Ms. Debbie Seguin
Assistant Director, Office of Policy, U.S. Immigration and Customs Enforcement
U.S.Department of Homeland Security
500 12th Street SW
Washington, DC 20536
ICEB-2018-0002-0001

Dear Ms. Seguin:

I am submitting comments to the U.S. Departments of Homeland Security and Health and Human Services, related to the proposed rule, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, ID ICEB-2018-0002-0001. I am writing you as a public policy analyst who specializes in estimating the impacts of federal and state programs and policies that affect family well-being. I work for a nonpartisan research center, the National Center for Children in Poverty, at Columbia University, among colleagues who specialize in immigration policy, childhood health policy, and childhood education policy, although my comments do not necessarily reflect the position of my employer nor the center where I work. I am also writing this as a former employee of an organization that provides services to individuals with criminal justice system involvement. I am also writing this on a personal note, based on my family's experiences.

I urge the federal government to withdraw this proposed rule from consideration. Below, I have provided several reasons for why the implementation of this rule would be harmful and why the rule's justification appears inadequate.

1) **There is no way to provide minors with dignity and respect while detaining them in prolonged government custody.** The justification for this rule explains that it "would satisfy the basic purpose of the [*Flores* Settlement Agreement] in ensuring that all juveniles in the government's custody are treated with dignity, respect, and special concern for their particular vulnerability as minors, while doing so in a manner that is workable in light of subsequent changes" (p45486, col. 1, 1st paragraph), and is therefore consistent with the court's ruling in Flores v. Reno. However, no current or historical instances of juveniles being securely detained for any sustained period of time in government custody of any kind confers them dignity or respect, and there is no evidence of innovative designs of potential new detention centers that allow for either dignity or respect being shown toward children. On the contrary, holding children in detention or prison in any form increases the likelihood of adverse childhood experiences (ACEs) and other negative health, mental health, educational and other socioeconomic outcomes among those children, due to no fault of their own (Lutheran Immigration & Refugee Service and the Women's Refugee Commission, 2007, updated 2014, https://www.womensrefugeecommission.org/images/zdocs/Fam-Detention-Again-Full-Report.pdf.) Additionally, it is likely that as a result of these adverse experiences in federal custody at detention centers, these children will be more likely to engage in criminal activity specifically as a result of their detention and be more likely to require public assistance. (Studies on the effects of juvenile incarceration offer us a model of these effects. See, for

example, a study from the Justice Policy Institute at http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf and A. Aizer & J. Doyle, *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, The Quarterly Journal of Economics, Volume 130, Issue 2, 1 May 2015, Pages 759–803, https://academic.oup.com/qje/article/130/2/759/2330376.). Moreover, the U.S. Administration of Children and Families' Office of Refugee Resettlement indicates that the U.S. Centers for Disease Control have concluded that these children do not pose a public health risk upon entry into the U.S. (https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-frequently-asked-questions). Although refraining from holding these children and their parents in custody is not a perfect solution to the policy challenges of children entering the United States without appropriate authorization, it is better than any of the alternatives.

2) **It is both unproductive and inefficent to detain or incarcerate minors.** The choice between detention and parole for these children is similar to the choice between incarcerating a minor or releasing them on probation to community-based alternative-to-incarceration programs. Increasingly, local and state jurisdictions have been embracing these incarceration alternatives not only because they are healthier for children who have engaged in criminal acts, but also because, in the long run, these alternatives help save jurisdictions the costs of incarceration and lower the incidence of recidivism, which, as indicated above, reduces reincarceration costs, lessens the likelihood of future damage to the community through crimes prevented, and reduces the likelihood of further public spending on these individuals as they grow up.
3) **The benefits of implementing this rule are not appropriately defined.** The benefits described in this rule focuses primarily on the legality of implementing specific regulatory decisions, but does not describe what benefits will result from this implementation as opposed to following current practice of paroling all family members in the United States. In order for a description of benefits to be complete, it requires an account of the tangible benefits of implementing this rule in contrast to the costs of current practice. Cost savings and benefits to public health can be included in these benefits with adequate justification. The text of this rule appears to indicate that benefits may include savings resulting from disincentivizing dangerous travel across borders that result in adverse health outcomes, which have required medical attention (p. 45493, col. 2, 2nd par.). A sensible approach for estimating the health and economic benefits in these cases is to provide the number or estimate of families and juveniles that DHS has encountered that required medical attention, provide a justified calculation for the number of these individuals who would be disincentivized to attempt entry the United States as a result of this policy, and multiply this number by the estimated or average cost for treatment of these individuals.
4) **The costs of implementing this rule are not appropriately defined.** The text of the rule indicates that the many variables involved in the implementation of this rule will likely impact the initial or annual cost this rule (p. 45488, col. 3). It is, however, important to attempt these calculations in terms of potential economic impact, to provide for a ceiling or upper-bound estimate of these costs, in as justifiable an estimation as possible. That "the Departments seek comment on how these costs might be reasonably estimated, given the uncertainties" (p. 45514, col. 3, par. 2) is a further indication that these costs have yet to be

adequately determined. The text of the rule states that the Office of Information and Regulatory Affairs has determined that this is not a major rule for the purposes of congressional review under the Congressional Review Act (p. 45522, col. 3, par. 1), in that they have determined that it will not cost over $100 million, but it appears that such a determination is not possible given the potential breadth of this law and the Department's own statement that it is unable to determine costs. If the Office of Information and Regulatory Affairs has produced a justifiable calculation for determining that this rule will not cost over $100 million, that justification must be made publicly available for scrutiny if it has not yet available. In order to demonstrate that it is not a major rule requiring congressional review, in recognition of both the Department's own request for comments about how costs can be estimated, and in recognition of the potentially large impact of this rule, a cost analysis must be made of the program's net costs. This analysis should include at least the following:

a. An estimate of the maximum fixed and annual costs of holding children in government custody could, for example, include the costs of holding the 113,920 juveniles apprehended by the U.S. Customs and Border Protection in Fiscal Year 2017 as well as their parents, in a facility that could contain them while also treating the contained children with "dignity, respect, and special concern for their particular vulnerability as minors" (p45486, col. 1, 1st paragraph). The proposed rule is clear that there is no current facility that can offer an adequate model for these specifications, but the lack of such a current facility is all the more reason to determine the potential costs that may result from this rule, not a reason to avoid proper accounting. This is especially important because the primary reason that the Flores ruling has not to date resulted in a policy of holding children with their parents in federal custody is the lack of potential facilities that satisfy agreed-upon licensing standards for keeping these families in custody given the presence of children and consideration of their needs.
b. In order to help determine costs, the federal government could consult with potential vendors who could provide such facilities, with as much adherence to potential licensing standards as possible, whose estimates could be made public. Relying on previous costs of prisons, adult detention centers, juvenile detention centers, or other housing facilities would be unacceptable because no current facility has been constructed or licensed to adequately consider the special characteristics of this population (in that they are composed of adults and children, to be kept together, and in accordance with the respect and dignity of children).
c. Additionally, an adequate analysis of costs would include the impact of the increased health care costs associated with increased mental health needs or health of detained children and their parents, as a result of their prolonged detention. As indicated in the Justice Policy Institute report at http://www.justicepolicy.org/uploads/justicepolicy/documents/sticker_shock_final_v2.pdf (page 17), there is widespread agreement that juvenile incarceration damages the lives of incarcerated children and results in higher costs than available alternatives. Previous estimates of the costs of juvenile incarceration can be used for these calculations for children, and of adult incarceration can be used for their parents. If there is a reason why government custody of children would result in lower societal costs than does

incarceration of minors, or that detention of parents would result in lower costs than adult incarceration, a justification for an alternate number must be provided.

This rule must include a cost estimate that encompasses at least the above concerns. If any discernible benefits that arise from implementing this rule that can mitigate these costs, it would be acceptable in this analysis to offer those benefits as an offset to these costs. In lieu of any firmer estimates, a maximum-cost approach is appropriate for understanding how the potential budgetary impact this rule has on taxpayers.

5) **Child and adult detention often invites abuses.** A reasonable and defensible explanation must be provided for how the standards detailed in this rule will prevent abuse, and thereby accord to the Flores Settlement Agreement. Estimates for the costs of these safeguards should be included in the aforementioned estimates of the construction and maintenance of detention facilities.
6) **There is a dangerous precedent for incarcerating individuals indefinitely for visa violations that we should not follow: Germany, 1935.** Before Nazi concentration camps were used for mass slaughter, they were used to detain Germans found guilty of any among a variety of civil offenses, including visa violations. Such detention was based on legislation passed by Nazi officials in 1935, officially justified by national security concerns but specifically aimed at minorities, including Jews. My great-grandmother, Garbriele Herz, was one of the many individuals detained in prison for a visa violation. She was lucky enough to complete her prison term before the Nazi government transferred the inmates in the same prison where she was detained to other facilities. Eventually these prisoners were transferred to the Ravensbrück concentration camp, where many perished as victims of the Holocaust. (See Jane Caplan, Introduction, *The Women's Camp in Moringen: A Memoir of Imprisonment in Germany* by Garbriele Herz, translated by Hildegard Herz and Howard Hartig, New York: Berghahn Books, 2006.) Although I trust that this path will not be followed in the United States, expanding the detention system in this manner offers an alarming parallel to this dark period. Despite any justifications based on health or national security, similar measures in the recent past have resulted in horrors beyond imagination.

Again, I urge you to refrain from implementing this rule. I am writing this with the understanding that not all detention is equatable to incarceration, but there is little indication in how this rule will avoid abuses and possible horrors inflicted upon the non-criminal population that it affects.

Thank you.

Sincerely,
Seth Hartig