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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

JENNY LISETTE FLORES, <i>et al.</i> ,	)	Case No. CV 85-4544-RJK(Px)
	)	
Plaintiffs,	)	REPLY TO DEFENDANTS' OPPOSITION TO
- vs -	)	MOTION TO ENFORCE SETTLEMENT OF
	)	CLASS ACTION RE ADVISALS
WILLIAM BARR, Attorney General of	)	
the United States, <i>et al.</i> ,	)	
	)	Hearing: September 4, 2020
Defendants.	)	Time: 11:00 A.M.
_____	)	Judge: Hon. Dolly Gee

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I. INTRODUCTION

Plaintiffs’ motion for a proper advisal of rights and reasonable steps to implement Class Members’ release seeks no more than enforcement of the terms of the Agreement itself and the Court’s exercise of its authority to enforce its own Orders. *See Jeff D. v. Kempthorne*, 365 F.3d 844, 853 (9th Cir. 2004) (“Once the decree was entered, the district court retained jurisdiction to enforce it[.]”); *Flores* Settlement Agreement (“FSA”) at ¶ 37; October 5, 2018 Order Appointing Special Master/Independent Monitor at ¶ E.4 [Doc. # 494].

Defendants’ position that “ICE evaluates all families for release together in the first instance, but in situations where ICE determines that release of the parent is not appropriate, *continued custody of children with their parents is appropriate and consistent with the Agreement*,” Defendants’ Opposition to Motion to Enforce Settlement of Class Action at 1 (“Opposition”) (emphasis added) [Doc.# 923], is mind-boggling.

An accurate statement would be in situations where ICE determines that release of the parent is not appropriate, “*continued custody of children with their parents is appropriate and consistent with the Agreement if that is what a parent decides is in their child’s best interest after being fairly advised of their child’s Flores release rights.*”

Equally absurd is Defendants’ position that this Court should “reject Plaintiffs’ continued campaign for this Court to impose protocols that would, in effect, result in a family-separation mechanism.” *Id.* Even if a parent remains in custody because Defendants refuse to release the parent, this “does not excuse Defendants from the commitment they made in the *Flores* Agreement to make and record efforts to release minors in ICE custody, even if the ... parent is in expedited removal (i.e., awaiting a credible fear determination).” June 27, 2017 Order Re Plaintiffs’ Motion to Enforce and Appoint a Special Monitor at 26 (“June 2017 Order”) [Doc. # 363].

1 What Defendants fail to face up to is the simple proposition that the difficult
2 decision regarding “family separation” is one that under the *Flores* Settlement
3 Agreement (“FSA”) the *parent* of an accompanied Class Member must make, not
4 Class Counsel, Defendants, or the Court.

5 Rather than seeking a “family-separation mechanism,” Plaintiffs seek a
6 mechanism for parents to be fully and fairly advised of their child’s *Flores* rights, and
7 a mechanism to implement those rights should a parent decide it’s in their child’s best
8 interest to be released.

9 At bottom, Paragraph 12 of the FSA requires that advisals be given, and
10 Paragraphs 14 and 18 require the release of minors who are not flight risks or a danger
11 to themselves or others. Paragraphs 15 and 16 require Defendants to take certain steps
12 to assess whether designated sponsors are suitable and will produce Class Members for
13 future proceedings. If they are suitable and will produce the Class Member for future
14 proceedings, Paragraphs 14 and 18 require the child’s release without unnecessary
15 delay. This is what the FSA clearly requires and what this Court has repeatedly
16 ordered.¹

17 Defendants do not contest that they provide no advisals to detained parents about
18 their children’s FSA rights other possibly than Form I-770, which does not describe
19 Class Member’s FSA rights.² Simply put, Defendants prefer to keep parents in the
20 dark about their children’s rights. Moreover, even if a parent believes it is in their
21 child’s best interest to be released, it appears ICE has no procedures in place to assess
22 potential sponsors identified by a parent or to effect the prompt release of a minor to a

23 ¹ See Motion to Enforce Settlement of Class Action at 8-14 (“Motion”). [Doc. # 919.]

24 ² Advisals are necessary to ensure that Class Members and their caregiving parents are
25 making informed and intelligent decisions regarding release, sponsorship, legal
26 representation, and the potential waiver thereof. A waiver is generally an “intentional
27 relinquishment or abandonment of a known right or privilege.” *Johnson v Zerbst*, 304
28 US 458, 464 (1938) (internal quotation marks omitted).

1 designated and approved sponsor. The Motion seeks an Order remedying these
2 violations of the FSA. To the extent compliance with the FSA and this Court's prior
3 Orders may provide a binary choice for parents, the choice they may face is brought
4 about by Defendants' heartless and largely irrational unwillingness to release parents
5 with their children, regardless whether the parents are flight risks or a danger.

6 II. BACKGROUND

7 In the "Background" section of the Opposition, Defendants argue that in 2017
8 this Court "made clear" that "[u]ltimately, based upon an individualized review of the
9 facts, Defendants may conclude that it is in the best interests of an accompanied minor
10 to remain with a parent who is in detention." Opposition at 1, *quoting Flores v.*
11 *Sessions*, 394 F. Supp. 3d 1041, 1067 (C.D. Cal. 2017). This statement by the Court in
12 no way helps Defendants' position opposing the Motion.

13 There is no question under Paragraph 17 of the FSA Defendants may in their
14 discretion, after assessing a sponsor designated by a parent, determine that the sponsor
15 likely cannot safely care for the Class Member or produce the minor at future
16 proceedings and therefore "Defendants may conclude that it is in the best interests of
17 an accompanied minor to remain with a parent who is in detention." Similarly,
18 Defendants may decide that it is not in the best interest of a child to be released
19 because they are a danger to themselves or others.

20 Nevertheless, the FSA and numerous prior Court Orders make clear that
21 Defendants are required to release minors when they are not a danger or a flight risk,
22 and when it appears the designated sponsor will safely care for the Class Member and
23 produce him or her at future proceedings.

24 Next, Defendants opine that since 2017 the ICE Juvenile Coordinator has
25 regularly reported to the Court regarding the manner by which ICE is complying with
26 the Court's 2017 Order, and in two of the Special Master/Independent Monitor's
27 ("Monitor") 2019 reports, she did not take issue with ICE's manner of compliance with
28

1 the Court's orders. Opposition at 1-2. Thus, Defendants argue, "the Court and the
2 Monitor have, at least tacitly, approved of ICE's processes for complying with the
3 2017 order." *Id.* at 2. The obvious response is that the ICE Juvenile Coordinator and
4 the Monitor have addressed a wide range of compliance issues involving ICE, ORR,
5 and CBP, not every single one that may exist whether or not previously raised by
6 Plaintiffs. Neither the Juvenile Coordinator, nor the Special Monitor, nor the Court has
7 ever "tacitly" or otherwise approved Defendants' failure to provide parents an advisal
8 of their children's FSA rights, or Defendants' failure to adopt procedures to release
9 children whose parents believe should be released.

10 Indeed, Defendants next concede, as they must, that "[o]n several occasions, the
11 Court has stated that ... a parent may choose, on behalf of the class member child,
12 whether to exercise or waive a class member child's right to be released under the
13 Agreement." Opposition at 2.³ Defendants then incredibly argue that "the Court has
14 left it to the parties to develop and implement any procedures by which such release or
15 waiver could occur ..." *Id.*

16 ³ See, e.g. *Flores v. Sessions*, No. CV 85-4544-DMG (AGRx), 2018 WL 4945000, at
17 *4 (C.D. Cal. July 9, 2018) ("[D]etained parents may choose to exercise their Ms. L
18 right to reunification or to stand on their children's *Flores* Agreement rights.
19 Defendants may not make this choice for them."); Order, ECF No. 784, April 24, 2020,
20 at 15 n.6 ("Parents may waive their children's *Flores* rights."); Order ECF No. 833,
21 June 26, 2020 at 3 (requiring ICE to release class member children separately from
22 their parents "with the consent of their adult guardians/parents"); *id.* at 6 (requiring the
23 parties to meet and confer "regarding the adoption and implementation of proper
24 written advisals and other protocols to inform detained guardians/parents about
25 minors' rights under the FSA and obtain information regarding, and procedures for
26 placement with, available and suitable sponsors"); Order, ECF No. 799, May 22, 2020,
27 at 2 ("[A]lthough the Court finds that ICE did not seek or obtain formal waivers from
28 detained parents of their children's *Flores* rights during ICE officers' conversations
with detained parents on or about May 15, 2020, those conversations caused confusion
and unnecessary emotional upheaval and did not appear to serve the agency's
legitimate purpose of making continuous individualized inquiries regarding efforts to
release minors.").

1 Yet it was Defendants who after several meetings with Plaintiffs and arriving at
2 agreement on almost every aspect of an advisal, *see* Declaration of Class Counsel Peter
3 Schey re Joint Status Report [Doc. 905], engaged in a *volte face*, refused to continue to
4 meet and confer, and objected “to the implementation of *any* protocol that would
5 potentially provide for the separation of a parent and child who are currently housed
6 together in an ICE family residential center (FRC).” Joint Status Report at 6 (emphasis
7 added). [Doc. # 902].⁴ Defendants reiterate this position in their Opposition.
8 Opposition at 5. By the time of the hearing conducted on August 7, 2020, Defendants
9 clearly stated “*the government would prefer that Your Honor impose a remedy.*”
10 August 7, 2020 Hearing Tr. at 16:13-17 (emphasis added). In another *volte face*,
11 Defendants now object to the Court imposing a remedy.

12 Next, Defendants argue that *amici* counsel stated during a status conference that
13 she has “at times” inquired whether some parents wish to have their children released
14 and they did not, and that Defendants are not aware of any parent who has sought the
15 release of his or her child. Opposition at 3. This says nothing about the importance of
16 parents being fully informed of their children’s release rights and ICE having
17 procedures in place to follow when a parent *does* want their child released.⁵ Parents
18 may not exercise or waive their rights if they are uninformed of those rights, may know
19 Defendants have no procedures in place to implement a parent’s wishes, and may have
20

21
22 ⁴ Defendants obviously know that they have been enjoined in separate class action
23 litigation from separating class member parents from their children, absent an
24 affirmative, knowing, and voluntary waiver of the parent’s right to be detained with
25 their children at an ICE FRC. *See Ms. L. v. ICE*, 310 F. Supp. 3d 1133, 1149 (S.D. Cal.
26 June 26, 2018).

27 ⁵ *Amici* counsel’s comments during a hearing are obviously not evidence and its
28 entirely unclear if she’s addressing her clients, a small number of all detained families,
or the clients of the three *amici* parties.

counsel focused primarily on trying to win the release of parents through public advocacy and litigation in another Court.⁶

III. ARGUMENT

a. Defendants Should Be Required To Implement the Procedures Requested by Plaintiffs.

Defendants first argue that they “have always objected—and continue to object—to any reading of the Agreement that will require ICE to implement a protocol to potentially separate a parent and child who are currently housed together in an ICE FRC, and who *both are subject to lawful detention* by ICE in accordance with the Immigration and Nationality Act.” Opposition at 7 (emphasis added). Obviously detaining Class Members in ICE FRC’s is controlled *not* just by the Immigration and Nationality Act, but also by the FSA and this Court’s prior Orders.

While Defendants may object to “potentially separate[ing] a parent and child,” the FSA *only* requires they do so if the child is not a flight risk or a danger, and if a parent designates an appropriate sponsor for their child. As this Court has observed, “[t]he blessing or the curse – depending on one’s vantage point – of a binding contract is its certitude. The Flores Agreement is a binding contract and a consent decree. It is a final, binding judgment that was never appealed. It is a creature of the parties’ own contractual agreements and is analyzed as a contract

⁶ This Court has made clear Defendants may avoid the hard choice of releasing a minor without his or her parent when it ordered the transfer of Class Members who have resided at the FRCs for more than 20 days to non-congregate settings through one of two means: (1) releasing minors to available suitable sponsors or other available COVID-free non-congregate settings with the consent of their adult guardians/parents; or (2) by releasing the minors with their guardians/parents if ICE exercises its discretion to release the adults or another Court finds that the conditions at these facilities warrant the transfer of the adults to non-congregate settings. June 2020 Order ¶ 1 [Doc. # 833.]

1 for purposes of enforcement. Defendants cannot simply ignore the dictates of the
2 consent decree merely because they no longer agree with its approach as a
3 matter of policy. The proper procedure for seeking relief from a consent decree
4 is a Rule 60(b) motion by which a party must demonstrate that a change in law
5 or facts renders compliance either illegal, impossible, or inequitable. Relief may
6 also come from a change in law through Congressional action. Having failed to
7 obtain such relief, Defendants cannot simply impose their will by promulgating
8 regulations that abrogate the consent decree's most basic tenets. That violates
9 the rule of law. And that this Court cannot permit.

10 Order Re Plaintiffs' Motion to Enforce Settlement and Defendants' Notice of
11 Termination and Motion In the Alternative to Terminate the *Flores* Settlement
12 Agreement (September 27, 2010) ("September 2019 Order") at 24. [Doc. # 688.] It is
13 unclear what part of this Court's prior Orders, including its September 2019 Order,
14 Defendants do not understand.

15 Defendants point out that Paragraph 14 states that "'INS shall release a minor
16 from its custody without unnecessary delay, in the following order of *preference*' with
17 the 'parent' being the first priority. But Paragraph 14 does not address what to do when
18 the child is already in custody with the parent ..." Opposition at 7 (emphasis added).
19 This is inaccurate. As the language of the FSA makes clear, Paragraph 14 lists an order
20 of "preference" to whom Class Members may be released. It nowhere states or
21 suggests that if a Class Member is detained with a parent, and ICE refuses to release
22 the parent, the Class Member's right to release to other potential sponsors listed in
23 Paragraph 14 may be disregarded.

24 The FSA's terms were not changed when this Court opined that Defendants
25 were "acting in good faith and in the exercise of due diligence" if a "brief extension of
26 time will permit DHS to keep the family unit together." Opposition at 8, *quoting*
27 *Flores v. Lynch*, 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015). As Plaintiffs have
28

1 repeatedly pointed out, the previous administration achieved substantial compliance
2 with the FSA by having a ninety to ninety-five percent (90-95%) credible fear approval
3 rate, and promptly releasing Class Members with their parents found to possess a
4 credible fear of persecution if returned to their home countries. Motion at 3; Joint
5 Status Report (August 5, 2020) at n. 2. [Doc. # 902.] That approach to compliance no
6 longer exists, as the credible fear approval rate has now dropped to about ten percent
7 (10%) as a result of the current Administration substantially restricting its asylum
8 policies. *Id.*

9 Defendants next argue that “[i]t bears emphasizing that class counsel do not
10 represent the parents of the children at issue in this case and that, while this Court has
11 said a parent may waive the child’s rights on behalf of his or her child, this Court has
12 not addressed—and, given that this case involves a class of children only, cannot
13 address—any separate rights the parent may have which are not governed by the
14 Agreement.” Opposition at 8.

15 All parties and the Court obviously understand that Class Counsel do not
16 represent the parents. However it is equally obvious, and Defendants nowhere explain
17 otherwise, that when children possess certain rights that may be exercised or waived,
18 parents may stand in their children’s shoes to make decisions for their children. *See,*
19 *e.g. Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this
20 case -- the interest of parents in the care, custody, and control of their children -- is
21 perhaps the oldest of the fundamental liberty interests recognized by this Court ... It is
22 cardinal with us that the custody, care and nurture of the child reside first in the parents
...”).

23 Finally, Defendants argue that Plaintiffs are “seeking an order for a remedy
24 without presenting any evidence of harm.” Opposition at 10. As Plaintiffs explained in
25 their Motion and their Response to Defendants’ Notice of Filing of Ice Juvenile
26
27
28

Coordinator Report (“May 2020 Plaintiffs’ Response to Juv. Coord. Report”) [Doc. # 796]:

... ICE continues to evaluate Class Members for release based on a “Parole Worksheet” that on its face is materially inconsistent with the plain language of the FSA, and the agency’s purported securing of parents’ waivers of their children’s right to release under the FSA was obtained [on or about May 15, 2020] ...

- without notice to parents’ and Class Members’ counsel of record,
- without parents or Class Members having any opportunity to consult with their counsel of record,
- without counsel of record for Class Members and parents being present,
- without providing parents or Class Members with an oral or written notice of Class Members’ rights under the FSA,
- without providing parents or Class Members with a notice of Class Members’ rights in a language parents or Class Members understood,
- without advising parents or Class Members that any decision they made to have a Class Member released could be reversed prior to the Class Member actually being released,
- without explaining what steps ICE would take, if any, to assess the ability of designated sponsors to safely care for released Class Members, and
- without advising parents that they could apply for parole so they could possibly be released with their child under 8 CFR 212.5(b)(3)(ii).

Thus, any purported “waivers” of Class Members’ FSA rights ICE obtained were hardly “proper waiver[s] of Flores rights,” nor were they “affirmative, knowing, and voluntary” waivers of the parents’ right to be detained with their children. April 24, 2020 Order at 15 n. 6 and 18.

1 Motion at 12; May 2020 Plaintiffs' Response to Juv. Coord. Report at 4.⁷

2 Further evidence of the "harm" is defendants' admission that they do not advise
3 parents about their children's FSA rights and have no procedures in place to implement
4 a parent's decision that their child's best interest would be served by release to a
5 relative. It's highly unlikely a law enforcement agency that refused to advise detained
6 persons of their *Miranda* rights and adopted no procedures to honor those rights if
7 exercised, could defend their position by arguing that no detained person had exercised
8 or waived their *Miranda* rights.

9 Plaintiffs' Motion does not demand that parents exercise or waive their
10 children's FSA rights one way or the other. It seeks to remedy the harm inherent in
11 Defendants not advising parents about their children's FSA rights, or having in place
12 procedures to implement an exercise of those rights.

13 **b. Defendants Have Not Made Good Faith Efforts to Comply With the**
14 **Court's Orders, and a Procedural Remedy is Therefore Appropriate.**

15 Plaintiffs believe the remedies sought involve reasonable interpretations of the
16 FSA and reasonable remedies for Defendants' breaches. In that case, the Court need
17 not find Defendants in contempt, a step that provides the Court with greater ability to
18 Order Defendants to take certain steps with the goal being to obtain substantial
19 compliance with the FSA.

20 Defendants argue they have complied with the FSA and this Court's prior
21 Orders by making "individualized determinations regarding the release of class
22 members." Opposition at 11, *citing* Defendants' Supplemental Response, ECF No.

24 ⁷ The evidence shows that ICE continues to "cause[] confusion and unnecessary
25 emotional upheaval" by approaching newly-placed families and following the same
26 methods it used in May 2020. *See* Ex. D (C.M. Decl.) [Doc. # 903 at 54]; Ex. F (T.T.P.
27 Decl.) [Doc. # 903 at 64], at ¶¶ 25–27; Ex. G (A.C. Decl.) [Doc. # 903 at 69]; Exhibit
28 H (G.P. Decl.) [Doc. # 903 at 72], at ¶¶ 35–36.

746, April 6, 2020, at 31-35. Plaintiffs and this Court have endlessly pointed out that Defendants’ determinations have repeatedly violated the FSA. *See, e.g.* Order Re Plaintiffs’ Motion to Enforce (April 24, 2020) at 16 (“April 2020 Order”) [Doc. # 784] (“[b]ecause ICE has not submitted evidence of individualized release assessments for Class Members awaiting asylum decisions, much less evidence that ICE makes and records individual assessments in a prompt and continuous manner, the Court finds ICE in violation of the FSA’s Paragraph 18 (as well as the Court’s prior June 27, 2017 Order) ...”); Order Re Updated Juvenile Coordinator Reports (June 26, 2020) at 5, Section 4c (“June 2020 Order”) [Doc. # 833] (“the ICE Juvenile Coordinator shall give a detailed individualized explanation of why that minor is a flight risk (cursory explanations such as ‘In custody—pending IJ hearing/decision,’ ‘pending USCIS response,’ ‘plaintiff in a pending lawsuit,’ or any other justification that the Court has already rejected as being insufficient indicia of imminent removal shall not be acceptable explanations”); June 2017 Order at 25 [Doc. # 363] (this Court again held that “the *Flores* Agreement creates an affirmative obligation on the part of Defendants to individually assess each class members’ release ...”); *Amici* Brief at 12 [Doc. # 903] *citing* Ex. D (C.M. Decl.), Ex. A (Meza Decl.), at ¶¶ 10–14, Ex. Q (M.E.F. Decl.), at ¶¶ 32-33. (“ICE has not provided [individualized] custody determinations [even] based upon a Class Member’s medical conditions.”)

The fact that “almost all family units have been released together from FRCs, and only a small number remain,” Opposition at 11, is relatively meaningless given that detained Class Members possess FSA rights whether their number is 1, 10, 100, or more. And, more importantly, it hardly helps defend Defendants’ history of violating the FSA and this Court’s Orders, by conceding that hundreds of Class Members have been detained for long periods of time, in secure facilities not licensed for the care of dependent minors, without the Class Members or their parents being informed about the Class Members’ rights under the FSA or Defendants even bothering to establish

1 procedures to make and record steps—as required by Paragraph 18 of the FSA—to
2 release Class Members if that’s what their parents decide.

3 Defendants also argue that the Court and the Monitor are somehow to blame for
4 Defendants’ FSA violations. Opposition at 11-12 (“neither the Court nor the Monitor
5 ever raised any issues or concerns with the manner of Defendants’ compliance ... The
6 Order [ECF No. 833] provides no guidance as to how such consent can be obtained
7 ...”) The FSA does not contemplate the Court acting as an ever-present uber roving
8 monitor watching and dispensing orders to Defendants every time it believes they’re
9 not in substantial compliance with the FSA. Regardless of whether the Court gives
10 ongoing or future “guidance” to Defendants, they are obligated to comply with the
11 terms of the FSA and the Court’s prior Orders. Obviously, when the Court repeatedly
12 orders that Defendants’ release determinations are neither timely nor based on proper
13 criteria, it is not issuing vacuous meaningless Orders assuming they’ll never have any
14 effect because in any event Defendants won’t adopt any procedures to actually release
15 minors.⁸

16 Defendants reliance on *Kelly v. Wengler*, 822 F.3d 1085, 1097 (9th Cir. 2016) is
17 misplaced. Opposition at 13. Given Defendants’ history of non-compliance, under the
18 standards discussed in *Kelly*, this Court unquestionably has the authority to issue the
19 remedial orders in the form proposed by Plaintiffs. The district court in *Kelly* found the
20 Defendants “had materially breached the settlement agreement and, indeed, that there
21 was ‘serious doubt’ whether [they] had ever substantially complied with it ... [They]
22 had not substantially complied with the settlement agreement and had failed to
23 take several reasonable steps to ensure compliance. “ *Id.* at 1096-97. As is true of the

24 ⁸ Defendants again repeat their argument that there is no evidence of harm. Opposition
25 at 13. As Plaintiffs responded *supra*, the best evidence of the “harm” is defendants’
26 admission that they do not advise parents about their children’s FSA rights and have no
27 procedures in place to implement a parent’s decision that their child’s best interest
28 would be served by release to a relative. It’s the challenged policies that create the
harm Plaintiffs seek to remedy.

1 remedies Plaintiffs propose in this case, “[r]ather than punishing [Defendants],” the
2 orders issued in the *Kelly* case imposed sanctions that “sought to return Plaintiffs as
3 nearly as possible to the position they would have occupied had [Defendants] not
4 violated the agreement.” *Id.* at 1097.

5 As the parties agree, to establish that such remedies are authorized, Plaintiffs
6 must show by clear and convincing evidence that a violation of the Agreement has
7 actually occurred. Opposition at 13; Motion at 26-27. Based on the record as discussed
8 in the Motion and *supra*, there is no real question that Plaintiffs have not shown by
9 clear and convincing evidence that numerous violations of the Agreement have
10 actually occurred, in fact have repeatedly occurred. *See, e.g.* Motion at 2-3, 6-13.

11 **c. Defendants Are in Breach of the Notice Requirement.**
12

13 Assuming the Court does not find Defendants in contempt and use its remedial
14 power to order the issuance of an advisal of rights, Defendants argue that the Court has
15 no authority to require an advisal because an advisal about the FSA’s rights is not
16 required by Paragraph 12.A. Opposition at 14.

17 However, Defendants misconstrue Plaintiffs position, arguing that Plaintiffs read
18 Paragraph 12.A to suggest that it requires notice of “generalized provisions of rights
19 that are not detailed anywhere in the Agreement.” Opposition at 14. The Motion makes
20 clear that Plaintiffs believe the text of Paragraph 12.A obligates Defendants to “provide
21 all detained Class Members or, if accompanied, their parents, with an advisal regarding
22 their rights under the FSA *rather than* the totality of their rights under the Immigration
23 and Nationality Act ...” Motion at 16 (emphasis added).

24 Defendants also rely on the fact that the FSA requires Defendants to provide
25 Class Members with two specific notices. Opposition at 14, *citing* Paragraphs 24.C-D.
26 As Defendants obviously know, Paragraph 24.C deals with a notice providing the
27 “reasons” for housing the minor in a detention or medium security facility, not a notice
28

1 of the Class Member's rights under the FSA. Paragraph D is limited to the right to
2 appeal certain custody decisions as described in Exhibit 6, including being provided
3 Form I-770 and a list of legal services. Including these provisions in the FSA in no way
4 negates Defendants' obligations to provide advisals as required by Paragraph 12.A. By
5 Paragraph 12.A *not* specifying that the advisals should only address one or another
6 identified part of FSA, it is reasonable to conclude the advisals may cover the most
7 significant parts of the FSA.

8 Plaintiffs agree that the Agreement "should be read to give effect to all of its
9 provisions and to render them consistent with each other." Opposition at 14, *quoting*
10 *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). Since the vast
11 majority of Class Members and their parents are entirely unfamiliar with Class
12 Members' FSA rights, and are detained, and their rights are fairly meaningless if they
13 don't know about them, reading Paragraph 12.A's advisal text to require a reasonable
14 advisal about Class Member's basic FSA rights, especially to release, clearly gives
15 effect to all of the FSA's provisions and renders them consistent with each other.

16 The Court has authority to order remedies that reasonably interpret what the
17 FSA requires. Requiring Defendants to issue an advisal along the lines proposed by
18 Plaintiffs is within the Court's authority to bring about substantial compliance with the
19 FSA.

20 **d. Plaintiffs' Proposed Documents Do Not Contain Legal Errors And**
21 **Would Not Cause Further Confusion**

22 Finally, after refusing to complete the meet and confer process and agree to a
23 notice of rights and protocol that do not contain legal errors and do not cause further
24 confusion, Defendant now complain that "requiring the use of [the proposed]
25 documents would cause confusion and create further problems ..." Opposition at 15.
26 Defendants only provide a handful of examples of erroneous or confusing provisions,
27 any of which the Court may modify in its discretion.
28

1 First, in the protocols document, in the section entitled “Custody
2 Determinations,” Plaintiffs propose that ICE instruct its personnel that “8 C.F.R. §
3 1236.3 requires ICE to assess and document whether an adult parent should be released
4 from ICE custody to effectuate the release of a child from custody.” ECF No. 921-1, ¶
5 3. Defendants argue this statement is inaccurate because the cited regulation “is not a
6 release authority,” and “does not instruct agents in the authority under which they may
7 consider individuals for release.” Opposition at 15. The challenged text does not
8 preclude ICE from applying its “usual custody decision making procedures to the
9 parent or legal guardian at the appropriate point in the process ...” *Id.* Defendants are
10 also free to propose alternative language.

11 Second, Defendants complain because Plaintiffs propose that “[a]ny documents
12 provided to a parent or a minor to implement this protocol or comply with the FSA
13 shall be forwarded by email or mailed by first class mail to the parent’s and minor’s
14 attorney(s) of record.” Opposition at 16, *quoting* ECF No. 921-1, ¶ 11. This
15 requirement would not exceed the authority of this Court “to the extent that it provides
16 a right to the parent to have documents served on his or her counsel,” *id.*, because
17 Defendants regulation requires that copies of documents served on someone by ICE
18 must be served on their counsel of record. 8 C.F.R. § 292.5 (“Whenever a person is
19 required by any of the provisions of this chapter to give or be given notice; to serve or
20 be served with any paper other than a warrant of arrest or a subpoena; ... to file or
21 submit an application or other document; or to perform or waive the performance of
22 any act, such notice, service, motion, filing, submission, performance, or waiver shall
23 be given by or to, served by or upon, made by, or requested of the attorney or
24 representative of record, or the person himself if unrepresented.”).

25 “More importantly,” Defendants say, this provision “might at times” require ICE
26 to provide confidential or sensitive information about the sponsor ... to counsel who do
27 not represent the sponsor and to whom the sponsor has not authorized its release.” *Id.*

1 at 16. Defendants can perhaps withhold this information from counsel or obtain the
2 sponsor's consent to share it with the parent's attorney of record.

3 Finally, Defendants argue against Plaintiffs' proposed language allowing a
4 parent to designate an adult who will transport their child to any sponsor the parent
5 identified and ICE has approved to care for the child, allowing ICE in its discretion to
6 run a background check on any such adults designated by a parent and decline to
7 transfer the child to the adult's custody if the adult has a criminal history such that the
8 child may not be safe being transported by the adult, or alternatively, allowing ICE to
9 transport the child to the approved sponsor's home. *Id.*

10 Defendants complain that this provision would require ICE to either undertake
11 transportation of a minor alone, or transfer custody of a minor to an adult "who is not
12 fully vetted by ICE based solely on a 'background check' ..." *Id.* Defendants are free
13 to propose alternative language involving something more than a background check.
14 Regarding the option of transporting a minor, Plaintiffs' proposed language is similar
15 to Defendants' regulation which states: "DHS shall assist without undue delay in
16 making transportation arrangements to the DHS office nearest the location of the
17 relative to whom a minor is to be released. DHS may, in its discretion, provide
18 transportation to minors." 8 C.F.R. § 236.3(j)(5)(iii).

19 ///

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant the Motion and enter an Order in the form proposed by Plaintiffs.

Dated: August 28, 2020.

Respectfully submitted,

CENTER FOR HUMAN RIGHTS &
CONSTITUTIONAL LAW

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CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2020, I served the foregoing pleading on all
counsel of record by means of the District Clerk's CM/ECF electronic filing system.

/s/ Peter Schey

Peter A. Schey

CENTER FOR HUMAN RIGHTS &
CONSTITUTIONAL LAW

Class Counsel for Plaintiffs