

COPY

Filed in The District Court  
of Travis County, Texas

FA

No. D-1-GN-15-004336

NOV 20 2015

At 5:00 P.M.  
Velda L. Price, District Clerk

GRASSROOTS LEADERSHIP, INC.,

*Plaintiff,*

v.

TEXAS DEPARTMENT OF FAMILY  
AND PROTECTIVE SERVICES (DFPS),  
JOHN J. SPECIA, Jr. in his official capacity  
as DFPS Commissioner, TEXAS  
HEALTH AND HUMAN SERVICES  
COMMISSION (HHSC), and  
CHRIS TRAYLOR, in his official capacity  
as HHSC Executive Commissioner,

*Defendants.*

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

(All proceedings assigned  
to the 250<sup>th</sup> Judicial District Court)

**TEMPORARY INJUNCTION**

On November 12, 2015, the Court considered Plaintiff's Application for a Temporary Injunction (the "Application"). Plaintiff and Defendants Texas Department of Family and Protective Services ("DFPS"), Texas Health and Human Services Commission (HHSC), and their Commissioners appeared through counsel of record. The record of testimony was duly reported by the court reporter for the 250th Judicial District Court.

Plaintiff asserts a cause of action for declaratory relief under TEX. GOV'T CODE § 2001.038(a), also known as the Administrative Procedure Act (APA), by challenging the validity of the emergency rule adopted by DFPS and published in the Texas Register on September 18, 2015 as Title 40, Part 19, Chapter 748, Subchapter A, Rule § 748.7 (herein the "Emergency Rule"), effective immediately and without notice and comment rulemaking procedures.

After reviewing the Application, testimony, evidence presented, and all other documents filed in this case to date, the arguments of counsel, and applicable law, the Court FINDS:

1. Plaintiff has demonstrated a probable right to a declaratory judgment as to the Emergency Rule's invalidity because no imminent peril to public health, safety or welfare exists as required by TEX. GOV'T CODE § 2001.034(a)(1) to support the agency's use of emergency procedures, and no federal or state law required the agency to use emergency procedures;
2. Plaintiff will suffer immediate and irreparable harm absent a temporary injunction because money damages are unavailable against the state agency, and Plaintiff will be deprived of the statutory rights granted to Plaintiff by TEX. GOV'T CODE §§ 2001.001 to 2001.038, including the rights to adequate notice and the opportunity to comment prior to implementation of agency rules, as well as the right to review and challenge the adequacy of reasons that the agency states in writing in response to Plaintiff's comments, as provided in Tex. Gov't Code §§ 2001.029 to 2001.030; and
3. The temporary injunction is necessary to preserve *the status quo* while the challenge to the validity of the agency's Emergency Rule proceeds to final trial pursuant to TEX. GOV'T CODE § 2001.038.

**I. Background Information**

**A. *Flores v. Johnson Settlement Agreement – January 1997***

On July 11, 1985, a class of plaintiffs initiated a lawsuit against U.S. Immigration and Customs Enforcement (ICE) and other defendants in the District Court of Central California.

*Flores v. Johnson*, CV 85-4544 DMG (C.D. Cal). On January 28, 1997, the parties entered into court approved a class-wide settlement of the lawsuit (the “*Flores Settlement Agreement*”). The *Flores Settlement Agreement* provided that, if a minor is not released and detained, the minor shall be placed temporarily in an unsecure<sup>1</sup> and licensed program. The *Flores Settlement Agreement* defines a “licensed program” as a “program, agency or organization *that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children ....*” The Defendants in this case were not parties to the *Flores* case or subject to any timelines under the *Flores Settlement Agreement*.

B. *ICE Family Residential Centers in Texas – 2006 to present*

In March 2006, the Correction Corporation of America, an ICE contractor, notified DFPS that it intended to house families with children in a Family Residential Center (FRC) at the T. Don Hutto Residential Center in Taylor, Texas and that it would soon request a license to do so.

Instead of initiating rule-making procedures regarding licenses for FRCs, DFPS notified the Correction Corporation of American that the T. Don Hutto Residential Center was exempt from the licensure requirements under Texas administrative law for child care facilities. The T. Don Hutto Residential Center continued in operation without DFPS licensure until the facility closed in 2009.

In the summer of 2014, in response to a wave of Central Americans arriving at the U.S.-Mexico border, ICE began detaining women and children in two secure and unlicensed facilities in Texas. On July 31, 2014, the GEO Group, another ICE contractor, opened the Karnes County Residential Center in Karnes City, Texas. On December 18, 2014, the Correction Corporation of America opened the South Texas Family Residential Center in Dilley, Texas. Both facilities

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<sup>1</sup> “Secure” refers to a detention facility where individuals are held in custody and are not free to leave, while “non-



have been housing women with children without any licensure by DFPS.

C. *Flores v. Johnson Enforcement Action - July 2015*

On February 2, 2015, certain class members in *Flores v. Johnson* filed a motion to enforce the *Flores* Settlement Agreement. Among other claims, the class members specifically challenged ICE's failure to comply with the *Flores* Settlement Agreement through its policies and practice of confining minors in secure and unlicensed facilities.

On July 24, 2015, the *Flores* Court issued an Order related to enforcement of the *Flores* Settlement Agreement (the "*Flores* Enforcement Order"). The Defendants in this case were not party to the enforcement action and the *Flores* Enforcement Order does not require Texas to adopt a Texas rule on fewer than 30 days' notice.

The purpose of the licensing provision of the *Flores* Settlement Agreement is to provide "the essential protection of regular and comprehensive oversight by an independent child welfare agency." See *Flores* Enforcement Order at p. 14. The fact that the Texas FRCs do not comply with the *Flores* Settlement Agreement does not, in and of itself, create an emergency. See *Flores* Enforcement Order at pp. 12-13.

D. *DFPS' Emergency Rule § 748.7 - September 2015*

TEX. GOV'T CODE § 2001.034 provides that a state agency may adopt an emergency rule without prior notice or hearing, or with an abbreviated notice and a hearing that it finds practicable, if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. Section 2001.034 further requires that the agency shall set forth in an emergency rule's preamble

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secure" facilities are those where individuals are not held in custody.

the finding imminent peril to the public health, safety, or welfare.

On September 2, 2015, DFPS adopted and published the Emergency Rule in the Texas Register. As required by TEX. GOV'T CODE § 2001.034 (a)(2), Defendants set forth the Emergency Rule's preamble with findings to purportedly support that an imminent peril to the public health, safety, or welfare required adoption of the Emergency Rule:

**40 TAC §748.7**

On behalf of the Department of Family and Protective Services (DFPS), the Health and Human Services Commission adopts, on an emergency basis, new §748.7 of Title 40, concerning the applicability of Chapter 42, Human Resources Code, and licensing rules and statutes in general to residential family centers operated by contractors of U.S. Immigration and Customs Enforcement (ICE). The new section is adopted on an emergency basis pursuant to §2001.034, Government Code, which allows emergency rulemaking if a state agency finds an imminent peril to the public health, safety, or welfare.

On July 24, 2015, a federal district court determined that ICE's policy of detaining female-headed families in family residential centers, which are unlicensed and secure, violated the terms of a 1997 settlement agreement requiring, *inter alia*, that minors in custody be released without unnecessary delay and that, while they are detained, they be housed in non-secured, state-licensed facilities. *Flores v. Johnson*, CV 85-4544 DMG (C.D. Cal. July 24, 2015). The court noted that the purpose of the licensing provision in the settlement agreement "is to provide class members the essential protection of regular and comprehensive oversight by an independent child welfare agency."

The court's ruling highlights a gap in the oversight of the children housed in facilities covered by the settlement agreement. There are two such facilities in Texas: the South Texas Family Residential Center in Dilley, Texas and the Karnes County Residential Center in Karnes City, Texas. Both are family residential facilities designed for detention of adults with children. Neither is currently licensed by the Child-Care Licensing Division of DFPS. Because there is no regular and comprehensive oversight of the care of children housed in the facilities by an independent agency, there is an imminent peril to the public's health, safety, or welfare.

The Emergency Rule's preamble findings rely on the *Flores* Enforcement Order as a basis for implementing the Emergency Rule; the preamble does not state that federal law requires adoption of the Emergency Rule on fewer than 30 days' notice as allowed under TEX. GOV'T CODE § 2001.034.

The Emergency Rule's preamble references the two Texas FRCs that have operated in

Texas without any license, but disregards the fact that each has been in operation in Texas for well over a year.

The Emergency Rule removes a FRC's obligations to comply with current Texas Minimum Standards for General Residential Operations<sup>2</sup> that pertain to the safety and welfare of children. Specifically, the Emergency Rule exempts the FRCs from complying with: (1) limitations on room occupants; (2) children sharing a room with an adult that may be unrelated; and (3) children sharing a room with children of the opposite gender.

The Emergency Rule demonstrates that Defendants utilized the emergency rule power for administrative purposes rather than to address a true emergency. The Emergency Rule allows for significantly less oversight of FRCs than DFPS's own Minimum Standards for General Residential Operations. The Emergency Rule does not address an actual emergency or provide for "regular and comprehensive oversight" of the FRCs.

## **II. Injunctive Relief**

IT IS ORDERED, ADJUDGED, AND DECREED that the following Temporary Injunction shall be issued:

1. THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES and the TEXAS HEALTH AND HUMAN SERVICES COMMISSION, and all of their officials, agents, servants, employees, and attorneys are hereby ORDERED to desist and refrain from implementing the regulation that the agency published in the Texas Register as 40 Tex. Admin. Code § 748.7 on September 18, 2015 (the "Emergency Rule"), which includes relying on the Emergency Rule to license any residential facility until expiration or

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<sup>2</sup> See June 2015 Minimum Standards for General Residential Operations issued by Licensing Division of DFPS.



amendment of this Order. Nothing in this Order, however, shall prevent or preclude Defendants from proceeding through the traditional rule adoption procedures outlined in TEX. GOV'T CODE § § 2001.023 and 2001.029.

2. IT IS FURTHER ORDERED that the bond that Plaintiff has already executed and filed with this Court shall be held sufficient for issuance of this Temporary Injunction in conformity with Rule 684 of the Texas Rules of Civil Procedure to ensure that Plaintiff will abide by the decision which may be made in the cause, and that Plaintiff will pay all sums of money and costs that may be adjudged against it.

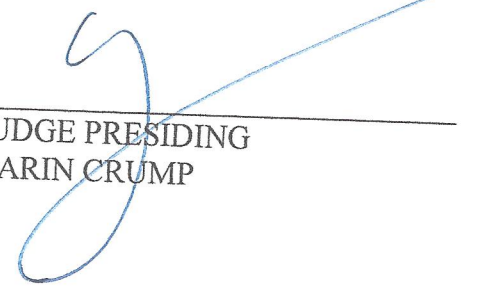
3. The clerk shall forthwith, when so requested by Plaintiff, issue a writ of Temporary Injunction in conformity with the law and the terms of this Order.

### III. Final Hearing

IT IS FURTHER ORDERED that final trial on the merits in this case will be held on May 9, 2016 at 9:00 o'clock a.m.

IT IS FURTHER ORDERED that this Order is effective immediately upon execution by the Court.

SO ORDERED this 20<sup>th</sup> day of November, 2015 at 5:10 o'clock p.m.

  
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JUDGE PRESIDING  
KARIN CRUMP