

Submitted via email

Administration for Children and Families
Office of Planning, Research, and Evaluation (OPRE)
330 C Street SW, Washington, DC 20201
infocollection@acf.hhs.gov
Attn: ACF Reports Clearance Officer

April 19, 2021

RE: ORR Proposed Information Collection Activity, 86 FR 10082; Comments in Opposition to Proposed Information Collection Activity; Legal Services for Unaccompanied Alien Children (New Collection)

Dear ACF Reports Clearance Officer,

The Young Center for Immigrant Children's Rights (Young Center) writes regarding the above-referenced proposed information collection activity entitled "Legal Services for Unaccompanied Alien Children (New Collection)," published February 18, 2021, by the Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).¹

The Young Center serves as the federally-appointed best interests guardian *ad litem* (Child Advocate) for trafficking victims and other vulnerable unaccompanied children in government custody as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA).² The Young Center is the only organization authorized by ORR to serve in that capacity. The role of the Child Advocate is to advocate for the best interests of the child. A child's best interests are determined by considering the child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity. Since 2004, ORR has appointed Young Center Child Advocates for thousands of unaccompanied children in ORR custody.

The Young Center has joined comments submitted by the Florence Immigrant and Refugee Rights Project and several other organizations that serve unaccompanied immigrant children, but we write separately to express additional concerns regarding ORR's proposed forms related to specific consent, as well as ORR's policies and procedures regarding specific consent, from our vantage point as Child Advocate. In our experience, specific consent affords many unaccompanied children the opportunity to access their state foster care system, opening doors to long-term, stable placement in a home setting, as well as access to a range of social services and supports, which all promote the child's health, safety, and wellbeing. The proposed changes to ORR's specific consent forms create unnecessary barriers for unaccompanied children to obtain specific consent and accordingly fail to comport with ORR's legal obligation to place children in

¹ See Federal Register No. 31, Vol. 86 at 10082-10084.

² William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-171) [hereinafter TVPRA].

its custody in the least restrictive setting in their best interests. We ask ORR to rescind these proposed changes and make appropriate changes to the existing specific consent forms to ensure that children are placed in the least restrictive setting and that ORR prioritizes the best interests of the child when deciding specific consent requests.

I. The Specific Consent Request Case Summary Form should be revised to consider factors in favor of placing the child in the least restrictive setting that is in their best interests.

As explained in our joint comment, we oppose the proposed “Specific Consent Request Case Summary” Form L-2 (hereafter “Case Summary Form L-2”), because it fails to consider the best interests of the child, contravening ORR’s legal obligation under the TVPRA to place children in the least restrictive setting that is in their best interest.³ To meet its obligation to advance the best interests of children, ORR policies and procedures must take into account each child’s safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity.⁴ Rather than consider the best interests of the child, the Case Summary Form L-2 includes six queries that seek only to document information for the Federal Field Specialist (FFS) to show that the child is a danger to self, danger to the community, and risk of flight. The questions are worded in a way that is deficit-oriented, seeking to document only negative information about the child that weighs against granting specific consent. The form fails to elicit any information regarding whether a change in custody or placement would promote the safety, health, and wellbeing of the child. It also fails to document the child’s strengths and progress that the child has made in their development and growth while in ORR custody. Thus, the form is worded in a way to provide a skewed, one-sided portrait of the child that is likely to be inaccurate and incomplete and fails to provide the information needed to accurately assess whether a change in custody or placement is in the child’s best interests.

A. Questions that elicit SIRs and criminal background information should be removed or revised, because this information often lacks a broader context and provides an inaccurate and incomplete portrait of the child.

We are particularly concerned that the Case Summary Form L-2 specifically elicits information regarding behavioral incidents, including the attachment of Significant Incident Reports (SIRs), and criminal background. In our experience, SIRs and criminal background information in the case files of children in ORR custody are often gathered and documented by ORR staff or ORR contractors without the broader context of the many challenging circumstances each unaccompanied child confronts and the significant trauma many have endured and which are important context for the events constituting an alleged “SIR”. As a result, this information often creates unjustified impediments to a child’s efforts to achieve permanency and safety.

³ 8 U.S.C. § 1232(c)(2).

⁴ SUBCOMM. ON BEST INTERESTS, INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 5 (2016) (citations omitted).

The majority of children in ORR custody are teenagers—not yet adults physically, emotionally or intellectually. Under the very best of circumstances children at this age and stage of development are primed to crave autonomy and independence and push back against authority. They are also more likely than adults to be impacted by emotionally stressful circumstances.⁵ The uncertainty of their situation in ORR custody, including how long they will be in custody, seeing other children coming and going while they remain in custody, weighs upon them heavily. This combination of stressors compounds the trauma children have experienced before their arrival and, unsurprisingly, impacts their presentation and behaviors in a manner which may subsequently be reported in SIRs.⁶

At the same time, SIRs document specific moments of a child's behavior while in ORR custody, but fail to set forth a full portrait of the child or provide the broader context surrounding a child's behavior during a single incident. SIRs may prompt a child to be stepped up to an even more restrictive environment, which are often inappropriate to address a child's trauma and related manifestations of that trauma. Additionally, they often unduly complicate and delay a child's transfer to a long-term foster care placement. Critically, SIRs may even be used against the child in their legal proceedings, in an effort to persuade a judge or asylum officer to deny a child the right to remain in the United States, despite the absence of any process to ensure the fairness of these forms when they are first filed. While such forms might be routine in the child welfare context, those proceedings are governed by the best interests principle, where everyone is working to ensure the child's safety. In contrast, children in immigration proceedings are in adversarial proceedings where information gathered about them while in government custody, including SIRs, can and is often used against them.

Staff who complete SIRs receive limited training on the use of the forms; they may lack expertise to complete certain sections of the form (e.g., regarding the child's mental or physical health) or may lack an understanding of how the form may be used against the child in legal proceedings far in the future. Moreover, the checkbox format of SIR forms is insufficient to fully report on any significant incidents within ORR facilities; the lack of space to provide detail and context make SIR forms a tool that are easily used in a manner against the child's best interests. Additionally, the forms are completed and become part of the child's record without any participation by the child, the child's attorney (if they have one), the independent Child Advocate (if they have one), and the local ORR-funded legal services provider.

Similarly, allegedly criminal background information is often gathered and documented without providing the broader context of specific incidents and is often relied upon to make placement decisions without consideration as to whether they are relevant in determining whether a child presents a risk to self or others. ORR and facility staff are not, and should not be, trained to

⁵ FRANCES E. JENSEN & AMY ELLIS NUTT, *THE TEENAGE BRAIN: A NEUROSCIENTIST'S SURVIVAL GUIDE TO RAISING ADOLESCENTS AND YOUNG ADULTS* 22 (2015).

⁶ See Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 *CHILD ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AM.* 185, 199-200 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3968319/pdf/nihms-555973.pdf> (discussing how childhood trauma can inhibit executive function, memory, and problem solving).

decode complicated criminal records. A child's case file may include criminal charges that have been dismissed or withdrawn, or juvenile delinquency findings. However, ORR should not consider criminal charges that have not resulted in convictions in evaluating whether a child presents a risk to others while in ORR custody. Criminal charges that have been dismissed or withdrawn should be deemed to lack probable cause, as there was a determination by a criminal court that the charges would not be prosecuted and were likely unfounded. Juvenile delinquency adjudications within the United States are subject to state confidentiality laws and disclosing information about them on these forms could violate those laws. Moreover, per the Immigration and Nationality Act and *Matter of Devinson*,⁷ juvenile charges or delinquency findings are not considered criminal convictions.

ORR and facility staff may also be unable to discern whether a charge was dismissed or changed to a less serious charge. For example, when children are accused of criminal acts, it is not uncommon for district attorneys to overcharge cases and later "break them down" or change them to something less serious. The original charges will still appear on the child's record, even if the final verdict is "not guilty." If ORR and facility staff are unable to decipher all of the annotations and notes in a child's criminal record, it may lead to the child being placed in an overly restrictive placement or in settings that are not in the best interests of the child, or being denied release to a parent, family member, or other sponsor who is better able to care for the child within the community. ORR forms also do not require the reporting individual to request, review, and fully understand the incident report or other documents underlying the criminal or delinquency charges. Those reports will often explain that the underlying incident is not as serious as the criminal charge would otherwise lead them to believe.

In the context of specific consent, the Case Summary Form's focus on behavioral incidents and criminal background information is particularly problematic, because many children who request specific consent have trauma histories and suffer from detention fatigue that provide critical context for their behavior while in ORR custody. Children who seek specific consent have often come to the United States after fleeing situations of abuse and neglect that caused profound trauma. Moreover, many do not have family members in the United States and have spent long periods of time in ORR custody, even though ORR care is intended for much briefer lengths of stay. In our experience, the amount of time a child has spent in government custody, as well as their age and prior experiences of trauma, are the factors most likely to lead to detention fatigue and corresponding incidents of "acting out." ORR facilities have reported that "longer lengths of stay resulted in deteriorating mental health for some children" and that "children with longer stays experienced more stress, anxiety, and behavioral issues..."⁸ ORR staff have also reported that "longer stays resulted in higher levels of defiance, hopelessness, and frustration among children, along with more instances of self-harm and suicidal ideation."⁹

⁷ *Matter of Devinson*, 22 I&N Dec. 1362 (BIA 2000).

⁸ OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERV., CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 12 (2019), <https://oig.hhs.gov/oei/reports/oei-09-18-00431.pdf>.

⁹ *Id.*

Yet, SIRs and criminal history information documented in ORR forms do not acknowledge the time the child may have spent in custody or the impact of adverse childhood experiences such as abuse and neglect, even though these specific traumas directly inform how or why a child is acting out. Without any reporting of these underlying factors, the role of adults or systems beyond the child's control is ignored, and the child's behavior can be taken completely out of context with serious consequences for the child.

Instead of documenting information that provides a limited and often inaccurate portrait of the child, ORR should consider the child's best interests and how a change in custody or placement may promote the safety, health, wellbeing, and development of the child. The Case Summary Form L-2 should be revised to elicit information regarding the child's strengths, the child's growth and progress while in government custody, and the positive impact that specific consent would have in promoting the child's development, health, and safety, as discussed below.

B. Specific consent provides children the opportunity to seek transfer to the state welfare system where they can access long-term stable placement and critical supports and services.

The importance of specific consent for children in ORR custody who request it cannot be overstated. In our experience, many children seek specific consent in circumstances where they require a change in custody or placement in order to ensure their health, wellbeing, and safety. Many of these children have been in ORR custody for a long period of time, have no family in the United States, and are approaching the age of 18, at which point they will "age out" of ORR custody and face the possibility of being transferred to adult detention in an Immigration and Customs Enforcement (ICE) facility, which is not an appropriate environment for a young person.

Specific consent affords children the opportunity to seek a transfer into the state's child welfare system so that they can access extended state foster care past the age of 18. A transfer to the state's child welfare system opens doors not only to long-term stable placement but also access to critical services and resources, such as housing placement services, case management, therapeutic services, medical insurance, educational supports, vocational training and job placement services, and other supportive services.¹⁰ The unique breadth of services and resources that state child welfare systems offer will enable the child to achieve greater stability in a supportive and secure home environment. These services are particularly vital for children with mental health care needs and those who have suffered trauma to ensure that they continue to receive the therapeutic treatment and medical care they need. While in the state foster care system, the child can also work with their attorney through the completion of their immigration case and receive ongoing support from their Child Advocate, if they are appointed one, until the child achieves legal permanency.

¹⁰ CHILD WELFARE INFORMATION GATEWAY, CHILDREN'S BUREAU, ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERV., EXTENSION OF FOSTER CARE BEYOND AGE 18 3-4 (current through Feb. 2017), <https://www.childwelfare.gov/pubPDFs/extensionfc.pdf>.

A denial of a child's specific consent request means an even longer time in ORR custody for the child and the possible transfer to ICE custody upon turning 18 years old. Those outcomes further exacerbate the harm to the child's health and wellbeing from prolonged detention. It is well-established that immigration detention not only puts children at risk for compromised development and psychosocial health, but it can also aggravate already-existing trauma for children who have complex trauma histories.¹¹ Research shows that exposing children to detention even for a brief period can "cause psychological trauma and induce long-term mental health risks."¹² Prolonged detention can have a detrimental effect on any child. For young people who have survived traumas and have suffered a lack of stability and support, as many children seeking specific consent have, the prolonged uncertainty and transition of immigration detention is likely only to increase their fear and anxiety, and chip away at their hopes for permanency, safety, and stability in the future.

A child's transfer to ICE custody upon turning 18 is particularly harmful and detrimental to their health, as ICE is not an appropriate environment for young people. Adolescence, the period during which a young person develops from a child into an adult, is a unique and important developmental period characterized by significant growth.¹³ The National Academies of Sciences, Engineering, and Medicine's Committee on the Neurobiological and Socio-behavioral Science of Adolescent Development and Its Applications has stated: "As adolescents explore, experiment, and learn, they still require scaffolding and support, including environments that bolster opportunities to thrive."¹⁴ The National Commission on Correctional Health Care (NCCHC)¹⁵ has taken the position that "[a]dult facilities are not well equipped to deal with the mental or physical health needs of adolescents . . .," which puts youth entering adulthood "at greater risk of physical and sexual assault."¹⁶ Because the conditions of adult detention often cause anxiety and "can exacerbate existing mental health issues," adolescents also face a

¹¹ M. von Werthern, et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY 1, 13-15 (2018), <https://bmcpsy psychiatry.biomedcentral.com/track/pdf/10.1186/s12888-018-1945-y>.

¹² Julie M. Linton, et al., American Academy of Pediatrics Council on Community Pediatrics, *Detention of Immigrant Children*, 139 PEDIATRICS 1, 6 (2017), <https://pediatrics.aappublications.org/content/pediatrics/139/5/e20170483.full.pdf>.

¹³ COMMITTEE ON THE NEUROBIOLOGICAL AND SOCIO-BEHAVIORAL SCIENCE OF ADOLESCENT DEVELOPMENT AND ITS APPLICATIONS, BOARD ON CHILDREN, YOUTH, AND FAMILIES, NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, *THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 2* (Backes EP & RJ Bonnie, eds., 2019).

¹⁴ *Id.*

¹⁵ A study of jails by the American Medical Association (AMA) in the early 1970s served as the genesis of the National Commission on Correctional Health Care (NCCHC). The AMA and other organization created a project in 1983, which later became an independent non-profit organization. "The mission of the [NCCHC] is to improve the quality of health care in jails, prisons, and juvenile confinement facilities." NCCHC, <https://www.ncchc.org/about>.

¹⁶ NAT'L COMM'N ON CORRECTIONAL HEALTH CARE, *HEALTH SERVICES TO ADOLESCENTS IN ADULT CORRECTIONAL FACILITIES* (reviewed and reaffirmed in 2018), <https://www.ncchc.org/health-services-to-adolescents-in-adult-correctional-facilities> [hereinafter ADOLESCENTS IN ADULT FACILITIES].

significantly higher risk of suicide.¹⁷ Given the harmful impact of detaining adolescents in adult penal facilities, the NCCHC advises that all facilities housing adolescents “should recognize [adolescents’] vulnerability in an adult setting.”¹⁸

Yet, ICE detention facilities fail to account at all for the particular needs and vulnerabilities of young people. Though immigration detention is considered a civil sanction, “ICE’s detention system is built and operated on a correctional model.”¹⁹ It has been reported that “ICE oversees a network of approximately 158 detention facilities across the country, where immigrants who are facing civil charges encounter cruel and abusive conditions that mirror – or are worse than – those found in criminal prisons.”²⁰

For children with trauma histories and therapeutic needs, as many children seeking SIJS and specific consent are, adult detention is particularly dangerous to their emotional and psychological health, as well as their safety and wellbeing, given ICE’s inability to support a child with trauma history and specific therapeutic needs. ICE’s failure to ensure detained immigrants receive appropriate medical and mental health care has been widely documented.²¹ Very few facilities have on-site mental health supports, and it is difficult to arrange for outside professionals to visit on a regular basis. “[S]ome detained immigrants have been forced into segregation after expressing suicidal thoughts – a tactic that only exacerbates their symptoms as they remain in total isolation for days, weeks or even months.”²² Those who suffer from mental illness “are thrown into segregation to languish alone when they need treatment to address their mental health concerns.”²³ Others in ICE detention who have been identified as particularly vulnerable include those with PTSD; the health and well-being of many of these people

¹⁷ CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM (2016), <http://cfyj.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf>.

¹⁸ ADOLESCENTS IN ADULT FACILITIES, *supra* note 16.

¹⁹ National Immigrant Justice Center, *Immigration Detention and Enforcement* (last visited April 19, 2021), <https://immigrantjustice.org/issues/immigration-detention-enforcement>.

²⁰ *Who is impacted by ICE’s disregard of medical, mental health, and disability needs of detained immigrants? Too many people. CREEC and others are working to put an end to it*, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER (Aug. 28, 2019), <https://creeclaw.org/2019/08/28/who-is-impacted-by-ices-disregard-of-medical-mental-health-and-disability-needs-of-detained-immigrants-too-many-people-creec-and-others-are-working-to-put-an-end-to-it/>.

²¹ See, e.g., COMM. ON HOMELAND SECURITY, U.S. HOUSE OF REPS., ICE DETENTION FACILITIES: FAILING TO MEET BASIC STANDARDS OF CARE 13-17 (Sept. 21, 2020), <https://homeland.house.gov/imo/media/doc/Homeland%20ICE%20facility%20staff%20report.pdf>; Renuka Rayasam, *Migrant mental health crisis spirals in ICE detention facilities*, POLITICO, July 21, 2019, <https://www.politico.com/story/2019/07/21/migrant-health-detention-border-camps-1424114>.

²² SPLC, *allies sue ICE for ignoring medical, mental health and disability needs of detained immigrants*, SOUTHERN POVERTY LAW CENTER (Aug. 19, 2019), <https://www.splcenter.org/news/2019/08/19/splc-allies-sue-ice-ignoring-medical-mental-health-and-disability-needs-detained-immigrants> (hereafter SOUTHERN POVERTY LAW CENTER).

²³ *Id.* See also Hannah Rappleye, et al., *Thousands of immigrants suffer in solitary confinement in U.S. detention centers*, NBC NEWS, May 21, 2019, <https://www.nbcnews.com/politics/immigration/thousands-immigrants-suffer-solitary-confinement-u-s-detention-centers-n1007881>.

deteriorate while being in detention.²⁴ Some detainees with mental health concerns do not receive therapy and have their medications changed, causing their mental health to deteriorate due to a lack of adequate support.²⁵

Given the risk of profound harm and danger to a child from denying specific consent, ORR must ensure that its process for considering specific consent requests considers the best interests of the child and does not result in the prolonged and unnecessary detention of children in its custody, including transfer to ICE detention. Although ICE determines whether a teenager transferred to its custody from ORR will be detained or released, ORR has an obligation to consider the high likelihood (or certainty, in some cases) of a child's detention upon transfer to ICE custody when considering whether to grant specific consent. The agency cannot ignore the likely harm of transfer to ICE custody any more than it can ignore known risk factors in transfer to a particular setting within ORR or to a sponsor.

C. ORR should implement policies and procedures regarding specific consent to ensure oversight and consistency in its decisionmaking and to ensure that children have a fair opportunity to be heard.

Our concerns regarding the proposed changes to ORR's specific consent forms derive from a more fundamental concern—ORR's failure to make its policies and procedures regarding specific consent publicly available. The ORR Policy Guide contains no information regarding ORR's procedures regarding specific consent, and we are not aware of any policies and procedures that have been made available to children, their advocates, or the public. Thus, it is difficult to assess the potential impact of ORR's proposed changes to its specific consent forms without being able to review ORR's policies and procedures regarding specific consent. We have little information as to how the decisionmaker within ORR currently reaches a decision when a specific consent request is made and whether the decisionmaker considers information beyond that provided by the FFS in the Case Summary Form L-2. In fact, prior to this notice of information collection, we were unaware of the existence of the Case Summary Form L-2. The first paragraph of the proposed Case Summary Form L-2 also refers to a "Specific Consent Request Internal Clearance Form," but we were also not aware of this form and have not been provided with a copy of it through the "Proposed Information Collection Activity" process.

Moreover, rather than make non-substantive edits to the form, the proposed changes to the Case Summary Form L-2 actually reflect a change in ORR's procedures with respect to specific consent. By adding a section for an FFS recommendation regarding whether ORR should grant specific consent, the proposed form alters the nature and purpose of the form, changing it from a case summary form for the FFS to provide information, to a form that elicits the recommendation of the FFS as to how ORR should decide the child's request. ORR provides no explanation or justification for this change; while there may be benefits to having the FFS, who may be able to speak with stakeholders to assess whether granting specific consent is in the child's best interest, it is difficult to assess this change in policy without further explanation from ORR. Before

²⁴ SOUTHERN POVERTY LAW CENTER, *supra* note 22.

²⁵ *Id.*

proposing and adopting changes to its specific consent forms, ORR should provide stakeholders with its policies and procedures regarding specific consent.

ORR should also ensure that its policies and procedures regarding specific consent ensure that a child has a fair opportunity to be heard on their request. Before ORR denies a request, the child, their attorney, and their Child Advocate (if they have one), should be provided with the Case Summary Form L-2 and given the opportunity to respond to the conclusions of the FFS and the case manager and to correct, clarify, or provide supplemental information regarding the information upon which they are relying to make their recommendation. The Child Advocate should also be permitted to submit their Best Interest Determination to be included with the Case Summary Form. This would ensure that ORR considers the Child Advocate's Best Interest Determination as they consider the specific consent request. If ORR still decides to deny the request for specific consent, ORR should provide its decision in writing and provide the reasoning for its denial, including the specific information ORR relied upon in denying the request. The Case Summary Form L-2 indicates that a child can request ORR to reconsider a denial; however, ORR should also have procedures to ensure that the child has an opportunity to present additional relevant information responding to ORR's reasons for denying the request, which ORR should consider as part of its reconsideration. Without these procedural protections, ORR is likely to make erroneous decisions based on incomplete or inaccurate information.

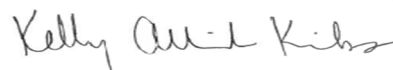
II. Conclusion

Far from proposing minor changes to existing forms, the proposed forms reflect policy changes that directly affect the safety, well-being, and rights of children in ORR custody; as such, ORR should provide further explanation for the changes and delineate the measures it will take to ensure that the information is used in accordance with children's best interests and will not undermine ORR's ability to meet its legal obligation to place children in the least restrictive setting. Without this additional information, we oppose the adoption of the proposed forms in their present form. We recommend that ORR withdraw the proposed forms and review them for potential revision in light of the significant concerns set forth above, as well as in our joint comment.

Respectfully submitted,



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