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## Enforcing the “Safe and Sanitary” Environment Standard Within U.S. Detention Facilities to Save Children’s Lives

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**ENFORCING THE “SAFE AND SANITARY” ENVIRONMENT  
STANDARD WITHIN U.S. DETENTION FACILITIES TO SAVE  
CHILDREN’S LIVES**

ABSTRACT

*Overcrowding and unsanitary conditions within Customs and Border Protection (CBP) detention facilities are ideal for the transmission of infectious disease among CBP detainees. This is a dangerous problem. Between 2018 and 2019, at least six children died after acquiring infectious diseases while detained at CBP facilities. Migrant children are particularly vulnerable because their immune systems are not fully developed and due to the negative impact of trauma and stress have on their immune systems. Infectious disease promulgation within CBP facilities also puts the American public at risk because of the potential for transmission beyond CBP facilities. Employees who are regularly in direct contact with detainees, as well as released detainees, may expose members of their communities to infectious disease.*

*Under Section 264 of the Public Health Service Act (PHSA), the federal government has the duty to protect American citizens from the spread of infectious disease. Additionally, the Flores Settlement Agreement (FSA) charges the federal government with the duty to provide “safe and sanitary” living conditions for children in its custody. This Article argues that the government is in violation of the PHSA and the FSA by allowing the poor conditions within CBP facilities and by failing to provide vaccinations within CBP facilities. The federal government should provide vaccinations within CBP facilities in order to protect the children in its custody, as well as the American public.*

## I. INTRODUCTION

On December 18, 2018, eight-year-old Felipe Alonso Gomez and his father were apprehended by the United States (U.S.) Customs and Border Protection (CBP) as they crossed into the United States from the southern border.<sup>1</sup> After being detained for six days in CBP custody, on December 24, Felipe developed a cough and displayed flu-like symptoms.<sup>2</sup> Since influenza has an incubation period of four days, it is highly likely that he acquired the infection while in CBP custody.<sup>3</sup> Felipe did not live long enough to see Christmas.<sup>4</sup> The subsequent autopsy report contained gruesome findings of the effects of infection that Felipe never should have endured.<sup>5</sup> Specifically, the influenza infection resulted in a deadly complication: a bacterial infection from *Staphylococcus aureus*.<sup>6</sup> The autopsy found that Felipe had bloody fluid in his chest cavity, damage from inflammation in his respiratory tract, and a massive hemorrhage in his lower lungs.<sup>7</sup> These are horrifying conditions for any human being to have to endure, let alone an eight-year-old child.

The death of Felipe is just one example of a migrant child dying from an infection after crossing the U.S. border. Between December 2018 and late May 2019, there have been three reported deaths of migrant children in CBP detention facilities, and three additional reported deaths of migrant children just after their release from CBP custody, all from illnesses such as influenza, staph, and pneumonia.<sup>8</sup> According to a letter from physicians and public health professionals connected to Johns Hopkins and Harvard Medical Schools, the number of child migrant deaths from influenza reflects a substantially higher death rate from influenza as compared to the general population.<sup>9</sup> Migrant

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1. Mark A. Travassos, *A "Natural Death": The Political Battlefield of Infections and Migrant Children's Bodies*, 70 *CLINICAL INFECTIOUS DISEASES* 2721, 2721 (2019).

2. *Id.*

3. *Id.*

4. Felipe was taken to a hospital on December 24, but he was incorrectly diagnosed with a cold, and discharged back into CBP custody the same day. *Id.*

5. *Id.* at 2722.

6. Travassos, *supra* note 1, at 2722.

7. *Id.*

8. Nicole Acevedo, *Why Are Migrant Children Dying in U.S. Custody?*, NBC NEWS (May 29, 2019, 3:44 PM), <https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316?fbclid=IwAR38n79Vu1jBLEjqEPL8NCeCJ7qaGinN2TJOUtFEkVII1BKJDylSX3Jee7Rs>.

9. Letter from Melinek et al., Physicians with PathologyExpert, Inc., Harvard Medical School, and John Hopkins Bloomberg School of Public Health, to Rosa DeLauro and Lucille Roybal-Allard, Chairs, Committee on Appropriations (Aug. 1, 2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/32e1590e-f161-42fa-b5c0-2c680eb975ad/note/9fabfc6a-5b17-4cc3-85f2-7835d3bf720e.pdf#page=1>; Scott Simon, *Opinion: We Are Risking Health and Life*, NPR (Aug. 24, 2019, 8:30 AM), <https://www.npr.org/2019/08/24/753889380/opinion-we-are-risking-health-and-life>.

children in detention facilities also have a higher risk of acquiring severe influenza compared to children in the general U.S. population due to factors such as lower immunization rates in their home countries, higher rates of infection with other infectious diseases, and insufficient access to health care.<sup>10</sup>

The conditions within migrant detention facilities are dangerous for detainees.<sup>11</sup> Even though the CBP facilities are only meant for short-term detention of undocumented immigrants while they are being processed, detainees have faced long detention periods and overcrowding.<sup>12</sup> The overcrowding of these detention facilities, which leads to inadequate sanitation, food, and health care, creates a high risk environment for transmission of infectious diseases in addition to poor sanitation-related health issues.<sup>13</sup> For example, between 2018 and 2019, one CBP facility that mainly detained children had outbreaks of scabies, shingles, and chicken pox among detainees.<sup>14</sup> As this Article focuses on outbreaks within CBP facilities, it is important to understand where CBP falls within the immigration process, as well as which laws apply to the regulation of health care provision at CBP facilities.

In 2003, per the Homeland Security Act of 2002, the Immigration and Naturalization Service (INS) was disbanded and reorganized into three components: U.S. Citizenship and Immigration Services (USCIS), to focus on benefits applications; U.S. Immigration and Customs Enforcement (ICE), to focus on immigration enforcement; and CBP, to focus on border security.<sup>15</sup> CBP and ICE facilities are thus federal facilities, and their regulation falls under the purview of the federal government. The Public Health Service Act of 1944 (PHSA) gives the federal government broad authority to regulate the spread of communicable diseases.<sup>16</sup> Section 264 of the PHSA states that the federal government has the authority to "prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the states or possessions, or from one state or possession into any other state or possession."<sup>17</sup>

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10. Letter from Melinek et al. to Rosa DeLauro and Lucille Roybal-Allard, *supra* note 9.

11. Christina Potter, *Outbreaks in Immigrant Detention Facilities*, OUTBREAK OBSERVATORY (July 11, 2019), <https://www.outbreakobservatory.org/outbreakthursday-1/7/11/2019/outbreaks-in-migrant-detention-facilities>.

12. JENNIFER COSTELLO, DEP'T. OF HOMELAND SEC., MANAGEMENT ALERT – DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (REDACTED) 2 (2019)

13. Potter, *supra* note 11.

14. *Id.*

15. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 25, 2011), <https://www.uscis.gov/about-us/our-history>.

16. JARED COLE & KATHLEEN SWENDIMAN, CONG. RSCH. SERV., RS21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS (2014).

17. 42 U.S.C. § 264.

The purpose of this law is to prevent the spread of infectious disease carried by individuals coming from other countries to the United States.<sup>18</sup>

Additionally, the Flores Settlement Agreement (FSA) is a 1997 agreement signed by the U.S. government that sets standards for the care of minors in federal immigration custody.<sup>19</sup> This agreement is a binding contract between the U.S. government and all minors detained in CBP and ICE custody that remains binding until the federal government implements regulations that codify it.<sup>20</sup> The FSA specifically provides that minors are to be held in “facilities that are safe and sanitary and that are consistent with the [CBP and ICE’s] concern for the particular vulnerability of minors.”<sup>21</sup> The purpose of this agreement is to protect the health of minors who are detained in U.S. custody.<sup>22</sup>

However, the reality is that the conditions in the CBP detention facilities perpetuate the spread of disease and have even led to the death of children.<sup>23</sup> Moreover, CBP has refused to provide flu vaccinations for detainees at CBP detention facilities, which is an important step in reducing the spread of flu within detention facilities and beyond, such as when detainees are released to the general population.<sup>24</sup> The federal government is acting in violation of Section 264 of the PHSA and the federal regulations requiring safe and sanitary conditions by not providing infectious disease vaccinations to child detainees upon their arrival in CBP detention facilities.<sup>25</sup> The government is failing to fulfill its duties under the PHSA by allowing the spread of infectious diseases among detainees in CBP facilities and from detainees to American citizens once detainees move through the immigration system and are released into local communities. Moreover, the government is in violation of the federal regulations requiring safe and sanitary conditions because by detaining children in conditions that promote the spread of infectious disease, the standard of a “safe and sanitary” environment is not being met for child detainees. To prevent these violations and to protect the health of detainees and American citizens, the federal government must provide the option for vaccination to child detainees upon arrival in CBP detention.

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18. *Id.*; *Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> (last visited Nov. 16, 2020).

19. SARAH HERMAN PECK & BEN HARRINGTON, CONG. RSCH. SERV., R45297, THE “FLORES SETTLEMENT” AND ALIEN FAMILIES APPREHENDED AT THE U.S. BORDER: FREQUENTLY ASKED QUESTIONS 7 (2018).

20. *Id.*; *Flores v. Barr*, 407 F.Supp.3d 909, 931 (C.D. Cal. 2019); Stipulated Settlement Agreement at 7, *Flores et al. v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. 1997).

21. Stipulated Settlement Agreement, *supra* note 20.

22. *Id.*

23. Potter, *supra* note 11.

24. Simon, *supra* note 9.

25. Stipulated Settlement Agreement, *supra* note 20, at 7–8.

In the past, the PHSA has mainly been used in relation to quarantine and isolation measures in order to prevent the interstate spread of disease. To date, it has not been applied to how the federal government deals with infectious disease among individuals within U.S. detention centers.<sup>26</sup> However, that may be because the issues of child deaths in CBP detention facilities, as well as the spread of infectious disease in CBP facilities, have only recently been brought to light.<sup>27</sup> Moreover, the FSA does not clearly define "safe and sanitary" conditions for child detainees with respect to a standard of care for child detainees.<sup>28</sup> Consequently, this Article is one of the first to discuss the issue of infectious disease within CBP detention centers, along with the federal government's responsibility under federal law to reduce the spread of disease and promote safety of child detainees.

This Article will proceed as follows. Part II will first describe the conditions in detention centers and how those conditions create a high-risk environment for infectious diseases and other illnesses related to poor hygiene and sanitation. Part III will discuss the federal government's responsibility under Section 264 of the PHSA to protect American citizens from the spread of infectious disease, as well as its responsibility under the FSA to provide appropriate living conditions for child detainees within U.S. custody. Part IV will argue that the government is acting in violation of the FSA and PHSA by failing to maintain safe and sanitary conditions within detention centers and by not providing the option of vaccinations to children in CBP custody. Lastly, Part V will offer recommendations that may help to provide a better standard of care for child detainees to prevent deaths and the spread of disease.

## II. THE SPREAD OF DISEASE WITHIN CBP DETENTION FACILITIES

Conditions in detention centers create a high-risk environment for the spread of infectious diseases and other sanitation-related illnesses.<sup>29</sup> In May 2019, the U.S. Department of Homeland Security (DHS) Office of Inspector General (OIG) conducted inspections of five CBP facilities in El Paso, Texas, and the Rio Grande Valley and found serious issues with overcrowding and prolonged detention.<sup>30</sup> The problem of overcrowding creates circumstances, including poor living conditions and poor sanitation, that promote the spread of infectious disease.<sup>31</sup> Other issues that further increase the potential for infectious disease

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26. COLE & SWENDIMAN, *supra* note 16, at 9.

27. *See* Potter, *supra* note 11.

28. U.S. COMM'N ON C.R., TRAUMA AT THE BORDER: THE HUMAN COST OF INHUMANE IMMIGRATION POLICIES 126 (2019).

29. *See* Potter, *supra* note 11. *See also* Charlotte Christaine Hammer et al., *Risk Factors and Risk Factor Cascades for Communicable Disease Outbreaks in Complex Humanitarian Emergencies: A Qualitative Systematic Review*, 3 *BMJ GLOB. HEALTH* 1, 7–8 (2018).

30. COSTELLO, *supra* note 12, at 2; Potter, *supra* note 11.

31. Potter, *supra* note 11.

transmission include lack of access to food, which can cause malnutrition that results in higher susceptibility to infections in children,<sup>32</sup> and lack of access to health care.<sup>33</sup>

#### A. Overcrowding

In 2019, the number of unaccompanied minors apprehended at the southern U.S. border was the highest it has ever been.<sup>34</sup> In the first eleven months of fiscal year 2019, of the over 950,000 individuals apprehended by CBP, 72,873 were unaccompanied minors.<sup>35</sup> The highest number of children held at a Clint, Texas facility known for holding unaccompanied, undocumented children, was estimated at over 700 children around April and May 2019, and that number was at 250 children in early July 2019.<sup>36</sup> As a result of this increased influx of unaccompanied child migrants, there are still delays in processing detainees, detainees are being held for longer periods of time in CBP detention facilities, and CBP facilities are overcrowded.<sup>37</sup>

According to the World Health Organization, overcrowding, meaning high population density within a limited area, is a major factor in the spread of infectious diseases with epidemic potential.<sup>38</sup> This is because overcrowding often results in reduced quality of the living area and poor sanitation, both of which promote infectious disease transmission.<sup>39</sup> Additionally, rapid cycling of infectious diseases among people living in close quarters can lead to higher chances of evolution of any given infectious disease, potentially causing more serious manifestations of that disease.<sup>40</sup> In the context of detention centers, the high population density of such centers also makes it difficult to effectively

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32. Peter Katona & Judit Katona-Apte, *The Interaction Between Nutrition and Infection*, 46 CLINICAL INFECTIOUS DISEASES 1582, 1582 (2008).

33. Potter, *supra* note 11.

34. WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1, 2 (2019).

35. *Id.* at 2–7. See also John Hudak & Christine Stenglein, *The Moral and Policy Failures of Immigration Detainee Vaccination Policy*, BROOKINGS (Nov. 25, 2019), <https://www.brookings.edu/research/the-moral-and-policy-failures-of-immigration-detainee-vaccination-policy>.

36. Simon Romero et al., *Hungry, Scared and Sick: Inside the Migrant Detention Center in Clint, Tex.*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/interactive/2019/07/06/us/migrants-border-patrol-clint.html>.

37. Hudak & Stenglein, *supra* note 35.

38. *What Are the Health Risks Related to Overcrowding?*, WORLD HEALTH ORG., [https://www.who.int/water\\_sanitation\\_health/emergencies/qa/emergencies\\_qa9/en/](https://www.who.int/water_sanitation_health/emergencies/qa/emergencies_qa9/en/) (last visited Nov. 9, 2020).

39. Andrew B. Christie et al., *Population Density*, BRITANNICA (May 1, 2010), <https://www.britannica.com/science/infectious-disease/Population-density>.

40. *Id.*

quarantine infected individuals.<sup>41</sup> Thus, overcrowding can lead to conditions that promote infectious disease transmission within CBP detention centers.<sup>42</sup>

### B. Poor Conditions Within CBP Facilities

Poor living area quality and sanitary conditions within CBP facilities can lead to increased transmission of infectious diseases.<sup>43</sup> The *New York Times* reported that the stench from the children's clothing at the Clint, Texas facility was so strong that the CBP agents working there would smell of it when they left work.<sup>44</sup> The children had no way to clean themselves, including no way of washing their hands after going to the bathroom, which is known to contribute to the spread of disease.<sup>45</sup> A DHS report found that children at three of the five CBP facilities it inspected did not have access to showers or laundry facilities and had limited access to a change of clothes,<sup>46</sup> while other reports detailed a lack of soap and toothbrushes.<sup>47</sup> Often, babies would have to drink from unwashed bottles and faced diaper shortages.<sup>48</sup> As noted by a physician, these unsanitary conditions amounted to "intentionally causing the spread of infectious disease."<sup>49</sup>

The medical care available for children within detention facilities is inadequate and ineffective, leaving children even more vulnerable to health issues.<sup>50</sup> Many children in CBP detention are detained without access to a pediatrician.<sup>51</sup> Additionally, even if they did eventually receive care, many children did not receive timely and appropriate care while they were detained.<sup>52</sup> Lack of access to pediatricians and delays in receiving care are problematic

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41. Potter, *supra* note 11.

42. Christie, *supra* note 39; Potter, *supra* note 11.

43. Christie, *supra* note 39; Potter, *supra* note 11.

44. Romero et al., *supra* note 36.

45. Jeremy Raff, *What a Pediatrician Saw Inside a Border Patrol Warehouse*, THE ATLANTIC (July 3, 2019), <https://www.theatlantic.com/politics/archive/2019/07/border-patrols-oversight-sick-migrant-children/593224/>.

46. *Id.*

47. Madeleine Joung, *What Is Happening at Migrant Detention Centers? Here's What to Know*, TIME (July 12, 2019, 2:01 PM), <https://time.com/5623148/migrant-detention-centers-conditions>.

48. *Id.*

49. Arya Sundaram, *The Border Patrol-to-Emergency Room Pipeline*, THE ATLANTIC (July 21, 2019), <https://www.theatlantic.com/family/archive/2019/07/border-crisis-reaches-emergency-rooms/594160>.

50. *Id.*

51. Acevedo, *supra* note 8.

52. *Kids in Cages: Inhumane Treatment at the Border: Hearing Before the Subcomm. on Civil Rights and Civil Liberties H. Oversight and Reform Comm.*, 116th Cong. \_\_ (2019) (statement of the National Association of Pediatric Nurse Practitioners).

because children can get sick quickly and delays in care can lead to detrimental outcomes, including death.<sup>53</sup>

Indeed, children from detention centers who were later seen by health care providers after their release showed signs of medical neglect.<sup>54</sup> A member of the National Association of Pediatric Nurse Practitioners (NAPNAP) working in a clinic in San Antonio, Texas, stated that many of the children who came to the clinic for treatment after release from detention facilities were already sick with infectious diseases, gastrointestinal conditions, and other symptoms.<sup>55</sup> A physician who was able to examine children from a CBP facility noted that some of the children she saw exhibited signs of malnutrition and dehydration, and about two-thirds of them displayed symptoms of respiratory infection.<sup>56</sup> As noted by a former detainee, children were even getting sick from consuming moldy or expired food.<sup>57</sup>

There is also a lack of continuity of care, as CBP refuses to disclose any medical records to the doctors that treat released children outside of the detention facility.<sup>58</sup> For pediatricians treating released migrant children, this lack of transparency is an obstacle because the pediatricians do not know what medical conditions the child may have.<sup>59</sup> Studies show that continuity of care leads to increased efficiency in the provision of care and better outcomes for patients.<sup>60</sup> That CBP refuses to share previously detained migrants' medical records with the migrants' pediatricians is a failure to promote continuity of care, which reduces the quality of care that children are able to receive after their release.<sup>61</sup>

### C. *Negative Outcomes for Child Detainees in CBP Detention*

There are many reports of disease spreading among both adult and child detainees in various CBP facilities during 2019, of which the following are just a few examples. The Clint, Texas, CBP detention facility had outbreaks of scabies, shingles, and chicken pox, spreading among children and adults crammed into cells insufficiently sized for the number of individuals being

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53. Acevedo, *supra* note 8.

54. *See id.* *See also* Sundaram, *supra* note 49. *See generally* Channelle Diaz, *The Real Border Crisis: Medical Neglect of Migrants in Detention Centers*, STAT (Jan. 10, 2019), <https://www.statnews.com/2019/01/10/medical-neglect-migrants-detention/>.

55. *Id.*

56. Sundaram, *supra* note 49.

57. *Id.*

58. Jen Christensen & Mike Nedelman, *Doctors Describe Black Box of Medical Care in Detention Facilities: 'That is Not Medical Care. That's Malpractice'*, CNN (July 3, 2019, 1:22 AM), <https://www.cnn.com/2019/07/02/health/migrant-conditions-doctors-bn/index.html>.

59. *Id.*

60. Vidya Sudhakar-Krishnan & Mary CJ Rudolf, *How Important is Continuity of Care?*, 92 ARCHIVES DISEASE CHILDHOOD 381, 381 (2007).

61. *See id.*; Christensen & Nedelman, *supra* note 58.

held.<sup>62</sup> There were also reports of lice outbreaks among children at the Clint facility.<sup>63</sup> In May 2019, thirty-two migrants tested positive for influenza at the McAllen, Texas, CBP facility just one day after a sixteen-year-old Guatemalan migrant, Carlos Hernandez Vasquez, died of influenza at the same facility.<sup>64</sup>

Since 2018, at least seven children were reported to have died while in CBP custody, six of them from becoming ill after being detained by CBP.<sup>65</sup> At least three of these children died from influenza;<sup>66</sup> three died from complications due to infection, respiratory illness, fever, and other symptoms; and the seventh child died from surgery-related complications.<sup>67</sup> Physicians have noted that there is a high risk for influenza outbreaks within detention centers,<sup>68</sup> largely because "an inflow of susceptible people within a closed or semi-open community experiencing an outbreak, has been shown to slow the creation of immunity in a community and 'can amplify the risk of transmission.'"<sup>69</sup> The deaths of these children while in CBP custody shows the seriousness of infectious disease transmission within CBP facilities, which cannot be overstated.

#### D. *Lingering Health Risks Post-Release and Lack of Access to Care*

Aside from detainees not receiving proper medical care while detained, another issue is that undocumented immigrants face difficulty accessing medical services even after release.<sup>70</sup> Children who are kept in detention centers should be properly examined after release to ensure that there are no lingering issues, including potential infections that occurred during detention.<sup>71</sup> Even though pediatricians say child detainees need continuity of care after they are released, released detainees are less likely to seek out medical care or assistance because of the traumatic experiences they endured during detention.<sup>72</sup> Undocumented

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62. Romero et al., *supra* note 36.

63. Victoria Gagliardo-Silver, *Migrant Detention Conditions in Texas 'The Worst I've Ever Seen', Admits Republican After Reports of Lice-Infested Children Sleeping on Floors*, INDEPENDENT (June 23, 2019, 11:57 PM), <https://www.independent.co.uk/news/world/americas/us-politics/migrant-detention-centres-texas-conditions-children-cbp-ice-latest-trump-border-a8971521.html>.

64. Meagan Flynn, *Three Dozen Migrants with Flu Virus Quarantined at Texas Processing Facility*, WASH. POST (May 22, 2019, 5:56 PM), <https://www.washingtonpost.com/nation/2019/05/22/mcallen-detention-center-flu-outbreak-teenage-migrant-died-custody>.

65. Acevedo, *supra* note 8.

66. Letter from Melinek et al. to Rosa DeLauro and Lucille Roybal-Allard, *supra* note 9, at 1.

67. Acevedo, *supra* note 8.

68. Letter from Melinek et al. to Rosa DeLauro and Lucille Roybal-Allard, *supra* note 9, at 2.

69. *Id.*

70. Jim Daley, *Detained Migrant Children Need Continuous Medical Care*, SCI. AM. (July 26, 2019), <https://www.scientificamerican.com/article/detained-migrant-children-need-continuous-medical-care1>.

71. *Id.*

72. *Id.*

immigrants also have limited access to health insurance, are more likely to be uninsured, and are thus less likely to seek necessary care.<sup>73</sup> This is important with respect to infectious diseases, as released detainees who may be infected are released without proper treatment and without a post-release treatment plan. This places not only the health of the released detainee at risk, but also increases the risk of spread of infectious disease to other individuals within the community.<sup>74</sup>

### III. GOVERNMENTAL DUTIES, REQUIREMENTS, AND THE AUTHORITY TO PROVIDE VACCINATIONS TO CBP DETAINEES

There is little regulation regarding overcrowding in CBP detention centers.<sup>75</sup> However, provisions in the FSA and the CBP National Standards on Transport, Escort, Detention, and Search (TEDS) indicate CBP facilities are to hold detained minors only for short periods of time. The FSA specifies that minors must be released within five days at the most.<sup>76</sup> Moreover, TEDS standards state that CBP detainees are not to be held longer than seventy-two hours.<sup>77</sup> Despite these rules and guidelines, detainees are being held for longer than the prescribed amount of time, which is causing overcrowding within CBP facilities.<sup>78</sup>

The standards for conditions of confinement for CBP detainees are not well-defined.<sup>79</sup> The FSA requires the federal government to hold minor detainees in “facilities that are safe and sanitary.”<sup>80</sup> Even though the FSA does not clearly define this standard, poor, overcrowded conditions and lack of sufficient supplies for detainees that impact their ability to sleep, eat properly, and maintain personal hygiene, have been found to be in violation of the “safe and sanitary” standard.<sup>81</sup> The federal government’s duty to maintain a sanitary environment necessitates providing vaccinations to minors in CBP custody because a facility that is “safe and sanitary” for children should mean one in

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73. Samantha Artiga & Maria Diaz, *Health Coverage and Care of Undocumented Immigrants*, KAISER FAM. FOUND. 3 (July 15, 2019), <https://www.kff.org/disparities-policy/issue-brief/health-coverage-and-care-of-undocumented-immigrants>.

74. *Kids in Cages*, *supra* note 52 (providing an example of volunteer clinician contracting influenza from a child recently released from CPB custody).

75. HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 39, 47 (2019).

76. Stipulated Settlement Agreement, *supra* note 20, at 8.

77. U.S. CUSTOMS & BORDER PROT., NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH 14 (2015).

78. COSTELLO, *supra* note 12, at 3, 5.

79. SMITH, *supra* note 75, at 39.

80. Stipulated Settlement Agreement, *supra* note 20, at 7.

81. *Flores v. Johnson*, 212 F. Supp. 3d 864, 881–82 (C.D. Cal. 2015), *aff’d in part, rev’d in part*, 828 F.3d 898 (9th Cir. 2016).

which a child is protected from acquiring a potentially deadly infectious disease.<sup>82</sup>

*A. Regulations Relating to Overcrowding in Detention Centers*

CBP is generally responsible for the short-term detention of migrants, including children.<sup>83</sup> Despite this, a 2019 report by the OIG found that in the five Texas CBP facilities it inspected, thirty-one percent of children were held longer than seventy-two hours.<sup>84</sup> CBP can only transfer detainees when ICE facilities have space to accept single adults and families, or when the U.S. Department of Health and Human Services (HHS) facilities have space to accept unaccompanied minors.<sup>85</sup> Because ICE and HHS facilities, where detainees are transferred after being held at CBP facilities, are operating at or over full capacity, detained migrants, including children, are being held for longer periods of time than the prescribed seventy-two hours at CBP facilities.<sup>86</sup> With new detainees still coming in and older detainees being held for longer periods of time, CBP facilities are overcrowded.<sup>87</sup>

Legal standards specifically relating to the issue of overcrowding seem to be nonexistent.<sup>88</sup> However, there are some provisions in the FSA and TEDS standards that cover the length of time minors are to remain in CBP facilities. The FSA, which is discussed in more detail in Section B of this Part, sets standards for how minors are cared for after their initial arrest by immigration authorities.<sup>89</sup> Specifically, minors must be released to non-secure, state-licensed facilities within three days if space is available at a licensed facility, or within five days otherwise, unless an exception applies that would prevent the minor's timely release or placement into a program.<sup>90</sup> Exceptions include an influx of minors, which is defined as CBP or ICE having custody at any given time of over 130 minors that are eligible to be placed in a licensed program, as well as emergencies that would otherwise impede CBP from placing minors in licensed programs.<sup>91</sup> Also, per TEDS standards, detainees are not to be held longer than seventy-two hours and should be held only for the "least amount of time required for their processing, transfer, release or repatriation as appropriate and as

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82. *Flores v. Barr*, 934 F.3d 910, 916 n.6 (9th Cir. 2019).

83. Potter, *supra* note 11.

84. COSTELLO, *supra* note 12, at 5.

85. *Id.* at 3.

86. Potter, *supra* note 11.

87. *Id.*

88. SMITH, *supra* note 75, at 39, 47.

89. See Stipulated Settlement Agreement, *supra* note 20 (explaining how the INS must hold minors in "safe and sanitary" facilities following arrest).

90. *Id.* at 8; PECK & HARRINGTON, *supra* note 19, at 8.

91. Stipulated Settlement Agreement *supra* note 20 at 8–9.

operationally feasible.”<sup>92</sup> The standards also dictate that the occupancy rate within CBP holding rooms are not to exceed the maximum occupancy rate as determined by the fire marshal in any circumstances.<sup>93</sup> However, TEDS standards are guidelines rather than binding law.<sup>94</sup> While there are certain provisions regarding the length of stay in CBP facilities, because of the poor health conditions that result from overcrowding, overcrowding is also dealt with by regulations relating to safety and sanitation, as discussed in the next Section.<sup>95</sup>

### B. *Standard of Care for Minors Under CBP Custody*

The FSA resulted from a lawsuit that was originally filed in 1985, involving the way INS handled the detention of immigrant minors.<sup>96</sup> The FSA establishes specific policies for the release of minor detainees and for their care while in immigration detention.<sup>97</sup> Even though this agreement was initially intended as a temporary measure, the parties added a stipulation in 2001 that the FSA would not terminate until forty-five days after the federal government published final regulations implementing the terms of the agreement.<sup>98</sup> According to the FSA, any proposed regulations that would replace the FSA are to be consistent with the terms of the FSA.<sup>99</sup> In September 2018, DHS and HHS proposed a federal regulation regarding the care of minors immediately following apprehension that supposedly “parallel[ed] the relevant and substantive terms” of the FSA and was intended to replace the FSA.<sup>100</sup> In September 2019, however, a federal judge found that the new regulations, even in their revised form, did not have the effect of terminating the FSA because they did not meet the same standards of care for minors required by the FSA.<sup>101</sup> As a result, the federal district court concluded

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92. U.S. CUSTOMS & BORDER PROT., *supra* note 77.

93. *Id.* at 16.

94. *See id.* at 3 (introducing the document as an “agency-wide policy” rather than a binding legal provision).

95. *See Flores v. Johnson*, 212 F. Supp. 3d 864, 880, 882 (C.D. Cal. 2015), *aff’d in part, rev’d in part*, 828 F.3d 898 (9th Cir. 2016) (holding that safety and sanitary standards were violated as a result of overcrowding, amongst other factors).

96. *Flores v. Sessions*, 862 F.3d 863, 869 (2017); Peter Margulies, *What Ending the Flores Agreement on Detention of Immigrant Children Really Means*, LAWFARE (Aug. 29, 2019, 5:39 PM), <https://www.lawfareblog.com/what-ending-flores-agreement-detention-immigrant-children-really-means> (describing how the FSA stemmed from a lawsuit brought on behalf of unaccompanied migrant children).

97. *Sessions*, 862 F.3d at 866; Stipulated Settlement Agreement, *supra* note 20, at 6.

98. Stipulated Settlement Agreement, *supra* note 20, at 1.

99. *Flores v. Barr*, 407 F. Supp. 3d 909, 914 (2019).

100. 8 C.F.R. § 236.3 (2019); *Flores*, 407 F. Supp. 3d at 913.

101. *Flores*, 407 F. Supp. 3d at 914, 921.

that the FSA remains binding and placed a permanent injunction on the DHS federal regulation, 8 C.F.R. § 236.3.<sup>102</sup>

According to the FSA, the federal government has a heightened responsibility for the well-being of immigrant minors in its custody.<sup>103</sup> The portion of the FSA describing how minors will be cared for following apprehension provides that minors will be held in "facilities that are safe and sanitary and that are consistent with . . . concern for their particular vulnerability."<sup>104</sup> However, despite the many reports mentioned previously of infectious disease and other poor conditions in detention centers, the Supreme Court has so far only addressed issues of duration of detention, not conditions of detention.<sup>105</sup>

The federal district court overseeing litigation involving violations of the FSA has held that DHS has violated the FSA by detaining minors in substandard conditions.<sup>106</sup> For example, in *Flores v. Johnson*, the district court found that the conditions of the CBP detention centers, including extreme cold, lack of blankets or mattresses, extreme overcrowding (such that some detainees had to sleep standing up), and inadequate nutrition and hygiene, were violations of the FSA's "safe and sanitary" standard.<sup>107</sup> The court also held that even though CBP established its own standards for the care of minors in its custody, simply having those standards is insufficient to show the standards were actually met.<sup>108</sup> In *Flores v. Barr*, the Ninth Circuit stated in a footnote that keeping children in "safe and sanitary" conditions also means "protecting children from developing short- or long-term illnesses as well as protecting them from accidental or intentional injury."<sup>109</sup> The FSA does require that licensed programs to which minors are transferred after CBP detention meet minimum standards for health care.<sup>110</sup> This includes screening for infectious diseases within forty-eight hours after arrival and providing immunizations in accordance with the Centers for Disease Control and Prevention's (CDC) recommendations.<sup>111</sup> Despite this, there is no specific mention of what standard of medical care falls under the "safe and sanitary" provision for CBP facilities, nor any indication of whether vaccinations are included in that standard.<sup>112</sup>

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102. *Id.* at 931.

103. Stipulated Settlement Agreement, *supra* note 20.

104. *Id.*

105. SMITH, *supra* note 75, at 47.

106. *Id.* at 50.

107. *Flores v. Johnson*, 212 F. Supp. 3d 864, 880–82 (C.D. Cal. 2015), *aff'd in part, rev'd in part*, 828 F.3d 898 (9th Cir. 2016).

108. *Id.* at 881.

109. *Flores v. Barr*, 934 F.3d 910, 916 n.6 (2019).

110. Stipulated Settlement Agreement, *supra* note 20, at exhibit 1, at 1.

111. *Id.*

112. *Id.* at 7.

Because “safe and sanitary” standards are not defined in the FSA, an alternative way to approach the interpretation of this phrase is to consider the plain meaning of these words. According to the Merriam-Webster Dictionary, the word “safe” means “free from harm or risk.”<sup>113</sup> The word “sanitary” means “of or relating to health” or “characterized by or readily kept in cleanliness.”<sup>114</sup> An examination of the conditions within CBP facilities using plain definitions of the terms “safe” and “sanitary” can help to clarify whether, in lieu of a legal definition, the conditions within CBP facilities even meet the plain meaning of the “safe and sanitary” standard.

CBP’s TEDS standards “govern CBP’s interaction with detained individuals.”<sup>115</sup> Regarding illnesses, the standards state that any observed or reported illnesses should be properly recorded and reported to supervisors, and “appropriate medical care should be provided or sought in a timely manner.”<sup>116</sup> Moreover, if a detainee reports having, or is suspected of having, a contagious disease, then the appropriate protective measures must be taken.<sup>117</sup> However, the TEDS standards do not mention providing vaccinations to detainees as soon as possible after apprehension.<sup>118</sup> Even though the TEDS standards are guidelines for how CBP should care for detainees in its custody, there is still nothing in the standards that clearly defines what “safe and sanitary” means.<sup>119</sup>

Another area to look for a definition of “safe and sanitary” is within the context of federal prisons standards. It may be reasonable to consider the Federal Bureau of Prisons (BOP) policies to prevent the spread of infectious disease because, with CBP detention centers becoming more long-term, there are similarities between CBP facilities and federal prisons. The BOP is tasked with managing the incarceration of federal prisoners, as well as providing for their medical care.<sup>120</sup> According to BOP’s Clinical Guidance on Preventative Healthcare Screening, new inmates are screened for conditions that require intervention, including contagious diseases, and are provided immunizations per BOP’s clinical guidance recommendations for immunizations.<sup>121</sup> Federal inmates are also supposed to have annual appointments, in which they receive an annual flu shot.<sup>122</sup> This type of vaccination program is important because

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113. *Safe*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/safe> (last visited Jan. 19, 2020) [hereinafter *Safe*].

114. *Sanitary*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sanitary> (last visited Jan. 19, 2020) [hereinafter *Sanitary*].

115. U.S. CUSTOMS & BORDER PROT., *supra* note 77, at 1–3.

116. *Id.* at 14.

117. *Id.*

118. *See generally id.*

119. *See generally id.*

120. OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS’ MEDICAL STAFFING CHALLENGES i (2016).

121. FED. BUREAU OF PRISONS, PREVENTIVE HEALTH CARE SCREENING 2 (2018).

122. *Id.* at 3.

prisoners are at high risk of being infected with vaccine-preventable diseases due to, among other things, the structure of the prison community.<sup>123</sup> Federal prisons also face conditions such as overcrowding, poor sanitation, poor food quality, and close contact with other prisoners.<sup>124</sup> These conditions are very similar to the types of conditions present in CBP detention facilities, and as such the federal prison Clinical Guidance is a useful comparator for what would be appropriate in CBP facilities.

C. *Federal Authority to Provide Vaccinations Under Section 264 of the PHSA*

Under the PHSA, Congress has authorized the Secretary of HHS to make and enforce regulations in order "to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."<sup>125</sup> The law further mentions how quarantine of individuals may be used to prevent the spread of a communicable disease.<sup>126</sup> The federal government has generally kept its role in regulating vaccination within the United States limited to "promoting, facilitating, or monitoring the use and/or manufacture of vaccinations, and ensuring vaccine safety."<sup>127</sup> However, with regards to immigrants seeking entry into the United States, the federal government has used this authority in a more imposing manner.<sup>128</sup> Specifically, the government can exclude immigrants from entering the country if they have not received certain vaccinations.<sup>129</sup> Presently, the vaccination requirements for immigrants seeking entry to the United States include some vaccinations recommended by the CDC and some required by federal statute.<sup>130</sup> The CDC requires vaccinations for all vaccination-preventable diseases that are detailed in § 212(a)(1)(A)(ii) of the Immigration and Nationality Act, including "mumps, measles, rubella, polio, tetanus and diphtheria toxoids, pertussis, *Haemophilus influenzae* type B, and hepatitis B."<sup>131</sup> The purpose of requiring these

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123. Victor-Guillermo Sequera et al., *Vaccinations in Prisons: A Shot in the Arm for Community Health*, 11 HUM. VACCINES & IMMUNOTHERAPEUTICS 2615, 2616–17 (2015).

124. *Id.* at 2617.

125. 42 U.S.C. § 264.

126. *See id.* § 264(b)–(d).

127. *Id.* at 3.

128. *Id.*

129. *See* 8 U.S.C. § 1182. *See also* COLE & SWENDIMAN, *supra* note 16, at 9.

130. COLE & SWENDIMAN, *supra* note 16, at 9.

131. Criteria for Vaccination Requirements for U.S. Immigration Purposes, 74 Fed. Reg. 58634, 58634 (Nov. 13, 2009).

vaccinations is to prevent the spread of infectious diseases of public health significance.<sup>132</sup>

Despite imposing infectious disease vaccination requirements for immigrants seeking entry into the United States, the federal government does not have a program in place by which it provides vaccination to detained migrants immediately after apprehension in CBP facilities.<sup>133</sup> In fact, the CBP said in a statement that its policy is not to provide vaccinations within CBP detention centers because detainees are only meant to be housed there for a short period of time.<sup>134</sup> Thus, the federal government has mainly used its vaccination authority to exclude immigrants rather than to establish a vaccination program for immigrants upon apprehension. This is a problem because allowing the promulgation of infectious diseases within CBP detention facilities carries the same risk as allowing an immigrant with an infectious disease into the country: the spread of infectious disease amongst both the states and U.S. citizens.<sup>135</sup> In order for the federal government to properly carry out its duty of preventing the spread of infectious disease, it must offer vaccinations for individuals detained within CBP facilities.

#### IV. THE FEDERAL GOVERNMENT IS ACTING IN VIOLATION OF LAW BY NOT PROVIDING VACCINES IN CBP FACILITIES

The government is acting in violation of federal law because the conditions within CBP detention centers do not meet the FSA's "safe and sanitary" standard of care that is required for minor detainees.<sup>136</sup> Overcrowding and poor conditions within CBP facilities result in the spread of infectious disease within CBP facilities, which is a failure of the government's duty, under the FSA, to protect immigrant minors in its custody.<sup>137</sup> The government is also acting in violation of the PHS Act, under which it has a duty to prevent the spread of disease into and among the states.<sup>138</sup> There is a real threat of infectious diseases passing beyond CBP facilities and into local communities, through CBP officers or CBP

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132. *Medical Examination of Immigrants and Refugees*, CTFS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/immigrantrefugeehealth/exams/medical-examination.html> (last visited Feb. 23, 2020).

133. Marie DeLuca & Katherine McKenzie, *The Flu Shot Saves Lives. Why Aren't Migrants in US Custody Vaccinated?*, CNN (Dec. 28, 2019, 2:43 PM), <https://www.cnn.com/2019/12/28/opinions/doctors-vaccination-migrants-in-detention-deluca-mckenzie/index.html>.

134. Suzanne Gamboa, *Doctors Offer to Give Free Flu Shots to Detained Migrants, Warn Trump Admin. of Epidemic*, NBC NEWS (Nov. 19, 2019, 9:16 AM), <https://www.nbcnews.com/news/latino/doctors-offer-give-free-flu-shots-detained-migrants-warn-trump-n1085206>.

135. Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424, 56427 (Sept. 11, 2020).

136. Stipulated Settlement Agreement, *supra* note 20.

137. *Id.* at 7–8.

138. 42 U.S.C. § 264(a).

detainees who are released into the local community.<sup>139</sup> Providing vaccination to CBP detainees on arrival at CBP detention facilities is essential to preventing infectious disease and to protecting the health of both minors in CBP detention and the American public.

A. *Overcrowding Within CBP Facilities is Contrary to the FSA and TEDS Standards*

While it would be a violation of the FSA if minors remained in CBP custody longer than five days, there are exceptions to this rule, including when there is an influx of minor immigrants.<sup>140</sup> This exception would likely apply in the current immigration climate because the number of children CBP apprehended in fiscal year 2019 was the highest it has ever been, causing many CBP facilities to be at or over capacity.<sup>141</sup> Moreover, while the TEDS standards state that detainees should not remain in CBP custody for longer than seventy-two hours and that the occupancy rate for holding cells must not be exceeded in any event, this has simply not been the case.<sup>142</sup> Even though CBP facilities are acting in violation of TEDS standards, these standards are just guidelines that are not legally binding.<sup>143</sup>

B. *The Government is Not Acting in Accordance with the “Safe and Sanitary” Standard*

According to the FSA, after apprehension, minors will be held “in facilities that are safe and sanitary and that are consistent with . . . concern for their particular vulnerability,”<sup>144</sup> but “safe and sanitary” remains an ambiguous term. One district court found that the conditions of the CBP detention centers, including extreme cold, lack of blankets or mattresses, extreme overcrowding, and inadequate nutrition and hygiene, were violations of the FSA’s “safe and sanitary” standard.<sup>145</sup> Nevertheless, these conditions still persist in CBP

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139. Jaquelin Dudley, *Deep in the Hearts of Texans, We Must Vaccinate to Protect the Herd*, UNIV. TEX. NEWS (Sept. 20, 2019), <https://news.utexas.edu/2019/09/20/deep-in-the-hearts-of-texans-we-must-vaccinate-to-protect-the-herd>.

140. Stipulated Settlement Agreement, *supra* note 20, at 8; PECK & HARRINGTON, *supra* note 19, at 8.

141. KANDEL, *supra* note 34.

142. COSTELLO, *supra* note 12, at 3. See generally *Oversight of Family Separation and CBP Short-Term Custody Under the Trump Administration: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2019) (statement of Diana R. Shaw, Assistant Inspector General for Special Reviews and Evaluations, Department of Homeland Security).

143. *Health Risks of Customs and Border Protection Detention*, PHYSICIANS FOR HUM. RTS. (July 2019), [https://phr.org/wp-content/uploads/2019/07/PHR-Fact-Sheet\\_Health-Risks-of-CBP-Detention.pdf](https://phr.org/wp-content/uploads/2019/07/PHR-Fact-Sheet_Health-Risks-of-CBP-Detention.pdf).

144. Stipulated Settlement Agreement, *supra* note 20, at exhibit 2, at 1.

145. *Flores v. Johnson*, 212 F. Supp. 3d 864, 881–82 (C.D. Cal. 2015), *aff’d in part, rev’d in part*, 828 F.3d 898 (9th Cir. 2016).

facilities, and based on the district court's finding, continue to be a violation of the "safe and sanitary" standard. Additionally, per the district court, "safe and sanitary" also includes protecting child detainees from acquiring short-term or long-term diseases.<sup>146</sup> However, the evidence of many infectious disease outbreaks, as well as reports of sanitation-related illnesses within CBP facilities, undermine the FSA's standards of care for minors in CBP custody. Even though the district court's interpretation of "safe and sanitary" does not explicitly include vaccinating child detainees in CBP facilities against infectious diseases, vaccination is necessary to create a "safe and sanitary" environment for child detainees. Thus, by not utilizing vaccinations as a preventative measure, the government is acting in violation of the FSA.

Moreover, even by the plain meaning of the words "safe and sanitary," minors held in CBP facilities are not being kept in conditions that can be considered "safe" or "sanitary." Minors in CBP custody are far from "safe." Young children are more vulnerable to infectious diseases because their immune systems do not fully develop until they reach about seven or eight years old.<sup>147</sup> Moreover, migrant children often deal with a traumatic and stressful journey to the United States,<sup>148</sup> which can negatively impact the way their immune systems function.<sup>149</sup> Because they are exposed to life-threatening illnesses while detained in CBP detention facilities, there is no way that these children are "free from harm or risk."<sup>150</sup> Neither do the conditions in CBP detention facilities meet any definition of the word "sanitary" because detention centers are reported to be overcrowded, unsanitary, and detainees are not able to maintain personal hygiene.<sup>151</sup> These conditions are clearly not "characterized by or readily kept in cleanliness,"<sup>152</sup> as the *Flores* court also noted.<sup>153</sup>

Even the BOP ensures that federal prisoners receive vaccinations for infectious diseases.<sup>154</sup> It is telling that federal prisoners, who have been charged with crimes, receive vaccinations, yet child detainees in CBP detention facilities, who are not criminals in any sense of the word, do not receive the same basic level of care when it comes to protection from infectious disease. This powerful

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146. *Flores v. Barr*, 934 F.3d 910, 916 (9th Cir. 2019).

147. Malgorzata Kloc et al., *Development of Child Immunity in the Context of COVID-19 Pandemic*, CLINICAL IMMUNOLOGY, Aug. 2020, at 1, 2.

148. See Katherine Bortz, *Migrant Children's Health Endangered by Family Separation at US Border*, HEALIO (Aug. 14, 2018), <https://www.healio.com/news/pediatrics/20180814/migrant-childrens-health-endangered-by-family-separation-at-us-border#>.

149. Jennifer N. Morey et al., *Current Directions in Stress and Human Immune Function*, 5 CURRENT OP. PSYCH. 13, 13–15 (2015).

150. *Safe*, *supra* note 113.

151. *Potter*, *supra* note 11.

152. *Sanitary*, *supra* note 114.

153. *Flores v. Johnson*, 212 F. Supp. 3d 864, 882 (C.D. Cal. 2015), *aff'd in part, rev'd in part*, 828 F.3d 898 (9th Cir. 2016); Hudak & Stenglein, *supra* note 35.

154. FED. BUREAU OF PRISONS, *supra* note 121, at 2.

illustration of the wide variation in the standard of care should, by itself, give policymakers pause and prompt the question of why these children are denied a basic courtesy that is even given to convicted criminals.

The fact that influenza and other infectious diseases are transmitted among individuals in a detention center shows that there are not proper procedures in place to control infectious disease.<sup>155</sup> It is also unclear what the rates of infectious disease actually are among child detainees in CBP facilities, as CBP has refused to provide this information.<sup>156</sup> However, as at least some of the infections are occurring after arrival at CBP detention centers, the exclusion or quarantine policy that the government has practiced so far would be insufficient to prevent the spread of infectious disease. Even a short-term stay in a CBP facility would be enough for a child to contract an infection.<sup>157</sup> Physicians recommend that during the flu season, all detainees should be offered vaccinations on arrival to CBP detention centers, before exposure to infectious diseases.<sup>158</sup> Vaccinating these children as they arrive at CBP facilities, before they are exposed to infectious diseases, would make conditions in CBP facilities safer for children because vaccines are proven to help prevent the spread of infectious disease and can save these children's lives.<sup>159</sup> Thus, vaccinating children before they are exposed to the infectious disease-promulgating conditions in CBP detention facilities is necessary to protect the health of the children and to maintain a "safe and sanitary" standard of care.

*C. The Government Has a Responsibility to Protect the American Public from the Threat of Communicable Disease*

Though Section 264 of the PHS Act mentions procedures for quarantining individuals with communicable diseases, and this law has mainly been used for quarantine or excluding immigrants who cannot show record of certain infectious disease vaccinations from entry into the country, this Article argues that the authority provided by the PHS Act is broad enough to include providing vaccination to children in CBP facilities.<sup>160</sup> The purpose of quarantine and exclusion is to prevent the spread of certain communicable diseases within the

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155. *Id.* at 2.

156. Judy Stone, *The Political Battlefield of Infections and Migrant Children's Bodies*, FORBES (Nov. 2, 2019, 11:00 AM), <https://www.forbes.com/sites/judystone/2019/11/02/the-political-battlefield-of-infections-and-migrant-childrens-bodies/#25e904c584f3>; Elizabeth Cohen et al., *CBP Refuses to Publicly Reveal How Many Migrants Are Sick with Contagious Diseases*, CNN (Aug. 23, 2019, 7:20 AM), <https://www.cnn.com/2019/08/23/health/cbp-migrants-contagious-diseases/index.html>.

157. Hudak & Stenglein, *supra* note 35.

158. Letter from Melinek et al. to Rosa DeLauro and Lucille Roybal-Allard, *supra* note 9, at 5–6.

159. *Id.* at 6.

160. 42 U.S.C. § 264(a); COLE, *supra* note 16, at 9.

states.<sup>161</sup> A vaccination program to provide vaccines for children in CBP detention facilities falls under the scope of Section 264 because vaccines build the body's immunity to an infectious disease before infection, which helps to prevent the spread of infectious disease.<sup>162</sup> Thus, a vaccination program would serve the same purpose as the government's use of quarantine and immigrant exclusion with respect to infectious disease—to “prevent the introduction, transmission, or spread of communicable diseases” because it would prevent children from getting sick and passing along the illness in the first place.<sup>163</sup>

By not providing vaccinations to CBP detainees, the federal government is failing to protect the American public from the spread of infectious disease, as is its duty under the PHSA.<sup>164</sup> There is a real threat of infectious disease being transferred beyond CBP facilities.<sup>165</sup> People who are in direct contact with unvaccinated CBP detainees, such as CBP agents, advocates, and others, can inadvertently transmit infectious diseases outside the detention facilities.<sup>166</sup>

Children released from CBP detention facilities can also transmit infectious diseases when they move to other DHS facilities or when they are released to the community in the custody of a family member.<sup>167</sup> In a statement by NAPNAP, volunteers at an El Paso, Texas, facility that provided treatment to immigrant families reported that many of the adults and children recently released from CBP facilities were suffering from influenza and other respiratory illnesses.<sup>168</sup> These patients also put others at risk of acquiring infectious diseases. For example, NAPNAP reported that a volunteer health care provider in a charity clinic in Albuquerque, New Mexico, contracted influenza from a child who was recently released from a CBP facility.<sup>169</sup> According to the CDC, most adults who are infected with influenza are contagious one day before symptoms develop and can remain infectious five to seven days after becoming ill.<sup>170</sup> Children, on the other hand, can be contagious for longer than seven days, while others may be infected with the flu and be contagious but not show any symptoms of the illness.<sup>171</sup> Thus, by failing to provide vaccinations to children when they first arrive at CBP detention facilities, the federal government is

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161. COLE, *supra* note 16, at 9.

162. *The Importance of Vaccinations*, FAM. DR., <https://familydoctor.org/the-importance-of-vaccinations> (last visited Jan. 1, 2020).

163. 42 U.S.C. § 264(a); FAM. DR., *supra* note 162.

164. 42 U.S.C. § 264(a).

165. Dudley, *supra* note 139.

166. *Id.*

167. *Kids in Cages*, *supra* note 52.

168. *Id.*

169. *Id.*

170. *How Flu Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/about/disease/spread.htm> (last reviewed Aug. 27, 2018).

171. *Id.*

allowing the spread of infectious disease from individuals who are coming from outside the country into local communities.

This is a public health crisis not only for CBP detainees but also for American citizens. CBP agents, health care providers, immigrant advocates, and individuals in communities to which CBP detainees travel after release, as well as the people with whom these individuals have direct contact, are all at risk of contracting infectious disease. By not providing vaccinations to at least child detainees at CBP detention centers, the federal government is perpetuating a public health crisis that puts Americans at risk and, therefore, is failing to protect Americans from the spread of infectious disease.

#### V. INFECTIOUS DISEASE VACCINATIONS IN CBP DETENTION FACILITIES

There are potential solutions that can help alleviate the issue of infectious diseases spreading within CBP facilities and the risk of infectious diseases spreading to the American public. The immediate solution is that CBP should change its protocol to provide vaccinations to children as they arrive at CBP detention facilities. A change in law will take more time to achieve but is important because it will help to set a standard of care for children that includes vaccination. Specifically, a bill introduced in the 116th Congress that sought to enforce better standards of care for children in detention facilities was the Humanitarian Standards for Individuals in Customs and Border Protection Custody Act.<sup>172</sup> Legislators should also include vaccinations as part of the next iteration of this bill.

##### A. *Providing the Option of Vaccines to All Children Upon Arrival in CBP Detention Facilities*

The CBP has stated that the reason it does not give vaccinations in CBP facilities is that detention within its facilities is meant to be short-term and no longer than seventy-two hours.<sup>173</sup> One of the problems with this statement is that in 2019, due to increased apprehensions, detainees were being held in CBP facilities for much longer than seventy-two hours.<sup>174</sup> Further, even seventy-two hours is enough time for children to be at risk of acquiring disease, and physicians recommend vaccinating them as soon as possible.<sup>175</sup> Vaccinations are known to reduce the burden of infectious diseases and are estimated to

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172. *Kids in Cages*, *supra* note 52. As of July 25, 2019, H.R. 3239 was passed in the House and was awaiting a decision in the Senate, *see All Actions H.R.3239 — 116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/3239/all-actions> (last visited Feb. 28, 2021). However, the 116th Congress was adjourned on January 3, 2021, *Dates of Sessions of the Congress*, U.S. SENATE, <https://www.senate.gov/legislative/DatesofSessionsofCongress.htm> (last visited Feb. 28, 2020). Thus, the bill remains unpassed.

173. Acevedo, *supra* note 8.

174. Hudak & Stenglein, *supra* note 35; Gamboa, *supra* note 134.

175. Acevedo, *supra* note 8.

prevent about six million deaths annually around the world.<sup>176</sup> Given that overcrowding is a more difficult and time-consuming problem to solve, the more immediate and ideal solution to prevent a public health crisis is a vaccination program in which children are provided an opportunity to get infectious disease vaccinations in detention facilities.<sup>177</sup>

Moreover, vaccination programs are cost-effective, especially among high-risk populations, such as children.<sup>178</sup> Influenza vaccinations are relatively inexpensive; one dose of the average influenza vaccine costs between \$1.00 and \$1.50.<sup>179</sup> The federal government can sometimes even get the vaccine for free.<sup>180</sup> A group of physicians, Doctors for Camp Closure, recently offered to provide vaccinations to CBP detainees for free, but CBP did not accept that offer.<sup>181</sup> In general, the cost of vaccination is much cheaper for the government to bear than the cost of emergency medical services for children who become severely ill with infectious disease.<sup>182</sup> Taking influenza as an example, the Brookings Institute estimates that an influenza vaccination program would cost about \$1,000,258, which is 0.002% of DHS's annual budget, and 0.007% of CBP's annual budget.<sup>183</sup> On the other hand, according to a 2012 CDC study, emergency room care for children with influenza costs an average of \$730 per child, while hospitalization for a child suffering from influenza costs an average of \$3,990 per child.<sup>184</sup> Hospitals are required to screen and stabilize any and all patients seeking emergency medical care, and Medicaid helps pay the cost of emergency care for undocumented immigrants if the individual would be otherwise eligible but for their immigration status.<sup>185</sup> As child detainees in CBP detention facilities are also likely low-income, meaning below 200% of the federal poverty level per Medicaid's eligibility criteria, they would be eligible for Medicaid and CHIP but for their immigration status.<sup>186</sup> Thus, as the federal government is on the

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176. FE Andre et al., *Vaccination Greatly Reduces Disease, Disability, Death and Inequity Worldwide*, 86 BULL. WORLD HEALTH ORG. 140, 140–41 (2008).

177. Hudak & Stenglein, *supra* note 35.

178. *Id.*

179. *CDC Vaccine Price List*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/programs/vfc/awardees/vaccine-management/price-list/index.html> (last updated Sept. 1, 2020); Hudak & Stenglein, *supra* note 35.

180. Hinman et al., *Financing Immunizations in the United States*, 38 CLINICAL INFECTIOUS DISEASES 1440, 1441 (2004).

181. Gamboa, *supra* note 134.

182. Hudak & Stenglein, *supra* note 35.

183. *Id.*

184. *CDC Study: Treating Children's Flu Illness Costly*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/spotlights/2011-2012/childrens-flu-costly.htm> (last updated May 21, 2012).

185. Artiga & Diaz, *supra* note 73.

186. *Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/chip/eligibility/index.html> (last visited Jan. 19, 2020).

hook for the cost of emergency care for these child detainees, it might as well choose the more cost-effective option of providing vaccination, which has the added benefits of preventing the spread of infectious disease and saving lives.

*B. Using Legislation to Establish Vaccination Protocols: Humanitarian Standards for Individuals in Customs and Border Protection Custody Act*

There were a number of bills in Congress that would require DHS and CBP, to provide certain medical screenings and care to children detained in CBP detention facilities.<sup>187</sup> One such bill was the Humanitarian Standards for Individuals in Customs and Border Protection Custody Act, H.R. 3239, which was passed in the House of Representatives in July 2019 and was pending in the Senate, until the 116th Congress was adjourned on January 3, 2021.<sup>188</sup> The purpose of this bill was to protect the health of individuals who are detained in CBP custody, as it provided standards for the conditions within detention centers, standards for treatment of detainees, and rules for inspection and monitoring of the facilities.<sup>189</sup> Section 2 of this bill laid out guidelines for the medical screening of detainees when they arrive at CBP detention facilities.<sup>190</sup> Specifically, an initial screening would be provided to detainees no later than twelve hours after their arrival, and would include a standard provider interview, screening of vital signs (pulse, temperature, blood pressure, oxygen saturation, and respiration), blood glucose screening (only for diabetics or suspected diabetics), weight assessment if under twelve years of age, physical examination, and risk assessment and development of a care plan when necessary.<sup>191</sup> Moreover, children would be screened no later than six hours after arrival at CBP detention facilities.<sup>192</sup> Section 3 of the bill also provided that detainees must have access to drinking water, sanitary products, and hygiene facilities.<sup>193</sup>

This bill seemed to be a promising solution for improving the conditions and level of care provided to child detainees because it laid out a detailed plan for how care should be provided to children, in contrast to the more vague "safe and sanitary" standard provided by the FSA. The provisions in this bill regarding the initial screening of detainees provided a detailed and comprehensive level of care that would adequately assess whether a child is ill or particularly weak (and therefore more susceptible to catching an infectious disease). It also addressed

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187. See SMITH, *supra* note 75, at 56 n.379 (listing several recent Congressional bills that would regulate conditions within CBP facilities).

188. Legislative Details of H.R. 3239 of the 116th Cong, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/3239> (last visited Feb. 28, 2021).

189. *Id.*

190. H.R. 3239, 116th Cong. § 2 (2019).

191. *Id.*

192. *Id.*

193. *Id.* § 3.

overcrowding in that it prohibited CBP facilities from exceeding occupancy limits set by the local fire marshal or other authority.<sup>194</sup> However, the one thing it did not mention specifically was providing vaccinations to children.<sup>195</sup> Providing vaccinations at an initial screening, such as the one described in this bill, would reduce the risk that a child would acquire an infectious disease while in CBP detention. Certainly, the provision regarding water, sanitation, and hygiene would help to reduce spread of infectious diseases as well, but there is still a need for vaccination because the constant turnover of detainees within detention centers creates a high-risk environment for transmission.<sup>196</sup> Preventing infectious disease outbreaks within CBP facilities should be considered an important part of protecting the health of individuals detained in CBP custody, and a vaccination program should be part of the initial screening that this bill proposed. A bill such as the Humanitarian Standards for Individuals in Customs and Border Protection Custody Act, could be a vehicle for changing the standard of care for children in CBP custody to include a vaccination program.

This bill had political support behind it,<sup>197</sup> which may be helpful to gathering support for a similar bill with a vaccination provision. A vaccination provision is motivated by the same goal as H.R. 3239: protecting the health of CBP detainees, as well as the welfare of child detainees. The bill had 160 co-sponsors, all of which were members of the Democratic Party.<sup>198</sup> Under the new Biden administration, the Democrats currently constitute a majority in the House of Representatives<sup>199</sup> and hold the majority of the Senate as well.<sup>200</sup> With this new political climate, it is possible that a new bill to establish standards of care in CBP facilities, including infectious disease vaccinations, could pass into law.

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194. *Id.* § 5.

195. *See generally* H.R. 3239.

196. Letter from Melinek et al. to Rosa DeLauro and Lucille Roybal-Allard, *supra* note 9, at 2.

197. *HR 3239 - Humanitarian Standards for Individuals in Customs and Border Protection Custody Act - National Key Vote*, VOTE SMART, <https://justfacts.votesmart.org/bill/26792/68350/humanitarian-standards-for-individuals-in-customs-and-border-protection-custody-act> (last visited Oct. 13, 2020).

198. List of Cosponsors of H.R. 3239 of the 116th Congress, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/3239/cosponsors?searchResultViewType=expanded> (last visited Feb. 28, 2021).

199. *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Institution/Party-Divisions/Party-Divisions/> (last visited Feb. 28, 2021).

200. *Who Will Control the U.S. Senate in 2021?*, APM RSCH. LAB (Jan. 19, 2021, 5:45 PM), <https://www.apmresearchlab.org/senate-control-2021>. The Democrats hold forty-eight seats, but the two Independent senators caucus with the Democrats. *Id.* With Vice President Harris's tie-breaking vote, the Democrats effectively hold the majority of the Senate. *Id.*

### C. Challenges to Vaccination in CBP Facilities

Providing vaccinations in CBP facilities is a controversial solution for many reasons. A major challenge is the political "battlefield" that has resulted from the reports of infectious diseases in detention centers and related deaths.<sup>201</sup> For those who oppose vaccination within CBP facilities, anti-immigration rhetoric and dehumanization of migrant detainees lead to a lack of sympathy for the plight of migrant detainees.<sup>202</sup> Meanwhile, proponents argue that there is a humanitarian need to provide vaccinations within CBP facilities.<sup>203</sup> This kind of political polarization makes it much more difficult to gather unified political support for any policies that would propose vaccination in CBP facilities.

Another issue that opponents may raise is that of potential adverse reactions. With regards to providing medical care for children who may have serious adverse reactions, Medicaid would likely cover the costs of emergency care.<sup>204</sup> Individuals affected by adverse reactions will also need an avenue to file claims. However, while adverse reactions to vaccinations can occur, they tend to be very rare.<sup>205</sup> Vaccines can protect individuals from getting the disease in the first place, and on a societal level, they provide herd immunity, which is essential for the protection of the most vulnerable and immunocompromised members of society.<sup>206</sup> Therefore, just the fact that side effects may occur in a small percent of the population is not a strong argument against providing vaccinations in CBP facilities.

Finally, other barriers to effective vaccination pertain to migrant detainees themselves. Language barriers, lack of trust, and low health literacy are issues that physicians and advocates will have to address in implementing a vaccination program.<sup>207</sup> An additional issue with respect to migrant detainees is the matter of consent.<sup>208</sup> Imposing vaccinations on child detainees could infringe on the child and their family's right to choose whether or not to get vaccinated. A way

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201. Stone, *supra* note 156.

202. See Stone, *supra* note 156; See also Julissa Arce, *Trump's Anti-Immigrant Rhetoric Was Never About Legality — It Was About Our Brown Skin*, TIME (Aug. 6, 2019, 4:47 PM), <https://time.com/5645501/trump-anti-immigration-rhetoric-racism/>.

203. Hudak & Stenglein, *supra* note 35.

204. *Update on Access to Healthcare for Immigrants and Their Families*, NAT'L IMMIGR. L. CTR. 4–5 (2020), <https://www.nilc.org/wp-content/uploads/2020/03/immigrant-access-to-healthcare-update.pdf> ("Emergency Medicaid is available to individuals who are otherwise eligible for Medicaid, except for their immigration status.").

205. See generally *Possible Side Effects from Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vaccines/vac-gen/side-effects.htm#:~:text=Any%20medication%20can%20cause%20a,few%20hours%20after%20the%20vaccination>. (last visited Oct. 8, 2020).

206. Andre et al., *supra* note 176, at 142.

207. Carlo Foppiano Palacios, *Influenza in U.S. Detention Centers — The Desperate Need for Immunization*, 382 NEW ENGLAND J. MED. 789, 790 (2020).

208. *Id.*

to implement this solution without infringing on the rights of the child or their family could be to get the consent of the child's guardian. However, a complicating factor here is that many of the children apprehended by CBP facilities are unaccompanied minors.<sup>209</sup> While some of these children may have family members or other guardians that have already immigrated to the United States who can give consent, it is unclear how consent can be obtained for children who do not have a guardian.

## VI. CONCLUSION

By not providing infectious disease vaccinations to children in CBP detention centers, the federal government is failing its responsibilities under Section 264 of the PHSA and under the FSA. Vaccinations are proven to prevent the spread of infectious disease, are cost effective, and are a practical and immediate solution to the issue of the spread of infectious disease. Moreover, a new iteration of a bill such as the Humanitarian Standards for Individuals in Customs and Border Protection Custody Act, which already set standards for the medical screening of child detainees upon arrival at CBP detention facilities, could be a vehicle to establish vaccination of children as a standard of care.<sup>210</sup> At the very least, steps must be taken to resolve the poor conditions within CBP facilities. No child, whether he or she is a migrant or an American citizen, should have to face the horrible illness and death that can result from infectious diseases. Ultimately, the overarching concern that all Americans should have is the safety and wellbeing of these children within U.S. custody. To ignore this issue is to continue to put the lives of children at risk, and that is unacceptable.

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209. KANDEL, *supra* note 34.

210. Setting vaccinations as a standard of care is especially important in the context of the current COVID-19 Pandemic. While the SARS-CoV-2 virus is out of the scope of this paper, the conditions within detention centers facilitate the spread of disease, which is particularly dangerous during a deadly pandemic. See Donald M. Berwick et al., *Protecting Incarcerated People in the Face of COVID-19: A Health and Human Rights Perspective*, HEALTH AFFS. (May 1, 2020), <https://www.healthaffairs-org.ezp.slu.edu/do/10.1377/hblog20200428.846534/full/>.

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