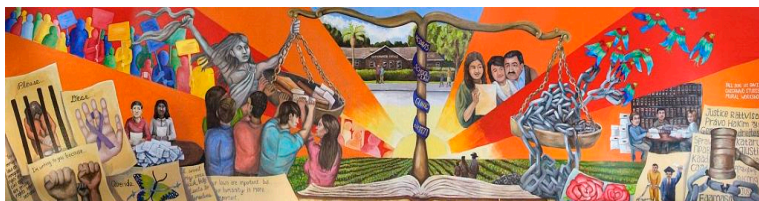




National Center for Youth Law



Practice Alert on July 30, 2018 Decision in *Flores v. Sessions III*

Judge Gee, presiding in the Central District of California, found that certain practices and policies implemented by ORR breached the Flores Agreement. Judge Gee ordered immediate action and procedural remedies to protect detained children.

On July 30, 2018, Judge Dolly Gee issued an order in the United States District Court for the Central District of California finding several breaches of the *Flores* Agreement, including unnecessarily delaying the release of children from detention centers; “stepping-up” children to more secure facilities without justification, notification or ability to challenge the placement; and administering psychotropic medications without consent from a legally authorized individual. The order was in response to a motion to enforce filed on behalf of the *Flores* class on April 16, 2018.

The order focuses primarily on the Shiloh Residential Treatment Center in Manvel, Texas. During oral argument, Judge Gee signaled that she may expand the scope of the order to cover other facilities that are similarly noncompliant.

WHAT ARE THE PRACTICE IMPLICATIONS OF THIS DECISION?

ORR must transfer class members who do not pose a risk of harm out of Shiloh.

- All class members detained at Shiloh must be transferred “...unless a licensed psychologist or psychiatrist has determined or determines that a particular Class Member poses a risk of harm to self or others.”
- During oral argument, the Court admonished that although its remedial order technically covers only Shiloh RTC, ORR should consider its order a “bellwether” for what it would require at other RTCs.

ORR must provide notice to class members regarding the grounds for step-up.

- ORR must provide class members who have been “stepped-up” and placed into secure, staff-secure or Residential Treatment Centers (RTC’s), with notice of the reason for the step-up either prior to or following ORR’s placement decision.

- This notice should be in a language the class member can understand.
- Such notice, according to the order, is necessary because “...Paragraph 24C is intended to facilitate judicial review of such decisions.”¹
- Advocates with clients detained in secure, staff-secure, or RTC facilities should submit a request on behalf of their client for notice of why this placement decision was made. If there is not adequate evidence for the decision or there was a misdiagnosis or medication that caused changes in behavior, or assumptions of gang involvement have been made with no evidence of offenses committed, advocates should push for the class member to be “stepped-down.” Those with clients about to be “stepped-up,” should ask for written notice immediately and attempt to challenge this designation based on the requirements set forth in this order.
- In cases where advocates deem their clients non-dangerous, they should consider requesting an immigration judge review ORR’s reasons for considering a detained juvenile dangerous. An immigration judge’s finding that a juvenile is not dangerous provides a powerful argument against ORR’s continuing to confine a juvenile in a secure or semi-secure setting.
- Pursuant to § 24B of the *Flores* Settlement, detained juveniles who disagree with ORR’s having placed them in a secure, staff-secure, or RTC facility are also entitled to judicial review of their placement.

ORR must step-down class members from secure facilities where there is illegitimate evidence of gang involvement, or any “chargeable” offense.

- ORR must “step-down” or remove from secure facilities class members who have been “stepped-up” solely due to allegations: (1) of gang involvement, either reported, self-disclosed or suspected of before or during care, without probable cause that they have committed any specific offense or (2) that the class member “may be chargeable” with an offense, as opposed to when a class member “is chargeable” with an offense.
- ORR must transfer these class members to the “least restrictive setting,” in compliance with the *Flores* Agreement.
- Advocates should advise clients not to disclose information that is not necessary for their treatment and not to answer any incriminating questions posed by psychiatrists and others with access to the class members’ files and records.
- If there are no specific offenses or charges in class members’ ORR records, advocates should push for the youth to be “stepped-down” based on the July 30th order.

ORR may not automatically require that all post-release services be in place prior to release.

- The government must cease its blanket policy requiring post-release services to be in place prior to the release of a class member to a sponsor for whom home study services were conducted. The order allows for continued detention of a class member “if and only if ORR conducts an individualized assessment and determines that, given the

¹ See FN 18 of the decision.

particularized needs of the Class Member, the sponsor would not be a suitable custodian if such post-release services were not in place prior to release.”

- Advocates should ask ORR and case workers for *written* and individualized explanations for why their clients are not being released to their sponsors. If a written explanation cannot be provided and evidence of a blanket, generalized policy appears, advocates should use the July 30th order as a basis for release to a qualified sponsor for whom home study services were conducted, if other requirements for release can be met.

ORR may not delay release of certain class members subject to ORR Director approval.

- ORR may no longer require ORR Director or designee approval prior to the release of Class Members who: 1) have previously been in secure or staff-secure facilities but are now in less restrictive settings; 2) prevailed on *Flores* bond hearings; or 3) were placed in secure or staff-secure facilities based on incomplete, inaccurate or erroneous information.
- If class members fall within one of the three groups above, advocates should review their files and the government’s justifications for the class members’ delayed release. False or misleading information could include, for example, suspected or self-disclosed gang involvement without any specific offense, as previously mentioned.

ORR must comply with all Texas child welfare laws and regulations governing the administration of psychotropic medications to class members at Shiloh

- *Before* administering any psychotropic medication to class members at Shiloh RTC, the government must obtain the written, informed consent of a person legally authorized to give medical consent for the child.
- Where no informed consent can be obtained, ORR must obtain a court order authorizing the administration of the medication.
- On September 13, 2018, ORR sent a letter to Shiloh to clarify the above requirements regarding informed consent articulated in the July 30th order. ORR’s letter is available here: http://www.centerforhumanrights.org/PDFs/ACF_Ltr2ShilohReMeds091318.pdf.
- Because Judge Gee found a violation of the *Flores* Agreement, the court’s order has implications for practices outside the state of Texas and Shiloh RTC. As noted, the Court indicated that its ruling regarding Shiloh should be considered a bellwether for other ORR facilities in which children are medicated. If advocates are aware of other facilities where ORR or facility staff are administering psychotropic medications to children without first obtaining written, informed consent from a person legally authorized to give consent or obtaining a court order—advocates are encouraged to document and report these issues to ORR and send any evidence to *Flores* counsel. Advocates are also encouraged to notify *Flores* counsel if they have evidence that ORR or facility staff have indicated in any way that an individual’s refusal to provide consent would have negative consequences, including delaying or preventing the release of a class member.

ORR must eliminate unnecessary security measures at Shiloh

- The order requires Shiloh RTC to cease employing security measures “...not necessary for the protection of minors or others, including the denial of access to drinking water,” and to permit “Class Members to talk privately on the phone....”

WHAT COMES NEXT?

Advocates are encouraged to document and share evidence of violations of the July 30th order.

- Advocates working with detained class members are encouraged to request ORR files, take declarations and review all aspects of the treatment of the youth.
- Contact ORR to request review of class members’ placement and send any evidence of noncompliance with the Court’s July 30th order to the *Flores* litigation team at crholguin@centerforhumanrights.org.

Further litigation to enforce the *Flores* Settlement’s prompt release and licensed placement requirements.

- *Flores* counsel are considering whether to return to court to request ORR be held in civil contempt of the 1997 settlement, which is the legal equivalent of a federal consent decree. Advocates who believe ORR is violating the *Flores* settlement’s prompt release or licensed placement requirements are encouraged to contact the *Flores* litigation team.

The government has appealed Judge Gee’s July 30th order.

- On September 27, 2018, the federal government filed a notice of appeal to the Ninth Circuit Court of Appeals of this order.

The *Lucas R.* litigation.

- Anticipating that the *Flores* settlement might not furnish an adequate legal basis to enjoin ORR’s arbitrarily declaring class members’ proposed custodians unfit or stepping-up class members to secure or semi-secure placements, in late June 2018, the *Flores* litigation team filed an adjunct and supplementary proposed class action, *Lucas R. v. Azar*.
- Among other claims, the *Lucas R.* plaintiffs allege that the U.S. Constitution prohibits the government from implementing policies and practices that unlawfully prolong class members’ detention and delay their reunification with their families. The complaint alleges violations of the Freedom of Association Clause of the First Amendment and the Due Process Clause of the Fifth Amendment—as well as violations of the *Flores* Agreement, the Administrative Procedure Act, and the Trafficking Victims Protection Reauthorization Act.

- In September, Plaintiffs filed an amended complaint, which added two additional named plaintiffs and a claim under Section 504 of the Rehabilitation Act of 1973 alleging that ORR unlawfully discriminates against immigrant and asylum-seeking minors with disabilities.
- The *Lucas R.* litigation is ongoing and further updates will be provided as they occur.