

How the Administration's Immigration Enforcement Agenda Got in the Middle of Family Reunification:

Frequently Asked Questions about the DHS / HHS Information-Sharing Agreement

This week several members of Congress visited a detention center for immigrant children in Homestead, Florida. Homestead is part of a network of facilities used by the United States government to temporarily house children who arrive in the United States without a parent or guardian, seeking safety.¹ The elected officials were alarmed by what they saw. Rep. Debbie Mucarsal-Powell described the facility as having a “prison-like feel.”² Rep. Joaquin Castro described the current process that undocumented children go through in the United States as “immoral.”³ Rep. Donna Shalala described her time inside the Homestead facility as a “chilling experience.”⁴

Private companies are profiting off government contracts to jail thousands of vulnerable refugee children. How did we get here? This Q&A aims to provide a guide to the federal policies that have led to this moment, including information-sharing between the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS). Policy changes recently announced by HHS and legislative provisions in the 2019 DHS spending bill have mitigated some but not all of the harms. Lastly, NIJC recommends three actions the U.S. government must take to ensure the United States welcomes children in need with policies that prioritize their well-being.

Q: What happens when a migrant child presents themselves at the border seeking safety or is stopped by a border patrol agent between ports, and the child has no parent or legal guardian available to care for them?

A: The child will first go into the custody of U.S. Customs and Border Protection (CBP). By federal law, CBP is not supposed to hold a child for longer than three to five days before transferring them to the care and custody of the Office of Refugee Resettlement (ORR) within HHS.⁵ However, even the short amount of time spent in CBP custody is notoriously dangerous and miserable for children, with reports of “poor sleeping conditions, controlled access to food and water,” the use of “chain-link cages,” and the high likelihood of diseases and illnesses

¹ John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in the U.S.*, NPR (Feb. 13, 2019), <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u->.

² Monique O. Madan & Jimena Tavel, *'It has a prison-like feel': Lawmakers Tour Homestead Shelter in Hopes of Shutting it*, MIAMI HERALD (Feb. 19, 2019), <https://www.miamiherald.com/news/local/immigration/article226443430.html>.

³ Karli Barnett, *Congressional Oversight Delegation Visits Homestead Children Detention Facility*, CBS MIAMI (Feb. 19, 2019), <https://miami.cbslocal.com/2019/02/19/rep-mucarsel-powell-leads-congressional-oversight-visit-of-homestead-children-detention-facility/>.

⁴ Madan & Tavel, *supra* note 2.

⁵ See Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), available at https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf [hereinafter, *Flores Settlement Agreement*].

spreading due to overcrowding.⁶ Once the child is transferred to ORR custody, federal law and the terms of a binding judicial settlement agreement known as the Flores Settlement Agreement⁷ require the agency to consider the child's best interests above other concerns and begin the process of reunifying the child with family members or loved ones as expeditiously as possible.⁸

Q: What is the DHS-ORR Information Sharing Memorandum of Agreement (MOA)?

A: In April 2018, ORR, CBP, and Immigration and Customs Enforcement (ICE) entered into an agreement wherein information obtained from an unaccompanied child would be shared between HHS and DHS.⁹ This agreement places DHS's enforcement sub-agencies in the middle of what should be a child-welfare-focused process designed to reunify a child with their loved ones.¹⁰ Prior to the Trump administration, this reunification process was centralized within ORR, and ORR officials were tasked with the critical responsibility of ensuring that the child's sponsor did not pose any safety risks to the child. The information-sharing agreement changed this. Rather than ORR conducting the vetting process for sponsors, the agreement explicitly shifted that responsibility to ICE to conduct the fingerprinting and background check process for sponsors, and to log the information in ICE's own databases.¹¹

Far from simply requiring information sharing, the agreement and its implementing regulations give ICE a license to use information obtained from children to detain and deport their parents and potential sponsors. Even more worrisome, the MOA extends not only to a child's potential sponsor but to *all* adults who live in the potential sponsor's household.¹²

Q: What harms does the information-sharing agreement cause?

A: Many.¹³

⁶ Tara Law, *Children in Border Patrol Custody are Still at Risk Despite New Guidelines, Pediatricians Say*, TIME (Dec. 27, 2019), <http://time.com/5489204/migrant-children-guidelines-health/>.

⁷ *Flores Settlement Agreement supra* note 5.

⁸ *Id.*; 8 U.S.C. §1232(c)(2) (2018); *See also* Homeland Security Act, Pub. L. 107-296 (H.R. 5005).

⁹ *Memorandum of Agreement Among the Office of Refugee and Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters* (Apr. 13, 2018), *available at* <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf> [hereinafter, MOA].

¹⁰ *Id.*

¹¹ 83 FR at 20846 (May 15, 2018); *See also* 83 FR 5221 (Oct. 16, 2018); Diane Eikenberry, National Immigrant Justice Center (NIJC) Comment on proposed rulemaking, *DHS Notice of Modified System of Records, Docket Number DHS-2018-0013* (June 7, 2018), *available at* <https://www.immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2018-06/NIJC%20Comments%20on%20DHS-2018-0013%20System%20of%20Records%20Notice.pdf>. Subsequent to the implementation of the MOA, DHS published a System of Records Notice (SORN) in the federal register allowing DHS to investigate the immigration status of parents and other potential sponsors and engage in enforcement operations using the resulting information.

¹² MOA § V(A).

¹³ Even prior to issuance of the information sharing agreement, ICE had begun experimenting with the use of enforcement operations against sponsors of unaccompanied children as a tactic to spread fear in immigrant communities. NIJC and partner organizations submitted a civil rights complaint on behalf of impacted families. *See*

It has created a chilling impact on family reunification: Due to the risk of detention and deportation, many potential sponsors are now too afraid to step forward to reunify with children.¹⁴ After the agreement was implemented, between July and November 2018, ICE detained approximately 170 individuals who attempted to reunify with kids.¹⁵ Additionally, where undocumented parents or other potential sponsors are undocumented, those individuals now must rely on, or even be required to pay, a distant relative or other individual to help them get a child out of ORR custody. This only increases the probability for trafficking or other harms, which contradicts ORR's mission of prioritizing a child's best interests above all.

Prolonged detention of children in unacceptable conditions: When parents and potential sponsors are afraid to participate in the process needed to reunify with kids, children remain in government custody longer. There are currently more than 10,000 children in ORR custody,¹⁶ a number that used to be about 2,500 prior to the implementation of the information-sharing agreement.¹⁷ Facing this explosion in the number of children in its care, ORR has taken the dramatic and harmful measure of placing children outside of its usual system of state-licensed shelters into so-called "influx" or "emergency" facilities such as Homestead, rather than expand its licensed shelter system.¹⁸

More children shuttled into ICE jails: The information sharing agreement also caused an increase in the number of children who, once they turn 18-years-old, are transferred from an ORR facility to an adult detention center.¹⁹ When a child turns 18 in ORR custody, ICE, like ORR, is required to consider placing the young person in the least restrictive setting, which might include alternatives to detention, placement with sponsors, or group homes.²⁰ But this is not happening. Instead, the number of kids who have aged out of ORR custody and been transferred directly to an adult ICE jail has more than doubled since 2014.²¹ Government data shows that ICE put children into detention when they turned 18 in two-thirds of 1,531 cases from

National Immigration Justice Center et al., DHS CRCL Complaint, *ICE and CBP Coercive Enforcement Actions Against Sponsors of Unaccompanied Children Conducted in Violation of Family Unity, Protection, and Due Process Rights*, (Dec. 16, 2017), available at https://www.immigrantjustice.org/sites/default/files/content-type/press-release/documents/2017-12/Sponsor%20Enforcement-OIG_CRCL_Complaint_Cover_Letter-FINAL_PUBLIC.pdf.

¹⁴ Tal Kopan, *The Simple Reason More Immigrant Kids are in Custody Than Ever Before*, CNN (Sept. 14, 2018), <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>.

¹⁵ Tal Kopan, *ICE Arrested Undocumented Adults Who Sought to Take in Immigrant Children*, SAN FRANCISCO CHRONICLE (Dec. 10, 2018), <https://www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php>.

¹⁶ John Burnett, *Lawsuits Allege 'Grave Harm' to Immigrant Children in Detention*, NPR (Jan. 24, 2019), <https://www.npr.org/2019/01/24/688068932/lawsuits-allege-grave-harm-to-immigrant-children-in-detention>.

¹⁷ Caitlin Dickerson, *The Government is Moving Migrant Children to a Texas Tent City. Here's What's Behind it*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/migrant-children-tent-city-camp-texas.html>.

¹⁸ *Id.*

¹⁹ 8 U.S.C. § 1232(c)(2)(A); Pub. L. 113-4, § 1261.

²⁰ *Id.* § 1232(c)(2)(B)

²¹ David Brand, *A 'Cruel Birthday Present' for Immigrant Children*, DOCUMENTED NY, (June 20, 2018), <https://documentedny.com/2018/06/20/a-cruel-birthday-present-for-immigrant-children/>.

April 2016 to February 2018.²² NIJC is pushing back at this unjust practice and is currently litigating a class action lawsuit on behalf of children who “age-out” of the ORR system into ICE jails.²³

Q: Is the increase in the number of kids in ORR custody due to the increased number of unaccompanied children arriving at the southern border?

A: No. In fact, the number of unaccompanied children arriving at the southern border has remained fairly consistent over the past three years.²⁴

Q: How is Homestead different than other ORR facilities?

A: Homestead is the only for-profit facility operated by ORR. Because ORR has designated it as an “influx” facility, it has been exempt from the state-level monitoring required under the Flores Settlement for all other ORR facilities.²⁵ Homestead currently detains approximately 1,600 children, ages 13 to 17, and has capacity to detain up to 2,350 children.²⁶ Reports of the facility being run like the military base to which it is adjacent are common.²⁷ Children are told from day one they are forbidden from having physical contact with other kids, including hugging their own siblings.²⁸ Seemingly endless rows of metal bunkbeds fill a room where children sleep, far from the type of welcome our country should be extending to children fleeing violence and danger in their home countries.²⁹

Q: Did the changes HHS announced to the information-sharing policy in December 2018 fix the problem?

A: No. In December 2018, ORR announced changes to its policy guidance which would limit certain applications of the MOA with regard to household members of potential sponsors. However, the change in policy is limited to household members, not sponsors or potential sponsors, and even then there are still many broad exceptions. Ultimately, information provided by children to HHS is *still being shared* with ICE and, pursuant to ICE’s formally promulgated

²² John Burnett, *Migrant Youth Go From A Children's Shelter To Adult Detention On Their 18th Birthday*, NPR (Feb. 22, 2019), <https://www.npr.org/2019/02/22/696834560/migrant-youth-go-from-a-childrens-shelter-to-adult-detention-on-their-18th-birth>.

²³ *Garcia Ramirez v. ICE*, No. 1:18-cv-00508 (D.D.C. Mar. 5, 2018), available at https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2018-03/GarciaRamirezvICE_Complaint_filestamped_20180305.pdf.

²⁴ See Southern Border Migration FY 2017, U.S. Customs and Border Protection – Department of Homeland Security (Dec. 15, 2017), available at <https://www.cbp.gov/newsroom/stats/sw-border-migration-fy2017>; Southern Border Migration FY 2018, U.S. Customs and Border Protection – Department of Homeland Security (Nov. 09, 2018), available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>; Southern Border Migration FY 2019, U.S. Customs and Border Protection – Department of Homeland Security (Feb. 08, 2019), available at <https://www.cbp.gov/newsroom/stats/sw-border-migration>.

²⁵ *Flores Settlement Agreement supra* note 3.

²⁶ Burnett, *supra* note 1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

policy, that information is still being permanently housed in an immigration enforcement database.³⁰

Q: Didn't the 2019 spending bill fix the problem?

A: No. The Fiscal Year 2019 spending bill signed into law this month does include a provision precluding ICE, in some cases, from detaining or deporting sponsors of unaccompanied children on the basis of information obtained from HHS.³¹ While the provision does take critical steps in the direction of mitigating harms caused by the information-sharing agreement, many problems remain.

Under the DHS provision of the spending bill, ICE *will continue* to receive information from HHS about a potential sponsor. ICE *will also continue* to put the information obtained from those checks in its own enforcement database. The only limitation the bill provides is that ICE *cannot* use money appropriated to it to detain, enforce, or initiate proceedings against a potential sponsor on the basis of information received from HHS.³² The provision also contains broadly sweeping exceptions to its protections, giving ICE the opportunity to use an un-adjudicated pending criminal charge as an excuse to engage in an enforcement action against a potential sponsor.³³

Q: What now?

A: NIJC recommends three actions the U.S. government must take to ensure it upholds the rights and wellbeing of children who arrive in our country seeking safety:

1. DHS and HHS must terminate the agencies' information-sharing
2. HHS must discontinue use of the Homestead facility
3. HHS must exclusively rely on state-licensed and Flores-compliant facilities for the care and custody of unaccompanied children.

The process of reunifying a child with their parent or loved one should first and foremost be a child-welfare focused process. It is past time for Congress to insist that immigration enforcement play no role in the care and welcome the United States provides to children seeking safety.

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³⁰ 2.5.1 *Criteria for Background Checks*, OFFICE OF REFUGEE AND RESETTLEMENT (Dec. 18, 2018), available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2>; Eikenberry, *supra* note 11.

³¹ See Tal Kopan, *Funding Deal Blocks ICE from Arresting Adults Taking in Undocumented Children*, SAN FRANCISCO CHRONICLE (Feb. 14, 2019), <https://www.sfchronicle.com/politics/article/Funding-deal-blocks-ICE-from-arresting-adults-13617721.php>.

³² H.J. Res. 31, 116th Cong. § 224 (2019), available at <https://docs.house.gov/billsthisweek/20190211/CRPT-116hrpt9.pdf>.

³³ *Id.* § 224(b).