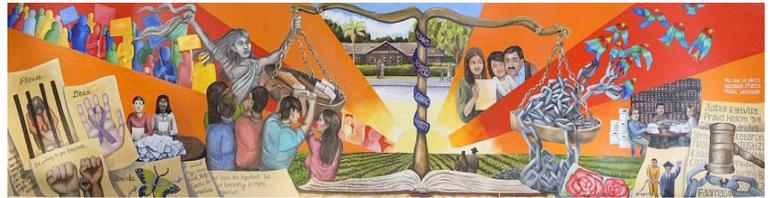




National Center for Youth Law



PRACTICE ADVISORY:

APPOINTMENT OF INDEPENDENT MONITOR IN THE *FLORES* SETTLEMENT AGREEMENT

SUMMARY

On October 5, 2018, the Honorable Judge Dolly M. Gee appointed an Independent Monitor (hereinafter “Monitor”) to oversee compliance and investigate potential breaches of *Flores* Settlement Agreement. The Monitor is authorized to “monitor compliance with the Court’s June 27, 2017 and July 30, 2018 Orders, and other Court orders issued during the term.”¹ The October 5, 2018 Order² grants the Monitor authority to interview any individual, including any Representatives of Class Members, any current or former Class Member, or their relatives or accompanying adults. The Monitor has the power to bring to the attention of the Court any potential breach of the *Flores* Settlement agreement, and in particular, the June 27, 2017 Order and the July 30, 2018 Order³, but the Monitor cannot issue orders or sanctions. Additionally, the Monitor can request any data relating to Class Members.

Representatives or Class Members that wish to share information with the Monitor should please contact *Flores* counsel any time before October 17, 2019.

WHO IS AFFECTED?

- Unaccompanied or accompanied minors who were previously, or are currently, detained by ORR, ICE, or CBP and endured violations of the *Flores* Settlement Agreement.

WHAT DOES THE ORDER ALLOW?

The October 5, 2018 Order allows the intervention of the Monitor to aid the Court in enforcing compliance with the June 27, 2017 Order and the July 30, 2018 Order issued by Judge Gee in the *Flores* litigation. The Order allows the Monitor to supervise, investigate and provide recommendations to the Court in regards to the Defendants’ compliance or non-compliance with the aforementioned orders.

¹ *Jenny L. Flores, et al., v. Jefferson B. Sessions III, U.S. Attorney General, et al.*, Order Appointing Special

² The full opinion appointing an Independent Monitor is available at:

<https://www.aila.org/File/Related/14111359af.pdf>

³ A practice advisory for the July 30, 2018 order can be found here: <https://law.ucdavis.edu/faculty-activity/files/gee-july-30th-practice-advisory-flores-order.pdf>.

WHY WAS A SPECIAL MONITOR APPOINTED?

Rationale: The Court reasoned that the appointment of the Monitor was warranted “[b]ecause of the complexity of the *Flores* Agreement, the Court’s findings of non-compliance, and ongoing disputes between the Parties relating to the implementation of the *Flores* Agreement.”⁴

Statutory authority: Federal Rules of Civil Procedure 53 and 28 U.S.C. § 1651(a) authorize the appointment of a Monitor to monitor compliance with a Court’s order.⁵

If applicable, the Monitor’s Reports and Recommendations may also address any suspected breaches of the *Flores* Agreement that have been brought to her attention, but which are beyond the scope of the June 27, 2017 and July 30, 2018 order.

WHO IS THE MONITOR?

The Monitor is **Andrea Sheridan Ordin**.

WHAT ARE THE MONITOR’S POWERS?

- **Monitor** compliance with the Court’s June 27, 2017 and July 30, 2018 orders and other Court orders issued during the Term,⁶
- **Meet with Parties** and their counsel and receive and/or hear evidence and legal arguments on issues pertaining to compliance with the Court’s orders;
- Make **findings of fact** and prepare formal Reports and Recommendation to the Court regarding achievement of the goals of monitoring and substantial compliance with the Court’s orders;
- Conduct **investigations** as necessary to achieve the goals of monitoring aid in the preparation of Reports and Recommendations;
- Conduct **interviews** as necessary to achieve the goals of monitoring or aid in the preparation of Reports and Recommendations;
- Conduct **site visits** as necessary to achieve the goals of monitoring or aid in the preparation of Reports and Recommendations;
- **Hire and retain others**, including, but not limited to independent experts, specialists, associate attorneys, law clerks, paralegals, and/or interpreters, to assist the Monitor in the performance of her duties;
- **Direct the Parties** to produce such information or documents as the Monitor deems relevant to achieve the goals of monitoring or to prepare reports ad recommendations;
- **Resolve such disputes** as may arise between the Parties regarding the implementation of the Court’s orders, including this order;
- Preside over and facilitate **mediations** and/or **settlement** negotiations between the Parties as to any issues pertaining the implementation of the Court’s orders;
- **Advise and update the Court** on the status of the Defendants’ compliance with the Court’s Orders;⁷

⁴ *Flores v. Sessions*, October 5, 2018, pg. 6

⁵ *Flores v. Sessions*, October 5, 2018, pg. 2; Fed. R. Civ. P. 53 and the All Writs Act (28 U.S.C. § 1651(a)) authorize the appointment of a special master to monitor compliance with a court’s orders, and not to coerce that compliance or punish a defendant for noncompliance

⁶ *Id.* pg. 3-4

PRACTICE TIPS

SHOULD MY CLIENT REQUEST A MEETING WITH THE MONITOR?

Yes, a client may request such a meeting. The Monitor is authorized to speak with Class Members (minors currently or formerly in detention) and their representatives. A detention facility notice will be distributed to the detention centers where Class Members reside and will include the email contact information for the Monitor in the event that a Class Member or his or her parent or representative wishes to report a compliance problem with the Court's orders.⁸

In the alternative, the *Flores* counsel recommends that the minor's attorney contact the *Flores* counsel to begin the process of reaching out to the Monitor. The contact information is provided at the end of this practice advisory.

Non-compliance with *Flores* may include:

❖ **CBP Detention:**⁹

- Being detained in a CBP facility for more than 72 hours under CBP custody; CBP has a duty under the *Flores* Settlement to keep record of all proceedings and statistical information so advocates can know if they are taking reasonable steps to remove or release the child.
- Not having sanitary conditions¹⁰
- Failing to advise class members of their rights under the Agreement
- Exceeding cell capacity
- Failing to make and record ongoing efforts aimed at release or placement of class members
- Interfering with Class Members' right to counsel
- Not providing sufficient meals, water, and other amenities
- Denying access to basic necessities

❖ **Insufficient notice of “step-up” from a shelter to a secure, staff-secure, or residential treatment center:** a child was not provided with written notice of the reason for placing the minor in a secure facility, staff-secure facility or an RTC, and was not provided notice of the step-up within a reasonable time either before or after ORR's placement decision, in a language the child understands.¹¹

❖ **Failure to place minor in the least restrictive setting:** minors must be placed “in the least restrictive setting appropriate to each Class Member's age and special needs, provided that such setting is consistent with Defendants' interest to ensure the child's appearance before Defendant and the immigration courts and protect the Class Members well-being and that of others.”¹²

⁷ *Flores v. Sessions*, October 5, 2018, pg. 4

⁸ *Flores v. Sessions*, October 5, 2018, pg. 7

⁹ *Flores v. Sessions*, June 27, 2017, pg. 33

¹⁰ Stipulated Settlement Agreement at 9, 10, 11, 16, *Flores v. Reno*, No CV85-4544-RJK (9th Cir. 1997)

¹¹ *Flores v. Sessions*, July 30, 2018, pg. 30-32

¹² *Id.*

- ❖ **Failure to place minor in a licensed facility:** Defendants must provide a record of continuous efforts to release Class Members and place them in non-secure, licensed facilities;¹³
- ❖ **Child was transferred to secure facility on unfounded allegations:** the Order requires ORR remove all children from secure detention centers if they were placed in a secure detention center solely because the child:
 - “May be chargeable with an offense”;
 - The child reported gang involvement or displayed gang affiliation while in the custody and care of ORR and ORR did not have probable cause to believe that the individuals committed any other specified offense; or
 - Child self-disclosed gang involvement prior to placement in ORR custody, BUT this did not give rise to probable cause to believe that the individual had committed a specified offense.
- ❖ **Child being administered psychotropic medication without parental or guardian’s consent:**
 - **Texas:** At Shiloh RTC, ORR shall give notice to a person who is legally authorized to provide medical consent for a child and obtain that person’s written consent before administering medication to the child.¹⁴ If Defendants are not able to obtain such informed written consent, then they may not administer the psychotropic medication to the child unless they obtain a court order authorizing them to do so under Texas law or there is an “emergency.”
- ❖ **State-specific issues: please contact *Flores counsel******
 - **Size of cells**
 - **Content of meals and drinks**
 - **Bathroom facility concerns**
 - **Room temperature concerns while in detention**
- ❖ **Child was not provided with a list of legal services and/or right of judicial review of placement.**¹⁵
- ❖ **Issues with release**¹⁶: ORR Director or designee approval is NOT required for a child:
 - previously placed in a secure or staff-secure facility, but who has since been transferred to a less restrictive setting;
 - who prevailed on their *Flores* bond hearing; or
 - placed in secure or staff-secure facilities based on incomplete, inaccurate, or erroneous information.

¹³ *Flores v. Sessions*, October 5, 2018, pg. 1

¹⁴ *Flores v. Sessions*, July 30, 2018, pg. 2; Exhibit 1 to the Agreement requires licensed programs to “comply with all applicable state child welfare laws and regulations,” see *Flores* Agreement, Ex. 1 at ¶ A [Doc. # 101], and claim that ORR has violated Texas law by forcing Class Members at Shiloh RTC to take psychotropic medication without first obtaining a court order or the informed, written consent of a person authorized by state law to provide such consent.

¹⁵ *Flores v. Sessions*, October 5 Order, pg. 1

¹⁶ *Flores v. Sessions*, July 30 Order, pg. 30-32

❖ **Other problems with release:**

- Delayed fingerprinting process for Sponsor or requiring all members of the household to complete fingerprinting process;
- Class Members must be released without unnecessary delay.¹⁷

DOES MY CLIENT HAVE A RIGHT TO MEET WITH THE MONITOR?

YES. The Monitor may from time to time interview any individual including any Representatives of Class Members, any former or current Class Member, their relatives, or accompanying adults (provided that the interviewee, or her or his Representative, does not object to such an interview).¹⁸

If requested, Defendants shall provide suitable facilities and arrangements for the conduct of such interviews under conditions satisfactory to the Monitor.¹⁹

WHEN SHOULD MY CLIENT MEET WITH THE MONITOR?

The Monitor is available from October 17, 2018 until October 17, 2019. Her term may be extended, but an extension is not guaranteed. The earlier your client contacts the Monitor, the better, because if there is an “absence of serious, specific, and ongoing concerns by the Parties and/or the Monitor, her Term will end.”²⁰ Please contact the *Flores* counsel to coordinate a meeting.

WHAT CAN THE MONITOR NOT DO?

The Monitor may not issue any orders or impose any sanctions, but she may recommend to the Court various orders pertaining to the goals of Monitoring, including any contempt sanction, provided that the Parties are given notice and an opportunity to respond.²¹

The Monitor shall not have authority to intervene in or direct Defendants’ activities.

FURTHER INFORMATION/CLASS COUNSEL CONTACTS

The *Flores* class is represented by counsel, which includes the Center for Constitutional and Human Rights, the National Center for Youth Law and the UC Davis Immigration Law Clinic. Please contact class counsel, Holly Cooper by emailing hscooper@ucdavis.edu with any questions about the Appointment of the Independent Monitor or this advisory.

¹⁷ *Flores v. Sessions*, October 5, 2018, pg. 1

¹⁸ *Flores v. Sessions*, October 5, 2018, pg. 7-8.

¹⁹ *Id.* at 8

²⁰ *Flores v. Sessions*, October 5, 2018, pg. 6

²¹ *Id.* at 6