April 19, 2021

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

Submitted via email to infocollection@acf.hhs.gov

RE: 86 Fed. Reg. 10082
FR Doc. 2021-03261, Proposed on 2-17-21
PROPOSED INFORMATION COLLECTION ACTIVITY
LEGAL SERVICES FOR UNACCOMPANIED CHILDREN

Joint Comments of:
The Florence Immigrant and Refugee Rights Project (FIRRP)
Catholic Legal Immigration Network, Inc. (CLINIC)
The Center for Human Rights and Constitutional (CHRCL)
Legal Aid Justice Center (LAJC)
University of California, Davis School of Law, Immigration Law Clinic
The Young Center for Immigrant Children's Rights

Dear Mary B. Jones:

The undersigned organizations submit these comments to oppose certain aspects of the proposed forms listed in FR Doc. 2021-03261. We are particularly concerned with the Office of Refugee Resettlement's (ORR) interference with legal representation of unaccompanied children through the newly created notice of attorney representation. Additionally, ORR continues to disregard its mandate to promptly place unaccompanied children in the "least restrictive setting that is in the best interest of the child" through the current and proposed specific consent request case summary, especially when reviewed in conjunction with the other federal register publications in 2021 that propose significant changes to certain forms like the Significant Incident Report forms (SIR, SIR addendum, and SA-SIR). Because many of these changes will have harmful impact on the unaccompanied children that we serve, we ask the Department of Health and Human Services (HHS) to retract certain proposals or revise the forms.

I. As Legal Services Providers and Child Advocates that Have Expertise Representing and Advocating for Unaccompanied Children, Our Organizations Are Uniquely Positioned to Submit Comments Regarding These Proposed Changes

Because of its decades-long history providing legal services to detained unaccompanied children ("UAC" or "unaccompanied children"), the **Florence Immigrant and Refugee Rights Project** (the "Florence Project") is uniquely positioned to comment on these proposals. Founded in 1989, the Florence Project is a 501(c)(3) non-profit organization that provides free legal and social services to adults and unaccompanied children facing immigration removal proceedings in Arizona. In 2019, the Florence Project provided services to approximately 10,000 adults and unaccompanied children. As the only 501(c)(3) non-profit organization in Arizona dedicated to providing free legal services to people in immigration detention, our vision is to ensure that every person facing removal proceedings has access to counsel, understands their rights under the law, and is treated fairly and humanely.

The **Catholic Legal Immigration Network, Inc.** (**CLINIC**) promotes the dignity and protects the rights of immigrants in partnership with a dedicated network of over 380 Catholic and community-based immigration legal services programs. CLINIC and its affiliates strive to meet the growing need for quality, affordable legal representation for low-income immigrants and vulnerable populations. As part of this goal, CLINIC provides technical assistance and training to legal services providers who represent unaccompanied children, and signs this letter in support of that effort.

The **Center for Human Rights and Constitutional Law** ("CHRCL") is a non-profit, public interest law foundation dedicated to furthering the legal, civil, human, and constitutional rights of immigrants, refugees, children, indigenous peoples, and the indigent. CHRCL is counsel to the plaintiff class in *Flores v. Sessions*, No. 85-CV-4544 (C.D. Cal) ("*Flores*") and *Lucas R. v. Azar,* No. 18-CV-05741-DMG, (C.D. Cal.) ("*Lucas R*."). CHRCL has nationally recognized expertise in law and policy affecting its target populations, including unaccompanied immigrant children. CHRCL devotes a majority of its resources to major class action litigation. CHRCL also conducts administrative and legislative advocacy, and policy analysis on behalf of its target populations. CHRCL also serves as a resource for policy makers, advocacy coalitions, and community-based organizations in the areas of migration, refugees, and labor-related immigration law and policy.

The **Legal Aid Justice Center** ("LAJC") has provided legal representation for low-income individuals in Virginia since 1967. Our mission is to seek equal justice for all by solving client's legal problems, strengthening the voices of low-income communities, and rooting out the inequities that keep people in poverty. LAJC's Immigrant Advocacy Program supports low-income immigrants in their efforts to find justice and fair treatment. In addition to representing clients with individual legal issues, we promote systemic reforms to reduce the abuse and exploitation of immigrants, and advocate for state and local policies that promote integration and protect immigrants from overly aggressive immigration enforcement. Our work aims to end the mass detention and deportation of immigrants, with a special focus on child refugees fleeing violence and individuals and communities targeted for enforcement by overzealous federal

immigration agents. LAJC combats family separation by working with children and families throughout the reunification process to ensure prompt reunification of children with their families. As class counsel in *J.E.C.M. et al., v. Stirrup et al.*, we also represent children who have been in the custody of the Office of Refugee Resettlement for sixty days or longer, and for whom a Category 1 or 2 sponsor has expressed a desire to sponsor the child. Through this work, LAJC works with families in the community who are potential sponsors of children in ORR custody and represents children who are in ORR custody. LAJC also hosts the Antonin Scalia Law School Immigration and Litigation Clinic. Through the clinic, students represent immigrants in a range of cases, including children in ORR custody and children who have been released from ORR custody.

The **University of California Davis School of Law, Immigration Clinic** ("UCD Immigration Law Clinic") is a nonprofit, public interest clinic dedicated to serving detained immigrants and educating law students. The UCD Immigration Law Clinic is counsel to the plaintiff class in *Lucas R.* and has national expertise in federal litigation, criminal defense, and immigration law. The UCD Immigration Law Clinic is the second oldest immigration law clinic in the United States and has decades of experience defending asylum seekers, immigrant children, and vindicating the rights of immigrants in federal court.

The **Young Center for Immigrant Children's Rights** 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 of 2008 ("TVPRA"). 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.

II. We Strongly Oppose Several Aspects of the Specific Consent Forms (Form L-1 & Form L-2)

While the specific consent forms are not new and the changes are mostly to the format of the forms, we take this opportunity to provide our significant concerns regarding the current and proposed content of Form L-2, Specific Consent Request Case Summary. Form L-2 is especially concerning because of includes the alarming suggestion found among the numerous forms proposed by HHS through the myriad Federal Register announcements[1] this year that UCs are dangerous or gang members. The numerous proposed forms, including significant incident

[1] Administration and Oversight of Unaccompanied Alien Children Program, 86 Fed. Reg. 545, (proposed Jan. 6, 2021); Mental Health Care Services for Unaccompanied Alien Children, 86 Fed. Reg. 1114 (proposed Jan. 7, 2021); Placement and Transfer of Unaccompanied Alien Children into ORR Care Provider Facilities, 86 Fed. Reg. 5196 (proposed Jan. 19, 2021); Monitoring and Compliance for Office of Refugee Resettlement Care Provider Facilities, 86 Fed. Reg. 6340 (proposed Jan. 21, 2021).

reports[2] which will be recorded on Form L-2, extensively record and report alleged gang or cartel crimes, activities, and affiliation.

We object to the proposed forms because they fail to take a child-centric approach to trauma, use historically inaccurate information and lack clarity with respect to gang/cartel designations, undermine ORR's ability to provide for the welfare of children in its care, promote and preserve racial inequality, and can have negative impacts on UCs immigration proceedings.

a. The Specific Consent Forms: *Fail to take a child-centered and trauma informed approach to ORR's obligation to provide for the welfare of UCs.*

First, like the proposed forms in other proposed information collection activities, these fail to take a child-centered and trauma-informed approach to ORR's obligations to provide for the welfare of UCs. Instead, they place much greater emphasis on negative behavior, criminalizing childhood and the trauma many of these children have experienced. Furthermore, we are extremely concerned that the broad and subjective criteria reflected in these questions recorded with little to no oversight will have harmful consequences for hundreds of detained unaccompanied children. They will place many children at high risk of detrimental prolonged detention. Finally, the risks and dangers associated with the other forms ORR has recently proposed (e.g. administrative forms, mental health forms, etc.) will be further compounded because these forms rely on and amplify unreliable allegations recorded and reported in other forms at different points in a child's custody.

b. The Specific Consent Forms: *Promote the continued use of historically unreliable information regarding gang affiliation or involvement and criminal history.*

ORR has a history of incorrectly labeling children as dangerous based on inaccurate allegations of gang involvement, past criminal activity, or criminalizing behavior that is typical for a traumatized child in federal custody. LAJC has represented several children in cases seeking writs of habeas corpus and release from custody through *Flores* bond and *Saravia* bond hearings in which ORR's reporting mechanisms indicated gang involvement and criminality that was exaggerated or entirely inaccurate.[3] Gang allegations are made and used with no youth-specific safeguards. Furthermore, although the forms record "criminal history," most child behaviors are not, in fact, criminal. The distinction between juvenile delinquency and adult crimes is clear and consistent across Supreme Court jurisprudence, the juvenile justice systems in all 50 states and the District of Columbia, and Board of Immigration Appeals case law in *Matter of Devison-Charles*.[4]

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[2] Administration and Oversight of Unaccompanied Alien Children Program, 86 Fed. Reg. 545, (proposed Jan. 6, 2021).

[3] *See, e.g.*, *Beltran v. Cardall,* 222 F.Supp.3d 476 (E.D. Va. 2016); *Santos v. Smith*, 260 F. Supp.3d 598 (W.D. Va. 2017); *O.D.T.M. v. Lloyd*, 1:18-cv-524 (May 2018).

[4] Philip Desgranges, New York Civil Liberties Union, *Trump Is Locking Up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation*, Aug. 2, 2017; Liz Robbins, N.Y. Times, *Teenagers' Arrests Are Unconstitutional, A.C.L.U. Lawsuit Says*, Aug. 11, 2017.

The required threshold for an individual to be identified as gang- or cartel-affiliated remains unclear. ORR does not define gang affiliation or cartel affiliation (or how to determine whether something is gang- or cartel-related) in its Guide to Terms.[5] There is also no definition of gang or cartel membership or gang or cartel association in immigration statutes.[6] In fact, neither law enforcement nor scholars agree on a uniform definition of a "gang."[7] Labeling an incident as gang related may perpetuate false information about the child (see above). For example, if a child discloses that he or she is fleeing from forced gang involvement, subsequent behavior in ORR custody may be designated as gang-related regardless of whether or not that is accurate. The threshold for what conduct necessitates a formal incident report is left to the discretion of ORR's care provider staff, resulting in children being threatened with write-ups for all kinds of common behaviors.[8]

Despite this lack of definition, standard, or guidance, ORR's forms record, report, and share information accusing children of being involved with gangs, cartels, or other criminal activity. In LAJC's experience reviewing unaccompanied children's ORR files, this designation may be based on information from a number of sources. First, ORR relies on information from the Initial Placement Referral Form provided by CBP/ICE to make its placement decisions.[9] Agents may identify an immigrant youth as gang- or cartel-affiliated based on tattoos, "self-disclosures" and reports of the violence the child is fleeing, or if a "reliable source" identifies the child as gang- or cartel- affiliated.[10] ICE frequently misidentifies immigrant youth as gang members for the purpose of deporting them.[11] For the past four years, official rhetoric about immigrant youth has been focused on identifying them as criminals and gang members, either overtly or using coded language.[12]

c. The Specific Consent Forms: *Undermine ORR's ability to provide for the welfare of children in its care.*

ORR's overall emphasis on recording and reporting gang or cartel involvement undermines ORR's ability to provide for the welfare of the children in its care. Significant Incident Reports ("SIRs"), which would be reported and considered in these proposed forms, are routinely submitted after a child reveals prior exposure to gang or cartel violence to a trusted ORR or care-

[5] Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Guide to Terms* (Mar. 3, 2021), https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms.
[6] *See* 8 U.S.C. § 1101 (Supp. 2014) (providing definitions).
[7] *See* Nat'l Gang Ctr., *National Youth Gang Survey Analysis*, https://www.nationalgangcenter.gov/Survey-Analysis ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies.").
[8] *See, e.g.* John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in The U.S.*, NPR (Feb. 13, 2019), https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant- children-in-the-u-.
[9] Nat'l Ctr. For Border Sec. & Immigration, Univ. of Tex. At El Paso, *Unaccompanied Alien Children (UAC) Project* 9-10 (Mar. 20, 2014), http://ncbsi.utep.edu/documents/UAC%20Project%20Site%20Visits/UTEP%20NCBSI%20FinaJ%20Report%20March%2020%202014.pdf [http://perma.cc/36YJ-G4XP].
[10] Press Release, U.S. Immigration & Customs Enf't, Operation Matador Nets 39 MS-13 Arrests in Last 30 days (June 14, 2017), https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days.
[11] *See, e.g.*, Dina Radtke, *ICE Is Wrongly Designating Immigrants as Gang Members to Deport Them*, SALON (May 7, 2018, 10:30 AM), https://www.salon.com/2018/05/07/ice-is-wrongly-designating-immigrants-as-gang-members-to-deport-them_partner/.
[12] Celest Gomez et al., *The President's Intent: Preliminary Findings of a Critical Discourse Analysis of Trump's Speeches and Tweets from the Date of his Candidacy to Mid-September 2017* (2017), https://www.thepresidentsintent.com/full-report/.

provider staff member or therapist.[13] This is particularly concerning because so many unaccompanied immigrant children are fleeing forced gang recruitment or targeting by gangs and cartels, making it all the more likely that they will discuss gang and cartel related violence during therapy and with adults as their cases are processed.[14]

Nearly all allegations against LAJC's child clients originated in a child's revelation of experiences or fears to a therapist or other trusted adult staff member while in ORR custody. Additionally, in *every* instance in which LAJC's clients have been gang involved, their involvement was coerced, under duress, or both. They have volunteered information about what they have seen or done as victims of a ruthless strategy of targeting and forcibly recruiting children by different gangs or cartels in the child's home country. ORR should not view, identify, or treat these children as criminals or gang-members. Instead, ORR must be engaged in recognizing trauma, and helping children heal from and move on from their traumatic past experiences.

d. The Specific Consent Forms: *May have a disproportionate negative impact on children of color and promote racial inequality.*

The majority of children entering ORR custody are from the Northern Triangle of Central America, and have experienced severe trauma before coming to the United States.[15] Often, they have recently experienced or witnessed violence at least once in their home countries, and commonly long-lasting or chronic violence or neglect.[16] Many of them also experience traumatic events on the journey to the United States.[17] This will be particularly true for children arriving in the United States after fleeing not only their home countries, but the horrific conditions in the migrant camps caused by the Migration Protection Protocols program.[18] The United Nations refugee agency has found that the majority of children coming to the southern border merit protection under international law.[19] All of this creates an essential backdrop to understanding the psychological needs and the behaviors of children in ORR custody.

In other contexts outside of ORR, a similar lack of uniformity of criteria and oversight exacerbates the level of error in tools used to identify gang affiliation.[20] The broad and subjective criteria inevitably leads to misclassification and racial profiling of youth of color based on how

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[13] Bob Ortega et al., *For One Teen Asylum Seeker, Confessing Fears Led to Months in Detention*, CNN (June 29, 2018), https://www.cnn.com/2018/06/29/us/teenage-asylum-seeker-migrant-describes-months-in-detention-invs/index.html ("A teenage minor under ORR custody reported that he was assigned a therapist who told him that she would help him. However, every time he would share his exposure to deadly violence, he was labeled a "gang member" by the therapist. Further, the confidential information he shared with the therapist, including the dangers he faced in Guatemala and the fear he experienced, was used against him.")

[14] UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, *available at*, https://www.unhcr.org/56fc266f4.html.

[15] UNHCR, *Children on the Run*, https://www.unhcr.org/56fc266f4.html.

[16] *Id.*

[17] *Id.*

[18] *See* Camilo Montoya-Galvez, *700 children crossed the U.S. border alone after being required to wait in Mexico with their families*, CBS News (Jan. 15, 2021), https://www.cbsnews.com/news/children-who-crossed-the-u-s-border-after-their-families-were-required-to-wait-in-mexico-are-being-denied-legal-safeguards-suit-says/

[19] UNHCR, *Children on the Run*, https://www.unhcr.org/56fc266f4.html.

[20] Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 733 (2018).

they look.[21] For example, school authorities have mislabeled students involved in physical fights or verbal altercations as gang members or classified them as gang related even though none of students were members of a gang.[22]

The extensive alleging, recording, and reporting of gang or cartel allegations inherent to the proposed forms and the records upon which information in the forms will be based will be necessarily, and almost exclusively, applied to children of color. People of color, including youth, are disproportionately negatively impacted by their race in educational, juvenile justice, and immigration settings.[23] Children of color are not afforded the protections ordinarily understood to attach to children, both in context of juvenile and immigration proceedings.[24] This is all the more true for those who do not speak English.[25] The conflating of criminality with immigration grows out of a system steeped with racism that has not been acknowledged or addressed.[26] Mark Morgan's comments about his ability to unequivocally identify future gang members simply by looking at children in immigration custody is just a disturbingly public expression of the pernicious racism that underlies our immigration system. [27] In fact, U.S. incarceration and deportation policies have proven to be "not only failed strategies for combating gang violence" but also key generators of gang violence in Central America.[28] History also

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[21] *National Youth Gang Survey Analysis*, NAT'L GANG CTR., https://www.nationalgangcenter.gov/Survey-Analysis ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies."); Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 732 (2018).
[22] Yvette Cabrera, *Troubled Pasts Force Hard Choices for Some Undocumented Immigrants*, VOICE OF OC (Feb. 28, 2016), http://voiceofoc.org/2016/02/troubled-pasts-force-hard-choices-for-some-undocumented-immigrants.
[23] *See e.g.,* LAJC, *Decriminalizing Childhood: Ending School-Based Arrest for Disorderly Conduct*, Oct. 2019, https://www.justice4all.org/wp-content/uploads/2019/10/LAJC-DC-policy-brief-FINAL.pdf; Kristen Weir, *Policing in Black & White* (Dec. 2016), https://www.apa.org/monitor/2016/12/cover-policing; Emily Ryo, *Predicting Danger in Immigration Courts*, 44 Law & Social Inquiry 227, 245 (2019).
[24] *See*, Nat'l Inst. For Bldg. Cmty. Tr. & Justice, *Implicit Bias*, https://trustandjustice.org/resources/intervention/implicit-bias; Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officers with Caution*, 44 Pepp. L. Rev. 245, 293-294 (2017); Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities,* 61 Cath. U.L. Rev. 921, 949 (2012); Ctr. For Child Law & Policy, *Red Practice Manual: Introduction and Chapter 1: Beginning or Restarting Work to Reduce Racial and Ethnic Disparities* 14-15 (2015), http://www.cclp.org/wp-content/uploads/2016/06/Introduction-and-Chapter-1-Beginning-or-Restarting-Work-to-Reduce-Racial-and-Ethnic-Disparities.pdf ("Black and Latinx youth confront particular hardships in the juvenile justice system, including overrepresentation, more severe treatment than white youth for similar offenses, unnecessary entry and entrenchment into the system, and overbroad antigang laws.")
[25] *See* Anastasia Coppersmith, *Lost in Translation: Persons with Limited English Proficiency and Police Interaction in the United States*, 10 N. Ill. U. L. Rev. 1, 14 (2018).
[26] Yolanda Vázquez, Constructing Crimmigration: Latino Subordination in a 'Post-Racial' World, 76 OHIO STATE L.J. 599, 608 (2015) ("W]hile overt racism has played a role in its [crimmigration's] development, structural inequality works to mask and entrench racism within the system as it allows for the continued racial disparities in a post-racial world--court decisions refuse to recognize it, society refuses to acknowledge it, and individuals can forcefully insist that they support the system as it stands because it is not based on race or racism.").
[27] Ted Hesson, *Trump's Pick for ICE Director: I Can Tell Which Migrant Children will Become Gang Members by Looking into Their Eyes*, POLITICO (May 16, 2019), https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570 ("Mark Morgan, the White House choice to lead [ICE] ... said ... 'I've been to detention facilities where I've walked up to these individuals that are so-called minors, 17 or under ... I've looked at them and I've looked at their eyes ... and I've said that is a soon-to-be MS-13 gang member. It's unequivocal.'").
[28] *See* Kevin Johnson*, Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals,* 66 Case W. Res. 993, 998 (2016).

shows us that despite this scholarship, politicians continue to vilify youth of color in order to justify pro-incarceration and pro-deportation policies.[29]
ORR's emphasis and focus on gang and cartel involvement and on criminal history only serves to promote and preserve racial inequality in the United States and its severe impact on children, many whom have only just arrived.

e. The Specific Consent Forms: *Label children as gang-affiliated and record activity as criminal which can have severe and harmful consequences for children that are or have been in ORR custody.*

Our organizations have repeatedly criticized ORR for conducting an entirely subjective process while operating within an opaque system without neutral oversight. Youth from Latin America are particularly at risk for mislabeling because ORR staff rely almost exclusively on subjective criteria, such as the perception of gang-related appearance, and self-disclosure *by children in a restrictive setting* to make determinations on gang affiliation. In many cases, disclosures are made while the child is detained by law enforcement. An ICE-ORR Memorandum directed the Department of Homeland Security ("DHS") to train ORR staff on how to identify MS-13 gang colors and signs as a basis for making these determinations.[30] That training has resulted in teens from Central America being mislabeled as gang members and erroneously held in ORR secure facilities.[31]

The high-stakes consequences of gang allegations beyond what happens in ORR custody is even more concerning. There is little or no oversight about what does and does not get labeled gang-, cartel-, or crime-related, combined with a mandate to report any and every allegation of gang-related activity to ICE and HSI.[32] This mandate is reflected in each proposed SIR form under the FFS Reporting section. Nor is there any way for a child to challenge an allegation of gang or cartel involvement. At a minimum, ORR should make clear that untested allegations of gang or cartel *affiliation* are not reportable "gang-related *activity*".

Also, because of an historic disregard for privacy resulting in sharing of information between ORR and DHS and between ORR and the Executive Office for Immigration Review ("EOIR"),

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[29] *See* Priscilla A. Ocen, *(E)racing Childhood: Examining The Racialized Construction of Childhood and Innocence,* 62 UCLA L. REV. 1586, 1594 (2015)*;* Kevin Johnson*, Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals,* 66 Case W. Res. 993, 998 (2016); The Sentencing Project*, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Sep. 3, 2014), *https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/;* Carrie Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals,* 13 U. St. Thomas L.J. 532, 555 (2017); Allegra M. McLeod, The *U.S. Criminal-Immigration Convergence and its Possible Undoing,* 49 Am. Crim. L. Rev. 105, 110 (2012).

[30] *See* Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020)

[31] Alice Speri, *Federal Judge Frees Salvadoran Teen Accused of Gang Ties, Pens Lengthy Rebuke of His Detention by ICE*, INTERCEPT (June 27, 2018), https://theintercept.com/2018/06/27/federal-judge-frees-salvadoran-teen-ice-detention/; Sarah Gonzlez, *Undocumented Teens Say They're Falsely Accused Of Being In A Gang*, NPR (August 17, 2017), https://www.npr.org/2017/08/17/544081085/teens-in-u-s-illegally-say-theyre-falsely-accused-of-being-in-a-gang.

[32] Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 5*, https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-5#5.8.5 (FFS must email the SIR to the ICE/HSI Tip Line within one business day of receiving the SIR for any "gang-related activity".)

we are extremely concerned that these reports will be used against unaccompanied children in the course of their removal proceedings before Immigration Court and/or their requests for benefits before the U.S. Citizenship and Immigration Services ("USCIS"). These forms inappropriately blur the boundaries between ORR's role as a caretaker and that of an enforcement agency. They invite interference with legal cases. Gang allegations increase the chance that immigrant youth will be denied immigration benefits and deported.[38] These allegations of gang activity become a permanent part of a child's ORR file, and typically remain available to DHS, following them through the culmination of immigration proceedings. ORR discloses all gang-tagged SIRs to DHS per the ORR UAC Policy Guide.[33] Once the gang activity is reported, HSI places gang memoranda in individuals' A-files and explicitly directs all future immigration services and applications for benefits or relief be denied.[34]

In LAJC's experience, DHS *always* submits these SIRs in immigration proceedings, whether to prevent an adult who was in ORR custody as a child from being released on bond, to prevent a favorable exercise of discretion in asylum and in other forms of relief, or in some cases to argue that the child is barred from relief altogether based on unverified SIRs from when the child was in ORR custody. ORR's insistence on labeling and documenting activities as gang-related, cartel-related, or criminal does little to protect children in ORR's care but actively harms the children ORR accuses.

Gang allegations may also be used to deny DACA renewal, U-visas, or other adjustment of status applications before USCIS.[35] If a child has reported gang affiliation, judges will likely opt to remove that child rather than grant him or her voluntary departure, a discretionary form of relief.[36] These allegations operate as a presumption in immigration court as immigration judges will often accept the allegations as fact without recognizing issues of unreliability underlying gang identification protocols.[37]

The rise of gang allegations within the immigration context has been met with intense criticism about information integrity.[38] Cases involving gang allegations have challenged the lack of due consideration of the reliability or veracity of the suspicions used to deny immigration benefits.[39]

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[33] Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 5.8.4* (Mar. 3, 2021), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5#5.8.4

[34] STUCK WITH SUSPICION https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf (Pg. 14-16)

[35] N.Y. Civil Liberties Union & N.Y Immigration Coal., *Stuck With Suspicion* 14-16 (2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf.

[36] K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-trial Detention*, 23 St. Thomas L. Rev. 620 (2011); Lauren R. Aronson, *The Tipping Point: The Failure of Form over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 Harv. Latino L. Rev. 1, 22 (2015).

[37] Imm. Legal Res. Ctr., *Deportation by Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members* (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf

[38] *E.g.*, Aviva Stahl, *How Immigrants Get Deported for Alleged Gang Involvement*, VICE (Aug. 12, 2016 10:02 AM), https://www.vice.com/en_us/article/yvedev/how- immigrants-get-deported-for-alleged-gang-involvement; Ali Winston, *Marked for Life: U.S. Government Using Gang Databases to Deport Undocumented Immigrants*, INTERCEPT (Aug. 11, 2016, 10:34 AM), https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport- undocumented-immigrants/; Ali Winston, *Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members*, INTERCEPT (Feb. 17, 2017, 6:12 PM), https://theintercept.com/2017/02/17/ loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/.

These forms inappropriately blur the boundaries between care of UCs and immigration law enforcement, and they invite negative interference with children's legal cases. The responsibility of caring for unaccompanied immigrant children was specifically placed under an agency that had no responsibility for enforcing immigration laws or working to remove immigrant children from the United States. But the proposed forms focus on collecting information about gang- and cartel- involvement and criminal history, together with designating children's in-custody behavior as falling into those categories does more to contribute to children's removal to dangerous places than to their protection and care.[40] The direct impact of including gang information on the specific consent form erodes the important divide between protection and law enforcement, and raises serious questions about conflicts of interest with ORR in possible violation of its mandate to care for the wellbeing of unaccompanied children.

In sum, we are deeply concerned that ORR is moving towards the role of detention and removal enforcer rather than complying with its congressional mandate to provide for the welfare of all the children under its care, including promptly placing children in the least restrictive setting.

f. Form L-2, Specific Consent Request Case Summary: *Ignores the mandate to document any factors in favor of placing the child in the "least restrictive setting that is in the best interest of the child" in violation of the TVPRA.*

With both the existing and proposed Form L-2, ORR disregards its clear duty under the TVPRA to place unaccompanied children in the least restrictive setting that is in the child's best interest. In making placements, the TVPRA allows ORR to consider danger to self, danger to the community, and risk of flight. However, the statute requires that unaccompanied children "**shall** be promptly placed in the least restrictive setting that is in the best interest of the child."[41] (emphasis added).

Form L-2 ignores the TVPRA's mandate. It has six queries that seek only to document danger to self, danger to the community, and risk of flight. The questions are:

- Question 1 - *If the UAC was released from ORR custody into the new custody situation, would there be any risk to the child's safety?*
- Question 2 - *If the UAC was released from ORR custody into the new custody situation, would there be any risk to the community?*
- Question 3 - *If the UAC was released from ORR custody into a new custody situation, would there be any risk of escape?*

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[39] First Amended Petition for Writ of Habeas Corpus & Class Action Complaint for Injunctive and Declaratory Relief at 1, 10-11, 17-18, Gomez v. Session, No. 3:17-cv-03615-VC (N.D. Cal. Aug. 11, 2017) (discussing false claims); Jennifer Medina, *Gang Databases Criticized for Denying Due Process May Be Used for Deportations*, N.Y. TIMES (Jan. 10, 2017, 9:10 PM), https://www.nytimes.com/2017/01/10/us/gang-database- criticized-for-denying-due-process-may-be-used-for-deportations.html?pagewanted=all&_r=0; Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM), http://www.latimes.com/ local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html.

[40] *See e.g.,* Lauren R. Aronson, *The Tipping Point: The Failure of Form over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 Harv. Latino L. Rev. 1, p. 11 (2015).

[41] 8 U.S.C. § 1232(c)(2)(A)

- Question 4 – *Has the UAC had any reported behavioral incidents that threaten or harmed other children, staff, or themselves while in ORR care? Significant Incident Reports (emergency standard, or sexual abuse) might be used to demonstrate these behavioral incidents.*
- Question 5 – *Does the UAC have any history of violence or criminal background?*
- Question 6 – *Provide a brief summary of the UAC's functioning, behavior, and psychosocial history.*

The questions only mention one factor that can weigh in favor of prompt release ***in the child's best interest -*** Question 1, a child's safety. In contrast, the Convention on the Rights of the Child outlined several additional elements to consider when assessing the child's best interests. Those elements include a child's safety and

- The child's views;
- The child's identity;
- Preservation of the family environment and maintaining relations;
- Situation of vulnerability;
- The child's right to health; and
- The child's right to education.[42]

Because of the TVPRA's clear mandate to promptly place the child in the least restrictive setting according to the child's best interest, we unequivocally recommend that ORR incorporate these elements in Form L-2. For example, the child's expressed views should be a pivotal part of the case summary, along with consideration of the proposed placement's access to religious and cultural identity; consideration of family unity (for example, great weight should be placed in favor of the new placement if it will be with the child's family or convenient access to in-person visits with family); consideration of the detrimental effects of detention on the child's mental health, including factors such as the length of child's detention; and a child's ability to enroll in a school where child can earn credits recognized by the state. These are all examples of questions that, under the TVPRA, should carry more weight in the determination of whether ORR grants specific consent to the least restrictive setting rather than the Questions 2-6 of Form L-2.

Further, we are deeply concerned that ORR could deny specific consent and thus bar a child's ability to seek special immigrant juvenile status in cases where ORR makes a determination of danger or flight risk without considering the TVPRA's mandate that the child be placed in the least restrictive setting in the child's best interest. This form allows ORR to assume the role of gatekeeper by denying specific consent if there is "any risk" of danger to the child's safety or flight. This is the incorrect standard of when ORR must grant specific consent. The TVPRA's mandate *must* be the central inquiry here: *is the proposed placement the least restrictive setting that is in the child's best interest?* This Form's questions about danger and flight risk must be secondary considerations, especially given that the denial of specific consent means that some children cannot pursue legal status and permanency in the United States. Further, the Form's

[42] Comm. on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (art. 3, para. 1), ¶ 52-79, U.N. Doc. CRC/C/GC/14 (May 19, 2013) [hereinafter General Comment No. 14].

language should clarify that the standard should not be whether there is "any risk" in the new placement, but rather how the risk in the proposed placement compares to the risk in the current placement.

In addition, we are concerned that the current forms may create an unnecessarily long and cumbersome process. The specific consent process should prioritize the swift grant of jurisdiction to the state juvenile court, which can then modify the child's placement in accordance with the child's best interest, a central consideration of every juvenile court.[43] In cases where ORR intends to deny specific consent, it should produce a detailed report including an individualized assessment of the child's history since birth by a multidisciplinary team, as described in the Convention on the Rights of the Child.[44] We recommend that this case summary be completed in collaboration with the case manager, clinician, the facility's lead clinician, counsel for the child, the UAC, and the appointed child advocate, if any. We believe that the participation of the child and access to counsel during this process is crucial because of the high risk of harmful consequences that could result by using Form L-2: the inability to pursue special immigrant juvenile status, continued detention, and adverse information shared with DHS that could be used against unaccompanied children in custody or removal proceedings.

g. Form L-1, Request for Specific Consent to Juvenile Court Jurisdiction: *Fails to provide sufficient time to requests specific consent and raises privacy and confidentiality concerns related to medical, criminal and gang information.*

We support ORR's decision to consider the cases of children who are aging out of ORR custody as urgent. However, we recommend that ORR allow legal services providers and child advocates to submit urgent requests 180 days before the child's 18th birthday instead of 30. Unaccompanied children with vulnerabilities or barriers often experience delays in the juvenile court cases that are outside of their control. For example, in the Florence Project's experience working with UACs who speak uncommon languages, local juvenile courts often must reschedule hearings for lack of an interpreter or because of telephonic connection issues when parents are in foreign countries. Allowing legal services providers to request specific consent 180 days before the child's birthday will greatly benefit those unaccompanied children who are aging out of custody and have a particular vulnerability or need special accommodations by providing a more realistic timeline for the specific consent process and juvenile court custody proceeding. Further, the increase to 180 days would allow children time to seek reconsideration if specific consent is initially denied and give ORR adequate time to consider those requests.

We also suggest broadening the form's language to allow Child Advocates and other non-attorneys advocating for the child to request specific consent from ORR. Given that there is no right to government-appointed counsel, this change would allow the greatest number of children to access the specific consent process—an essential protection as they approach the age-out process and their 18th birthdays.

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[43] Child Welfare Information Gateway. (2020). *Determining the best interests of the child.* Washington, DC: U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/ (last accessed Apr. 16, 2021)

[44] Id. ¶ 76.

The proposed forms contain fields related to children's criminal history and real or perceived involvement in gang activity. It is unclear if ORR considers these forms to be subject to state and federal laws governing the protection of children's information and privacy. To the extent that any information reported in the Specific Consent forms include medical information, including notes about mental health, ORR must recognize that those medical records are subject to HIPPA and protect them accordingly.[45] Legislatures have chosen to restrict access to children's records in this manner in recognition of the inherent vulnerability of children and related policy concerns. Protecting children's information and privacy promotes rehabilitation and removes barriers to seeking employment, housing, and other opportunities.[46] Additionally, restricting access to children's information is consistent with the U.S. Supreme Court's longstanding recognition that children should not be stigmatized for "youthful indiscretions."[47] In recognition of these longstanding norms and policies, ORR should ensure that the information collected on the proposed forms are adequately safeguarded and comply with state and federal laws governing the protection of children's health and criminal information.

As noted above, the forms specifically contain information regarding children's alleged criminal or gang history. In general, sharing information about children's criminal history outside of ORR is inconsistent with the policy rationale underlying protections for juvenile criminal information. In Virginia, for example, juvenile confidentiality laws have long protected juvenile information arising from certain proceeding, including juvenile delinquency.[48] Any agencies or individuals not statutorily authorized to review a child's file must obtain a court order to do so.[49] Children's law enforcement records are likewise restricted, and a court order must be obtained for most outside agencies or personnel to access the record.[50] A violation of the juvenile confidentiality provisions is a class 3 misdemeanor.[51]

Similarly, in California, juvenile confidentiality laws have long protected juvenile information arising from certain proceedings, including juvenile delinquency.[52] Only certain individuals and agencies are permitted automatic access to information and files regarding juveniles who are or were in delinquency or dependency proceedings.[53] Any other agencies or individuals not statutorily authorized to review a child's file must obtain a court order to do so.[54] These procedures are purposely stringent and "explicitly reflect a legislative judgment that rehabilitation through the process of the juvenile court is best served by the preservation of a

[45] *See, e.g.,* 5 U.S.C. § 552(a); 20 U.S.C. § 1232g; Health Insurance Portability and Accountability Act, H.R. 3103, 104th Cong. (1996); CA WIC.
[46] Riya Saha et al., *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*, 6 (2014)
[47] *In re Gault,* 387 U.S. 1, 60 (1967) (J. Black concurring) ("The juvenile court planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions.").
[48] VA Code Ann. § 16.1-305
[49] *Id.*
[50] VA Code Ann. § 16.1-301
[51] VA Code Ann. § 16.1-309
[52] Cal. Welf. & Inst. Code § 827 (Deering 2021).
[53] *Id.*
[54] *Id.*

confidential atmosphere in all of its activities."[55] California statute sets forth the specific persons and entities entitled to inspect juvenile case files without a court order.[56] Parties allowed to inspect or receive copies of juvenile records are prohibited from disclosing the juvenile's information to unauthorized parties.[57] A violation of juvenile confidentiality provisions is a misdemeanor punishable by a fine.[58] California does not authorize the disclosure of juvenile information in any form to federal officials, including representatives of DHS, absent an order from the judge of the juvenile court.[59] In finding that juvenile court records "should remain confidential regardless of the juvenile's immigration status," the Legislature emphasized that "confidentiality is integral to the operation of the juvenile justice system in order to avoid stigma and promote rehabilitation for *all youth*, regardless of immigration status."[60] Moreover, the information required to be protected is broadly defined to include the juvenile's case file and information relating to the juvenile.[61]

Laws in Arizona, New York, Texas, and Florida similarly protect juvenile records. In these states, any party seeking information contained in a juvenile's court records must petition the state court; and in Texas, the juvenile court or the Texas Department of Family and Protective Services.[62] Without a court order granting ORR authorization to share this information specifically with DHS or another third party, ORR's collection, recording and reporting of this information may violate applicable state laws.

Federal law as it relates to unaccompanied children is similarly protective. The *Flores* Agreement requires ORR facilities to "develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which *preserves the confidentiality of client information and protects the records from unauthorized use or disclosure*."[63] The ORR website states, "HHS does not release information about individual children or their sponsors that could compromise the child's location or identity."[64] The website also states, "HHS has strong policies in place to ensure the confidentiality of [UACs] personal information."[65] ORR's promises reflect the *Flores* Agreement's provision that the child has "a reasonable right to privacy."[66] From the rights listed in the provision, naturally,

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[55] *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 776-77 (Cal. 1971).
[56] Cal. Welf. & Inst. Code § 827.
[57] Cal. Welf. & Inst. Code § 827(a)(4) (Deering 2021); *see also In re Tiffany G.*, 29 Cal. App. 4th 443, 451 (Cal. App. Ct. 1994).
[58] Cal. Welf. & Inst. Code § 827(b)(2) (Deering 2021).
[59] The Juvenile Court has the exclusive authority to determine the extent to which juvenile case records can be disclosed. *In re Elijah S.*, 125 Cal. App. 4th 1532 (Cal. App. Ct. 2005).
[60] Cal. Welf. & Inst. Code § 831(a) (Deering 2021).
[61] Cal. Welf. & Inst. Code § 831(e) (Deering 2021).
[62] A survey of the juvenile and child abuse and neglect records confidentiality laws of these five states—Arizona, New York, Florida, California and Texas—is included as an appendix to this comment. This appendix is meant to present a sampling of state juvenile records confidentiality laws, on the basis that the rest of the U.S. states and the District of Columbia oversee similar laws. *See infra* Appendix 2.
[63] Flores Settlement Agreement, Ex. 1 at ¶ E (emphasis added).
[64] Office of Refugee Resettlement, *Health and Safety*, https://www.acf.hhs.gov/orr/about/ucs/health-and-safety (last visited Feb. 19, 2021) (citing to the text under "Privacy" heading).
[65] Office of Refugee Resettlement, *Health and Safety*, https://www.acf.hhs.gov/orr/about/ucs/health-and-safety (last visited Feb. 19, 2021) (citing to the text under "Privacy" heading).
[66] *Flores* Settlement Agreement, Ex. 1 at ¶ A.12 ("A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster

the child must also have the right to privacy of their own records. A child's ORR file's information should not be accessible by third parties, including when ORR provides or denies specific consent, without the child's authorization. Additionally, the proposed forms should indicate that the child's ORR file is separate from the child's "Alien File," and the documents as well as the information in a child's ORR file must not be accessible by any entity within DHS or the DOJ.

Thus, to promote rehabilitation and align with child welfare principles, state and federal laws, ORR should not share criminal history or allegations of criminal activity information with outside agencies and should have strict firewalls on ability to access the information.

III. We Object to Certain Changes That Will Be Improper, Duplicative, and Will Cause Unnecessary Delays (Forms L-3, L-7, L-8, L-8B, LRG-8A)

a. Form L-7, Change of Venue: *Requiring or allowing a custodian's signature will violate the EOIR Practice Manual, could result in rejection by EOIR staff, and is unnecessary.*

We ask that ORR retract Form L-7, Motion for Change of Venue ("COV Form") in its entirety and ask ORR facilities to consult with legal service providers familiar with the local practices for each Immigration Court to establish uniform procedures in their region; in the alternative, we ask that ORR delete the custodian signature section from the proposed COV Form as problematic for the following reasons

First, it is unclear why ORR is requiring or adding a space for the custodian to sign the COV Form, and it is likewise unclear who has the legal authority to sign as the custodian. Many shelters will ask the FFS to sign as custodian or could require the receiving sponsor to sign. The ambiguous term will result in delay and confusion.

Second, requiring a custodian's signature will likely violate the Executive Office for Immigration Review's practice manual ("EOIR Practice Manual"). Because a COV is a written request made by a *party* in removal proceedings, only in certain limited exceptions can a non-party sign a submission to the Immigration Court. In this case, the child is the party moving the Immigration Court to change venue after their release or transfer from the ORR facility to the Court closest to their new address. The EOIR Practice Manual states that "only those individuals who have been authorized by Immigration Court" who meet a detailed list of criteria[67] and have submitted the necessary paperwork may sign submissions.[68] For example, a parent or legal guardian may do so on behalf of a child.[69] Requiring or even allowing a custodian to sign a COV will be in violation of the EOIR Practice Manual and is an impermissible overstep by ORR in the

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home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house and regulations; and (e) receive and send uncensored mail unless there is reasonable belief that the mail contains contraband.").

[67] OFFICE OF THE CHIEF IMMIGRATION JUDGE, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL, Section 2.9 [hereinafter EOIR Practice Manual].

[68] EOIR Practice Manual, Section 3.3.

[69] EOIR Practice Manual, Section 2.8.

child's removal proceedings. EOIR staff may reject the filing, resulting in delayed adjudication of the request once the child has already left the venue.

Third, the custodian's signature is unnecessary. Although neither 8 C.F.R. § 1263.3, which regulates the detention and release of juveniles, nor the EOIR Practice Manual have any specific guidance as to how the motion to change venue is filed for unaccompanied children, Congress's intent to place unaccompanied children in the least restrictive setting in the best interest of a child is clear.[70] Accordingly, ORR must prioritize a swift COV process and not muddy the waters by adding portions to a motion not called for by the regulations or guidance that could delay reunification.

Fourth and finally, requiring sponsor signatures will result in unnecessary government expense with Case Managers spending significant time in obtaining the signatures, causing undue delay in the changes of venue with Immigration Court.

The Florence Project has seen first-hand the delay and extra work that results when ORR requires a sponsor signature on a *pro se* Change of Venue form. Between about 2015 and 2016, an Immigration Judge in Tucson, Arizona, required sponsor signatures on all *pro se* Motions for Changes of Venue. On numerous occasions, children who had already reunified out of state remained on the docket because their case managers had not obtained sponsor signatures prior to their release. In one case, a youth reunified from Arizona to Tennessee in mid-December. Shortly after his reunification, shelter staff filed his Change of Venue form without a sponsor signature. The judge declined to rule on the motion until his sponsor signed the form. Because his hearing was still set for late December and the immigration judge did not rule on his Motion to Appear Telephonically prior to the hearing, the youth's only option was to buy a bus ticket in order to travel back to Tucson and attend his hearing. Fortunately, the judge agreed to grant the motion just days before the child travelled. Requiring the sponsor's signature added enormous and unnecessary extra work and stress in this matter.

Unfortunately, requiring a custodian signature could delay the change of venue for thousands of children each year. This requirement will prevent immigration judges from swiftly adjudicating pending requests for change of venue, will add unnecessary work for legal services providers like the undersigned organizations. More alarmingly, the extra signature requirement will create additional uncertainty for children who have already reunified if the shelter fails to obtain the correct signature prior to the child's release.

We recommend that ORR retract Form L-7 and that the Agency collaborate with legal service providers in each jurisdiction to develop forms that meet Immigration Court standards. For example, the Florence Project serves detained unaccompanied children before the Immigration Court in Phoenix, Arizona. We have observed that the Court changes venue after ORR staff provide the Verification of Release Form and EOIR-33, Change of Address without requiring a written Change of Venue form. The Florence Project supports this process and believes it is the most efficient and least burdensome process for all stakeholders involved.

[70] 8 U.S.C.A. § 1232(c)(2).

In the alternative, we recommend that the custodian section ("Custodian's Printed Name" and "Custodian's Signature") be deleted from the COV Form. We further recommend that ORR staff have clear instructions to attach both the Verification of Release Form and the Court's EOIR-33, Change of Address, form to each COV Form, as these documents will likely ensure that the Immigration Court change venue where the child is not able to sign because of their age or physical or mental impairment.

b. Form L-3, Notice of Attorney Representation: *ORR should retract this form as it is duplicative, unnecessary, and will likely interfere with the counsel's duties to their UAC clients.*

ORR should continue to accept a G-28 as notice of attorney representation. ORR does not explain why this form is necessary. Historically, attorneys and DOJ accredited representatives have submitted their Form G-28 in order to receive case updates and to get a copy of the child's ORR file.[71] In many cases, children will need to sign a G-28 with their attorney during the course of representation, and that should be sufficient to provide notice of counsel. Further, if an attorney prefers to use a G-28, ORR should accept that as a standard notice of attorney form.

The commenting parties are concerned that the proposed new form, L-3, Notice of Attorney Representation, has certain elements that are not based on any federal or state law or regulation and are, in plain terms, coercive and ask attorneys to violate their ethical obligations. For example, the statement under Section E titled "Signature of Attorney or Accredited Representative" reads as follows:

> "I have read and agree to abide by the regulations and conditions contained in 8 CFR 103.2 and 292 governing appearances and representation of UAC and the **ORR policies governing representation of UAC.** I will represent the UAC in accordance with the professional ethics required by my licensing bureau. **I will not unreasonably interfere with or obstruct ORR from performing its charged duties, including but not limited to releasing the UAC from ORR custody.** I declare under penalty of perjury under the laws of the United States that the information I have provided on this form is true and correct." Form L-3 (emphasis added).

The commenting parties are also unaware of any ORR policies governing representation of UAC. ORR cannot make access to information or a file contingent on an agreement without even knowing what those policies are. In any case, ORR does not have the statutory or regulatory authority to limit or restrict UC's access to counsel or their ability to exercise fundamental rights with respect to the reunification process.

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[71] OFFICE OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., Policy & Guidance: Request for UAC Case File Information (Apr. 14, 2014), available at https://www.acf.hhs.gov/orr/policy-guidance/requests-uac-case-file-information.

Most alarmingly, the statement makes the attorney swear under penalty of perjury that they "will not unreasonably interfere with or obstruct ORR from performing its charged duties, including but not limited to releasing the UAC from ORR custody." With this statement, ORR is itself obstructing a child's access to counsel by making attorneys sign a broad statement that is in no way related to the representation. This statement is impermissible, because there are circumstances where counsel must intervene on behalf of their client and their failure to interfere may result in the attorney violating their own professional duties under their state licensing jurisdiction. Attorneys generally owe an ethical duty solely to their client – requiring that this additional agreement be signed in order to receive any information from ORR creates the potential for conflicts of interest to arise.

Moreover, in a few limited instances, children have disclosed that they are afraid of reunifying with a proposed sponsor because of past abuse or threats of future abuse. In those situations, the legal services provider *must* step in to advise ORR that the placement is not in the child's best interest. Failing to do so would be a violation of professional duties and would put the child in danger.

Further, in Arizona, a lawyer has a duty of diligence and competence[72] that may require that they step in to interfere with reunification when reunification can affect their access to relief from deportation. The same rule appears in the American Bar Association's Model Rules of Professional Conduct[73] and most state bars around the country. For example, the Tucson EOIR has been reluctant to change venue in cases of children scheduled for a second or third master calendar hearing when those children have been released. The Florence Project has had to advocate for ORR to wait a few days to allow the child to appear in person and request a change of venue, then release the child. If ORR had released the child when the child was still scheduled to appear in court in Tucson, the child would have had to face homelessness or instability while waiting for that hearing, or reunify only to have to immediately return to Tucson for removal proceedings. In these limited cases, and with our clients' agreement, we have asked ORR to delay reunification for a few days so that the client can attend court and then reunify.

Furthermore, a child being subjected to inappropriate prolonged detention, including when the delay in release is a result of ORR's actions and decisions related to the reunification process, has the right to retain counsel to assist them in protecting their fundamental right to liberty and family. During representation, counsel may be required to challenge ORR's reunification processes or decisions in order to carry out her duties as a child's lawyer. ORR may deem these actions as unreasonable interference or obstruction, despite our actions being justified and required based on our duties to our client. In sum, Section E of this proposed form is completely inappropriate and represents a misguided overreach of authority and inappropriate coercion limiting a child's access to representation.

Finally, Form L-3's instructions further states that the attorney of record for UAC must submit this completed form with information about the scope, nature, and duration of representation to

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[72] ARIZ. RULES OF PROF'L CONDUCT, ERs 1.3, 1.1.

[73] AMERICAN BAR ASS'N, RULES OF PROF'L CONDUCT, ERs 1.3, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence/

receive updates on the UAC's case during the course of representation and that this form is also required to get a copy of the UAC's case file. However, in many instances, the scope of representation is unclear *until* an attorney has been able to review the case file. Artificially limiting the course of information before the attorney and child have had an opportunity to discuss and agree upon a scope of representation is inappropriate. This also inappropriately inserts ORR into the agreement between the child and attorney, of which ORR is not a party. The "course of representation" section should be removed from this form.

We recommend that ORR retract this form in its entirety and continue to use Form G-28, Notice of Entry of Appearances as Attorney or Accredited Representative. Historically, ORR has required a Form G-28 to access the child's information or initiate contact with the child. For example, the undersigned organizations regularly file Form G-28 with ORR Case Managers to inform ORR that they are representing the child. The Form G-28 contains all the necessary information, including counsel's contact information, eligibility to represent – Bar Number or information regarding Department of Justice accreditation through a recognized organization – along with the child's information and a statement under penalty of perjury that counsel has "read and understand[s] the regulations and conditions contained in 8 CFR 103.2 and 292."[74].

c. Form L-8B, Motion to Request a Bond Hearing, Non-Secure and Form LRG-8A, Motion to Request a Bond Hearing, Secure-Staff Secure: *Having a separate motion for children in secure and staff secure is prejudicial.*

The proposed Forms L-8B and LRG-8A make it so that the Immigration Court more easily distinguishes between non-secure and staff-secure/secure placements by making the placement bold. Requiring the child to disclose harmful information, like secure or staff secure placement, to the Immigration Court is improper. The Federal Register announcement only explains that this form is to be used when an unaccompanied child requests a *Flores* Bond Hearing – it does not provide an explanation about why the child's placement (in bold) is needed. Because of the risk for prejudice, we ask ORR to provide justification. While we suspect that having separate motions might be to alert the Immigration Judge about what issues are being raised by the motion, this alone is not sufficient justification for having two forms that alert the Immigration Judge as to placement.

A Motion to Request a Bond Hearing allows for an unaccompanied child to challenge their placement in a meaningful way, including the opportunity to present evidence and review and rebut evidence presented against them. Most importantly, the government, through the DHS trial attorney, should bear the burden of producing information on how ORR reached its decision regarding the child's placement. It should also bear the burden of proof that the unaccompanied child poses a danger or a flight risk.[75] Making a child disclose potentially harmful information – placement in secure or staff secure – is very problematic, especially when children in ORR care have no other choice but to use this form to even access the Immigration Court.

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[74] U.S. DEP'T OF HOMELAND SEC., Notice of Entry of Appearance as Attorney or Accredited Representative, OMB No. 1615-0105 (2021).

[75] RACHEL PANDRINI & ALISON KAMHI, *Practice Alert on Flores v. Sessions*, IMMIGRANT LEGAL RESOURCE CENTER (Jul. 2017), https://www.ilrc.org/sites/default/files/resources/flores_v._sessions_practice_alert_final.pdf.

Furthermore, these forms should clarify that they only present ORR's view of their obligations and the weight of the Immigration Judge's decision at a *Flores* bond hearing. At the very least, if ORR keeps the language it proposes in this form, it should also add language stating that ORR *must* release a child to a viable sponsor in the child's best interests.

In addition, if ORR provides this form only for the purposes of a dangerousness analysis and not for review of a release determination, ORR should likewise provide a form to assist children with a habeas request where the child believes he or she is being held despite having a viable sponsor and despite release being in his or her best interests. Just as these forms serve an important purpose providing notice to children of their right to a *Flores* bond hearing and a mechanism through which to request one, ORR should develop a parallel process to notify *all* children of their right to bring a habeas claim in Federal District Court where they believe ORR is unlawfully and inappropriately refusing release.

d. Form L-8, Post Legal Status Plan: *We ask that ORR retract this form or provide justification for the need of this form, as it creates concerning questions about ORR intruding on the child's legal case.*

It is unclear why this new form tracking legal information is necessary. The form tracks the child's legal case, including references to milestones or notices, and immigration status upon release. In our experience, ORR staff does not have an accurate understanding of the child's legal case and information provided by the case manager would likely be inaccurate. Further, the applicable Rules of Professional Conduct in every state prevent attorneys from disclosing any information about representation without the client's consent.[76] Asking the attorney to provide this information without the child's consent results in a violation of attorney-client confidentiality. Moreover, a child should not be required to consent to such a release in order to receive necessary services from ORR and access to counsel.

Likewise, it is unclear why ORR wishes to collect this information or how the collection of this information would be in the child's best interest. This form has the potential to collect erroneous information that could later impact the child's case, especially since ORR has a history of sharing ORR files with DHS that can and have later been used against UACs in removal proceedings. We therefore recommend that this form be retracted in its entirety.

[76] AMERICAN BAR ASS'N, RULES OF PROF'L CONDUCT, ER 1.6, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/

IV. We Object to the Improper Translation of Form LRG-7 in Form LRG-7s, Which Denies UCs Access to Information in a Language the UC Can Understand.

The Spanish translation in Form LRG-7s, Request for a *Flores* Bond Hearing – Spanish, is missing some key words and has other grammar and syntax errors that affect meaning. We make the following recommendations to ensure that children who speak Spanish can understand the contents of their request for a *Flores* bond hearing. We urge ORR to at the very least add the missing words (sections in red).

Proposed Form	**Recommended Change:**
First paragraph: *En una audiencia de fianza, el juez de inmigración estudiara su caso para determinar si usted representa un riesgo para la comunidad.*	We recommend changing the word "estudiara" to "revisara," as it is a more accurate translation.
Second paragraph: *…dicha decisión invalida a determinación que ORR haya tomado al respecto.*	We recommend replacing that section with: dicha decisión anula la determinación que ORR haya hecho al respecto.
Third paragraph: *Una audiencia de fianza Flores ante un juez de inmigración no la decisión que ORR tome al respecto de la habilidad de su patrocinador;*	**Most importantly, the translation is missing the word "affect."** We recommend changing to: Una audiencia de fianza Flores ante un juez de inmigración no **afecta** la decisión que ORR tome al respecto a la aptitud de su patrocinador para recibirle; solamente ORR tiene el poder para hacer esa decisión.
Third paragraph: *La audiencia no su caso de inmigración ni en el hecho de poder permanecer en los Estados Unidos.*	**The translation is again missing the word "affect" and has an unnecessary word.** We recommend changing to: La audiencia no **afecta** su caso de inmigración ni ~~en~~ el hecho de poder permanecer en los Estados Unidos.
Fourth paragraph: *Para comprender plenamente la audiencia de fianza Flores…*	Recommend replacing the word "plenamente" with "completamente".
Fourth paragraph:	We recommend changing to:

Si desea hablar con un abogado, infórmele a un personal de este establecimiento para ponerlo en contacto con un abogado sin cargo alguno, o puede solicitar hablar con su abogado si tiene uno.	Si desea hablar con un abogado, infórmele a un personal de su albergue para ponerlo en contacto con un abogado gratuito, o puede solicitar hablar con su abogado si tiene uno.
The second section that indicates: *Seleccione Uno,* third option which translates "on my own behalf": *Soy el niño mencionado anteriormente y estoy presentando la solicitud en mi propio nombre.*	Comment: In our experience working with UACs, we believe that a better translation for "request on my own behalf" would be: - estoy presentando mi solicitud por mi mismo [OR] - estoy presentando mi solicitud abogando por mi mismo

V. The Commenting Process Lacked Clarity and Time for The Organizations to Meaningfully Review the Impact That Changes Will Have.

In the beginning of 2021, HHS published a significant number of proposed changes to information collection[77] that affect all unaccompanied children in ORR custody. Nonprofit organizations like ours have been overwhelmed in reviewing and preparing comments to object to numerous changes that will have direct and harmful impact on hundreds or thousands of unaccompanied children who they serve.

In addition to the numerous changes, organizations lacked timely clarity from the government about whether these proposed changes were subject to the regulatory freeze announced by the Biden-Harris administration through Ronald A. Klain's memorandum titled "Regulatory Freeze Pending Review" announced on January 20, 2021. This lack of clarity in the process made it so that organizations had significantly less time to prepare their comments. In addition, capacity to respond to these changes have been cut by the numerous hours spent in litigating certain unlawful actions implemented by the Trump administration that have not been rescinded by the Biden administration. We are also working to digest numerous other changes to immigration law and policy, including the Administration's new enforcement guidelines, and the Biden Administration's proposed comprehensive immigration reform bill. Finally, the COVID-19 pandemic has affected our work on the ground tremendously. Our staff continues to struggle daily with increased workloads, less resources, and daily obstacles ranging from inability to communicate with our clients to court delays and closures.

These circumstances have made it very difficult for organizations who provide legal services to detained unaccompanied immigrant children and their allies to review and comment on these suggested forms. As a result, ORR should extend the commenting period by an additional 60 days. We further request that ORR provide specific explanations for changes in each of the forms so that organizations like ours can better understand the Agency's concerns and respond to them.

[77] *Supra* note 1.

VI. Conclusion

We strongly urge HHS to review the comments submitted by legal service providers for ***all*** the federal register proposals this year, 2021. The cumulative impact of numerous proposed changes will have harmful and long-lasting consequences for the unaccompanied children we serve. We further urge ORR to explain the rationale behind many of the proposed changes and also ask that HHS seek additional feedback from organizations, including from the Vera network of legal services providers, that did not have the opportunity to submit comments to the proposed changes.

Submitted on April 19, 2021, by

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