

UNITED STATES
DETAINED AND DEPRIVED OF RIGHTS:
CHILDREN IN THE CUSTODY OF THE
U.S. IMMIGRATION AND NATURALIZATION SERVICE

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I. SUMMARY AND RECOMMENDATIONS

For six months, Xiao Ling lived in a small concrete cell, completely bare except for bedding and a Bible in a language she could not read. Locked up in prison-like conditions with juveniles accused of murder, rape, and drug trafficking, Xiao Ling told Human Rights Watch in June 1998 that she was kept under constant supervision, not allowed to speak her own language, told not to laugh, and even forced to ask permission to scratch her nose. Bewildered, miserable, and unable to communicate with anyone around her, she cried every day.¹

Only fifteen years old at the time of her detention, Xiao Ling was never charged with any crime. Every year, thousands of unaccompanied children like Xiao Ling are apprehended by the U.S. Immigration and Naturalization Service (INS). Once in the hands of the INS, the children generally either accept immediate return to their countries of origin or face removal proceedings; most of the children arrested are released to family members or expelled from the United States within a few days. But for a variety of reasons, some of the children are detained by the INS while their cases are pending. Rarely understanding what is happening to them or why, they often end up, like Xiao Ling, in highly restrictive settings where they are denied basic rights.²

In 1997, Human Rights Watch released *Slipping Through the Cracks*, which documented the results of our investigation of children held by the INS in Arizona and California. The report detailed numerous violations of children's rights, in breach of the U.S. Constitution, U.S. statutory provisions, INS regulations, the terms of court orders binding on the INS, and international law. We found that with regard to unaccompanied children, the INS has an inherent and troubling conflict of interest: children are arrested, imprisoned, and frequently removed by the same agency that is charged with caring for them and protecting their legal rights. Additionally, we found that too many children were detained in jail-like conditions for long periods of time and that the INS failed to inform children of their legal rights, interfered with their efforts to obtain legal representation, and failed to facilitate contact with their family members. Based on our findings, Human Rights Watch recommended that the U.S. Congress separate the INS's caregiving function from its enforcement function by placing unaccompanied children in the custody of appropriate child welfare authorities. We also made a series of recommendations regarding detention policies and conditions, access to legal information and representation, and monitoring of conditions and practices.³

¹Unless otherwise noted, accounts are taken from Human Rights Watch interviews of children detained or recently released from INS detention at the Berks County Youth Center, Leesport, Pennsylvania. Interviews were conducted on June 5, June 16, September 2, November 19, and November 23, 1998. Most interviews were conducted in Spanish or Chinese; quotations taken from those interviews were translated by Human Rights Watch. The names of children interviewed have been changed to protect their privacy.

²INS data record 4,295 "custody occurrences" of juveniles from October 1997 to July 1998. At the end of July, the INS had 479 juveniles in current custody. INS, *Custody Status of Juveniles, Fiscal Year 1998 (Through 7/98)* (September 1998). In 1990, the INS arrested 8,500 undocumented children, 70 percent of whom were unaccompanied by an adult guardian. *Reno v. Flores*, 507 U.S. 292, 295 (1993) (citing INS brief on appeal). In our investigation prior to the publication of our 1997 report on unaccompanied children detained by the INS, we found that over 200 children were in INS custody of more than seventy-two hours' duration at any given time. Human Rights Watch, *Slipping Through the Cracks: Unaccompanied Children Detained by the U.S. Immigration and Naturalization Service*, p. 2, n. 3 (New York: Human Rights Watch, 1997).

³Human Rights Watch has also reported on the conditions of confinement of adult INS detainees. See, for example, Human Rights Watch, "Locked Away: Immigration Detainees in Jails in the United States," *A Human Rights Watch Short Report*, vol. 10, no. 1 (G), September 1998; Helsinki Watch, *Detained, Denied, Deported: Asylum Seekers in the United States* (New York: Human Rights Watch, June 1989).

After the INS agreed to address concerns raised by human rights and other organizations, Human Rights Watch conducted several site visits in Pennsylvania to review the agency's progress. Our follow-up investigation focused on conditions of detention for children at the Berks County Youth Center (BCYC), in Leesport, Pennsylvania. BCYC consists of a secure detention facility and two shelter care facilities administered by the county.⁴ Between June and November 1998, we conducted a series of interviews with children and with their attorneys and immigration advocates. Ten of the fifteen children we interviewed were placed at BCYC at the time of interview; five had recently been released.

We visited BCYC three times, once in June 1998 and twice in November 1998. During our site visits, we met with BCYC Superintendent Jack Borden, Assistant Director Eric Ruth, and other BCYC staff. In June 1998, we met with local INS Supervisory Detention/Deportation Officer Marion Dillis (who has since transferred to a different position within the INS); and in November, with the INS National Juvenile Coordinator John Pogash, Assistant District Director Ted Nordmark, local INS Supervisory Detention/Deportation Officer James Slovik, and local INS juvenile coordinator David Savina.

Since our original research, the INS has made efforts to improve its policies and practices regarding unaccompanied minors. The INS has implemented an extensive training program, providing training for more than 1,500 INS officers nationwide. It has increased the number of shelter beds substantially, to approximately 350 from the 130 which the *Flores v. Reno* settlement agreement provides for;⁵ in Berks County, negotiations between BCYC and the INS led to the opening of a second thirty-five bed shelter care facility primarily for unaccompanied minors detained by the INS. The INS has improved its data collection efforts,⁶ and it has issued new regulations for the implementation of *Flores*.

⁴BCYC's primary function is to house county children who are adjudicated delinquent or who are placed in the custody of child welfare authorities. Those adjudicated delinquent are placed in secure detention; those in the custody of child welfare authorities are placed in shelter care. The INS contracts with Berks County to place unaccompanied minors in BCYC; in response to the INS's need for shelter care beds, BCYC opened a new thirty-five bed shelter care facility in mid-October 1998. At the time of Human Rights Watch's visits to BCYC, the INS placed between five and ten children in the secure detention facility and between fifteen and thirty children in shelter care. See Findings at Berks County Youth Center section.

⁵*Flores v. Reno* was a nationwide class-action lawsuit filed against the INS to challenge its policies relating to the detention, processing, and release of children. It resulted in a negotiated settlement which sets out national policy for the detention, release, and treatment of minors in the custody of the INS. See Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544-RJK(Px) (C.D. Cal. January 17, 1997) (hereinafter "*Flores* Settlement Agreement"). The INS published proposed regulations implementing the settlement agreement in July 1998. *Federal Register*, vol. 63, p. 39,759 (July 24, 1998) (amending 8 C.F.R. section 236.3).

⁶In October 1998, Congress enacted legislation that requires the Attorney General to collect data on detained asylum seekers and other INS detainees. The statute specifies that the data must include a breakdown of the ages of detainees; the location of each detainee by detention facility; whether each of the facilities is also used to detain criminals and whether any of the detainees are held in the same cells as criminals; the number and frequency of transfers of detainees between detention facilities; the average length of detention; and a description of the disposition of the detainees' cases. Beginning in October 1999, the Attorney General must submit an annual report of these data to Congress. Omnibus Appropriations Act of 1998, Sections 903-904, in *Congressional Human Rights Watch* 11190-91 (daily ed. October 19, 1998)4 December 1998, Vol. 10, No. 4 (G)

Despite these improvements, we found the INS's performance lacking in critical areas. Nationwide, as many as one-third of children in INS detention are placed in secure detention centers for juvenile offenders.⁷ Often held with youth detained for committing violent crimes, they are denied personal possessions and held in a severely restrictive, punitive environment. Children interviewed for this report were handcuffed during transport, strip searched, and subjected to other degrading treatment. We found that too often, children in INS custody do not receive adequate legal information or representation and are transferred without the knowledge of their attorneys or families. Many children are denied information about their detention or education in a language that they understand and may be confined for months at a time without direct access to a single person with whom they can converse in their own language.

Recommendations

Based on our site visit and interviews, Human Rights Watch found that many of the concerns raised in our 1997 report remain unaddressed and that the INS continues to violate its own regulations and the rights of children in its custody. The following recommendations reiterate many of those made in our 1997 report.

To the U.S. Congress:

- To prevent conflicts of interest, the U.S. Congress should not charge the same agency with the care of unaccompanied, undocumented children and also the enforcement of the immigration laws against them. Once apprehended by the INS, unaccompanied children should be placed in the custody of appropriate child welfare authorities.
- Congress should request that the General Accounting Office initiate a study into the use of local juvenile detention centers by the INS to house children. The study should produce information on the number of children held in juvenile detention centers, including the number of those children who are asylum seekers; the number and location of all detention centers used; the average length of detention of children at each facility; transfer policies; language abilities of local detention center staff; compliance with INS detention standards and American Correctional Association guidelines; and compliance with international and domestic standards on the treatment of juvenile administrative detainees.

To the U.S. Department of Justice:

- The U.S. Department of Justice should direct the INS to work towards full compliance with the United Nations High Commissioner for Refugees (UNHCR) Guidelines on Detention of Asylum Seekers, UNHCR Guidelines on the Protection and Care of Refugee Children, and the UNHCR Guideline on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.
- United States Attorney General Janet Reno should order the INS to comply fully with all relevant national laws, regulations, and international standards concerning detention conditions for children.
- Unaccompanied children awaiting determination of their status should not be detained.

Until arrangements have been made to transfer custody of unaccompanied children from the INS to appropriate child welfare authorities:

- Attorney General Janet Reno should order that the INS immediately cease to place unaccompanied children in state juvenile justice or criminal justice facilities, or in other facilities with prison-like conditions.
- The Special Litigation Section of the Civil Rights Division should investigate conditions of confinement of children held by the INS in local juvenile detention centers.

To the U.S. Immigration and Naturalization Service (INS):

⁷Human Rights Watch interview with John Pogash, INS National Juvenile Coordinator, Leesport, Penn., November 23, 1998.

Detention Policies and Conditions

Until custody of unaccompanied children is transferred to appropriate child welfare authorities:

- The INS should develop and implement alternatives to detention, consistent with its expressed policy of placing children “in the least restrictive setting appropriate to the juvenile’s age and special needs.” These alternatives should include local social service agencies and foster families in the area in which the child was originally detained. The INS should develop such alternatives to detention with the assistance of local public interest attorneys and community groups.
- In emergencies where there is no alternative to placing children in juvenile detention facilities, placement should be for the shortest possible period of time, and children should be separated from juvenile offenders.
- Safety considerations may require keeping some children in secure facilities to protect them against recapture by smugglers. Such determinations should be made only on a case-by-case basis, and such children should be detained in secure facilities only if a thorough and individualized investigation reveals no possible safe alternatives. If children must be detained in secure facilities, they should be held separately from children adjudicated delinquent.
- Shelter-care facilities should be in major ports of entry to the United States, where culturally appropriate community resources and legal services are available. When possible, children should be placed in shelter-care facilities in the area in which they were originally apprehended or in which they have friends or relatives.
- Children in detention (whether in juvenile detention facilities or in private shelter-care facilities) should be permitted to retain their own clothes and personal belongings, receive an adequate education, to visit public libraries, and to go on frequent educational and recreational field trips. Children in longer-term custody should be permitted to attend public school whenever possible.
- Children should be given unrestricted and private access to telephones and assisted in making calls. The INS should enable children to call relatives who cannot accept collect calls.
- Children in INS custody should not normally be subjected to the use of handcuffs or other restraints. In those rare instances in which the use of restraints must be used to protect a child’s safety or the safety of others, instruments of restraint should not cause humiliation or degradation, and they should be used restrictively and only for the shortest period of time.
- Grievance procedures, including mechanisms for making confidential complaints against facility staff, should be made available and described in writing and clearly explained to children upon their arrival at a facility. INS officials and local facility supervisors should promptly investigate and respond to all complaints.

Age Assessment

- Where the INS employs age assessments, it should take care to ensure that the method of assessment conforms to the United Nations High Commissioner for Refugees’s Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum. Any assessment must take into account both the physical appearance and the psychological maturity of the child. Any examination must allow for a margin of error and must take into account the possibility of overestimating a child’s age because of the inherent unreliability of many assessment tools which purport to measure chronological age. Further, examinations must employ methods which are safe and which respect human dignity. Finally, immigration authorities should err on the side of extending the protections accorded to minors in cases where an individual cannot be identified as an adult with certainty.

Access to Legal Information and Representation

- All unaccompanied children awaiting determination of their immigration status should have access to meaningful legal representation. If an unaccompanied child is indigent, the government should pay for legal representation. All legal representation should be by an attorney or accredited representative who is given adequate time to prepare the case and who commits to representing the child through completion of the proceedings.
- Just as regulations currently in place provide that immigration judges cannot accept an admission of removability from an unrepresented child, the INS should adopt a regulation or operating instruction to prohibit INS officers from presenting a voluntary departure form or accepting a voluntary departure request from an unaccompanied, unrepresented child.
- No agency should receive a contract to provide shelter care for unaccompanied children unless it provides a full and complete plan for ensuring that all children in its facilities will have access to meaningful legal representation.
- The INS should promptly and regularly provide children with information about their legal rights in a language they can understand.
- The INS should promptly inform children of their court dates verbally and in writing in a language they can understand.
- The INS should inform children both verbally and in writing of their right to contact a local office of the United Nations High Commissioner for Refugees.
- The INS should ensure that all written rights advisory forms are translated into the language spoken by each child and provided to each child.
- The INS should provide a sufficient number of trained interpreters at facilities housing unaccompanied children, as required by the shifting language populations in the facilities.
- The INS should keep children, their attorneys, and the local public interest bar informed of all legal and policy developments affecting the children in their custody.

Monitoring of Conditions and Practices

- In compliance with the data collection provisions of the Omnibus Appropriations Act of 1998, the INS should keep statistics on all children apprehended and detained, including those detained for less than seventy-two hours and those who accept voluntary departure as an alternative to deportation proceedings. For those detained less than seventy-two hours, the INS should record the same information which it is required by law to collect on longer-term detainees, including the place of apprehension; whether the child was given the opportunity to call a parent, relative, friend, or free legal services organization; whether such a call was in fact made; whether the child accepted voluntary departure; and, if voluntary departure was accepted, when, where, and to whom the child's custody was transferred.
- In addition to the aggregate data which the Omnibus Appropriations Act of 1998 requires the INS to collect, the INS should maintain comprehensive individual statistics on each child's age and country of origin; place and length of detention; whether the place of detention is also used to detain juvenile offenders; if so, whether the child shares a cell with a juvenile offender; and the ultimate disposition of the child's case.
- As long as the INS retains custody of unaccompanied children, each INS district should keep comprehensive statistics on detained children, ensure that detention facilities provide appropriate standards of care, and maintain meaningful contact with children's attorneys and the immigration and public interest bars.
- Each INS regional office should form an oversight committee to monitor conditions for detained children. Membership of the committee should include representatives of local social service and legal service groups, and

the committee should be empowered to make spot inspections of all juvenile detention facilities and to recommend changes in placement options.

- No agency should receive a contract to provide shelter care for unaccompanied children unless it provides a full and complete plan for ensuring that all applicable laws, regulations, and standards will be complied with, including those found in the U.S. Department of Justice's Alien Minors Shelter Care Program Guidelines and Requirements.

To the Working Group on Arbitrary Detention of the U.N. Human Rights Commission:

- The Working Group on Arbitrary Detention should investigate the detention of unaccompanied children in the United States by the INS.
- The Working Group on Arbitrary Detention should issue written guidelines, in consultation with nongovernmental organizations, juvenile specialists, and detention experts, to delineate the minimum standards appropriate for administrative immigration detainees. These guidelines should contain a special section on unaccompanied children detained by immigration authorities.

To the United Nations High Commissioner for Refugees (UNHCR):

- UNHCR should give priority to the needs of unaccompanied children, who are particularly vulnerable.
- UNHCR should actively, extensively, and regularly investigate conditions in facilities in which unaccompanied children are detained to ensure that their treatment complies with international laws and standards and with UNHCR guidelines and policies; UNHCR should make the findings of such investigations public.
- UNHCR should pay particular attention to children's access to lawyers and interpreters, and to children's ability to contact family members or adult friends by telephone or otherwise.
- UNHCR should talk with children privately and for whatever time is necessary to assess their situation and treatment.
- UNHCR should request the INS to provide UNHCR with full information on the total number of unaccompanied children taken into custody, including those released or those who accept voluntary departure within seventy-two hours. This information should include the number, ages, and nationalities of the children; place of apprehension; place and length of detention; the number of children applying for asylum; the disposition of each case; when, where, and to whom each child was ultimately released; whether the children had access to legal representation, and the number of children who contacted family members or other adult friends.
- Local offices of UNHCR should apply to the U.S. Department of Justice's Executive Office for Immigration Review to be placed on the legal services lists for each immigration court to enable unaccompanied minors to contact UNHCR.
- Local offices of UNHCR should develop the capacity to respond to requests for assistance from detained unaccompanied minors or to refer such requests for assistance to local pro bono counsel.
- UNHCR should meet regularly with nongovernmental organizations and lawyers' groups working actively on the issue of unaccompanied children and their treatment by the INS.

To the Organization of American States:

- The Inter-American Commission on Human Rights of the Organization of American States should investigate the treatment and conditions of confinement of children in INS detention in the United States.

II. LEGAL STANDARDS

United States Law and Policy

In the United States, children have the same basic right to constitutional protection as adults.⁸ Children detained by the INS and placed in removal proceedings benefit from the U.S. Constitution's most fundamental guarantees, including the Fifth Amendment's directive that no person shall "be deprived of life, liberty, or property, without due process of law."⁹

In addition, the U.S. Supreme Court has been careful to point out that children may require additional legal protection: "[C]hildren have a very special place in life which law should reflect. . . . [C]onstitutional principles [must] be applied with sensitivity and flexibility to the special needs of parents and children. . . . [While] children generally are protected by the same guarantees against government deprivation as are adults, the State is entitled to adjust its legal system to account for children's vulnerability."¹⁰

Recent Changes to U.S. Immigration Laws

On a wave of public anti-immigrant sentiment, Congress overhauled the immigration laws twice in 1996, enacting the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in April and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) in September.¹¹ These changes eliminated many of the statutory rights that immigrants had enjoyed for decades. Of particular concern for children apprehended by the INS, these amendments provide for the "expedited removal," with no meaningful review, of those who were never properly admitted to the United States; place a one-year filing deadline and other limitations on most asylum applications; and purport to eliminate judicial review of discretionary decisions under the immigration laws.¹²

⁸In the landmark 1967 case *In re Gault*, the Supreme Court noted that "[n]either the Fourteenth Amendment nor the Bill of Rights is for adults only." 387 U.S. 1, 13 (1967). The Supreme Court reaffirmed this principle in 1979, declaring that "a child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979).

⁹The U.S. Supreme Court has long recognized that most constitutional provisions are applicable to noncitizens, including those who enter the United States without inspection or who otherwise violate the immigration laws. As the Supreme Court declared in a 1953 decision, "[a]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). Similarly, in *Plyler v. Doe*, the Supreme Court reaffirmed its commitment to protecting the right of aliens: "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." 457 U.S. 202, 210 (1981).

¹⁰*Bellotti*, 443 U.S. at 634-35 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (concurring opinion of Justice Frankfurter)).

¹¹Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Public Law No. 104-132, title IV, sections 401-443 (April 24, 1996), 110 Stat. 1258 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law No. 104-208 (September 30, 1996), 110 Stat. 3009 (1996).

¹²We discuss these recent changes to the immigration laws in greater depth in "Locked Away," pp. 31-33. For an assessment of the expedited removal process, see Lawyers Committee for Human Rights, *Slamming the Golden Door: A Year of Expedited Removal* (New York: Human Rights Watch/Lawyers Committee for Human Rights, April 1998). December 1998, Vol. 10, No. 4 (G)

Even in the wake of these significant legal changes, unaccompanied minors apprehended by the INS may have a number of options. They may request “voluntary departure,” which requires them to leave the United States at their own expense, within a certain period of time, and permits them to avoid the legal consequences of removal.¹³ Some unaccompanied minors may qualify to apply for asylum or receive the benefit of a provision known as “withholding of removal.”¹⁴ Others may benefit from special programs which give permanent residence to some battered children or to some children who have been placed in foster care by a juvenile court.¹⁵ Less frequently, a child may be eligible for an extraordinary form of relief known as “cancellation of removal”¹⁶ or may demonstrate that he or she is a United States citizen.¹⁷ The evaluation of these possible options, the application process for each, and the level of documentation required to prevail are daunting for most adults. A child would find these options bewildering and virtually incomprehensible without the assistance of counsel.

Right to Counsel

¹³8 C.F.R. sections 240.25 and 240.26.

¹⁴Asylum is a discretionary form of relief from removal for those who establish past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Grants of asylum are governed by INA sections 208 and 101(a)(42)(A), codified at 8 U.S.C. sections 1158 and 1101(a)(42)(A). In December 1998, the INS released guidelines for adjudicating the asylum claims of children. INS, Office of International Affairs, Guidelines for Children’s Asylum Claims (December 10, 1998). See also Jaqueline Bhabha and Wendy A. Young, “Through a Child’s Eyes: Protecting the Most Vulnerable Asylum Seekers,” *Interpreter Releases*, vol. 75, pp. 757-73 (June 1, 1998). Withholding of removal, a related form of relief, is mandatory if an individual establishes that his or her life or freedom would be threatened upon return because of one of the five grounds of persecution (in contrast, eligibility for asylum requires only that such persecution be likely). INA, section 241(b)(3), codified at 8 U.S.C. section 1231(b)(3). Withholding may also be granted administratively to those who establish that they will be tortured if deported to the designated country of removal. See INS Office of Internal Affairs, Asylum Division, “Memorandum: Guidance on Compliance with Article 3 of the Convention against Torture,” April 27, 1998.

¹⁵The Violence Against Women Act of 1994 provides for relief from deportation for some undocumented spouses and children who have been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident while in the United States. See Public Law No. 103-322, title IV, 108 Stat. 1902; 8 C.F.R. sections 103, 204, 205, and 216. See also Gail Pendleton, *Immigration Law and Applications for Battered Immigrants Under the Violence Against Women Act* (Boston: National Immigration Project of the National Lawyers Guild, October 1998).

Some children who have been declared dependent on a juvenile court or placed with a child welfare agency may qualify for special immigrant juvenile status, which permits them to apply for permanent residence. See generally Katherine Brady, Jan Austerlitz, and Kim Pederson, *Special Immigrant Juvenile Status for Children in the Dependency System* (San Francisco: Immigrant Legal Resource Center, 1997).

¹⁶This form of relief can only be granted to individuals who establish at least ten years’ physical presence in the United States; good moral character; and “exceptional and extremely unusual” hardship to a U.S. citizen or permanent resident spouse, parent, or child. Even if all of these conditions are met, relief from removal under this provision is discretionary. INA, section 240A(b), codified at 8 U.S.C. section 1229b(b). See Dan Kesselbrenner and Lory D. Rosenberg, *Immigration Law and Defense*, 3rd edition (Deerfield, Ill.: West Group, 1998).

¹⁷While citizenship by birth in the United States is generally straightforward, U.S. citizenship can be acquired by operation of law in other ways, usually through birth abroad to a U.S. citizen parent or upon the naturalization of one or both parents. See Human Rights Watch, “Acquisition of Citizenship,” *Immigration Briefings*, April-December 1998, Vol. 10, No. 4 (G)

Individuals in immigration proceedings have a right to counsel, but not at government expense.¹⁸ In general, constitutional due process guarantees protect against interference with the right to counsel in immigration proceedings and require that detainees be given a reasonable opportunity to secure legal representation.¹⁹ Further, although the courts have generally found that the government is not required to pay for counsel for adults in deportation or removal proceedings,²⁰ there is a strong constitutional basis for asserting that the government has an obligation to provide counsel at government expense for indigent detained children in removal proceedings. This issue has not yet been addressed directly by the U.S. courts.

Based upon the due process guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution, the Supreme Court held in *Gideon v. Wainwright* that the government must provide free counsel for indigent defendants in adult criminal cases. In *In re Gault*, the court extended its holding in *Gideon*, finding that due process requires the government to provide lawyers for children in delinquency proceedings. Before the court's decision in *Gault*, children did not receive counsel at government expense in delinquency proceedings because such proceedings were technically civil rather than criminal in nature. The court based its holding in *Gault* on the fact that children in juvenile delinquency proceedings have a strong liberty interest at stake.²¹ As the result of *Gault*, the right to government-appointed counsel does not turn upon technical distinctions between "civil" and "criminal" proceedings; instead, the right rests upon the seriousness of the proceeding's consequences. In particular, the right to an attorney provided by the government depends upon whether there are important constitutionally recognized interests at stake.²²

As with juvenile delinquency proceedings, removal proceedings are technically civil in nature, not criminal. The courts have recognized, however, that the consequences of removal from the United States are as grave as the consequences of many criminal proceedings. In the words of the United States Court of Appeals for the Sixth Circuit, "although it is not penal in character, deportation is a drastic measure, at times the equivalent of banishment or exile. . . ."²³

¹⁸Immigration and Nationality Act (INA), section 240(b)(4)(A), codified at 8 U.S.C. section 1229a(b)(4)(A), provides that an "alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in [removal] proceedings."

¹⁹For a thorough discussion of the development of immigration detainees' right to legal counsel and current obstacles to representation, see Margaret H. Taylor, "Promoting Legal Representation for Detained Aliens," *Connecticut Law Review*, vol. 29, p. 1647 (Summer 1997).

²⁰See, for example, *Murgia-Melendez v. I.N.S.*, 407 F.2d 207, 209 (9th Cir. 1969); *Tupacyupanqui-Marin v. I.N.S.*, 447 F.2d 603, 606 (7th Cir. 1971). These decisions did not resolve the constitutional issues raised by the immigration law's explicit limitation that counsel in removal proceedings must be at no expense to the government. The Sixth Circuit has noted that fundamental fairness may be violated by failure to provide an unrepresented indigent alien with counsel at the government's expense. *Aguilera-Enriquez v. I.N.S.*, 516 F.2d 565 n.3 (6th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). In a nuanced decision, the Second Circuit has held that lack of appointed counsel does not violate due process where the noncitizen admits the allegations of deportability and it does not appear that an attorney would affect the outcome of the case, implying that appointed counsel may be required under some circumstances. See *Henriques v. I.N.S.*, 465 F.2d 119, 121 (2d Cir.), cert. denied, 410 U.S. 968 (1972).

²¹*In re Gault*, 387 U.S. at 46.

²²See, for example, *Aguilera-Enriquez v. I.N.S.*, 516 F.2d 565 n. 3 (6th Cir. 1975).

²³*United States ex rel. Brancato v. Lehmann*, 239 F.2d 663, 666 (6th Cir. 1956). Similarly, another court of appeals noted that "deportation is not a criminal action, but the consequences may more seriously affect the deportee than a jail sentence. The liberty of the individual is at stake and 'meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness.'" *Johns v. Department of Justice of the United States*, 624 F.2d 522, 524 (5th Cir. 1980).

Two federal courts of appeals have suggested that where a noncitizen's rights would be substantially impaired in the absence of counsel, the government may be constitutionally required to pay for an attorney in immigration proceedings. The United States Court of Appeals for the Sixth Circuit has noted that "[w]here an unrepresented indigent alien would require counsel to present his position adequately to an immigration judge, he must be provided a lawyer at the Government's expense. Otherwise, 'fundamental fairness' would be violated."²⁴ In a similar context, the United States Court of Appeals for the Ninth Circuit has held that "Congress' treatment of indigent aliens . . . may not be constitutional as applied in individual cases. The fifth amendment guarantee of due process applies to immigration proceedings, and in specific proceedings, due process could be held to require that an indigent alien be provided with counsel"²⁵

If there is a strong argument for asserting that the government may at times be required by the U.S. constitution to provide legal counsel for indigent adult aliens in removal proceedings, the argument is still stronger as applied to unaccompanied minors. As one federal district court observed, unaccompanied children in INS custody "encounter a stressful situation in which they are forced to make critical decisions. Their interrogators are foreign and authoritarian. The environment is new and the culture completely different. The law is complex. . . . In short, it is obvious to the Court that the situation faced by unaccompanied minors is inherently coercive."²⁶ For this reason, Human Rights Watch believes that the United States government should provide counsel for indigent unaccompanied children who have been detained by the INS pending the outcome of removal proceedings.²⁷

Detention Conditions and Release Options for Children

As with all INS detainees, children held in INS detention are being detained for administrative reasons, not as punishment for criminal behavior. As a result of the 1996 amendments to the immigration laws, detention is mandatory for those classified as "aggravated felons," for certain other criminal aliens, and for asylum seekers awaiting final decisions on their cases.²⁸ In addition, the INS faces particular concerns in the case of unaccompanied minors. As the U.S. Supreme Court has noted, "the INS cannot simply send [juveniles] off into the night on bond or recognizance."²⁹

Until the early 1980s, there was no codified INS policy governing the detention and release of unaccompanied minors. A class action suit initiated in 1985, ultimately known as *Flores v. Reno*, challenged the INS Western Region's blanket detention policy for minors and the prison-like conditions of detention. The INS settled *Flores* in 1997 and

²⁴*Aguilera-Enriquez*, 516 F.2d at 565 n. 3. The court distinguished prior decisions "which contain dictum appearing to set forth a *per se* rule against providing counsel to indigent aliens facing deportation" on the ground that they "rested largely on the outmoded distinction between criminal cases (where the Sixth Amendment guarantees indigents appointed counsel) and civil proceedings (where the Fifth Amendment applies)." *Ibid.* Despite this analysis, the *Aguilera-Enriquez* court did not direct the government to provide counsel in the case before it because it found that "[c]ounsel could have obtained no different result." *Ibid.*, p. 516.

²⁵*Escobar-Ruiz v. I.N.S.*, 787 F.2d 1294, 1297 n.3 (9th Cir. 1986), *affirmed en banc*, 838 F.2d 1020 (1988). In *Escobar-Ruiz*, an *en banc* court of eleven judges upheld the initial decision of a three-judge panel, noting that "deportation proceedings are difficult for aliens to fully comprehend, let alone conduct, and individuals subject to such proceedings frequently require the assistance of counsel." 838 F.2d at 1026.

²⁶*Perez-Funez v. I.N.S.*, 619 F. Supp. 656, 662 (C.D. Cal. 1985).

²⁷For an analysis of this argument in greater depth, see *Slipping Through the Cracks*, pp. 19-23.

²⁸IIRIRA, section 303(b) (transition custody rules); INA, sections 236(c) (detention of criminal aliens) and 235(b)(1)(B)(iii)(IV) (detention of asylum seekers). For discussions of these mandatory detention provisions, see "Locked Away," pp. 15, 30-33; Daniel Kerwin, "Detention of Newcomers: Constitutional Standards and New Legislation," *Immigration Briefings*, December 1996, p. 1; Daniel Kerwin, "Throwing Away the Key: Lifers in INS Custody," *Interpreter Releases*, vol. 75, p. 649 (May 11, 1998). In cases in which the mandatory detention rules do not apply, "an alien generally . . . should not be detained or required to post bond except on a finding that he is a threat to the national security or that he is a poor bail risk." *Reno v. Flores*, 507 U.S. 292, 295 (1993).

²⁹*Reno v. Flores*, 507 U.S. at 295.

issued interim regulations based on the settlement agreement in 1998.³⁰ The settlement agreement and interim implementing regulations include the following provisions:

³⁰The comprehensive agreement sets out nationwide police for the detention, release, and treatment of children in INS custody. *Flores Settlement Agreement*, p. 6. The interim regulations were published in July 1998. "Processing, Detention, and Release of Juveniles," *Federal Register*, vol. 63, p. 39,759 (July 24, 1998) (amending 8 C.F.R. section 236.3). For a brief account of the *Flores* litigation, see *Slipping Through the Cracks*, pp. 23-26. For a discussion of constitutional challenges to INS detention conditions generally, see Margaret H. Taylor, "Detained Aliens Challenging Conditions of Confinement and the Porous Border of Human Rights Doctrine," *Hastings Constitutional Law Quarterly*, vol. 22, p. 1807 (December 1998), Vol. 10, No. 4 (G)

- As a matter of general policy, the INS will place detained children “in the least restrictive setting appropriate to the juvenile’s age and special needs, provided that such setting is consistent with the need to ensure the juvenile’s timely appearance before the [INS] or the immigration court and to protect the juvenile’s well-being and that of others.”³¹
- Upon apprehending an unaccompanied child who is not an “arriving alien,” the INS must provide the child with a written notice of rights. If the child is under fourteen, the INS must read and explain the form to the child in a language he or she understands.³²
- An unaccompanied child who is apprehended in the immediate vicinity of the border and who resides permanently in Mexico or Canada must be “informed” of his or her right to call a parent, “close relative,” friend, or “an organization found on the current list of pro bono counsel”; after so advising the unaccompanied child, the INS may present him or her with a voluntary departure form. All other unaccompanied children must “be provided access to a telephone and must, in fact, communicate with a parent, adult relative, friend, or an organization found on the current list of pro bono counsel prior to presentation of the voluntary departure form.”³³
- Following arrest, the INS will permit contact with family members who were arrested with the child.³⁴
- The INS must separate unaccompanied children from unrelated adults, except that “[w]here such segregation is not immediately possible, an unaccompanied juvenile will not be detained with an unrelated adult for more than 24 hours.”³⁵
- Unaccompanied children should not be transported in the same vehicles as detained adults “except when being transported from the place of arrest or apprehension to a Service office or when separate transportation would be otherwise impractical, in which case juveniles shall be separated from adults.”³⁶
- Children represented by counsel must not be transferred from one facility to another without advance notice to counsel “except in unusual and compelling circumstances such as where the safety of the juvenile or others is threatened, or the juvenile has been determined to be an escape risk, or where counsel has waived notice.” Under such circumstances the INS must give notice to counsel within twenty-four hours of transfer.³⁷

International Standards

The United States has ratified the two principal international treaties that protect the human rights of detainees: the International Covenant on Civil and Political Rights (ICCPR), ratified in 1992, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified in 1994. These documents establish that under international law all individuals in INS custody, whether adults or children, have the right to be free from arbitrary detention and to be protected from cruel, inhuman, or degrading treatment.³⁸

³¹*Flores Settlement Agreement*, pp. 8-9, 12-15; 8 C.F.R. section 236.3(d). For a discussion of the conditions under which the INS may place children in secure detention, see “The Standards for Placing Children in Secure Detention.”

³²8 C.F.R. section 236.3(c)(2). See also *Flores Settlement Agreement*, pp. 7-8.

³³8 C.F.R. section 236.3(c)(3).

³⁴*Flores Settlement Agreement*, p. 8; 8 C.F.R. section 236.3(d)(1).

³⁵*Flores Settlement Agreement*, p. 8; 8 C.F.R. section 236.3(d)(1).

³⁶*Flores Settlement Agreement*, pp. 15-16; 8 C.F.R. section 236.3(i)(1).

³⁷*Flores Settlement Agreement*, p. 16; 8 C.F.R. section 236.3(i)(4).

³⁸International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (opened for signature Dec. 19, 1966; entered into force Mar. 23, 1976); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46, 1465 U.N.T.S. 85 (adopted December 10, 1984; entered into force June 26, 1987).

Article 10(1) of the ICCPR establishes that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,” and Article 7 of the ICCPR provides that “[n]o one shall be subjected to cruel, inhuman or degrading treatment or punishment.” Articles 11 and 16(1) of the Convention against Torture obligate the United States to take to prevent torture or cruel, inhuman, or degrading treatment December 1998, Vol. 10, No. 4 (G)

The ICCPR mandates that juvenile detainees must be “accorded treatment appropriate to their age,”³⁹ a general rule which has been developed more fully in subsequent international documents on children. The most authoritative of these documents is the United Nations Convention on the Rights of the Child, which the United States signed in 1995.⁴⁰ The convention recognizes that children are entitled to special care and assistance and that the best interests of the child must be a primary consideration in all actions concerning children.⁴¹ Article 37 of the convention extends specific protections to children deprived of their liberty. Under Article 37:

- no child shall be subjected to cruel, inhuman, or degrading treatment or punishment; the arrest and detention of a child must be “used only as a measure of last resort and for the shortest appropriate period of time”;
- every child deprived of his or her liberty shall be separated from adults, with the exception of unusual cases in which it is not in the child’s best interest to maintain such separation;
- in general, detained children have the right to maintain contact with their family through correspondence and visits;
- every child deprived of his or her liberty shall have the right to “prompt access to legal and other appropriate assistance,” the right to “challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority,” and the right “to a prompt decision on any such action.”

Other international standards, notably the U.N. Rules for the Protection of Juveniles Deprived of Their Liberty (U.N. Rules for the Protection of Juveniles), the Standard Minimum Rules for the Treatment of Prisoners, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), provide authoritative guidance for the interpretation of these treaties.⁴² Finally, the United Nations High Commissioner for Refugees’ Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (UNHCR Guidelines on Policies), the UNHCR Policy on Refugee Children, the UNHCR Guidelines on Detention of Asylum Seekers, and the recommendations of the Executive Committee of UNHCR provide additional assistance in complying with the international standards applicable to children in INS custody.⁴³

III. THE IMMIGRATION AND NATURALIZATION SERVICE’S TROUBLING CONFLICT OF INTEREST

³⁹ICCPR, Article 10(3).

⁴⁰As a signatory to the Convention on the Rights of the Child, the United States is obligated to refrain from acts which would defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties, Article 18(a), 1155 U.N.T.S. 331 (concluded May 23, 1969; entered into force January 27, 1980). The United States is one of only two countries which has not ratified the Convention on the Rights of the Child; the other is Somalia, which has no effective government.

⁴¹Convention on the Rights of the Child, Article 3(1), G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (adopted November 20, 1989; entered into force September 2, 1990).

⁴²U.N. Rules for the Protection of Juveniles Deprived of Their Liberty (U.N. Rules for the Protection of Juveniles), G.A. Res. 45/113, U.N. Doc. A/45/49 (1990); Standard Minimum Rules for the Treatment of Prisoners, U.N. ECOSOC Res. 663C (XXIV), U.N. Doc. E/3048 (1957), amended by ECOSOC Res. 2076, U.N. Doc. E/5988 (1977); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), G.A. Res. 43/173, U.N. Doc. A/43/49 (1988).

⁴³UNHCR, Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum (February 1997); UNHCR, Policy on Refugee Children, U.N. Doc. EC/SCP/82 (October 1993); UNHCR Guidelines on Detention of Asylum Seekers (January 29, 1996). *See also* UNHCR, *Refugee Children: Guidelines on Protection and Care* (Geneva: UNHCR, 1994). UNHCR is currently in the process of revising the guidelines to suggest alternatives to detention and recommend that unaccompanied minors should never be detained, among other revisions.

The Executive Committee of UNHCR has repeatedly emphasized that all actions taken on behalf of refugee children must be guided by the “best interests of the child” principle. Conclusion No. 47 (XXXVIII), Refugee Children, 1987; Conclusion No. 59 (XL), Refugee Children, 1989; Conclusion No. 84 (XLVIII), Conclusion on Refugee Children and Adolescents, 1997. More generally, the Executive Committee has stated that detention must be humane. Whenever possible, asylum seekers should “not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered.” Conclusion No. 44 (XXXVII), Detention of Refugees and Asylum Seekers, 1986. Further, asylum seekers, including minors, should not be detained on an arbitrary basis or for unduly long periods, nor should they be detained without “adequate access to UNHCR and to fair procedures for timely review of their detention status.” Conclusion No. 85 (XLIX).

Unaccompanied children are unique from other individuals in INS custody. Because they are too young to be released on their own recognizance, children who have no close relatives are forced to remain in detention under the legal guardianship of the INS. This presents a serious conflict of interest, since children are subject to the enforcement of the immigration laws by the same agency responsible for their care and protection. We have previously recommended that the United States solve this problem by separating the care-giving function from the enforcement function. In Britain, Canada, Denmark and the Netherlands, for instance, unaccompanied children are placed in the care of appropriate child welfare authorities while immigration officials evaluate the children's case.⁴⁴

In a letter to Human Rights Watch, the INS argued that "[s]ince alien juveniles in INS custody are routinely placed in facilities that are owned and operated by non-INS agencies, INS believes that a 'split-off' of the care giving role already exists."⁴⁵ Human Rights Watch finds this argument unconvincing. Although non-INS facilities and staff may provide day-to-day services for detained children, the INS retains legal responsibility for the children and determines where the children are placed. As a result, a large number of children are placed in secure, jail-like facilities. The INS, as legal custodian, also maintains enormous influence over children's access to information on their legal rights and their access to meaningful legal representation. The complexity of immigration proceedings and their frequent lack of English skills makes it almost impossible for children to make their way through the legal process without the help of an attorney. The INS, which is usually seeking the children's removal from the United States, has little incentive to ensure that children receive this help.

Children are a uniquely vulnerable group and are entitled to be placed in the care of individuals or agencies which will act in the best interest of the child and are capable of protecting children's rights. Reassigning care-giving functions from the INS to appropriate child welfare authorities would eliminate the INS's troubling conflict of interest and would help ensure that the needs of unaccompanied children will be adequately met.

IV. FINDINGS AT BERKS COUNTY YOUTH CENTER

The Berks County Youth Center (BCYC) consists of three separate facilities: a secure detention wing, housing juveniles who have been charged or adjudicated delinquent; a shelter care facility used primarily for children in the custody of local child welfare authorities (referred to in this report as the "old shelter"); and a second thirty-five-bed shelter care facility which opened in October 1998, used primarily for children in INS custody (referred to as the "new shelter").

The new shelter nearly triples the number of shelter beds available to the INS at BCYC. At capacity, the shelter will house thirty-five juvenile detainees. At the time of our visit on November 23, 1998, it held twenty-two children.

⁴⁴ See *Slipping Through the Cracks*, pp. 64-67.

⁴⁵ Letter from Richard B. Cravener, INS Acting Associate Commissioner for Field Operations, to Lois Whitman, Executive Director, Human Rights Watch, Human Rights Watch, August 13, 1998. December 1998, Vol. 10, No. 4 (G)

INS detainees may be placed in any one of the three facilities. Of the forty-seven children in INS custody who were detained at BCYC between October 1 and November 9, 1998, approximately one-quarter were placed in secure detention and three-quarters in shelter care. On a national basis, roughly one-third of the children held by the INS are kept in secure detention.⁴⁶

BCYC's old shelter care facility is carpeted, with comfortable furniture in both common areas and in individual rooms. Children in shelter care are allowed to maintain personal possessions, decorate their rooms, and are frequently allowed to go outdoors. Children interviewed report a wide range of available activities and a caring staff. With the exception of difficulties related to language and translation (discussed later in this report), children described general satisfaction with the facility and its programs.

The new shelter is a renovated wing of a retirement home. At the time of our November visit, it had been open only a few weeks and reflected the relatively sterile environment of a newly opened facility. However, its well-lit day rooms had newly installed carpet, comfortable furniture, television, and games. It also has two classrooms, each equipped with several computer terminals.

In stark contrast, BCYC's secure detention facility is surrounded by a fifteen-foot razor wire fence. Children are brought to secure detention in handcuffs and leg irons and are strip-searched upon entry. They are forced to relinquish their personal clothing and issued t-shirts, sweat pants, and sweat shirts. Children are assigned to cells with concrete walls, ceiling, and floor, completely bare except for bedding and a Bible.

Findings Common to All BCYC Facilities

Information on Legal Rights and Available Legal Services

Very few of the children that we interviewed reported receiving any information about legal services from either INS or BCYC staff. Fernando, a sixteen-year-old Salvadoran, told us in November that "when I came here, they gave us a paper and told us to read it. They told us about the rules here, and about showers, classes, etc. But no, they didn't give me a list of lawyers, or anything about court or a judge."

Neither could local INS and BCYC staff identify a clear mechanism by which children received this information. While local INS Supervisor Marion Dillis first told us that children received a list of legal services when they were first picked up, she later said that lists were provided by BCYC counselors.⁴⁷ BCYC director Jack Borden, on the other hand, said he didn't know anything about attorney representation and that the children had access to attorneys through Marion Dillis.⁴⁸ Some other BCYC staff told us that counselors had lists of attorneys. Asked for the list, a counselor spent several minutes rummaging in a file cabinet. He finally produced two dog-eared pages of listings, some nearly illegible and others without phone numbers. A local immigration judge told Human Rights Watch that while some children appearing in his court indicate that they have been given a list of legal services, "I always presume they have not."⁴⁹

⁴⁶Interview with John Pogash, INS National Juvenile Coordinator, Leesport, Penn., November 23, 1998.

⁴⁷Human Rights Watch interview with Marion Dillis, INS Supervisory Detention/Deportation Officer, Leesport, Penn., June 16, 1998.

⁴⁸Human Rights Watch interview with Jack Borden, BCYC Superintendent, Leesport, Penn., June 16, 1998.

⁴⁹Human Rights Watch telephone interview with Immigration Judge Walter A. Durling, August 10, 1998. Judge Durling is a Human Rights Watch judge in York, Pennsylvania, where the cases of children detained in December 1998, Vol. 10, No. 4 (G)

Several local immigration attorneys reported difficulty in learning about children needing legal representation. One commented that local INS and BCYC staff “don’t care about representation”⁵⁰ and another said that she felt that it was an “unstated policy to make legal representation as difficult as possible.”⁵¹ Attorneys handling juvenile cases reported that while they were sometimes called by BCYC counselors who believed a child needed representation, they were more often approached directly by judges.⁵²

Several children reported that their only communication about legal representation was with an immigration judge at their first hearing. An immigration judge in nearby York, Pennsylvania, reported that the vast majority of children are unrepresented the first time they appear in his court. He said that access to legal representation for juveniles was a “great concern” and indicated that very few attorneys are willing to take on pro bono juvenile cases. “If an attorney happens to be in the court at the time, I’ll talk to them and ask them to stand in, but I’m wearing out my welcome doing that.”⁵³

As required by regulation, local immigration judges refuse to take pleadings from children without an attorney or family members present.⁵⁴ According to one attorney, “what this means is that kids are there for months and months without representation”⁵⁵ and often end up going back and forth to court.

Because few children have the means to pay for attorneys, most depend on pro bono representation. As a result, attorneys are often unwilling or unable to give the case much time and attention. Several children who told us that their attorneys had been secured by local judges reported that they had no contact with the attorney apart from a few minutes’ conversation prior to a hearing. These children can hardly be said to have meaningful representation.

The expansion at Berks caused great concern among local attorneys and others concerned about legal representation for children in INS detention. One immigration attorney, referring to the limited number of local attorneys who are willing to take juvenile cases on a pro bono basis, said, “I don’t know how we’re ever going to represent that many kids.”⁵⁶ Her concerns were echoed by a local immigration judge, who said, “I’m very concerned about it [the expansion] from the perspective of having virtually no pro bono counsel here in York. Frankly, I don’t know how to approach this. We’re up against a wall.”⁵⁷

In an effort to meet the legal needs of the increased number of juvenile detainees at BCYC, INS Assistant District Director Ted Nordmark has made efforts to improve access to legal representation. Shortly before the opening of the new shelter, he contacted the Nationalities Service Center (NSC), an agency in Philadelphia that provides immigration and other legal services. NSC is now working to set up a legal services program for juveniles at BCYC which would rely on law students, volunteer attorneys from the Pennsylvania chapter of the American Immigration Lawyers Association, and other local organizations. NSC is seeking funding for a full-time coordinator for the program and is identifying volunteer translators to help with representation. Under the planned program, NSC plans to send law

⁵⁰Human Rights Watch interview with immigration attorney Susan Weber, York, Penn., June 16, 1998.

⁵¹Human Rights Watch telephone interview with immigration attorney Susan Toler, May 6, 1998.

⁵²Human Rights Watch interviews with immigration attorneys Susan Weber, York, Penn., June 16, 1998, and Ann Carr, Lancaster, Penn., June 16, 1998.

⁵³Human Rights Watch telephone interview with Immigration Judge Walter A. Durling, August 10, 1998.

⁵⁴8 C.F.R. section 240.10(c) requires:

The Immigration Judge shall not accept an admission of removability from an unrepresented respondent who is incompetent or under the age of 18 and is not accompanied by an attorney or legal representative, a near relative, legal guardian, or friend; nor from an officer of an institution in which a respondent is an inmate or patient. When, pursuant to this paragraph, the immigration judge does not accept an admission of removability, he or she shall direct a hearing on the issues.

⁵⁵Human Rights Watch interview with Ann Carr, Lancaster, Penn., June 15, 1998.

⁵⁶Human Rights Watch interview with immigration attorney Susan Weber, York, Penn., June 16, 1998.

⁵⁷Human Rights Watch telephone interview with Immigration Judge Walter A. Durling, August 10, 1998.

students and attorneys to BCYC once or twice a week to complete initial interviews with the children and help identify appropriate attorneys willing to take cases.⁵⁸

The INS is exploring the possibility of installing video-conferencing equipment to facilitate contact between children and their attorneys and allow the possibility of conducting hearings by video conference. Such capabilities could both reduce the need for lengthy trips to York and make it more possible for Philadelphia-area attorneys to represent clients at BCYC. INS officials also plan to propose that York-based immigration judges travel to Leesport to hold hearings at BCYC, also in an effort to reduce the amount of travel for both children and their attorneys.

⁵⁸Human Rights Watch interview with Cherylle Corpuz, director of legal services, Nationalities Service Center, in Leesport, Pennsylvania, March 1998.

If implemented as envisioned, these changes and the NSC's anticipated legal services program could significantly relieve existing problems related to legal access. However, the planned program depends on outside grant funding and the willingness of Philadelphia-area attorneys to take on pro bono clients housed over an hour away. One local attorney welcomed the new effort but expressed some skepticism that Philadelphia attorneys would be willing to travel to Berks, remarking, "Attorneys need to have direct contact with the children. It's very impersonal to do it by video conferencing. That's not terribly good for anything substantive."⁵⁹

The concerns regarding legal representation and difficulties in hiring staff with appropriate language skills underline the importance of locating facilities housing juveniles in INS custody in major ports of entry to the United States and near urban centers where legal assistance and services from nongovernmental agencies (including those with multicultural staff and programs) are more likely to be available, as recommended by the United Nations High Commissioner on Refugees.⁶⁰

Access to Translators

A problem identified repeatedly in our interviews was the unavailability of translation, particularly the lack of staff with any Chinese language skills. While BCYC employs Spanish-speaking staff, until recently there were no staff who could communicate with Chinese-speaking children, despite the fact that the majority of the INS children detained at BCYC in the past year have been Chinese.

On a day-to-day basis, Chinese-speaking children often find themselves completely isolated, unable to communicate their needs or questions. The plight of these children underscores the need to locate facilities in areas where culturally appropriate community resources are available, as the United Nations High Commissioner for Refugees has recommended.⁶¹

BCYC staff acknowledged the need for Chinese-speaking staff and expressed frustration that they had been unable to hire staff with Chinese language skills. Several BCYC staff told Human Rights Watch that "we do the best we can," emphasizing that translation services can be requested through the INS when needed and are available twenty-four hours a day by telephone. However, not all staff appear to be aware of this option. For example, during our tour of the intake area for the secure facility, when one staff member mentioned the availability of telephone translation, the officer staffing the area responded, "I was never told to do that; we don't do that."⁶² The intake process for the secure facility can be frightening for any child. However, one can only imagine that being brought in handcuffs and leg irons into a facility surrounded by a fifteen-foot razor-wire fence and then being strip searched without any explanation in a language a child can understand, could be terrifying.

⁵⁹Human Rights Watch telephone interview with local immigration attorney, November 16, 1998.

⁶⁰The United Nations High Commissioner for Refugees recommends that "[f]acilities should not be located in isolated areas where culturally appropriate community resources and legal access may be unavailable." UNHCR Guidelines on Policies, section 7.7.

⁶¹*Ibid.*, section 7.7.

⁶²Human Rights Watch site visit to BCYC, June 16, 1998.

Human Rights Watch was shown copies of facility rules translated into Chinese and Spanish, and BCYC staff told us that a computer system offers some translation assistance for Chinese-speaking children. Nevertheless, most Chinese children we interviewed reported that they had not seen any Chinese-language materials.⁶³

In addition, only one of the children we interviewed reported using telephone translation services. Most were unaware that it was available if needed. For many children, even basic requests were very difficult to communicate. For example, Bao, a fifteen-year-old from China, recalled during our September interview that he needed to make a phone call to relatives but lacked the ability to communicate his request to the staff.

While some Chinese-speaking children have been able to rely on other Chinese detainees with stronger English skills to help communicate with staff and other children, Human Rights Watch interviewed one child who had been detained for five months without a single person present in the facility with whom he could converse in his own language.

At the time of our June visit, there were no Chinese speaking staff at the facility. According to John Pogash, national INS juvenile coordinator, a condition of the expansion at Berks is that Chinese-speaking staff would be hired to provide twenty-four-hour coverage at the facility. Although BCYC is seeking additional staff with appropriate language capabilities and now has part-time Chinese-speaking staff, this goal has not been met.

Without exception, Chinese children identified Chinese-speaking staff and teachers as the single biggest need at BCYC. Qing, detained at age fifteen, told Human Rights Watch in September, "They should have staff who can speak Chinese, so things will be much easier for us." Miguel, a sixteen-year-old from El Salvador, shared the concern, telling us in November, "I think they should have more bilingual staff here, not just Spanish and English, because there are people here from lots of different countries, like India and China. They should have people who speak their language."

Visitation and Telephone Access

Children at BCYC are allowed weekly visits and phone calls. Both attorneys and children expressed appreciation for policies that allow children to call family members as far away as China. Children from Central America also indicated that they were able to make extra phone calls after the November hurricane that affected several Central American countries to inquire about the health and safety of family members.

However, several children described difficulties in making telephone calls. Xiao Ling, fifteen at the time of her apprehension, and Carlos, sixteen, each described having to make repeated requests to place a phone call, despite staff promises to offer assistance. Both relayed instances where it took over a week until the promised call was finally made.

At the time of our interview in June, Carlos indicated that it has been ten or eleven days since he had been able to speak to his family.

Miguel, sixteen, told us that on at least one occasion, staff had noted in their records that a phone call to his family had been made, when in fact, the call did not go through. He relayed another instance where he was trying to reach his brother in El Salvador. When his sister-in-law answered the phone and indicated that the brother was not at home, BCYC staff terminated the call rather than allowing Miguel to speak to his sister-in-law.

Although phone calls are reportedly allowed twice a week, several children told us that they were only able to make them once a week, and Juan reported that while in secure detention, he was allowed phone calls only once every fifteen days.

Education

⁶³International standards require that children in detention be given a copy of the detention center rules and a written description of their rights and obligations in a language they can understand. In addition, "for those juveniles who are illiterate or who cannot understand the language in the written form, the information should be conveyed in a manner enabling full understanding." Human Rights Watch, *Rules for the Protection of Juveniles*, Article 24, December 1998, Vol. 10, No. 4 (G)

The *Flores* settlement stipulates that children in “licensed programs,”⁶⁴ including those in shelter care facilities, must be provided educational services that are appropriate to the child’s level of development and communication skills. These services must be provided in a structured classroom setting, and they must concentrate primarily on basic academic competencies and secondarily on English language training.⁶⁵

Although the *Flores* agreement does not address the educational services that are required for children in secure detention, the Convention on the Rights of the Child calls upon states to make secondary education “available and accessible to every child.”⁶⁶ The U.N. Rules for the Protection of Juveniles clarify that a child in detention has the “right to education suited to his or her needs and abilities and designed to prepare him or her for return to society.”⁶⁷ Similarly, the United Nations High Commissioner for Refugees has stated that “[e]very child, regardless of status, should have full access to education in the asylum country.”⁶⁸

Children in shelter care at BCYC receive about four hours of classes per day, while children in secure detention receive about three hours. Non-English speaking children are often simply given books or worksheets to work on individually. Until recently, BCYC had no English-as-a-second language program, which severely hampered the ability of children to adapt to their environment or to benefit from other instruction. A local advocate had interviewed a Chinese youth who spoke no English even after two years at BCYC and a subsequent transfer to an adult facility.⁶⁹ Describing communication between the teacher and the Spanish-speaking students, Jesús told us, “We didn’t know what she was saying, and she didn’t know what we were saying.”

Chinese children are generally forced to learn on their own, with books and access to a computer with a bilingual English-Chinese language program. Qian, fifteen, reported in September that as many as seven Chinese-speaking children were at BCYC at one time during her period of detention. Because the facility only had one computer equipped with the Chinese-English language program, the children were forced to sign up at intervals to gain access.

Teachers are available for questions, but children report that communication is difficult and often consisted of sign language. Bao told Human Rights Watch that during his four and a half months in detention, “it seems I made very little progress because there was no translator.” Another Chinese girl was classified at the third grade level at the time of her release from BCYC but within months of entering public school was ranked in the top third of her ninth grade class.⁷⁰

In conjunction with the opening of the new shelter facility, INS and BCYC officials have worked to implement new and improved services and programs for detainees. Education programs now include English as a Second Language (ESL) instruction, and the addition of new teachers has reduced the average class size. Both INS and BCYC have reached out to local non-profit agencies, such as the Nationalities Service Center for legal services and Latino Social Service for help building a foreign language library. BCYC staff have also made contact with local Chinese churches in order to provide Chinese-language pastoral visits for children at the Center.

Use of Restraints During Transportation

⁶⁴A licensed program is “any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors.” *Flores* Settlement Agreement, p. 4.

⁶⁵*Ibid.*, exhibit 1 (Minimum Standards for Licensed Programs), p. 2, paragraph 4.

⁶⁶Convention on the Rights of the Child, Article 28(1)(b).

⁶⁷U.N. Rules for the Protection of Juveniles, Article 38.

⁶⁸UNHCR Guidelines on Policies, section 7.12.

⁶⁹Human Rights Watch interview with immigration advocate, June 15, 1998.

⁷⁰Human Rights Watch interview with Harriet Miller, Seven Valleys, Penn., June 1, 1998. Human Rights Watch, *Children in Detention*, Vol. 10, No. 4 (G) December 1998.

Regardless of whether they were in secure detention or in shelter care, most of the children we interviewed reported that they were handcuffed when they were taken to court to appear before an immigration judge. To make the trip to immigration court, which is an hour away, in York, Pennsylvania, children often leave the facility at 6:30 or 7:00 a.m. and return to BCYC at 2:00 or 3:00 p.m. Several children told us that they were handcuffed on such an occasion for more than eight hours, including transportation and time spent consulting with their attorney. One attorney complained about the practice and described meeting with an eleven-year-old client who was “so small, the handcuffs were practically falling off his hands.”⁷¹

Other children reported that the handcuffs were only used during transport, and were taken off once they reached court. Paul, a sixteen-year-old interviewed in November, estimated that he was handcuffed during five of his eight trips to immigration court.

Until recently, children in INS custody were also transported to court together with adult inmates, in direct violation of the *Flores* agreement.⁷² Once this practice became known to district and national INS officers, they indicated that it would stop immediately. When asked about the use of handcuffs, however, they asserted that the INS was within its rights to use handcuffs as a security measure, stating that under INS enforcement standards, the use of restraints during transportation was at the officers’ discretion.⁷³ International guidelines, however, only allow the practice in exceptional circumstances.⁷⁴

Several children also told us that they were forced to skip meals on days when they appeared in court. Jose told us, “When you go to court, you are always hungry. Everyone always told us that.” When the issue was raised with BCYC staff, they said that lunches were supposed to be provided at court but that they would explore providing bag lunches as an alternative.⁷⁵

Discipline

⁷¹Human Rights Watch telephone interview with Ann Carr, November 11, 1998.

⁷²*Flores* Settlement Agreement, pp. 15-16.

⁷³Human Rights Watch interview with John Pogash, Ted Nordmark, and others, Leesport, Penn., November 23, 1998. INS enforcement standards provide that “[r]emoval or application of restraints during transportation or escort shall be at the discretion of the officer.” INS Enforcement Standard, Use of Restraints, Standard III.L (February 5, 1998). These standards also provide that in exercising discretion:

Each officer will make an assessment of the detainee’s risks to the public, the escorting officer(s), and him or herself, as well as the likelihood of absconding. This assessment will include, at a minimum, a review of the detainee’s criminal violations (if any), aggressive or asocial behavior, suspected influence of alcohol or drugs, physical condition, age, sex, and medical condition. Officers should also take into consideration the nature of the assignment, such as type of detainee, length of travel, destination or exposure to the public.

Ibid., Standard III.C. The standards require the INS officer to observe a special degree of care when using restraints on children: “When an officer determines that conditions warrant the use of restraints for members of a family unit, females or juveniles, the officer must be able to articulate the conditions which require the restraints, in accordance with Standard III.C.” *Ibid.*, Standard III.H.

⁷⁴Article 64 of the U.N. Rules for the Protection of Juveniles states that only in exceptional circumstances should instruments of restraint be used. Restraints should not cause humiliation or degradation and should be used restrictively for the shortest possible period of time. Article 26 states that “[t]he transport of juveniles should be carried out at the expense of the administration in conveyances with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity.”

⁷⁵Human Rights Watch interview with Eric Ruth, Jack Borden, and others, Leesport, Penn., November 23, 1998. Vol. 10, No. 4 (G)

BCYC procedure identifies the use of restraints and isolation as a last resort for dealing with children exhibiting aggressive behavior. Both staff and children report that physical exercise is one of the primary disciplinary measures used in the facility. Children in shelter care as well as secure detention are required to do pushups in increments of twenty-five for noncompliance. Although physical condition is supposed to be noted when a child has his or her intake physical, we received several reports that indicate that physical exercise may be used excessively, putting children at risk. When describing the use of pushups as a disciplinary measure, one child indicated that even if children were sick or unable to complete the exercise, the staff “would keep on fucking with them until they do it.” José, a seventeen-year-old Honduran housed in the new shelter, told us in November that during physical exercises another child developed cramps and started to cry, but staff forced him to continue the exercises. Paul, sixteen, reported that another detainee in the new shelter had been required to do 400 disciplinary pushups during the course of one day. A local advocate told us of another detainee who was forced to run laps despite severe asthma. On several occasions, staff forced her to continue until she collapsed and even then continued to harass her.⁷⁶

The imposition of pushups and other physical exercise as disciplinary measures violate international standards when such punishment compromises the physical or mental health of a child.⁷⁷

Several children held in the new shelter complained that discipline was sometimes administered inappropriately as a result of language barriers between detainees and staff. Fernando, sixteen, told us, “Sometimes they tell you to do something and we don’t understand, so they make us do pushups.” Miguel, a sixteen-year-old Salvadoran, said, “When you come here, they make you learn English and say everything to you in English. But if you are from El Salvador, and don’t speak English, they don’t give you time to understand. . . . A lot of times, staff don’t give time for translation and make us do pushups.”

Treatment by Staff and Grievance Procedures

In general, children held in shelter care at BCYC expressed satisfaction with the treatment they received from staff. Most indicated that they were treated well, and some children credited staff with being helpful when they experienced problems.

The difficulties described by detainees were primarily related to language problems. Bao, a Chinese boy, told us that “because we [Chinese detainees] didn’t speak English, we were blamed for conflicts with other kids. If we went to staff to complain, other kids would tell the opposite story, so we got frustrated.” As described above, in such situations, children were often forced to do pushups. In other cases, detainees felt that discipline was applied arbitrarily. Miguel, age sixteen, told us that because he does not have glasses for reading, he often gets headaches. On one such occasion, he asked for permission to lie down but was refused. The staff person reportedly told him, “You don’t get to do what you want to here” and made him do twenty-five pushups. Miguel reflected, “There are some people here who shouldn’t be working here because they abuse their authority.”

The U.N. Rules for the Protection of Juveniles establishes that children have the right to make requests or complaints to the director of the detention facility and other judicial authorities and to be informed of the response without delay. The rules also advocate an independent office to receive and investigate complaints made by juveniles deprived of their liberty.⁷⁸

⁷⁶Human Rights Watch interview with immigration advocate, June 15, 1998.

⁷⁷U.N. Rules for the Protection of Juveniles, Article 67. In addition, the use of instruments of restraint and closed or solitary confinement as disciplinary measures violates international standards. *Ibid.*, Articles 64 and 67.

When asked about grievance procedures at BCYC, staff told us that children had the right to speak to a shift supervisor or to submit a written complaint to the shelter director. When asked how that policy was communicated to detainees, we were told that it was part of the handbook that children get at the time of admission. However, the only instruction the document gives is "if a problem arises let staff know immediately." BCYC staff acknowledged that the instruction was not clear, and needed to be rewritten.⁷⁹

Activities and Recreation

Richard, sixteen, had spent several months in shelter care at BCYC and told Human Rights Watch in June that he was able to participate in a range of activities and was rarely bored. Children in shelter care attend presentations on reproductive health, AIDS, nutrition, and drug and alcohol awareness and participate in sewing, arts and crafts, and other activities. Richard also reported field trips to soccer games, wrestling matches, and a roller skating rink.

Children in the new shelter report that they are able to play outdoors almost daily, usually soccer and occasionally basketball. For their outside games, however, they are restricted to a small fenced area. Paul, a sixteen-year-old detained at the new shelter during its first two weeks of operation, told us that he felt the playing area was too small for the fourteen children who were housed at the facility at the time. He said he couldn't imagine how the field would accommodate thirty-five children when the facility reaches full capacity.

During the first month of operation, children in the new shelter were not able to go on any field trips. Staff are now arranging such trips, and are securing a new van to facilitate transportation.

None of the children we interviewed who had been in secure detention had ever been on a field trip. They also described a general lack of activities. In some cases, they spent hours each day in their bare rooms with no books or distractions.

Transfers to Other Facilities

In the past year, detained children at Berks have been transferred to several different facilities, including those in San Diego, Miami, Chicago, and Phoenix. In one case, four boys were kept in secure detention at Berks, only to be transferred to San Diego on the day that authentication of their guardianship papers was received by the INS. Although they had been held in secure detention on the ground that the INS believed them to be escape risks, their attorney was informed the reason for the transfer was that the San Diego facility was the only one available to keep the children under less restrictive conditions.⁸⁰ After approving their release, the INS delays in transporting the children back to Berks forced their guardians (who were each New York City residents) to travel to San Diego and arrange return transportation for both themselves and the children at considerable personal expense and additional delay.

In this instance, the children's attorney was also not notified in advance of the transfer; she learned of the decision when INS attorneys filed a motion for a change of venue. Another attorney told us that his client had been transferred to Florida in the middle of the night without notice.⁸¹

⁷⁹Human Rights Watch interview with Jack Borden, Eric Ruth, and others, Leesport, Penn., November 23, 1998.

⁸⁰Human Rights Watch interview with Ann Carr, Lancaster, Penn., June 15, 1998.

⁸¹Human Rights Watch telephone interview with attorney Blake Chisam, August 7, 1998. Human Rights Watch, December 1998, Vol. 10, No. 4 (G)

The local INS officer seemed unconcerned about the difficulties created by transferring children to facilities that are distant from both their attorneys and family or guardians. She told us that children could be adequately represented by telephone, and that while attorneys are normally contacted prior to a child being transferred, there are other occasions when “we don’t necessarily want them knowing when someone is leaving”⁸² because of security concerns. At the same time, she acknowledged that there have been no problems with smugglers at the BCYC facility.

The INS practice of transferring children without notice to their attorneys violates *Flores v. Reno* and other INS regulations. Particularly when the INS transfers children to distant facilities, this practice interferes with the ability of counsel to interview their clients, prepare applications for asylum and other forms of relief, and otherwise provide adequate representation. Accordingly, by moving children with no advance notice or notice within twenty-four hours in circumstances that are truly unusual, the INS routinely impedes minors’ right to counsel, protected under domestic law and international standards.⁸³

Local attorneys and advocates also complained that children are too often transferred between facilities without notification of the family. One attorney told Human Rights Watch that family members were often unaware of a child’s whereabouts until she contacted them herself.⁸⁴

Release and Family Reunification

In interviews with children and attorneys, we learned of several instances where the release of children to the custody of family members or guardians was unnecessarily delayed. For example, four Pakistani children were held in secure detention at BCYC for three months despite the fact that each had a close relative in New York with guardianship papers. The INS submitted the papers to the Pakistani Consulate with the request that they be sent to Pakistan for authentication. During the weeks required for this process, the children were kept in secure detention and denied both phone contact and visitation with their relatives. Contact was reestablished only after their attorney protested.⁸⁵

Xiao Ling, from China and now seventeen, was detained for one year, including six months in secure detention, despite the fact that she had an uncle in New York who had agreed to take custody of her. In another instance, an attorney representing two Tamil children reported that the children remained at BCYC for more than a month after receiving asylum because no contact had been made with their family.⁸⁶

Release has also been delayed when families fail to receive clear information about the requirements for the release process. One attorney told us of one family that was forced to make two or three trips to BCYC and was each time turned away because the paperwork required for release was incomplete. The family kept returning because they couldn’t read the written instructions that they had received and didn’t understand what was required.⁸⁷

⁸²Human Rights Watch interview with Marian Dillis, INS Supervisory Detention/Deportation Officer, Leesport, Penn., June 16, 1998.

⁸³Under *Flores*, “[n]o minor who is represented by counsel shall be transferred without advance notice to such counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape risk, or where counsel has waived such notice, in which cases notice shall be provided to counsel within 24 hours following transfer.” *Flores* Settlement Agreement, p. 16.

⁸⁴Human Rights Watch interview with Ann Carr, Lancaster, Penn., June 15, 1998. UNHCR recommends that “changes in residence for unaccompanied children should be limited to a minimum.” UNHCR Guidelines on Policies, section 7.2.

⁸⁵Human Rights Watch interview with Ann Carr, Lancaster, Penn., June 15, 1998.

⁸⁶*Ibid.*

The INS is currently sending many of the Chinese children in its custody to Arizona, claiming that more appropriate services are available at facilities there. However, according to John Pogash, 90 percent of these children are eventually released to relatives or guardians in the New York City area.⁸⁸ To send them to a facility so remote from their families creates unnecessary isolation and exacerbates problems related to both release and access to legal representation.

Conditions in BCYC's Secure Detention Facility

The environment within BCYC's secure wing is more restrictive than in many other juvenile detention centers. BCYC's 1997 annual report noted an increase in the number of residents with violent behavioral backgrounds. It states that BCYC has a reputation of taking "out of control" juveniles from other county facilities which cannot control these youth. The report claims that BCYC's effectiveness in holding such residents can be attributed to the "strict rules and regulations" enforced at the facility.⁸⁹ Children interviewed by Human Rights Watch describe a rigid atmosphere and reported that in secure detention they were not allowed to laugh, often told not to talk, and were even required to ask staff for permission to scratch their nose. Both Spanish-speaking and Chinese-speaking children reported that they were not allowed to speak in their native languages. A local attorney who has represented numerous children reported that her clients have begged her to get them out.⁹⁰ Xiao Ling, who spent several months in secure detention, told Human Rights Watch that while there she cried every day.⁹¹

Our investigation of secure confinement at BCYC revealed that the INS's placement decisions were often arbitrary. In addition, international standards for children in confinement and INS regulations guarantee particular rights for children in confinement, including the right to personal possessions, to wear their own clothes, to have access to information in their own language, appropriate educational services, and meaningful activities and programs promoting the child's development and health.⁹² Children in secure detention at BCYC are denied each of these rights.

The Standards for Placing Children in Secure Detention

⁸⁸Human Rights Watch interview with John Pogash, INS National Juvenile Coordinator, Leesport, Penn., November 23, 1998.

⁸⁹Berks County Juvenile Detention Center Annual Report, p. 15 (Leesport, Penn.: Berks County Sheriff's Department, 1997).

⁹⁰Human Rights Watch interview with immigration attorney Ann Carr, Lancaster, Penn., June 15, 1998.

⁹¹Conditions for INS detainees in other secure juvenile facilities have been documented by other organizations. For example, the Women's Commission on Refugee Women and Children visited the Liberty County Juvenile Correctional Center in Texas in June 1998. At the time, the INS had over eighty children incarcerated in the maximum security facility, where they were commingled with juveniles with criminal records, forced to wear prison uniforms, pat searched, and restricted to cells for twenty-three hours a day. Testimony before the Senate Judiciary Subcommittee on Immigration, September 16, 1998, by Wendy Young, Washington Liaison, Women's Committee on Refugee Women and Children.

⁹²*See generally* Convention on the Rights of the Child; U.N. Rules for the Protection of Juveniles; UNHCR Guidelines on
Political Rights and Settlement Agreement. Human Rights Watch December 1998, Vol. 10, No. 4 (G)

The settlement agreement in *Flores v. Reno* allows the INS to keep children in secure detention in several circumstances. First, the INS may hold children in secure detention for no more than five days while it finds a licensed placement, arranges transportation from remote areas, or locates interpreters for “unusual languages.”⁹³ Second, the INS may hold children in secure detention for an unspecified but temporary period of time in the event of an emergency or an “influx of minors into the United States”; under this provision, the INS must place children with less secure facilities “as expeditiously as possible.”⁹⁴ Finally, a child may be kept in secure detention if he or she:

- has been charged with, is chargeable with, or is convicted of a crime;
- is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act;⁹⁵
- has committed or threatened to commit a violent or malicious act, including an act directed at him or herself;
- has engaged in unacceptable and disruptive behavior in a licensed program;
- is an escape risk; or
- must be held for his or her own safety, “such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.”⁹⁶

The agreement also stipulates that under such circumstances:

- whenever possible, a child should be kept in a medium-security juvenile residential facility instead of a secure detention facility;
- when placed in a detention facility, the child should be placed in separate accommodations for INS minors;
- in all cases, the child must be provided with written notice of the reason for his or her placement in secure detention.

Several of the children we interviewed had been kept in secure detention while at BCYC, including one girl who had been kept in the secure wing for several months. The decisions whether to place a child in the secure wing or shelter care at BCYC often appear arbitrary. One sixteen-year-old girl, in secure detention for several months, told Human Rights Watch in June that she was transferred to shelter care only after her prospective foster parents were quoted in the local newspaper about her situation. Other children who had been in secure detention for periods ranging from one week to three months told Human Rights Watch that they were neither informed why they were placed in the secure wing nor told the reason for their eventual transfer to shelter care. In fact, none of the children with whom we spoke reported being given any reason, either written or verbal, for being placed in the secure wing.

⁹³*Flores* Settlement Agreement, p. 8.

⁹⁴Under *Flores*, an “influx of minors” occurs whenever the INS has more than 130 minors eligible for placement in licensed programs, including those already placed. *Ibid.*, p. 9. Our 1996 investigation found that at any given time, over two hundred children were in INS custody for seventy-two hours or more. According to data provided to us by the INS, some 241 children were in detention between October 7 and October 14, 1996, a figure that excludes those children detained less than seventy-two hours. Of that total, 28 percent were age fifteen or under; 5 percent were under the age of ten. *Slipping Through the Cracks*, p. 2. INS figures for fiscal year 1998 showed 479 juveniles in the “current custody” of the INS. Although these figures are not directly comparable (the 1998 figures represent “total custody occurrences” rather than the total number of juveniles), they show that the “influx” exception to the time limits on temporary secure detention is defined so broadly as to render the limit virtually meaningless.

⁹⁵The criminal and delinquency provisions do not apply to children whose offenses are isolated ones that do not fall into a pattern or practice of criminal activity and do not involve violence against a person or the use or carrying of a weapon. These provisions also do not apply to petty offenses, such as shoplifting, joyriding, or disturbing the peace. *Flores* Settlement Agreement, pp. 12-13.

In addition, none of the children in secure detention was segregated from children who were awaiting delinquency proceedings. The BCYC superintendent, Jack Borden, informed us that the secure facility houses violent offenders, including children accused of murder, rape, and drug trafficking. He also indicated that many of the children are repeat offenders.⁹⁷ Although another BCYC staff person informed us that INS detainees in secure detention were either assigned rooms by themselves or shared a room with another INS detainee, we found this was not the case. During our June tour of the facility, we observed a posted resident list indicating that one of the children in INS custody roomed with a juvenile offender. Our interviews of children confirmed that INS detainees and juvenile offenders shared rooms. Even those children who may be assigned a room by themselves have extensive contact with juveniles charged as delinquents during meals, classes, physical training, and unstructured time in their pods' common room.

Although this commingling is prohibited by INS regulations and runs counter to international guidelines,⁹⁸ BCYC staff universally praised it. They indicated that they felt it had a positive effect on both populations by enabling the INS children to pick up English and giving culturally enriching interactions to the juveniles charged as delinquents.

Decisions regarding the transfer of a detainee from a shelter care facility to secure detention are made entirely at the discretion of the INS. For example, a child in INS custody who exhibits disruptive behavior could be transferred to secure detention based solely on the recommendation of a local INS officer and approval by the INS Regional Office. In contrast, a child who is in shelter care as a ward of local social welfare authorities can not be transferred into secure detention unless formal charges are brought against the child as the result of a police investigation and probable cause hearing.

While INS officers stressed to us that children in secure detention were often placed there because they are charged or adjudicated delinquent,⁹⁹ all of the detainees we interviewed who had been in secure detention were eventually placed in shelter care, indicating that it was unlikely that they had a history of delinquency. Most of the children we interviewed had been in secure detention for at least a week, and two had been held for more than three months.

Privacy and Personal Possessions

International standards state that the right to personal possessions is a basic element of the right to privacy and essential to the psychological well-being of the child.¹⁰⁰ Detainees in secure detention at BCYC are forbidden to have any personal possessions in their cells, and are even denied deodorant. Children are not allowed to put anything on their walls, nor allowed books (other than an English language Bible), games or toys, even teddy bears. A prospective foster mother of a Chinese girl reported that when she took a child's storybook to the facility, the staff "acted like we'd brought a weapon."¹⁰¹ The children are not allowed pencils in their rooms, unless given specific permission by staff.

Detainees are denied the right to wear their own clothes, and are given t-shirts, sweat pants, and sweat shirts. They are forced to use toilet stalls with no doors, and staff supervise their showers.

During our visit, Human Rights Watch observed concrete cells, completely bare except for bedding and a Bible. The negative impact of this sterile environment is compounded by the fact that in some cases, children spend several hours a day confined to their rooms, deprived of any sensory or intellectual stimulation except for a Bible in a language they most often cannot read.

⁹⁷Human Rights Watch interview with Jack Borden, BCYC superintendent, Leesport, Penn., June 16, 1998.

⁹⁸The *Flores* settlement requires that "minors shall be separated from delinquent offenders." *Flores* Settlement Agreement, p. 8. Guideline 6 of the UNHCR Guidelines on the Detention of Asylum Seekers directs that asylum seekers should be separated from convicted criminals, an extension of the general international standard requiring separation between different categories of detainees. See Standard Minimum Rules, Article 8; U.N. Rules for the Protection of Juveniles, Article 29.

⁹⁹Interview with John Pogash, Ted Nordmark, and others, Leesport, Penn., November 23, 1998.

¹⁰⁰Article 35 of the U.N. Rules for the Protection of Juveniles note that the possession of personal effects is a basic element of the right to privacy and is essential to the well-being of a child.

¹⁰¹Human Rights Watch interview with Harriet Miller, Seven Valleys, Penn., June 1998. Human Rights Watch, Vol. 10, No. 4 (G)

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