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November 6, 2018

The Honorable Kirstjen M. Nielsen
Secretary of Homeland Security
Washington, D.C. 20528

The Honorable Alex M. Azar II
Secretary of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Comments on the Notice of Proposed Rulemaking to Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, DHS Docket No. ICEB-2018-0002

Dear Secretary Nielsen and Secretary Azar:

On behalf of ZERO TO THREE, I write to offer comments on the Notice of Proposed Rulemaking (NPRM) to the Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, proposed by the Departments of Homeland Security (DHS) and Health and Human Services (HHS). We will specifically address the change to regulations concerning the detention of family units. Out of deep concern for young children and the future of our country, ZERO TO THREE stands in strong, informed opposition to any practice that causes trauma and long-term harm to children. We believe family detention is such a practice and urge the Departments to discontinue efforts to promulgate regulations that will open the door to its widespread and prolonged use.

Founded more than 40 years ago, ZERO TO THREE is a national nonprofit organization whose mission is to ensure that all babies and toddlers have a strong start in life. We translate the science of early childhood development into useful knowledge and strategies for parents, practitioners, and policymakers. We work to ensure that babies and toddlers benefit from the family and community connections critical to their wellbeing and healthy development. Based on the science that tells us what young children need for healthy development, we believe this proposed rule change poses great harm. While our expertise, and thus the focus of our comments, centers on very young children, we believe family detention places children of any age at risk.

For decades, the wellbeing of immigrant children detained at our country's borders has been protected by the Flores Settlement Agreement (FSA), whose terms—agreed to by the government—are based on accepted child welfare principles. The FSA requires that children be treated with “dignity, respect, and special concern for their particular vulnerability as minors.” The FSA provision that is paramount to safeguarding these rights is the principle that immigrant children should not be incarcerated, requiring them to be released “without unnecessary delay.”¹

This NPRM would wipe away these protections, allowing children in the company of their parents to be incarcerated indefinitely in detention facilities known as Family Residential Centers (FRC). The stated goal of the NPRM is to “allow for detention at FRCs for the pendency of immigration proceedings (subject to all applicable statutes and regulations governing their detention or release) in order to permit families to be detained together and parents not be separated from their children.” (FR 45493) This provision ignores the central FSA principle, reiterated many times, favoring a “General Policy Toward Release” in the case of migrant children being held in detention—including those held with their parents—and therefore the need for ending that detention as soon as possible.

8 CFR 236.3(h)—Detention of Family Units and 8 CFR 236.3(i)—Detention of Minors Who Are Not UACs in DHS Custody:

ZERO TO THREE is deeply concerned about the overall direction of this Notice of Proposed Rulemaking, particularly the elements regarding the detention of children in family units and alone, in 8 CFR 236.3(h) and 8 CFR 236.3(i). We urge the Departments to drop this proposal to regulate child and family detention in a manner that allows indefinite detention of children with their parents. In accordance with internationally accepted child rights, immigrant and refugee children should be treated with dignity and respect and should not be exposed to conditions that may harm or traumatize them. Detaining families not only puts children at risk of harm but guarantees to bring with it the devastating and long-lasting impacts of trauma and toxic stress, in direct opposition to both internationally recognized rights as well as the legal requirements established in the FSA, that provide a critical level of protection of the best interests of refugee and immigrant children. While one rationale for these changes is the idea that family detention promotes children's wellbeing, decades of research leads us to believe the contrary – that any length of time in detention will induce damaging impacts to a child's development.

In making this recommendation, we are guided by the science of early childhood development that leads us to conclude: Sending infants and toddlers, even with their parents, to institutional detention is profoundly inadequate to nurture the health and well-being of a young child. Years of research in child development clearly show that babies' physical and social environments have a significant impact on their development. Young children, especially infants and toddlers are at particularly high risk. A baby's brain makes more than one million neural connections every second, growing faster than at any point later in their life. These connections are shaped by their experiences—both positive and negative—and the consequent level of harmful stress in their lives. For young children, particularly infants, exposure to an environment such as detention or jailing not only is insufficient to provide the positive experiences necessary for them to thrive, but is actively detrimental to their growth and development.

Family detention places children in an environment of confinement, deprivation of stimuli, and developmentally inappropriate and often harsh treatment, which cause severe stress for both the children and their caregivers. The trusting relationship infants and toddlers form with their close caregivers, most often

their parents, can help buffer them from chronically stressful situations that can be toxic to the developing brain. However, in situations where parents are experiencing their own intense stress and even fear from the conditions in detention facilities, this protective buffering capacity may be undermined, resulting in more harm to the child's wellbeing.

No amount of time in detention has been proven safe for young children. Research has consistently shown that even a short amount of time in detention is harmful to children, particularly those who have already experienced trauma in their home countries or during their journey.ⁱⁱ Evaluations of children who have been detained with their families reveal alarming outcomes for young children, with many displaying developmental delays and signs of emotional disturbance. The long-term harm of family detention on children is well known. Research has shown that children in detention are more susceptible to Post-Traumatic Stress Disorder (PTSD) symptoms as compared to adults.ⁱⁱⁱ Further, researchers have found regressions in child development, suicide attempts, and high levels of anxiety and depression in children in detention.^{iv} While even brief periods of detention impact children's functioning, worsening mental health symptoms increase the longer a child is in detention.^v

If the legal protections established for children's care in such facilities, including time limits and regulations, are challenged and reversed, infants, toddlers and their families placed in detention facilities are entirely vulnerable to protracted, unlimited stays, abuse, and neglect. Reports indicate that children in federal detention have often suffered cruel and abusive treatment including in family detention facilities, where they have been starved, taunted, physically assaulted and forced to strip naked.^{vi vii viii} One particularly disturbing account of such activity came this past July, when a federal judge ordered the Administration to remove children from a detention center that was using psychotropic drugs as a "chemical straitjacket".^{ix}

In 8 CFR § 236.3(b) DHS posits that challenges to state licensing of family residential facilities are a justification for eliminating the Flores requirement of state licensing and permitting self-licensing by the federal government. However, challenges to licensing these facilities have come about as state oversight mechanisms exercised their authority to enforce accountability for unacceptable conditions of confinement for children and families. The difficulty in detaining children and families does not arise due to state licensing requirements—it arises because detention center facilities are fundamentally inappropriate for housing families for any length of time. Family detention by definition cannot comply with requirements that protect the safety, health and well-being of children.

Further compounding the risks to their well-being, families in detention may face inadequate access to services including the medical and mental health care they so desperately need. Children and families, babies and expectant mothers in particular, need specialized medical and mental health services in order to ensure healthy growth and development. This type of specialized, individually tailored services is generally not possible in the context of detention, and the unlikelihood of appropriate mental health care applies particularly to infants and toddlers. Family residential centers, all located in remote areas far from urban centers, have consistently failed to recruit adequate health staff including pediatricians, child and adolescent psychiatrists, and pediatric nurses. Families released through non-custodial measures have access to providers based in the community, but in detention their access to qualified medical and mental health professionals has been demonstrated to be severely inadequate.^{xxi}

Decades of psychological and brain research have demonstrated that adverse experiences during this critical period of early childhood can have profound immediate and long-term harm on child development.^{xii} This type

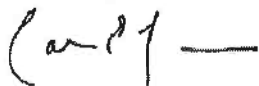
of trauma, particularly when not addressed by an experienced and trusted clinician, has severe implications for both physical and emotional health over time, increasing young children's risk for learning difficulties, problems forming relationships, and adult health problems. The problem is only exacerbated when children are returned to their homes or communities. Research has shown that children continue to have mental health problems which must be dealt with by pediatric and local mental health services that may not have any experience in dealing with children with traumatic experiences of family detention.^{xiii}

We underscore that the experience of detention itself will be the cause of much of this trauma and again, urge the Departments to back away from a rule that will lead to such harm. In fact, when The Department of Homeland Security's (DHS) own advisory committee convened to inform the agency how to improve family detention, its top recommendation was that DHS should discontinue the practice. Furthermore, the committee determined that "detention is generally neither appropriate nor necessary for families" and that **detention of families for the purposes of immigration enforcement or management are never in the best interest of children.**

In conclusion, the detention of children and family units outlined in 8 CFR 236.3(h) and (i) are unacceptable. We strongly recommend that the Departments follow the central tenet of the FSA to release children expeditiously and eliminate family detention in all but the most short-term, transitory situations, as Flores contemplates. In light of the immense risk posed by detention, we reject the NPRM's assertion that family detention creates "advantages to family unity during immigration proceedings". There are proven, cost-effective alternatives to detention that maintain family unity and protect the best interests of vulnerable children, including tested community-based case management programs. Most recently, in 2013, Lutheran Immigration and Refugee Services (LIRS) entered into an agreement with Immigration and Customs Enforcement (ICE) to screen vulnerable immigrants for release from detention and enrollment in LIRS' Community Support Initiative. Between June 2013 and November 2014, 44 out of 46 formal referrals were in complete compliance – an appearance rate of 95.6%. These holistic programs that offer case management services, and facilitate access to legal counsel as well as safe, affordable housing have been shown to substantially increase program compliance without the extensive and expensive use of electronic monitoring.^{xiv}

The science of child development, in conjunction with past experience, tell us that young children cannot be detained, with or without their families, without experiencing significant harm. Children must not be incarcerated.

Sincerely,



Matthew E. Melmed
Executive Director

ⁱ Flores v. Reno, Case No. CV 85-4544-RJK(Px), Stipulated Settlement Agreement (United States District Court, Central District of California, January 17, 1997.)

ⁱⁱ Mares, S. (2015). Fifteen years of detaining children who seek asylum in Australia – evidence and consequences. *Australasian Psychiatry*, 24(1), 1-14. doi:10.1177/1039856215620029

ⁱⁱⁱ Triggs, G. (2015). The Forgotten Children: National Inquiry into Children in Immigration Detention 2014. *The Medical Journal of Australia*, 202(11), 553-555. doi:10.5694/mja15.00551

^{iv} Acer, E., Byrne, O. (2015). Family Detention: Still Happening, Still Damaging. *Human Rights First*. <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>

^v Mares, S. (2015). Fifteen years of detaining children who seek asylum in Australia – evidence and consequences. *Australasian Psychiatry*, 24(1), 1-14. doi:10.1177/1039856215620029

^{vi} Lutheran Immigrant and Refugee Services and Women's Refugee Commission. (2014). Locking Up Family Values, Again: The Continued Failure of Immigration Family Detention. https://www.lirs.org/assets/2474/lirswrc_lockingupfamilyvaluesagain_report_141114.pdf

^{vii} Doe v. Shenandoah Valley Juvenile Center Commission - Second Amended Class Action Complaint (United States District Court for the Western District of Virginia Harrisonburg Division, July 11, 2018).

^{viii} Lucas R. v. Alex Azar, Case No. 2:18-CV-05741-DMG-PLA. Complaint for Injunctive Relief, Declaratory Relief, and Nominal Damages. (United States District Court Central District of California, June 28, 2018).

^{ix} Jenny L. Flores, et al. v. Jefferson B. Sessions, III, et al., Case No. CV 85-4544-DMG (AGRx). (United States District Court Central District of California, July 30, 2018).

^x Dr. Scott Allen and Dr. Pamela McPherson, Letter to the Senate Whistleblowing Caucus, July 17, 2018, <https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf>.

^{xi} O'Connor, K., Thomas-Duckwitz, C., Nuñez-Mchiri, G. G. (2015). No Safe Haven Here: Mental Health Assessment of Women and Children Held in U.S. Immigration Detention. *Unitarian Universalist Service Committee*. http://www.uusc.org/sites/default/files/mental_health_assessment_of_women_and_children_u.s._immigration_detention.pdf

^{xii} Felitti, V. J., Anda, R. F., Nordenberg, D., Williamson, D. F., Spitz, A. M., Edwards, V., . . . Marks, J. S. (1998). Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults. *American Journal of Preventive Medicine*, 14(4), 245-258. doi:10.1016/s0749-3797(98)00017-8

^{xiii} Fillmore, E. (2010). The Effects of Immigration Detention on the Health of Children and Families in the UK. *Adoption & Fostering*, 34(1), 88-91. doi:10.1177/030857591003400112

^{xiv} United States Government Accountability Office. (2014). Alternatives to Detention; Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness. <https://www.gao.gov/assets/670/666911.pdf>