Submitted via email to infocollection@acf.hhs.gov

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

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

Dear Mary B. Jones:

Public Counsel submits these comments to oppose certain aspects of the proposed forms. 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 and the continuation of ORR's disregard of its mandate to place unaccompanied children promptly in the "least restrictive setting that is in the best interest of the child." The proposed forms disregard this mandate through the current and proposed specific consent request case summary, especially when reviewed in conjunction with the other federal register publications in 2021 that made significant changes to certain forms like the Significant Incident Report forms (SIR, SIR addendum, and SA-SIR). Because many of these changes will have a harmful impact on the unaccompanied children we serve, we ask the Department of Health and Human Services (HHS) to retract certain proposals or revise the forms.

I. Public Counsel is Uniquely Positioned to Comment

Public Counsel, based in Los Angeles, California, is the largest pro bono law firm in the nation.. Through a pro bono model that leverages the talents of thousands of attorney and law student volunteers, Public Counsel annually assists more than 30,000 families, children, and nonprofit organizations, and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy. Public Counsel's Immigrants' Rights Project provides pro bono placement and direct representation to individuals and families—including unaccompanied children, families, and asylum seekers, many of whom are or were detained by DHS or HHS—in the Los

Angeles Immigration Court, the Board of Immigration Appeals, and the United States Court of Appeals for the Ninth Circuit.

Our Immigration Rights Project's Unaccompanied Children's Program has been representing minors in removal proceedings for almost a decade. Our staff attorneys carry an active caseload of approximately 200 unaccompanied children – including those in ORR custody and those released to sponsors –and provide training and technical assistance on unaccompanied children throughout the country. Some of our clients speak uncommon indigenous languages and many are survivors of extreme trauma. Public Counsel has a strong interest in ensuring that HHS and ORR provide children with the care and access to counsel to which they are entitled under the law.

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 the alarming theme among the numerous forms proposed by HHS through the slew of federal register announcements[1] this year. The numerous proposed forms, including SIRs,[2] 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 will be recorded with little to no oversight and will have harmful consequences for hundreds of detained unaccompanied children. They will place many children at high risk of detrimental prolonged detention. Also, 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). For example, DHS attorneys have tried to introduce evidence of a child's alleged gang activity through HHS's provided therapist. Children in HHS care must receive confidential services like therapy in order to recover from the trauma many of them have endured. Sharing information with DHS runs contrary to HHS's mandate to care for unaccompanied children and provide them the services that they need.

---

[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).

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

In sum, 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.

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

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. For example, in Public Counsel's experience working with UCs who speak uncommon languages, local juvenile courts often must reschedule hearings for lack of an interpreter. Allowing legal services providers to request specific consent 60 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 specific consent process and juvenile court custody proceeding.

b. 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 Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) to place unaccompanied alien children ("UAC," "unaccompanied children" or "children") 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"[3] (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?*
- 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.*

[3] 8 U.S.C.A. § 1232(c)(2).

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. As a signatory to the Convention, the United States may not act contrary to the Convention by disregarding 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.[4]

Because of the TVPRA's clear mandate to place the child in the least restrictive setting promptly according to child's best interest, we strongly recommend that ORR incorporate these elements into 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 a child's detention; and a child's ability to enroll in a school where the child can earn credits recognized by the state. These are all the 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.

Finally, we are 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." We strongly believe that any determination that a child poses a danger to self or the community should be made only after making an individualized assessment of the child's history since birth by a multidisciplinary team.[5] We recommend that this case summary be completed in collaboration with the case manager, clinician, the facility's lead clinician, counsel, the UC, and the appointed child advocate, if any. We believe that 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.

---

[4] 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].
[5] Id. ¶ 76.

III. 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 likely will 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 cases 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[6] and have submitted the necessary paperwork may sign submissions.[7] 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. 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. Both 8 C.F.R. § 1263.3, which regulates the detention and release of juveniles, and the EOIR Practice Manual do not have any 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;[8] accordingly, ORR must prioritize a swift COV process. Requiring a custodian to sign the COV form will delay the child's change of venue and could potentially prevent venue from being changed if the custodian is unable or unwilling to sign.

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.[9] In addition, requiring sponsor signatures will result in unnecessary government expense with Case Managers spending significant time to obtain the signatures; and will cause undue delay in the changes of venue with Immigration Court.

---

[6] 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].
[7] EOIR Practice Manual, Section 3.3.
[8] 8 U.S.C.A. § 1232(c)(2).
[9] EOIR Practice Manual, Section 2.8.

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, Public Counsel serves released and detained unaccompanied children before the Immigration Court in Los Angeles, California. We have observed that the Court changes venue after ORR staff provide the Verification of Release Form and EOIR-33, Change of Address, to the court. Public Counsel 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 changes 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 placement 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 after an unaccompanied child receives the Request for a *Flores* Bond Hearing Bond – it does not provide an explanation about why the child's placement (in bold) is needed.

A Motion to Request a Bond Hearing allows an unaccompanied child to challenge their placement in a meaningful way. They can present evidence and review and rebut evidence presented against them. The government, through the DHS trial attorney, bears the burden of proof that the unaccompanied child poses a danger or is a flight risk.[10] It should also bear the burden of producing information on how ORR reached its decision 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. Because of the risk for prejudice, we ask ORR to rescind this harmful and unnecessary requirement.

---

[10] 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.

c. **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 UC clients.*

The proposed new form, L-3, Notice of Attorney Representation, is not only duplicative and unnecessary – since ORR already uses Form G-28 – 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 UAC must submit this completed form to 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.

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[11]. The commenting party is 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.

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 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.

For example, a child may disclose that a potential sponsor has harmed her in the past, or that she does not feel safe living with this person and does not wish to be released to them. In this case, an attorney who has signed L-3 therefore would be forced to either acquiesce to an impermissible or unsafe release of his client, or violate L-3.

---

[11] 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.

Additionally, in California, the lawyer has a duty of diligence and competence[12] that may require that they step in to interfere with reunification when reunification can affect their access to relief from deportation or when ORR's reunification plan runs contrary to the child's wishes. For example, one of our attorneys had to intervene throughout the reunification process to ensure that the client was released to his brother, who was the person most ready to provide the client with the support he needed and assure he was able to attend his immigration hearings and ICE check-ins.

Recommendation: Discard 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[13] or initiate contact with the child. For example, Public Counsel's legal representatives 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."[14].

d. **Form L-8, Post Legal Status Plan:** *We ask that ORR retract 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. 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 Public Counsel's experience, ORR staff does not have 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 been used later against UCs in removal proceedings. We recommend that this form be retracted in its entirety.

Further, the Rules of Professional Conduct in California 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.

---

[12] CAL. RULES OF PROF'L CONDUCT, Rules 1.3, 1.1.
[13] *Supra* note 11.
[14] U.S. DEP'T OF HOMELAND SEC., Notice of Entry of Appearance as Attorney or Accredited Representative, OMB No. 1615-0105 (2021).

IV. Access to Information – Language Children Can Understand

a. **Form LRG-7s, Request for a Flores Bond hearing – Spanish**: *The translation is missing some key words from the English version.*

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 at the very least to 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 parapraph: *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 changing 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 Review The Impact That Changes Will Have in a Meaningful Way.

In beginning of 2021, HHS published several proposed changes to information collection[15] that affect all unaccompanied children in ORR custody. Nonprofit organizations, like Public Counsel, 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 organizations had significantly less time to prepare their comments. In addition, capacity to respond to these changes has been cut by the numerous hours spent 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 ICE's 100-day moratorium 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, fewer resources, and daily obstacles ranging from inability to communicate with our clients to court delays and closures. As a result, Public Counsel has been unable to submit comments on the following proposed rules: 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).

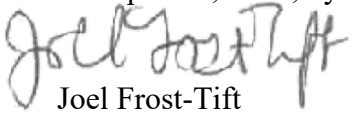
[15] *Supra* note 1.

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.

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 consequences for many of the unaccompanied children. We also ask that HHS seek additional feedback from organizations, like Public Counsel, that did not have the opportunity to submit comments to the proposed changes.

Submitted on behalf of Public Counsel
On April 19, 2021, by



Joel Frost-Tift