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Office of Refugee Resettlement
Administration for Children and Families
Department of Health & Human Services

**Re: FR Doc. 2020-29276; Comments in Response to Proposed
Rulemaking: Administration and Oversight Instruments**

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Ayuda appreciates the opportunity to provide the following comments in response to the Notice of Proposed Rulemaking regarding procedures for information collection instruments, published on January 6, 2021. *See* FR Doc. 2020-29276. Ayuda opposes certain aspects of the proposed revisions, and supports others. For the reasons detailed in the comments that follow, Ayuda urges the Department of Health and Human Services (HHS) to provide clarification and make changes to several of its proposal forms.

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Ayuda is a 501(c)(3) organization that provides legal, social and language access services to low-income immigrant community members in Virginia, Maryland, and the District of Columbia. For over forty-five years, we have served tens of thousands of immigrants through our legal services program. Ayuda's immigration legal services program represents children, including extremely young children and adolescents, who are currently in ORR custody and children who have been released from ORR custody throughout Northern Virginia, Washington D.C., and Maryland's D.C. suburbs. In addition to representing children in immigration proceedings, Ayuda attorneys frequently represent children who have been released from ORR custody in state court matters related to custody and guardianship. In addition to the legal services that Ayuda offers, our social services program provides counseling and comprehensive case management services to hundreds of immigrant victims of violence each year, including many children who have been released from ORR custody. Our language access program further provides specialized interpretation and translation services to individuals who are non-English speakers and/or deaf or hard-of-hearing, including children in ORR custody and who have been released from ORR custody.

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Ayuda therefore has a strong interest in the proposed changes to the administrative forms proposed by ORR, particularly in the areas of privacy and the criminalization of children. We offer the following comments to ensure HHS' continued ability to provide for children's welfare and well-being, and we urge HHS to remain committed to that exclusive mandate rather than carrying out law enforcement activities. Due to capacity constraints, Ayuda is

commenting only on certain provisions of the proposed forms. A lack of comment in this document by Ayuda should not be interpreted as support or lack of objection to other elements of the proposed forms or proposed forms themselves but instead of a limitation on our ability to provide a fully detailed comment on this proposal due to other constraints on our time, including not only our obligations to our ongoing clients with active and demanding cases but also the effects of the pandemic and the need for multiple staff members who work with children to be away from work as a result of the pandemic in the time period leading up to the deadline for submission of this comment.

I. Proposed forms A-9; A-10A; A-10B (SIR); A-10C (SA/SIR) would involve extensive recording and reporting of alleged gang or cartel involvement and criminal activity by unaccompanied children and lack safeguards against false allegations and error.

a. ORR’s allegations of gang involvement and past or current criminal activity are historically unreliable and raise similar concerns to the use of gang databases across the country.

i. SIRs based on initial intake information

ORR has a history of incorrectly labeling children as dangerous based on inaccurate allegations of gang involvement, past criminal activity, or criminalizing behavior that is typical for a traumatized child in federal custody. Ayuda has represented several clients over the years who have faced unsubstantiated allegations of gang-related activity or gang involvement. Ayuda is concerned that such unsubstantiated allegations have increased the traumas our clients endure in pursuing the immigration relief to which they are entitled and sometimes render the clients’ best possible form of relief out of reach. Our clients have frequently faced allegations that are spurious at best, including allegations that appear to be based on little, if anything, more than our clients’ race or ethnicity or the other adolescents with whom our clients may voluntarily or involuntarily associate in ORR custody or elsewhere.

It remains unclear what the required threshold is for an individual to be identified as gang- or cartel-affiliated. ORR does not define gang-affiliation or cartel-affiliation (or how to determine whether something is gang- or cartel-related) in its Guide to Terms.¹ There is also no definition of gang or cartel membership or gang or cartel association in immigration statutes.² In fact, neither law enforcement nor scholars agree on a uniform definition of a “gang”.³

We are particularly concerned also about the role that “admissions” by our clients may play in initial arrests and interviews. Remembering that those affected by these forms can be very young children or adolescents, that they are often survivors of trauma, that they have often had traumatic interactions with law enforcement and other figures of authority in their countries of origin, and that our clients may have only the most limited understandings of their rights at this stage of the proceedings (and may not yet have counsel), we are concerned about children being

¹ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Guide to Terms* (Mar. 3, 2021), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms>.

² See 8 U.S.C. § 1101 (Supp. 2014) (providing definitions).

³ 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.”).

asked questions without basic procedural protections, such as Miranda advisals, that lead to “admissions” that our clients may not understand or intend, and criminal and/or immigration consequences far beyond our clients’ understanding at the moment of interview. We have also had clients placed in “secure” facilities based on such information, increasing trauma to our clients, isolation, and often risk to our clients while detained from other individuals in the facilities.

Miranda warnings are required in civil investigations that *may* result in criminal prosecutions.⁴ In the broader immigration context, while Miranda warnings may be discussed in greater detail in separate comments responding to revisions to the proposed intake forms). In Ayuda’s experience, disclosures and observations made during the intake process that relate to gangs, cartels, or criminal histories are recorded both in the intake forms and significant incident reports (“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.) The intake includes subjective assessments of whether tattoos, clothing, art, or other personal items are gang- or cartel-related. Typically, it relies primarily on information children report themselves in addition to the more limited information provided by ICE, 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.⁵ For the same reasons explained above, ORR must provide Miranda advisals prior to eliciting potentially incriminating information from children. If it does not do so, information gathered in the intake interview related to criminal history, gang-involvement, and cartel-involvement must not be memorialized, recorded, or reported.

ii. SIRs based on events or disclosures that occur in ORR custody

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.” Labeling an incident as gang related may perpetuate false information about the child (see above). For example, if a child discloses that he or she is fleeing from forced gang involvement, subsequent behavior in ORR custody may be designated as gang-related regardless of whether that is accurate. The threshold for what conduct necessitates a formal incident report is left to the discretion of ORR’s care provider staff, resulting in children being threatened with write-ups for all kinds of common behaviors.⁶

ORR’s overall emphasis on recording and reporting gang- or cartel-involvement likewise 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-

⁴ 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).

⁵ See, *Joseph H. v. California*, 137 S.Ct. 34 (2016), Br. Of *Amici Curiae* Juvenile Law Center and the Center on Wrongful Convictions of Youth in Support of Petitioner, available at <https://www.scotusblog.com/wp-content/uploads/2016/04/15-1086-JLC-Amicus-Brief.pdf>.

⁶ See, e.g. John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in The U.S.*, NPR (Feb. 13, 2019), <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u->.

provider staff member or therapist.⁷ 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.⁸ Ayuda's clients in ORR custody or released from ORR custody have almost always survived extraordinary trauma. For their own health and survival, it is imperative that children in ORR custody are able to trust the adults, including therapists and other individuals entrusted with their care.

The high-stakes consequences of gang allegations beyond what happens in ORR custody is even more concerning. There is little or no oversight about what does and does not get labeled gang-, cartel-, or crime-related, combined with a mandate to report any and every allegation of gang-related activity to ICE and HSI.⁹ This mandate is reflected in each proposed SIR form under the FFS Reporting section. Nor is there any way for a child to challenge an allegation of gang- or cartel-involvement. At a minimum, ORR should make clear that untested allegations of gang- or cartel-affiliation are not reportable “gang-related activity” within the meaning of Policy Guide Section 5.8.5

b. 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

SIR forms' new labels identifying children's behavior as gang- or cartel-related, or criminal results in four major harms to children: (i) children get transferred to more secure facilities; (ii) it interferes with family reunification and unnecessarily and/or unjustifiably delays or prevents family reunification; (iii) children are subjected to prolonged detention; and (iv) gang-, cartel-, and criminal allegations against children undermine their immigration cases.

i. Children are inappropriately be placed in more restrictive settings

While in ORR custody, ORR must place children in the least restrictive setting in their best interests.¹⁰ No child may be placed in a secure detention facility unless ORR determines the minor “poses a danger to self or others or has been charged with having committed a criminal

⁷ 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.”)

⁸ UNHCR, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*, available at, <https://www.unhcr.org/56fc266f4.html>.

⁹ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 5*, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-5#5.8.5> (FFS must email the SIR to the ICE/HSI Tip Line within one business day of receiving the SIR for any “gang-related activity”).

¹⁰ Trafficking Victims Protection Reauthorization Act of 2008 (“TVPPRA”), 8 U.S.C. § 1232(c)(2)(A) (The federal government must ensure that children are “promptly placed in the least restrictive setting that is in the best interest of the child”).

offense.”¹¹ ORR places children in staff-secure facilities if a child “[h]as reported gang involvement or displays gang affiliation while in care [or] [h]as self-disclosed violent criminal history or gang involvement prior to placement in ORR custody that requires further assessment.”¹² In the past, children have been labeled as gang members and placed into staff-secure or secure facilities after confiding in ORR therapists about their previous exposure to deadly gang violence.¹³ Although ORR no longer relies on unverified and error-ridden self-disclosures for placing children in secure facilities, it continues to use them to place children in staff-secure facilities.

In addition, ORR still places children in secure settings based on self-disclosures of “violent criminal history”. The proposed SIR forms now contain sections to designate and categorize children’s behavior as “criminal history”. Pursuant to section 1.2.4 of the UAC Policy Guide,¹⁴ ORR considers unaccompanied children’s self-disclosures of “violent criminal history” requiring further assessment as a factor in evaluating whether the child will be placed in a secure facility because he or she poses a danger to self or others. In addition to the intake forms, the proposed SIR forms serve as the instruments that would identify and designate these disclosures as “violent criminal history” requiring assessment. In addition, SIRs that identify and designate disclosures and behavior in ORR custody as criminal have a cumulative effect when used to determine whether a child’s in-custody behavior is “a pattern or practice of criminal activity.” Evaluating whether in-custody behavior warrants transfer to a secure facility depends heavily on this “pattern and practice” evaluation.¹⁵ These designations and categorizations will cause children to be inappropriately placed in staff-secure and secure placements, with the concomitant delays to reunification and harms to their immigration cases that come with those placements. (See below.)

ORR itself agrees that detaining children is detrimental to their welfare. Detaining children, especially in staff-secure and secure settings, causes profound and negative impacts on their welfare and development.¹⁶

Nonetheless, the proposed forms invite ORR to perpetuate unverified gang or cartel allegations against the children in its care and to characterize children’s past experiences as criminal history.

¹¹ The Flores Settlement Agreement, *Flores v. Reno*, 507 U.S. 292, 316 (1993), ¶¶ 6, 19, 21, 23; 8 U.S.C. § 1232(C)(2)(A).

¹² Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1.2.4* (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.4>.

¹³ 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.”)

¹⁴ Elsewhere in this document, Ayuda refers to children or “UCs” (“Unaccompanied children”) rather than using the statutory term “UAC” due to the dehumanizing nature of the term “UAC.” However, where referenced a U.S. Government Sources that uses the formal UAC designation, Ayuda continues to use the term UAC for purposes of clarity and consistency.

¹⁵ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1.2.4* (Jan. 30, 2015).

¹⁶ See, Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), <http://www.justicepolicy.org/research/1978>.

This is likely to contribute to the transfer of those children to more restrictive or jail-like settings. In addition to being harmful to children's psychological and physical wellbeing, and to their healthy development, transferring children to more restrictive placements may further delay reunification and compromise their ability to secure long-term immigration relief.

ii. Children's access to immigration relief may be undermined

Gang allegations increase the chance that immigrant youth will be denied immigration benefits and deported.³⁸ 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. ORR discloses all gang-tagged SIRs to DHS per the ORR UAC Policy Guide.¹⁷ 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.¹⁸ In Ayuda's experience, DHS *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 in ORR's care but actively harms the children ORR accuses.

Gang allegations may also be used to deny DACA renewal, U-visas, or other adjustment of status applications before USCIS.¹⁹ If a child has reported gang affiliation, judges will likely opt to remove that child rather than grant him or her voluntary departure, a discretionary form of relief.²⁰ 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.²¹

The rise of gang allegations within the immigration context has been met with intense criticism about information integrity.²² Cases involving gang allegations have challenged the lack of due

¹⁷ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 5.8.4* (Mar. 3, 2021), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5#5.8.4>

¹⁸ STUCK WITH SUSPICION https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf (Pg. 14-16)

¹⁹ 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.

²⁰ K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-trial Detention*, 23 St. Thomas L. Rev. 620 (2011); 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).

²¹ 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

²² E.g., Aviva Stahl, *How Immigrants Get Deported for Alleged Gang Involvement*, VICE (Aug. 12, 2016 10:02 AM), https://www.vice.com/en_us/article/yvedev/how-immigrants-get-deported-for-alleged-gang-involvement; Ali Winston, *Marked for Life: U.S. Government Using Gang Databases to Deport Undocumented Immigrants*, INTERCEPT (Aug. 11, 2016, 10:34 AM), <https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport-undocumented-immigrants/>; Ali Winston, *Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members*, INTERCEPT (Feb. 17, 2017, 6:12 PM), <https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/>.

consideration of the reliability or veracity of the suspicions [used to deny immigration benefits].²³

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. Further, they are very 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 and they are less likely to succeed than if they appear in person.²⁴ Additionally, detained cases move more quickly than cases for non-detained immigrants, which can be harmful to a child's case, forcing them to move forward while detained rather than with the support of a caring adult and an attorney after release.

The responsibility of caring for unaccompanied immigrant children was specifically placed under an agency that had no responsibility for enforcing immigration laws or working to remove immigrant children from the United States. But the proposed SIRs focus on collecting 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.²⁵ 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.

c. The proposed changes to all event and SIR forms focusing on criminal history and gang- and cartel-involvement raise serious due process concerns

For many of the reasons explained above, the proposed modifications to ORR's administrative and oversight information collection instruments (hereafter "forms") 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

²³ First Amended Petition for Writ of Habeas Corpus & Class Action Complaint for Injunctive and Declaratory Relief at 1, 10-11, 17-18, *Gomez v. Session*, No. 3:17-cv-03615-VC (N.D. Cal. Aug. 11, 2017) (discussing false claims); Jennifer Medina, *Gang Databases Criticized for Denying Due Process May Be Used for Deportations*, N.Y. TIMES (Jan. 10, 2017, 9:10 PM), https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html?pagewanted=all&_r=0; Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM), <http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html>.

²⁴ Erica Bryant, *Unaccompanied Children Suffer as Hearings are Sped Up, Switched to Video During COVID-19 Crisis*, Vera Institute of Justice (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 Center 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/597ab5f3beba0a625aaf45/t/5e4d5c0cc48abe2cc9bd102a/1582128140439/YOUNG+Center+VTC+Report_Updated+January+2020.pdf.

²⁵ See e.g., 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, p. 11 (2015)

incident report, significant incident report, sexual assault significant incident report, and program-level event report forms are designations that can result in the deprivation of children and their sponsors fundamental rights to liberty and family unity.²⁶

These proposed forms fail to provide notice to a child in custody or their adult caregiver/sponsor or legal representative that they are identified as being gang- or cartel-affiliated, fail to ensure the reasoning behind the designation is well documented with the evidence used to make the determination²⁷, and fail to provide a child or their representative any opportunity to challenge the designation²⁸.

Worse, without any of these protections and with a very high risk of error, these SIRs are required to be sent to DHS (and in some cases DOJ), where they will have hugely harmful effects on multiple aspects of the child's life. When subjected to the *Mathews* due process analysis, there are clear violations here.²⁹ Children's liberty and family interests are implicated. There is an extremely high risk of error, as explained above. And there appears to be little benefit to the government or public interest, particularly given the high risk of error. Like being placed on a "no fly" list, ORR's forms would brand children as gang- or cartel-affiliated or as criminals, and share that label far and wide in a way that would deprive them of their fundamental rights.³⁰

To comply with the law, ORR 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. 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 change a child's placement.³¹ Ayuda is concerned about the unevenness of information inherent in a situation which such serious allegations about a child are not shared with the child or sponsor (or counsel) prior to any use of that allegation for adverse purposes. In addition, Ayuda is concerned that there is not an adequate process in place to challenge any allegations or designations in the forms.

II. ORR should not criminalize complex child behavior, particularly given the trauma histories of the majority of the children it cares for.

²⁶ See *J.E.C.M. v. Lloyd* 352 F.Supp.3d 559 (E.D.Va. 2018); see also, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, (I)(2) (The United Nations Rules for Children Deprived of their Liberty further express that "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 cases."); UN Convention on Rights of the Child, Article 9, (The UN Convention on the Rights of Children state that "a child 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).

²⁷ While Ayuda notes that the form contains a small "If yes, explain" box, it does require any documentary evidence nor does it provide any guidance on standards for documenting and making such a determination.

²⁸ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied*, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied>

²⁹ *Mathews*, 424 U.S. at 335; *Mullane*, 339 U.S. 306.

³⁰ See, e.g., *Elhady*, 2019 WL 4194545 (holding that lack of criteria for inclusion on a terrorist watch list contributed to a violation of procedural due process).

³¹ If safety requires an immediate change in placement, this opportunity must be provided promptly following the transfer.

The majority of children entering ORR custody are from the Northern Triangle of Central America, and have experienced severe trauma before coming to the United States.³² Often, they have recently experienced or witnessed violence at least once in their home countries, and commonly long-lasting or chronic violence or neglect.³³ Many of them also experience traumatic events on the journey to the United States.³⁴ 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.³⁵ The United Nations refugee agency has found that the majority of children coming to the southern border merit protection under international law.³⁶ All of this creates an essential backdrop to understanding the psychological needs and the behaviors of children in ORR custody.

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

The forms recording events and SIRs fail to take into account any kind of trauma-informed understanding of child behavior or communication. Viewing these forms, it appears that gang allegations are made and used with no youth-specific safeguards. Furthermore, although the forms record “criminal history”, most child behaviors are not, in fact, criminal. 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, and BIA case law in *Matter of Devison-Charles*.³⁷

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.³⁸ The SIR forms listing children as victims or perpetrators inappropriately and misleadingly categorize child behavior.³⁹ Studies have illustrated how the immigration agency has wrongfully conflated gang and immigration enforcement, calling Latino boys gang members in immigration proceedings without evidentiary support.⁴⁰ The form’s emphasis on recording and reporting gang- and cartel-involvement and criminal history furthers the growing and ugly discourse equating immigrant children with criminals.⁴¹

³² UNHCR, *Children on the Run*, <https://www.unhcr.org/56fc266f4.html>.

³³ *Id.*

³⁴ *Id.*

³⁵ 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/>

³⁶ UNHCR, *Children on the Run*, <https://www.unhcr.org/56fc266f4.html>.

³⁷ Philip Desgranges, New York Civil Liberties Union, *Trump Is Locking Up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation*, Aug. 2, 2017; Liz Robbins, N.Y. Times, *Teenagers' Arrests Are Unconstitutional*, A.C.L.U. Lawsuit Says, Aug. 11, 2017.

³⁸ 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).

³⁹ See Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020)

⁴⁰ N.Y. Imm. Coalition & CUNY Sch. Of Law, *Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers* (2018), available at 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

⁴¹ 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); Hlass,

Instead, the forms should be restructured to use a more nuanced, child-centric framing of events. Ayuda uses child-friendly versions of our own forms and documents to serve children in ORR custody. We recognize, as do all providers of legal services to children in ORR custody (and to children more generally), that we must cater our documents and information to children's unique capabilities and strengths. We also realize that children who are survivors of trauma often require special accommodations. ORR should realize the same. Specifically, Ayuda suggest that ORR remove the "perpetrator" designation from the forms. 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. Surely ORR has the resources 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 might be called in a criminal investigation. 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.

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

The extensive alleging, recording, and reporting gang or cartel allegations inherent to the proposed SIR forms will be necessarily, and almost exclusively, applied to children of color. People of color, including youth, are disproportionately negatively impacted by their race in educational, juvenile justice, and immigration settings.⁴² Children of color are not afforded the protections ordinarily understood to attach to children, both in context of juvenile and immigration proceedings.⁴³ This is all the more true for those who do not speak English.⁴⁴ Mark Morgan's comments about his ability to unequivocally identify future gang members simply by looking at children in immigration custody is just a disturbingly public expression of the pernicious racism that underlies our immigration system.⁴⁵ Both domestic and international scholarship has long criticized gang taskforce initiatives as a cause of [extrajudicial killings](#), [police corruption](#), and an [ineffective public safety tool](#). In fact, U.S. incarceration and

The School to Deportation Pipeline, supra (examining how gang allegations against immigrant youth work to push young people into a school-to-deportation pipeline).

⁴² See e.g., LAJC, *Decriminalizing Childhood: Ending School-Based Arrest for Disorderly Conduct*, Oct. 2019, <https://www.justice4all.org/wp-content/uploads/2019/10/LAJC-DC-policy-brief-FINAL.pdf>; Kristen Weir, *Policing in Black & White* (Dec. 2016), <https://www.apa.org/monitor/2016/12/cover-policing>; Emily Ryo, *Predicting Danger in Immigration Courts*, 44 Law & Social Inquiry 227, 245 (2019).

⁴³ See, Nat'l Inst. For Bldg. Cmty. Tr. & Justice, *Implicit Bias*, <https://trustandjustice.org/resources/intervention/implicit-bias>; Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officers with Caution*, 44 Pepp. L. Rev. 245, 293-294 (2017); rla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 Cath. U.L. Rev. 921, 949 (2012).

⁴⁴ See Anastasia Coppersmith, *Lost in Translation: Persons with Limited English Proficiency and Police Interaction in the United States*, 10 N. Ill. U. L. Rev. 1, 14 (2018).

⁴⁵ Ted Hesson, *Trump's Pick for ICE Director: I Can Tell Which Migrant Children will Become Gang Members by Looking into Their Eyes*, POLITICO (May 16, 2019), <https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570> ("Mark Morgan, the White House choice to lead [ICE] ... said ... 'I've been to detention facilities where I've walked up to these individuals that are so-called minors, 17 or under ... I've looked at them and I've looked at their eyes ... and I've said that is a soon-to-be MS-13 gang member. It's unequivocal.'").

deportation policies have proven to be “not only failed strategies for combating gang violence” but also key generators of gang violence in Central America.⁴⁶ History also shows us, that despite this scholarship, politicians continue to vilify youth of color in order to justify pro-incarceration and pro-deportation policies.⁴⁷

ORR’s emphasis and focus on gang- and cartel-involvement and on criminal history only serves to promote and preserve racial inequality in the United States and its severe impact on the children who have only just arrived.

III. Privacy and Third Party Reporting

The proposed forms contain fields related to children’s criminal history and real or perceived involvement in gang activity. It is unclear if ORR considers these forms to be subject to state and federal laws governing the protection of children’s information and privacy. Children’s information and privacy is protected broadly under numerous state and federal laws.⁴⁸

Legislatures have chosen to restrict access to children’s records in this manner in recognition of the inherent vulnerability of children and related policy concerns. Protecting children’s information and privacy promotes rehabilitation and removes barriers to seeking employment, housing, and other opportunities.⁴⁹ Additionally, 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.”⁵⁰ In recognition of these longstanding norms and policies, ORR should ensure that the information collected on the proposed forms are adequately safeguarded and comply with state and federal laws governing the protection of children’s health and criminal information.

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 Virginia, for example, juvenile confidentiality laws have long protected juvenile information arising from certain proceedings, including juvenile delinquency.⁵¹ Any agencies or individuals not statutorily authorized to review a child’s file must obtain a court order to do so.⁵² Children’s law enforcement records are likewise restricted, and a court order must be obtained for most

⁴⁶ See Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 Case W. Res. 993, 998 (2016).

⁴⁷ See Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 Case W. Res. 993, 998 (2016); The Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Sep. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/>; Carrie Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. St. Thomas L.J. 532, 555 (2017); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 Am. Crim. L. Rev. 105, 110 (2012).

⁴⁸ See, e.g., 5 U.S.C. § 552(a); 20 U.S.C. § 1232g; Health Insurance Portability and Accountability Act, H.R. 3103, 104th Cong. (1996); CA WIC.

⁴⁹ Riya Saha et al., *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*, 6 (2014)

⁵⁰ *In re Gault*, 387 U.S. 1, 60 (1967) (J. Black concurring) (“The juvenile court planners envisaged a system that would practically immunize juveniles from ‘punishment’ for ‘crimes’ in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions.”).

⁵¹ VA Code Ann. § 16.1-305

⁵² *Id.*

outside agencies or personnel to access the record.⁵³ A violation of the juvenile confidentiality provisions is a class 3 misdemeanor.⁵⁴

Although the “Collaborators’ Data Entry Window” restricts read/write access to the UC 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. See ORR Policy 5.8.5 (care providers must report arrests to FOJC, and FFS have to report gang related activities to ICE/HSI Tip line). Therefore, the restrictions that apply to accessing UC 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. Thus, in order to promote rehabilitation and align with child welfare principles, 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.

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 *preserves the confidentiality of client information and protects the records from unauthorized use or disclosure.*”⁵⁵ The ORR website states, “HHS does not release information about individual children or their sponsors that could compromise the child’s location or identity.”⁵⁶ The website also states, “HHS has strong policies in place to ensure the confidentiality of [UCs] personal information.”⁵⁷ ORR’s promises reflect the *Flores* Agreement’s provision that the child has “a reasonable right to privacy.”⁵⁸ 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 forms should indicate that the child’s ORR file is separate from the child’s “A 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 DOJ.

IV. Reporting to law-enforcement (DOJ/FBI/Local Law Enforcement) and ICE impermissibly turns 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 remove the responsibility for safeguarding children’s welfare from the law-enforcement focused

⁵³ VA Code Ann. § 16.1-301

⁵⁴ VA Code Ann. § 16.1-309

⁵⁵ Flores Settlement Agreement, Ex. 1 at ¶ E (emphasis added).

⁵⁶ Office of Refugee Resettlement, *Health and Safety*, <https://www.acf.hhs.gov/orr/about/ucs/health-and-safety> (last visited Feb. 19, 2021) (citing to the text under “Privacy” heading).

⁵⁷ Office of Refugee Resettlement, *Health and Safety*, <https://www.acf.hhs.gov/orr/about/ucs/health-and-safety> (last visited Feb. 19, 2021) (citing to the text under “Privacy” heading).

⁵⁸ *Flores* Settlement Agreement, 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.”).

DHS.⁵⁹ The proposed event and SIR forms 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 attached to these forms through the UAC Policy Guide Section 5 reveal that through these forms, ORR is little more than an arm of DHS, and specifically ICE and HSI. According to an ICE-ORR memoranda, DHS will train ORR staff on how to identify MS-13 and other gang colors and signs, how to report suspected gang affiliation, and become integrated into local anti-gang task forces.⁶⁰ 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 forms are all the more concerning when reviewed in conjunction with the parallel notices of proposed forms to elicit and record information from children that may be self-incriminating without any protections that would normally accompany such law-enforcement activities.

a. Notice to Children for Flores Visits

Flores counsel has the right to request to meet with any child in HHS custody. Although a child may decline to meet with *Flores* counsel, they need not affirmatively request a meeting. To the extent the proposed form suggests *Flores* counsel may meet only with children who affirmatively ask to meet with *Flores* counsel, it is inaccurate.

b. Authorization for Release of Records

i. The restrictions of release of records indicated on the form violate children and their sponsor's 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 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, including ways any concerns can be mitigated to allow children's representatives to obtain some or all of the records they request in order to adequately advocate for them. 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 current proposed form 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 likely unlawful. Prompt access to such information is essential to affording children notice of decisions being made about them and the basis for those decisions. They are

⁵⁹ See Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199 (2020)

⁶⁰ Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020)

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 its 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 halls or psychiatric facilities. The commenting parties are aware of no legal authority, and the proposed rule references none, for withholding such evidence. On the contrary, this blanket restriction is a blatant violation of procedural due process rights for children and their sponsors.

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.⁶¹ When individuals, including children in ORR custody, request their records from the federal government, including ORR, FOIA broad access possible regardless of immigration status.⁶² 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. Specifically, under FOIA, "each agency . . . shall make available for public inspection in an electronic format . . . copies of all records, regardless of form or format."⁶³ FOIA grants a government agency 20 days in which to decide whether to comply with a FOIA request and notify the requestor of the agencies "determination and the reasons therefor[e]."⁶⁴ Likewise, HHS should respond to the records request within 20 days, unless "unusual circumstances" exist and require an extended deadline.⁶⁵

Ayuda has direct experience both experiencing difficulties in obtaining a child's ORR file and in planning to make sure that a child we temporarily represent in ORR custody has a complete file with ORR and will later be able to access that file as needed. It is our experience that there is general little, if any, hesitation to use a child's ORR file *against* the child. ORR, as an agency charged with ensuring the wellbeing of children in its care, must ensure the child themselves, and their agents (authorized family members, attorneys, etc.) have access to *their own* file.

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 UC case file information are outlined on ORR's website. A requesting party, including a child in ORR custody, 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).⁶⁶ However, these instructions do not provide guidance about how a child

⁶¹ U.S. Department of Homeland Security, *Privacy Impact Assessment for the FOIA Immigration Records System (FIRST)*, (Mar. 20, 2019), at 1. <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-first-march2019.pdf> 0.pdf.

⁶² U.S. Department of Homeland Security, *Privacy Impact Assessment for the FOIA Immigration Records System (FIRST)*, (Mar. 20, 2019), at 1, 25 <https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-first-march2019.pdf> 0.pdf.

⁶³ 5 U.S.C. Section 552(a)(2)(D).

⁶⁴ 5 USC Section 552(a)(6)(A)(i)(I).

⁶⁵ See 5 USC Section 552(a)(6)(B).

⁶⁶ Office of Refugee Resettlement, *Requests for UAC Case File Information*, (April 14, 2014) <https://www.acf.hhs.gov/orr/policy-guidance/requests-uac-case-file-information>.

would request their own case file information *while in custody*.⁶⁷ 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.

ii. Ayuda suggests the following specific changes to the form

Based on Ayuda's practice representing individual unaccompanied children, both in ORR custody and post-release, we suggest adding the following under Section E.

- 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.

Generally, Ayuda commends 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 UC transfer, placement, and release without compromising children's and sponsor's private and sensitive information.

However, ORR should clarify that this applies with equal force to all entities within DHS and DOJ. ORR should also clarify that UC information that ORR may share with outside agencies is limited to basic, directory-type information (name, address, age) and 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.

Additionally, ORR should not release children's information to a representative of a Federal/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/State government agency applies to all representatives from the Department of Homeland Security and the Department of Justice. 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 law enforcement activities against the children that are or have been in its care or against their caregivers.

⁶⁷ Office of Refugee Resettlement, *Requests for UAC Case File Information*, (April 14, 2014) <https://www.acf.hhs.gov/orr/policy-guidance/requests-uac-case-file-information>.

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.

Finally, Ayuda requests 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.

c. Notification of Concern (A-7)

Ayuda requests clarification about who completes form A-7. (E.g. a post-release service provider, case manager, staff operating the hotline, etc.).

In addition, this form 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.

Finally, this form 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. It is worrisome that perhaps the intended use of this document is to share individuals' personal information with law enforcement agencies. Ayuda believes that ORR does not have the authority to take children back into custody based on a notification of concern. For these reasons, Ayuda requests that ORR provide possible outcomes that may result from a Notification of Concern for children and for sponsors and caregivers.

d. SIR and Addendum (A-10A and A-10B (less serious events/no immediate threat))

The distinction between Form A-10A and A-10B is unclear, and is not clearly marked on either system-generated PDF of either form, notwithstanding the footer with the form number. What constitutes an immediate threat to safety/wellbeing and what requires an SIR but does not constitute such a threat? Ayuda urges 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.

Ayuda has seen our clients faulted for merely being present (including in a facility where our clients did not have free choice about their locations and/or associations) when other individuals were engaged in violence (even simple fights) or cases in which our clients in custody have been accused of gang-related activity for activity that our clients engaged in, such as body art, for purposes entirely unrelated to any gangs or violence.

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. Ayuda requests that the agency provide for clarification and comment a justification of why events predating a child's ORR custody should be included on such forms and for what purpose(s) information about pre-custody activities will be used. In addition, to the extent that the SIRs will include both pre- and during-custody events, Ayuda requests that the form be clarified in order to clearly indicate whether an event took place in custody or prior to custody.

The inclusion of criminal history on an SIR is inappropriate and confusing. It is 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, or simply to identify whether a child has ever had any contact with law enforcement or an accusation of gang activity.

In addition, the "criminal history" recording, if included in the form at all, should include an explanation of *how* that determination was made. This should include a required field for "Source of Information" 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 include how ORR obtained such document. This will provide accountability to ensure ORR is documenting not only the criminal information but also 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. 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.

Ayuda requests clarification about whether any video, audio, or photo footage will be archived in addition to being described through these forms.

e. Sexual Abuse SIR (SA/SIR A-10C)

- i. "Code of Conduct Violation" should not be included as a category that warrants the issuing of a SA/SIR**
- ii.**

First, Ayuda urges ORR to modify the title of this form, as it appears it may encompass behavior that does not meet the definition of sexual abuse.

"Sexual abuse" and "Sexual Abuse Significant Incident Report" are not defined in ORR's Guide to Terms.⁶⁸ However, sexual abuse is defined for ORR at 45 § C.F.R. 411.6 both for interactions between unaccompanied children in ORR custody and for interactions between staff and

⁶⁸ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Guide to Terms*, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms>.

unaccompanied children in ORR custody. For the purposes of this comment, we will refer to allegations against unaccompanied children of sexual abuse.⁶⁹

However, the UAC Policy Guide Section 4: Preventing, Detecting, and Responding to Sexual Abuse and Harassment, also defines sexual harassment and “inappropriate sexual behavior” as applied to children. These definitions are broad. “Inappropriate sexual behavior” is simply defined as “behavior that does not meet the definition of sexual abuse or sexual harassment but is sexual in nature,” without distinguishing whether the behavior is carried out by a child or adult. Ayuda requests that ORR clarify if inappropriate sexual behavior, as defined in the UAC Policy Guide, would be the subject of an SA/SIR. Further, it requests that ORR provide guidance as to 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? Further guidance and clarity is needed to protect children from being inappropriately accused of sexual abuse. 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 misbehavior.

Similarly, Ayuda strongly urges ORR to clarify that “code of conduct violation” as a category of behavior that could ever, alone, result in a sexual abuse SIR only applies to the “Staff Code of Conduct” in UAC Policy Guide Section 4.3.5 and 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 SA/SIR is both misleading and criminalizing with respect to the child accused, especially given the statutory definition of sexual abuse in this context.

Further, children and young adults are still developing their executive functioning skills.⁷⁰ They may be impulsive or engage in ill-advised behavior that while wrong, does not rise to the level of sexual abuse. As an example, following the statutory definition of sexual abuse as applied to ORR, 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 the statutory definition.⁷¹ It appears, however, that admittedly inappropriate child-like behavior could be treated as sexual abuse and reported as an SIR, which criminalizes and adultifies normal childhood behavior that children must learn to inhibit.

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

f. Program-Level Event Report and Addendum (A-10D)

⁶⁹ 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.

⁷⁰ See Harvard Ctr. on the Dev. 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; Ellen Barlow, *Under the Hood of the Adolescent Brain*, Harvard Center on the Developing Child (Oct. 17, 2014), <https://hms.harvard.edu/news/under-hood-adolescent-brain>.

⁷¹ 45 C.F.R. 411.6

Ayuda is unclear what the available “roles” are for any given individual involved in a program-level incident. This information was not provided in the sample updated forms or in the explanation of the forms in the NPRM.

In addition, if this form will be used to document group behavior by children (e.g. food fight, larger fight between multiple children, etc.), Ayuda would like information about how it will be used. Will it duplicate individual SIR information for any children involved? Will it be shared with law enforcement? Explanation is needed for how this form will be used in practice and guidelines for how and when to use it beyond the example provided (active shooter).

Sincerely,

A handwritten signature in blue ink that reads "Laurie Ball Cooper". The signature is written in a cursive, flowing style.

Laurie Ball Cooper
Legal Director, Ayuda