

March 6, 2021

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**RE: Request for Comments: Proposed Information Collection Activity; Administration and Oversight of the Unaccompanied Alien Children Program (OMB #0970-0547); [86 FR 545](#)**

Dear Ms. Jones,

The undersigned organizations respectfully submit this comment in connection with the Proposed Information Collection Activity published on January 6, 2021 by the Department of Health and Human Services (HHS). We appreciate the opportunity to provide this feedback to the Department and its component the Office of Refugee Resettlement (ORR).

These comments are based upon the expertise and contributions of organizations that advocate for the rights and wellbeing of unaccompanied immigrant children (“children” or “unaccompanied children”), including direct legal services providers (LSP), child advocates, and policy advocacy organizations. The undersigned organizations have a vested interest in ensuring that ORR safeguards the full spectrum of rights as well as the best interests of unaccompanied immigrant children and their families and caregivers.

This comment responds to the proposed changes to the “Authorization for Release of Records” in Part I as well as the proposed changes to the Emergency Significant Incident Report (SIR) and Addendum (Form A-10A), SIR and Addendum (Form A-10B), the Sexual Abuse Significant Incident Report (SA/SIR) and Addendum (Form A-10C), and the Program Level Event (PLE) Report and Addendum (Form A-10D) in Part II. Part I discusses the changes highlighted in the notice and compares this proposed ARR with the last iteration as proposed in April 2020. Part II discusses our serious concerns with the newly added questions labeling incidents as related to “gang/cartel crimes, activities, or affiliation.”

#### **I. Proposed Authorization for Release of Records (A-5)**

ORR’s newly proposed changes include a new requirement for scope of investigation or subpoena and a new section G for ORR-funded LSP certification. Our comments concern both of these new additions in Parts A & B below, while Part C relate to other aspects of the proposed ARR.

*A. Scope of Investigation or Subpoena (Section F & Instructions)*

On June 15, 2020, a coalition of 16 stakeholder organizations submitted comments to the Proposed Information Collection Activity; Administration and Oversight of Unaccompanied Alien Children Program (April 16, 2020), focusing on the proposed changes to the “Authorization for Release of Records” (ARR) and the proposed “UAC Satisfaction Survey.”<sup>1</sup> The comment<sup>2</sup> urged ORR to define and limit the scope of investigatory requests from state and federal agencies requesting children’s files.<sup>3</sup> The current proposed ARR appears to incorporate some of these concerns, by requiring state and federal agencies to define their scope in one of two ways. Unfortunately, ORR still fails to protect children’s interests with this adjustment.

ORR proposes to accept either a statement on the agency's official letterhead that verifies the requesting party's affiliation, specifies the scope of their investigation, and includes a case reference number OR a court-issued subpoena or order. The latter would satisfy the concerns stated in our prior comment,<sup>4</sup> as it is predicated on independent, neutral review. However, the former grants ORR broad discretion to release children’s files to state or federal agencies, including clinical notes, confidential juvenile records, and incident reports. Permitting an agency to define the scope of their investigation on letterhead should not be a replacement for a court-order or subpoena.

*B. New ORR-Funded LSP Certification (new Section G)*

In this section, ORR requests that the LSP representative certify that they represent the child subject to the ARR in order to access the child’s records. This is a heightened requirement compared to the current ARR, which permits LSPs to request records prior to entering appearance. Raising the threshold for LSPs collapses the difference between LSPs and attorneys of record. Though the distinction disappears upon entry of appearance, LSPs have unique access to detained children, to whom they provide legal screenings and follow-up assessments prior to placement with in-house or pro bono counsel.

HHS must ensure that all unaccompanied children have access to counsel “to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act.”<sup>5</sup> At present, HHS has not funded LSPs to enter representation for every child they encounter. Requiring them to certify representation in each case would interfere with LSP’s ability to find counsel for children they screen, undermining HHS’s mandate.

Requiring this certification of LSPs also stands in broad contrast with records request practices before other agencies, such as the Executive Office of Immigration Review and the Department

<sup>1</sup> HHS Docket No. ACF-2020-07995, 85 FR 21240 June 15, 2020.

<sup>2</sup> Attached as Appendix 1: Stakeholder Comment.

<sup>3</sup> See Part I.A. & C of Appendix 1.

<sup>4</sup> *Id.*

<sup>5</sup> 8 U.S.C. § 1232(c)(5)

of Homeland Security. Neither of these agencies limit access to records to attorneys of record, if the subject of the file request supplies their consent. ORR should remove hurdles LSPs face for placement of children's cases, not compound them. This would mean returning to the current authorization form's checkbox related to LSP file requests, which does not require certification of representation.

### *C. Other aspects of the proposed ARR*

The instant proposed form preserved many changes that caused stakeholder organizations concern in the April 2020 information collection. Rather than repeat those concerns, we incorporate the comments previously made in Appendix 1 at Section I.B. through I.G in their entirety.<sup>6</sup>

## **II. Proposed Emergency Significant Incident Report (SIR) and Addendum (Form A-10A), SIR and Addendum (Form A-10B), the Sexual Abuse Significant Incident Report (SA/SIR) and Addendum (Form A-10C), and the Program Level Event (PLE) Report and Addendum (Form A-10D)**

Our concerns regarding Proposed forms A-10A and A-10B are also reminiscent of concerns that many of the undersigned organizations, as well as other stakeholders, raised in a comment submitted by stakeholders in June 2020, in response to changes to these same forms that were proposed by ORR in April 2020. Rather than repeat those concerns, we attach and incorporate this comment in light of those continuing concerns.<sup>7</sup>

Generally speaking, this information collection alarmingly expands the scope of SIRs, adding video footage of incidents and capturing more information that may later be used against children with respect to placement, release, and in their ability to seek protection in immigration proceedings. In addition, the information collection will likely result in the generation of SIRs for more children, as it requires the identification of any children "involved" in an incident and linking these children's profiles to the SIR.

We are particularly troubled by the addition of questions eliciting "whether the incident is related to gang/cartel crimes, activities, or affiliation" to proposed forms A-10A, A-10B, A-10C, and A-10D.<sup>8</sup> Proposed form A-10B also adds fields under the Criminal History section for "Gang or

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<sup>6</sup> ORR has cured some of the typographical errors noted in Section I.G., though not all.

<sup>7</sup> See Appendix 2, SIR Comment.

<sup>8</sup> Although our comments center the questions added related to gang, cartel, or criminal activities, we were also alarmed at the added sections that amplify the use of SIRs as police reports and tools for criminalization of children—e.g., labeling children "alleged perpetrators," referencing incident investigation and video footage, reporting incidents to law enforcement and Child Protective Services and requiring an explanation when an incident is not reported to these agencies (even though reporting is not required for many incidents), labeling children's conduct sexual harassment or assault, including fields for "fraud schemes," and destruction of property. As stated in Appendix 2, we believe these additions—perfunctory on their face, but reverberating with impact on the form users' approach to children—do great harm to children.

cartel-related’ and “Gang affiliation.” As we explain further below, ORR should eliminate these additions because: they lead ORR astray from its child welfare perspective (Part A); they fall outside of ORR’s expertise (Part B); they raise serious racial justice concerns (Part C); and may have ripple effects on children’s lives that ORR does not appear to contemplate (Part D).<sup>9</sup>

*A. There is no child welfare justification for ascribing gang or cartel labels to children.*

Congress tasked HHS with the care and custody of unaccompanied children. Instead of prosecuting children, HHS, through ORR, is tasked with prioritizing the welfare of immigrant children while DHS acts as children’s adversary in removal proceedings or adjudicator for benefits applications. Bifurcating the care of unaccompanied children from their prosecution or adjudication thus lies at the heart of ORR’s role in children’s lives.

As stakeholders, we view the distinction between ORR and DHS as sacrosanct to the services and advocacy we can provide unaccompanied children. Many of the children we serve flee due to gangs and cartels, only to become vilified by DHS during their removal proceedings. Plausible questions on children’s consent, maturity, and developmental capacity are frequently factors that DHS frequently overlooks prior to labeling them as gang or cartel affiliates. Similarly, the questions ORR proposes to add to Forms A-10A, A-10B, and A-10D are but a checkbox for ORR to label children in summary fashion—based on an isolated incident and the staff member’s individual viewpoint. As such, they serve no child welfare purpose and have no place in ORR forms.

*B. ORR staff lack the expertise requisite to make such findings.*

ORR staff (including case managers and clinicians, as well as staff who interact daily with unaccompanied children) are not equipped to make those findings.<sup>10</sup> Their training and expertise do not prepare them to elicit any of the information targeted in those questions. ORR should prioritize training staff members to approach every aspect of their work through the prism of child welfare, not law enforcement.

This is especially concerning as law enforcement agencies, whose training is more likely to align with the questions ORR seeks to add, frequently produce gang databases riddled with gross

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<sup>9</sup> For the same reasons, we also recommend that ORR eliminate the inclusion of information regarding “gang involvement” in its proposed Notification of Concern form (Form A-7).

<sup>10</sup> As noted in Appendix 2, the lack of training to fill SIR forms is already alarming as it frequently leads to inappropriately stepping up children to more restrictive placements when their behavior is the product of trauma, separation from relatives, uncertainty about their length in ORR custody, and many other combined stressors.

errors that improperly label youth and adults alike.<sup>11</sup> In other words, agencies whose practice centers crime prevention commit consistent errors when labeling individuals as affiliates or participants of gang activities. There is no sound basis for requiring ORR staff, as members of a child welfare agency, to make those findings.

*C. These questions criminalize primarily Black and Brown children in ORR's care.*

ORR proposed these new questions at a time where law enforcement agencies are revisiting their gang intelligence due to the disproportionate representation of Black and Latinx individuals.<sup>12</sup> This begs the question as to why ORR would propose these changes, given the established nexus between gang labeling and racial profiling.

As stakeholder organizations who serve unaccompanied children daily, we know that ascribing this change to children's behavior is improper. The children we serve were the victims of gang violence, not their masterminds. Of all individuals "confirmed *or suspected*" with suspected gang affiliations apprehended at the southwest border between 2011 and 2017, approximately 0.03% were unaccompanied children per U.S. Border Patrol<sup>13</sup>—a profoundly unremarkable figure to pivot policy or practice, even for a law enforcement agency that is steeped in histories of racial animus<sup>14</sup> and profiling.<sup>15</sup> Since these proposed changes do not respond to the children ORR serves, we question the motivation behind these added questions.

We urge ORR not to repeat the harmful practices of the past administration, who consistently villainized the Black, Brown and indigenous children in its care. Alarming, the rhetoric of the past four years betrayed impermissible racial animus towards immigrant children. Former

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<sup>11</sup> See Justin Jouvenal, *Virginia police task force drops use of controversial gang database*, Wash. Post (Jan. 28, 2021), available at [https://www.washingtonpost.com/local/public-safety/gangnet-database-controversy/2021/01/27/0dec3d4-5bfd-11eb-b8bd-ee36b1cd18bf\\_story.html](https://www.washingtonpost.com/local/public-safety/gangnet-database-controversy/2021/01/27/0dec3d4-5bfd-11eb-b8bd-ee36b1cd18bf_story.html) (Northern Virginia Regional Gang Task Force dropping use of gang database after concerns that "minorities are disproportionately represented in it and its use is shrouded in secrecy"); Mike Dumke, *Chicago's Inspector General Finds the City's Gang Database Is Riddled With Errors*, ProPublica (April 11, 2019), available at <https://www.propublica.org/article/chicago-police-department-gang-database-inspector-general-report> (Chicago Police Department "cannot confirm that all of its gang designations are accurate and up-to-date," per inspector general and it "may not be able to ensure that all gang-related data collection tools serve a legitimate law enforcement purpose and are used appropriately.").

<sup>12</sup> *Id.*

<sup>13</sup> U.S. Senate Committee on the Judiciary, Testimony of Acting Chief U.S. Border Patrol (USBP) Carla Provost, "The MS-13 Problem: Investigating Gang Membership, its Nexus to Illegal Immigration, and Federal Efforts to End the Threat," June 21, 2017, available at <https://www.judiciary.senate.gov/imo/media/doc/06-21-17%20Provost%20Testimony.pdf> ("Of the approximately 5,000 individuals apprehended by USBP with confirmed or suspected gang affiliations since FY 2012, 159 were UACs.").

<sup>14</sup> Katy Murdza & Walter Ewing, *The Legacy of Racism within U.S. Border Patrol*, American Immigration Council (Feb. 10, 2021), available at [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_legacy\\_of\\_racism\\_within\\_the\\_u.s.\\_border\\_patrol.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_legacy_of_racism_within_the_u.s._border_patrol.pdf).

<sup>15</sup> Sarah Towle, *The Education of a United States Border Patrol Agent*, Medium (Oct. 6, 2020), available at <https://medium.com/the-first-solution/the-education-of-a-united-states-border-patrol-agent-10ac7f9ea4b9>

Attorney General Jeff Sessions called immigrant children “wolves in sheep clothing.”<sup>16</sup> The former President also called immigrant children “animals,”<sup>17</sup> while his Acting U.S. CBP Commissioner has proclaimed the power to detect when “so-called minors” are “soon-to-be” gang members by staring into children’s eyes.<sup>18</sup> The language is reflective of the racist rhetoric relating to “super predators” of the 1990s, when political figures demonized Black communities by characterizing children as less than human, and undeserving of empathy.<sup>19</sup> Unfortunately, ORR imported this rhetoric by requiring gang awareness and prevention information and focus on criminal activity as an element of children’s release from its custody.<sup>20</sup> We urge ORR to end the criminalization and vilification of children in all its forms, including in the proposed terms and questions added here.

*D. The impact of these questions is hard to overstate.*

As discussed, the risk for error is immense, while the benefit of these new additions is scarce. Given its child welfare mission, we also urge ORR to consider the wide-ranging impact of these additions. Specifically, the following impacts are noteworthy:

- Improper restrictive placement of children: SIRs are already a springboard for stepping up children in more secure placements. The proposed changes to the forms at hand would dramatically increase such step-ups and undermine the individualized, best-interest review that is required at each stage of ORR’s care. This would result in improper placement

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<sup>16</sup> U.S. Department of Justice, “Attorney General Sessions Gives Remarks to Federal Law Enforcement in Boston About Transnational Criminal Organizations,” September 21, 2017, <https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about>.

<sup>17</sup> “Trump calls some illegal immigrants ‘animals’ in meeting with sheriffs,” CBS News, May 16, 2018, <https://www.cbsnews.com/video/trump-calls-some-illegal-immigrants-animals>.

<sup>18</sup> 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>.

<sup>19</sup> Kevin Drum, “A Very Brief History of Super-Predators,” Mother Jones, March 3, 2016, <https://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators>. See also Laila L. Hlass, “Our immigration system must treat immigrant children as children,” The Hill Opinion, December 28, 2018, <https://thehill.com/opinion/immigration/422351-our-immigration-system-must-treat-immigrant-children-as-children>.

<sup>20</sup> U.S. Senate Committee on the Judiciary, Testimony of ORR Director Scott Lloyd, “The MS-13 Problem: Investigating Gang Membership, its Nexus to Illegal Immigration, and Federal Efforts to End the Threat,” June 21, 2017, available at <https://www.judiciary.senate.gov/imo/media/doc/06-21-17%20Lloyd%20Testimony.pdf>

in restrictive settings, which would compound and prolong harms to these children.<sup>21</sup> This is especially concerning as children's feelings of self-worth are closely entangled with the judgment of adults who surround them; criminalizing labels can thus have lasting impacts on children, even post-detention.

- Precluding children's release to sponsors: The least restrictive setting for children is to release them to their loved ones. However, children's release is predicated on ORR's assessment that the child will not be a danger to self or the community. The new questions and fields ORR proposes are all but certain to elicit dangerousness assessments. That is why we are deeply concerned that the proposed changes invite ORR staff to preemptively corroborate future release denials, on the basis of hasty and untrained assessments.
- Transfer into DHS custody upon age-out: Recent litigation has revealed the serious harm that unaccompanied children suffer upon transfer to DHS custody in violation of the Trafficking Victim Protection Reauthorization Act.<sup>22</sup> Such transfers are predicated on dangerousness determinations that are often hastily conducted, reviewing ORR records and representations made by ORR staff. The new questions and additions in the proposed SIR and PLE forms heighten the risk for children's improper transfer to DHS custody.<sup>23</sup> As stated in Part I, the ARR also purports to vastly expand access to records for state and federal agents. All these factors and existing information-sharing agreements contribute to the pipeline between ORR and DHS custody, which pivots on the proliferation of records that incriminate children and interfere with their chances of release upon age-out.
- Impact on children's immigration cases: Until there is a robust firewall between ORR and DHS, DHS will continue to use children's ORR records against them in the adjudication of their asylum applications.<sup>24</sup> The recent story of Kevin Euceda, a remarkable asylum

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<sup>21</sup> Julie M. Linton, Marsha Griffin & Alan J. Shapiro, "Detention of Immigrant Children," American Academy of Pediatrics (Mar. 2017) ("Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school. Qualitative reports about detained unaccompanied immigrant children in the United States found high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems. Additionally, expert consensus has concluded that even brief detention can cause psychological trauma and induce long-term mental health risks for children."). Research has shown that children detained for prolonged periods of time are ten times more likely to develop psychiatric disorders. See also Steel, Zachary, Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleya Everson, Konya Roy, Michael Dudley, Louise Newman, Bijou Blick, and Sarah Mares, "Psychiatric Status of Asylum Seeker Families Held for a Protracted Period in a Remote Detention Centre in Australia," Australian and New Zealand Journal of Public Health 28, no. 6 (September 25, 2004): 527-36, available at <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-842X.2004.tb00042.x>.

<sup>22</sup> See Spencer S. Hsu, *ICE unlawfully jails unaccompanied migrant children once they turn 18, judge rules*, Wash. Post (July 2, 2020), available at [https://www.washingtonpost.com/local/legal-issues/us-judge-rules-ice-unlawfully-jails-unaccompanied-migrant-children-once-they-turn-18/2020/07/02/6a8d6cd4-bc91-11ea-bdaf-a129f921026f\\_story.html](https://www.washingtonpost.com/local/legal-issues/us-judge-rules-ice-unlawfully-jails-unaccompanied-migrant-children-once-they-turn-18/2020/07/02/6a8d6cd4-bc91-11ea-bdaf-a129f921026f_story.html).

<sup>23</sup> This information collection also expands the scope of SIRs, adding video footage and capturing more information that may later be used against children. See n. 8 *supra*.

<sup>24</sup> See Tae D. Johnson, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, U.S. Immigration and Customs Enforcement (Feb. 18, 2021), available at

seeking youth who entered ORR custody is a tragic and heartbreaking example. Despite a short time in ORR custody, Kevin’s ORR therapy notes were used against him in his immigration proceedings.<sup>25</sup> As subsequently revealed,<sup>26</sup> the use of his ORR record had ripple effects, as Kevin was detained for over three years until he lost hope during a COVID-19 outbreak—only to be found dead one month after his deportation. Kevin’s story elevates the impact that ORR records can have on children’s lives, including their immigration cases and the risk of their fatal deportation.

## **Conclusion**

For the foregoing reasons, we urge ORR not to implement the proposed changes discussed, re-center child welfare at every level of its proposed regulatory changes, and advance the rights and interests of unaccompanied children.

Sincerely,

Catholic Legal Immigration Network, Inc.

Center for the Human Rights of Children, Loyola University Chicago School of Law

CWS-Lancaster

First Focus on Children

HIAS PA

Human Rights Initiative of North Texas

Immigrant Defenders Law Center

Kids in Need of Defense (KIND)

Legal Services for Children

Michigan Immigrant Rights Center

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[https://www.ice.gov/doclib/news/releases/2021/021821\\_civil-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf)

(presuming that noncitizens 16 years or older who “intentionally participated in an organized criminal or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization” is a public safety enforcement and removal priority).

<sup>25</sup> See Hannah Dreier, *Trust and Consequences*, Wash. Post (Feb. 15, 2020), available at <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/>.

<sup>26</sup> See Dreier, *To Stay or To Go?*, Wash. Post (Dec. 26, 2020), available at <https://www.washingtonpost.com/nation/2020/12/26/immigration-detention-covid-deportation/?arc404=true>.



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