



November 6, 2018

Debbie Seguin
Assistant Director
Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street SW
Washington, DC 20536

Re: DHS Docket No. ICEB-2018-0002, RIN 0970-AC42 1653-AA75, Comments in Response to Proposed Rulemaking: Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children

To Whom It May Concern:

On behalf of the Human Rights Campaign's more than 3 million members and supporters nationwide, I write in response to the Department of Homeland Security's request for public comments regarding a proposed rule amending regulations related to the apprehension, processing, care, custody, and release of alien juveniles on September 7, 2018. HRC strongly opposes these revisions, and urges the Department to reconsider the proposed problematic policies prior to publication of the final rule.

As the nation's largest organization working to achieve equal rights for the lesbian, gay, bisexual, transgender and queer (LGBTQ) community, we are deeply concerned that the proposed rule will put LGBTQ immigrants, including LGBTQ immigrant children, at increased risk of discrimination and abuse. The proposed rule will also systematically place these individuals at a disadvantage as they prepare the evidence necessary to build their legal cases for immigration. The lifelong impact of this regulation on individuals cannot be overstated.

The proposed rule would result in the prolonged detention of LGBTQ people in facilities where they do not have basic protections from abuse or access to necessary medical care.

According to information ICE provided to U.S. Rep. Kathleen Rice, while LGBTQ people make up less than one percent of people in immigration detention, they make up 12% of the reported

victims of sexual abuse and assault in ICE detention.¹ This means that LGBTQ people are 97 times more likely to report being sexually abused in detention than non-LGBTQ people in the same conditions.

Current detention policies regarding housing assignments for transgender detainees are also extremely concerning and likely increase the risk of violence and assault. ICE detains transgender women in at least four all-male facilities and in thirteen mixed facilities where ICE routinely detains transgender women with the male detainees. Women housed within male populations face increased risk for verbal and sexual abuse. The routine use of solitary confinement as a way to address these dangers is not the answer. In far too many cases, ICE has chosen to place LGBTQ detainees - and particularly transgender detainees - into solitary confinement, despite the fact that ICE has a clearly stated policy that solitary confinement should only be used as a last resort and for no more than 30 days. Recent data show that one out of every eight transgender people detained by ICE last year were placed in solitary confinement at some point during their detention,² for an average of 52 days. There are also reports that earlier this year, ICE placed a lesbian asylum seeker into solitary confinement to pressure her to withdraw an accusation of sexual abuse that she had made against a guard.³

It is also deeply concerning that LGBTQ detainees may not be receiving necessary medical care. Transgender detainees have often had to fight for the right to receive necessary hormone treatments,⁴ and detainees who are living with HIV have often faced delays in treatment.⁵ In particular, we have raised concerns regarding the case of Roxsana Hernandez in a May 30 letter and an accompanying Freedom of Information Act (FOIA) request on July 26. Ms. Hernandez died from suspected HIV-related complications while in ICE custody this May.

For all these reasons, it is crucial that your Department engage in strong oversight of ICE and its treatment of detained immigrants - LGBTQ and otherwise. Unfortunately, the DHS Office of the Inspector General recently concluded that DHS inspections of detention facilities have not

¹ Kathleen Rice, *LGBT Immigrants in ICE Detention Letter to Secretary Nielsen*, Congress of the United States (May 30, 2018), https://kathleenrice.house.gov/uploadedfiles/2018.05.30_lgbt_immigrants_in_ice_detention_letter_to_sec_nielsen.pdf.

² *Ibid.*

³ Clark Mindock, *Laura Monterrosa: Woman Put in Solitary Confinement After Claiming She Was Sexually Abused by Immigration Prison Guard*, The Independent (Feb. 14, 2018), <https://www.independent.co.uk/news/world/americas/laura-monterrosa-immigrant-sexual-abuse-assault-guard-texas-jail-prison-solitary-confinement-hutto-a8211206.html>. Accessed 16 July 2018.

⁴ Aaron Martinez, *Jailed Transgender Woman Granted Hormonal Treatment*, El Paso Times (Feb. 27, 2018), <https://www.elpasotimes.com/story/news/2017/02/27/jailed-transgender-woman-granted-hormonal-treatment/98498902/>. Accessed 16 July 2018; Human Rights Watch. *Do You See How Much I'm Suffering Here?* 23 March 2016.

⁵ John Washington, *An HIV-Positive Gay Asylum Seeker Staged a 7-Day Hunger Strike in an ICE Detention Facility*, The Nation (Dec. 12, 2018), <https://www.thenation.com/article/an-hiv-positive-gay-asylum-seeker-staged-a-seven-day-hunger-strike-in-an-ice-detention-facility/> Accessed 16 July 2018; Center for American Progress. *Dignity Denied*. November 2013.

ensured consistent compliance with detention standards, because the inspections are not strong enough.⁶ In the absence of consistent, meaningful oversight abuse is allowed to thrive.

The proposed rule would expose LGBTQ people to targeted threats to their health and safety. Under the proposed rule, ICE would be able to detain LGBTQ people and their families for prolonged periods of time and, by lengthening the time they are detained and exposed to risks to their safety, increasing their risk of abuse.⁷

The proposed rule would allow the government to detain LGBTQ people and their families for prolonged periods of time in facilities that are inappropriate for housing children.

The Flores Settlement Agreement requires facilities housing children to be licensed by the state in which the facility is located. Section 236.3(b)(9) of the proposed rule seeks to bypass this basic child welfare requirement by establishing what it purports to be the equivalent. Despite the proposed rule's attempt to establish a comparison, the licensing regime it proposes is in no way comparable to the rigorous licensing standards state child welfare agencies use. Family detention facilities applying the government's standards were found to not be in compliance with minimum child welfare standards in the states the facilities are located.⁸ A cursory checklist inspection of whether a facility is in compliance with the inadequate standards that already theoretically govern family detention facilities does not fulfill the letter, or even the spirit, of the Flores Agreement.

The proposed rule's "emergency influx" definition would lead to the prolonged detention of vulnerable LGBTQ youth in extremely unsafe CBP hold facilities.

The rule proposes defining "influx" to mean just 130 minors in custody eligible for placement, without regard to actual capacity or need for emergency protocols. While that might have constituted an influx 20 years ago when the Immigration and Nationality Act (INA) used that definition, the current climate is very different and the old definition is no longer adequate. The proposed rule would allow DHS to bend and even ignore basic child welfare provisions necessary to keep minors safe. Even limiting time in CBP facilities to under 72 hours poses dangers; a 2016 report on sexual abuse in CBP facilities found that children accounted for 60 percent of reported victims of sexual abuse.⁹ These facilities are entirely inappropriate for holding children and the time children are held in these facilities should be limited, not expanded.

The proposed rule would put LGBTQ youth in harm's way by subjecting them to more restrictive custody settings, increasing their vulnerability to abuse.

⁶ Office of Inspector General, ICE's Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance of Systemic Improvements (2018).

⁷ NAT'L PRISON RAPE ELIMINATION COMM'N REP (2009).

⁸ Letter from Matthew Jones, Dir. Pa. Dep't of Human Serv. to Diane Edwards, Exec. Dir. Berks County Comm'rs (Jan. 27, 2016).

⁹ U.S. Customs and Border Prot., *Ann. Rep. on Sexual Abuse and Sexual Assault by CBP Emp.*, (2016).

Proposed sections 8 CFR 236.3(c), 8 CFR 236.3(D), and 8 CFR 236.3(E) would cause minors to lose the protections of the Trafficking Victims Protection Reauthorization Act and subject them to the harms LGBTQ people face in ICE detention facilities.¹⁰ We are also concerned with 45 CFR 410.203 inclusion of “chargeable” offenses as a reason to place Unaccompanied Alien Children (UAC) and 236.3(i)(1) for non-UAC in state or county juvenile detention facilities or other secure facilities. Unlike in the Flores Settlement Agreement (FSA), which includes exceptions for isolated offenses that did not involve violence and for petty offenses, the proposed rule’s enumeration of vague offenses could provide DHS with an excuse to subject LGBTQ immigrant youth and immigrant youth living with HIV to placement in secure facilities.¹¹ Studies show that LGBTQ youth face harsher penalties when engaging in the same behavior as their straight and cisgender counterparts.¹² We are concerned that the proposed rule’s inclusion of “chargeable” offenses will subject LGBTQ youth to placement in secure facilities where they are unsafe.

Including “engagement in unacceptably disruptive behavior that interferes with the normal functioning” of the shelter as a chargeable offense that would allow for placement in a secure facility and adding “displays sexual predatory behavior” to the list of behaviors that may be considered unacceptably disruptive is also concerning.¹³ Studies have shown that in the juvenile justice context LGBTQ youth are more likely to face criminal consequences for engaging in consensual sexual activity than straight or cisgender youth. We are very concerned that as revised, this proposed rule could be used to funnel LGBTQ youth into unnecessarily restrictive placements where they are subjected to higher risks of abuse. According to the Bureau of Justice Statistics, youth who identified as lesbian, gay, bisexual, or “other” reported a rate of sexual victimization by other youth in juvenile detention facilities at a rate of nearly 7 times higher than straight youth.¹⁴ Preventing LGBTQ youth from being moved to more restrictive facilities is an important factor in protecting them from sexual violence. We are concerned that the proposed rule would instead put LGBTQ youth in more restrictive settings, increasing their vulnerability to abuse.

The proposed rule would endanger LGBTQ immigrants and their families by arbitrarily putting them at a disadvantage for winning their immigration cases.

¹⁰ NAT’L PRISON RAPE ELIMINATION COMM’N REP (2009).

¹¹ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544- RJK(Px) (C.D. Cal. Jan. 17, 1997), available at http://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf.

¹² Council of State Governments Justice Center, *The School Discipline Consensus Report: Strategies from the Field to Keep Students Engaged in School and Out of the Juvenile Justice System*, Justice Center (2014), http://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf.

¹³ 45 CFR 410.203

¹⁴ BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH (2012).

Immigrants are less likely to win their immigration cases when they are detained.¹⁵ Detained asylum applicants face significant barriers to gathering relevant evidence and documentation regarding their persecution, and to retaining legal counsel.¹⁶ For LGBTQ people, who face criminalization and persecution in much of the world, losing their case could mean permanent loss of liberty or even death. The impact of detaining LGBTQ asylum seekers for longer periods of time is too dangerous to disregard. A recent study found that, controlling for all other factors, being detained made asylum seekers with excellent legal counsel over 10 percent less likely to win their cases than their counterparts who were not detained.¹⁷ In other words, detaining LGBTQ asylum seekers makes them less likely to win, regardless of the strength of their asylum case.

Given that freedom from detention is so critical to winning an asylum case, the proposed rule's expansion of the time families spend in detention, as well as the increased ease of the proposed rule's movement of unaccompanied children to adult detention facilities unnecessarily puts the lives of LGBTQ asylum seekers in jeopardy.

Conclusion

For all the reasons stated above, we strongly oppose this rule and urge DHS to rewrite it with an eye toward the protection of children, first and foremost, and especially the most vulnerable, who are often LGBTQ. The Human Rights Campaign appreciates the opportunity to weigh in at this time. Thank you for considering our comments. If you have any questions regarding our comments, please do not hesitate to contact Jeremy Kadden on my staff at (202) 216-1515.

Sincerely,



David Stacy
Government Affairs Director

¹⁵ Steering Committee of the New York Immigrant Representation Study Report, "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings," *Cardozo Law Review* 33 (2) (2011): 357–416, available at <http://www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf>.

¹⁶ ANNELIESE HERMANN, *ASYLUM IN THE TRUMP ERA*, (Center for American Progress)(2018)

¹⁷ Steering Committee of the New York Immigrant Representation Study Report, "Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings," *Cardozo Law Review* 33 (2) (2011): 357–416, available at <http://www.cardozolawreview.com/Joomla1.5/content/33-2/NYIRS%20Report.33-2.pdf>.