April 19, 2021

Ms. Mary B. Jones
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

Dear Ms. Jones:

Kids in Need of Defense (KIND) submits these comments arguing for changes to certain aspects of the proposed forms related to legal services published by the Office of Refugee Resettlement (86 Fed. Reg. 10082). We are particularly concerned by (a) the introduction of a new notice of attorney representation form that creates barriers to legal representation of unaccompanied children by service providers, as well as (b) proposed requirements related to specific consent that undermine ORR's ability to comply with its obligations under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) and the *Flores* Settlement to promptly place unaccompanied in the "least restrictive setting that is in the best interest of the child." These changes, when reviewed in conjunction with the other Federal Register publications in 2021 that would make significant changes to certain forms like the Significant Incident Report forms (SIR, SIR addendum, and SA-SIR), will have harmful impacts on the unaccompanied children we serve. We offer the following comments detailing these concerns, and we respectfully request that the Department of Health and Human Services (HHS) retract certain proposals or revise the forms to ensure the well-being and legal rights of unaccompanied children.

I. KIND is Uniquely Positioned to Comment

KIND is a national nonprofit organization dedicated to providing free legal representation and protection to unaccompanied immigrant and refugee children in removal proceedings. Since January 2009, KIND has received referrals for more than 21,000 children from 77 countries. KIND has field offices in ten cities: Los Angeles, San Francisco, Atlanta, Baltimore, Boston, Houston, Newark, New York City, Seattle, and Washington, DC. Legal services professionals who serve children through KIND provide defense in removal proceedings and pursue immigration benefits, including asylum, withholding of removal, and protection under the Convention Against Torture on behalf of their child clients. KIND also employs social services coordinators throughout the country, providing unaccompanied alien children ("UC," "unaccompanied children" or "children") with the support they need outside of the courtroom. KIND

promotes protection of children in countries of origin and transit countries and works to address the root causes of child migration from Central America. KIND also advocates for laws, policies, and practices to improve the protection of children.

While all of KIND's offices provide legal services to released UC, KIND's offices in Seattle, New York, Houston, San Francisco and, in the near future, Atlanta also provide services to UC in custody, ranging from transitional foster care to staff secure. KIND's Seattle office has robust experience with providing services to traumatized children who have complicated histories, including assisting those who have turned 18 while in ORR custody, and KIND's New York office has the unique experience of providing services to children who have been subjected to MPP and has worked through the complications of those cases.

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

The proposed new form L-3, Notice of Attorney Representation, is duplicative and unnecessary, as ORR already uses the established Form G-28 to accomplish the same purpose. Additionally, certain aspects of the form are not based on any federal or state law or regulation and are, in plain terms, coercive. 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).

Form L-3's instructions further states that the attorney of record for UC must submit this completed form to receive updates on the UC's case during the course of representation and that this form is also required to get a copy of the UC's case file.

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.[1] KIND is also unaware of any ORR policies governing representation of UC that would require a unique notice of representation. ORR cannot make access to information or a file contingent on an agreement without indicating what those policies are or why it would require any agreement beyond the attorney's undertaking to represent his or her client.

[1] 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 UC from ORR custody." With this statement, ORR is obstructing representation – thus, a child's access to counsel – by making the attorney 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.

The American Bar Association's (ABA's) Model Rules for Professional Conduct sets forth the ethical and professional rules an attorney must follow and most state bar associations have modeled their rules of professional conduct after the ABA's Model Rules. For example, the lawyer has a duty of diligence[2] and competence that may require that they step in to advocate on behalf of their client on issues relating to placement within ORR or with reunification when placements or reunification can affect their access to relief from deportation. Whether "reasonableness" is the applicable standard in this circumstance is a question of law that could vary from jurisdiction to jurisdiction, and in any event, is not ORR's to impose.

Additionally, the creation of a distinct ORR form related to attorney representation injects confusion about ORR's role in the immigration court process. Pursuant to the Homeland Security Act of 2002 and the TVPRA, HHS is charged with the care and custody of unaccompanied children—functions that Congress deliberately separated from the Department of Homeland Security's law enforcement functions and the immigration court process. Importantly, while ORR is tasked with providing legal representation to unaccompanied children and ensuring their appearance at any proceedings while a child is in custody, it does not and should not have a role in the adjudication of children's immigration cases. In recent years, several policies (e.g. the 2018 Memorandum of Agreement providing for broad information sharing between DHS and HHS) blurred the lines between the missions of ORR, DHS, and EOIR, with harmful consequences for unaccompanied children. ORR has rightfully undertaken the reversal of many such policies in an effort to restore its child welfare focus. We are concerned that the new form is contrary to these efforts, suggesting a new or expanded role in immigration court proceedings on ORR's behalf that increases, rather than decreases, confusion.

Recommendation: In light of the above concerns, we recommend discarding this form in its entirety and continuing the use of 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, KIND's attorneys 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, bar membership and bar number, long 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."[3]

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

[2] AMERICAN BAR ASSOCIATION'S MODEL RULES OF PROFESSIONAL CONDUCT, 1.3, 1.1.

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

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 the alarming theme among the numerous forms proposed by HHS through the slew of Federal Register announcements[4] this year. The numerous proposed forms, including SIRs[5] which will be recorded on Form L-2, extensively record and report alleged gang or cartel crimes, gang or cartel activities, and gang or cartel affiliation. We are extremely concerned that these questions have broad and subjective criteria that are recorded with little to no oversight and will have harmful consequences for hundreds of detained unaccompanied children. Collection of potentially prejudicial information, under vague criteria, will place many children at high risk of detrimental prolonged detention. As referenced above, because of an historic disregard for privacy resulting in sharing of information between ORR and the Department of Homeland Security (DHS) and between ORR and the Executive Office for Immigration Review (EOIR), 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).

We urge ORR to rededicate efforts to ensuring compliance 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, rather than continuing on a course that undermines this critical mission through a focus on law enforcement that is beyond the agency's purview and expertise.

a. 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 UC in the least restrictive setting that is in the child's best interest. In making placements, while the TVPRA allows ORR to consider danger to self, danger to the community and risk of flight, ORR **"[shall]** promptly place in the least restrictive setting that is in the best interest of a child"[6] (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 a 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?*

[4] 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).

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

[6] 8 U.S.C.A. § 1232(c)(2).

- 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. The Convention on the Rights of the Child outlined several additional elements to take into account 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.[7]

Because of the TVPRA's clear mandate to promptly place the child in the least restrictive setting according to child's best interest, KIND strongly recommends that ORR incorporate these elements to 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 near 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 types of questions that under the TVPRA should carry more weight in the determination of whether ORR grants specific consent to a least restrictive setting rather than the Questions 2-6 of Form L-2.

In addition, KIND is concerned that instructions ask the federal field specialist (FFS) to complete the form only in collaboration with the case manager. The form asks for extensive documentation of broad and/or clinical criteria like danger to self and asks for a summary of the child's "functioning, behavior, and psychosocial history." KIND strongly believes that placement decisions should be made after making an individualized assessment of the child's history since birth by a multidisciplinary team.[8] We recommend that this case summary be completed in collaboration with the case manager, clinician, the facility's lead clinician, counsel, the UAC, and the appointed child advocate, if any. The participation of the child and access to counsel is crucial because of the high potential for harmful consequences that Form L-2 carries – continued detention and/or falling in the hands of DHS to be used against their requests for relief. Finally, at the very least these inquiries should be made in collaboration with the child's clinician and with the approval or participation of the facility's lead clinician.

[7] 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].
[8] Id. ¶ 76.

b. Form L-1, Request for Specific Consent to Juvenile Court Jurisdiction

Finally, we support ORR's decision to consider the cases of children who are aging out of ORR custody as urgent. We recommend that ORR allow legal services providers to submit urgent requests 60 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. Allowing legal services providers to request specific consent 60 days before the child's birthday will provide a more realistic timeline for specific the specific consent process and juvenile court proceeding, which will greatly benefit those unaccompanied children who are aging out of custody and have a particular vulnerability or need special accommodations.

IV. We Object to Certain Changes that Will Be Improper, Duplicative, And Will Cause Unnecessary Delays

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.*

First, it is unclear why ORR is requiring or adding a space for the custodian to sign the Motion for Change of Venue, Form L-7 (COV Form), and it is likewise unclear who has the legal authority to sign as the custodian. Even without knowing this information, we ask that ORR retract this 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.

The custodian signature may violate the Executive Office for Immigration Review's practice manual ("EOIR Practice Manual") and is unnecessary. 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 the detailed list of criteria[9] and have submitted the necessary paperwork may sign submissions.[10] Requiring or even allowing a custodian to sign a COV will be in violation of the EOIR Practice Manual and is, overall, an impermissible overstep by ORR in the child's removal proceedings, where ORR is not a party. EOIR staff may reject the filing, resulting in delayed adjudication of the request once the child has already left the jurisdiction.

Moreover, the custodian's signature is unnecessary. Neither 8 C.F.R. § 1263.3, which regulates the detention and release of juveniles, nor the EOIR Practice Manual, have specific guidance as to how the motion to change venue is filed for unaccompanied children. However, Congress's intent is to place unaccompanied children in the least restrictive setting in the best interest of a child[11]; accordingly, ORR must prioritize a swift COV process.

[9] 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].
[10] EOIR Practice Manual, Section 3.3.
[11] 8 U.S.C.A. § 1232(c)(2).

Finally, we strongly caution against requiring a signature from the ORR sponsor. Requiring a signature from an ORR sponsor will also violate the EOIR Practice Manual when the sponsor is not a parent or legal guardian.[12] In addition, requiring sponsor signatures will result in unnecessary government expense with Case Managers spending significant time in obtaining the signatures; and will cause undue delay in the changes of venue with Immigration Court.

Recommendation:
We recommend that ORR retract Form L-7 and that the Agency collaborate with Legal Service Providers in their jurisdiction to create a form that meets the local practices for Immigration Courts. For example, KIND's Seattle office serves detained unaccompanied children before the Immigration Court in Seattle, Washington. We have observed that the Court changes venue after DHS counsel provides the Verification of Release Form and EOIR-33, Change of Address and moves the Court for a change of venue to the court that has jurisdiction to where the child is residing. KIND supports this process and believes it is the most efficient and least burdensome process for all stakeholders involved.

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-8B, Motion to Request a Bond Hearing, Non-Secure and Form LRG-8A, Motion to Request a Bond Hearing, Secure-Staff Secure:**

i. 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 declaring the placement (and doing so in boldface print). 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 after unaccompanied child receives the Request for a *Flores* Bond Hearing – it does not provide an explanation about why the child's placement is needed (much less in boldface type). Because of the risk for prejudice, ORR would need a substantial justification for structuring the form(s) in this way. While we suspect that ORR's goal in 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 attorney, should bear the burden of producing information on how ORR reached its decision. It should also bear the burden of proof that the unaccompanied child poses a danger or a flight risk.[13] Making a child disclose potentially

[12] EOIR Practice Manual, Section 2.8.
[13] RACHEL PRANDINI & 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.

harmful information – placement in secure or staff secure – is inappropriate, especially when children in ORR care have no other choice but to use this form to even access the Immigration Court.

c. **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 and from whom ORR will obtain the information. It is likewise unclear who within ORR is responsible for completing the form. The form tracks the child's legal case, including references to milestones or notices and immigration status upon release. In KIND's experience, ORR staff often lack an accurate understanding of the child's legal case. 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 recommend that this form be modified to provide clarity as to whom is completing the form and how accurate information will be obtained.

Further, as mentioned above, the ABA's Rules of Professional Conduct prevent attorneys from disclosing any information about representation without the client's consent. Asking the attorney to provide this information could result in a violation of attorney-client confidentiality.

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, the Department of Health and Human Services (HHS) published a number of proposed changes to information collection[14] that affect all unaccompanied children in ORR custody. Nonprofit organizations, like KIND, have been obligated to dedicate substantial effort to review and prepare comments on 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 organizations had significantly less time to prepare their comments. We are also working to digest numerous other changes to immigration law and policy, and to ensure the provision of legal services to a large number of children in ORR custody under challenging conditions presented by the Covid pandemic. Our staff continues struggles daily with increased workloads, less resources, and daily obstacles ranging from inability to communicate with our clients to court delays and closures. Lastly, we are working to ensure the well-being of and serve high numbers of unaccompanied children currently in government custody.

These circumstances have made it very difficult for organizations who provide legal services to detained unaccompanied immigrant children, and as a result, ORR should extend the commenting period by an additional 60 days.

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[14] *Supra* note 1.

VI. CONCLUSION

We strongly urge HHS to review the comments submitted by legal service providers for ***all*** of ORR's 2021 Federal Register proposals. The cumulative impact of numerous proposed changes will have harmful consequences for many of the unaccompanied children. We ask that ORR withdraw the notice of representation, the change of venue form, and the post-legal status plan forms, and modify the other proposed forms as described. We also ask that HHS provide an additional 60 days of comment, to allow feedback from organizations that did not have the opportunity to submit comments to the proposed changes.

Respectfully Submitted -

/S/

Maria Odom
Vice President of Legal Services
Kids in Need of Defense, Inc.