet other obligations regarding facility conditions, such as:

- inadequate provision of food;
- inadequate access to clean drinking water;
- unsanitary and unsafe conditions;
- freezing temperatures, and;
- inadequate sleeping conditions.[19]

Proposed Rulemaking Regulations on the *Flores* Settlement Agreement

On September 7, 2018, DHS and the Department of Health and Human Services (HHS) published a notice of proposed rulemaking intended to promulgate regulations implementing *Flores* protections and, ultimately, terminate the *Flores* settlement agreement.[20] In the notice, the government sought to have ICE detain children with their parents and exempt family detention centers from requiring that facilities detaining children be licensed by an appropriate state agency.[21] In September 2019, District Court Judge Gee blocked the DHS and HHS regulations, stating: "This regulation is inconsistent with one of the primary goals of the *Flores* Agreement, which is to instate a general policy favoring release and expeditiously place minors in the least restrictive setting appropriate to the child's age and special needs."[22] According to the court, the proposed regulations would have undermined critical legal protections for accompanied children. The District Court dismissed the government's

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[17] *Flores v. Johnson*, 212 F. Supp. 3d 864 (C.D. Cal. 2015).
[18] *Id.*
[19] *Id.*
[20] U.S. Department of Homeland Security and U.S. Department of Health and Human Services, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children," *Federal Register* 83 (174) (2018): 45486–45534, available at https://www.regulations.gov/document?D=ICEB-2018-0002-0001.
[21] *Id.*
[22] United States District Court Central District of California Civil Minutes—General, https://youthlaw.org/sites/default/files/2022-03/9.27-Flores-Order.pdf.

argument to modify the *Flores* settlement agreement.[23] The Ninth Circuit largely upheld the District Court's decision in December 2020.[24]

Current Status of the *Flores* Settlement Agreement

> *"When Flores counsel first took on this litigation, I never expected the litigation to go on for this long. We [Flores counsel] didn't anticipate reaching a nationwide settlement for immigrant children. It's been over twenty years, and this settlement agreement remains in effect until the federal government introduces final regulations to codify the agreement." - Peter Schey.*

It's been over thirty years since the class action lawsuit was originally filed in 1985. The *Flores* settlement agreement has lived through multiple administrations and has been invoked in numerous enforcement actions. While much has changed in thirty years, where does the *Flores* settlement agreement stand today? In a 2022 court filing, the Biden administration stated that it would abandon the Trump-era regulations that would have led to an attempt to terminate the *Flores* settlement agreement protections for children in federal immigration custody.[25] The Biden administration omitted the Trump-era HHS rule from its annual public agenda.[26] The administration will now work on its own regulations to codify *Flores*. In the next year, we should expect to see some action from the Biden administration. The *Flores* settlement agreement has been a critical component for protecting and safeguarding immigrant children in government custody. Since the inception of the *Flores* settlement agreement, programming for unaccompanied immigrant children has been subject to judicial oversight. *Flores* is still under the watch of the judicial branch; Judge Dolly M. Gee still presides over *Flores v. Garland* today. But the time has come to move away from judges overseeing the program.

Today, the Unaccompanied Children's Program is housed within the Office of Refugee Resettlement, part of the Administration for Children and Families at HHS, an agency whose

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[23] *Id.*

[24] *Flores v. Barr*, 407 F. Supp. 3d 909 (C.D. Cal. 2019).

[25] DHS and HHS announce new rule to implement the *Flores* Settlement Agreement; Final Rule published to fulfill obligations under *Flores* Settlement Agreement DHS and HHS Announce New Rule to Implement the *Flores* Settlement Agreement | Homeland Security, https://www.dhs.gov/news/2019/08/21/dhs-and-hhs-announce-new-rule-implement-flores-settlement-agreement.

[26] 84 FR 44392, available at https://www.govinfo.gov/content/pkg/CFR-2019-title45-vol3/pdf/CFR-2019-title45-vol3-part410.pdf.

mission is to protect the welfare of children and families. The Biden administration's ORR should issue a rule implementing its portions of the settlement agreement and take the opportunity to increase protections for unaccompanied immigrant children, such as appointing more child advocates for vulnerable children and expanding the use of the Unaccompanied Refugee Minors Program. This programming for children should fall under the purview of the executive branch, specifically ORR at HHS, not a single judge in the judicial branch. Moving forward, Congress should also perform its role, as it did in the Trafficking Victims Protection Reauthorization Act of 2008, and pass legislation to improve the care and ensure the safety for unaccompanied immigrant children, such as guaranteeing post-release services for all children, providing refugee benefits to children with Special Immigrant Juvenile Status (SIJS), and creating a Children's Corps, like the Asylum Corps, but with officers trained in both immigration law and child welfare. The principles of *Flores* have been vital to ensuring that immigrant children are protected while in immigration custody. However, we now need the administration and Congress to go further and enhance protections beyond those initially conceived in the *Flores* settlement agreement.