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IN THE COURT OF APPEALS FOR THE EIGHTH DISTRICT

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8th COURT OF APPEALS
EL PASO, TEXAS
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DENISE PACHECO
Clerk

TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, *et al.*,
Appellants,

v.

GRASSROOTS LEADERSHIP, INC., *et al.*,
Appellees.

On Appeal from Cause No. D-1-GN-15-004336
In the 250th District Court of Travis County, Texas

BRIEF OF APPELLANT CORECIVIC

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

Nature of the Case: This is an administrative rule challenge. Appellees challenged the Texas Department of Family Protective Services' ("DFPS") authority to issue a new rule, 40 TEX. ADMIN. CODE § 748.7, regarding the licensing of family residential centers ("FRCs"). The FRCs are run by intervenors CoreCivic and The GEO Group under contract with the federal government to house immigrant women and children awaiting asylum proceedings. As explained in its adopting order, 41 TEX. REG. 1493 (Feb. 26, 2016), DFPS determined that it had jurisdiction and the necessity to monitor and regulate the FRCs because the facilities provided around-the-clock care. DFPS adopted Rule 748.7 to license and regulate the FRCs in the same manner that it regulates other 24-hour child-care facilities, general residential operations ("GROs"), with limited exemptions. Appellees dispute DFPS's authority to issue Rule 748.7 and to license the FRCs.

Trial Court: 250th District Court, Travis County, Texas
The Honorable Karin Crump, presiding.

Trial Court Disposition: On cross-motions for summary judgment, the trial court entered an amended final judgment that declared Rule 748.7 invalid and enjoined DFPS from licensing the FRCs, holding that Rule 748.7 "contravenes" the statutory definition of GROs and "runs counter to the general objectives of the Texas Human Resources Code" (the enabling statutes for DFPS to pass such Rules). However, the trial court also found that DFPS's regulation and oversight of the FRCs was "in the best interest of the children" and, thus, issued a permanent injunction ordering the DFPS to regulate the FRCs as it does with licensed facilities to "preserve the *status quo*" during the pendency of this appeal, albeit without a license. (CR 4210-4217).

STATEMENT REGARDING ORAL ARGUMENT

Appellant CoreCivic (formerly known as Corrections Corporation of America) respectfully requests an opportunity to present oral argument. Oral argument will help bring clarity to the governing law, proper standard of review, and Appellant's issues; and it will expedite the Court's resolution of the case.

ISSUES PRESENTED

1. Whether the trial court may substitute its own policy preferences about the methods of care for children provided at the family residential centers ("FRCs") in the place of the DFPS's expertise and policy determinations.

2. Whether the DFPS was within its broad grant of regulatory authority to "ensure the protection of all children . . . through a licensing program" in issuing Rule 748.7 with limited exemptions related to the number of occupants in a room and family members sharing a bedroom.

3. Whether the DFPS reasonably determined that the FRCs qualify as general residential operation ("GRO") child-care facilities by providing 24-hour personal safety, shelter, food, clothing, hygiene, medical care, education, access to legal services and technology, and orderly daily activity management.

STATEMENT OF FACTS

I. An unprecedented surge of immigrants crossed the Texas border in 2014-2016.

In 1993, the United States Supreme Court recognized that a surge in the apprehension of "more than 8,500" alien minors represented a "problem" and that the problem "is a serious one." *Reno v. Flores*, 507 U.S. 292, 294 (1993). Recently, the Southwest border has experienced a surge of immigrant family units (women and children) that far eclipses this threshold.

During the spring and summer of 2014, the already-escalating numbers of apprehensions of family units along the Southwest border surged to over 10,000 family units per month in May and June 2014.[1] Similarly, during the first three months of fiscal year 2016, the numbers again increased significantly, with family unit apprehensions rising by 152% when compared to the same three months in fiscal year 2014 and rising by 187% when compared to the same three months in fiscal year 2015.[2] In the first quarter of 2016, 21,469 family units were apprehended at the Southern border.[3]

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[1] *See* United States Border Patrol, *Total Monthly Family Unit Apprehensions by Month* (FY 2013-FY 2016), *available at*, https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY16.pdf.

[2] *See* United States Border Patrol, Southwest Border Apprehensions, Family Unit Subjects (FY 2012 – FY 2016), *available at*: https://www.cbp.gov/sites/default/files/family-unit-apps-sept-20161017_0.jpg; *see also* https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.

[3] *Id*.

A. Federal officials decide to house mothers and children together in Family Residential Centers (FRCs).

In response to this unprecedented surge, the U.S. Department of Homeland Security, through Immigration and Customs Enforcement ("ICE"), initiated a number of steps in 2014 and 2015. Among those steps was the opening and operation of FRCs to detain accompanied minors and their mothers. This included ICE opening the Dilley, Texas FRC in December 2014. (*See* CR 1944, ¶ 17.) CoreCivic (formerly known as Corrections Corporation of America)[4] operates the Dilley FRC under contract with and on behalf of ICE. (CR 1953-2012.) The GEO Group, Inc. ("GEO") also operates an FRC, the Karnes Family Residential Center in Karnes City, Texas.

The FRCs enable ICE to use the immigration enforcement tools created by Congress—including expedited removal and detention authority and, where appropriate, removal of family units who cannot demonstrate a claim of asylum. (CR 1940–1941, ¶¶ 8-9.) The FRCs allow ICE to respond to the ever-changing trends in immigrant populations crossing the border and to ensure compliance with the obligation to appear at immigration proceedings and for removal. (*See id.*)

[4] Corrections Corporation of America announced its rebranding as CoreCivic on October 28, 2016.

B. The FRCs provide 24-hour care as the residents await asylum proceedings.

The FRCs are designed to house minor children with their mothers in a safe, residential setting that maintains them in custody while allowing the family to remain together as ICE follows its identification and processing procedures. The FRCs have a number of features that provide for the needs of residents, including living quarters, common areas, libraries, classrooms, computer rooms, video game rooms, outdoor and indoor exercise and recreational facilities, medical care facilities, and dining areas. (*See* CR 2013–2052, ¶¶ 15-23; CR 1945-1946, ¶ 20; CR 2063–2072.)

At ICE's FRC in Dilley, CoreCivic provides temporary residential shelter care and other related services to families in ICE's custody. ICE determines the family groups that are eligible for the services and controls all receiving and discharging at the facility. (CR 1953-2012.) ICE has stationed a supervisor at the facility who is in charge of the facility, and ICE monitors all technical day-to-day aspects of the facility. (CR 2079-2081.) ICE has provided CoreCivic with a set of policies and standards governing the requirements for care and treatment of the residents in the Dilley FRC. (CR 1953-2012.) The family services at the facility include medical care, education, recreation, life skills, study period, counseling, group interaction, free time, access to legal services, and access to space for religious services. *Id*.

As described by ICE's Unit Chief of Juvenile and Family and Residential Management:

> [The FRC] is designed as an open planned community with freestanding, multiple-family housing units located adjacent to school, library, dining and health facilities . . . . A typical [FRC] housing unit consists of two bedrooms of four family beds each . . . . Each housing unit contains its own family room featuring a sitting area, a flat-screen television and telephone. Each unit contains a kitchenette with a refrigerator of beverages and snacks that is re-stocked twice per day . . . . [The FRC] contains open recreational areas for sports and play areas for younger children . . . . [The FRC] provides education by state-licensed bilingual teachers to all school-age children . . . [and] features seven (7) classrooms with a class ratio of one teacher to twenty students . . . . [The FRC] features both recreational and law libraries for residents. There is a dedicated computer lab/internet café at the library.

(CR 2013-2052, ¶¶ 15-23.)

ICE has Family Residential Standards ("FRS") that govern all aspects of care and custody at family residential centers. (CR 2091, ¶ 17.) The ICE Enforcement and Removal Operations' Juvenile and Family Residential Management Unit oversees the FRCs and ensures compliance with ICE's Family Residential Standards. (*See id.,* ¶ 19.) The FRCs are also subject to inspections by the ICE Office for Professional Responsibility's Office of Detention Oversight, the DHS Office for Civil Rights and Civil Liberties, and an independent compliance inspector. (*See id*.)

II. DFPS determines it must regulate, and thus license, the FRCs.

Because the FRC's are on Texas soil, DFPS inspected the FRCs and determined that the care being provided at the FRCs fell within DFPS's purview. (CR 1812-1821, 2097-2102, 2106.) For example, DFPS learned that the FRCs provided 24-hour care, including providing all shelter, meals (including any special dietary or allergy needs), clothing, and medical attention. *Id.* DFPS also learned that the mothers did not always have exclusive or direct decision-making capacity for their children's care and were not always with the children, sometimes being separated for over 24 hours due to medical or legal situations. *Id.*

Thus, in September 2015, DFPS published an emergency rule to regulate, and thus license, the FRCs under DFPS's licensing program. *See* 40 TEX. REG. 6229. The emergency rule implemented TEX. HUM. RES. CODE § 42.042(a), which authorizes the DFPS to regulate and license a variety of facilities, homes, and agencies that provide services to minors. Thereafter, DFPS sought and received public input following statutory procedures for non-emergency rules and held a public hearing. *See* TEX. GOV'T CODE § 2001.029; Appx. B, 41 TEX. REG. 1493 (Feb. 26, 2016). DFPS then issued a final rule with its reasoned justification for enacting it on February 26, 2016. *See* Appx. B. The final rule appears at 40 TEX. ADMIN. CODE § 748.7.

Rule 748.7 implements standards for the child-care licensing at the FRCs. The Rule states that the FRCs are to be regulated like other 24-hour child-care facilities, general residential operations ("GROs"), with limited exemptions. *Id.* By incorporating the GRO minimum standards, the Rule applies hundreds of minimum standards specific to GROs under 40 TEX. ADMIN. CH. 748 as well as the hundreds of licensing regulations under 40 TEX. ADMIN. CH. 745.

In order to permit children to remain with their mothers in the FRCs, subsection (c) of Rule 748.7 contains three exemptions from the hundreds of GRO standards concerning the number of occupants in a room and family members sharing a bedroom. *See* 40 TEX. ADMIN. CODE § 748.7(c). DFPS determined that these exemptions for these particular facilities correctly "strike a balance between family preservation within the current facility and the paramount concern of child safety." (Appx. B, 41 TEX. REG. 1493.) Still, as with any exemption granted under DFPS's regulatory scheme, the "exception is not unfettered, and DFPS may place conditions on it appropriate to the circumstances." *Id.*; *see also* 40 TEX. ADMIN. CODE §§ 748.7(d), 745.8313.

III. Appellees contradict prior positions and file this lawsuit to oppose DFPS's licensure of the FRCs.

Appellees filed this lawsuit on September 30, 2015, challenging DFPS's authority to issue Rule 748.7. Appellee and lead plaintiff Grassroots Leadership, Inc. ("Grassroots") is a political organization whose "core mission and

goals" is to "end for-profit incarceration." (*See* CR 3015-3016.)[5] The other Appellees are a daycare owner 500 miles from the FRCs and former residents of the FRCs, some of whom were parties to parallel litigation in California.

A. Previously, Appellees requested licensure of the FRCs in a California lawsuit.

In 1997, the United States District Court for the Central District of California entered a Stipulated Settlement Agreement in a class action lawsuit – *Flores v. Lynch* – that requires those defendants to not detain class members in "unlicensed" facilities. (*See* Jan. 17, 1997 Stipulated Settlement Agreement in No. 85-cv-4544 in the C.D. Cal.) At the time the Stipulated Settlement Agreement was executed, the concept of an FRC did not exist – the Dilley FRC would not open for almost 18 years.

Importantly, many of the Appellees in this lawsuit are parties to the *Flores* litigation in California. (*See* CR 1143, ¶ 57) ("The eleven minor Plaintiffs listed in the caption of this petition are class members in the *Flores* federal litigation."). While this Texas lawsuit has been ongoing, those Appellees have filed Motions to Enforce the *Flores* court orders, which included remedies concerning the licensing requirements in the *Flores* orders. (*See, e.g.,* Doc. # 100, 197, 201, 239 in No. 2:85-CV-04544 in the C.D. Cal.) Additionally, Appellees' lead trial counsel in this Texas lawsuit filed a sworn affidavit in the *Flores* lawsuit in California in support

[5] *See also* http://grassrootsleadership.org/mission.html

of those Motions to Enforce the *Flores* licensing requirements. (*See* Doc. # 197-2 Ex. 18, 202-2 Ex. 18 in No. 2:85-CV-04544 in the C.D. Cal.)

In the 1997 *Flores* "Stipulated Settlement Agreement" in California, Appellees agreed that ICE "shall make reasonable efforts to provide licensed placements in those geographical areas where the majority of minors are apprehended, such as . . . southeast Texas" and "that the INS [now ICE] shall continue to house the general population in [ICE] custody in facilities that are licensed for the care of dependent minors." (Jan. 17, 1997 Stipulated Settlement Agreement in No. No. 85-cv-4544 in the C.D. Cal ¶¶ 6, 40.)

Thereafter, in the recent *Flores* litigation in California, Appellees filed a "Motion to Enforce Settlement" and cited the declaration of Appellees' lead trial counsel in this Texas litigation for the proposition that "[t]he detention facilities are also not licensed as required by the Settlement" and "[t]he Settlement further requires that children not released pursuant to [the Settlement] be placed in a licensed program provided for by ICE." (*See id.* at Doc # 197 p. 16, 27 n.23). Appellees' trial counsel argued at the Motion to Enforce hearing in California: "That's the whole purpose of the settlement. And to keep them in properly licensed facilities." (*Id*. at Doc #147 p. 37.)

B. Conversely, Appellees oppose licensure in this Texas lawsuit.

While Appellees were seeking to enforce the licensing requirement in the California litigation, in this Texas litigation, these same Appellees and the same trial counsel seek "temporary and permanent injunctions prohibiting issuance of any further licenses under the FRC Rule, and invalidating all licenses issued under the FRC Rule, including the April 29, 2016 license issued to GEO for operation of the Karnes facility . . . ." (*See* CR 1141, ¶ 48.)

Thus, in the California litigation, Appellees and their counsel *demand* that the FRCs be licensed in Texas. However, in this Texas litigation, Appellees are *preventing* DFPS from exercising its licensing authority over the FRCs. In other words, Appellees allege that the settlement in the *Flores* lawsuit *requires* that the FRCs be licensed by the State; but through this lawsuit, Appellees conversely seek to *prevent* the State from issuing a license to the FRCs.

C. None of the Appellees reside at these FRCs.

It is undisputed that Appellees Grassroots and Gloria Valenzuela were never residents at the FRC. Grassroots is a political organization and Valenzuela is a day-care operator for a small daycare (not a 24-hour GRO) that is located over 500 miles away from either FRC. (CR 1143-1144, ¶ 59; CR 2112-2113; CR 2059-2060.) The remaining former residents of the FRCs are no longer at the FRCs. In fact, they have *all* been released in the U.S. (*See* CR 2082; CR 2096.)

IV. The trial court orders DFPS to regulate the FRCs without a license.

On cross-motions for summary judgment, the trial court entered an Amended Final Judgment that declared administrative Rule 748.7 invalid and enjoined DFPS from licensing the FRCs, holding that Rule 748.7 "contravenes" the statutory definition of GROs and "runs counter to the general objectives of the Texas Human Resources Code." However, the trial court also found that DFPS's regulation and oversight of the FRCs was "in the best interest of the children" and, thus, issued a permanent injunction ordering the DFPS to regulate the FRCs as it does with licensed facilities, albeit without a license, to "preserve the status quo" during the pendency of this appeal. (CR 4210-4217.)

SUMMARY OF THE ARGUMENT

Appellees do not have standing to bring this administrative rule challenge. None of Appellees reside at the FRCs. Grassroots is a political organization that "fights to end for-profit incarceration," Ms. Alvarez owns a daycare 500 miles away from the FRCs, and all of the former residents have been released. Accordingly, no Appellee has standing to challenge the Rule.

DFPS properly issued Rule 748.7 under its broad rule-making authority. Because it is "the policy of the state to ensure the protection of all children under care in child-care facilities," the Legislature mandated that DFPS regulate all child-care facilities in Texas "through a licensing program" and issue minimum

standards under which licensed facilities must operate. TEX. HUM RES. CODE §§ 42.001, 42.042(a). Here, the FRCs provide comprehensive, 24-hour care for the children at the FRCs, making them a GRO child-care facility that must be licensed by DFPS. By issuing Rule 748.7, DFPS made clear that the FRCs would be subject to hundreds of GRO child-care standards under 40 TEX. ADMIN. CODE Ch.745 and 748 once the FRCs were licensed.

Because every facility is different, Texas law provides mechanisms for DFPS to grant exemptions to the child-care standards that DFPS issues (not the Legislature). *See* TEX. HUM. RES. CODE § 42.048(c); 40 TEX. ADMIN. CODE §§ 745.8301-.8319. Here, DFPS allowed exemptions from just three of the hundreds of GRO standards so that children could remain with their mothers at the FRCs during the night. Still, even those three exemptions are "not unfettered" and DFPS may very well impose additional conditions on the exemptions and "any other limitation" on the FRCs if DFPS deems them necessary. *See* 40 TEX. ADMIN. CODE §§ 748.7(d); 745.8313.

The trial court correctly held that "DFPS has legislative authority to issue a license to Dilley as a general residential operation (GRO)" and that DFPS's regulation and oversight of the FRCs was "in the best interest of the children." (CR 4216.) However, the trial court incorrectly held that Rule 748.7 "contravened" the definition of a GRO and "runs counter to the general objectives of the Texas

Human Resources Code." (CR 4214.) In so holding, the trial court erred in four ways:

(1) The Rule does nothing to "contravene" the definition of a GRO. Rather, the Rule embraces the GRO definition and simply notes that the FRCs' provision of 24-hour child-care qualifies them as GROs.

(2) The trial court incorrectly held that DFPS was not permitted to grant the three limited exemptions allowing children to remain with their mothers because, in the trial court's words, the three exempted standards were "legislatively mandated." This is incorrect. The Legislature did not mandate any particular standards concerning bedroom occupancy and, instead, delegated that policy-making to DFPS. Thus, DFPS was well within its authority to grant such exemptions, as it often does to meet a particular facility's situation.

(3) By ordering DFPS to regulate the FRCs without a license, the trial court violated the statutory scheme for child-care facility regulation, which the Legislature mandated occur "through a licensing program." TEX. HUM. RES. CODE § 42.001. Indeed, the trial court ordered DFPS to regulate the facilities "with the minimum standards required by the State" (Appx. A, CR 4216), but those very standards only apply to "licensed" facilities. TEX. HUM. RES. CODE § 42.042(e).

(4) By substituting its own policy preferences concerning the wisdom of the three exemptions in Rule 748.7(c) and the duration that residents remain at the

FRCs, the trial court improperly usurped DFPS's Executive Branch authority in violation of Texas' strict adherence to separation of powers and the trial court's limited jurisdiction in an administrative rule challenge. Further, in its attempt to write Executive Branch policy, the trial court's Amended Final Judgment results in bad policy, as it would separate children from their mothers and leave the FRCs and their residents without the DFPS's expertise, oversight, and protection.

ARGUMENT

I. Appellees lack standing.

The Court should dismiss this action without reaching the merits because each of the Appellees lacks standing to bring this lawsuit.

Appellees bring their lawsuit under the Texas Administrative Procedures Act ("APA"). A plaintiff may bring an APA action if "the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff." TEX. GOV'T CODE § 2001.038. To have standing, Appellees 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. dism'd).

A. Grassroots' political agenda does not give it standing.

Grassroots' political position is that the federal government's immigration policy decision to use the FRCs is in contrast to Grassroots' "core mission and goals" and "frustrates [its] ability to – to advocate for [its] goals" to "end for-profit

incarceration." (CR 3015-3016, pp. 8-9.)[6] However, a state court judicial forum is no place to determine federal immigration policy.

Grassroots also disagrees with the policy decisions made by an agency of the Executive Branch of the State of Texas, the DFPS, in determining its role in the protection and care of children at the FRCs. However, an administrative rule challenge in the Judicial Branch is not a means to determine the Executive Branch's policies or achieve a political outcome. While Grassroots disagrees with the Executive Branch's policy decisions concerning what it describes as an "enormous current public interest, controversy, and political sensitivity" (CR 3035), this lawsuit is an improper means to enact or alter that public policy.

Grassroots argues that it has been harmed because it advocates for immigration reform and because (1) it has dedicated resources to implement change regarding the FRCs and (2) DFPS's licensing efforts have purportedly caused Grassroots to divert volunteer and financial resources from its other work. (*See* CR 1142, ¶ 54.) Thus, Grassroots essentially argues that it is "harmed" by its own choice to engage in political advocacy to further its stated mission of eliminating the entire private prison industry and any form of family detention. (CR 2095; CR 2105.)[7]

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[6] *See also* http://grassrootsleadership.org/mission.html.

[7] http://grassrootsleadership.org/mission.html ("Grassroots Leadership fights to end for-profit incarceration….")

This argument is also far too attenuated to constitute legal standing; Grassroots' choice to engage in political activities is not a concrete injury resulting from the DFPS's rule. *See Balquinta*, 429 S.W.3d at 739. Grassroots has suffered no injury. Instead, the existence of the FRCs merely frustrates Grassroots' broader political mission and purpose, which is not actionable.

B. Ms. Valenzuela's daycare is not affected by Rule 748.7.

To have standing, a plaintiff must have a concrete injury resulting from the DFPS's rule. *Balquinta*, 429 S.W.3d at 739. Here, Appellee Gloria Valenzuela is a day-care operator in El Paso, Texas. (CR 1131-1345, ¶ 59.) Ms. Valenzuela has a completely different type of license than the GRO license sought by CoreCivic and GEO. (CR 2112-2113; CR 2059-2060.) Instead, she holds a DFPS license to operate a small daycare facility (not a 24-hour GRO with hundreds of residents). (*Id.*; *see* CR 1131-1345, ¶ 59.)

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. *Id*. However, Ms. Valenzuela has never been detained at one of the facilities, and she does not operate an ICE detention center or any other FRC. Her daycare is located approximately 607 miles from the Karnes FRC and 564 miles from the Dilley FRC. Further, the Karnes FRC has been licensed the entirety of the pendency of

this action, but Ms. Valenzuela has not identified any actual harm resulting from the Karnes license. Thus, Ms. Valenzuela has no legal standing to bring a rule challenge to Rule 748.7.

C. Any controversy with the former residents is now moot.

1. There is no evidence that DFPS regulation harms the Appellees.

Here, Appellees have no injury caused by the extra protections afforded by DFPS regulation. Again, while Appellees may disagree with *federal immigration policy*, there is no evidence that any harm occurred (or will occur) from *DFPS regulation*. Further, there is certainly no evidence that having *more* regulation by the experts in the care of children (DFPS) would result in more harm than if the Court were to prevent such oversight, inspections, and regulation.

Importantly, the only relief requested by Appellees is to prevent DFPS from regulating the FRCs. Thus, to meet their burden, Appellees must show that the regulation itself – not federal immigration policy or site conditions – is what would result in harm to Appellees. Therefore, yet again, Appellees' counterintuitive claims are exposed. Appellees have no evidence and no argument that having more DFPS regulation, inspections, and oversight would *increase* harm to the children at the FRCs, let alone to these Appellees that have already left (in the case of the former residents) or have never been there (in the case of Grassroots and Ms.

Valenzuela). Accordingly, because Appellees cannot show harm from DFPS regulation of the FRCs, they have no standing.

2. If Appellees ever had standing, any controversy is now moot.

Any controversy between the former resident Appellees and the Appellants is now moot. "[A]n actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation." *Kingdomware Techs., Inc. v. United States*, __ U.S. __, 195 L. Ed. 2d 334, 343 (2016). Here, it is undisputed that the former resident Appellees are no longer at the FRCs, and it is undisputed that Grassroots and Ms. Valenzuela were never there. (CR 1131-1345; CR 2082; CR 2096.) Because none of the Appellees are at the FRCs any longer, a controversy no longer exists. Whether or not the trial court issued its findings concerning the exemptions in Rule 748.7(c) or the duration that residents remain at the FRCs had no affect these Appellees, which means they would have no cognizable harm without such rulings. Accordingly, any potential controversy is now moot, and Appellees thus have no standing.

3. The challenged action cannot occur again between these parties.

While there is an exception to the mootness doctrine for a controversy that is "capable of repetition, yet evading review," "[t]hat exception applies only in exceptional situations, where (1) the challenged action [is] in its duration too short

to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that *the same complaining party* [will] be subject to the same action again." *Id*. (internal quotations and citations omitted) (emphasis added).

Here, the capable-of-repetition exception does not apply because the same action is not likely to recur in future controversies between the *same* parties, as required for the exception to apply. *Id*. at 343-344. Indeed, once a former resident appellee leaves one of the facilities, which occurs in a short period of time, there is no evidence that any of these former resident Appellees is likely to return to the FRCs. Thus, there is no reasonable expectation that the same complaining party will be subject to the same action. For this reason, any controversy that may have existed between the former resident Appellees and the Appellants is moot and should be dismissed on that basis.

D. Appellees' attempt at procedural "gotcha" does not provide them standing.

This lawsuit is a shell game under the guise of a rule challenge. In California, some of these same Appellees and their counsel have obtained Court orders that purportedly *require* ICE to obtain state licenses for its FRCs. However, in Texas, these same Appellees and counsel are fighting *against* the FRCs' attempts to obtain the very licenses the Appellees told the California Court are vitally necessary. Thus, while in California they argue that the State *must* license the FRCs. But in Texas, they argue that the State *cannot* license the FRCs.

This lawsuit is simply an attempt to put the FRCs in a game of "gotcha": first, obtain a Court order in California that a license must be issued, then obtain a Court order in Texas that a license cannot be issued, and thus manufacture the FRC's inability to comply with the very Court orders that these Appellees and counsel requested in California.

This is about the political agenda of Grassroots, not child welfare. If this were really about the welfare of children at the FRCs, Appellees would be demanding the involvement of the sole agency charged with protecting the welfare of children in the State of Texas –DFPS – not opposing it. While Grassroots does not like the policy reasons for the Rule adopted by DFPS (a member of the Executive Branch), it provides this Court (a member of the Judicial Branch) with no basis for Appellees' standing to challenge DFPS's policy determination.

Accordingly, because the Appellees lack standing, this Court should reverse the trial court's judgment without reaching the merits.

II. Standard of Review – Validity, Not Policy

Under TEX. GOV'T CODE § 2001.038, a party may obtain a declaratory judgment concerning the "validity" of an agency's rule. The test for a validity challenge is whether the rule is contrary to the relevant statute authorizing the rule. *Office of Pub. Util. Counsel*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004, pet. denied). A rule can be declared invalid only if the rule: (1) contravenes specific

statutory language; (2) runs counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *Id.* The court is required to "presume that an agency rule is valid, and the challenging party bears the burden to demonstrate its invalidity." *Gulf Coast Coal. of Cities v. PUC*, 161 S.W.3d 706, 712 (Tex. App.—Austin 2005, no pet.).

Importantly, however, Texas recognizes a strict separation of powers among the branches of government. *State v. Rhine*, 297 S.W.3d 301, 315-318 (Tex. 2009). A trial court may not invalidate a rule on the basis that it disagrees with the policy decisions underlying the rule's issuance. *Gulf Coast Coal. of Cities*, 161 S.W.3d at 712 ("This Court does not decide matters of policy; we are limited to evaluating whether the Commission acted contrary to the statute."). Thus, while a trial court may disagree with an agency's analysis, a rule challenge is not a process to "decide matters of policy"; and a court cannot invalidate a rule because it disagrees with the policy decisions underlying the rule's issuance. *Id*. "The rule need not be wise, desirable, or even necessary." *McCarty v. Tex. Parks & Wildlife Dep't*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no writ).

III. DFPS issued Rule 748.7 pursuant to its broad rule-making authority.

In delegating authority to an administrative agency, the Legislature is not expected to provide for every specific detail or anticipate every unforeseen

circumstance. *Tex. Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 654 (Tex. 2004). Rather, the administrative agency generally has implied authority to accomplish a delegated purpose. *Tex. Dep't of Human Servs. v. Christian Care Ctrs., Inc.*, 826 S.W.2d 715, 719 (Tex. App.—Austin 1992, writ denied) (citing *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. Civ. App.—Austin 1986, writ ref'd n.r.e.)). Thus, 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). An agency's rule is valid if it is in harmony with the general objectives of the statute involved. *Id*.

Further, "[i]f there is vagueness, ambiguity, or room for policy determinations in a statute or regulation," the Texas Supreme Court will "defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438 (Tex. 2011). While such deference to an agency's interpretation is not conclusive, a reasonable interpretation by the agency charged with enforcing the statutory framework "is therefore entitled to serious consideration." *Id*.

A. Texas has a strong public policy interest in protecting "all children" and does so "through a licensing program."

Chapter 42 of the Human Resources Code codifies Texas' public policy to protect all children in facilities existing on Texas soil:

> 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.

TEX. HUM. RES. CODE § 42.001 (emphasis added).

This statute goes on to state that the vehicle to accomplish this public policy is a licensing program that can regulate the facilities under established standards:

> The purpose of this chapter is 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***.

Id. (emphasis added).

B. The Legislature vested DFPS with the authority to protect "all children" through DFPS's "licensing program."

In order to accomplish the public policy of protecting "all children" by "regulating the facilities through a licensing program," the Legislature gave express authority to DFPS to adopt rules to accomplish that purpose in TEX. HUM. RES. CODE § 42.042(a). *See also* TEX. GOV'T CODE § 531.0055 (Health and Human Services Commission adopts rules on behalf of DFPS). DFPS's licensing requirement and minimum standards work to achieve that purpose. *See id.* §§ 42.041(a); 42.042(f).

The Legislature has also mandated that the DFPS's rule-making authority is to be liberally construed in order that its purposes may be accomplished. *See id.* § 11.002(b). Indeed, Texas courts have held that, 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 Tex. App. LEXIS 5465, at *5-6 (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 Tex. App. LEXIS 8340, at *6-7 n.3 (Tex. App.—Corpus Christi Oct. 20, 2011, pet. denied) (discussing DFPS's broad rule-making authority).

1. DFPS issues child-care standards to protect children at the facilities that it licenses.

Through its licensing program, DFPS regulates "child-care facilities," which are broadly 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).

One type of child-care facility is a "general residential operation" ("GRO"), which is broadly defined as "a child-care facility that provides care for more than 12 children for 24 hours a day . . . ." *Id.* § 42.002(4). This definition provides examples of GROs such as "children's homes, halfway houses, residential treatment centers, emergency shelters, and therapeutic camps . . . ." *Id*. Here, DFPS designated the FRCs as a type of GRO. (Appx. B, 41 TEX. REG. 1493.)

Through its rule-making authority, DFPS has issued thousands of minimum standards that apply to various types of child-care facilities. Here, by incorporating the GRO minimum standards into Rule 748.7, DFPS applied hundreds of its minimum standards specific to GROs under 40 TEX. ADMIN. CH. 748 as well as hundreds of licensing regulations under 40 TEX. ADMIN. CH. 745. Thus, Rule 748.7 is just one of hundreds of child-care standards that would apply to the FRCs if DFPS were allowed to license them.

2. DFPS issues exemptions and waivers to meet each facility's situation.

Both the Legislature's statutory scheme and DFPS's Rules expressly envision that the DFPS will provide for exemptions and variances to fit a particular circumstance. *See* TEX. HUM. RES. CODE § 42.048(c); 40 TEX. ADMIN. CODE §§ 745.8301-.8319. Thus, because every facility is different, the Legislature grants DFPS the authority to exempt its standards to meet a particular situation, and DFPS has adopted procedures to evaluate whether to grant an exemption.

C. The FRCs are GROs and, thus, must be licensed by DFPS.

A GRO is "a child-care facility that provides care for more than 12 children for 24 hours a day . . . ." *Id.* § 42.002(4). Here, the FRCs provide comprehensive, around-the-clock care to the residents at the facilities, including personal safety, shelter, food, clothing, hygiene, medical care, education, access to legal advice, access to technology such as internet cafes and video games, and orderly daily activity management. (*See* CR 1812-1821; CR 2077-2078; CR 2013-2052, ¶¶ 15-23; CR 1564-1565.) Further, the FRCs are similar to the other, non-exclusive list examples of GROs in the statute, such as "children's homes, halfway houses, residential treatment centers, emergency shelters, and therapeutic camps." *See* TEX. HUM. RES. CODE §§ 42.002(3), (4).

Because DFPS is required by statute to protect the health, safety, and well-being of "all" children in Texas under a non-family member's care, DFPS's licensing of the FRCs directly fulfills DFPS's statutory charge of "protecting the health, safety, and well-being of the children of the state who reside in child-care facilities" as the FRCs "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 . . ." *See* TEX. HUM. RES. CODE §§ 42.001, 42.002(3), 42.002(4), 42.041(a), 42.042(f).

When adopting Rule 748.7, DFPS explained how licensing the FRCs coincides with DFPS's mission to enhance quality care for 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.
>
> . . .
>
> 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.

(Appx. B, 41 TEX. REG. 1493.)

D. DFPS properly recognized the need to keep families together.

Again, both the Legislature's statutory scheme and DFPS's Rules expressly envision that DFPS will provide for exemptions and variances to fit a particular circumstance. *See* TEX. HUM. RES. CODE § 42.048(c); 40 TEX. ADMIN. CODE §§ 745.8301-.8319. When DFPS adopted Rule 748.7, DFPS explained its rationale behind subsection (c) concerning the number of occupants in a room and family members sharing a bedroom:

> 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.

. . .

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's 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's 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***.

(Appx. B, 41 TEX. REG. 1493.)

Still, 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 the children. 40 TEX. ADMIN. CODE §748.7(d); *see also id.* § 745.8313.

IV. The trial court correctly saw the benefit of DFPS regulation of the FRCs.

Even as the trial court misconstrued Rule 748.7, it recognized that DFPS involvement at the FRCs is appropriate and in line with the statutory framework. For example, during the temporary injunction proceedings, the trial court held:

> It is in the best interest of the children detained by the federal government and housed at Dilley that the State of Texas continues to provide regular and comprehensive oversight at Dilley consistent with the minimum standards required by the State of Texas . . . .

(CR 1111.) Specifically, the trial court found that DFPS has authority to license the Dilley FRC under its general residential operation program:

> . . . DFPS has legislative authority to issue a license to Dilley as a general residential operation (GRO) . . . .

(CR 1112.) In so ruling, the trial court recognized the benefits of DFPS's involvement at the FRCs:

> . . . DFPS has the ability to provide state oversight over Dilley and provides benefits to the children presently housed at those facilities 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 on the application; (iv) staff

> training; (v) investigation of claims of abuse and neglect by staff members . . . .

(CR 1111.)

The trial court echoed these rulings in its Amended Final Judgment:

> . . . 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 . . . .

(Appx. A, CR 4216.)

Thus, even in the trial court's own words, the issue here is not whether DFPS can and should regulate the FRCs as child-care facilities (GROs). Rather, the only issue is whether the trial court can forbid DFPS from licensing the FRCs, as required by statute, or from granting limited exemptions in the licensing process.

V. The trial court misconstrued the statutory framework.

The trial court's Amended Final Judgment is internally inconsistent, undermining its own stated basis. On the one hand, the trial court (1) held that "it is in the best interest of the children . . . that the State of Texas continue to provide regular and comprehensive oversight" at the FRCs and thus (2) ordered DFPS to continue to regulate the facilities "consistent with the minimum [GRO] standards."

(CR 4216.) However, on the other hand, the trial court held that DFPS's Rule 748.7 (1) "runs counter to the general objectives" of DFPS's enabling legislation and (2) "contravenes" the definition of a GRO. (Appx. A, CR 4214.) This stark inconsistency reveals the trial court's misunderstanding of both the statutory framework and its own authority in an administrative rule challenge.

A. The FRCs provide 24-hour care like other GROs.

Without discussion, the trial court declared that Rule 748.7 "contravenes" the statutory definition of a GRO in TEX. HUM. RES. CODE § 42.002(4). (CR 4214.) The Rule does nothing of the sort. Rather, the Rule embraces the GRO definition, simply stating: "[a] family residential center is a general residential operation (GRO)". (*See* Appx. B, 41 TEX. REG. 1493.) Indeed, the order goes on to explain that the Rule will "make FRCs subject to regulation as General Residential Operations (GROs)" and "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." *Id*. Thus, Rule 748.7 does nothing to change (or "contravene") the statutory definition of a GRO.

A GRO is "a child-care facility that provides care for more than 12 children for 24 hours a day . . . ." *Id*. § 42.002(4). Here, the FRCs provide comprehensive, around-the-clock care to the residents at the facilities, including personal safety, shelter, food, clothing, hygiene, medical care, education, access to legal advice,

access to technology such as internet cafes and video games, and orderly daily activity management. (*See* CR 1812-1821; CR 2077-2078; CR 2013-2052, ¶¶ 15-23; CR 1564-1565.) Thus, it cannot be reasonably disputed that the GROs provide 24-hour care. Further, it is perfectly reasonable for DFPS to view the FRCs as similar to other accepted, non-exclusive examples of GROs in the statute such as "children's homes, halfway houses, residential treatment centers, emergency shelters, and therapeutic camps." *See* TEX. HUM. RES. CODE §§ 42.002(3), (4).

Thus, Rule 748.7 does nothing to "contravene" the definition of a GRO, and the FRCs' provision of 24-hour care brings them in line with the definition. Even if this is debatable, it is not an unreasonable conclusion; and the trial court should have followed the Texas Supreme Court's direction to "defer to the agency's interpretation unless it is plainly erroneous or inconsistent with the language of the statute, regulation, or rule." *Combs*, 340 S.W.3d at 438.

B. Rule 748.7 does not alter any "legislatively mandated GRO requirements."

In declaring that the Rule "runs counter to the general objectives of the Texas Human Resources Code," the trial court incorrectly held that the three exemptions in Rule 748.7(c) contradict a *statutory* requirement. (Appx. A, CR 4213, 4215.) Specifically, the trial court stated that the exemptions regarding the number of occupants in a room and family members sharing a bedroom violated "legislatively mandated GRO requirements." (*Id.*)

However, the legislature did not "mandate" *any* particular standards regarding bedroom occupancy at GROs. Rather, those determinations are delegated to DFPS, and those are found in DFPS-authored rules, which allow for exemptions.

HUM. RES. CODE CH. 42 generally delegates authority to DFPS to develop GRO standards. While the statute contains some specific statutory requirements for the GRO standards, none of those specific statutory requirements address the number of room occupants or family members sharing a bedroom. Rather, the specific *statutory* requirements for GRO standards concern subjects such as caregiver training. *Compare* general grant of authority in TEX. HUM. RES. CODE §§ 42.042(a), (e), (f) with specifics of §§ 42.042(p), 42.0421. There is no provision of HUM. RES. CODE CH. 42 that governs the number of occupants in a room or family members sharing a bedroom.

Accordingly, because there is no statutory provision to the contrary, the Legislature has delegated to DFPS the authority to determine the specifics of these GRO standards, including those in Rule 748.7(c). Indeed, both the Legislature's statutory scheme and DFPS's Rules expressly envision that the DFPS will provide for exemptions and variances to fit a particular circumstance. *See* TEX. HUM. RES. CODE § 42.048(c); 40 TEX. ADMIN. CODE §§ 745.8301-.8319.

As DFPS explained in the order adopting the Rule, the benefits behind these exemptions are that they allow families to stay together and young children to

remain with their mothers and siblings. (Appx. B, 41 TEX. REG. 1493.) Relying on its expertise in care for children, DFPS determined that these exemptions for these particular facilities correctly "strike a balance between family preservation within the current facility and the paramount concern of child safety." *Id.* Still, as with any exemption granted under DFPS's regulatory scheme, the "exception is not unfettered, and DFPS may place conditions on it appropriate to the circumstances." *Id.*; *see also* 40 TEX. ADMIN. CODE §§ 748.7(d), 745.8313.

Such exemptions are nothing new, as DFPS commonly grants "bedroom" variances to fit a facility's circumstances. (CR 2482-2484.) Indeed, without the application of Rule 748.7, when an adult is also in care at a DFPS facility, as is the case at the FRCs, the existing GRO standards already permit an adult to share a bedroom with an unrelated child in certain circumstances. (CR 1578-1579, CR 1599-1600); *see, e.g.,* 40 TEX. ADMIN. CODE § 748.1937.)

Thus, in not allowing DFPS to make policy decisions concerning adults and children sharing bedrooms, the trial court invalidates many types of DFPS Rules, common practices, and precedent and improperly inserts its own policy-making into the licensing process.

C. The trial court's order requiring DFPS to regulate the FRCs without a license violates the statutory scheme.

The TEXAS HUMAN RESOURCES CODE requires that DFPS perform its regulatory functions "through a licensing program." *See* § 42.001; *see also*

§ 42.002(3) (defining "child-care facility" as a "licensed" facility); § 42.041(a) ("No person may operate a child-care facility or child-placing agency without a license issued by the department."); § 42.042(e) (minimum standards apply to "licensed" child-care facilities); § 42.048(a) ("The department shall issue a license after determining that an applicant has satisfied all requirements.")

The Legislature clearly mandates that the DFPS utilize a licensing program to fulfill its regulatory functions, and DFPS's ability to ensure the safety and well-being of children at child-care facilities emanates from its licensing authority. Thus, in ordering DFPS to regulate the FRCs without a license, the trial court's Amended Final Judgment violates the statutory scheme.[8]

D. While improper, the trial court's foray into policy-making is also bad policy.

A trial court's authority in an administrative rule challenge is limited to determining whether the rule is contrary to the statutory scheme authorizing the rule, and a trial court may not decide matters of policy. *Gulf Coast Coal. of Cities*, 161 S.W.3d at 712. Here, the trial court attempts to override the policy considerations that the DFPS extensively evaluated and, instead, insert the trial

[8] The trial court's injunction is also defective because Appellees did not plead for any injunctive relief as to CoreCivic or GEO and it employs a temporary rather than a permanent injunction standard. *Webb v. Glenbrook Owners Ass'n, Inc.*, 298 S.W.3d 374, 385 (Tex. App.—Dallas 2009, no pet.); *Triantaphyllis v. Gamble*, 93 S.W.3d 398, 401 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

court's own policy preferences concerning family members sharing a bedroom and the duration that residents remain at the FRCs.

Ironically, invalidating Rule 748.7 under the auspices of what is in the "best interest of the children" would actually harm children by separating them from their mothers. As recognized in the variances appearing in subsection (c) and DFPS's explanation in the order adopting the Rule, DFPS's existing GRO rules would not permit the children at the FRCs to remain with their mothers at night at the FRCs. This is because Rule 748.3361 would not permit a child older than two years to remain with his or her mother and because Rule 748.3363 would not permit a sibling older than five years to remain with his or her siblings. *See* 40 TEX. ADMIN. CODE §§ 748.3361, 748.3363.

Therefore, by declaring Rule 748.7 invalid, the exemptions that DFPS enacted to keep families together would be destroyed, resulting in children as young as three-years-old being separated from their mothers and siblings older than five being separated. Without the variances in subsection (c), children over age two would be required to sleep apart from their mothers and apart from any siblings older than five. For example, if a mother arrives at the facility with a four-year-old daughter and a seven-year-old son, the trial court would separate the family into three different bedrooms.

This further demonstrates both the reasonable means (providing a variance) and the legitimate objective (keeping families together) of Rule 748.7(c). It allows families to stay intact, including allowing young children to remain with their mothers. The trial court usurped this reasoned Executive Branch policy when it declared the Rule void.

Accordingly, the trial court's Amended Final Judgment should be reversed.

VI. The trial court correctly rejected Appellees' various other arguments.

Appellees raised four other arguments to invalidate Rule 748.7. All arguments are without merit, and the trial court did not even mention them in the lengthy Amended Final Judgment.

A. DFPS provided a reasoned justification for Rule 748.7

In their motion for summary judgment, Appellees alleged that DFPS failed to comply with the procedural requisites of TEX. GOV'T CODE § 2001.033 in passing Rule 748.7. The scope of judicial review under TEX. GOV'T CODE § 2001.033 is limited to the face of the order adopting the Rule. *Gulf Coast Coal. of Cities*, 161 S.W.3d at 713. When examining the face of the order, the only inquiry is whether it provides the statutory basis for the rule, a rational basis for the rule, and a summary of the comments received and the agency's response. *Id.* A court must uphold the Rule as long as the order shows in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective. *Id*.

To declare the Rule invalid, the Court would have to find that it was adopted in a completely arbitrary and capricious manner. *Id*. An agency's action is arbitrary only if the face of the order shows that the agency did not consider a factor that the Legislature intended the agency to consider in the circumstances, considered an irrelevant factor, or reached a completely unreasonable result after weighing only relevant factors. *Id.* Because the only inquiry is limited to statutory construction and the four corners of the adopting rule, a challenge of an agency rule is a matter of law for the court. *Id.*

Here, the Court's inquiry is limited to the face of 41 TEX. REG. 1493. The face of the DFPS order here clearly shows a reasonable justification for Rule 748.7. Indeed, the order provides nearly nine (9) pages of reasoned justification for adopting the Rule. This includes a discussion of the nearly 3,000 comments DFPS received concerning the Rule as well as the media interest regarding the same. Notably, DFPS specifically noted Grassroots' comments.

In discussing the concerns raised by the comments, the order divided them into 11 categories and addressed each in kind -- including DFPS's authority to the pass the Rule; how licensure protects the children; how licensure will improve conditions; the policy rationale behind detention in general at the FRCs; how the Rule and licensure of the FRCs coincides with DFPS's mission; the conditions at

the Dilley FRC, and the proposed exceptions, waivers, and variances. (Appx. B, 41 TEX. REG. 1493.)

This order complies with all prerequisites of TEX. GOV'T CODE § 2001.033. It is clear and logical, and it shows that applying GRO standards with limited exemptions is a reasonable means to provide protection to alien children apprehended by ICE.

B. Rule 748.7 does not even mention intake studies.

Appellees also raised TEX. HUM. RES. CODE § 42.042(f) as a reason to invalidate Rule 748.7. Ironically, this section actually demonstrates the wide latitude provided to DFPS in determining how child-care facilities should be regulated, stating that the DFPS "shall recognize the various categories of services . . . the various categories of children and their particular needs, and the differences in the organization and operation" of different types of facilities. TEX. HUM. RES. CODE § 42.042(f).

Appellees point to the clause in section 42.042(f) that GRO standards must require an intake study. However, nothing in Rule 748.7 attempts to alter any intake study requirements. Indeed, Rule 748.7, which is part of Chapter 748's GRO standards, does not even mention intake studies. Rather, the intake requirements are addressed elsewhere in the hundreds of other Rules in Chapter 748 that contain the GRO standards, of which Rule 748.7 is just one rule. Thus,

TEX. HUM. RES. CODE § 42.042(f) cannot be the basis to declare Rule 748.7 invalid.

C. Rule 748.7 did not require its own temporary work group.

Appellees also generally cited TEX. HUM. RES. CODE § 42.042(i) for the unremarkable position that DFPS must convene a temporary work group before adopting minimum standards. A temporary work group is composed of at least six people all from different geographic regions of the state and must include a DFPS official, an expert in the different facility and program classifications, a parent experienced in the different classifications, and a nonprofit entity. *See id.* § 42.042(i)(1). Before DFPS adopted the minimum standards, it was required to convene this group to advise DFPS regarding the proposed standards. *Id.*

Here, it appears that Appellees attempt to mischaracterize the temporary work group requirement as applying specifically to Rule 748.7. In other words, it appears that Appellees would have a Texas agency convene a group from all over the State every time it proposes a single rule revision, repeal, typo correction, etc., no matter how minor. This is not the case.

Chapter 748 is found in Part 19 of Title 40 of the ADMINISTRATIVE CODE and provides the DFPS's standards for GROs. The single DFPS Rule at issue here, 748.7, is just one of hundreds of standards in Chapter 748, and just one of thousands of DFPS Rules found in Part 19 of Title 40. The DFPS's Rules, like any

other agency's rules, are reviewed, revised, altered, repealed, and corrected on a consistent basis. *See generally* the TEXAS REGISTER.

Section 42.042(i) does not require that DFPS convene a temporary work group any time an individual Rule is touched. Rather, it required the group when new standards as a whole were 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). Indeed, if an agency were required to gather a group from all over the State every time it proposes a single rule revision, repeal, typo correction, etc., it would bring the agency's activities to a grinding halt. Instead, DFPS is advised of concerns with individual rules in the notice and comment process. *See generally* TEX. GOV'T CODE §§ 2001.023-.029. Here, DFPS simply applied existing GRO standards to the FRCs.

Because TEX. HUM. RES. CODE § 42.042(i) does not apply here, it cannot be used to invalidate Rule 748.7.

D. Appellees' Family Code sections are inapplicable.

The trial court also correctly chose not to adopt Appellees' arguments under two sections of the TEXAS FAMILY CODE as a reason to invalidate Rule 748.7. This is because section 54.011(f) of the FAMILY CODE is a procedural statute in the TEXAS JUVENILE JUSTICE CODE that only applies to local county-operated facilities,

not an FRC under federal ICE power, and because section 151.003 only applies to SAPCR proceedings.

1. Texas Family Code § 54.011(f) only applies to local state county facilities, not federal ICE facilities.

In construing statutory provisions, a Court determines legislative intent from "the statute as a whole and not from isolated portions of it." *In re Dep't of Family & Protective Servs.*, 273 S.W.3d 637, 641 (Tex. 2009). Section 54.011(f) is found in Title III of the FAMILY CODE. Title III is the TEXAS JUVENILE JUSTICE CODE. The JUVENILE JUSTICE CODE undergirds an entire system under Texas state law for the prosecution, adjudication, sentencing, and detention of juvenile offenders, completely separate from the criminal justice system for adults. *See* TEX. FAM. CODE § 51.01. The JUVENILE JUSTICE CODE is the state law that applies to proceedings in a Texas state county's juvenile court, which is designated by the local county's juvenile board. *See* TEX. FAM. CODE § 51.04.

Section 54.011(f) was added to the JUVENILE JUSTICE CODE in 2003 to prevent local county governments from accepting federal funds for juvenile justice outside the specific standards allowed under Texas and federal law. (*See* CR 1824-1838; s*ee also* CR 1858, 1860; *see also* Tex. H.B. 2319, 78 Leg. R.S. (2003).)

Here, the FRCs are federal immigration facilities under contract with ICE, not a county or state-run Texas Juvenile Justice Department facility. The residents do not arrive at the FRCs through the Texas state juvenile justice system, and no

local county juvenile board is involved in the process. Thus, the regulation envisioned in TEX. FAM. CODE § 54.011(f) simply does not apply to the FRCs. Section 54.011(f) applies exclusively to local county facilities under the JUVENILE JUSTICE CODE, not the FRCs under ICE control.

2. This is not a SAPCR proceeding.

Appellees' Motion for Summary Judgment also made a passing reference to TEX. FAM. CODE § 151.003 – a ground not pled in Appellees' Fifth Amended Petition. Like section 54.011(f), Appellees cite this SAPCR statute completely out of context. Regardless, Appellees make no effort to meet the high burden of proving a violation of "fundamental" rights, including how an immigrant apprehended at the border has a fundamental constitutional right to not be detained at an FRC with their child. *See* Tex. Att'y Gen. Op. JC-0226 (2000) (discussing "fundamental right" in the statute as the constitutional term of art); *see generally Wash v. Glucksberg*, 521 U.S. 702, 720 (1997) (discussing the high burden of proving a "fundamental" right). Accordingly, Appellees' two-sentence reference to TEX. FAM. CODE § 151.003 is not a ground to invalidate Rule 748.7.

CONCLUSION AND PRAYER

Accordingly, Appellant CoreCivic (formerly known as Corrections Corporation of America) prays that this Court reverse the trial court's judgment and render judgment in Defendants', CoreCivic's, and GEO's favor, allowing

DFPS to license the FRCs, and for other and further relief to which they may be entitled.

Respectfully submitted,

WINSTEAD PC

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I hereby certify that, on this 6th day of June, 2017, a true and correct copy of the above and foregoing instrument was served on all counsel of record as follows:

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Rule 9.4(I), if applicable, because it contains 10,085 words, excluding any parts exempted by Rule 9.4(i)(1).

*/s/ Bruce R. Wilkin*____________
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APPENDIX A

Filed in The District Court
of Travis County, Texas

DEC 16 2016 55
At 4:15 P M.
Velva L. Price, District Clerk

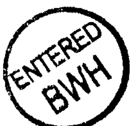
No. D-1-GN-15-004336

GRASSROOTS LEADERSHIP, INC., *et al.*, *Plaintiffs*,	§ § § §	IN THE DISTRICT COURT OF
v.	§ §	
TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES (DFPS), *et al.* *Defendants*,	§ § § § §	TRAVIS COUNTY, TEXAS
and	§ §	
CORRECTIONS CORPORATION OF AMERICA, INC., and THE GEO GROUP, *Intervenors.*	§ § § §	353rd JUDICIAL DISTRICT (All proceedings assigned to the 250th Judicial District Court)

AMENDED FINAL JUDGMENT

This case involves a challenge under TEX. GOV'T CODE § 2001.038, also known as the Administrative Procedure Act (APA), to the regulation adopted by the Texas Department of Family and Protective Services and published in the Texas Register at Title 40, Part 19, Chapter 748, Subchapter A, Rule § 748.7 (effective March 1, 2016), 41 Tex. Reg. 1493-1502 (Feb 26, 2016) (hereinafter referred to as the "FRC Rule"). On December 2, 2016, the Court signed a Final Judgment in this cause. On December 5, 2016, the Court considered Plaintiffs' Motion to Prevent Automatic Suspension of Judgment Pending Appeal (the "Motion to Prevent").

At the hearing on Plaintiffs' Motion to Prevent, Defendants notified the Court of their intent to: (1) perfect an appeal and automatically supersede the Court's Final Judgment; (2) issue a license under the FRC Rule to The South Texas Family Residential Center in Dilley, Texas ("Dilley") operated by Intervenor CCA; and (3) give full force and effect to the license



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

APPENDIX B

41 TEXREG 1493

Volume 41, Number 9, February 26, 2016

ADOPTED RULES

Reporter
41 TEXREG 1493 *

TX - Texas Register > 2016 > February > February 26, 2016 > ADOPTED RULES > DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

Agency

DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

Administrative Code Citation

40 TAC § 748.7

Text

NOTES:

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, Jose Rodr[iacute]guez, Jose Menendez, 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/readtacxt.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 practice 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 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 childcare 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-[agrave]-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*.

HISTORY:

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 10, 2016.

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Department of Family and Protective Services

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

Regulations

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 19. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES

CHAPTER 748. MINIMUM STANDARDS FOR GENERAL RESIDENTIAL OPERATIONS

SUBCHAPTER A. PURPOSE AND SCOPE

[*1502]

§ 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.

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