DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, AND OFFICE OF REFUGEE RESETTLEMENT

Proposed Information Collection Activity; Administration and Oversight of the Unaccompanied Alien Children Program (OMB #0970-0547)	**)**	**Notice of Proposed Information Collection Activity 86 Fed. Reg. 545-547 (Jan. 6, 2021)**

Joint Comments of —

University of California Davis School of Law, Immigration Law Clinic
The Center for Human Rights and Constitutional Law

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I. INTRODUCTION

The Office of Refugee Resettlement ("ORR"), Administration for Children and Families ("ACF"), and U.S. Department of Health and Human Services ("HHS") (collectively, "the Agencies"), propose several instruments that the Agencies believe allow the Unaccompanied Alien Children ("UAC") Program to monitor care provider facility compliance with federal laws and regulations, legal agreements, and ORR policies and procedures, as well as allow the Agencies to perform other administrative tasks (collectively, "Proposed Admin & Oversight Instruments").[1] The Proposed Admin & Oversight Instruments present six revised instruments and two new instruments, six of which will be incorporated into ORR's case management system, UAC Path, and two of which will remain PDF instruments.

Proposed instruments A-1 through A-10D raise several concerns. First, the proposed instruments request gang, cartel and criminal related information, which present numerous concerns, including but not limited to the lack of safeguards against false allegations and error, self-incrimination, harmful custody, reunification, and immigration consequences, as well as Fifth Amendment Due Process violations. Second, the proposed instruments raise concerns that these instruments will result in the criminalization of events or activities related to the trauma histories the majority of children in ORR custody have experienced. Third, the proposed instruments raise state and federal privacy and confidentiality concerns. Fourth, the collection and recording of gang, cartel and/or criminal information, which trigger reporting requirements to law enforcement, including DHS, raise concerns that ORR is impermissibly turning into a law enforcement agency, rather than focusing on its child welfare duties. Lastly, the Commenting Parties have numerous concerns identified below by instrument type, including but not limited to concerns relating to the Authorization of Release of Records instrument violating children and their sponsors' due process rights and interfering with attorney representation, the misleading nature of using a form with sexual abuse in its title to record behavior that does not rise to the level of sexual abuse, and the use of ambiguous terms like inappropriate sexual behavior to categorize behavior warranting an incident report which can then lead to restrictive placement. Our comment highlights these concerns and others and makes suggestions for improvement.

II. COMMENTING PARTIES

The *University of California, Davis School of Law Immigration Clinic* ("The Clinic") is a nonprofit, public interest clinic dedicated to serving detained immigrants and educating law students. The Clinic is counsel to the plaintiff class in *Lucas R v. Azar, No. 2:18-CV-05741 (C.D. Cal) ("Lucas R.")* and has national expertise in federal litigation, criminal defense, and immigration law. The Clinic is the second oldest immigration law clinic in the United States and has decades of experience defending asylum seekers, immigrant children, and vindicating the rights of immigrants in federal court.

The *Center for Human Rights and Constitutional Law* ("CHRCL") is a non-profit, public interest law foundation dedicated to furthering the legal, civil, human, and constitutional rights of immigrants, refugees, children, indigenous peoples, and the indigent CHRCL is counsel to the plaintiff class in *Flores v. Sessions, NO. 85-CV-4544 (C.D. Cal.) ("Flores")* and *Lucas R.* CHRCL has nationally recognized expertise in law and policy affecting its target populations.

[1] Proposed Information Collection Activity; Administration and Oversight of the Unaccompanied Alien Children Program (OMB #0970-0547), 86 Fed. Reg. 545-547 (published Jan. 6, 2021).

CHRCL devotes a majority of its resources to major class action litigation. CHRCL also conducts administrative and legislative advocacy, and policy analysis on behalf of its target populations. CHRCL also serves as a resource for policy makers, advocacy coalitions, and community-based organizations in the areas of migration, refugees, labor-related immigration law and policy.

III. COMMENTS

A. Proposed Instruments A-9 (Event), A-10A (Emergency SIR), A-10-B (SIR), A-10C (SA/SIR), and A-10D (Program Level Event Report), Which Involve Extensive Recording and Reporting of Alleged Gang or Cartel Involvement and Criminal Activity by Unaccompanied Children, Lack Safeguards Against False Allegations and Error, Result in Harmful Custody and Immigration Consequences, and Raise Fifth Amendment Due Process Concerns.

According to the Proposed Admin & Oversight Instruments, Form A-9 ("Event" instrument), is a new instrument that is intended to be "used by ORR care provider programs to document high-level information about situations that must be reported to ORR."[2] Completing an Event instrument is the first step in creating any type of incident report, such as the significant incident reports ("SIRs") under proposed instruments A-10A through A-10D or a Notification of Concern under proposed instrument A-7.[3] Once an Event form is created, an SIR, Program-Level Event Report or Notification of Concern is created for each child involved in the incident and is linked to the Event.[4] Proposed instruments A-10A, A-10B, A-10C, and A-10D all add a new field asking the following about the incident being recorded: "Was this incident related to gang/cartel crimes, activities, or affiliation?" and "If yes, Explain." The concerns discussed in this section relate to the inclusion of these fields, which result in the collecting, recording and reporting of gang- and/or cartel-involvement and/or criminal information.

1. ORR should not use historically unreliable information and information obtained without a Miranda Warning to collect and record alleged gang- or cartel- involvement and/or criminal history.

ORR has a history of incorrectly labeling children as dangerous based on inaccurate and unreliable allegations of gang involvement, past criminal activity; or criminalizing behavior that is typical for a traumatized child in federal custody. For the reasons discussed below, ORR should refrain from collecting, recording, and reporting any information that is unreliable or will result in the violation of children's rights.

a. Concerns regarding the drafting of Significant Incident Reports based on information collected for initial referral and placement into ORR custody

As an initial matter, the threshold for identifying an individual as gang- or cartel-affiliated is unclear. For example, ORR does not define gang-affiliation or cartel-affiliation (or

[2] *Id.* at 545.
[3] *Id.*
[4] *Id.*

how to determine whether something is gang- or cartel-related) in its "Guide to Terms."[5] There is also no definition of gang or cartel membership, association, or affiliation in the immigration statutes.[6] In fact, neither law enforcement nor scholars agree on a uniform definition of a "gang."[7] Despite this lack of definition, standard, or guidance, ORR records, reports, and shares information accusing children of being involved with gangs, cartels, or other criminal activity.

In the Commenting Parties' experience, children may be designated as gang- and/or cartel-involved and/or as criminals based on information from a number of sources. First, ORR relies on information from the referring agencies, often Customs and Border Protection ("CBP") or Immigration and Customs Enforcement ("ICE"), to make initial placement decisions.[8] Agents may identify an immigrant youth as gang- or cartel-affiliated based on tattoos, "self-disclosures" and reports of the violence the child is fleeing, or if a "reliable source" identifies the child as gang- or cartel- affiliated.[9] ICE frequently misidentifies immigrant youth as gang members for the purpose of deporting them.[10] Information collected by ICE is provided to ORR to use during the intake and placement process. In the Commenting Parties' experience, ORR has accepted these accusations as true from ICE without verification notwithstanding its questionable reliability and the motives and objectives ICE has when recording and sharing this information.

Second, during initial arrests and interviews by CBP, ICE, or other referring federal agencies, children are generally asked questions that elicit incriminating information, specifically information regarding gang-/cartel-involvement and/or criminal activities. As noted above, this self-disclosed information is then shared with ORR to make initial placement decisions for the child (we comment separately on our concerns regarding the revisions to the placement and transfer forms and instruments). Additionally, once a child is in ORR custody, the child continues to undergo an intake process that again elicits similar information. In other words, the intake process prior to and subsequent to arrival at ORR relies primarily on information children report themselves in addition to information provided by the referring agency, which likewise relies primarily on children's own reports. Children's self-disclosures, particularly when made in a detained setting, are unreliable measures of gang-involvement and criminal history.[11]

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[5] Office of Refugee Resettlement, *Children Entering the United States Unaccompanied: Guide to Terms* (Mar. 21, 2016), https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms.

[6] *See* 8 U.S.C. § 1101 (2018) (providing definitions for the "Act," referring to the Immigration and Nationality Act).

[7] *See* Nat'l Gang Ctr., *National Youth Gang Survey Analysis*, https://www.nationalgangcenter.gov/Survey-Analysis ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies.") (last visited Mar. 4, 2021).

[8] *See* Office of Refugee Resettlement, *ORR Guide: Children Entering the United States Unaccompanied* § 1.3.1 (Feb. 12, 2021), https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied [hereinafter ORR Policy Guide]; *see also* NAT'L CTR. FOR BORDER SEC. & IMMIGRATION, UNIV. OF TEX. AT EL PASO, UNACCOMPANIED ALIEN CHILDREN (UAC) PROJECT 9-10 (Mar. 20, 2014), https://www.ktsm.com/wp-content/uploads/sites/38/2020/10/UTEP-NCBSI-Final-Report-March-20-2014.pdf.

[9] Press Release, U.S. Immigration & Customs Enf't, Operation Matador Nets 39 MS-13 Arrests in Last 30 Days (June 14, 2017), https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days.

[10] *See, e.g.*, Dina Radtke, *ICE Is Wrongly Designating Immigrants as Gang Members to Deport Them*, SALON (May 7, 2018, 10:30 AM UTC), https://www.salon.com/2018/05/07/ice-is-wrongly-designating-immigrants-as-gang-members-to-deport-them_partner/.

[11] *See* Brief of *Amici Curiae* Juvenile Law Center and the Center on Wrongful Convictions of Youth in Support of Petitioner, Joseph H. v. California, 137 S. Ct. 34 (2016) (No. 15-1086), https://www.scotusblog.com/wp-content/uploads/2016/04/15-1086-JLC-Amicus-Brief.pdf.

Despite their unreliability, disclosures made during the intake process that relate to gangs, cartels, or criminal histories are recorded both in the intake instrument and SIRs labeling the child as gang- or cartel-affiliated or as a child with a criminal history, regardless of whether charges were brought or the child has been adjudicated delinquent of any offense. ORR then uses this same information to determine a child's placement, which includes placement into a juvenile jail. This information can also be used to bring criminal or juvenile delinquency proceedings or impact a child's immigration case, especially where ORR policy requires care providers and ORR staff to share this type of information with ICE.[12] All of this is concerning not only because this information is often unreliable, but also because the Commenting Parties are not aware of any requirement or policy that ORR, CBP, ICE or any other referring federal agency eliciting this type of information provide the child with a Miranda warning, despite the applicability of Miranda rights in this context.

The privilege against self-incrimination is not limited to the trial setting, but extends to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [a person] in future criminal proceedings."[13] Miranda warnings are required in civil investigations that *may* result in criminal prosecutions.[14] In the broader immigration context, while Miranda warnings may not be required in "booking exception" settings involving routine questions generally unlikely to elicit incriminating responses,[15] they do apply to booking questions designed to elicit incriminating responses.[16] Because of this, courts have held that "[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the Miranda warnings."[17] Immigration officers' statements that the

[12] *See* ORR Policy Guide, *supra* note 8, at § 5.8.5 (Aug. 2, 2018) (referring to the policy requiring mandatory reporting to DHS of SIRs involving arrests, incidents of violence by a child, and gang-related activities); *see also* Section *infra* Section III.D.

[13] *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)).

[14] *See, e.g.*, *Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (requiring Miranda warnings where petitioner was questioned by the IRS regarding a civil matter because tax investigations often lead to criminal prosecutions, just as it did in this case); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1279 (9th Cir. 1983) (finding INS investigator's failure to give Miranda warnings rendered detainee's citizenship response inadmissible where the INS officer had reason to suspect that the question asked would likely elicit an incriminating response).

[15] *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

[16] *See United States v. Arellano-Banuelos*, 912 F.3d 862, 868 (5th Cir. 2019) (holding that an ICE Agent's questioning exceeded the scope of the routine booking exception when it went beyond basic biographical information to include inquiries into whether or not Arellano-Banuelos had been previously deported and whether he had received permission from the Attorney General to reenter the United States); *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (finding that in this case the routine booking questions were not subject to Miranda, while still recognizing that routine booking questions could be subject to Miranda if they are designed to elicit incriminating responses).

[17] *Mata-Abundiz*, 717 F.2d at 1279. To determine whether Miranda warnings must be given in such civil contexts, the Ninth Circuit employs an objective factor test based on *Rhode Island v. Innis* that focuses on whether, based on the totality of the circumstances, the questioner should have known that questioning was likely to elicit incriminating information. *See, e.g.*, *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006) (affirming district court's decision to require Miranda warning during INS interview of an alien in INS custody where defendant was questioned in a district that has a practice of prosecuting the specific crime at issue and where the prosecutor had a desire to pursue charges against defendant to obtain his cooperation against another defendant); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046-47 (9th Cir. 1990) (inquiries by Border Patrol agents constituted interrogation in violation of detainee's Miranda rights when questioned about his place of birth, immigration status and use of aliases, which were then used to prove charges of illegal entry and being a deported alien found in the U.S); *Mata-Abundiz*, 717 F.2d at 1280 (requiring a Miranda warning where INS investigator of 23 years knew that evidence of alienage plus evidence of firearms possession could lead to a federal prosecution and the investigator

interview was meant to obtain biographical information for a "routine, civil investigation" are irrelevant in light of the objective factors suggesting that the questions are likely to elicit an incriminating response.[18]

For these reasons, ORR and other referring agencies must provide a Miranda warning prior to eliciting potentially incriminating information from children and specifically advise the child that the information they divulge can result in criminal and/or immigration consequences, as well as impact their placement at ORR, including placement into a juvenile jail. If ORR and/or the referring agency fails to provide a Miranda warning and inform the child of the potential consequences that can result from the information they share with said agency, ORR must not rely or report on information collected in a manner that violates children's rights against self-incrimination, whether that information was collected outside of ORR or by ORR staff or grantees. To the extent that the source of information regarding criminal history, gang-involvement, or cartel-involvement originated from interviews in which the child was not Mirandized, it should not be memorialized in an SIR of any kind or any other ORR child record, nor should it be shared with law enforcement.

b. Concerns regarding the drafting of Significant Incident Reports based on events that occur while the child was in ORR custody

One of our concerns with respect to SIRs based on events that occur while the child is in ORR custody is that there are no discernable standards or criteria that indicate what characterizes an incident that occurs in ORR custody as one related "to gang/cartel crimes, activities, or affiliation." This is similar to the concern we address above with respect to no uniform definition for "gang." With no clear guidance on when to characterize an incident as gang or cartel related, ORR leaves to the discretion of its care provider staff when to make such designation. Similarly devastating and problematic is how the limited training ORR staff have received risks mislabeling Latin American youth, especially where ORR staff rely almost exclusively on subjective criteria, such as the perception of gang-related appearance. An ICE-ORR Memorandum, which directed the Department of Homeland Security ("DHS") to train ORR staff on how to identify MS-13 gang colors and signs as a basis for making these determinations,[19] has resulted in teens from Central America being mislabeled as gang members and erroneously held in ORR secure facilities.[20] Unfortunately for these youth, harms resulting from mislabeling a child as gang- or cartel-involved extend beyond placement designations, and as discussed above in Section III.A.1.a. and below in Section III.A.2, mislabeling can impact a child's criminal

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had reason to know that any admission of alienage would be highly incriminating). The D.C. Circuit applies a similar test. *U.S. v. Sheffield*, 821 F. Supp. 2d 351, 356 (D.C. Cir. 2011) ("[I]n determining whether the questioning was reasonably likely to elicit an incriminating response, the court looks at the totality of the circumstances and conducts an objective inquiry where the subjective intent of the officer is irrelevant but not dispositive.") (quoting *United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir. 1997) (internal quotations omitted)).

[18] *Mata-Abundiz*, 717 F.2d at 1278-79.

[19] *See* Laila L. Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 233 (2020).

[20] *See* Sarah Gonzalez, *Undocumented Teens Say They're Falsely Accused of Being in a Gang*, NPR (Aug. 17, 2017, 5:18AM ET), https://www.npr.org/2017/08/17/544081085/teens-in-u-s-illegally-say-theyre-falsely-accused-of-being-in-a-gang/; Alice Speri, *Federal Judge Frees Salvadoran Teen Accused of Gang Ties, Pens Lengthy Rebuke of His Detention by ICE*, INTERCEPT (June 27, 2018, 9:25AM), https://theintercept.com/2018/06/27/federal-judge-frees-salvadoran-teen-ice-detention/.

and/or juvenile proceedings, family reunification options, length of care in ORR custody, and immigration cases.

Another concern with respect to these types of reports is ORR's overall emphasis on recording and reporting gang- or cartel-involvement, which undermines ORR's ability to provide for the welfare of the children in its care. SIRs are routinely submitted after a child reveals prior exposure to gang or cartel violence to a trusted ORR or care-provider staff member or therapist.[21] In fact, most of the gang and/or cartel allegations we have noticed in the case files we have reviewed originated in a child's revelation of experiences disclosed to a therapist or other trusted adult staff member while in ORR custody. The new fields on the SIRs and Program-Level Event instrument requiring inclusion of whether the incident related to gang/cartel crimes, activities or affiliation risks misidentifying or classifying a child as gang- or cartel-involved, which could impact the child's future incident reports being mischaracterized as gang or cartel-involved and could impact the child's placement level in ORR, future criminal and/or juvenile charges or adjudications, and immigration relief options. This is particularly concerning because so many unaccompanied immigrant children are fleeing forced gang recruitment or targeting by gangs and cartels, making it all the more likely that they will discuss gang and cartel related violence during therapy and with adults as their cases are processed.[22]

The high-stakes consequences of gang allegations within ORR custody and beyond requires, at a minimum, that if ORR is to collect this type of information on the proposed instruments, ORR provide clarity that untested allegations of gang- or cartel-affiliation (1) cannot be used to deny a child release, (2) cannot be used to transfer a child to a more restrictive placement, and (3) are not reportable "gang-related activity" within the meaning of ORR Policy Guide Section 5.8.5.[23] The proposed instrument, itself, must also be updated to ensurethat untested allegations of gang- or cartel-affiliation are not reportable, particularly under the FFS reporting section in A-10A, A-10B, and A-10C, which currently reflect the reporting requirements under ORR Policy Guide Section 5.8.5.

2. Labeling SIRs as gang- or cartel- related and recording activity as criminal absent delinquency adjudications has severe and harmful consequences for children that are or have been in ORR custody.

The proposed SIRs' new labels identifying children's behavior as gang- or cartel-related, or criminal present four major harms to children: (i) children are transferred to more secure facilities; (ii) it interferes with family reunification and unnecessarily and/or unjustifiably delays

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

[22] *See* UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, https://www.unhcr.org/56fc266f4.html (last visited Mar. 4, 2021).

[23] ORR Policy Guide, *supra* note 8, at § 5.8.5 (requiring FFS to email the SIR to the ICE/HSI Tip Line within one business day of receiving the SIR for any "gang-related activity").

or prevents family reunification; (iii) children are subjected to prolonged detention; and (iv) gang-, cartel-, and criminal allegations against children undermine their immigration cases.

a. Children may be inappropriately placed in a more restrictive setting.

The proposed instruments invite ORR to perpetuate unverified and unreliable gang or cartel allegations against the children in its care and to characterize children's past experiences as criminal history. This is likely to contribute to the transfer of those children to more restrictive or jail-like settings. This is especially true given "ORR has admitted in legal proceedings that it places children in secure detention without any inquiry into the accuracy of information submitted by law enforcement and without any notice to the child, their attorneys, or their parents of the information upon which the determination is being made."[24] Likewise, in the Commenting Parties' experience, ORR conducts little if any inquiry into the veracity of allegations made by staff or other children in ORR facilities. Relying on unverified and unreliable information to place a child in a restrictive setting contravenes the protections in the *Flores* Settlement Agreement ("FSA") and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA").[25]

ORR's current placement criteria for secure care allows placement of a child in secure if the child "has self-disclosed violent criminal history in ORR custody that requires further assessment."[26] Because ORR can place a child into a secure facility based on *self-disclosed* criminal history, the collection and recording of this information in the proposed SIR instruments and categorization as "criminal history," despite the unreliability and often unverified nature of these self-disclosures, puts children at risk of being inappropriately placed in the most secure level of care.

Additionally, in the past, children labeled as gang members have been placed into secure or staff-secure facilities after confiding in ORR therapists about their previous exposure to deadly gang violence.[27] Although ORR placement criteria no longer relies on unverified and error-ridden self-disclosures of gang involvement or affiliation for placing children in secure facilities,[28] it continues to use gang-related self-disclosures to place children in staff-secure

[24] Letter from New York Civil Liberties Union Philip Desgranges, et al., to Scott Lloyd, Director, Off. of Refugee Resettlement, et al. (July 27, 2017), https://www.nyclu.org/sites/default/files/field_documents/nyclu-letter-to-orr.pdf.

[25] *Flores v. Reno* (Case No. 85-cv-4544) Stipulated Settlement Agreement, https://youthlaw.org/wp-content/uploads/2015/05/Flores_Settlement-Final011797.pdf [Hereinafter *Flores* Settlement Agreement]; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), H.R. 7311, 110th Cong. (2008), 8 U.S.C. § 1232(c)(2)(A) (2018) (stating that the federal government must ensure that children are "promptly placed in the least restrictive setting that is in the best interest of the child").

[26] ORR Policy Guide, *supra* note 8, § 1.2.4 (last revised Oct. 10, 2018).

[27] *See supra* note 21.

[28] Prior to the July 30, 2018 Order, ORR placed children into secure, rather than staff-secure care, based on self-disclosed gang involvement prior to placement in ORR custody that requires further assessment. *See Flores v. Sessions*, No. 2:85-cv-04544-DMG, 2018 WL 10162328, Order Re Plaintiffs' Motion to Enforce Class Action Settlement, at 13-14 (July 30, 2018).

facilities.[29] In the Commenting Parties' experience, although staff-secure facilities are not as restrictive as secure facilities, they frequently exacerbate children's negative behavior leading to placement in a secure facility, and as discussed in Sections III.A.2.b-d, compromise a child's ability to secure long-term immigration reliefand, at a minimum, are correlated with delays in family reunification and prolonged lengths of stay in ORR custody.

b. Family reunification may be unnecessarily or unjustifiably delayed.

ORR is required to ensure that children are released in a timely and safe manner without unnecessary delay from ORR custody to sponsors, which are often parents (labeled as Category 1 sponsors by ORR), but can also be close or more distant relatives (Categories 2A, 2B and 3).[30] Potential sponsors undergo a difficult application process and subsequent vetting by ORR to determine their fitness to receive a child, even if they are parents that have raised the child since birth. Family unity has long been a key factor in determining the best interest of children in custody at the state level.[31] Likewise, the U.S. Constitution has recognized and protected this same right to family unity,[32] even extending it beyond the rights of parents and their children.[33] Despite this strong legal right, however, ORR will not release a child from its custody if it—in its sole discretion—unilaterally determines that the child poses a threat to the safety of himself or

[29] ORR places children in staff-secure facilities if a child "[h]as reported gang involvement (including prior to placement into ORR custody) or displays gang affiliation while in care." ORR Policy Guide, *supra* note 8, § 1.2.4 (last revised Oct. 10, 2018).

[30] *See Flores* Settlement Agreement, *supra* note 25, at ¶¶ 14-18; *see also* 8 U.S.C. § 1232(c)(2)(a) (2018) ("[A]n unaccompanied alien child . . . shall be promptly placed in the least restrictive setting that is in the best interest of the child.").

[31] *See* CHILD WELFARE INFO. GATEWAY & CHILDREN'S BUREAU, DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Bestinterestsdefinition.

[32] *See Rosenbaum v. Washoe Cty.*, 663 F.3d 1071, 1079 (9th Cir. 2011) ("The substantive due process right to family integrity or to familial association is [also] well established."); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that parents and children have a well-elaborated constitutional right to live together without government interference); *D.B. v. Cardall*, 826 F.3d 721, 740 (4th Cir. 2016) (holding that children "enjoy a familial right to be raised and nurtured by their parents") (internal quotation marks omitted); *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013) ("The right to live with and not be separated from one's immediate family is 'a right that ranks high among the interests of the individual' and that cannot be taken away without procedural due process."); *Beltran v. Cardall*, 222 F. Supp. 3d 476, 482 (E.D. Va. 2016) ("It is beyond dispute that [a mother's] right to the care and custody of her son – and [a son's] reciprocal right to his mother's care . . . is deserving of the greatest solicitude.") (internal quotation marks and citation omitted).

[33] Numerous courts have also held that a child's right to familial association is not limited to parents. *See Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."); *J.E.C.M. v. Lloyd*, 352 F. Supp. 3d 559, 585 (E.D. Va. 2018) (rejecting argument that child's interest in family unity is unique to parents, and finding "siblings, aunts or uncles, grandparents, or first cousins" are family "captured in ORR's second-level category of would-be sponsors" and also "constitutionally significant"); *Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1006 (N.D. Ill. 1989) (holding that children have "constitutionally protected right to associate with their siblings").

others.[34] This is true regardless of whether the child has an appropriate and duly approved sponsor, even if that sponsor is a parent.[35]

One of the most determinative factors in ORR making a finding that a child poses a threat to the safety of themselves or others, is an SIR. And this is especially true of an SIR that has an allegation that a child is involved in gang or cartel related activities, which makes it significantly more difficult for ORR to approve a child's release from custody—again, even if it is to a parent. Given the unreliability of these types of allegations or designations, and the due process concerns previously mentioned, including this new information on the proposed SIR instrument, is highly problematic.

A consequence of marking an SIR as gang-related is that ORR then adds additional requirements and barriers to reunification of family members. In the Commenting Parties' experience, ORR has required significantly more documentation, interviews and information of sponsors of children who have an SIR that is marked as gang-related, including requiring a family to provide constant surveillance of the child regardless of age or enrolling the child in mental health services prior to release, without due consideration to the harmful effects of continued detention and family separation.[36] In many cases, there seems to be no way for a sponsor to prove their ability to care for a child that ORR has alleged to be gang-involved or cartel-involved through unappealable SIRs. Likewise, children have no way to contest or appeal an SIR that has contributed to their prolonged detention and separation from a sponsor.

Instead of unnecessarily prolonging the separation between children and parents or other family members, ORR should release children to family members where they are more likely to experience physical and emotional well-being, safety, and stability.[37] To do this and fulfill is statutory mandates, ORR should not include reports regarding gang- or cartel-related disclosures. Such SIRs compromise a child's best interests instead of safeguarding them as ORR is mandated to do.

c. Being placed in a more restrictive setting delays family reunification, which in turn, leads to prolonged child detention and worse case outcomes.

There is no question that detaining and separating children from their family is detrimental to their welfare,[38] and that detaining children, especially those with a history of

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[34] *See* ORR Policy Guide, *supra* note 8, at § 2.7.4 (last revised June 18, 2019) ("ORR will deny release to a potential sponsor if . . . Release of the unaccompanied alien child would present a risk to him or herself, the sponsor, household, or the community.").

[35] *See Santos v. Smith*, 260 F. Supp. 3d 598, 614 (W.D. Va. 2017) ("[H]ad better or more process been given especially as to the delay and the burden being on Ms. Santos to initiate and justify reunification, rather than the default rule being otherwise, the outcome could have been different.").

[36] *See* Laura C.N. Wood, *Impact of Punitive Immigration Policies, Parent-Child Separation and Child Detention on the Mental Health and Development of Children*, BMJ PEDIATRICS OPEN (2018), https://bmjpaedsopen.bmj.com/content/bmjpo/2/1/e000338.full.pdf.

[37] *See* ANNIE E. CASEY FOUNDATION, STEPPING UP FOR KIDS: WHAT GOVERNMENT AND COMMUNITIES SHOULD DO TO SUPPORT KINSHIP FAMILIES 2 (2012), https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf.

[38] NAT'L CTR. FOR YOUTH LAW, BRIEFING: CHILD WELFARE & UNACCOMPANIED CHILDREN IN FEDERAL IMMIGRATION CUSTODY 6 (2019), https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf.

trauma, in restrictive settings, causes profound and negative impacts on child welfare and development.[39] The Commenting Parties address some of negative impacts of restrictive placement on a child's welfare, particularly a child's length of stay in detention and the likelihood of reunification with a sponsor.

Analysis of ORR's data supports the Commenting Parties' concern that adding gang, cartel and criminal information to the SIRs and Program-Level Event instruments will lead to prolonged child detention in ORR custody and worse case outcomes. Namely, children who receive SIRs, especially those in which they are accused—with no due process of any kind—of gang- or cartel-involvement or of having a criminal history, are placed in restrictive facilities. This in turn causes children to remain in ORR custody for significantly longer than other children in ORR custody who have not been transferred to more restrictive facilities, regardless of the reliability of reporting or severity of the incidents.

One of the experts in *Lucas R.*, Dr. Emily Ryo, analyzed over two years' worth of ORR data from 2017 to early 2020, and found that among custody periods that included time spent at a restrictive facility, such as a secure or staff-secure facility, the average times to reunification were significantly longer than the average times to reunification for children who were only ever placed at a shelter level.[40] Specifically, she found that children who were only ever in shelter level care spent an average of 52.9 days in ORR custody prior to reunification with a sponsor, whereas children who spent time at a staff-secure or secure level spent an average of 176.5 days and 185.9 days in ORR custody, respectively, prior to reunification.[41]

The same data analysis also revealed that not only do children who spend time in restrictive settings on average spend more time in ORR custody, but children who spend time in restrictive settings also have worse case outcomes in terms of the type of release from ORR custody.[42] For example, 92.97% of children who were only ever placed in shelter level care were reunified with a sponsor, whereas only 47.76% and 41.74% of children who spent time at a staff-secure or secure level of care, respectively, were reunified with a sponsor.[43] In contrast, the percentages of ORR discharges based on voluntary departure or removal orders were higher for children who spent time in staff-secure or secure level placements compared to children who were only ever in shelter level care.[44] The data revealed the following: (1) 1.10% of shelter care only custody periods resulted in a discharge type based on voluntary departure, compared to 10.30% and 6.96% for custody periods where children spent time in staff-secure or secure level placements, respectively; and (2) 0.03% of shelter care only custody periods resulted in

[39] *Id.*; *see* Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL'Y INST. (2006), http://www.justicepolicy.org/research/1978; *see also* Sarah MacLean, *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCIENCE & MED. 303 (2019); Martha von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCHIATRY 382 (2018).
[40] *Lucas R. v. Azar* (Case No. 2:18-CV-05741) DMG PLA, Excerpts from the Expert Report of Dr. Emily Ryo (June 16, 2020), Docket 272-3 at 143-158 (Exhibit A), at 154.
[41] *Id.*
[42] *Id.* at 155.
[43] *Id.*
[44] *Id.*

discharge type based on removal orders, compared to 5.67% and 6.52% for custody periods where children spent time in staff-secure or secure level placements, respectively.[45]

Accordingly, the data clearly shows how placement in a restrictive setting, which often occurs based on the information contained in SIRs or similar documents recording alleged gang, cartel or criminal information, can have detrimental effects on a child's length of detention and release from ORR custody.

d. Children's access to immigration relief will be undermined.

Gang allegations increase the likelihood that immigrant youth will be denied immigration relief and subsequently be deported. These allegations of gang activity become a permanent part of a child's ORR file, and typically remain available to DHS, following them through the culmination of immigration proceedings. In fact, ORR discloses all gang-tagged SIRs to DHS per the ORR Policy Guide.[46] Once the gang activity is reported, HSI places gang memoranda in individuals' A-files and explicitly directs all future immigration services and applications for benefits or relief be denied. [47] In the Commenting Parties' experience, DHS nearly always submits these SIRs in immigration proceedings, whether to prevent an adult who was in ORR custody as a child from being released on bond, to prevent a favorable exercise of discretion in asylum and in other forms of relief, or in some cases to argue that the child is barred from relief altogether based on unverified SIRs from when the child was in ORR custody. ORR's insistence on labeling and documenting activities as gang-related, cartel-related, or criminal does little to protect children while they are in ORR's care but actively harms the children ORR accuses and often mislabels, sometimes long after they have been released from custody.

Gang allegations may also be used to deny, among other forms of immigration relief, DACA renewal, U-visas, or adjustment of status applications before USCIS.[48] If ORR has included information in a file regarding a child's alleged self-reported gang affiliation while in ORR custody, judges will not review this information for its veracity, nor inquire into how or where the information was obtained. Instead, more likely than not, immigration judges will opt to remove that child from the U.S. rather than grant them a discretionary form of relief, such as voluntary departure.[49] In other words, these allegations operate as a presumption in immigration court, as immigration judges will often accept the allegations as fact without recognizing issues of unreliability underlying gang identification protocols and due process shortcomings.[50]

The prolonged detention that often results from gang- or cartel-related SIRs also harms children's immigration cases. It is much more difficult for detained children to obtain full immigration representation, as government-funded legal service providers generally do not enter

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[45] *Id.*

[46] ORR Policy Guide, *supra* note 8, at § 5.8.5 (last revised Aug. 8, 2018).

[47] N.Y. CIVIL LIBERTIES UNION & N.Y IMMIGRATION COAL., STUCK WITH SUSPICION 14-16 (2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf.

[48] *Id.*

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

[50] IMM. LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf.

their appearance as representative for a detained child due to how often and how quickly children are transferred between facilities. Further, children that are released are likely to be reunified in a state different than one in which they are being held, meaning that their case will likely be transferred to a different court upon release from ORR custody. This impedes both the ability to secure representation, and the ability of the judge to effectively adjudicate any case. Finally, many detained children have to appear in immigration court via VTC conferencing instead of in person. Appearing via video is harmful to children's cases where they are less likely to succeed than if they appear in person.[51] Finally, detained cases move more quickly through immigration court than cases for non-detained immigrants, even more so now during the Covid-19 pandemic.[52] This can be harmful to a child's immigration case, forcing them to move forward while detained, rather than with the support of a caring family member and an attorney dedicated to full-scope representation, after their release.

The responsibility for the custody and care for unaccompanied immigrant children was specifically placed under the auspices of HHS, a government agency that has no responsibility for enforcing immigration laws or working to remove immigrant children from the United States. But the proposed SIRs collection of information about gang- and cartel- involvement and criminal history, together with designating children's in-custody behavior as falling into those categories, does more to contribute to children's removal to dangerous places than to their protection and care.[53] The direct impact of gang-tagged SIRs and SIR designations of behavior as criminal on children's immigration proceedings essentially erodes the important divide between protection and law enforcement, and raises serious questions about conflicts of interest with ORR in possible violation of its mandate to care for the wellbeing of unaccompanied children.

3. The proposed changes to the instruments, focusing on criminal history and gang- and cartel- involvement, raise serious due process concerns.

For the reasons explained above, the proposed modifications to ORR's administrative and oversight information collection instruments raise serious due process concerns. Adding fields that allege that an "incident is related to gang/cartel crimes, activities, or affiliation" and including extensive criminal history sections on ORR's emergency significant incident report, significant incident report, sexual assault significant incident report, and program-level event report instrument are designations that can result in the deprivation of fundamental rights to liberty and family unity for children and their sponsors.[54] The proposed instruments fail to

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[51] Erica Bryant, *Unaccompanied Children Suffer as Hearings Are Sped Up, Switched to Video During COVID-19 Crisis*, VERA INST. JUST. (April 14, 2020), https://www.vera.org/blog/covid-19-1/unaccompanied-children-suffer-as-hearings-are-sped-up-switched-to-video-during-covid-19-crisis; YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, IMMIGRATION HEARINGS BY VIDEO: A THREAT TO CHILDREN'S RIGHT TO FAIR PROCEEDINGS (Jan. 2020), https://static1.squarespace.com/static/597ab5f3bebafb0a625aaf45/t/5e4d5c0cc48abe2cc9bd102a/1582128140439/Young+Center+VTC+Report_Updated+January+2020.pdf.

[52] American Bar Ass'n, *Impact of COVID-19 on the Immigration System*, https://www.americanbar.org/groups/public_interest/immigration/immigration-updates/impact-of-covid-19-on-the-immigration-system/ (last visited Mar. 4, 2021).

[53] *See, e.g.*, Aronson, *supra* note 48, at 11.

[54] *See, e.g.*, *J.E.C.M. v. Lloyd*, 352 F. Supp. 3d 559 (E.D. Va. 2018); *see also* G.A. Res. 45/113, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990) ("Deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional

provide notice to a child in custody or their adult caregiver/sponsor or legal representative that they are being identified as gang- or cartel-affiliated, fail to ensure that the veracity of the reasoning behind the designation is well documented and that there is equal access to the evidence used to make the determination[55], and fail to provide a child or their representative any opportunity to challenge the designation or rebut the alleged evidence.

Because the information from these instruments can be used to prolong a child's detention, often in restrictive facilities, as well as keep families apart, clear liberty interests to be free from detention, to familial association, and to be placed in the least restrictive setting—interests guaranteed by the Constitution, the TVPRA, and the FSA—are implicated.[56] Without any procedural due process protections and with substantial risk of error, the instruments will result in hugely harmful effects on multiple aspects of the child's life.[57] At a minimum, due process requires notice and "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[58] Such protections have long been provided as standard in the juvenile context.[59] Indeed, recently the Ninth Circuit in *Saravia v. Sessions* upheld a preliminary injunction that provided procedural process in the form of detention hearings, among other protections, for children who were rearrested by ICE and placed in ORR custody based on

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cases."); G.A. Res. 44/25, Convention on the Rights of the Child (Sept. 2, 1990) ("[A] child should not be separated from his or her parents against their will except when competent authorities *subject to judicial review* determine … that such separation is necessary for the best interests of the child.") (emphasis added).

[55] While we note that the form contains a small "If yes, explain" box, this only furthers the unilateral nature of the form where no documentary evidence is required, nor does it provide any guidance on standards or veracity for documenting and making such a determination.

[56] *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (recognizing a Fifth Amendment liberty interest for immigrant detainees in civil custody); *see also* 8 USC § 1232(c)(2)(A) (2018) ("[A]n unaccompanied alien child . . . shall be promptly placed in the least restrictive setting that is in the best interest of the child."); *Hernandez v. Sessions*, 872 F.3d 976, 981 (9th Cir. 2017) ("[T]he government's discretion to incarcerate non-citizens is always constrained by the requirements of due process."); *Flores* Settlement Agreement, *supra* note 25, at ¶ ¶ 6, 19, 21, 23.

[57] The law has granted protections to even less vulnerable groups than detained unaccompanied immigrant children facing gang and cartel allegations. *See e.g., Boumediene v. Bush*, 553 U.S. 723, 783-84 (2008) (requiring sufficient process for suspected terrorists held at Guantanamo, including the rights to assistance of counsel, notice of allegations, presentation of evidence and cross-examination of witnesses against the accused where a court "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality) (finding that an enemy combatant has the right to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."); *United States v. Salerno*, 481 U.S. 739, 751-52 (1987) (upholding the Bail Reform Act as providing sufficient process where pretrial detainees were provided counsel, right to present evidence, cross-examine witnesses, and testify in front of a neutral judicial officer at a detention hearing); *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (upholding a sexually violent predator statute where the burden of proof was on the government and certain procedural safeguards were present, including counsel and the right to present evidence and witnesses).

[58] *Rumsfeld*, 542 U.S. at 533; *Doe v. Gallinot*, 657 F.2d 1017, 1024 (9th Cir. 1981); *see also Bowman Transp. v. Arkansas Best Freight Sys.*, 419 U.S. 281, 288 n.4 (1974) ("[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

[59] *In re Gault*, 387 U.S. 1, 57 (1967) ("[A]bsent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.").

alleged gang allegations.[60] The very behavior and lack of protections which the court in *Saravia* sought to protect against are again at issue with the instruments being proposed here.

To comply with the law, if ORR insists on keeping questions about gang and cartel allegations, they must develop a process for providing children and their sponsors and legal representatives meaningful notice of any and all gang allegations, and of attempts to illicit a child's criminal history.[61] ORR must also develop internal oversight over issuing and reporting these allegations, and an opportunity for children and their sponsors and legal representatives to challenge them *before* they are shared outside of ORR or used to place a child in a restrictive placement.[62] Given the potential allegations contained in SIRs, the Commenting Parties have serious concerns that all SIRs are not provided to children or their legal representatives. This has long been a concern of Commenting Parties even before the proposed additions in the instruments, particularly in light of the significant impact that SIRs often have on a child's fundamental and constitutional rights. If challenged, there must be a neutral adjudicator to evaluate the allegation based on the evidence presented by both the child (and any adult caregiver or legal representative) and the individual making the allegation, no different than what the Ninth Circuit has required under *Saravia v. Sessions*.

B. The Trauma Histories of the Majority of the Children in ORR Custody Account for Many of the Issues that the Instruments Would Criminalize.

The majority of children entering ORR custody are from the Northern Triangle of Central America—which includes Guatemala, Honduras and El Salvador. Many have experienced severe trauma before coming to the United States.[63] Often, they have experienced or witnessed violence recently in their home countries, and commonly long-lasting or chronic violence or neglect throughout their lives.[64] Many of them also experience traumatic events on the journey to the United States.[65] This will be particularly true for children arriving in the United States after fleeing not only their home countries, but the horrific conditions in the migrant camps caused by the Migration Protection Protocols program.[66] Experts across psychiatric fields have found that trauma causes children to misbehave, and this is worsened by detention; in other words, untreated trauma in the context of prolonged detention causes behavior issues.[67] All of this creates an essential backdrop to understanding the psychological needs and the behaviors of

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[60] *Saravia v. Sessions*, 905 F.3d 1137, 1144-45 (9th Cir. 2018) (finding no abuse of discretion where district court required prompt hearing before a neutral decisionmaker at which the minors could contest gang allegations and government would need to justify detention based on allegations).
[61] *See supra* Section III.A.1. for the requirements of *Miranda* in such circumstances.
[62] *See Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990) (noting that due process generally requires "some kind of a hearing" before a deprivation of protected liberty interests).
[63] *See* Nat'l Ctr. for Youth Law, *supra* note 38, at 20 ("Childhood traumatic experiences can alter the brain's responses to stress and cause children to lose their sense of safety and control. Unaccompanied children often experience trauma before, during, and after migration.").
[64] *Id.*
[65] *Id.*
[66] *See* Camilo Montoya-Galvez, *700 Children Crossed the U.S. Border Alone After Being Required to Wait in Mexico with Their Families*, CBS News (Jan. 15, 2021), https://www.cbsnews.com/news/children-who-crossed-the-u-s-border-after-their-families-were-required-to-wait-in-mexico-are-being-denied-legal-safeguards-suit-says/.
[67] *See* Nat'l Ctr for Youth Law, *supra* note 38.

children in ORR custody, and the necessity of appropriately considering mental health issues and treatment in analyzing (and not criminalizing) behaviors.[68]

1. The event and SIR instrument should take a child and trauma-centric approach and structure, accounting for child development and past trauma.

The instruments recording events and SIRs fail to take into account any kind of trauma-informed understanding of child behavior or communication. To the Commenting Parties, the instruments appear to focus on gang allegations to the detriment of youth-specific safeguards. Furthermore, although the instruments suggest that they record "criminal history", most child behaviors that they criminalize have not, in fact, been adjudicated as such by a neutral factfinder. Furthermore, the distinction between juvenile delinquency and adult crimes is clear and consistent across Supreme Court jurisprudence, the juvenile justice systems in all 50 states and the District of Columbia.[69] Indeed, even in the immigration context, juvenile adjudications are not considered convictions under the statutory definition of the term used in the Immigration and Nationality Act.[70]

Equally revealing, these forms label children as either "victims" or "perpetrators." The field of child development and decades of research have shown that rarely are these roles clean and clear.[71] The SIR instruments listing children as victims or perpetrators inappropriately and misleadingly categorize child behavior, without considering past trauma or the cumulative effects of prolonged detention.[72] Studies have illustrated how immigration agencies—including ICE and CBP—have wrongfully conflated gang and immigration enforcement, claiming Latino boys are gang members in immigration proceedings without evidentiary support.[73] The form's emphasis on recording and reporting gang- and cartel-involvement and criminal history furthers

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[68] *See Id.* at 19 ("Because ORR shelters lack the resources to provide children with the care they need, children with mental health needs are often transferred, or 'stepped-up,' to residential treatment centers, staff-secure, or secure detention centers. These step-ups risk further damaging children's mental health, as restrictive institutional environments increase the trauma of detention.").

[69] Philip Desgranges, *Trump Is Locking Up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation*, ACLU (Aug. 2, 2017 1:30 PM), https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/trump-locking-and-threatening-deport-children; Liz Robbins, *Teenagers' Arrests Are Unconstitutional, A.C.L.U. Lawsuit Says*, N.Y. Times (Aug. 11, 2017), https://www.nytimes.com/2017/08/11/nyregion/aclu-lawsuit-ms-13-teenager-arrests-.html.

[70] *Matter of Devison-Charles*, 22 I. & N. Dec. 1362, Int. Dec. 3435 (BIA 2000) (holding that adjudication of youthful offender status under New York law is not a criminal conviction for immigration purposes).

[71] Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. Cal. Rev. L. & Soc. Just. 195 (2014).

[72] *See* NAT'L CTR. FOR YOUTH LAW, *supra* note 38, at 21 ("Children are sometimes held in ORR custody simply because they are not deemed sufficiently 'mentally stable' for release. This is profoundly counterproductive, as longer stays in detention are associated with deteriorating mental health."); *see also* Hlass, *supra* note 19, at 233.

[73] N.Y. IMM. COALITION & CUNY SCH. OF LAW, SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS (2018), https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf; IMM. LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf.

the growing and ugly discourse equating immigrant children with criminals[74], repeating behavior that the Ninth Circuit already enjoined in *Saravia v. Sessions.*

Instead, the instruments should be restructured to use a more nuanced, child-centric framing of events, taking due consideration of past trauma and the psychological harm of prolonged detention. Commenting Parties urge ORR to remove the "perpetrator" designation from the instruments, and to lessen ORR's criminal justice mimicry. While some children are clearly victims in a situation and can be identified as such, the culpability of the offending child is rarely as clear, particularly in cases where severe trauma, family separation and prolonged detention are all occurring, often simultaneously. ORR has the resources and understanding to incorporate evidence-based and child-centric strategies for ensuring the safety and well-being of all of the vulnerable children in its care, without labeling children as "perpetrators" as they are typically referred to in the criminal justice setting. ORR should have no part furthering the false narrative of immigrant children as criminals nor should it participate in any activity that does not further the welfare of *all* the children in its care, including those unable to constructively process their trauma.

2. ORR's focus on alleging, recording, and reporting gang or cartel involvement and criminal history in its proposed event and SIR instrument has a disproportionate negative impact on children of color and promotes racial inequality.

Gang allegations in and of themselves are fraught with racial bias and have been utilized against immigrant children for the very purpose of securing their deportation. ORR should not engage in the criminalization of the children it has been entrusted to protect. Latinx youth are disproportionately accused of gang affiliation, to the extent that even culturally popular clothing and sports team logos for example, are ascribed as gang-related by law enforcement and immigration officials.[75] Notoriously inaccurate gang databases "label, stigmatize, and punish many citizens and non-citizens as "gang members" and there is extraordinary racial disparity in gang databases.[76]

Practices such as ORR's alleging, recording, and reporting gang involvement or criminal history merely "transfer the discriminatory practices of the criminal legal system into the enforcement of immigration laws.[77] Racial injustice persists in the juvenile justice context, where even though the overall number of youths have declined, "the rate of disparities in these systems

[74] *See generally* Laila L. Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697 (2018) (examining how gang allegations against immigrant youth work to push young people into a school-to-deportation pipeline); Karla M. McKanders, *America's Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L.J. 197 (2015) (examining the conceptualization of immigrant youth who are subject to delinquency adjudications).
[75] IMMIGRANT LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING YOUTH AS GANG MEMBERS (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf.
[76] Philip Marcelo, *Gang Database Made Up Mostly of Young Black, Latino Men*, AP NEWS (July 30, 2019), https://apnews.com/article/dd5643e358c3456dbe14c16ade03711d.
[77] NAT'L IMMIGRANT JUSTICE CTR., DISENTANGLING LOCAL LAW ENFORCEMENT FROM FEDERAL IMMIGRATION ENFORCEMENT (2021), https://immigrantjustice.org/research-items/policy-brief-disentangling-local-law-enforcement-federal-immigration-enforcement.

has risen."[78] Thus, sharing SIRs or other documented allegations of gang involvement serves only to stigmatize and criminalize already marginalized youth. Indeed, the purpose of "affixing gang labels is [] to criminalize black and Latino youth" and immigration officials have taken "the [Trump] administration's rhetoric as carte blanche to increase their own use of allegations of gang involvement as a tool to pursue immigration enforcement against Latinx youth."[79]

Gang involvement and criminal history are death knells for Latin American men in immigration proceedings, and particularly Central American men. The emphasis on crime-based removals is "responsible for the mass removal of Latinos living in the United States, most significantly poor Latinos from Mexico, Guatemala, Honduras, and El Salvador."[80] Indeed, "more than ninety-five percent of noncitizens removed annually are from Mexico and Central America—far out of proportion to those groups' representation in the U.S. immigrant population."[81] Dangerousness findings in removal proceedings instrumentalize this exclusionary system, where the likelihood of being deemed "dangerous" by an immigration judge is "significantly higher for Central Americans than for non-Central Americans."[82] As a male, the likelihood is even higher. As a Central American male with a criminal record, even more so.

The consequences of deportation are dire, particularly where the majority of youth in ORR detention are from Central America and many people deported to Central America have been killed by the very persecutors they fled in the first place.[83] Thus, given that the majority of youth in ORR custody are from Central America, ORR's alleging, recording, and reporting gang involvement or criminal history contributes to structural racism with dire consequences and could, quite frankly, mean the difference between exclusion or deportation, family reunification or separation, and even life or death.

C. The Proposed Instruments Raise Privacy and Confidentiality Concerns.

Children's information and privacy is protected broadly under numerous state and federal laws.[84] Legislatures have chosen to restrict access to children's records in this manner in recognition of the inherent vulnerability of children, as well as the need to avoid early stigmatization of children and promote rehabilitation. Protecting children's information and privacy removes significant barriers to seeking employment, housing, and other opportunities.[85] Additionally, providing the mental health services and trauma informed care that children in ORR custody need requires a level of trust and confidentiality. Currently, children in ORR

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[78] Maritza Perez, *Mistaken Identity: The Dangers of Sweeping Gang Labels for Black and Latino Youth*, CTR. AM. PROGRESS (2018), https://www.americanprogress.org/issues/criminal-justice/reports/2018/09/13/457854/mistaken-identity/.

[79] IMMIGRANT LEGAL RES. CTR., *supra* note 73.

[80] Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RSRV. L. REV. 993, 998 (2016).

[81] Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 247 (2016).

[82] Emily Ryo, *Predicting Danger in Immigration Courts*, 44 L. & SOC. INQUIRY 227, 245 (2019).

[83] HUMAN RIGHTS WATCH, DEPORTED TO DANGER: UNITED STATES DEPORTATION POLICIES EXPOSE SALVADORANS TO DEATH AND ABUSE (2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and.

[84] *See, e.g.*, 5 U.S.C. § 552a (2018); 20 U.S.C. § 1232g (2018); Health Insurance Portability and Accountability Act, H.R. 3103, 104th Cong. (1996); CA WIC § 825-836.

[85] Riya Saha Shah et al., *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*, JUVENILE LAW CTR. (2014), https://jlc.org/resources/juvenile-records-national-review-state-laws-confidentiality-sealing-and-expungement.

custody have legitimate fears that information they disclose to their counselors will be used against them to justify a transfer to a more restrictive facility or to undermine their immigration case.[86] Immigration attorneys have increasingly observed the government using ORR files containing confidential medical and psychological records as evidence in immigration court.[87] The current instruments do nothing to mitigate these concerns; on the contrary, they expand them.

As noted above, the forms specifically contain information regarding children's alleged criminal or gang history. In general, sharing information about children's criminal history outside of ORR is inconsistent with the policy rationale underlying protections for juvenile criminal information. In California, for example, juvenile confidentiality laws have long protected juvenile information arising from certain proceedings, including juvenile delinquency.[88] Only certain individuals and agencies are permitted automatic access to information and files regarding juveniles who are or were in delinquency or dependency proceedings.[89] Any other agencies or individuals not statutorily authorized to review a child's file must obtain a court order to do so. These procedures are purposely stringent and "explicitly reflect a legislative judgment that rehabilitation through the process of the juvenile court is best served by the preservation of a confidential atmosphere in all of its activities."[90]

California statute sets forth the specific persons and entities entitled to inspect juvenile case files without a court order.[91] Parties allowed to inspect or receive copies of juvenile records are prohibited from disclosing the juvenile's information to unauthorized parties.[92] A violation of juvenile confidentiality provisions is a misdemeanor punishable by a fine.[93]California does not authorize the disclosure of juvenile information in any form to federal officials, including representatives of DHS, absent an order from the judge of the juvenile court.[94]

In finding that juvenile court records "should remain confidential regardless of the juvenile's immigration status," the Legislature emphasized that "confidentiality is integral to the operation of the juvenile justice system in order to avoid stigma and promote rehabilitation for *all youth*, regardless of immigration status."[95] Moreover, the information required to be protected is broadly defined to include the juvenile's case file and information relating to the juvenile.[96]

Federal law as it relates to unaccompanied minors is similarly protective. The *Flores* Agreement requires ORR facilities to "develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which

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[86] *See, e.g.*, Ella Nilsen, *Kids Who Cross the Border Meet with Therapists and Social Workers. What They Say Can Be Used Against Them*, Vox (June 19, 2018, 8:51 AM), https://www.vox.com/policy-and-politics/2018/6/18/17449150/family-separation-policy-immigration-dhs-orr-health-records-undocumented-kids.
[87] *Id.*
[88] CA WIC, *supra* note 84, at § 827.
[89] *Id.*
[90] *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 776-77 (Cal. 1971).
[91] CA WIC, *supra* note 43, at § 827.
[92] *Id.* at § 827(a)(4); *See also In re Tiffany G.*, 29 Cal. App. 4th 443, 451 (Cal. App. Ct. 1994).
[93] CA WIC, *supra* note 84, at § 827(b)(2).
[94] The Juvenile Court has the exclusive authority to determine the extent to which juvenile case records can be disclosed. *In re Elijah S.*, 125 Cal. App. 4th 1532 (Cal. App. Ct. 2005).
[95] CA WIC, *supra* note 84, at § 831(a) (emphasis added).
[96] *Id.* at § 831(e).

preserves the confidentiality of client information and protects the records from unauthorized use or disclosure."[97] The ORR website states, "HHS does not release information about individual children or their sponsors that could compromise the child's location or identity."[98] The website also states, "HHS has strong policies in place to ensure the confidentiality of [UACs] personal information."[99] ORR's promises reflect the *Flores* Agreement's provision that the child has "a reasonable right to privacy."[100] From the rights listed in the provision, naturally, the child must also have the right to privacy of their own records. A child's ORR file's information should not be accessible by third parties without the child's authorization, especially USCIS and ICE. Accordingly, the proposed instruments should indicate that the child's ORR file is separate from the child's "Alien File," and the documents as well as the information in a child's ORR file must not be accessible by any entity within DHS or the Department of Justice ("DOJ").

While the "Collaborators Data Entry Window" restricts read/write access to the UAC Path where this information is inputted, it does nothing to remove ORR's current policy requiring the reporting of the content of these forms (SIRs) to ICE.[101] Therefore, the restrictions that apply to accessing UAC Path do not mitigate the harm of permanently including information from this system into a child's ORR file, which ICE and other individuals appear to be able to access at least via request if not through ORR's affirmative sharing of some or all of the information. Restricting access to children's information is consistent with the U.S. Supreme Court's longstanding recognition that children should not be stigmatized for "youthful indiscretions." Thus, in order to promote rehabilitation and align with child welfare principles, as well as state and federal law and policy, ORR should not share criminal history or allegations of criminal activity information with outside agencies and should have strict firewalls on ability to access the information.

D. Reporting to Law Enforcement (DOJ/FBI/Local Law Enforcement) and ICE Impermissibly Turn ORR into a Law Enforcement Agency.

ORR is not a law enforcement agency. It does not have law enforcement responsibilities with respect to unaccompanied immigrant children. In fact, the responsibility of providing for unaccompanied immigrant children was transferred to ORR from DHS (formerly INS) precisely to separate the responsibility for safeguarding children's welfare from the law-enforcement focused DHS.[102] The proposed event and SIR instruments place ORR squarely into a law enforcement role, violating its obligations to the children in its care and revealing a serious conflict of interest that it must immediately reconcile. The mandatory law enforcement reporting

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[97] *Flores* Settlement Agreement, *supra* note 25, at Ex. 1 at ¶ E (emphasis added).
[98] Office of Refugee Resettlement, *Health and Safety*, https://www.acf.hhs.gov/orr/about/ucs/health-and-safety (citing to the text under "Privacy" heading) (last visited Feb. 19, 2021).
[99] *Id.*
[100] *Flores* Settlement Agreement, *supra* note 25, at Ex. 1 at ¶ A.12 ("A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house and regulations; and (e) receive and send uncensored mail unless there is reasonable belief that the mail contains contraband.").
[101] *See* ORR Policy Guide § 5.8.5 (care providers have to report arrests to FOJC, and FFS have to report gang related activities to the ICE/HSI Tip line).
[102] *See generally* Hlass, *supra* note 19.

attached to these forms through the UAC Policy Guide Section 5 reveal that ORR is danger of becoming—if it is not already—another arm of DHS. As noted above, according to an ICE-ORR Memoranda, DHS trains ORR staff on how to identify MS-13 and other gang colors and signs, report suspected gang affiliation, and become integrated into local anti-gang task forces.[103] The mandatory rapid reporting to DHS, and in some cases DOJ and the FBI, of criminal histories and gang and cartel allegations leaves no room for a child-centric analysis of the event, nor does it leave any room for any holistic consideration of the welfare of all children involved.

ORR has failed to explain or justify its expanded focus on collecting and documenting gang- and cartel-affiliation and criminal history and how it comports with its mandate to provide for the welfare of *all* the children in its care. The structure and use of the proposed event and SIR instruments are all the more concerning when reviewed in conjunction with the parallel notices of proposed forms for mental health screening and placement, which elicit and record information from children that may be self-incriminating without any protections that would normally accompany such law-enforcement activities.[104]

E. Additional Comments and Changes to Certain Proposed Instrument.

1. The Proposed Care Provider Facility Tour Request (Instrument A-1A)

Commenting Parties seek clarification that this form only applies to facility tours, and not to meetings with individual children for purposes of representation either in individual cases or as class members. Additionally, Commenting Parties seek clarification that this form is not required for Class Counsel of litigation regarding conditions of confinement in detention facilities to request an inspection of certain facilities.

2. The Proposed Notice to UAC for Flores Visit (Instrument A-4)

To the extent the proposed form suggests *Flores* counsel may meet only with children who affirmatively ask to meet with *Flores* counsel prior to or during the visit, it is inaccurate and Commenting Parties request modification. *Flores* counsel has the right to request to meet with any child in ICE, CBP and HHS custody.[105] Although a child may decline to meet with *Flores* counsel, they need not affirmatively request a meeting.[106]

3. The Proposed Authorization for Release of Records (Instrument A-5)

i. The restrictions for release of records indicated on the Authorization of Release of Records Instrument violate children and their sponsors' due process rights and interfere with attorney representation of children.

ORR inappropriately gives itself unfettered discretion to deny a request for records for any reason. For a child's legal representative, access to the child's records is often essential to

[103] *Id.* at 233.
[104] The Commenting Parties will be submitting more detailed comments in response to those proposed forms, which frequently are the source of information that generate an SIR. However, those comments should be read together with these comments regarding the administrative forms ORR proposes.
[105] *Flores* Settlement Agreement, *supra* note 25, at ¶ 32A ("Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff shall provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility.").
[106] *Id.* at ¶ 32D.

advocate for the child's interests. If ORR declines to release any of a child's records to a child's legal representative—including for a child under 14—it should be required to provide a written explanation as to why the request was denied and why denial is in the child's best interests, and clarify any concerns ORR has about sharing this information and how such concerns can be mitigated to allow children's representatives to obtain some or all of the records they request. ORR should also provide a mechanism by which children may seek administrative review of decisions to withhold their files, whether in whole or in part.

The proposed instrument notes that ORR refuses to release "internal correspondence, internal incident reports, Sponsor Assessments, Family Reunification Packets, and background check results" in any circumstance, without exception. Withholding this information raises serious due process concerns and is of questionable legality. Prompt access to such information is essential to affording children notice of decisions being made about them and the basis for those decisions, especially if they are incriminating and affect their detention. They are central to a child or their representative's ability to have a meaningful opportunity to assess ORR's delay in reunifying them with their sponsors, ORR's having declared their parents or other proposed custodians unfit, or ORR having placed them in a restrictive setting. In essence, ORR proposes to deny children the right to inspect the evidence it relies on to refuse them release or to consign them to juvenile jails or psychiatric facilities. The Commenting Parties are aware of no legal authority, and the proposed instrument references none, for withholding such evidence. On the contrary, this blanket restriction is a blatant violation of procedural due process rights of children and their sponsors.[107]

In addition, the Freedom of Information Act ("FOIA") requires federal agencies, including ORR, to disclose any information requested unless it falls under one of the nine exemptions.[108] When individuals, including children in ORR custody, request their records from the federal government, including ORR, FOIA authorizes broad access regardless of immigration status.[109] Specifically, under FOIA, "each agency . . . shall make available for public inspection in an electronic format . . . copies of all records, regardless of form or format."[110] ORR should not use a parallel authorization process in an attempt to insulate itself from the requirements of FOIA and due process confrontation of evidence requirements. ORR must comply with a request for a child's record in a free and timely manner, regardless of whether it is an Authorization for Release of Records request or a FOIA request.

ii. Children must have access to their own records.

To ensure minors also have access to their own files, there should be a clear provision in this form that unaccompanied children themselves have a right to *free* and *prompt* access to their case files *and* any information collected about them by ORR. The procedures to request UAC case file information are outlined on ORR's website. A requesting party, including a child in

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[107] *See Zerezghi v. U.S. Citizenship and Immigr. Serv.*, 955 F.3d 802, 810-12 (9th Cir. 2020) (stating that the government violated due process where it failed to provide the evidence it relied upon in making its decision thereby denying plaintiffs the opportunity to rebut the evidence); *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1075 (9th Cir. 2015).

[108] U.S. DEPARTMENT OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE FOIA IMMIGRATION RECORDS SYSTEM (FIRST) 1 (2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-first-march2019.pdf_0.pdf.

[109] *Id.* at 25.

[110] 5 U.S.C. § 552(a)(2)(D) (2018).

ORR, may seek copies of a UAC's case file by writing to ORR/DCS Division Director at Requests.DUCS@acf.hhs.gov, and they must also file an Authorization for Release of Records (ORR UAC/C-5).[111] However, these instructions do not provide guidance about how a child would request their own case file information *while in custody.* There are serious due process implications regarding a file that contains gang and cartel allegations or alleged criminal history for which a child has no access to on their own, especially where such content is used to continue to detain the child, place the child in a restrictive setting, or deny a child's sponsorship application. The proposed Authorization for Release of Records or an accompanying notice to detained children should clearly explain the process for a detained child to request their own ORR file, and care providers should both notify children of this right and assist them if they want to request their files themselves.

iii. Commenting Parties suggest the following specific changes to the form.

Based on Commenting Parties' experience working with individual unaccompanied children, both in ORR custody and post-release, we suggest adding the following under Section E:

- Sponsor contact information: This information, held by ORR, is often unknown or inaccessible to the unaccompanied child and their attorney and is essential for providing services related to reunification advocacy. With the child's consent, ORR should share basic Sponsor contact information with attorneys representing children in order to facilitate representation and enable attorneys to request the sponsor signatures required for release of any sponsor information, per the form instructions.
- Complete case file: A box labeled "Complete Case File" will promote clarity rather than requiring requestors to check all of the boxes or simply write "complete case file" in the "other" section. The form or instructions should also indicate a time certain by which ORR must give a child or their legal representative access to the child's complete file and should provide that such access may not be delayed more than five business days following a request.
- Sponsorship/Reunification Records: A box indicating a request specifically for all information related to reunification should be added. Reunification information is essential for exercising children's rights to be promptly placed with appropriate sponsors, and for sponsor's rights to bring their children home. A child's attorney should have access to a home study report, for example, without the sponsor's signature, as that information is often critical to advocating for the child's safe and prompt release. This would further promote clarity rather than requiring requestors to attempt to explain in the "other" box.

Generally, the Commenting Parties commend ORR's clear language limiting the information it will provide to government agencies without an authorizing signature or a court-issued subpoena or order. This is an important protection for children and appears to satisfy the needs to notify various agencies regarding UAC transfer, placement, and release without compromising children's and sponsors' private and sensitive information. However, ORR should clarify that this important protection applies with equal force to all entities within DHS and DOJ. ORR should also clarify that UAC information that ORR may share with outside agencies is

[111] Office of Refugee Resettlement, *Requests for UAC Case File Information,* (Apr. 14, 2014), https://www.acf.hhs.gov/orr/policy-guidance/requests-uac-case-file-information.

limited to basic, directory-type information (name, address, age) and even this basic information sharing should be limited to the duration of a child's custody in ORR. Placement documents should likewise be redacted to provide only directory information regarding a child's placement within ORR or their release information for the purposes of facilitating the transfer of their immigration court case to the proper venue upon release and for the provision of post release services, as appropriate. ORR should not share any documents that contain the reasons for placement or any other sensitive information, including health information or behavior histories, with any government agency without a subpoena or court order. With that in mind, Commenting Parties recommend the creation of a firewall for certain information between an ORR case file and what ends up in an A-file, or is shared with another agency.

Additionally, ORR should not release children's information to a representative of a Federal or State government agency without *both* "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," *and* a court-issued subpoena or order. ORR should clarify that the required supporting documentation for requests coming from representatives of a Federal or State government agency applies to all representatives from DHS and the DOJ. If DHS or DOJ wants access to a child's information or ORR file for any purpose other than changing the child's address within their system to facilitate transferring a child's immigration case to the proper venue, they must submit a request for the child's file using the Authorization for Release of Records and provide a court-issued subpoena or order. ORR should not participate in or engage with law enforcement activities against the children that are or have been in its care. The same should apply with equal force to the sponsors and relatives who receive the child.

Finally, Commenting Parties request clarification regarding the required supporting documentation "Notice of Attorney Representation". Is this an ORR-generated form? Instructions should clarify what constitutes Notice of Attorney Representation.

4.The Proposed Notification of Concern (Instrument A-7)

The Proposed Notification of Concern instrument (A-7) is a new instrument that is "used by home study and post-release service caseworkers, care provider case managers, and the ORR National Call Center to notify ORR of certain concerns that arise after a UAC is released from ORR custody." This instrument raises serious concerns about privacy protections for children, sponsors, and caregivers, especially because they may not be the ones providing the information to ORR themselves.

This instrument also raises concerns about inappropriate post-release surveillance. The categories listed in the incident information section include things that ORR should not be monitoring once a child is released, including but not limited to minor behavior incidents, media attention, post-release criminal and/or gang allegations, and substance abuse. Not only is this invasive, but it is not clear what, if anything, ORR has the authority or capacity to do in response to these types of events other than document them and share individuals' personal information with law enforcement agencies. The Commenting Parties' understanding is that ORR does not have the authority to take children back into custody based on a notification of concern. For these reasons, the Commenting Parties urge ORR to remove these categories from the incident information section of instrument A-7. If ORR insists on including these sections, despite the Commenting Parties' concerns, the Commenting Parties request that ORR provide possible outcomes that may result from a Notification of Concern for children and for sponsors and

caregivers. The Commenting Parties also request justifications and explanations for including information that, if not reported by a child seeking help (e.g., with substance abuse or criminal or gang allegations), does not implicate ORR's child welfare mandate and instead appears to veer into a law enforcement activity.

Finally, while ORR should report any immediate danger to local child protection services, they should not become involved in reporting to law enforcement based on notifications of concern. For safety reasons and logistical reasons, among others, all law enforcement reporting should be left to the local child protective service agencies who are on the ground and better able to evaluate the situation, including providing the safest next steps for the child. Frequently law enforcement notification places a child in greater danger, particularly if child protective services are not involved to ensure safe placement and care for children. Above all, ORR must be guided by the goal of protecting a child's welfare and should never engage in law enforcement activities.

5.The Proposed Event Form (Instrument A-9)

The Commenting Parties request clarification regarding options to respond to the following field: "Event occurred in ORR Care." Does this refer to whether the child was in the custody of ORR at the time of the event (as opposed to prior to when the child came into ORR custody)? Or does it refer to whether the child was physically in an ORR facility or was instead with a foster family through temporary foster care, or in a school, doctor's visit, etc. Clarification on this may also respond to our comment below regarding separating out events that occurred prior to when a child came into ORR custody from events occurring while in ORR custody. We also note that part of the need for clarification stems from this field being a drop-down menu field for which we are unable to see the drop-down options. Without this information, we are unable to fully comment on the inclusion of this field and whether the pre-selected list of options or responses are adequate and/or appropriate.

6.The Proposed Emergency SIR and Addendum (Instrument A-10A) and SIR and Addendum (Instrument A-10B)

a. The distinction between the two instruments is not clear.

According to the Proposed Instruments, A-10A "is used by ORR care provider programs to inform ORR of urgent situations in which there is an immediate threat to a child's safety and well-being that require instantaneous action." In contrasts, A-10B "is used by ORR care provider programs to inform ORR of situations that affect, but do not immediately threaten, the safety and well-being of a child." Without more, the distinction between A-10A and A-10B is less than clear. For example, what constitutes an immediate threat to safety or wellbeing and what requires an SIR but does not constitute such a threat? Is the A-10A intended to document Emergency Incidents as identified under ORR Policy Guide Section 5.8.1? If so, how do A-10A and A-10D (Program-Level Event) work together in light of the fact that A-10D is intended to be used to document incidents that may affect the entire care provider facility, such as an active shooting and natural disaster, which are currently captured as Emergency Incidents under ORR Policy Guide Section 5.8.1? Because the use and intended benefit of these forms is unclear, the Commenting Parties ask ORR to provide for comment clear guidelines regarding how to use each form, with examples of behavior that would implicate either form. We also encourage ORR to provide for comment clear guidelines about what type of behavior by a child *does not* require

an SIR, to make clear both to the public and to care providers the limits of ORR's proposed information collection and recording.

b. The instruments should provide a field for distinguishing between events that occurred while in ORR custody and events that occurred outside of ORR custody.

Under the "Incident Information" section on both A-10A and A-10B, there is no current option for indicating whether the event occurred while the child was in ORR custody or outside of ORR custody. Using SIRs for events that occurred prior to a child's custody in ORR and during a child's custody is confusing and can be misleading for placement, reunification, and immigration relief purposes. The Commenting Parties recommend that ORR add a field to each instrument to allow for clear indication of whether the event occurred while in ORR custody or outside of ORR custody (even if it was disclosed while in custody). Alternatively, ORR could achieve this by using an instrument with a different heading based on whether the incident occurred in or outside of ORR custody.

c. Clarification on whether any video footage will be archived in addition to being described through new fields in A-10A and A-10B

The Commenting Parties seek clarification from ORR on whether ORR will archive any video, audio or photo footage, in addition to adding fields intended to document whether these items exists and what is captured though this footage. To the extent any video, audio, or photo footage is being used to document an incident involving a child, the Commenting Parties insist that ORR make such footage available to the child and his or her representative for inspection if the child is challenging a decision made by ORR in reliance on the information captured in the SIR and/or footage.

d. Additional Concerns regarding Proposed Instrument A-10B

First, it is not clear whether the category "incidents involving law enforcement" under the SIR Details section is intended to refer to contact with law enforcement in connection with the "criminal history" category or whether it's meant to be its own separate category. For example, if a child has an arrest for criminal charges, would both fields "Criminal History" and "Incidents involving law enforcement" be completed? Or would separate SIRs need to be generated for each? It is also unclear whether the section titled "Incidents involving law enforcement" applies to contact with law enforcement as it relates to the incident that occurred or is being reported (such as destruction of property), or simply to identify whether a child has ever had any contact with law enforcement and what type of contact the child has had with law enforcement. As such, the Commenting Parties request further information on what this category and field is intended to capture and how a care provider would handle a situation triggering numerous categories (e.g., would multiple SIRs be drafted for each category even if based on the same event or would one SIR identifying each relevant category suffice). Alternatively, if ORR proceeds to include these fields without providing further information, despite its obligation to do so under the Administrative Procedures Act ("APA"), we recommend ORR provide clear guidance to ORR

care provider staff on how to complete this form when numerous categories apply to one incident.

Second, if the category and field on "criminal history" is to be included (against the Commenting Parties' recommendations above), ORR should include a drop-down or narrative option to record *how* the gang- or cartel-related, gang-affiliation, charges and/or conviction determination was made. This should include a required field for "Source of Information" with a text box intended to detail where this information came from. For example, whether the information came from the child him or herself or whether it was obtained through documents. If obtained through the child, the source of information field should note whether the child was Mirandized prior to obtaining this information. If the information was obtained through documents, the source of information field should note whether ORR had a court order to obtain this information. This will provide accountability to ensure ORR is documenting not only the criminal information but the source of information and ensure it is obtaining the information legally. There should also be a function or field to add related documents. This will further ensure accountability and provide the child information he or she may need in order to challenge his or her restrictive placement determination based on charges or criminal adjudications. And, as stated numerous times in above sections, to the extent this information is collected and included in the child's file, there should be protections in place to ensure the child's file and/or information regarding criminal charges and/or arrests are not shared with third-parties.

Lastly, there appears to be an overall "category" for separation from a parent. We recommend changing this category to "separation from family" and having a separate field with numerous available options under this category, similar to the separate fields created for categories like criminal history, trafficking concerns, past abuse or neglect, and so on. For example, we suggest a separate field with the heading "separation from family" be added into the SIR details section and that this field have at least the following available options: separation from a parent, separation from a primary caregiver, separation from sibling(s), separation from other family member. This type of information is relevant to the trauma children experience at the border and can inform not only the care they need in custody but also the reunification process.

7. The Proposed Sexual Abuse SIR and Addendum (Instrument A-10C)

a. The title of this instrument is misleading and risks erroneously labeling a child as a having committed sexual abuse.

First and foremost, the Commenting Parties urge ORR to modify the title of this instrument, as it appears it may encompass behavior that does not meet the definition of sexual abuse and risks mislabeling an incident and/or a child. For example, instrument A-10C has the following categories under the "Sexual Abuse in ORR Care SIR Details" section: sexual abuse, sexual harassment, inappropriate sexual behavior and code of conduct. The definitions for each, or for those that we have, vary significantly, and it is evident as discussed below that incidents of sexual harassment and inappropriate sexual behavior do not satisfy the definition of sexual abuse and therefore should not be captured on a form titled "Sexual Abuse Significant Incident Report."

Additionally, prior to diving into the definitions for each term, we must address the issue of where to locate definitions for the terms used by ORR within these instruments. ORR's Guide

to Terms fails to define "Sexual Abuse Significant Incident Report," "sexual abuse," "sexual harassment," "inappropriate sexual behavior," and "code of conduct." Fortunately, through several searches, the Commenting Parties were able to locate a definition for "sexual abuse," "sexual harassment," and "inappropriate sexual behavior."[112] We have not had such luck with locating a definition for "code of conduct." Because the issue of not easily locating material terms used in ORR's forms and instruments has been a reoccurring issue, the Commenting Parties urge ORR to either (1) move all material terms and definition to the ORR's Guide to Terms, or (2) at minimum, include all material terms and definition in the ORR's Guide to Terms and continue to define them throughout its Policy Guide. We also recommend that ORR define all material terms, including "code of conduct," which it has failed to define altogether, to avoid ambiguity. These changes will provide clarity and transparency to both ORR staff and care providers using the Policy Guide to implement these forms and policies, as well as others navigating ORR's procedures in representing a child in ORR's care.

As noted above, the definitions for sexual abuse, sexual harassment and inappropriate sexual behavior differ significantly. First, using 34 U.S.C. § 20341 and 45 C.F.R. § 411.6 ORR Policy Guide Section 4.1.1. defines sexual abuse through interactions between children and interactions between staff and children in ORR custody.[113] For the purposes of this comment, we will refer to allegations of sexual abuse against a child (i.e., sexual abuse of a child in ORR custody by another child in ORR custody).[114] Sexual abuse by an unaccompanied child against another child is defined as follows:

> Sexual abuse of a minor by another MINOR includes the following acts:
>
> 1. The employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, (2) or (3) below or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;
> 2. Actual or simulated sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex;
> 3. Intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation;
> 4. Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument;

[112] ORR Policy Guide, *supra* note 8, at § 4.1.1 (defining sexual abuse) (last revised Feb. 5, 2018); *Id.* at § 4.1.3 (defining sexual harassment) (last revised Feb. 5, 2018); *Id.* at § 4.1.4 (defining inappropriate sexual behavior) (last revised Feb. 5, 2018).

[113] *See id*. at § 4.1.1-4.1.3; 45 C.F.R. § 411.6 (defining "sex" under 34 U.S.C.§ 20341(c)(4), which defines "sexual abuse").

[114] We agree that any adult staff who sexually abuse children in their care should be immediately reported to law enforcement and should not be permitted to work with children where there are allegations of abuse.

5. Bestiality;
6. Masturbation;
7. Lascivious exhibition of the genitals or pubic area of a person or animal;
8. Sadistic or masochistic abuse; or
9. Child pornography or child prostitution.[115]

Sexual harassment is similarly defined through interactions between children and interactions between staff and children in ORR custody, and through incorporation of 45 C.F.R. § 411.6.[116] Again, we focus on the definition based on interactions between children in ORR custody. Unlike sexual abuse, "[s]exual harassment of a minor by another MINOR includes: repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, phone calls, emails, texts, social media messages, pictures sent or shown, other electronic communication, or actions of a derogatory or offensive sexual nature." In other words, sexual harassment captures a broader range of behavior than is captured in the definition of sexual abuse.

Inappropriate sexual behavior is defined as "behavior that does not meet the definition of sexual abuse or sexual harassment but is sexual in nature."[117] By definition, inappropriate sexual behavior is not sexual abuse. And lastly, where we have no definition for code of conduct, it is impossible to discern whether it is intended to capture conduct that is "sexual abuse" and would warrant a sexual abuse significant incident report.

Because children are still developing their executive functioning skills,[118] and as such may be impulsive and engage in ill-advised behavior that while wrong, does not rise to the level of sexual abuse, ORR should not use an instrument that broadly characterizes all sexual behavior as "sexual abuse." For example, a teenager who makes unwanted lewd gestures to another young person may be considered bullying, sexual harassment, or otherwise inappropriate, but it certainly is not committing sexual abuse per its definition and therefore should not be labeled as sexual abuse, through the use of a form with sexual abuse in its title. Keeping instrument A-10C with a sexual abuse title but with an intended use to capture broader sexual behavior risks inappropriate child-like behavior being treated as sexual abuse and reported as a sexual abuse SIR, which criminalizes and adultifies normal childhood behavior that children must learn to inhibit.

For the reasons stated above, ORR should change the title of instrument A-10C to prevent mislabeling an incident as an incident of sexual abuse and mislabeling a child as having committed sexual abuse when the conduct does not meet the statutory or regulator definition of sexual abuse.

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[115] ORR Policy Guide, *supra* note 8, at § 4.1.1.
[116] ORR Policy Guide, *supra* note 8, at § 4.1.3.
[117] ORR Policy Guide, *supra* note 8, at § 4.1.4.
[118] *See* Ellen Barlow, *Under the Hood of the Adolescent Brain*, HARV. CTR. DEVELOPING CHILD (Oct. 17, 2014), https://hms.harvard.edu/news/under-hood-adolescent-brain; HARVARD CTR. DEVELOPING CHILD, WHAT IS EXECUTIVE FUNCTION? AND HOW DOES IT RELATE TO CHILD DEVELOPMENT?, https://46y5eh11fhgw3ve3ytpwxt9r-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/ExecutiveFunctionInfographic_FINAL.pdf.

b. "Inappropriate Sexual Behavior" is too ambiguous to put a child on notice of what behavior is prohibitive and will result in a SIR, and leaves to much discretion to the care providers in deciding when an incident involves inappropriate sexual behavior.

As noted above, ORR Policy Section 4.1.4 defines "inappropriate sexual behavior" as "behavior that does not meet the definition of sexual abuse or sexual harassment but is sexual in nature."[119] ORR provides definitions for sexual abuse and sexual harassment, but fails to define or provide any guidance for what it considers "sexual in nature." Is physical contact required? What role does consent play in the inappropriateness of the sexual behavior between two minors? Does the sexual behavior have to be directed at another person, like sexual abuse and sexual harassment, or is sexual behavior towards oneself sufficient? Without a clear definition or any guidance whatsoever, care providers are left to their own subjective judgments to decide whether or not certain behavior is "inappropriate sexual behavior." For example, we have witnessed instances where ORR has claimed a child engaged in inappropriate sexual behavior when a child merely engaged in youth-like behavior (such as masturbation of oneself or exposing himself in an effort to be comical). Although this behavior is ill-advised, it often reflects a child's inability to control impulses and make good choices and should not be labeled as inappropriate sexual behavior, which can, under current ORR policy, result in a child's placement in a secure facility.[120]

Precision of language is particularly important where these reports, including the impact of their title, can have serious repercussions for a child's placement within ORR, reunification with a sponsor, and ability to win immigration relief, and the social stigma of being accused of sexual misconduct.

c. "Code of Conduct Violation" Should not be included as a category that warrants the issuing of a Sexual Abuse SIR.

The Commenting Parties strongly urge ORR to clarify that the category "code of conduct violation" on the Sexual Abuse Significant Incident Report only applies to *staff* conduct that is in violation of the "Staff Code of Conduct" in ORR Policy Guide Section 4.3.5 and that this "code of conduct violation" category cannot be selected if the SIR relates to allegations against a *child*. We are concerned that if applied to a child, a "code of conduct violation" category under the Sexual Abuse Significant Incident Report is both misleading and criminalizing with respect to the child accused, especially given the statutory and regulatory definitions of sexual abuse in this context. For example, behaviors like holding hands, passing love notes between minors, or smiling and waving at a young person of the opposite sex could be prohibited under any given code of conduct, but they do not rise to the level of sexual abuse and should therefore not be captured in a Sexual Abuse Significant Incident Report.

Further, including the category "code of conduct violation" means that this type of SIR will not have a uniform meaning across ORR facilities, as each facility has its own, often

[119] ORR Policy Guide, *supra* note 8, at § 4.1.4.
[120] *See* ORR Policy Guide, *supra* note 8, at § 1.2.4.

different, code of conduct. This raises concerns about abuse of discretion in addition to further muddling the definition of sexual abuse for the purposes of the SIR.

d. Non-definitive options should be available for the question "Was this incident related to gang/cartel crimes, activities, or affiliation?"

If ORR maintains this section of the instrument and does not revise the structure of the instrument based on the Commenting Parties' general comments above, the Commenting Parties suggest including options like "suspected" or "possible" rather than "yes/no," which are definitive in situations which may be far from clear. An erroneous "yes" could significantly harm children involved in the event, whether perpetrator, victim, or both.

8. The Proposed Program-Level Event Report and Addendum (Instrument A-10D)

According to the Proposed Instruments, Form A-10D "is used by ORR care provider programs to inform ORR of events that may affect the entire care provider facility, such as an active shooter or natural disaster." Without more, it is not clear whether this form is also intended to document group behavior by children, such as foot fights, larger fights between multiple children, etc. As such, the Commenting Parties request further information on the types of events that are meant to be captured by this form, aside from active shooters or natural disasters. Alternatively, if ORR proceeds to use this form without providing further information, despite its obligation to do so under the APA, we recommend ORR provide clear guidance on when this instrument is to be used instead of the SIR instruments in A-10A, A-10B, and A-10C.

IV. CONCLUSION

In conclusion, the Commenting Parties urge the Agencies to implement the aforementioned changes to the proposed administrative and oversight instruments in order to adequately protect the privacy, confidentiality and welfare of children who are or have been in ORR custody, as well as their rights to due process and against self-incrimination.

Attachment 1

Excerpts from the Expert Report of Dr. Emily Ryo

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LUCAS R., et al.,

Plaintiffs,

v.

ALEX AZAR, et al.,

Defendants.

Case No. 2:18-CV-05741 DMG PLA

DECLARATION OF DR. EMILY RYO

1. The facts set forth below are based on my personal knowledge and, if called as a witness, I could and would competently testify to them. I am over eighteen years of age.

2. Attached as Exhibit A is a true and accurate copy of my Expert Report, dated June 16, 2020, which I hereby reaffirm and verify under penalty of perjury as containing the opinions that I am offering in this case.

3. If called to testify at trial, I anticipate that I will testify to the matters and opinions as set forth in my Expert Report.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct. Executed on this 28 day of September, 2020.

Emily Ryo, JD., PhD.

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

LUCAS R., et al., Plaintiffs, v. ALEX AZAR, et al., Defendants.	Case No. 2:18-CV-05741 DMG PLA EXPERT REPORT BY DR. EMILY RYO

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given facility as a "stint," and the total time spent in ORR custody from initial placement to final discharge as a "custody period."

As explained in section III.A, I cannot assume a one-to-one relationship between UACs and A-Numbers. This means that I cannot guarantee that a UAC will be assigned the same A-Number for each custody period that he or she may experience. Due to this limitation, I have treated each custody period as independent of one another, and all of the analysis presented in this report is at the level of custody periods, rather than at the level of UACs.[7] For example, average detention lengths refer to the average length of detention for individual custody periods, rather than the average total length of detention for individual UACs.

D. Program types and restrictive placements

ORR facilities impose varying levels of restrictions on UACs. Definitions for the various program types are provided in Appendix C.[8] Figure 1 shows the ORR program types, with "less restrictive" program types on the left and "more restrictive" program types on the right.[9]

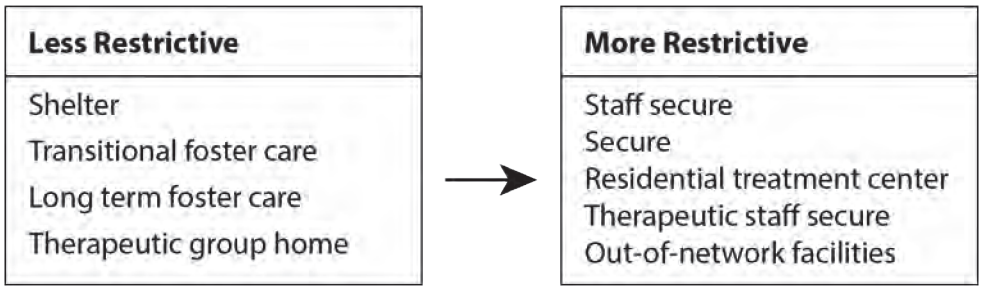

Figure 1. Program types by less restrictive to more restrictive.

For the purposes of this report, a "step-up" occurs when (1) a UAC is transferred from a less restrictive program and placed in any one of the more restrictive programs, or (2) when a UAC is

[7] Analysis conducted at the level of custody periods may have the effect of understating the amount of time a UAC spends in custody. For example, consider a UAC with two 100-day custody periods. Our analysis at the level of custody periods treats each 100-day custody period as independent of one another. In contrast, a UAC-level analysis would consider the total length of detention for this UAC to be 200 days.

[8] In considering whether a UAC was ever placed in any of these program types during a given custody period, I used the categorizations as they appear in the ORR Data. I do not provide any opinions as to whether the facilities in which the UACs were placed do in fact fit the definitions provided.

[9] The classifications presented in Figure 1 were provided by Plaintiffs' counsel based on ORR's classification of more and less restrictive facilities. I understand that there is disagreement among the parties, and even amongst Defendants' own employees, as to how to categorize program types from least restrictive to most restrictive. Since my analyses consider only whether a child was ever placed in a "more restrictive" program, I need not delineate where each program falls in a spectrum of least to most restrictive. I also do not provide any opinions as to the level of restrictiveness of these facilities in practice.

initially placed in a program that is more restrictive.[10] Although some UACs may experience multiple step-ups during a custody period, or may be stepped-up and later stepped-down to a less restrictive program, this report considers only whether a UAC was ever stepped up during a custody period.

III. Methodology

I describe in detail below the four key steps that I undertook to generate a cleaned, reliable dataset for analysis. These steps were necessary to address the data entry errors and other unexplained aberrations present in the ORR Data.

A. Data cleaning relating to A-Numbers

There are a number of issues relating to A-Numbers in the ORR Data. There are 19 records in the ORR Data that are associated with "fake" A-Numbers. I identified these records by checking for A-Numbers that are outside the normal range of values and then manually inspecting the UACs' names associated with those A-Numbers. For example, UACs named "TEST TEST," "FAKE FAKE," and "FAKIMUS KIDIUMUS" were removed from the ORR Data.

I next sought to identify when an A-Number is associated with more than one UAC. An A-Number may be associated with more than one UAC due to either (1) data entry errors, or (2) an A-Number being "reused" for an entirely different child. If there were records associated with a given A-Number that varied across four of the five personal characteristics (first name, last name, date of birth, country of birth, and gender), I manually inspected these records to ensure that the same A-Number was not used to identify two different UACs. I ensured that each of the 6 UACs whom I determined had non-unique A-Numbers in the ORR Data were assigned unique A-Numbers.

I also sought to identify UACs who are associated with more than one A-Number. A UAC may be associated with more than one A-Number due to either (1) data entry errors, or (2) a UAC being assigned a different A-Number upon re-admission after a discharge. I manually inspected records relating to 104 combinations of first name, last name, date of birth, country of birth, and gender that were associated with more than one A-Number. Combining these records was sometimes necessary to create a complete account of a UAC's time in ORR custody. For example, a referral record may have a different A-Number than the discharge record for the same UAC. If these A-Numbers are not linked to each other, the UAC represented by the A-Number in the referral record would be considered to still be in custody. I ensured that each of the 64 UACs whom I determined had two different A-Numbers in the ORR Data and whose records would be incomplete without being linked were assigned a single unique A-Number.

I linked A-Numbers only when it was necessary to avoid a falsely open-ended custody period (i.e., when a UAC appears to still be in custody but has actually been discharged, as indicated in the monthly discharges spreadsheet). In other cases, it is likely that the government used two different A-Numbers to identify the same UAC in different custody periods. I did not link these A-Numbers in those cases, since my goal was to clean the ORR Data only as necessary to

[10] This definition of step-up was provided by Plaintiffs' counsel.

D. Data cleaning relating to discharge types

In July 2018, several data columns were mis-labeled by ORR. The column labeled as discharge type in July 2018's discharges spreadsheet actually contained the program type, and the discharge type was not provided elsewhere. For this month only, I assumed that the presence of sponsor data (first name, last name, and state) indicates that the UAC was reunified with an individual sponsor. This is a reasonable assumption given that in the other monthly data that do not contain this data error (i.e., omission of discharge type), 95.9% of final discharges that contain sponsor information are designated as individual reunifications.

E. Outcome of data cleaning measures

The ORR Data described in Section II.A. represents all UACs who were initially admitted to ORR, regardless of whether they were placed in-network or out-of-network, on or after November 1, 2017 and discharged on or before February 29, 2020. Incorporating the data cleaning measures described in Sections III.A-D, and excluding 2 UACs who were recorded as being transferred from one ORR facility to another but were missing all subsequent records, generates a clean dataset for my analysis ("Clean Dataset"). This Clean Dataset is composed of 123,743 custody periods relating to 123,573 unique A-Numbers.

IV. Summary of Findings

Question 1. How long is a UAC typically detained by ORR before the first step-up occurs? I found that the average length of time to the first step-up was 67.3 days.[12] I also found that increasing lengths of custody are associated with higher percentage of custody periods with step-ups.

Question 2. How is step-up associated with detention length before reunification? The average time to reunification was higher for custody periods with step-ups (i.e., average of 183.8 days) than custody periods without step-ups (i.e., average of 52.6 days).

Question 3. How is placement type associated with detention length before reunification? I found that among the custody periods without step-ups, the average time to reunification was higher for custody periods that included a stint at a therapeutic group home (i.e. average of 184.6 days) compared to custody periods that took place only in shelters (i.e. average of 52.9 days). I also found that among custody periods that included step-ups, the average times to reunification increased in this order: staff secure (i.e., average of 176.5 days); secure (i.e. average of 185.9 days); residential treatment center (i.e., average of 236.3 days); therapeutic staff secure (i.e., average of 246.3 days); and out-of-network facilities (i.e., average of 327.2 days).

Question 4. How does the prevalence of reunification vary by length of detention among UACs who reunified, and how does the prevalence of voluntary departure vary by length of detention among UACs who elected voluntary departure? Among the custody periods resulting in reunification, I found that increasing detention length is generally associated with a lower

[12] All references to "average" in this report refer to mean values. Wherever relevant, I also provided median values in the appendix section.

percentage of reunifications (i.e., only 28.53% of these custody periods resulted in reunification on or after 61 days, whereas 71.47% of these custody periods resulted in reunification on or before 60 days). In contrast, among custody periods resulting in voluntary departure, increasing detention length is generally associated with a higher percentage of voluntary-departure discharges (i.e., 94.68% of these custody periods resulted in voluntary departure on or after 61 days, whereas only 5.32% of these custody periods resulted in voluntary departure on or before 60 days).

Question 5. How is placement type associated with whether or not UACs will reunify or elect voluntary departure? I found that the reunification rate is higher for custody periods that took place only in shelters (92.97%) compared to custody periods that included a stint at a residential treatment center (71.58%), therapeutic group home (53.33%), staff secure (47.76%), therapeutic staff secure (43.48%), secure (41.74%), and out-of-network facility (25.00%). In contrast, the percentage of voluntary departures is higher for custody periods that included a stint at out-of-network facility (31.25%), therapeutic group home (26.67%), therapeutic staff secure (21.74%), staff secure (10.30%), secure (6.96%), and a residential treatment center (5.26%), compared to custody periods that took place only in shelters (1.10%).

V. Analysis[13]

A. Question 1. How long is a UAC typically detained by ORR before the first step-up occurs?

For Question 1, I was asked to restrict the Clean Dataset to include only those custody periods that have an initial placement at a shelter.[14] I did not restrict this analysis to any particular type of discharge. This restricted sample is composed of 109,803 custody periods relating to 109,708 unique A-Numbers.

Of the 578 custody periods (pertaining to 575 unique A-Numbers) that included step-ups, the average length of time to the first step-up was 67.3 days, and the maximum time to the first step-up was 318 days.

[13] Because the questions presented ask that I restrict the Clean Dataset in various ways to provide the average lengths of time to reunification or discharge, I would like to note that for the Clean Dataset, the average time to discharge regardless of discharge type was 56.4 days, and the maximum time to discharge regardless of discharge type was 834 days.

[14] This analysis, therefore, does not include instances where a UAC was initially placed in a more restrictive facility upon referral to ORR.

Figure 2 below shows the percentage of custody periods that included step-ups within each range of custody lengths.[15]

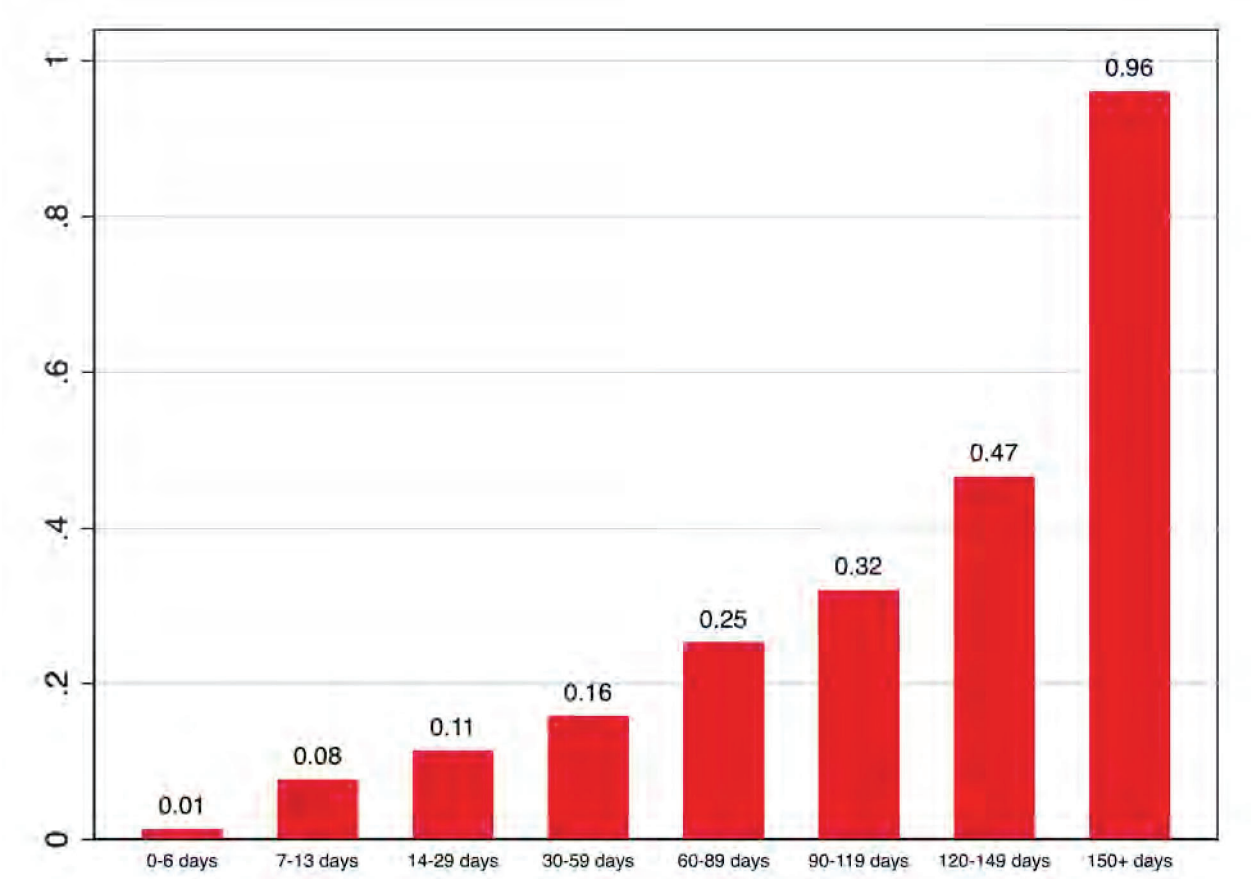

Figure 2. Percentages of custody periods that included a step-up, by length of custody.

[15] The range of custody lengths used in Figure 2 (e.g., 0-6 days, 7-13 days, 14-29 days, 30-59 days, etc.) was provided by Plaintiffs' counsel.

Table 1 below provides more detailed information on the custody periods that included step-ups. The first row of Table 1 shows that 15 of the 109,803 custody periods that lasted at least 0-6 days included step-ups between day 0 and day 6 (inclusive). The last row of the table shows that 59 of the 6,140 custody periods that lasted at least 150+ days included step-ups on or after day 150.[16]

Length of custody	# of custody periods	# of step-ups	% of custody periods including a step-up
0-6 days	109,803	15	0.01%
7-13 days	108,766	84	0.08%
14-29 days	101,500	116	0.11%
30-59 days	71,252	113	0.16%
60-89 days	34,338	87	0.25%
90-119 days	17,759	57	0.32%
120-149 days	10,076	47	0.47%
150+ days	6,140	59	0.96%

Table 1. Percentages of custody periods that included a step-up, by length of custody.

In summary, based on the data I have reviewed, increasing lengths of custody are associated with higher percentage of custody periods with step-ups.

B. Question 2. How is step-up associated with detention length before reunification?

For Question 2, I was asked to restrict the Clean Dataset to include only those custody periods that have a final discharge type of individual-sponsor reunification (as opposed to voluntary departures, removal orders, age outs, runaways, reunifications with program/facility, or other discharge types included in the Clean Dataset), regardless of whether there was a step-up. This restricted sample is composed of 114,589 custody periods relating to 114,544 unique A-Numbers.

I was also asked to compare the average times to reunification for custody periods that ended in reunification and did not include step-ups with custody periods that ended in reunification and did include step-ups.

[16] The last range of custody, 150+ days, includes the maximum custody length in this analytic sample, which is 813 days. This custody period ended in an individual-sponsor reunification.

Table 2 below shows the average length of detention before reunification by custody periods with and without step-ups. Further analysis of the time to reunification for custody periods with and without step-ups can be found in Appendix D.

Less Restrictive (No Step-Ups) versus More Restrictive (Step-Ups)	Average (days)
No Step-ups	52.6
Step-ups	183.8

Table 2. Average days to reunification, with and without step-ups.

In summary, the average time to reunification is higher for custody periods with step-ups (i.e., average of 183.8 days) than custody periods without step-ups (i.e., average of 52.6 days).

C. Question 3. How is placement type associated with detention length before reunification?

For Question 3, I was asked to apply the same restrictions to the Clean Data set as Question 2, and therefore the restricted sample remained the same: 114,589 custody periods relating to 114,544 unique A-Numbers.

I was also asked to compare the average times to reunification for custody periods without step-ups that included only shelter placements, custody periods without step-ups that included a stint at a therapeutic group home, and custody periods with step-ups that included stints at each of the more restrictive facility types.[17]

[17] The placement types that include step-ups are not mutually exclusive. For example, a custody period with a stint at a secure facility can also have a stint at a residential treatment center.

Table 3 below shows the average days to reunification for each placement type. Further analysis of the time to reunification by placement type is provided in Appendix E.

Placement type	Average (days)
Only shelter placements, no step-ups	52.9
Stint at a staff secure facility	176.5
Stint at a therapeutic group home, no step-ups	184.6
Stint at a secure facility	185.9
Stint at a residential treatment center	236.3
Stint at a therapeutic staff secure facility	246.3
Stint at an out-of-network facility	327.2

Table 3. Days to reunification by placement type.

In summary, among the placement types without step-ups, the average times to reunification are higher for custody periods that include a stint at a therapeutic group home (i.e., average of 184.6 days) compared to custody periods that took place only in shelters (i.e., average of 52.9 days). Among custody periods that included step-ups, the average times to reunification increase in this order: staff secure (i.e., average of 176.5 days); secure (i.e., average of 185.9 days); residential treatment center (i.e., average of 236.3 days); therapeutic staff secure (i.e., average of 246.3 days); and out-of-network facilities (i.e., average of 327.2 days).

D. Question 4. How does the prevalence of reunification vary by length of detention among UACs who reunified, and how does the prevalence of voluntary departure vary by length of detention among UACs who elected voluntary departure?

For Question 4, since discharge type data was not provided by the government for July 2018, I excluded 4,334 custody periods that ended in a July 2018 discharge. Therefore, the restricted sample for this question is composed of 119,409 custody periods relating to 119,255 unique A-Numbers.

Table 5 below shows the percentage of custody periods for each placement type that ended in these varying discharge types.

Discharge Type	Only shelter placements, no step-ups	Stint at a therapeutic group home, no step-ups	Stint at a staff secure facility	Stint at a secure facility	Stint at a residential treatment center	Stint at a therapeutic staff secure facility	Stint at an out-of-network facility
Reunified	92.97%	53.33%	47.76%	41.74%	71.58%	43.48%	25.00%
Voluntary Departure	1.10%	26.67%	10.30%	6.96%	5.26%	21.74%	31.25%
Removal Order	0.03%	0.00%	5.67%	6.52%	0.00%	0.00%	0.00%
Age Out / Redetermination	4.57%	13.33%	22.54%	32.61%	8.42%	8.70%	12.50%
Reunified (Program / Facility)	0.82%	0.00%	3.43%	3.48%	10.53%	17.39%	12.50%
Other	0.52%	6.67%	10.30%	8.70%	4.21%	8.70%	18.75%
# of custody periods	**104,846**	**15**	**670**	**230**	**95**	**23**	**16**

Table 5. Discharge type by placement type.

In summary, among the placement types without step-ups, the percentage of reunifications are higher for custody periods that took place only in shelters (92.97%) compared to custody periods that include a stint at a therapeutic group home (53.33%). In addition, the percentage of reunification was higher for custody periods that took place only in shelters (92.97%) compared to custody periods that included a stint at a residential treatment center (71.58%), therapeutic group home (53.33%), staff secure (47.76%), therapeutic staff secure (43.48%), secure (41.74%), and out-of-network facility (25.00%).

In contrast, the percentage of voluntary departures by placement type not involving a step-up shows a higher percentage of voluntary departures for custody periods that included a stint at a therapeutic group home (26.67%) compared to custody periods that took place only in shelters (1.10%). In addition, the percentage of voluntary departures was higher for custody periods that included a stint at out-of-network facility (31.25%), therapeutic group home (26.67%), therapeutic staff secure (21.74%), staff secure (10.30%), secure (6.96%), and a residential treatment center (5.26%), compared to the small percentage of voluntary departures for custody periods that took place only in shelters (1.10%).

June 16, 2020

Emily Ryo

Emily Ryo, JD., PhD.

Appendix D. Time to reunification for custody periods with and without step ups

Custody periods that ended in reunification and did not include step-ups

Of the 114,133 custody periods that ended in reunification and did not include step-ups, the average time to reunification was 52.6 days, the median time to reunification was 39 days, and the maximum time to reunification was 813 days.[24]

Custody periods that ended in reunification and included step-ups

Of the 456 custody periods that ended in reunification and included step-ups, the average time to reunification was 183.8 days, the median time to reunification was 163.5 days, and the maximum time to reunification was 611 days.

Like Table 2, Figure 3 shows the average length of detention before reunification by custody periods with and without step-ups.

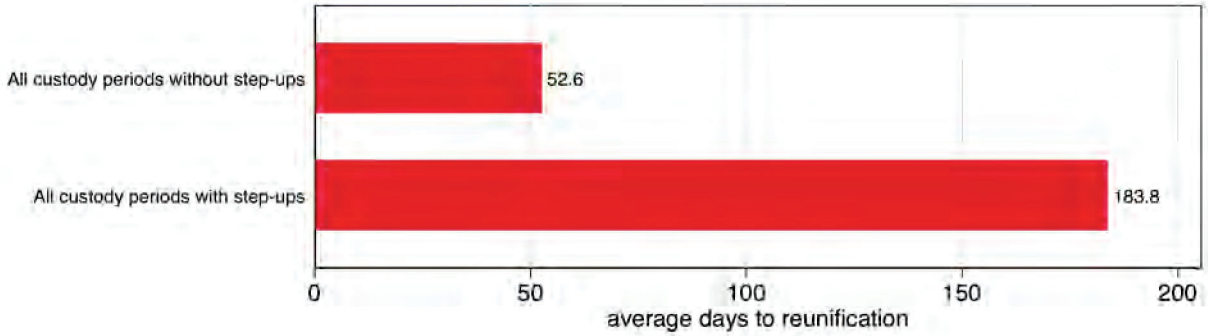

Figure 3. Average days to reunification, with and without step-ups.

[24] The child with the maximum custody period prior to reunification spent time at a long-term foster care placement.

Appendix E. Time to reunification by placement type

Custody periods that ended in reunification, did not include step-ups, and included only shelter placements

Of the 101,163 custody periods that ended in reunification, did not include step-ups, and included only shelter placements, the average time to reunification was 52.9 days, the median time to reunification was 40 days, and the maximum time to reunification was 738 days.

Custody periods that ended in reunification, did not include step-ups, and included a stint at a therapeutic group home

Of the 8 custody periods that ended in reunification, did not include step-ups, and included a stint at a therapeutic group home, the average time to reunification was 184.6 days, the median time to reunification was 168.5 days, and the maximum time to reunification was 353 days.

Custody periods that ended in reunification, included step-ups, and included a stint at a staff secure facility

Of the 354 custody periods that ended in reunification, included step-ups, and included a stint at a staff secure facility, the average time to reunification was 176.5 days, the median time to reunification was 157 days, and the maximum time to reunification was 611 days.

Custody periods that ended in reunification, included step-ups, and included a stint at a secure facility

Of the 106 custody periods that ended in reunification, included step-ups, and included a stint at a secure facility, the average time to reunification was 185.9 days, the median time to reunification was 173.5 days, and the maximum time to reunification was 498 days.

Custody periods that ended in reunification, included step-ups, and included a stint at a residential treatment center

Of the 73 custody periods that ended in reunification, included step-ups, and included a stint at a residential treatment center, the average time to reunification was 236.3 days, the median time to reunification was 211 days, and the maximum time to reunification was 551 days.

Custody periods that ended in reunification, included step-ups, and included a stint at a therapeutic staff secure facility

Of the 12 custody periods that ended in reunification, included step-ups, and included a stint at a therapeutic staff secure facility, the average time to reunification was 246.3 days, the median time to reunification was 256.5 days, and the maximum time to reunification was 451 days.

Custody periods that ended in reunification, included step-ups, and included a stint at an out-of-network facility

Of the 4 custody periods that ended in reunification, included step-ups, and included a stint at an out-of-network facility, the average time to reunification was 327.2 days, the median time to reunification was 378 days, and the maximum time to reunification was 422 days.

Figure 4 below illustrates the average days to reunification for each placement type using the data described above and in Table 3.

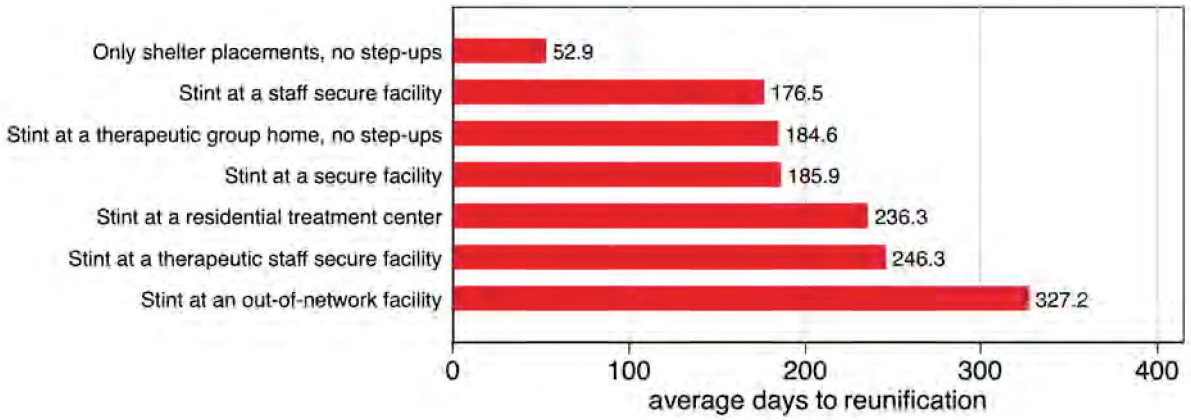

Figure 4. Average days to reunification, by placement type.