

March 8, 2021

Office of Refugee Resettlement
Administration for Children and Families
U.S. Department of Health and Human Services
via email: infocollection@acf.hhs.gov

RE: Proposed Information Collection Activity; Administration and Oversight of the
Unaccompanied Alien Children Program, 86 Fed. Reg. 545 (Jan. 6, 2021), OMB #0970-0547

To Whom It May Concern:

On behalf of the American Bar Association (ABA), I submit the following comments in response to OMB #0970-0547, Proposed Information Collection Activity; Administration and Oversight of the Unaccompanied Alien Children Program, 86 Fed. Reg. 545 (Jan. 6, 2021). For the reasons described below, we urge you to reconsider some of the proposed form revisions.

The ABA is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. Working with and through its Commission on Immigration, the ABA advocates for improvements to immigration law and policy; provides continuing education to the legal community, judges, and the public on immigration law issues; and develops and assists in the operation of pro bono legal representation programs for immigrants and asylum seekers, with a special emphasis on the needs of the most vulnerable. Our views are informed by our experience in operating the South Texas Pro Bono Asylum Representation Project (ProBAR) in Harlingen, Texas, which is the largest provider of legal services to unaccompanied children (UAC)¹ in the country, as well as the Children's Immigration Law Academy (CILA), a legal resource center in Houston that serves children's immigration legal services programs throughout Texas.

Through this Federal Register notice, the Office of Refugee Resettlement (ORR) proposes to make changes to several forms it uses in its UAC Program. Congress charged the Department of Health and Human Services, through ORR, with the care and custody of all UAC, requiring that

¹ An unaccompanied child (UAC) is someone who has not attained 18 years of age; has no lawful immigration status in the United States; and has no parent or legal guardian in the United States, or no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. § 279(g).

ORR place UAC “in the least restrictive setting that is in the best interest of the child.”² While in ORR care, UAC must be treated with “special concern for their particular vulnerability.”³

We have two main concerns with the proposed form changes. First while the ABA supports ORR’s efforts to limit the circumstances under which state and federal agencies can access UAC case file records, we believe the proposed limitations are not strict enough. ORR should require significantly more due process protections, such as a subpoena or court order, before UAC case file records are disclosed to state or federal agencies. Second, we are concerned that some of the new information that ORR proposes to collect, and the manner in which ORR proposes to collect it, is not necessary for the proper performance of ORR’s functions, may result in unreliable information, and is not in the best interest of UAC under its care.

Authorization for Release of Records (Form A-5)

ORR proposes to make several revisions to the form used by attorneys, legal service providers, government agencies, and other stakeholders to request UAC case file records. In one set of revisions, ORR proposes to revise what documentation a federal or state government agency, or the National Center for Missing or Exploited Children, must present to access UAC case file records. The revised instructions would require a federal or state government agency to present a statement on its official letterhead verifying the requesting party’s affiliation, the scope of the investigation at issue, and a case reference number – or a court-issued subpoena or order – to obtain the records.

The revised form instructions also state that authorizing signatures are not required for requests from government agencies, but that ORR only releases certain categories of records to government agencies without an authorizing signature. Finally, the revised instructions provide that ORR will not release any records “that are clearly outside of the scope of the agency’s investigation absent a court-issued subpoena or order.” Section B of the revised form asks the requester to identify the reason for the request. One of the enumerated purposes is “Conducting an investigation involving the subject of the request.”

If the proposed revisions are adopted, federal government agencies, such as Immigration and Customs Enforcement (ICE), could request a copy of a UAC’s case file records, as long as it complies with the requirements listed above. For example, ICE could request a copy of a UAC’s ORR file and information from the case file could later be introduced in immigration court by an ICE attorney to claim that the UAC is affiliated with a gang. The UAC would not even need to be a subject of the investigation identified by ICE in the request, as long as the investigation somehow “involved” the UAC.

² 8 U.S.C. § 1232(b)(1), (c)(2)(A); 45 C.F.R. § 410.102(a); ABA Commission on Immigration, *Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States* III.D (Aug. 2018), [standards for children 2018.pdf \(americanbar.org\)](https://www.americanbar.org/publications/standards_for_children_2018.pdf) (“ABA Standards”) (providing that, except as otherwise required by law, the best interests of the child shall be a primary consideration of ORR in all actions and decisions concerning UAC).

³ 45 C.F.R. § 410.102(d).

This process gives ORR too much discretion in determining what information from a UAC's case file is within the scope of another agency's investigation and potentially conflicts with its primary mandate of protecting the welfare of UAC. To adequately protect the interest of UAC, ORR should require significantly more due process protections, such as a subpoena or court order, before releasing UAC case file records. This would ensure a fair and impartial review of the government agency's request before a UAC's records are released.⁴

The fact that an authorized signature would be required for government agencies to access certain categories of UAC records is not sufficient to obviate the need for additional due process protections, such as a subpoena or court order. First, the proposed instructions state that, when government agencies request records that require an authorizing signature, and the UAC is in ORR custody, the UAC's signature is not required if the UAC is under 14 years old or has a diagnosed developmental disability. In those circumstances, ORR can decide to release the requested information "in its discretion in the best interest of the child." Second, for UACs who are not in ORR custody, the UAC, parent/legal guardian, or caregiver would need to consent to the release of such information to a government agency; however, the UAC, parent/legal guardian, or caregiver may not understand that they are permitted to refuse access or may have difficulty understanding their options if they are illiterate or are not able to access the information in their native language.

Proposed Changes to Notification of Concern (Form A-7)

ORR also proposes revisions to forms used to monitor care provider facility compliance with federal laws and regulations, legal agreements, and ORR policies and procedures. For example, ORR proposes a new form to be used by home study and post-release service caseworkers, care provider case managers, and the ORR National Call Center to notify ORR of concerns that may arise after a UAC is released from ORR custody to a sponsor. The form identifies several categories that can be used to describe the issue of concern. While it is important for ORR to be aware of concerns that may arise after a UAC is released, such as abuse or neglect, abduction or disappearance of a UAC, trafficking concerns, and other safety issues, the purpose of other proposed categories is less clear. Therefore, it would be helpful to understand how ORR will use the information collected on this form and what steps would be taken once a concern is identified. For example, it is unclear precisely what information will be collected for certain proposed categories, such as "Criminal Activity/Charges," "Criminal Activity-Gang Involvement," "Media Attention," "Potential fraud," and "Substance Abuse."

Allegations regarding criminal activity, gang involvement, potential fraud, and substance abuse related to a UAC can have impacts on a UAC's eligibility for certain immigration relief, as well as the eligibility of any other non-citizen referenced in connection with the incident. Since this information will be entered into an official government form, it is important to understand how

⁴ See *ABA Standards*, *supra* note 2, VII.C.7. cmts. (saying that "Individual records of a Child shall be confidential, and access shall be permitted only to the Child, the Child's Attorney, his Child Advocate, the entity or individual with whom the Child is placed, and the Custodial Agency charged with Custody, placement, and care of the Child. The Child or his Attorney shall be provided with an opportunity and a procedure to object to the release of the Child's records to any of these entities. Other than to facilitate notification of release, the Child's records should not be released to any division of a Custodial Agency with enforcement authority or to an Immigration Enforcement Agency.").

the information will be used, and what standards will be employed when acting on, using, or sharing the information. These concerns are described in further detail, below, in connection with the proposed changes to event and incident reports.

Proposed Changes to Significant Incident Reports (SIR) and Program-Level Event Report (Forms A-10A, A-10B, A-10C, A-10D)

These forms are used by ORR care provider programs to document information about situations that need to be reported to ORR, such as an immediate threat to a child's safety and well-being (Emergency Significant Incident Report and Addendum, Form A-10A); situations that affect, but do not immediately threaten, the safety and well-being of a child (Significant Incident Report and Addendum, Form A-10B); allegations of sexual harassment, sexual abuse, and inappropriate sexual behavior that occurred while the UAC was in ORR custody (Sexual Abuse Significant Incident Report and Addendum, Form A-10C); and events that may affect the entire case provider facility (Program-Level Event (PLE) Report and Addendum, Form A-10D). We are concerned that each of these forms has been revised to include a specific field in the "Description of Incident" that asks whether the incident was related to "gang/cartel crimes, activities, or affiliation" and provides a space to "explain" if the answer is yes.

ORR has not explained why information related to gang affiliation is set forth as a separate question to be answered in these forms or why this information is necessary to be added for ORR to perform its duties. Nor has ORR explained how the person filling out the Form will determine whether an incident was "related" to "gang/cartel crimes, activities, or affiliation."⁵ For example, the question whether the incident was related to "gang/cartel crimes, activities, or affiliation" is included as a separate field in the Significant Incident Report used to inform ORR about allegations of sexual harassment, sexual abuse, or inappropriate sexual behavior. ORR does not explain why gang/cartel crimes, activities, or affiliation are likely to be related to allegations of sexual abuse, sexual harassment, or inappropriate sexual behavior such that a specific question addressing this is needed in the form. The same question also is included in the "Description of Incident" section of Form A-10D, which is used to inform ORR about events that may affect the entire facility. The categories of events that might trigger the need to fill out this form include the death of someone other than a UAC, a major disturbance (such as a shooting or a terrorist attack), a natural disaster, a licensing violation, or an infectious disease. Why would it be necessary to ask whether this type of incident is related to gang/cartel crimes, activities or affiliation? ORR provides no explanation.

ORR's unexplained focus on gang affiliation is also evident in the proposed changes to Form A-10B, which is used to report a situation that affects, but does not immediately threaten, the safety and well-being of a child. Among the available categories to describe the incident in the current version of the form are "Incidents involving law enforcement," "Past Abuse or Neglect," and "Criminal History." ORR proposes to revise the form to add the following subcategories for the "Criminal History" category: "Gang or cartel related," "Gang affiliation," "Charges/Convictions,"

⁵ See 45 C.F.R. § 410.102(a)-(b) (providing that "ORR coordinates and implements the care and placement of UAC who are in ORR custody by reason of their immigration status" while the Department of Justice and the Department of Homeland Security "handle other matters, including immigration benefits and enforcement matters" for UAC in ORR custody).

and “Other.” ORR does not explain why gang or cartel related crimes and gang affiliation need to be listed separately from other types of criminal history, charges, or convictions on this form, or why questions related to gangs and cartels appear in two separate places on the form.

Gang affiliation, while not a stated ground of inadmissibility in immigration proceedings, is often considered as a discretionary factor, and can lead to a denial of immigration relief or an immigration benefit. Moreover, Forms A-10A-D are to be filled out as soon as ORR needs to be informed of an incident. Therefore, the information provided may be speculative, incomplete, unclear, and unreliable. In addition, a Form A-10A-10C is created for each UAC “involved in the incident.”⁶ The term “involved” is vague in this context and could include UAC who witnessed an incident or were in the same room where it happened. Given the implications that gang-related allegations can have for UAC, it is very concerning that these proposed revisions are included, especially since ORR has not explained why the information needs to be collected on each of the forms, or the criteria that will be used in determining how to answer the questions, and concerns surrounding the reliability of the information due to the situations under which it will be collected.

The proposed changes to ORR forms that seek information about gang affiliation and activities are not necessary for the proper performance of ORR duties, could result in the collection of information that is unreliable, and could harm UAC. Moreover, proposed revisions to the form used to access UAC case file records do not adequately protect UAC from requests by state and federal agencies for use in their investigations. Therefore, ORR should not move forward with these proposed changes.

Thank you for considering our views. If you have any questions or need additional information, please contact Kristi Gaines in our Governmental Affairs Office at kristi.gaines@americanbar.org.

Sincerely,



Patricia Lee Refo
President

⁶ 86 Fed. Reg. at 545. Forms A-10A-D also contain a feature that allows a case manager to “link” the profile of a UAC already in the ORR system to the report, further compounding the concern about UACs being impacted by having their name documented in connection with incidents in which they may have had little to no true involvement.