

No. 08-16-00334-CV

**In The Court Of Appeals
For The Eighth Court Of Appeals District
El Paso, Texas**

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**TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES; HENRY WHITMAN, IN
HIS OFFICIAL CAPACITY AS DFPS COMMISSIONER; TEXAS HEALTH AND HUMAN
SERVICES; AND CHARLES SMITH, IN HIS OFFICIAL CAPACITY AS HHSC EXECUTIVE
COMMISSIONER, CORRECTIONS CORP. OF AMERICA, AND THE GEO GROUP, INC.,**

Appellants

v.

**GRASSROOTS LEADERSHIP, INC., GLORIA VALENZUELA, E.G.S., FOR HERSELF AND AS
NEXT FRIEND FOR A.E.S.G., F.D.G., FOR HERSELF AND AS NEXT FRIEND FOR N.R.C.D.,
Y.E.M.A., FOR HERSELF AND AS NEXT FRIEND FOR A.S.A., ET AL.,**

Appellees.

FROM THE 353RD DISTRICT COURT, TRAVIS COUNTY, TEXAS
CAUSE NO. D-1-GN-15-004336, HONORABLE KARIN CRUMP, PRESIDING

BRIEF FOR APPELLANT THE GEO GROUP, INC.

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ORAL ARGUMENT REQUESTED

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GLOSSARY

Abbreviation	Full Name
APA	Texas Administrative Procedure Act, Tex. Gov’t Code § 2001.038
CCA	Corrections Corporation of America a/k/a CoreCivic
Defendants	DFPS; Henry Whitman, in his official capacity as DFPS Commissioner; HHSC; Charles Smith, in his official capacity as HHSC Executive Commissioner; CivicCore; GEO.
DFPS	Texas Department of Family and Protective Services
DHS	Department of Homeland Security
Dilley	South Texas Family Residential Center in Dilley, Texas
Emergency Rule	40 Tex. Reg. 6229
<i>Flores</i> Settlement Agreement	Court approved settlement of <i>Flores v. Johnson</i> , CV 85-4544 DMG (C.D. Cal. 1997).
FRC	Family residential center

FRC Rule	40 Tex. Admin. Code § 748.7; 41 Tex. Reg. 1493-1502 (Feb 26, 2016)
GEO	The GEO Group, Inc.
Grassroots	Grassroots Leadership, Inc.
GRO	General residential operation, more particularly described by Tex. Hum. Res. Code § 42.002(3).
HHSC	Texas Health and Human Services Commission
ICE	U.S. Immigration and Customs Enforcement
Immigrant Plaintiffs	Mothers and children formerly at one time housed at Karnes or Dilley: E.G.S., for herself and as next friend for A.E.S.G; F.D.G., for herself and as next friend for N.R.C.D.; Y.E.M.A., for herself and as next friend for A.S.A., et al.
Karnes	Karnes County Residential Family Center in Karnes City, Texas
Plaintiffs	Grassroots and Gloria Valenzuela; E.G.S., for herself and as next friend for A.E.S.G; F.D.G., for herself and as next friend for N.R.C.D.; Y.E.M.A., for herself and as next friend for A.S.A., et al.
State	DFPS; Henry Whitman, in his official capacity as DFPS Commissioner; HHSC; Charles Smith, in his official capacity as HHSC Executive Commissioner

STATEMENT OF THE CASE

Nature of the Case

A new administrative rule, 40 Tex. Admin. Code § 748.7, CR 1673-74 (“the FRC Rule”), applies regulations governing a certain type of child care called general residential operations (“GROs”) to family residential centers (“FRCs”). FRCs are privately operated facilities under contract with U.S. Immigration and Customs Enforcement (“ICE”) that process parents and children who are seeking asylum in this country.

Grassroots Leadership, Inc. (“Grassroots”) and several individual plaintiffs sued the Texas Department of Family and Protective Services (“DFPS”), Texas Health and Human Services Commission (“HHSC”), and their executive officers, seeking a declaration that the FRC Rule is invalid, and further seeking an injunction against licensing privately-run FRCs that care for immigrant children.

Private facility operators The GEO Group, Inc. (“GEO”) and Corrections Corporation of America (“CCA,” n/k/a CoreCivic) intervened in the trial court.

Trial Court Information

The district court granted summary judgment to the Plaintiffs in No. D-1-GN-115-004336 in the 250th Judicial District Court in Travis County, Texas (the case was initially filed in the 353rd Judicial District Court, but reassigned). The Honorable Karin Crump presided and signed an Amended Final Judgment on December 16, 2016. SCR1:3-10 (Appendix). The district court ruled that 40 Tex. Admin. Code § 748.7 is invalid and issued an injunction against Defendants, prohibiting, *inter alia*, the state agencies from licensing the FRCs.

Court of Appeals Information

All Defendants and Intervenors appealed to the Third Court of Appeals. CR 4218; SCR2:3-7. The case was transferred for docket equalization purposes to this Court.

ISSUES PRESENTED

1. Whether Plaintiffs have standing to challenge 40 Tex. Admin. Code § 748.7, including whether their claims are moot.

2. Whether 40 Tex. Admin. Code § 748.7 validly regulates “family residential centers” operated by private companies under contract with ICE to care for mothers and children undergoing federal immigration processing.

3. Whether the Plaintiffs, who claim to be members of the *Flores* settlement class that requires state regulation of ICE facilities, are estopped from arguing against the State of Texas’s efforts to license and regulate private facilities operating under contract with ICE in Texas.

4. Whether the district court abused its discretion in vacating a prior final judgment and granting unpled injunctive relief based on an impromptu telephone conference at which the parties were not permitted to properly brief and argue the merits of the injunction.

STATEMENT REGARDING ORAL ARGUMENT

The issues raised by this appeal are significant, and oral argument may be helpful to the Court. While DFPS may be the main appellant, GEO respectfully requests its own time for oral argument.

INTRODUCTION

Protection of children is a core value in American society, but disagreement regarding the best way to protect children is as common as the desire to help. In Texas, U.S. Immigration and Customs Enforcement (“ICE”) processes immigrant mothers and children seeking asylum using contracted private facilities called family residential centers (“FRCs”). The State of Texas, through the Department of Family Protective Services (“DFPS”),¹ exercised its statutory authority to promulgate a rule that licenses and regulates the care of children at those facilities (“the FRC Rule”).

The trends of mothers and children crossing the U.S. border together, and of ICE’s policies towards them, are relatively new. The State of Texas does not directly control the facilities where the mothers and children are processed, but the State used sound reasoning in deciding to regulate those facilities: “It is more protective of the children in the FRCs for DFPS to exercise its oversight than to abdicate its responsibility based on the notion that the centers are harmful.” 41 Tex. Reg. 1499.

Appellant The GEO Group, Inc. (“GEO”), which operates one of the facilities at issue here under contract with ICE, agrees with DFPS’s decision to regulate FRCs and the manner in which it did so. By contrast—perhaps perversely so, given their professed solicitude for the welfare of immigrant families—the

¹ A Glossary of abbreviations and acronyms used in this brief follows the Table of Contents.

Plaintiffs would have the courts bar the State of Texas from regulating the conditions in which these mothers and children live. CR 1145 ¶ 64.b (praying for a declaration that the State “lack[s] authority to regulate immigrant family detention centers as general residential operations”).

Plaintiffs’ lawsuit undermines the State’s goal of protecting mothers and their children by hindering legislatively-authorized regulation of private facilities under contract with ICE. From the start, the Plaintiffs’ challenge-by-lawsuit to DFPS’s rule has **not** been about whether such regulation benefits immigrant families. Instead, the lawsuit reflects Plaintiffs’ dogmatic objections to federal immigration policies. Their true intent in filing this lawsuit is to close immigration facilities, especially those privately owned. But their policy agenda is properly directed toward the legislative or executive branches, not the judicial branch.

As an overt act of judicial legislation, the district court’s Amended Final Judgment is riddled with contradiction and error. It paradoxically attempts to force DFPS to regulate through a hastily considered (and improper) injunction while erroneously declaring invalid DFPS’s reasonably constructed FRC Rule. This Court should deliver a prompt and well-deserved end to Plaintiffs’ crusade to conscript the judiciary in advancing their misguided policy agenda.

STATEMENT OF THE CASE

A. A Federal Lawsuit In California Requires State Licensure Of Facilities Housing Immigrant Children.

In 1985, a class of plaintiffs initiated a lawsuit against ICE's predecessor and other defendants in the District Court of Central California. *See Flores v. Johnson*, CV 85-4544 DMG (C.D. Cal 1997). In 1997, the parties entered into a court-approved settlement of the lawsuit (the "*Flores* Settlement Agreement"). CR 204. The *Flores* Settlement Agreement provided that, if a minor seeking asylum in this country is not released, the minor must be placed temporarily in a licensed program. CR 205. 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" CR 217.

In 2012, long after the class action's settlement, federal authorities began to experience a surge in children crossing the border with a parent seeking asylum. CR 205, 722. ICE contracted with private companies to operate residential centers to process these families. CR 722. In 2014, GEO opened the Karnes County Residential Family Center in Karnes City, Texas ("Karnes"). CR 724, 1136. Around the same time, CCA opened the South Texas Family Residential Center in Dilley, Texas ("Dilley"). CR 756.

In 2015, members of the *Flores* class filed a motion to enforce certain terms of the *Flores* Settlement Agreement. CR 1715. In granting the motion to enforce,

the federal court acknowledged that ICE's family residential centers did not exist at the time of the settlement. *Id.* Nonetheless, the court required the FRCs to be state licensed. CR 1715, 1717. The federal court's order was affirmed in part, reversed in part, and remanded in part for further enforcement proceedings. *Flores v. Lynch*, 15-56434, 2016 WL 3670046, at *9 & n.5 (9th Cir. July 6, 2016).

The minor Plaintiffs here allege they are members of the class that yielded the *Flores* Settlement Agreement and are entitled to the force of its provisions. *See* CR 1143 ¶ 57; CR 204-28; *Flores v. Johnson*, No. 2:85-cv-04544-DMG-AGR, Dkt. 177, Order at 1, 12 (C.D. Cal. July 24, 2015).

B. DFPS Issued An Emergency Rule To Allow Licensure Of ICE Facilities, But Plaintiffs Obtained An Injunction Thwarting The Agency's Effort To License and Regulate The Facilities.

DFPS has long licensed facilities that provide child care to minors who cross the border into Texas without their parents. CR 1750 (70:2-15); 40 Tex. Admin. Code ch. 748 (regulations pertaining to general residential operations ("GROs")). Initially, DFPS declined to regulate facilities where minors were accompanied by their parents because DFPS did not understand the nature of the care provided. CR 43-44; CR 1742-43 (19:20-20:2). Later, in light of the *Flores* litigation, DFPS published an emergency rule that would allow it to license FRCs providing care to minors who crossed the border with a parent. *See* CR 1191-94 ("Emergency Rule," 40 Tex. Reg. 6229); Tex. Gov't Code § 2001.034.

Grassroots immediately initiated this lawsuit under the Texas Administrative Procedure Act (“APA”) to challenge the Emergency Rule. CR 7-19; *see also* Tex. Gov’t Code § 2001.038 (providing a cause of action to declare a rule invalid if “the rule ... threatens to interfere with or impair ... a legal right or privilege of the plaintiff”). Defendants responded that Grassroots lacked standing. CR 255-63. The district court implicitly disagreed when it issued a temporary injunction prohibiting DFPS from implementing the Emergency Rule, citing concern that the Emergency Rule removed the obligations of FRCs to comply with three minimum standards usually applicable to GROs:

- limitations on the number of occupants in a room;
- restrictions against children sharing a room with an unrelated adult; and
- prohibitions against children sharing a room with children of the opposite gender.

CR 375-81. While enjoining the Emergency Rule, the district court permitted DFPS to proceed with traditional rulemaking procedures. Tex. Gov’t Code §§ 2001.023, 2001.029.

C. DFPS Promulgated A Final Rule To Allow Licensure Of ICE Facilities, But Plaintiffs Sought An Injunction To Thwart The Agency’s Efforts To License And Regulate The Facilities.

Thereafter, DFPS sought and received public input following statutory procedures for non-emergency rules. *See* Tex. Gov’t Code § 2001.029(a). DFPS held a public hearing and solicited input via mail and email. *See id.* § 2001.029(b);

41 Tex. Reg. 1495. Through the Texas Health and Human Services Commission (“HHSC”), DFPS responded to the various public comments with a reasoned justification. CR 1729-38 (41 Tex. Reg. 1493 (Feb. 26, 2016)).² The final rule was enacted at Title 40, Part 19, Chapter 748, Subchapter A, Section 748.7. *See* 41 Tex. Reg. 1493-1502 (Feb 26, 2016) (“FRC Rule”) (effective March 1, 2016) (also found at CR 1673-74 and in the Appendix).

The FRC Rule classifies family residential centers as GROs, that is, child-care facilities that provide care “for more than 12 children for 24 hours a day.” Tex. Hum. Res. Code § 42.002(3). The FRC Rule thereby subjects FRCs to the minimum standards governing GROs, with the same limited exceptions found in the Emergency Rule. *See id.* Grassroots then amended its petition to challenge the FRC Rule, adding a number of mothers and children from Karnes and Dilley as additional plaintiffs. CR 398-408.

D. DFPS Licensed GEO’s Karnes Facility.

After an intensive review process, DFPS exercised authority pursuant to the FRC Rule to license and regulate GEO’s operation of Karnes as a family residential center. CR 730. Although Plaintiffs attempt to portray FRCs as “immigrant jails,” CR 1132, ICE’s family residential centers are not like federal prisons; they operate under their own specifically-tailored standards. *Compare*

² The abbreviation “DFPS” in this brief is intended to include the HHSC and the defendant executive officials of those agencies.

Family Residential Standards (www.ice.gov/detentionstandards/family-residential) with 28 C.F.R. ch. V. Additionally, the federal standards that govern FRCs are not the same as state standards under the FRC Rule. *Compare* Family Residential Standards with 40 Tex. Admin. Code § 748.7.

To obtain its license for Karnes, GEO invested significant resources, such as hiring 70 staff members to meet new child/staff ratios. CR 1685 (150:8-14). As a result of the licensing process, Karnes became subject to:

- continuing oversight and unannounced inspections and investigations;
- more stringent staff background checks with access to DFPS's databank;
- increased staff training and retraining requirements;
- additional requirements for reporting injury to a child;
- more stringent caps on residents per room, plus additional restrictions on when children can room with others based on the age and sex of the child;
- required posting of the hotline phone number for Child Protective Services; and
- mandated safety modifications to the facility, as well as children-friendly features such as carpets and playgrounds.

CR 1682-85 (147:10-150:7); CR 1761 (30:20-25), CR 1763 (49:3-10), CR 1764-65 (50:24-51:3), CR 1775-76 (99:23-100:8).

Karnes houses only mothers and their minor children who are seeking asylum. CR 1774 (88:6-7). Upon arrival, each family is medically assessed and advised of their legal rights. CR 1685-86 (150:20-151:11); CR 1768 (57:1-3).

A preliminary service plan is created for the children within 72 hours of arrival. CR 1680-81 (111:22-112:6). The families are given clothes, shoes, and toys. CR 1686 (151:4-8); CR 1764 (50:11-18).

While at Karnes, families can use the facility's chapel, gym, and playgrounds. CR 1764 (50:1-2), CR 1763 (49:15-16). Children are enrolled in school, and the families have access to health care. CR 1771 (81:7-14). Karnes provides the families with televisions, microwaves, and refrigerators stocked with food and drink. CR 1763 (49:1-25). Karnes uses a buddy system to place families in suites if mothers with similar backgrounds have children with them that are younger than 35 months' old. CR 1686 (151:19-21); CR 1770 (73:16-25).

Families at Karnes are not restricted in their movements: there are no locks on the doors, and they are not told they cannot leave. CR 1772 (85:9-20); CR 1764 (50:21-22). Approximately 97% of the residents leave the residential center and move into the larger community within 7-10 days of arrival. CR 1676 (48:4-6); 1679 (94:11-22); 1689 (154:13-23).

CCA also sought a license for Dilley, prompting the district court to issue a second temporary injunction enjoining DFPS's implementation of the FRC Rule. CR 757, CR 1695-1703. But the court required DFPS to investigate any allegations of abuse or neglect, standards deficiencies, or violations of law at Dilley and Karnes during the pendency of the temporary injunction. CR 757, CR 1695-1703.

Subsequently, GEO and CCA intervened in the case, and GEO specifically alleged Plaintiffs had no standing to challenge the FRC Rule. CR 720-24 (GEO's intervention); CR 731 (GEO's motion to dismiss); CR 1346-1355 (CCA's intervention). Grassroots once again amended its petition to add new mothers and children because the former named plaintiffs were no longer living at Karnes or Dilley; Grassroots also added Gloria Valenzuela, the operator of a day care, as a plaintiff. CR 541-53.

E. The District Court's Summary Judgment And Amended Final Judgment.

All parties moved for summary judgment. CR 1491-1519 (State's MSJ); CR 1648-1672 (GEO's MSJ); CR 1777-1807 (CCA's MSJ); CR 3000-4179 (Plaintiffs' MSJ). Late in the afternoon on Friday, December 2, 2016, the district court granted the Plaintiffs' motion for summary judgment and denied the Defendants' motions, concluding that "[t]he FRC Rule contravenes Texas Human Resources Code § 42.002(4) and runs counter to the general objectives of the Texas Human Resources Code and is, therefore, invalid." CR 4184. However, the district court did not make any additional findings and did not grant any of the injunctive relief requested by the Plaintiffs in their petition. *See id.* To the contrary, the "Final Judgment" contained a Mother Hubbard clause that denied "[a]ll relief not expressly granted herein." *Id.*

However, it turned out that the December 2 Final Judgment was hardly "final" at all. Before 8:00 a.m. the following Monday, December 5, 2016, the

Plaintiffs filed a Motion to Prevent Automatic Suspension of Judgment Pending Appeal (the “Motion to Prevent”) and asked for a hearing as soon as possible. CR 4185-86, 4207. The Court advised all parties that it could conduct the hearing any day the week of December 5, 2016. CR4207. GEO and CCA advised the Court by email that they were not available to attend the hearing in person on December 5 and requested that it be set for later in the week. *Id.* Nonetheless, the Court scheduled the hearing for the same day, December 5, 2016 at 3:00 p.m., before any party could practically confer and file a written response to Plaintiffs’ motion. *Id.*; RR6:25-26.

In that hastily arranged telephonic hearing, which was expected to cover only the pending Motion to Prevent, the district court entertained Plaintiffs’ arguments regarding a number of proposed revisions to the December 2 Final Judgment. *See* RR6:15-16; CR 4207. GEO objected to the form and substance of the Plaintiffs’ proposed revisions and renewed all prior objections to Plaintiffs’ attempts to modify the December 2 Final Judgment. CR 4200. GEO further objected that the proposed changes were not based on valid findings or rulings of the Court discussed at the December 5, 2016 hearing or otherwise. *Id.*

The district court thereafter vacated its December 2 Final Judgment and on December 16, 2016, substituted a substantially different judgment. SCR1:3-10 (“Amended Final Judgment”). The Amended Final Judgment granted in part the Defendants’ plea to the jurisdiction with respect to the Uniform Declaratory

Judgment Act (including denying attorney fees), and dismissed those claims with prejudice, but denied the plea to the jurisdiction on all other grounds. SCR1:6-7. The district court granted summary judgment in favor of the Plaintiffs on their claim for declaratory relief under the APA, and denied the State's, CCA's and GEO's motions for summary judgment. SCR1:7. The Amended Final Judgment provides that "[t]he FRC Rule contravenes Tex. Hum. Res. Code § 42.002(4) and runs counter to the general objectives of the Texas Human Resources Code and is, therefore, invalid." SCR1:7.

The Amended Final Judgment also included a broad injunction; the district court found that "allowing Defendants to automatically supersede the Court's ruling that the FRC Rule is invalid would render the relief granted by this Amended Final Judgment ineffective." SCR1:8. The court also found that "Plaintiffs would suffer imminent and irreparable harm because money damages are unavailable against the state agency and, unless the *status quo* is maintained during the pendency of the appeal, Plaintiffs will be deprived of their statutory rights to protection that the Legislature has afforded children in the state minimum standards." SCR1:8.

Specifically, the district court found that the Defendants should not be allowed to supersede the judgment because it would deprive the Plaintiffs of the following "rights":

- A. Licensure under the FRC Rule would permit variances or exceptions to the legislatively mandated GRO requirements.

The variances or exceptions substantially endanger children by:

1. Permitting children to share a bedroom with others at a number that exceeds maximum standards;
 2. Permitting children to share bedrooms with an unrelated adult;
 3. Permitting children over the age of three to share a bedroom with an unrelated adult; and
 4. Permitting unrelated children of different genders to share a bedroom;
- B. Licensure under the FRC Rule will facilitate longer periods of detention of the mothers and children detained at Karnes and Dilley, which hurts children by subjecting them to psychological and/or physiological trauma and deprivation of freedom of action.

SCR1:8. The district court concluded that “[t]he FRC Rule provides for exemptions to our State Minimum Standards that run counter to the objectives of the Texas Legislature, as well as the *Flores* Settlement Agreement, and does not require the facilities to comply with the State’s Minimum Standards for residential operations.” SCR1:8.

The district court found that while this appeal is pending “it is in the best interest of the children detained by the federal government and housed at Karnes and Dilley that the State of Texas continue to provide regular and comprehensive oversight consistent with the minimum standards required by the State of Texas through: (i) unannounced state inspections to ensure the facility complies with existing state minimum standards; (ii) mandatory background checks on all

employees working at the facility; (iii) public hearings; (iv) staff training; and (v) investigation of claims of abuse and neglect.” SCR1:9.

Accordingly, the district court ordered the Defendants, and all of their officials, agents, servants, employees, and attorneys “to refrain from issuing licenses under the FRC Rule until the Court of Appeals issues a decision on appeal or further Order of the Court.” SCR1:9. The Defendants were also ordered “to continue to investigate and report any allegations of abuse or neglect, standards deficiencies, or violation(s) of rule of law at Karnes and Dilley during the pendency of any appeal of this Court’s ruling.” SCR1:9.

CCA and GEO were ordered to “cooperate with” and “not impede” Defendants’ efforts to conduct their investigative and regulatory functions at Dilley and Karnes. SCR1:9. The district court deemed the injunction “necessary to preserve the status quo and to allow Defendants the ability to continue regulatory and protective functions for the benefit of children detained at Karnes and Dilley until the challenge to the FRC Rule proceeds through appeal.” SCR1:10. The district court prohibited the Defendants from superseding the final judgment. SCR1:10. All Defendants timely appealed. CR 4218; SCR2:3-7.

SUMMARY OF THE ARGUMENT

The Plaintiffs’ claims are barred by lack of standing and mootness. The FRC Rule does not burden the Plaintiffs because the Human Resources Code is not designed to benefit groups such as Grassroots or a day care provider such as Gloria

Valenzuela, but it clearly benefits mothers and children at GEO's facility. It is undisputed, however, that none of the Plaintiff mothers or children remain at Karnes, and their claims are mooted.

Plaintiffs judicially admitted that the Human Resource Code directs DFPS to protect children and support family units by regulating child care, as it validly did here. The Court must defer to DFPS's understanding of what "child care" must be regulated under its statutory authority, regardless of Plaintiffs' efforts to re-describe the care of children at Karnes and Dilley as "detention" or "indirect" care.

Although DFPS had previously decided not to regulate private facilities under contract with ICE, DFPS was entitled to change its mind given the new phenomenon of mothers with children crossing the border in great numbers. FRCs meet the definition of "general residential operations." DFPS is expressly empowered to impose general residential standards onto FRCs and to grant exceptions to the standards that were designed to keep mothers and children together as a family unit.

The APA required DFPS to provide a reasoned justification for adopting the FRC Rule, and it did so. DFPS followed the necessary procedures to promulgate the FRC Rule, which yielded a significant explanation that grappled with public comments. While Plaintiffs would quibble with certain aspects of the rule, DFPS correctly explained that its regulation was better than nothing: "so long as children are housed there, and so long as mothers are not permitted to fully exercise their

parental responsibility, DFPS considers the FRCs to be providing child care.” 41 Tex. Reg. 1499. “It is more protective of the children in the FRCs for DFPS to exercise its oversight than to abdicate its responsibility based on the notion that the centers are harmful.” *Id.*

Neither of the Plaintiffs’ statutory challenges have merit. Section 42.042 of the Human Resources Code does not limit DFPS’s ability to adopt and implement the FRC Rule. Children promptly receive an assessment and service plan required by Section 42.042, although few even stay at the facilities long enough for such plans to matter. No temporary working group under Section 42.042 is relevant here.

Likewise, Section 54.011 of the Family Code does not limit DFPS’s ability to adopt and implement the FRC Rule. DFPS is directed by the Human Resources Code to supervise the care of children, and that duty applies notwithstanding any other statutory duties. In any event, Section 54.011 is inapplicable. It prohibits the detention of nonoffender juveniles in secure facilities “solely” for deportation. But Karnes does not hold minors “solely” for deportation (most are never deported), and Karnes is not a “secure” facility as understood by Section 54.011. To the extent Section 54.011 would apply at all (and it does not), it would be preempted by federal immigration law.

This case should have been barred from the start by estoppel. Plaintiffs allege that they are members of the *Flores* settlement class that obtained a consent

decree requiring state licensure of FRCs. By seeking judicial relief preventing such regulation by DFPS here, they take an inconsistent position, and their claims are judicially estopped.

Finally, the judgment at issue—the December 16, 2016 Amended Final Judgment—was obtained only through violation of due process. After issuing a final summary judgment ruling that granted declaratory relief, but no injunctive relief, the district court hastily convened an impromptu telephone hearing for the purported reason of hearing a motion to prevent supersedeas. Instead, without notice to the parties, the district court reconsidered a range of issues, and re-fashioned its “final” judgment to include injunctive relief that was not the subject of pleading, briefing, or sufficient argument. The end result, unfortunately, is that DFPS is enjoined from providing the licensing and regulatory oversight that it was authorized to provide by the Legislature.

ARGUMENT

I. PLAINTIFFS’ LACK OF STANDING AND THE MOOTNESS OF THEIR CLAIMS BAR CONSIDERATION OF THIS CASE.

Plaintiffs claimed standing on three bases: mothers and children as “detainees” at Karnes and Dilley; Grassroots Leadership as an organization harmed by DFPS’s regulations; and Gloria Valenzuela as an individual whose DFPS license is devalued by DFPS’s regulation of Dilley and Karnes. *See* CR 3011. Ms. Valenzuela and Grassroots lack standing because they were never residents of the FRCs and are not injured by the FRC Rule. Immigrant Plaintiffs lack standing

because the FRC Rule benefits them, and because they no longer reside at the facilities, their claims are moot.

A. Plaintiffs Lack Standing.

Standing requires that (1) the plaintiff suffered injury in fact; (2) a causal connection between the injury and the defendant's challenged act; and (3) likelihood that the injury will be redressed by a favorable decision. *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012). To have standing, the Plaintiffs must have a concrete injury resulting from the rule. *Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 739 (Tex. App.—Austin 2014, pet. dismiss'd);³ *see also* Tex. Gov't Code § 2001.038. Thus, the pertinent inquiry is whether DFPS exceeded its authority by adopting a rule that burdens Plaintiffs in contravention of the Human Resource Code. *See* CR 1145-46 ¶ 65.

The FRC Rule applies to family residential centers that are “operated by or under a contract with” ICE, such as Karnes. 40 Tex. Admin. Code § 748.7(a)(a). In sharp contrast, Grassroots is a non-profit corporation attempting to “end for-profit incarceration.”⁴ Grassroots is not running a family residential center and will never be subject to any requirement of the FRC Rule. Grassroots simply cannot be burdened by a rule that does not apply to it.

³ As the transferee, this Court applies the precedents of the Third Court of Appeals. Tex. R. App. P. 41.3.

⁴ <http://grassrootsleadership.org/mission.html>

The same is true for Gloria Valenzuela, who holds a license to operate a small daycare. CR 1133 ¶¶ 3-4. That license is completely different from the GRO license sought by CCA and GEO (24-hours with hundreds of residents, including family units). CR 2112 (224:19-225:16); CR 2425-26 (133:6-134:5). Ms. Valenzuela’s only claim of “injury” is that the DFPS license of the FRCs as GROs will “diminish and disparage” her daycare license because it will somehow change parents’ perception of her daycare license. CR 551 ¶ 48, 1060. However, Ms. Valenzuela’s daycare is located more than 600 miles from Karnes and over 560 miles from Dilley. *See* CR 2426 (134:10-13). And although the Karnes facility has been licensed throughout the entire pendency of this case, Ms. Valenzuela could not identify any actual harm to her license. *See* CR 1614-18. Thus, Ms. Valenzuela’s claims are too attenuated and speculative to support legal standing.

While the district court opined that the FRC Rule harms children, in reality, state licensure of FRCs has significantly benefitted the Immigrant Plaintiffs. *Compare* SCR1:8 with 41 Tex. Reg. 1499 (“It is more protective of the children in the FRCs for DFPS to exercise its oversight than to abdicate its responsibility based on the notion that the centers are harmful.”). As a result of the DFPS license, Karnes was subject to unannounced inspections, increased staffing and training standards, more intense employee background checks, additional reporting

obligations, restrictions on room occupants, and a host of other requirements. *See, e.g.*, CR 1682-85 (147:10-150:7).

Immigrant Plaintiffs argued below that they were harmed because the FRC Rule allows young children to sleep in rooms with unrelated adults. *See, e.g.*, CR 3009, 3012-14, 3048, 3065. The adults in these situations are mothers with children of similar age. CR 4023. Unrelated male and female children over the age of six do not share bedrooms. CR 2482 (230:6-15); 40 Tex. Admin Code 748.7(c). Families remain together, and no more than two families share a suite at Karnes. CR 4100-01 (72:22-73:4).

Without the FRC Rule, GRO standards mandate separation of children from their mothers and possible placement in entirely different facilities. 40 Tex. Admin. Code § 748.3361(b) (prohibiting any adult from sharing a bedroom with a child three years old and older); *see also* CR 3048 n.38 (recognizing that in Pennsylvania, male immigrants were sent to different facilities than their minor children). In similar fashion, siblings of different genders would be separated under the GRO standards. 40 Tex. Admin. Code § 748.3363 (prohibiting a child six years old and older from sharing a bedroom with any child of the opposite gender). The FRC Rule was designed “to allow the family members to stay together.” CR 1747 (51:13-18); CR 1749 (62:11-18); CR 1754 (98:8-19). That it is far better for children to remain with their mothers and siblings than to separate them is inarguable. *See id.*

Ironically, when families leave FRCs (as they did after the district court's ruling),⁵ they stay in completely unregulated facilities, where any number of unrelated adults share sleeping space with children, and where mothers and children are exposed to the presence of many unrelated men, even during the night. CR 2488, CR 3600 (49:8-12); Tex. Hum. Res. Code § 42.041(b)(3). While some of these stays at unregulated facilities are short, others last many months, much longer than the average stay of 7.5 days at Karnes. CR 2488, CR 3705 (154:20-23). These conditions sharply contrast with the intense state scrutiny Karnes endures under its FRC license. *See, e.g.*, CR 3698-701 (147:10-150:7); CR 4058 (30:20-25); CR 4077 (49:3-10); CR 4078-79 (50:24-51:3); CR 4127-28 (99:23-100:8).

And, as Plaintiffs concede, the average length of stay has decreased at Karnes under the FRC license. CR 3032 (chart). The district court's finding of harmful delay is not supported by the evidence. *Id.* Even if it were, the court's ruling invalidating the FRC Rule could not remedy the purported harm of immigration processing. *See Shaughnessy v. U.S. ex rel. Mezei*, 73 S. Ct. 625, 631 (1953) (holding that "temporary harborage [at a processing facility], an act of legislative grace, bestows no additional rights" on immigrants seeking entry).

⁵ *See, e.g.*, Jason Buch, *Immigrant families released from detention overwhelm local aid workers*, San Antonio Express News (Dec. 5, 2016) (noting over 200 women and children released from Karnes and Dilley following the district court's ruling were residing at the same church) (<http://www.expressnews.com/news/local/article/ICE-releases-nearly-500-from-Dilley-Karnes-City-10695599.php>).

The FRC Rule benefits children and demonstrates that Immigrant Plaintiffs have no standing. Accordingly, the trial court erred when it failed to dismiss this lawsuit.

B. The Claims Of The Immigrant Plaintiffs Are Moot.

It is undisputed that the Immigrant Plaintiffs are no longer at Karnes or Dilley, and that Grassroots and Ms. Valenzuela were never there. CR1553 (121:1-6), CR 3134 (61:11-24); CR 1689 (154:20-23). Accordingly, their claims are moot.

For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal. See *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). If a controversy ceases to exist—“the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome”—the case becomes moot. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982); *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) (past exposure to allegedly illegal conduct “does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects”). If a case becomes moot, the parties lose standing to maintain their claims. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983); *Murphy*, 455 U.S. at 481.

In *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001), two individuals released from jail contended that they had a legally cognizable interest in obtaining

injunctive or declaratory relief. However, the Texas Supreme Court held that their claims were moot (and they therefore lacked standing) because “[t]hey no longer face the unconstitutional conduct about which they complain, and thus any prospective relief we might grant cannot help them.” *Id.* at 184. Likewise, the claims of the Immigrant Plaintiffs are moot, since they no longer are subject to the regulation about which they complain.

Nor are the Immigrant Plaintiffs able to prevail under the “capable of repetition, yet evading review” exception to the mootness doctrine, which “applies only in rare circumstances.” *Lara*, 52 S.W.3d at 184 (citing *Lyons*, 461 U.S. at 109). To invoke the exception, a plaintiff must prove that: (1) the challenged action was too short in duration to be litigated fully before the action ceased or expired; and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *Id.*; *Blum v. Lanier*, 997 S.W.2d 259, 264 (Tex. 1999).

In *Lara*, the Supreme Court found that exception inapplicable where the plaintiffs had a brief stay in a county jail pending release, but it was “speculative” whether the plaintiffs would be charged with a crime that would lead to their incarceration in the county facility; therefore, there was no reasonable expectation that the plaintiffs would again be subject to the alleged unconstitutional conduct. *Lara*, 52 S.W.3d at 184-85. The *Lara* plaintiffs’ claims for prospective relief were moot, *id.* at 185, and so are the claims of the Immigrant Plaintiffs here.

II. DFPS HAS STATUTORY AUTHORITY TO ADOPT THE FRC RULE.

A. Agency Rules Are Presumed Valid.

An agency can adopt rules that are authorized by and consistent with its statutory authority. *R.R. Comm’n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992). The determining factor in whether an administrative agency has exceeded its rulemaking authority is whether the rules are in harmony with the general objectives of the legislation involved. *Gulf Coast Coal. of Cities v. Pub. Util. Comm’n*, 161 S.W.3d 706, 711 (Tex. App.—Austin 2005, no pet.). Whether the rules are in harmony with the general objectives of the legislation involved is a question of law determined through statutory construction without regard to matters of policy. *Id.* at 712 (“This Court does not decide matters of policy; we are limited to evaluating whether the Commission acted contrary to the statute.”).

Agency rules are presumed valid, and the burden of proof is on the party challenging the rule. *McCarty v. Tex. Parks & Wildlife Dept.*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ). To establish the FRC Rule’s facial invalidity, Plaintiffs were required to show that the rule: (1) contravenes DFPS’s enabling statute; (2) runs counter to the general objectives of the enabling statute; or (3) imposes burdens, conditions, or restrictions in excess of or inconsistent with the enabling statute. *Gulf Coast*, 161 S.W.3d at 712; *Ware v. Tex. Comm’n on Law Enf’t Officer Stds. & Educ.*, 03-12-00740-CV, 2013 WL 2157244, at *2 (Tex. App.—Austin May 16, 2013, no pet.). Plaintiffs failed to satisfy this test. As a

matter of law, the FRC Rule does not contravene or run counter to any statute, nor does it impose restrictions inconsistent with any statute. Instead, the FRC Rule significantly benefits the Plaintiffs.

B. The FRC Rule Furthers The General Objectives Of The Enabling Statute.

1. The Human Resource Code Directs DFPS To Protect Children And Support Family Units.

An agency may promulgate rules when a statute expressly authorizes it to do so or when implied authority is necessary to accomplish the purpose of the statute. *R.R. Comm’n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992). “When conferring a power upon an agency, the Legislature also impliedly intends that the agency have whatever powers are reasonably necessary to fulfill its express functions or duties, and the Legislature is not required to include every specific detail or anticipate all unforeseen circumstances when enacting an agency’s authorizing statute.” *Tex. Ass’n of Psychological Assocs. v. Tex. State Bd. of Examiners of Psychologists*, 439 S.W.3d 597, 603 (Tex. App.—Austin 2014, no pet.).

Chapter 40 of the Human Resource Code requires DFPS to:

- (1) provide protective services for children and elderly persons and persons with disabilities, including investigations of alleged abuse, neglect, or exploitation in facilities of the Department of State Health Services and the Department of Aging and Disability Services or the successor agency for either of those agencies;

- (2) provide family support and family preservation services that respect the fundamental right of parents to control the education and upbringing of their children;
- (3) license, register, and enforce regulations applicable to child-care facilities, child-care administrators, and child-placing agency administrators; and
- (4) implement and manage programs intended to provide early intervention or prevent at-risk behaviors that lead to child abuse, delinquency, running away, truancy, and dropping out of school.

Tex. Hum. Res. Code § 40.002(b).

The FRC Rule provides “protective services” for children, provides “family support,” and “license[s]” child-care facilities, achieving these statutory objectives. *See also* CR 1717 (“The purpose of the licensing provision is to provide class members the essential protection of regular and comprehensive oversight by an independent child welfare agency.”); CR 1677 (70:14-15) (Archbishop Gustavo Garcia Siller: “Licensure would provide some level of oversight[.]”). As a matter of law, the FRC Rule promotes the general objectives of DFPS’s express statutory authority.⁶

Furthermore, Plaintiffs judicially admitted that DFPS has the power and authority to implement Chapter 40 of the Texas Human Resource Code. CR 1133 (¶ 5) (alleging that DFPS “is the state agency charged with administering the Texas

⁶ The Legislature recently considered a bill that would reinforce this intent by overriding the district court’s decision. *See* Tex. S.B. 1018, 85th Leg., R.S. (2017) (“relating to the licensing of family residential centers by the DFPS and the detention of certain juveniles”) (legiscan.com/TX/bill/SB1018/2017). Should the bill be revived and enacted by any special session, GEO respectfully requests the opportunity to brief the Court on the impact of that legislation.

Human Resources Code Chapters 40, 42, and 261”). This judicial admission is fatal to Plaintiffs’ claims. *See Daimler-Benz Aktiengesellschaft v. Olson*, 21 S.W.3d 707, 720 (Tex. App.—Austin 2000, pet. dismiss’d w.o.j.) (illustrating that allegations in a petition can be judicial admissions).

2. DFPS Is Required By Statute To Regulate Child Care.

In accordance with the general mandate of Chapter 40 to license child-care facilities, Chapter 42 of the Human Resource Code requires DFPS to regulate facilities, homes, and agencies that provide child-care services. *See, e.g.*, Tex. Hum. Res. Code § 40.002(b); *id.* § 42.001 (“It is the policy of the state to ensure the protection of all children under care in child-care facilities and to encourage and assist in the improvement of child-care programs.”). DFPS is authorized to adopt rules to further these goals. *Id.* § 42.042(a) (“The executive commissioner shall adopt rules to carry out the provisions of this chapter.”); Op. Tex. Att’y Gen. No. GA-0649 (2008) (“The Department has express authority under chapter 42 to make rules concerning the regulation and licensing of child care facilities.”); Tex. Gov’t Code § 531.0055 (HHSC adopts rules on behalf of DFPS).

Again, Plaintiffs judicially admitted that DFPS has the power and authority to implement Chapter 42 and that DFPS is “require[d]” to regulate “child care facilities.” CR 1133 ¶ 5 & CR 1135 ¶¶ 18-19.

Furthermore, as a matter of grammar and statutory construction, GEO plainly provides “child care” at Karnes, and DFPS regulates the provision of that care.

Because the term “child care” is not statutorily defined in the Human Resources Code, it must be given its plain meaning. Tex. Gov’t Code § 311.011 (“Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”). The term “child-care facility” is defined as “a facility licensed, certified, or registered by the department to provide assessment, care, training, education, custody, treatment, or supervision for a child who is not related by blood, marriage, or adoption to the owner or operator of the facility, for all or part of the 24-hour day, whether or not the facility is operated for profit or charges for the services it offers.” Tex. Hum. Res. Code § 42.002(3).

Under these definitions, Karnes is unequivocally providing “child care” for the children who reside at the facility with their mothers. *See, e.g.*, CR 1740 (8:7-11) (DFPS: “[W]e determine the facility is providing care 24 hours a day, 7 days a week in different methods and forms: It could be providing food, it could be providing shelter, it could be providing supervision.”); CR 1771 (81:7-14) (GEO: “We provide the dining halls. We provide the school. We provide the activities....”).

Plaintiffs argued below that the only meaning of “child care” was “direct care”—as opposed to “indirect care”—by someone other than a parent who was

temporarily responsible for a child. CR 3040. According to a preeminent source, however, the first and primary definition of “child care” is “the action or skill of looking after children.” Oxford English Dictionary (en.oxforddictionaries.com/definition/us/child_care). There is no parsing between direct and indirect care, nor is there any distinction between a parent and another person as potential care givers.

At best, Plaintiffs’ proposed definitions would be secondary. “[W]hen an undefined term has multiple common meanings, the definition most consistent within the context of the statute’s scheme applies.” *State v. \$1,760.00 in U.S. Currency*, 406 S.W.3d 177, 180-81 (Tex. 2013). State law mandates that DFPS license and regulate child-care facilities as part of its larger mission to provide “family support” and “protective services” for children. Tex. Hum. Res. Code § 42.001, § 40.002(b). In that context, GEO’s facility is “looking after children” and therefore providing child care subject to DFPS’s regulation. *See, e.g.*, CR 1740 (8:7-11); CR 1771 (81:7-14).

To the extent there is any ambiguity in the definition, the Court must defer to DFPS’s definition to carry out the regulation of “child care.” *See R.R. Comm’n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624-25 (Tex. 2011) (deferring to agency’s definition); *R.R. Comm’n v. Tex. Coast Utilities Coal.*, 357 S.W.3d 731, 738 (Tex. App.—Austin 2011) (same), *aff’d*, 423 S.W.3d 355 (Tex. 2014). Plaintiffs’ distinctions between types of care and care providers

are ill-conceived barriers to DFPS's mission that should be rejected in the best interest of the children.

Plaintiffs also alleged that the "primary function" of FRCs is "detention," not child care. CR 1144-45 ¶¶ 64(b), (c). When facilities have more than one function, however, the facilities must be licensed by DFPS:

You will also undoubtedly find some institutions whose primary purpose is both education and child care[;] for instance, kindergartens whose function in the morning is education but for the remainder of the day is purely child care. Such institutions would require licensing by your department.

Op. Tex. Att'y Gen. No. H-104 (1973) at 4. DFPS complied with this directive by enacting the FRC Rule.

While certain types of child-care facilities are excepted from licensure, none of the statutory exceptions include FRCs. *See* Tex. Hum. Res. Code § 42.041(b). The list of exceptions cannot be expanded. Op. Tex. Att'y Gen. No. GA-0649 (2008) (opining "the Legislature intended to exempt from the licensing requirement only those facilities and programs that fall within the scope of the exception specifically listed in section 42.041(b)").

As DFPS explained, the *Flores* litigation highlighted a gap in the state's regulation of child care. 41 Tex. Reg. 1494. The children and families at Karnes are being cared for during short periods of time while the immigration process unfolds. CR 1689 (154:20-23) (average length of stay is "seven and a half days"). Contrary to the Plaintiffs' contention, children are not being "detained" for longer

periods of time than contemplated by the *Flores* Settlement Agreement. Compare CR 1145 ¶ 65(c) with CR 1689 (154:10-13) (GEO’s Rose Thompson testified that the license did not prolong the length of stay) & CR 1691 (162:20-21) (a license “would not allow us to keep them there longer”). Regardless, a primary function of FRCs is child care during at least a part of the day, and state regulation is appropriate.

3. Under Section 42.002(4), The FRCs Operate As GROs.

The Human Resources Code also authorizes DFPS’s regulation of Karnes because it is a GRO, defined as “a child-care facility that provides care for more than 12 children for 24 hours a day.” Tex. Hum. Res. Code § 42.002(4). DFPS embraced the GRO definition, stating that “[a] family residential center is a general residential operation (GRO).” 41 Tex. Reg. 1493.

The definition of “general residential operation” is not restricted to facilities providing 24-hour child care as long as the facilities operate for 24 hours. Likewise, a “residential child-care facility” means one “that operates for all of the 24-hour day.” Tex. Hum. Res. Code § 42.002(19); CR 1748 (59:2-9). By arguing that Karnes “do[es] not provide 24-hour care for children,” CR 1145 ¶ 64(d), Plaintiffs are attempting to rewrite the definitions to require 24-hour child care when 24-hour operation is all that is required. At Karnes, GEO provides care 24 hours a day, 7 days a week in different methods and forms. CR 1740 (8:8-11, 21-22); *see also* CR 1748 (59:7-9) (DFPS: “[T]hey don’t have to meet 24 hours

directly supervising the children to meet that 12 and up. It's about space and capacity.").

The power to regulate FRCs as GROs also includes the power to create exceptions when appropriate. Because “the legislature gave the Department the power to promulgate a pervasive regulatory scheme, the Department has exclusive jurisdiction to determine whether [a party] is exempt from its licensing requirements.” *Tex. Dep’t of Family & Protective Servs. v. ASI Gymnastics, Inc.*, No. 05-09-01469-CV, 2010 WL 2764793, at *2 (Tex. App.—Dallas July 14, 2010, no pet.); *see also Dayne v. Tex. Dep’t of Family & Protective Servs.*, No. 13-10-00679-CV, 2011 WL 4998872, at *2 n.3 (Tex. App.—Corpus Christi Oct. 20, 2011, pet. denied) (discussing DFPS’s broad rule-making authority). The FRC Rule exempts the FRCs from certain GRO standards to appropriately and reasonably allow family units to remain together, 40 Tex. Admin. Code § 748.7(c), and such exemptions are part and parcel of the grant of regulatory power to DFPS and do not contravene any specific statutory mandates governing GROs. Hum. Res. Code §§ 42.042(a),(e),(f).

4. As An Agency, DFPS Is Empowered To “Change Its Mind.”

DFPS acted within its authority by adopting the FRC Rule even though it declined to regulate facilities in the past. *See* CR 43-44. Agencies can and do change their statutory interpretations and regulatory frameworks. *See, e.g., First Am. Title Ins. Co. v. Strayhorn*, 169 S.W.3d 298, 306 (Tex. App.—Austin 2005)

(“[T]he Comptroller changed the previous interpretation of the retaliatory tax scheme, which she may do as long as the new interpretation does not contradict either statutory language or a formally promulgated rule.”), *aff’d sub nom. First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627 (Tex. 2008); *Grocers Supply Co. v. Sharp*, 978 S.W.2d 638, 642 (Tex. App.—Austin 1998, pet. denied) (finding no error in alleged failure to follow previous interpretation).

Indeed, agencies are “expected” to alter and refine their statutory interpretation to adjust to changing circumstances. *1756, Inc. v. Attorney General*, 745 F. Supp. 9, 15 (D.D.C. 1990). Not only were the facilities here new, but as one witness testified, DFPS did not initially understand that the FRCs were providing child care when the mothers were absent for a variety of reasons. CR 1742-43 (19:20-20:2); CR 1136 ¶¶ 24-25. DFPS’s prior statements about different facilities and different circumstances are irrelevant.

III. DFPS PROVIDED A REASONED JUSTIFICATION FOR THE FRC RULE AND SUBSTANTIALLY COMPLIED WITH THE APA.

As an administrative agency, DFPS must provide a reasoned justification for the rule as a whole, not for each clause. *Lambright v. Tex. Parks & Wildlife Dep’t*, 157 S.W.3d 499, 504 (Tex. App.—Austin 2005, no pet.). A reasoned justification must include: (1) a summary of comments the agency received from interested parties; (2) a summary of the factual basis for the rule; and (3) the reasons the agency disagrees with a party’s comments. Tex. Gov’t Code § 2001.033(a)(1).

The rule need not be perfect but must substantially comply with the rulemaking provisions of the APA. *Id.* § 2001.035(a).

The question of substantial compliance is a question of law determined from the face of the adopting order. *Id.* § 2001.035(c); *Gulf Coast Coal. of Cities v. Pub. Util. Comm’n*, 161 S.W.3d 706, 713 (Tex. App.—Austin 2005, no pet.). To substantially comply with the reasoned justification requirement, the four corners of the final order must (1) present the agency’s justification in a relatively clear, precise, and logical fashion; (2) accomplish the legislative objectives underlying the reasoned-justification requirement; and (3) come fairly within the character and scope of each of the statute’s requirements in specific and unambiguous terms. *Gulf Coast*, 161 S.W.3d at 713.

To be upheld on judicial review, “an agency rule must be reasonable.” *McCarty v. Tex. Parks & Wildlife Dep’t*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ). “A rule is reasonable when it is based on some legitimate position by the agency.” *Id.* A rule is arbitrary and capricious if the agency (1) does not consider a factor that the Legislature intended the agency to consider in the circumstances; (2) considers an irrelevant factor; or (3) reaches a completely unreasonable result after weighing only relevant factors. *Office of Pub. Util. Counsel v. Pub. Util. Comm’n of Texas*, 131 S.W.3d 314, 328 (Tex. App.—Austin 2004, pet. denied).

Here, the adopting order sets out more than eight pages of justifications that more than adequately support the adoption of the FRC Rule. 41 Tex. Reg. 1493-1502. This includes a discussion of the nearly 3,000 comments DFPS received concerning the rule, including a response to Grassroots' comments. *Id.*

Plaintiffs nonetheless argued that DFPS's reasoned justification is "conclusory," meaning Plaintiffs disagree with DFPS's conclusions. *See* CR 3059-62. That complaint is not a proper ground to invalidate the FRC Rule. *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 659 (Tex. 2004) ("The rules need not be, in the court's opinion, wise, desirable, or even necessary."); *McCarty v. Tex. Parks & Wildlife Dep't.*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ) (same).

DFPS was required to substantially comply with summarizing the factual basis for the rule, summarizing the public comments, and stating reasons for disagreeing with the comments. Tex. Gov't Code § 2001.033(a)(1), § 2001.035(a). ***It did exactly that.*** 41 Tex. Reg. 1493-1502; *Texas Med. Ass'n v. Tex. Workers Comp. Comm'n*, 137 S.W.3d 342, 354 (Tex. App.—Austin 2004, no pet.) (holding that an agency is not required to demonstrate that its conclusion is the only reasonable or factually defensible policy alternative; rather, the agency need only "demonstrate that there is a rational connection" between its conclusion and its statutory requirements). Indeed, DFPS modified the exemptions in Section 748.7(c) in response to the comments it received. 41 Tex. Reg. 1493.

Further, in the Rule itself, DFPS expressly reserved the right to impose additional conditions on the FRCs if DFPS deems them required for the health, safety, or welfare of children. 40 Tex. Admin. Code § 748.7(d).

Plaintiffs’ policy-based criticism of the FRC Rule—which comprised the bulk of their summary judgment motion and supporting documentation, *see, e.g.*, 3021-62—is not a reason for this Court to invalidate the FRC Rule. In reviewing for substantial compliance under the APA, the district court was required to presume the validity of the FRC Rule, and it was barred from delving into the underlying factual disputes. *Tex. Orthopaedic Ass’n v. Tex. State Bd. of Podiatric Med. Exam’r*, 254 S.W.3d 714, 723 (Tex. App.—Austin 2008, pet. denied). Plaintiffs’ voluminous summary judgment evidence not addressing the relevant statutory language is extraneous and irrelevant.

Moreover, policy arguments are not for the courts; they are for the Legislature as appropriately delegated to administrative agencies. *See, e.g.*, *Gonzalez v. Reno*, 212 F.3d 1338, 1353 (11th Cir. 2000) (“considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect”); *Indust. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 100 S.Ct. 2844, 2875 (1980) (Burger, C.J., concurring) (noting that an agency policy is valid even if it does not perfectly accomplish legislative goals).

Plaintiffs complained that “DFPS’s reasoned justification does not explain what change in law or facts justifies DFPS’s current view” that a license for FRCs is necessary. CR 1141 ¶ 48. To the contrary, DFPS plainly stated that the *Flores* litigation “highlighted a gap in the oversight of the children housed in facilities covered by the settlement agreement,” meaning Dilley and Karnes. 41 Tex. Reg. 1494. While this explanation may not have been sufficient to justify emergency rule making, it is more than sufficient to explain the final rule adopted by regular procedures. *See Brady v. John Hancock Mut. Life Ins. Co.*, 342 So. 2d 295, 304 (Miss. 1977) (“It follows that if an administrative body has the authority to change its practices, they are also subject to change by judicial opinion or legislative enactment.”). But DFPS provided other reasons as well.

DFPS explained, for example, “[t]o the extent the mothers are not exercising full parental control, and may not be with their children at a given time, the staff in the FRCs are assuming child-care responsibilities.” 41 Tex. Reg. 1497. Moreover, DFPS explained the final rule was necessary to protect children:

The adoption of the rule ensures the continued protection of children housed in the facilities by making the facilities subject to the regulatory authority of [child-care licensing] along with its associated requirements, with limited exception. The section will function by enhancing the quality of care for children housed in FRCs.

41 Tex. Reg. 1494. This conclusion is certainly not arbitrary or capricious. While Plaintiffs disagree with the conclusion, their disagreement is not enough to

invalidate the rule, particularly when all the evidence demonstrates the rule is beneficial to them. *See McCarty*, 919 S.W.2d at 854.

Plaintiffs argued that DFPS’s reasoned justification “recognizes but fails to address serious concerns of how the FRC Rule can be consistent not only with parental presence and custody, but also with serious mental health needs at the facilities covered by” the rule. CR 1141 ¶ 49. To the contrary, DFPS observed that “[m]any commenters expressed concern over the risk of psychological harm for children and families residing in the centers.” 41 Tex. Reg. 1498. In response, DFPS explained that its regulation might not be perfect, but it was better than nothing:

[S]o long as children are housed there, and so long as mothers are not permitted to fully exercise their parental responsibility, DFPS considers the FRCs to be providing child care. It is more protective of the children in the FRCs for DFPS to exercise its oversight than to abdicate its responsibility based on the notion that the centers are harmful.

41 Tex. Reg. 1499. Nothing more is required. *See Texas Med. Ass’n*, 137 S.W.3d at 354 (holding that an agency is not required to demonstrate that its conclusion is the only reasonable or factually defensible policy).

DFPS’s reasoned justification explains that Tex. Fam. Code § 54.011(f) does not deprive DFPS of rule-making authority because that statute applies to facilities operated by state juvenile justice agencies and not to federal facilities. 41 Tex. Reg. 1500. Plaintiffs criticized this explanation as unsupported by authority. CR 1141-42 ¶ 51. Ironically, Plaintiffs did not cite any authority for their presumption

that DFPS must cite case law. The plain terms of the Family Code itself, as explained below, illustrate why the Family Code has no application. Nothing more is required.

IV. HUMAN RESOURCES CODE SECTION 42.042 DOES NOT LIMIT DFPS'S ABILITY TO ADOPT AND IMPLEMENT THE FRC RULE.

The Amended Final Judgment granted Plaintiffs' summary judgment motion but did not contain specific findings about Tex. Hum. Res. Code § 42.042. *Compare* SCR1:7 with CR 1145 ¶ 64(f). To the extent the district court relied on this provision, it was error to do so.

A. The Children Receive An Assessment And Service Plan.

Section 42.042(f) contemplates that DFPS will require an "intake study" before children are placed in GROs:

In promulgating minimum standards for the provision of child-care services, the executive commissioner shall recognize the various categories of services, including services for specialized care, the various categories of children and their particular needs, and the differences in the organization and operation of childcare facilities and general residential operations. ***Standards for general residential operations must require an intake study before a child is placed in an operation.*** The intake study may be conducted at a community mental health and intellectual disability center.

Tex. Hum. Res. Code § 42.042(f) (emphasis added).

When a child's placement is made on an emergency basis, as in the case of the minor Plaintiffs here, the facility has 40 days to complete an intake study. CR 1680 (111:1-16). If there is an emergency, the study obviously cannot be done

in advance. *Id.* (111:17-24). Nonetheless, a preliminary service plan is created within 72 hours of the child's emergency placement at Karnes. *Id.* (111:22-112:6). As a practical matter, a full intake study may not be completed on the minors because the vast majority of them are released into the community within 7-10 days of arrival. CR 1689 (154:13-15); CR 1751-53 (90:1-92:11). DFPS's standards fully satisfy Section 42.042(f).

B. A Temporary Working Group Was Not Required.

Plaintiffs also argued that DFPS adopted the FRC Rule before complying with Tex. Hum. Res. Code § 42.042(i). CR 1145 ¶ 64(f). This complaint is misplaced. Section 42.042(i) requires a temporary working group to be convened when new minimum standards are adopted so that existing licensees may comment on them:

Before the executive commissioner ***adopts minimum standards***, the department shall: (1) convene a ***temporary work group*** to advise the executive commissioner regarding the proposed standards, composed of at least six members who represent the diverse geographic regions of this state , including [subcategories omitted]; and (2) send a copy of the proposed standards to each licensee covered by the proposed standards at least 60 days before the standards take effect to provide the licensee an opportunity to review and to send written suggestions to the department.

Tex. Hum. Res. Code § 42.042(i) (emphasis added).

The FRC Rule does not adopt any new minimum standards applicable to GROs. Instead, it merely extends existing GRO standards, with minor exceptions, to the newly created FRCs. 41 Tex. Reg. 1494 ("The essence of the new rule is the

application of Child-Care Licensing’s (CCL’s) regulations related to GROs to FRCs, as defined in the rule.”). Plaintiffs misread Section 42.042(i) to require a temporary work group every time the DFPS commissioner would propose a single rule revision, repeal a rule, correct a typographical error, or suggest some other change. There is no such requirement. The temporary work group requirement applies only when new standards as a whole are adopted. *See, e.g.*, Senate Comm. On Hum. Servs., Bill Analysis, Tex. S.B. 68, 81st Leg., R.S. (2009) (discussing addition of 42.042(i) temporary work group for promulgating standards for newly created school-age program regulations).

Moreover, as the operator of a new facility, GEO—not Plaintiffs—had standing to complain about any alleged failure to follow Section 42.042(i). But GEO is not complaining because, like Plaintiffs, GEO had the opportunity to be heard during the rule-making process.

V. FAMILY CODE SECTION 54.011 DOES NOT INVALIDATE THE FRC RULE.

The Plaintiffs argued below that Section 54.011 of the Family Code invalidated the FRC Rule. This section states:

Except as provided by Subsection (a) [which allows a status offender or nonoffender to be held for 24 hours for a detention hearing], a **nonoffender**, including a person who has been taken into custody and is being held **solely for deportation** out of the United States, may not be detained for any period of time in a **secure detention facility** or secure correctional facility, regardless of whether the facility is publicly or privately operated.

Tex. Fam. Code § 54.011(f) (emphasis added).

The district court’s Amended Final Judgment makes no specific findings about Section 54.011, although the court did so in prior rulings. *See, e.g.*, RR4:279 (noting that the FRC Rule “allows ICE to house immigrant children awaiting deportation in Texas [in] secure detention facilities despite the prohibition against doing so in the Texas Family Code Section 54.011(f)”). Section 54.011 does not support judgment in favor of the Plaintiffs.

A. DFPS’s Protective Role Supersedes Any Other Law.

The FRC Rule is firmly within DFPS’s enabling statute, which expressly preempts Section 54.011 of the Family Code:

Notwithstanding any other law, the department shall:

- (1) provide protective services for children ...;
- (2) provide family support and family preservation services ...
- (3) license, register, and enforce regulations applicable to child-care facilities ...

Tex. Hum. Res. Code § 40.002(b) (emphasis added). As the Supreme Court has repeatedly held, the phrase “notwithstanding any other law” indicates clear legislative intent that the provision prevail over any conflicting law. *In re Fisher*, 433 S.W.3d 523, 534 (Tex. 2014); *In re Lee*, 411 S.W.3d 445, 454 (Tex. 2013);

Molinet v. Kimbrell, 356 S.W.3d 407, 413-14 (Tex. 2011). Section 54.011(f) cannot restrict DFPS because the Human Resource Code says so.⁷

B. Section 54.011 Applies To State Facilities, Not Family Residential Centers.

Plaintiffs presumed, incorrectly and without authority, that Section 54.011 applies to GEO's facility. CR 1134 (¶ 16). Section 54.011 does not apply to FRCs, as DFPS explained when enacting the FRC Rule:

[T]he chapters of the [Texas Family Code] in question relate to facilities operated by or on behalf of the Texas Juvenile Justice Department or on behalf of a juvenile board in the state of Texas. They do not govern federal facilities.

41 Tex. Reg. 1500-01 (emphasis added).

The plain language of the Family Code confirms this rationale. *See In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 641 (Tex. 2009) (holding that a court determines legislative intent from "the statute as a whole and not from isolated portions of it"). Section 54.011(f) is found in Title 3, specifically entitled "Juvenile Justice Code." Chapter 54 itself is limited to "judicial proceedings," while section 54.011 addresses "detention hearings." The Juvenile Justice Code pertains to the state system for the prosecution, adjudication, sentencing, and

⁷ For the same reason, Section 151.003 of the Family Code cannot prevent DFPS from regulating and licensing child care in the best interests of the children. *Compare* Tex. Fam. Code § 151.003 (directing state agencies not to adopt rules "that violate[] the fundamental right and duty of a parent to direct the upbringing of the parent's child") *with* 40 Tex. Admin. Code § 749.3521 (allowing child-placement agencies, by rule, to terminate parental rights in the best interests of children). Nonetheless, as Plaintiffs admitted, neither GEO nor DFPS are interfering with any parental rights. CR 3036-38; CR 1815 (16:3-7).

detention of juvenile offenders. *See* Tex. Fam. Code. § 51.01. None of these provisions, on their face, apply to FRCs or immigration proceedings.

Chapter 54 plainly addresses conduct that occurs when a juvenile is taken into state custody. *See, e.g.*, Tex. Fam. Code § 54.01. The state agency that takes juveniles into custody for supervision and rehabilitation is the Texas Juvenile Justice Department. *See* Tex. S.B. 653, 82nd Leg., R.S. (2011); Tex. Hum. Res. Code § 201.002(1). Absent a violation of Texas criminal law, the Texas Juvenile Justice Department does not detain immigrant children. *See, e.g.*, 37 Tex. Admin. Code § 380.8535(c) (establishing guidelines for the Texas Juvenile Justice Department to work with ICE “concerning youth who are undocumented foreign nationals”).

Karnes is a federal immigration facility under contract with ICE. CR 1741 (10:2-8); CR 1759 (10:6-8). It is not a state-run facility operated by the Texas Juvenile Justice Department. *See* CR 1769 (64:4-18) (minors at Karnes are not charged with a crime). Even if the Juvenile Justice Code applied (and it does not), it favors facilities like Karnes. Tex. Fam. Code § 51.01(5) (preferring “a family environment whenever possible” to prevent “separating the child from the child’s parents”). Any regulation contemplated by the Family Code simply does not apply to Karnes. *See* Op. Tex. Att’y Gen. No. H-1166 (1978) (finding the Dallas County Boy’s Home to be a “child-care facility” because it was not a detention facility

operated under the Family Code for temporarily holding juveniles prior to adjudication by the juvenile court).

Moreover, the restrictions of Section 54.011(f) apply only when a juvenile is held in a state-run facility with the singular purpose of deporting juveniles. Tex. Fam. Code § 54.011(f) (discussing a nonoffender “being held solely for deportation out of the United States”); *see also id.* § 51.02(8)(B) (defining “nonoffender” as “a child who has been taken into custody and is being held solely for deportation out of the United States”). As Plaintiffs conceded, children at Karnes are not held “solely” for deportation. *See, e.g.,* CR 1247 ¶ 42; CR 3749 (198:19-21). Approximately 97% of the Karnes residents are processed out to the larger community, while a mere 3% are deported. CR 1689 (154:13-15). Again, the Family Code in no way restricts DFPS’s authority to adopt the FRC Rule.

C. Karnes Is Not A “Secure Detention Facility.”

Section 54.011(f) also applies to a “secure detention facility.” While Plaintiffs alleged that GEO’s facility is a secure detention facility, CR 1245 ¶ 24, Karnes does ***not*** meet the statutory definition:

“Secure detention facility” means “any public or private residential facility that”:

- (A) includes ***construction fixtures designed to physically restrict*** the movements and activities of juveniles or other individuals held in lawful custody in the facility; ***and***
- (B) is used for the temporary placement of any juvenile who is ***accused of having committed an offense***, any nonoffender, or any other individual accused of having committed a criminal offense.

Tex. Fam. Code § 51.02(14) (emphasis added). While this definition is focused on construction fixtures, it does not prohibit basic personal safety measures like a bathroom door lock or even a perimeter fence.

At Karnes, there are no locks on the front door. CR 1766 (55:15-23); CR 1772 (85:9-20); CR 1755-56 (100:15-101:15). GEO employees do not stop anyone from leaving the facility, nor do employees tell residents they cannot leave. CR 1762 (48:1-7); CR 1767 (56:17-19); CR 1768 (57:4-10). “Residents are allowed to move freely uninhibited without any restrictions.” CR 1767 (56:15-160). The children at Karnes have not been charged with any criminal offense. *See* CR 1769 (64:4-18). Accordingly, Karnes is not a secure detention facility, and Section 54.011(f) does not apply.

D. Federal Law Preempts Any Regulatory Effect Of Section 54.011.

Karnes is part of the federal government’s efforts to process and enforce its immigration policies. *See* CR 1697 (¶ 2.b). Even if Section 54.011(f) of the Family Code applied to Karnes (which it does not), then Section 54.011(f) would interfere with federal policy and would be preempted by federal law.

“The federal power to determine immigration policy is well settled.” *Arizona v. U.S.*, 132 S. Ct. 2492, 2498 (2012). The federal government has “broad, undoubted power over the subject of immigration.” *Id.* at 2498. The states “can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several

states.” *Takahashi v. Fish & Game Comm’n*, 68 S. Ct. 1138, 1142 (1948). Thus, Section 54.011(f) cannot prevent ICE from operating FRCs.

VI. PLAINTIFFS’ CLAIMS ARE BARRED BY ESTOPPEL.

This case was brought as an APA challenge. Therefore, the question is DFPS’s substantial compliance with its authority. The *Flores* Settlement Agreement typically would be outside the scope of this question. But *Flores* is relevant because Plaintiffs are putative members of the *Flores* class, and their claims are barred by judicial estoppel.

Judicial estoppel precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in prior litigation. *New Hampshire v. Maine*, 532 U.S. 742, 755 (2001); *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000). Likewise, a “party that benefits from a position that it has taken in a consent decree is similarly estopped from later asserting an inconsistent position.” *Bexar Metro. Water Dist. v. City of San Antonio*, 228 S.W.3d 887, 895-96 (Tex. App.—Austin 2007, no pet.). Finally, a party “may not use the state courts for a collateral attack on [a federal court] judgment.” *Id.* at 895.

In *Flores*, plaintiffs specifically asked that FRCs be state regulated. The minor plaintiffs expressly agreed to be placed in a “licensed program,” that is, a “program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children.” CR 1696

(¶ 2.a) (citing *Flores*, CR 1715). The minor Plaintiffs here claimed to be members of the *Flores* class and entitled to the benefits of the settlement. *See, e.g.*, CR 1143 ¶ 57, CR 1145 ¶ 65(b). The minor Plaintiffs (and by extension, their parents) are judicially estopped from challenging the FRC Rule and any license issued under authority of that rule. In other words, Plaintiffs got what they asked for and are entitled to nothing more.

**VII. THE DISTRICT COURT’S “AMENDED FINAL JUDGMENT”
AWARDED UNPLED INJUNCTIVE RELIEF AND VIOLATED DUE
PROCESS.**

The Amended Final Judgment prescribes, through injunctive power, a regime of facility inspections, employee background checks, public hearings, staff training and investigations. SCR1:9-10. According to the district court, that “injunction is necessary to preserve the *status quo* and to allow Defendants the ability to continue regulatory and protective functions for the benefit of children detained at Karnes and Dilley until the challenge to the FRC Rule proceeds through appeal.” SCR1:10.

It is not, however, the district court’s role to act as a stand-in legislature prescribing regulatory and protective functions, when the Texas Legislature has already enacted a statutory framework that authorized DFPS to promulgate a regulatory framework. Other than a vague reference to the appeal, the injunction has no end date. SCR1:10.

Injunctive relief is also guided by statute. Tex. Civ. Prac. & Rem. Code ch. 65. The Code requires plaintiffs seeking permanent injunctive relief to “plead and prove a valid cause of action against the defendants.” *Operation Rescue-Nat’l v. Planned Parenthood of Houston & Se. Texas, Inc.*, 937 S.W.2d 60, 71 (Tex. App.—Houston [14th Dist.] 1996), *aff’d as modified*, 975 S.W.2d 546 (Tex. 1998). Apart from a request that no licenses be granted, the Plaintiffs never pled the injunctive relief ordered by the district court. *See* CR 1147-48 (requested injunctive relief). The relief granted is therefore improper.

The manner in which the district court arrived at the Amended Final Judgment also violated the Defendants’ due process. The “system of justice comprehends due process to include notice and an opportunity to be heard.” *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 313-14 (1950); *Ex parte Peterson*, 444 S.W.2d 286, 289 (Tex. 1969). It is “[a]n elementary and fundamental requirement of due process” that notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Retzlaff v. GoAmerica Commc’ns Corp.*, 356 S.W.3d 689, 695 (Tex. App.—El Paso 2011, pet. denied) (quoting *Mullane*, 339 U.S. at 314). “The notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance.” *Id.* “[W]hen notice is a person’s due, process which is a mere gesture is not due

process.” *Id.* (quoting *Mullane*, 339 U.S. at 315). In *Retzlaff*, this Court held that due process was denied where a district court entertained a hearing on vexatious litigation, but granted additional injunctive relief that affected the plaintiff’s substantive rights. *Retzlaff*, 356 S.W.3d at 696.

Here, the district court’s December 2 Final Judgment granted summary judgment to the Plaintiffs by invalidating the FRC Rule, but not granting any injunctive relief. That was at least consistent with what the Plaintiffs sought in their motion, which did not include injunctive relief. *See* CR 3008, 3068-69 (not identifying the availability of injunctive relief as an “issue” on summary judgment or part of requested relief).

The following Monday morning, December 5, the Plaintiffs filed a motion to prevent the Defendants from superseding the judgment. In filing their motion, the Plaintiffs sought not only to prevent the Defendants from automatically suspending the judgment by superseding it, *see In re State Bd. of Educator Cert.*, 452 S.W.3d 802, 808-09 (Tex. 2014), Tex. R. App. P. 24.3(a)(2)-(3), but also suggested to the court that it “may wish to impose terms that are substantively identical to the terms stated in this Court’s temporary injunction issued June 3, 2016.” CR 4185.

The district court revised its judgment to order an indefinite injunction after hastily convening a conference, failing to provide adequate notice to the Defendants about the issues to be considered, and failing to permit responsive receiving briefing from the parties. The impromptu hearing was effectively an

unnoticed hearing on a combination of the Plaintiffs' Motion for Summary Judgment, an unfiled motion to modify the December 2 Final Judgment, and an unfiled motion for reconsideration. GEO had no notice that these issues would all be addressed at the December 5 telephonic hearing. The district court violated due process by depriving Defendants of any reasonable opportunity to respond to the unpled and unproven injunctive requests. Ironically, the hastily drawn injunction requires DFPS to provide oversight to the FRCs without the ability to license the centers, in contravention of the statutory scheme created by the Texas Legislature.

VIII. THERE ARE NO OTHER GROUNDS SUPPORTING THE AMENDED FINAL JUDGMENT.

As discussed, the Amended Final Judgment is sparse on actual findings. In their summary judgment papers, the Plaintiffs identified a number of arguments and items of evidence that they claim support invalidating or enjoining the FRC Rule. None of the other issues identified in those papers and/or that may be raised by Plaintiffs on appeal support the Amended Final Judgment. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625-26 (1996).

The Plaintiffs' true intent is to change federal immigration policies. As one witness testified, his "goal is to close the facilities," which is clearly a "federal issue." CR 1677 (70:17-18); 1678 (74:14-16). From the start of this case, Plaintiffs' challenge to the FRC Rule has been the wrong procedural vehicle for their efforts, and the district court fundamentally erred in entertaining the challenge. Rather than burdening the judicial system, Plaintiffs should be seeking

relief from the legislative or executive branches. In the words of the U.S. Supreme Court, immigration “policy questions [are] entrusted exclusively to the political branches of our Government, and we have no judicial authority to substitute our political judgment.” *Fiallo v. Bell*, 97 S. Ct. 1473, 1481 (1977); *see also Shaughnesy*, 73 S. Ct. at 628 (permitting an immigrant to be detained at Ellis Island for 21 months because “political departments [are] largely immune from judicial control”). The Amended Judgment must be reversed.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons and pursuant to Tex. R. App. P. 43, GEO asks the Court to:

- ▶ reverse the trial court’s judgment and declare that 40 Tex. Admin. Code § 748.7 is valid; or
- ▶ alternatively, reverse the trial court’s judgment and remand the case for further proceedings;
- ▶ award GEO appellate costs;
- ▶ grant all other relief to which GEO is entitled.

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that this brief complies with type-face and type-volume requirements. The document contains 13,977 words in total, which is less than the 15,000 word limit for select portions of the brief.

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**(All proceedings assigned to the
250th Judicial District Court)**

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previously issued under the FRC Rule to the Karnes County Residential Center in Karnes City, Texas (“Karnes”) operated by Intervenor GEO Group.

After reviewing Plaintiffs’ Motion to Prevent, the arguments and supplemental briefing of the parties, and the applicable law, the Court ORDERS that the Final Judgment of December 2, 2016 is vacated and substituted by this Amended Final Judgment.

I. Factual Background.

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 a court-approved settlement of the lawsuit (the “*Flores* Settlement Agreement”). The *Flores* Settlement Agreement provided that, if a minor is not released, the minor shall be placed temporarily in an unsecure 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 *Flores* Settlement Agreement further required that the licensed program:

- treat all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors;
- place each detained minor in the least restrictive setting appropriate to the minor's age and special needs;
- provide safe and sanitary facilities; and
- segregate unaccompanied minors from unrelated adults.

In 2014, ICE began detaining immigrant women and children in the Karnes and Dilley facilities. Both facilities are secure detention facilities. Unlike daycares, foster homes, domestic

violence shelters, residential treatment centers or Office of Refugee Resettlement contracted shelters for unaccompanied minors, Karnes and Dilley are designed to hold women and children in secure custody in order to execute federal immigration law enforcement purposes. The women and children held at Karnes and Dilley, including several individual Plaintiffs who testified before this Court, arrived at the family detention centers under final deportation orders by the United States Government.

Defendant DFPS did not attempt to regulate family residential centers in Texas until it adopted an emergency rule (the “Emergency Rule”) on September 2, 2015. Before that time, Defendant DFPS had historically and consistently acknowledged that it lacked authority to license family detention centers and declined to do so based upon that lack of authority.

On September 30, 2015, Plaintiff Grassroots Leadership, Inc. initiated this lawsuit to challenge the Emergency Rule. On November 20, 2015, the Court issued a Temporary Injunction prohibiting Defendant DFPS from implementing the Emergency Rule. In the Temporary Injunction, this Court cited its concerns with the Emergency Rule, namely that the Emergency Rule removed the FRC’s obligations to comply with the following current Minimum Standards for General Residential Operations that pertain to the safety and welfare of children: (i) limitations on room occupants; (ii) children sharing a room with an adult that may be unrelated; and (iii) children sharing a room with children of the opposite gender. However, the Court expressly permitted DFPS to proceed through the traditional rulemaking procedures outlined in TEX. GOV’T CODE §§ 2001.023 and 2001.029.

DFPS followed the procedures for rulemaking and the FRC Rule was subsequently adopted by the Texas Department of Family and Protective Services and published in the Texas Register on Feb 26, 2016. DFPS promptly licensed Intervenor The GEO Group’s license for

Karnes under the FRC Rule in March of 2016. Intervenor CCA's application for the Dilley license under the FRC Rule is currently pending. On May 3, 2016, Plaintiffs filed their Second Amended Petition to challenges the FRC Rule under the APA.

The FRC Rule, like the Emergency Rule, removes the family residential centers' obligation to comply with the legislatively mandated General Residential Operations ("GRO") Minimum Standards regarding the safety and welfare of minors. Accordingly, on June 3, 2016, the Court issued a Temporary Injunction enjoining Defendants' implementation of the FRC Rule but requiring Defendant DFPS to continue to investigate and report any allegations of abuse or neglect, standards deficiencies, or violation of rule of law at Dilley and Karnes during the pendency of the Temporary Injunction.

II. Defendants' Third Amended Plea to the Jurisdiction.

After considering Defendants Texas Department of Family and Protective Services ("DFPS"), Texas Health and Human Services Commission ("HHSC"), and their Commissioners' (collectively "Defendants") Third Amended Plea to the Jurisdiction (the "Plea to the Jurisdiction"), the Court is of the opinion that the Plea to the Jurisdiction should be GRANTED in part and DENIED in part as follows:

- A. IT IS ORDERED that Defendants' Plea to the Jurisdiction is GRANTED as to Plaintiffs' claims under the Uniform Declaratory Judgment Act and for the recovery of attorney's fees under the Uniform Declaratory Judgment Act and TEX. CIV. PRAC. & REM. CODE § 37.009;
- B. IT IS THEREFORE ORDERED Plaintiffs' claims under the Uniform Declaratory Judgment Act and for the recovery of attorney's fees under the Uniform Declaratory

Judgment Act and TEX. CIV. PRAC. & REM. CODE § 37.009 are DISMISSED with prejudice; and

C. IT IS ORDERED that Defendant's Plea to the Jurisdiction is DENIED as to all remaining grounds.

III. Parties' Cross-Motions for Summary Judgment.

By agreement of the parties, the Court accepted the following Cross-Motions for Summary Judgment regarding the validity of the FRC Rule by submission:

- A. Plaintiffs' Motion for Summary Judgment;
- B. Defendants' Motion for Summary Judgment;
- C. Intervenor Corrections Corporation of America's ("CCA") Motion for Summary Judgment; and
- D. Intervenor The GEO Group's ("GEO") Motion for Summary.

After reviewing the parties' Cross-Motions for Summary Judgment and responses thereto, the evidence presented and objections thereto, the pleadings on file, and the applicable law, IT IS ORDERED, ADJUDGED, AND DECLARED that:

- A. Plaintiffs' Motion for Summary Judgment on Plaintiffs' claim for declaratory relief under the APA is GRANTED;
- B. The FRC Rule contravenes TEX. HUM. RES. CODE § 42.002(4) and runs counter to the general objectives of the Texas Human Resources Code and is, therefore, invalid;
- C. Defendants' Motion for Summary Judgment is DENIED;
- D. Intervenor GEO Group's Motion for Summary Judgment is DENIED; and
- E. Intervenor Correction Corporation of America's Motion for Summary Judgment is DENIED.

IV. Injunctive Relief and Denial of Automatic Supersedeas.

The Court FINDS that allowing Defendants to automatically supersede the Court's ruling that the FRC Rule is invalid would render the relief granted by this Amended Final Judgment ineffective and Plaintiffs would suffer imminent and irreparable harm because money damages are unavailable against the state agency and, unless the *status quo* is maintained during the pendency of the appeal, Plaintiffs will be deprived of their statutory rights to protection that the Legislature has afforded children in the state minimum standards as follows:

- A. Licensure under the FRC Rule would permit variances or exceptions to the legislatively mandated GRO requirements. The variances or exceptions substantially endanger children by:
 - 1. Permitting children to share a bedroom with others at a number that exceeds maximum standards;
 - 2. Permitting children to share bedrooms with an unrelated adult;
 - 3. Permitting children over the age of three to share a bedroom with an unrelated adult; and
 - 4. Permitting unrelated children of different genders to share a bedroom;
- B. Licensure under the FRC Rule will facilitate longer periods of detention of the mothers and children detained at Karnes and Dilley, which hurts children by subjecting them to psychological and/or physiological trauma and deprivation of freedom of action.

The FRC Rule provides for exemptions to our State Minimum Standards that run counter to the objectives of the Texas Legislature, as well as the *Flores* Settlement Agreement, and does

not require the facilities to comply with the State's Minimum Standards for residential operations.

As outlined above, this Court has declared the FRC Rule is invalid. During the pendency of any appeal of this Court's ruling, the Court FINDS it is in the best interest of the children detained by the federal government and housed at Karnes and Dilley that the State of Texas continue to provide regular and comprehensive oversight consistent with the minimum standards required by the State of Texas through: (i) unannounced state inspections to ensure the facility complies with existing state minimum standards; (ii) mandatory background checks on all employees working at the facility; (iii) public hearings; (iv) staff training; and (v) investigation of claims of abuse and neglect.

Accordingly, Defendants, and all of their officials, agents, servants, employees, and attorneys be and hereby are ORDERED to refrain from issuing licenses under the FRC Rule until the Court of Appeals issues a decision on appeal or further Order of the Court.

Defendants are FURTHER ORDERED to continue to investigate and report any allegations of abuse or neglect, standards deficiencies, or violation(s) of rule of law at Karnes and Dilley during the pendency of any appeal of this Court's ruling.

IT IS ORDERED that Intervenor CCA and Intervenor GEO Group shall cooperate with Defendants and shall not impede Defendants' efforts to conduct its investigative and regulatory functions at Dilley and Karnes through: (i) scheduled and/or unannounced state inspections to ensure that the facilities comply with existing state minimum standards; (ii) background checks on all employees working at the facilities; (iii) staff training; and (iv) investigation of claims of abuse of the children and mothers and/or neglect of children.

The injunction is necessary to preserve the *status quo* and to allow Defendants the ability to continue regulatory and protective functions for the benefit of children detained at Karnes and Dilley until the challenge to the FRC Rule proceeds through appeal.

IT IS FURTHER ORDERED, in accord with Texas Rule of Appellate Procedure 24.2(a)(3), that the Court DECLINES to permit the Amended Final Judgment to be superseded, and that Plaintiffs shall deposit \$500.00 into this Court's registry, which shall serve as security for this Court's Order declining to permit the Amended Final Judgment to be superseded. This bond is sufficient because Defendants will not suffer any loss or damage as a result of the relief granted in this Amended Final Judgment.

IT IS FURTHER ORDERED that the \$100.00 bond that Plaintiffs previously deposited as security for this Court's Temporary Orders may be applied to the \$500.00 security.

All costs are assessed against each party incurring the same.

This Final Judgment disposes of all parties and claims and is a final and appealable judgment.

SIGNED on this the 16th day of December 2016.



JUDGE PRESIDING
KARIN CRUMP

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement portions of HB 1449, which adds Subchapter E, Adoption Evaluations to Chapter 107 of the Texas Family Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 9, 2016.

TRD-201600612

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General Counsel

Department of Family and Protective Services

Effective date: February 29, 2016

Proposal publication date: November 13, 2015

For further information, please call: (512) 438-5559



DIVISION 4. POST-PLACEMENT ADOPTIVE SOCIAL STUDY AND REPORT

40 TAC §§745.9091 - 745.9097

The repeals are adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeals implement portions of HB 1449, which adds Subchapter E, Adoption Evaluations to Chapter 107 of the Texas Family Code.

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DIVISION 5. COMPLAINTS

40 TAC §745.9100

The repeal is adopted under Human Resources Code (HRC) §40.0505 and Government Code §531.0055, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services; and HRC §40.021, which provides that the Family and Protective Services Council shall study and make recommendations to the Executive Commissioner and the Commissioner regarding rules governing the delivery of services to persons who are served or regulated by the department.

The repeal implements portions of HB 1449, which adds Subchapter E, Adoption Evaluations to Chapter 107 of the Texas Family Code.

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CHAPTER 748. MINIMUM STANDARDS FOR GENERAL RESIDENTIAL OPERATIONS

SUBCHAPTER A. PURPOSE AND SCOPE

40 TAC §748.7

On behalf of the Department of Family and Protective Services (DFPS), the Health and Human Services Commission adopts new §748.7, concerning the applicability of Chapter 42, Human Resources Code, and licensing rules and statutes in general to family residential centers operated by contractors of U.S. Immigration and Customs Enforcement (ICE), with changes to the proposed text as published in the November 13, 2015, issue of the *Texas Register* (40 TexReg 8009).

The justification for §748.7 is to define the term "family residential center" (FRC) and to make FRCs subject to regulation as General Residential Operations (GROs). Requiring FRCs to comply with all requirements for GROs will be more protective of children than taking no action regarding the provision of child care without a license.

DFPS first adopted §748.7 on an emergency basis effective September 2, 2015 as published in the September 18, 2015, issue of the *Texas Register* (40 TexReg 6229). The emergency rule tailored minimum standards for GROs to FRCs so that DFPS could most effectively regulate them. In its publication of the emergency rule, DFPS cited that the July 24, 2015 ruling of *Flores v. Johnson*, CV 85-4544 DMG (C.D. Cal. July 24,

2015) "highlighted a gap in the oversight of the children" housed in family residential centers. DFPS found that there was an imminent peril to the public's health, safety, or welfare due to the lack of "comprehensive oversight of the care of children housed in the facilities by an independent agency." *Id.*

Grassroots Leadership, Inc., a non-profit organization, filed suit seeking declaratory and injunctive relief from the emergency rule on September 30, 2015, in the 353rd District Court in Travis County. Judge Karin Crump of the 250th Travis County District Court granted a Temporary Restraining Order halting the adoption and implementation of the emergency rule on September 30, 2015. *Grassroots v. TDFPS*, No. D-1-GN-15-004336 (353rd Dist. Ct., Travis County, Tex. Sept. 30, 2015). On November 20, 2015, Judge Crump issued a Temporary Injunction halting the adoption of the emergency rule until a trial on the merits can be held on May 9, 2016. *Grassroots v. TDFPS*, No. D-1-GN-15-004336 (353rd Dist. Ct., Travis County, Tex. Nov. 20, 2015). The Court specifically held that the Temporary Injunction did not preclude DFPS "from proceeding with traditional rule adoption procedures." *Id.* at 7. Accordingly, DFPS published §748.7 as a proposed rule in the November 13, 2015, issue of the *Texas Register* (40 TexReg 8009).

The adoption of the rule ensures the continued protection of children housed in the facilities by making the facilities subject to the regulatory authority of CCL along with its associated requirements, with limited exception.

The section will function by enhancing the quality of care for children housed in FRCs.

The essence of the new rule is the application of Child-Care Licensing's (CCL's) regulations related to GROs to FRCs, as defined in the rule. That definition, found in subsection (a), applies regulations for GROs to FRCs that are operated by or under contract with ICE to enforce federal immigration laws and that detain children who remain with parents or other adult family members, who provide direct care for the child except in specific circumstances. The definition currently would apply only to the South Texas Family Residential Center (STFRC) operated by the Corrections Corporation of America in Dilley, Texas, and the Karnes County Residential Center operated by the GEO Group, Inc. in Karnes City, Texas.

Subsection (b) classifies the FRCs as GROs and requires them to comply with all associated requirements unless CCL issues a waiver or variance, or an exception is granted by the section itself. While the rule applies the standards to the FRCs and does not go into extensive detail regarding those standards, incorporating the standards for GROs by reference means incorporating a broad and comprehensive regulatory scheme designed to protect and enhance the well-being of children in care. As is discussed in additional detail in DFPS' responses to public comments received on the proposed rule, the regulatory overlay in place for GROs involves statutory mandates and direction, rules general applicable to all regulated operations including GROs which are found in Chapter 745 of this title, Licensing, as well as Minimum Standards specific to GROs found in Chapter 748 of this title. Those Minimum Standards include governing requirements across many domains that range from the qualifications for the Child Care Administrator each facility must employ to requirements for food storage to restrictions on the use of emergency behavior intervention.

Subsection (b) further clarifies that DFPS does not oversee requirements that pertain to other law. Of particular relevance to

the comments received to the proposed rule, DFPS explicitly clarifies that it has no role in determining whether the FRC is classified as secure.

Subsection (c) lists several exceptions that DFPS determined at the outset were appropriate in recognition of the unique character of the FRCs. First, because children are housed with parents or family members, and there may be sibling groups of more than four children, DFPS recognized that the limitation on four room occupants could be directly at odds with the need to house families together wherever possible and safely achievable. Secondly, because children would be sharing rooms with parents or other family members, DFPS recognized that the FRCs would not be required to comply with all of the requirements related to children sharing a bedroom with an adult. Finally, because siblings may be of the opposite gender, and because there may be circumstances where young children of different families would be housed together, DFPS granted a partial exception to the limitations on children of the opposite gender sharing a room. It should be emphasized that the text of the subsection noted that the facilities would not be required to comply with *all* of the provisions in the referenced standards, which makes clear that the FRCs may be required to comply with portions of the standards in question. Furthermore, and more significantly, DFPS reiterated in subsection (d) its ultimate discretion to place conditions on any exceptions and described some examples of such conditions by way of illustration. Specifically, DFPS offered a non-exhaustive list of possible conditions on the exceptions to allow flexibility in the agency's exercise of its authority in recognition of its responsibility for overseeing the safety and well-being of children in care, which include: limits on the number of room occupants to meet fire safety standards, or limitations on allowing children of opposite genders to share a room only if they are in the same family. DFPS then reiterated its discretion to place "any other limitation determined by the department to be necessary to the health, safety, or welfare of children in care."

Finally, in subsection (e) DFPS added a provision again in recognition of the FRCs' unique characteristics, which requires any documentation DFPS deems necessary to clarify the division of caretaking responsibility between FRC staff and the parents or family of a child in care. DFPS must not merely receive the documentation but must also approve it during the application process and at the point of any subsequent amendments to the documentation.

During the public comment period, DFPS sought public feedback regarding the proposed rules through multiple channels. In total, DFPS received 1486 comments in writing. DFPS received 3 responses through the U.S. Postal Service that were not also received either through email or in hard copy at the public meeting on the rule.

In total DFPS received 1460 responses via email. Of those responses, 701, or 48 percent were received from individuals or groups who reside outside the state of Texas. The vast majority of the comments (approximately 1350) were comprised of two standardized emails. The first of the two standardized emails appears to have been issued primarily in response to the emergency rule adopted by DFPS on September 2, 2015, the implementation of which was temporarily enjoined by the 250th District Court in Austin on November 12, 2015. Indeed, 488 of those comments were received prior to the publication of the proposed rule and could not, therefore, have been in response to the publication of the proposed rule. However, because the comments appear to be directed both at the emergency rule adoption as

well as the substance of the rule and because several of the standardized emails were received following publication of the proposed rule, DFPS considered the substance of the standardized email in its discussion of comments and the agency's response. DFPS also considered the substance of the second standardized email, which opposed licensing the FRCs, and incorporated the substance into the summaries of the comments.

In addition, DFPS announced that it would hold a public meeting on the rule proposal on December 9, 2015, in the following ways: (1) in the *Texas Register* Open Meetings section; (2) through the govdelivery.com service, which allows interested persons to sign up for email or text updates regarding DFPS or other governmental agencies; and (3) on the DFPS website page for items of interest to stakeholders. The meeting was well attended and received media coverage. Forty-five people testified, some in their individual capacities and others on behalf of an organization or group. In addition, 11 speakers handed in individual written testimony. An advocacy group submitted approximately 800 written comments to the panel of DFPS and HHSC representatives present to take testimony. DFPS subsequently determined that all but 12 of those printed comments were identical printouts to emails previously received by DFPS. The entire meeting was transcribed and published on the DFPS public website at http://www.dfps.state.tx.us/About_DFPS/Public_Meetings/Stakeholders/documents/2015-12-09-Licensing_Hearing_transcript_acc.pdf.

The public comments received by the agency included those submitted by interested groups or associations, as well as legislators in their official capacity. Specifically, the groups and officials submitted comments generally in opposition to the adoption of the rule include: the Interfaith Welcome Coalition; the Texas School of Law Immigration Clinic; Methodist Healthcare Ministries of South Texas; the Texas Catholic Conference; the Benedictine Sisters; CARA Family Detention Pro Bono Project (comprised of the Catholic Legal Immigration Network, Inc.; the American Immigration Council; the Refugee and Immigrant Center for Education and Legal Services; and the American Immigration Lawyers Association); Heartland Alliance's National Immigrant Justice Center; Texas Pediatric Society; Rio Grande Equal Voice Network; Representative Trey Martinez Fischer, Chairman, Texas Mexican American Legislative Caucus; Texas Senators: Judith Zaffirini, José Rodríguez, José Menéndez, Sylvia R. Garcia, Rodney Ellis, Juan "Chuy" Hinojosa, John Whitmire, and Kirk Watson; the De Anda Law Firm; CASA Latina; Mexican American Legal Defense and Education Fund; Grassroots Leadership; Unitarian Universalist Service Committee; Texas Impact; Women's Refugee Commission; American Civil Liberties Union of Texas; Unitarian Universalist Association; National Association of Social Workers, Texas Chapter (NASW); and Catholic Charities of the Rio Grande Valley.

The following groups and officials submitted comments generally supporting the adoption of the rule: Representative James White and a representative of the Karnes County Residential Center.

Finally, while not formal public comment, the rule proposal was covered in various media outlets. Included in the coverage were two editorial pieces regarding the proposed rule. The Fort Worth Star-Telegram on December 10, 2015, noted that the testimony in the public meeting was to the effect that the family residential centers have "a long way to go" to provide care to children. The Star-Telegram further indicated that it was "a shame" licensure by DFPS had taken so long. In addition, the San Antonio Express News on December 15, 2015, noted that so long as

women and children are being detained in the facilities, the state has some obligation to oversee the care of children who are detained there.

All of the public comments, whether submitted via mail, email or orally in the public meeting, were reviewed and considered by DFPS staff. The feedback generally fell into themes, which are summarized below, along with the agency's response.

(1) Comments Supporting Licensure As a Means to Protect Children and Improve Current Practice:

Comment: Two commenters, including one state representative, supported licensure. The representative noted that the state is statutorily obligated to ensure the safety and wellbeing of all children in Texas, and by providing oversight to the FRCs, DFPS would be able to ensure the children's safety and pass on its institutional knowledge of child safety and wellbeing to the federal government. The commenter further noted that by expanding its regulatory purview, DFPS would be able to play a vital role in identifying and providing services to children and families that are at high risk of human trafficking. Another commenter, who provides representation to one of the FRCs, noted that licensure is not merely an endorsement of the status quo as the FRCs would not only be required to meet the standards of a GRO, but would be required to provide evidence of compliance. The commenter cited to the significant fiscal impact to the FRCs to come into compliance with the proposed requirements, including increasing staff to detainee ratio, recruiting qualified staff to provide necessary services mandated by the rule, meeting the public hearing requirements, ensuring CPR certifications, obtaining background checks for employees, meeting square footage requirements, and submitting materials clarifying the supervisory and caretaking responsibilities of staff and family members. The commenter also noted that the exemptions to minimum standards, which DFPS has authority to place limits on, were formulated to allow children to continue residing with their mothers and not to continue the status quo.

Response: DFPS agrees with the comments.

(2) Comments Expressing Concern with Licensure and Any Exceptions, Waivers, or Variances Associated with Licensure:

Comment: A significant number of commenters expressed concern that licensing the Karnes County and Dilley Centers with exemptions, as the rule allows, would amount to the mere rubber stamping of the centers as they currently operate without meaningful consideration of their ability to provide adequate child care. Specifically, the commenters argued that the rule would not ameliorate the conditions of the centers, but would rather allow the centers to continue operating as detention centers in a manner that is contrary to the safety and well-being of children. One commenter noted that the Karnes County center has a history of temporarily altering its conditions, such as redecorating, providing extra toys, and improving food quality, in preparation for visitations by external entities; however, it has not made significant and permanent improvements. According to the commenters, licensure would not change the inherent purpose and overall substandard environment of the Karnes County and Dilley centers.

Response: The Texas regulatory scheme in place for GROs is comprehensive, extensive, and rooted in basic tenets of child protection and welfare. By properly designating the FRCs as GROs, DFPS brings to bear not only the single rule adopted here but a host of statutory, regulatory, and policy-based requirements aimed directly at protecting the health, safety, and

well-being of children in care. (See HRC §42.001). First, the Texas legislature has established the basic framework for the licensure of child-care facilities, primarily in CCL's enabling authority in HRC Chapter 42, as well as DFPS' general enabling statutes in HRC Chapter 40. (See in particular HRC §40.002(b)). The legislature has directed CCL, through the Executive Commissioner of HHSC, to adopt rules and standards to accomplish various purposes including: promoting the health, safety, and welfare of children; ensuring adequate supervision of children by capable, qualified, and healthy personnel; and ensuring that facilities follow the directions of health care professionals. (See HRC §42.042(e)). In addition to general direction to promulgate standards, the legislature has mandated certain critical aspects of the licensure process and its underlying requirements. For example, the Texas legislature has enacted laws related to the requirement for submission of an application (see HRC §42.046); requirements related to conducting and abiding by the results of criminal and abuse/neglect history checks (see HRC §42.056); the requirement that each facility hire and maintain a licensed child-care administrator for the facility (see HRC Chapter 43); and the requirement that a potential operation convene a public hearing in counties of a certain population size (see HRC §42.0461).

Based on its general statutory authority and duties, CCL has adopted a broad regulatory framework in Chapter 745 of this title, Licensing, contains rules of general applicability to various operations regulated by the agency. Of particular significance to this rule, Chapter 745 contains requirements and restrictions related to the criminal or abuse/neglect history of a person employed or present at the facility. (See Chapter 745, Subchapter F, Background Checks).

Next, CCL has various rule chapters in place recognizing the different operation types and the services they provide. (See HRC §42.042(f) and (g)). The various subchapters in this chapter related to GROs address a multitude of topics, many of which are discussed in greater detail in this preamble, including requirements related to training for staff, the provision of medical and dental care, the use of emergency behavior intervention. Examples of other topics covered by regulation and not discussed in great detail in this preamble include: requirements related to admission and service planning, the physical site of the operation, and transportation. Should there be any further question regarding the content of DFPS' standards, all are readily available to the public, both through the Secretary of State's website for the Texas Administrative Code (see [http://texreg.sos.state.tx.us/public/readtac\\$ext.ViewTAC?tac_view=3&ti=40&pt=19](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=3&ti=40&pt=19)) and DFPS' website (see http://www.dfps.state.tx.us/Child_Care/Child_Care_Standards_and_Regulations/default.asp). Moreover, the entire policy handbook in use by CCL staff is publicly available at any time (see <https://www.dfps.state.tx.us/handbooks/Licensing/default.asp>).

Against this extensive regulatory backdrop, the FRCs would be required to go through the same process as other GROs in the state and to demonstrate compliance with the various requirements of Texas statute and regulation discussed herein. First, they would be required to submit an application. Residential Child Care Licensing (RCCL) has 21 days to accept the application. (See §745.301 of this title (relating to How long does Licensing have to review my application and let me know my application status?)). During that time, RCCL reviews the application for completeness and ensures that policies and procedures that are required at application are included, and that applicable

fees have been paid. At times, RCCL may need to request additional information or clarification from the GRO in order to accept the application or RCCL may return the application.

Once the application is accepted, RCCL has up to two months to complete a Standard by Standard inspection to evaluate compliance with Minimum Standards. (See §745.321 of this title (relating to What will Licensing do after accepting my application?)). Concurrently, in counties with a population of less than 300,000 people, the GRO has one month from the date the application was accepted to hold a public hearing. (See §745.275(2)(C) of this title (relating to What are the specific requirements for a public notice and hearing?)). Notice of the public hearing must be published at least ten days prior to the date of the hearing in a newspaper of general circulation in a community where the services will be provided. (HRC §42.061(b) and §745.275(1) of this title (relating to What are the specific requirements for a public notice and hearing?)).

Once the public hearing occurs, the GRO has ten working days to submit a verbatim record of the hearing and a complete comment summary report to RCCL. (See §745.275(2)(C) of this title (relating to What are the specific requirements for a public notice and hearing?)). RCCL has two months after the date of the complete application being accepted to issue or deny the initial permit unless there is good cause to extend the timeframe, such as reviewing extensive comments of a public hearing. (See §745.321 of this title (relating to What will Licensing do after accepting my application?)).

RCCL may deny the application if the operation fails to comply with Minimum Standards, administrative rules, or the law. HRC §42.072(a) and §745.8605 of this title (relating to When can Licensing take remedial action against me?) further authorizes certain remedial actions related to failure to comply with aspects of the application process. Additionally, RCCL may deny the permit if information obtained through the public hearing process indicates licensure is inappropriate. (HRC §42.0461(e), §745.279 of this title (relating to How may the results of a public hearing affect my application for a permit or a request to amend my permit?), and §745.8605(21) of this title (relating to When can Licensing take remedial action against me?)).

When an initial permit is issued, it is valid for a period of six months. (HRC §42.051 and §745.347 of this title (relating to How long is an initial permit valid?)). During the initial permit period, RCCL will generally conduct a minimum of three unannounced inspections to determine compliance with Minimum Standards, administrative rules, and law. (§745.351 of this title (relating to If I have an initial permit, when will I be eligible for a non-expiring permit?)). If during the first initial permit period, the GRO fails to establish continued compliance and additional time is necessary to determine a pattern of compliance, RCCL may issue a second initial permit to establish ongoing compliance. If the second initial permit is issued, RCCL will again conduct at least three unannounced inspections. If after the first initial permit period or the second initial permit period, the GRO has established continued compliance, RCCL may issue a full permit. When a GRO is issued a full permit, RCCL will conduct at least one unannounced inspection per year, in addition to any other inspections or investigations that may be necessary as a result of reports received. (§745.8407 of this title (relating to When will Licensing inspect and/or investigate an operation?)).

The purpose of this rule is to apply the licensure requirements to the operations, a necessary byproduct of which is that they will come into compliance with said requirements. If a current prac-

tice is inconsistent with CCL standards, then the practice would be addressed in the licensure process. To argue that a given practice does not *currently* comply with regulations for child-care is to misapprehend the purpose of licensure and all that it entails.

Comment: Several commenters opposed the exceptions to Minimum Standards contained in the proposed rule stating that they are overbroad, arbitrary and capricious, set a dangerous precedent for regulating childcare facilities, and essentially allow the FRCs to continue operating under the status quo of a prison. The commenters noted that federal and state law do not provide any basis for lowering the standards for facilities that house accompanied minors as opposed to unaccompanied minors. They further noted that the exemptions effectively create a second-class of children subject to a lower, disparate standard from children under the custody of DFPS or unaccompanied minors. Several commenters expressed concern that the exceptions not only fail to address the problems of abuse and neglect, but increase the risk of physical and sexual abuse and maltreatment by allowing different genders and unrelated family members to be housed together in large numbers. One commenter noted that there have already been numerous allegations of assault and potential sexual abuse because of the lack of age and gender restrictions, and another commenter noted that the exemptions compromise the families' ability to file complaints for poor living conditions and abuse and neglect. While some commenters acknowledged a need for oversight, they contended that DFPS should only adopt rules consistent with those for child care facilities by requiring the FRCs to meet all current minimum standards and ensure appropriate therapeutic and trauma-informed settings as is required for other GROs.

Response: From the outset, DFPS recognized that the character of the FRCs is without an identical counterpart in the current regulatory structure. Children are housed with their mothers or other adult family members, yet by virtue of being divested of some or all of their authority to direct the daily activities, place of residence, and other aspects of their children's lives, the mothers cannot be considered the sole caregivers as they would be outside the setting. Moreover, while the families are generally housed together, there are times in which a mother may be separated from her child, e.g. when capacity is extremely high and some of the children are housed in a common, dormitory-like fashion. To the extent the mothers are not exercising full parental control, and may not be with their children at a given time, the staff in the FRCs are assuming child-care responsibilities, and it is important that this care receives oversight from the cognizant state agency.

However, in recognition of the uniqueness of the setting, DFPS included several exceptions to Minimum Standards in both the emergency rule and the rule now under consideration. The first exception, related to the limitation on the number of room occupants is intended to permit living arrangements that preserve family units. DFPS included in subsection (d) of the rule language to clarify that there may be conditions related to the outer limit on the number of occupants, particularly where such a limit is necessary to comply with fire safety standards. DFPS will require a minimum of sixty square feet per child, and as discussed herein, DFPS applies exceptions, waivers and variances in light of their potential implications to child safety, and would not implement the exception such that it was inconsistent with its child protection obligations.

The second exception in the rule relates to children sharing a bedroom with an adult, and is intended to permit children to sleep

in a room with their mothers. While DFPS' current standards related to adults sharing a bedroom with children relates to adults who are in care at the facility, unlike the mothers at the FRCs who are not in care, DFPS felt it was important to clarify from the outset that the limitation would be flexibly applied. Again, subsection (d) as well as DFPS' overall regulatory authority means that the exception is not unfettered, and DFPS may place conditions on it appropriate to the circumstances.

The third exception, like the others, is intended to permit the preservation of family units and may be tempered by any limitations DFPS deems appropriate. This particular exception relates to children of the opposite gender sharing a room. DFPS understands the concerns of commenters related to potential misconduct. However, DFPS intends to permit children of the opposite gender to share a room only if they are members of the same family or under the age of six. The goal of the exception is to strike a balance between family preservation within the current facility and the paramount concern of child safety.

However, because the rule text initially generated confusion and concern regarding the scope and purpose of the exceptions, DFPS has modified the proposed text to provide further clarification. First, the exception regarding the limitation on room occupants has been modified to make explicit that the number of children permitted in the room will be based on the square footage of the room, with no fewer than sixty square feet per child. Second, the exception related to children sharing a bedroom has been clarified to specify that the exception relates to children remaining with their own family. Third, the exception permitting children of the opposite gender to share a bedroom has been amended so that children from different families who are opposite gender may not share a bedroom unless they are under the age of 6. Finally, DFPS incorporates by reference in subsection (d) its regulation in §745.8313 of this title (relating to Is a waiver or variance unconditional?), which makes it explicit that DFPS retains the discretion to place conditions on any waiver or variance, as well as the exceptions contained in §748.7.

Comment: One commenter suggested that in light of the aim of the regulation to preserve family units, subsection (c) be modified to preface the exceptions with the language "Because the designated facilities house mothers with their children..."

Response: DFPS declines to make the change. By definition which is part of the rule, an FRC is a facility in which a child is detained with the child's mother or other family member, and the adult or other family member provides direct care and supervision. For this reason, DFPS views the change as substantively unnecessary.

Comment: Similarly to previous comments regarding the exceptions contained in the rule text, several commenters raised concerns that because DFPS may grant a waiver or variance to a Minimum Standard, in addition to the exceptions listed in the published rule, child safety could be compromised and there may be a disparate standard for unaccompanied minors compared to those housed with their mothers in the FRCs.

Response: It is true that all GROs, including the FRCs, are potentially eligible for a waiver or variance of a particular standard. However, the issuance of any waiver or variance is guided by published standards and policy and tempered always by the need to protect children.

Waivers and variances are tools to assist child-care providers to comply with standards within a specified period of time, without compromising the safety of children served by the

operation. A waiver or variance is not an entitlement. (See §745.8301 of this title (relating to What if I cannot comply with a specific minimum standard?)). Staff must evaluate the risk to children, along with several other specified variables, before granting approval for a waiver or variance. (See §745.8307 of this title (relating to How does Licensing make the decision to grant or deny my waiver or variance request?)), and Licensing Policy and Procedures Handbook Section 5110 (available at https://www.dfps.state.tx.us/handbooks/Licensing/Files/LPPH_pg_5000.asp#LPPH_5100)). A waiver or variance may not be granted if child safety would be negatively impacted. All waivers and variances, and any conditions placed on the waivers and variances, are time limited, and may be revoked or amended by CCL at any time if appropriate. (See §745.8317 of this title (relating to Can Licensing amend or revoke a waiver or variance, including its conditions?)). When granting a waiver or variance, conditions must be put into place to ensure that children are not at risk. (See §745.8313 of this title (relating to Is a waiver or variance unconditional?)) Such conditions must be easily observable and measurable by CCL staff as well as the caregivers in the facility. Licensing Policy & Procedure Handbook Section 5120 (available at http://www.dfps.state.tx.us/handbooks/Licensing/Files/LPPH_pg_5000.asp#LPPH_5120) Conditions are another way of achieving compliance with minimum standards and reducing risk to children. Conditions must be evaluated during each inspection and during each investigation relevant to the standard and the conditions. *Id.*

(3) Comments Relating to Problems with Detention in General and in the Individual FRCs:

Comment: Several commenters expressed opposition to the proposed rule on the grounds that the FRCs DFPS is seeking to license are not child care centers but rather detention centers designed to house individuals in the custody of ICE during immigration proceedings. Commenters argued that although the children are housed with their mothers, the mothers are stripped of authority to make decisions for their children's well-being. Commenters stated that the centers are similar to prisons in that they are enclosed within tall walls and barbed wire fences; house a large number of individuals rather than adhere to any specific child-to-provider ratio; require the families to submit to badge checks several times a day and pass through electronically locked doors for access to basic areas; limit and monitor access to telephones and computers which are provided to families at a monetary cost; discipline the families through the use of pepper spray and harsh consequences for children's misbehavior; threaten to remove children from mothers for failure to follow rules or if complaints are made; and house unrelated adults and children of different genders together in small non-private spaces. Many commenters further noted that the centers are operated by private prison corporations and staffed by individuals with backgrounds in law enforcement rather than individuals with experience and training in child care. Commenters also noted that simply hiring more staff with a background in law enforcement rather than child care will not change conditions in the FRCs.

Response: In both the rule and this adoption preamble, DFPS has stressed repeatedly that whether the FRC is operated as a detention or secure FRC is outside its purview. However, precisely because it appears that the mothers in the FRCs are divested of some or even all of their parental authority (when separated from their children, for example), DFPS has concluded that the FRCs and their staff are providing child care. The purpose of

licensure is to ensure compliance with the standards for the provision of such care. Those standards, as previously discussed, are robust. Of particular relevance to this question, there are many standards that relate to the appropriate use of discipline and punishment found in Subchapter M of this chapter (relating to Administrative Reviews and Due Process Hearings). There are detailed standards regarding the limited use of Emergency Behavior Intervention (EBI) found in Subchapter N of this chapter (relating to Administrator Licensing).

Next, while it may be true that the FRCs have heretofore hired staff with law enforcement experience, this does not translate inexorably to the same practices continuing in the future, nor does it alter the FRCs' obligation to comply with the child-care related training requirements placed on GROs by Minimum Standards. While the training requirements vary somewhat based on the services provided in a particular GRO, any caregiver at a licensed operation must participate in orientation, pre-service training, and annual training. Orientation gives the caregiver the opportunity to learn about the philosophy, organizational structure, policies, and a description of the services and programs the operation offers, as well as the needs and characteristics of children that the operation serves. Pre-service training focuses on topics relevant to job duties and must include, *inter alia*, content on appropriate discipline; child development; measures to identify, treat, and report suspected abuse, neglect and exploitation; and safety and emergency procedures. See §748.881 of this title (relating to What curriculum components must be included in the general pre-service training?) Each caregiver would be required to receive a minimum of 16 hours of pre-service training in a course led by a qualified instructor. (See §748.863 of this title (relating to What are the pre-service hourly training requirements for caregivers and employees?) and §748.869 of this title (relating to What are the instructor requirements for providing pre-service training?)). It must be competency based and require participants to demonstrate competency upon completion. Each caregiver must complete a minimum of 20 hours of additional training annually, including specific training on EBI if it is used in the facility. (See §748.931 of this title (relating to What are the annual training requirements for caregivers and employees?)). Overall, the comments imply that licensure as a GRO would not change current practice in the FRC, a contention with which, as discussed above, DFPS disagrees.

Comment: Many commenters expressed concern over the risk of psychological harm for children and families residing in the centers. These commenters stated that the risk is particularly acute for immigrants, who have often fled persecution, abuse, and frequent trauma in their homelands. Commenters also asserted that children are especially at risk of developing short and long-term mental health issues due to being detained in the centers. One commenter specifically noted that infants living in detention centers have problems with brain development and social functioning due to disruptions in emotional attachments to their mothers, and children living in detention centers tend to have greater maladaptive social and emotional development, academic failure, and criminal involvement than children not living in detention centers. One commenter noted that the children know they are in detention centers and feel they are being punished, thereby, normalizing the concept of detention and negatively impacting their moral development and understanding of the criminal justice system. Further, commenters stated that many women and children in the centers are exhibiting symptoms of post-traumatic stress disorder, anxiety, depression, and

other mental illnesses, and are not receiving adequate treatment for these issues.

Response: While DFPS is sympathetic to the concerns raised, the agency has no role in whether a person is placed or detained in one of the FRCs. However, so long as children are housed there, and so long as mothers are not permitted to fully exercise their parental responsibility, DFPS considers the FRCs to be providing child care. It is more protective of the children in the FRCs for DFPS to exercise its oversight than to abdicate its responsibility based on the notion that the centers are harmful.

Comment: A number of commenters expressed concern that the living conditions in the centers fail to meet the basic needs of children and families and pose fundamental threats to their health and safety. Commenters' specific concerns included residents' inadequate access to healthy, regular meals and snacks; cold temperatures in the centers and residents' inadequate access to heating or blankets; close living quarters in the centers with a large number of unrelated individuals; unhygienic living conditions; other poor living conditions and inadequate access to education for minors in the centers.

Response: Living conditions, to the extent they are covered by CCL's Minimum Standards for GROs, would be addressed during the licensure process. To the extent the living conditions relate to be the practices of the federal government or its contractors with respect to adults in the FRCs, they are outside DFPS' scope of authority.

Comment: A significant number of commenters expressed concern that residents' health care needs are not being met in the Karnes County and Dilley centers. One commenter noted that the US Commission on Civil Rights found that the Karnes County center failed to comply with federal standards for medical care. Commenters asserted that specific problems at the centers include: failure to administer proper medical protocol; failure of medical staff to obtain informed consent of patients prior to medical treatment; unavailability of doctors when residents are ill; failure to timely treat residents' illnesses; failure to timely refer patients to hospitals when they are critically ill; administration of adult doses of vaccines to children; prescription of solely water or Vick's Vaporub to treat various illnesses, including serious illnesses; lack of follow-up care; unreasonably lengthy waiting times to receive care; and mothers being asked to sign waivers stating they have declined medical care if they leave the medical facility for any reason, despite long waiting times.

Response: DFPS' scope of authority is limited to the provision of medical care to children in the facility, and defers to the expertise of medical professionals in the determination of frequency and mode of treatment. However, Minimum Standards contain requirements specifically geared at ensuring a baseline of adequate medical treatment for children in care.

Generally speaking, an operation must provide medical and dental care to children in the operation. A child in care must receive medical and dental care: (1) initially, upon admission; (2) at as early an age as necessary; (3) as needed for relief of pain and infections (dental) or as needed for injury, illness, and pain (medical); and (4) as needed for ongoing maintenance of dental or medical health. See §748.1501 of this title (relating to What general dental requirements must my operation meet?) and §748.1531 of this title (relating to What general medical requirements must my operation meet?).

A licensed dentist must determine the need and frequency of ongoing maintenance of dental health. (See §748.1503 of this title

(relating to Who must determine the need and frequency of ongoing maintenance of dental health for a child?). A health-care professional must determine the need and frequency for ongoing maintenance of medical care and treatment for a child. (See §748.1533 of this title (relating to Who determines the need and frequency for ongoing maintenance of medical care and treatment for a child?)). The operation must comply with dentist and health-care professional recommendations for examinations and treatment for each child. (See §748.1501(d) and §748.1531(d) of this title). Subchapter J of this chapter (relating to Child Care) contains additional requirements related to various aspects of health care, including immunizations, communicable diseases, and nutrition and hydration, among others. Additional rights for children in care related to treatment are found in Subchapter H of this chapter (relating to Child Rights).

Comment: Several commenters expressed concerns related to issues with the staff at the centers. One commenter expressed concern about the ethical practices of the management of the Karnes County center after her experience as a social worker there. The commenter reported being repeatedly asked to omit written information about residents' mental health needs from reports, to lie to federal immigration officials, and to withhold information from residents about their rights within the center. Other commenters asserted that staff misconduct regarding abuse and sexual assault has not been adequately addressed. In addition, one commenter stated that the centers are not complying with the Prison Rape Elimination Act (PREA) solitary confinement practices, which require that solitary confinement of minors to keep them or other residents safe only be used as a last resort. A few commenters noted that not only are the centers understaffed, but the employees are not qualified or trained to serve the families.

Response: Some of the concerns are outside DFPS' scope, such as extent of compliance with PREA. However, CCL will be implementing and enforcing Minimum Standards that would address some of the concerns regarding staff, at least insofar as they are serving in the role as a caregiver to a child. As previously discussed, Minimum Standards contain relatively extensive training requirements for all caregivers. For any facility that utilizes EBI, the training must include current information on EBI, and DFPS regulations generally require de-escalation and other age-appropriate techniques prior to utilization of any more severe measures. DFPS could not monitor staffing as a general proposition, but would monitor the adequacy of staff for the purposes of child-to-caregiver ratios in place in the FRCs. Minimum Standards also require various measures related to personnel and record keeping. In particular a permit holder must ensure the reporting of serious incidents including suspected abuse, neglect and exploitation. (See §748.105 of this title (relating to What are my operational responsibilities as the permit holder?)). Record keeping must ensure accurate and current child records. (See §748.393 of this title (relating to How must I maintain an active child record?)).

Comment: Several commenters advised that DFPS should take heed and not partake in the historical repetition of using family detention centers that inflict harm upon children and families. Commenters described how the T. Don Hutto Family Detention Center, ICE's first detention center in Texas that opened in 2006 and was operated by the for-profit corporation CCA, became a national and international scandal due to its substandard living quarters, inadequate health care, and inhumane treatment of children. Commenters noted that the American Civil Liberties Union of Texas (ACLU) and the University of Texas Immigration

Law Clinic successfully sued ICE to stop the use of the center for the detainment of immigrant children and families.

Response: DFPS does not influence whether a family or child is placed in an FRC; rather, DFPS is carrying out its duty "to protect the health, safety, and well-being of the children of the state who reside in child-care facilities by establishing statewide minimum standards for their safety and protection and by regulating the facilities through a licensing program" for those children who are placed in the FRC. (See HRC §42.001).

(4) Comments Relating to DFPS' Authority to Investigate Abuse and Neglect Allegations in the Facilities Without Licensure:

Comment: Several commenters opposed licensure, stating that DFPS has statutory authority to investigate abuse and neglect in non-licensed FRCs, and therefore, can already provide regular and comprehensive oversight of the centers without licensure. The commenters stated that DFPS offers no explanation of how licensing and exempting the FRCs from minimum child-care standards will protect the children from abuse and neglect. Furthermore, the commenters asserted that creating exemptions will weaken DFPS' ability to ensure child safety and well-being. One commenter suggested that rather than licensing the FRCs, DFPS should instead appoint an independent medical and psychological team to investigate reports of abuse, neglect, and exploitation in order to monitor and assure the well-being of the detained children.

Response: DFPS has consistently maintained that CPS could investigate reports of abuse or neglect by a parent or caretaker in the FRCs. Conducting abuse or neglect investigations, however, is only one part of regulation. A child abuse or neglect investigation conducted by childcare licensing should be conducted within the scope of the operation's effort to comply with relevant minimum standards.

Significantly, for the purposes of child protection, licensure offers an ongoing avenue to monitor medical care as well as allegations of abuse and neglect and other deficiencies in FRCs. While the commenters were concerned that the only additional authority in the licensure would be to inspect specific licensing requirements, this is in truth a significant enhancement, as detailed herein, and invokes a comprehensive regulatory and protective scheme. Responding to reports of abuse and neglect is reactive, and it assumes that a vulnerable individual has access to a telephone or the Internet to freely make the report. Licensure is comprehensive, ongoing, and gives DFPS the authority to make both announced and unannounced inspections, in addition to investigating individual reports of abuse or neglect. If a staff member is found to have abused or neglected a child there could be implications to the staff member's ability to work in the operation, which would not occur if the facility were not subject to regulation as a child-care facility, specifically as a GRO.

Finally, DFPS lacks authority to appoint an independent medical and psychological team to investigate reports of abuse, neglect and exploitation. The agency itself has the authority to investigate, but cannot without additional statutory authority and resources abdicate this responsibility and grant it instead to an independent group of medical and psychological professionals.

(5) Comments Relating to the *Flores* Settlement:

Comment: Many commenters argued that placing children in the Dilley and Karnes County centers violates the *Flores* settlement, which provides that children in immigration custody be placed in the least restrictive setting appropriate to their age and special

needs, generally, a non-secure FRC licensed to care for dependent, as opposed to delinquent, minors. Commenters argued that the prison-like environments of the FRCs violate *Flores*, and licensing the FRCs with various exceptions will not remedy the violation. One commenter was concerned that the potential licensure of the two FRCs would permit ICE and its private partners to attempt to claim compliance with Judge Gee's July 24, 2015, and August 21, 2015, orders. One commenter noted that the U.S. Commission on Civil Rights conducted an extensive investigation into the FRCs and found that the Department of Homeland Security and its contractors are not holding children in the least restrictive settings. Additionally, one commenter asserted detainment is unnecessary because the majority of the families at the FRCs have already demonstrated credible fear to an asylum officer, do not pose a threat to public safety, and have relatives in the United States to house them while they await a hearing.

Response: DFPS has repeatedly emphasized that its role with respect to the two FRCs currently in Texas is to oversee the care of the children who are housed with their mothers or family members there, not to determine whether the facility is secure. DFPS has no control over whether individuals are placed in the FRCs, and any outcome in the litigation is a matter outside the scope of DFPS' purview.

(6) Comment Concerning DFPS' Overall Authority to License the FRCs:

Comment: One commenter argued that DFPS' regulation of FRCs was unlawful and without authority because the FRCs violate state laws regarding the detention of juveniles. The commenter argued that the Texas Family Code offers a "robust series of statutes that specifically prohibit, and even criminalize placement of certain children in secure detention facilities." The commenter documented reasons why the FRCs should be considered secure detention facilities, including the use of techniques such as isolation as punishment, the existence of high walls, restrictions on movement, and so forth. The commenter then argued that because they are secure detention facilities where children are held, the FRCs, and any licensure of those FRCs, violates Texas laws regarding juvenile offenders. Specifically, the commenter asserts both that DFPS lacks statutory authority for and that DFPS is explicitly banned from licensure of the FRCs, though for the latter point no particular authority is cited. The rule, per the commenter, is without legal authority because children in the FRCs may be detained beyond statutory time frames and in contravention of other restrictions in Chapter 51 of the Texas Family Code (TFC), and because the children are never adjudicated in front of a Texas juvenile court but are being housed to enforce deportation laws, in contravention of TFC §54.011(f). Further, the commenter suggested that DFPS' licensure effectively aids in the commission of a Class B misdemeanor under the same statutory provision of TFC §54.011. The commenter explained that Texas juvenile detention laws prohibit the secure detention of children under the age of ten. Finally, after arguing that DFPS has no authority to regulate the centers as child-care facilities, the commenter concluded that DFPS was obligated to immediately order the FRCs to cease operation because they have been operating without such a license for more than one year pursuant to CCL's enabling chapter.

Response: The commenter's arguments related to the TFC are misplaced. As noted in materials attached by the commenter, the chapters of the TFC in question relate to facilities operated

by or on behalf of the Texas Juvenile Justice Department or on behalf of a juvenile board in the state of Texas. They do not govern federal facilities, including the FRCs under discussion in this rule promulgation. To the commenter's point that DFPS should immediately order the FRCs to cease operation as unlicensed facilities, DFPS has not previously issued regulatory guidance regarding the FRCs' status and to take enforcement action against the operators of the FRCs would in all likelihood violate the Administrative Procedure Act, Chapter 2001 of the Texas Government Code, in addition to being patently unjust. DFPS declines to take any such action on the basis of a previously nonexistent regulatory pronouncement.

(7) Comments Relating to the Proposed Rule Being Contrary to DFPS' mission:

Comment: A significant number of commenters argued that the proposed rule is at odds with DFPS' mission to protect children and families from abuse, neglect, and exploitation. These commenters expressed concern over the FRCs' ability to provide for the safety and well-being of children when the FRCs were created to detain immigrants under federal immigration law and are managed by privately-owned prison companies under contract with ICE. A few commenters called DFPS' integrity into question, asserting that the decision to license these FRCs is not motivated by concern for the children because licensing would not address or solve the problem of family detention. Specifically, one commenter argued that the rule does not have the best interests of children in mind, but rather exists only because these FRCs were determined to be outside of compliance by the court system. Additionally, many commenters argued that if DFPS truly wanted to hold these FRCs accountable for the well-being of children, DFPS would have responded to the numerous complaints received and investigated the FRCs under current authority.

Response: DFPS has concluded that licensure of the FRCs is mandated and consistent with its mission to protect vulnerable children in care. DFPS views the licensure process as a tool to enhance the FRCs' ability to provide for the children's safety and well-being. DFPS seeks not to solve the problem of family detention, but rather to provide protective oversight for children who find themselves in the FRCs. Finally, based on careful and ongoing review of the issues over the course of time, DFPS' position has evolved and culminated in the regulatory action contained herein.

(8) Comments Relating to the Fiscal Implications of the Proposed Rule:

Comment: A few commenters noted that the Child Care Licensing Division of DFPS already has limited resources so licensing two large facilities would have negative fiscal implications and involve a drain on other crucial agency resources. One commenter expressed concern over DFPS' estimate that the rule will have no fiscal impact upon the agency, questioning how DFPS would provide the essential protection of regular and comprehensive oversight to the centers without a budget. Additionally, the commenter expressed concern for the lack of budget line items for psychiatrists, psychologists, or counselors in the private operators' budget of \$32 million a year for both centers. Additionally, a few commenters noted that there are other established alternatives that could address the government's legitimate interests in managing immigration and ensuring child safety without inflicting further trauma on the families and at a lower financial cost.

Response: DFPS has concluded that it can absorb the workload associated with the rule within current resources, at least during the first five years following the rule's effective date. One of the FRCs submitted commentary that DFPS' fiscal estimates were too low, as discussed herein. DFPS believes its estimates are sound. Ultimately, the FRCs will assess the true costs of compliance to them and engage in the requisite cost-benefit balance analysis to determine how to proceed. Alternatives to the federal government's current immigration practice are outside the scope of this rule and DFPS' authority.

(9) Comments Relating to the Berks County Residential Center in Leesport, Pennsylvania:

Comment: Two commenters noted that the Pennsylvania Department of Human Services has publicly stated that it will refuse to renew the license of Berks County Residential Center, an ICE family detention center in Pennsylvania housing immigrant children and families similar to the Karnes County and Dilley centers, if the practice of using the facility as a secure family detention center continues because such practice is inconsistent with its current license as a child residential facility. The commenters urged DFPS to follow suit and refuse to license the Karnes County and Dilley centers.

Response: DFPS respects Pennsylvania's interpretation of its licensing laws and regulations. For the purposes of Texas law, DFPS has determined that the oversight inherent in licensure better serves the aims of child protection than the lack thereof.

(10) Comments Relating to the City of Dilley's Lack of Infrastructure to Support the Dilley Center:

Comment: One commenter opposed the rule, not due to the rule itself, but because the city of Dilley, with a population of only 3,894 residents, does not possess the infrastructure to support a large detention center. The commenter noted that water has cut out several times for the entire city since the Dilley center opened, and the center has had to call the city's emergency services for other unrelated incidents rather than being able to resolve such issues internally.

Response: DFPS would make basic assessments regarding the physical site as part of the licensure process. An assessment of the city's infrastructure would be beyond DFPS' authority, which would focus on the adequacy of the facility and its utilities vis-à-vis the provision of child care.

(11) Comments of Reasons for Adoption:

Comment: DFPS received two requests for a written, detailed rationale of the reasons for its adoption, or non-adoption, of the rule in question.

Response: While no particular authority was cited, DFPS will err on the side of maximum transparency and construe the requests to be requests for a statement of reasons for or against adoption pursuant to Texas Government Code §2001.030. Again, in the interest of maximum transparency, DFPS will include the statement in this preamble, though such inclusion is not required by the Government Code.

The principal reasons urged against the adoption of the rule may be summarized by reference to themes 2-10 detailed in the comments and response section. DFPS' reasoning for overruling the considerations and adopting the rule is discussed in detail in the summary section as well. It may be summarized by reiterating that the agency has concluded the broad regulatory scheme in

place for GROs will be more protective of children than taking no action regarding the provision of child care without a license.

Section 748.7 is being adopted with change. DFPS staff made modifications to subsection (c), paragraphs (1), (2), (3), and subsection (d) to clarify the extent of and reasons for the variances.

The new section is adopted under §40.0505, Human Resources Code, and §531.0055, Government Code, which provide that the Health and Human Services Executive Commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including the Department of Family and Protective Services.

The new section implements §42.042(a), Human Resources Code.

§748.7. How are these regulations applied to family residential centers?

(a) Definition. A family residential center is one that meets all of the following requirements:

(1) The center is operated by or under a contract with United States Immigration and Customs Enforcement;

(2) The center is operated to enforce federal immigration laws;

(3) Each child at the center is detained with a parent or other adult family member, who remains with the child at the center; and

(4) A parent or family member with a child provides the direct care for the child except for specific circumstances when the child is cared for directly by the center or another adult in the custody of the center.

(b) Classification. A family residential center is a general residential operation (GRO) and must comply with all associated requirements for GROs, unless the family residential center is approved for an individual waiver or variance or an exception is provided in this section. The department is responsible for regulating the provision of childcare as authorized by Chapters 40 and 42, Texas Human Resources Code and Chapter 261, Texas Human Resources Code. The department does not oversee requirements that pertain to other law, including whether the facilities are classified as secure or in compliance with any operable settlement agreements or other state or federal restrictions.

(c) Exceptions. A family residential center is not required to comply with all terms of the following Minimum Standards:

(1) the limitation of room occupants to four in §748.3357 of this title (relating to What are the requirements for floor space in a bedroom used by a child?), except that nothing in this exception shall be construed to require fewer than 60 square feet per child;

(2) the limitation on a child sharing a bedroom with an adult in §748.3361 of this title (relating to May a child in care share a bedroom with an adult?), if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member; and

(3) the limitations on children of the opposite gender sharing a room in §748.3363 of this title (relating to May children of opposite genders share a bedroom?), except that nothing in this exception shall be construed to permit children from different families who are over the age of six and members of the opposite gender to share a bedroom.

(d) Limitation of exception. Notwithstanding subsection (c) of this section, and as further described in §745.8313 of this title (relating to Is a waiver or variance unconditional?), the department retains the authority for placing conditions on the scope of the exceptions authorized for a family residential center, including conditions related to limiting occupancy in accordance with fire safety standards, limitations related to allowing children and adults of the opposite gender to occupy the same room only if they are part of the same family, and any other limitation determined by the department to be necessary to the health, safety, or welfare of children in care.

(e) Division of responsibility. In addition to the application materials described in §745.243(6) of this title (relating to What does a completed application for a permit include?), an applicant for a license under this section must submit the policies, procedures, and any other documentation that the department deems necessary to clarify the division of supervisory and caretaking responsibility between employees of the facility and the parents and other adult family members who are housed with the children. The department must approve the documentation during the application process and any subsequent amendments to the policies and procedures.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 438-3854

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