



March 5, 2021

Administration for Children and Families
Office of Planning, Research, and Evaluation (OPRE)
330 C Street SW
Washington, DC 20201
Attn: ACF, Reports Clearance Officer
Submitted via email to infocollection@acf.hhs.gov

**RE: FR Doc. 2020-29276, Comments in Response to
PROPOSED INFORMATION COLLECTION ACTIVITY;
ADMINISTRATION AND OVERSIGHT OF THE UNACCOMPANIED
ALIEN CHILDREN PROGRAM (OMB #0970-0547)**

The Florence Immigrant & Refugee Rights Project (“Florence Project”) submits these comments to strongly oppose certain aspects of the revisions. The Florence Project is particularly concerned with the harmful impact that the newly added questions regarding alleged gang or cartel involvement or criminal activity will have on the most vulnerable of unaccompanied children; and the restrictions to access to counsel imposed by the new Authorization for Release of Records. For the reasons detailed below, the Florence Project urges the Department of Health and Human Services (“HHS”) to seek additional feedback, especially from legal service providers working with unaccompanied children, and revise its proposed forms.

**I. THE FLORENCE PROJECT HAS A STRONG INTEREST AND IS
UNIQUELY POSITIONED TO COMMENT**

Because of its decades-long history providing legal services to detained unaccompanied children (“UAC” or “unaccompanied children”), the Florence Project is uniquely positioned to comment on these proposals. The Florence Project is a 501(c)(3) non-profit organization that provides free legal and social services to adults and unaccompanied children facing immigration removal proceedings in Arizona. In 2019, about 7,000 men, women, and unaccompanied children were detained and faced removal in Arizona on any given day. As the only 501(c)(3) non-profit organization in Arizona dedicated to providing free legal services to people in immigration detention, our vision is to ensure that every person facing removal proceedings has access to counsel, understands their rights under the law, and is treated fairly and humanely.

The Florence Project provides an array of legal services for unaccompanied children in Arizona, including age-appropriate legal orientations; role play where children act out immigration court; and direct representation of children before immigration court, the U.S. Citizenship and Immigration Services (“USCIS”), and local juvenile courts. It also has a robust *pro bono* representation program that includes referrals to local volunteer attorneys and continuous mentoring. The Florence Project has expertise providing trauma-informed legal services for unaccompanied children who have suffered trauma and/or violence. In addition, the Florence Project has a dedicated team of social workers who provide services to certain vulnerable detained unaccompanied children.

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II. THE COMMENTING PROCESS LACKED CLARITY AND TIME TO MEANINGFULLY REVIEW THE IMPACT THAT CHANGES WILL HAVE.

The Florence Project did not have the opportunity to meaningfully review all of the proposed changes to information collection. First, the Florence Project and its partners lacked timely clarity from the government about whether these proposed changes were subject to the regulatory freeze announced by the Biden-Harris administration through White House Chief of Staff Ronald A. Klain's memorandum titled "Regulatory Freeze Pending Review" announced on January 20, 2021. It was not until late February that the Florence Project learned from its partners that these proposed changes were not subject to the freeze, giving Florence Project staff less than two weeks to prepare comments. The proposed form changes here are also very similar to those found at 86 Fed. Reg. 1114-1115, resulting in further confusion as well as duplicative efforts. In addition, the Florence Project's capacity to respond to these changes have been cut by the numerous hours spent trying to mitigate and undue the unlawful actions of the Trump administration that continue to be litigated before several federal courts. We are also working to digest numerous other changes to immigration law and policy, including ICE's interim guidance and the Biden Administration's proposed comprehensive immigration reform bill. Finally, the COVID-19 pandemic has affected our work on the ground tremendously. Our staff struggles daily with increased workloads, fewer resources, and daily obstacles ranging from inability to communicate with our clients to court delays and closures.

These circumstances have made it very difficult to comment on all aspects of the proposed changes, and as a result, ORR should extend the existing comment period by at least another 60 days. ORR should also issue more clear and concise guidance as to the purpose of each of these proposed changes as well as the interaction of each proposed change with the other current proposals.

III. SIGNIFICANT INCIDENT REPORT AND ADDENDUM (FORMS A-10A, A-10B); AND SEXUAL ABUSE SIGNIFICANT INCIDENT REPORT (FORM A-10C)

The Florence Project strongly opposes changes to the forms which propose extensive recording and reporting of alleged gang or cartel crimes, gang or cartel activities, and gang or cartel affiliation. These changes will very likely result in false allegations and have harmful consequences for unaccompanied children. We urge HHS to retract them in their entirety.

In the Florence Project's experience, unreliable and unverified ORR documents, including Significant Incident Reports ("SIR" or "SIRs"), are already used against unaccompanied minors in a variety of ways that negatively impact their wellbeing. We are particularly concerned that these recordings will be rife with errors, and our clients will unjustly suffer the grave consequences and stigma that these gang and cartel labels carry. The addition of these questions will result in more unaccompanied children unnecessarily being placed at risk of being subject to unnecessary and detrimental prolonged detention in secure or staff secure facilities and will result in more adversarial proceedings before immigration court and/or USCIS. Children, represented or unrepresented, will have to defend themselves against these serious allegations.

The responsibility of caring for unaccompanied immigrant children was specifically placed under ORR because the agency has no responsibility for enforcing immigration laws or working to remove immigrant children from the United States. However, the proposed SIR's 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 prolonging children's detention in restrictive settings and placing children at higher risk of removal to dangerous places than it bears any reasonable relation to their protection and care.

In sum, HHS has not provided a reasonable justification for why the addition of these questions are necessary for carrying out its care of unaccompanied children, particularly given the significant potential for harm to those very children posed by the addition of these questions. A reasoned justification would need to take into consideration the very real negative impact that these allegations will have on a child's best interests, including their right to be placed in the least restrictive setting and apply for relief from removal.

1. Allowing ORR to author SIRs with these new categories during initial intake will only increase and perpetuate the already existing cases where immigrant children are punished for disclosing past harm.

ORR does not define gang-affiliation or cartel-affiliation. Despite the lack of definition or standard guidance¹ on how to apply these terms, ORR records, reports, and at times, shares information with Immigration and Customs Enforcement ("ICE") accusing children of being involved with gangs, cartels, or other criminal activity. In the Florence Project's experience reviewing unaccompanied children's ORR files, information about a child's affiliation to gangs or cartels and/or an arrest history may be based on information from a variety of sources. First, ORR relies on information from the Initial Placement Referral Form provided by CBP/ICE to make its placement decisions.² 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.³ ICE has misidentified immigrant youth as gang members for the purpose of deporting them.⁴ Information collected

¹ See OFFICE OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED § 1.2.4 (2015) [hereinafter "UAC Policy Guide"], available at <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms>; Also see 8 U.S.C. § 1101 (there is no definition in the immigration statutes). In fact, neither law enforcement nor scholars agree on a uniform definition of a "gang." National Youth Gang Survey Analysis, NAT'L GANG CTR., available at <https://www.nationalgangcenter.gov/Survey-Analysis> ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies.").

² National Center for Border Security and Immigration, University of Texas at El Paso, Unaccompanied Alien Children (UAC) Project, (Mar. 20, 2014), *9-10.

³ Press Release, U.S. Immigration & Customs Enf't, Operation Matador Nets 39 MS-13 Arrests in Last 30 days (Jun. 14, 2017), available at <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days>.

⁴ See, e.g., Dina Radtke, *ICE Is Wrongly Designating Immigrants as Gang Members to Deport Them*, SALON (May 7, 2018, 10:30 AM), available at https://www.salon.com/2018/05/07/ice-is-wrongly-designating-immigrants-as-gang-members-to-deport-them_partner/; Also See National Youth Gang Survey Analysis, NAT'L GANG CTR., available at <https://www.nationalgangcenter.gov/Survey-Analysis>.

by ICE is provided to ORR to use during the intake and placement process, despite its questionable reliability and the motives and objectives ICE has when recording and sharing this information.

ORR staff also conduct an intake assessment. In the Florence Project's experience, observations made during the intake process that relate to gang or cartel affiliation and/or arrest histories are recorded both in the intake forms and SIRs. More alarmingly, children are often not warned about how information provided in the interviews can be used against them; interviews are not consistently conducted in the child's best language, particularly for rare language speakers; children are not given access to counsel in the course of the interviews; children are not notified about these designations; and children do not have a reasonable opportunity to refute these allegations that ORR places into their files. Labeling children without giving them the opportunity to counter that label or communicate with counsel before the label is imposed is inappropriate and can have harmful consequences which are discussed below.

2. SIRs based on events or disclosures that occur during ORR custody can be equally as – or more – harming.

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. For example, if a child discloses that she/he/they 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 staff, resulting in children being threatened with write-ups for all kinds of common behaviors.

ORR's overall emphasis on recording and reporting gang or cartel involvement 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 clinician, without warning the child that these documents can be used against them in decisions regarding their reunification and/or negatively impact their immigration case. This is the case even when the information revealed by the child indicates that he or she was the victim of violence at the hands of those criminal organizations and not a perpetrator. 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. Using children's statements to trusted clinicians to create a permanent record that can be used against them is contrary to basic therapeutic practices or the child's best interest. For example,

Rolando (all names changed to protect privacy) was just 14 years old when he escaped his home country of El Salvador only to fall into the hands of corrupt coyotes who trafficked him on his journey to and during his first few days in the United States. He managed to escape his traffickers and was placed in the care of an ORR facility in

Analysis ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies.").

Arizona. Back in El Salvador, Rolando had had contact with an adult man who had ties to criminal activities. This man coerced Rolando to perform quick, non-violent errands and in exchange Rolando was given housing, food and clothing. Rolando didn't realize it at the time but he was being manipulated by this adult, and he innocently trusted him because he provided what Rolando needed to survive. Believing he could trust an ORR clinician and just having been the victim of trafficking, Rolando revealed these details, only to be labelled as a gang member via a Significant Incident Report ("SIR") and stepped up to a staff secure shelter in another state.

In studies of The School to Deportation Pipeline, researchers describe how a lack of uniform criteria and oversite- similar to that displayed in the ORR process - was found to exacerbate serious errors in tools used to identify gang affiliation.⁵ The broad and subjective criteria inevitably leads to misclassification and racial profiling of youth of color based on how they look.⁶ For example, school authorities have mislabeled students involved in physical fights or verbal altercations as gang members or classified them as gang related even though none of students were members of a gang.⁷

Youth from Latin America are particularly at risk for mislabeling because ORR staff rely almost exclusively on subjective criteria, such as the perception of gang-related appearance, and self-disclosure *by children in a restrictive setting* to make determinations on gang affiliation. In many cases, disclosures are made while the child is detained by law enforcement. ICE-ORR Memorandum directed DHS to train ORR staff on how to identify MS-13 gang colors and signs as a basis for making these determinations.⁸ That training has resulted in teens from Central America being mislabeled as gang members and erroneously held in ORR secure facilities.⁹

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 or cartel related, or crime-related, combined with a mandate to report any and every allegation of gang-related activity to ICE.¹⁰ This mandate is reflected in each proposed SIR form. Despite the deep flaws in how gang or cartel affiliation determinations are made and the dire consequences these determinations can have in a child's case, there is no way for a child to challenge an allegation of gang or cartel involvement.

⁵ Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 733 (2018).

⁶ *Id.*

⁷ Yvette Cabrera, *Troubled Pasts Force Hard Choices for Some Undocumented Immigrants*, VOICE OF OC (Feb. 28, 2016), available at <http://voiceofoc.org/2016/02/troubled-pasts-force-hard-choices-for-some-undocumented-immigrants>.

⁸ *Id.*

⁹ Alice Speri, *Federal Judge Frees Salvadoran Teen Accused of Gang Ties, Pens Lengthy Rebuke of His Detention by ICE*, INTERCEPT (Jun. 27, 2018), available at <https://theintercept.com/2018/06/27/federal-judge-frees-salvadoran-teen-ice-detention/>; Sarah Gonzalez, Undocumented Teens Say They're Falsely Accused Of Being In A Gang, NPR (Aug. 17, 2017).

¹⁰ ORR Policy Guide § 5.8.5 (Federal Field Specialist ["FFS"] must email the SIR to the ICE/HSI Tip Line within one business day of receiving the SIR for any "gang-related activity").

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

The SIR forms have new labels identifying children's behavior as gang or cartel related, or criminal, which results in three major harms to children:

- (a) inappropriately places children in more restrictive settings;
- (b) delays reunification, subjecting children to prolonged detention; and
- (c) affects their applications for relief from removal.

a. Children are inappropriately placed in more restrictive settings.

In the Florence Project's experience, ORR routinely uses SIRs to step up children into more secure facilities. Because of this common practice, the addition of these harmful and unverified gang and cartel labels is even more problematic.

While in ORR custody, children must be placed in the least restrictive setting that is in the child's best interest. 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 offense."¹¹ The proposed SIR forms now contain sections to designate and categorize children's behavior as "criminal history," even when the child has not been convicted of a crime or been adjudicated with juvenile delinquency. Pursuant to section 1.2.4 of the ORR UAC Policy Guide, 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 would now serve as instruments that would identify and designate certain 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 negative 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.¹² These designations and categorizations will cause children to be inappropriately placed in staff-secure and secure placements.

Detaining children, especially in staff-secure and secure settings, causes profound and negative impacts on their welfare and development.¹³ Nonetheless, the proposed forms invite ORR to perpetuate unverified gang or cartel allegations against the children in its care and to wrongly 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. As other organizations have pointed out, "ORR has admitted in legal proceedings that it places children in secure detention

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 ORR UAC Policy Guide, § 1.2.4.

¹³ 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), available at <http://www.justicepolicy.org/research/1978>.

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.”¹⁴

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.

- b. Children will be held in ORR custody for longer periods of time and be at much higher risk of being held in ICE detention facilities after turning 18.

ORR is required to ensure that children are reunified in a timely and safe manner from ORR custody to sponsors, most commonly parents or close relatives, who can care for them pending their immigration proceedings.¹⁵ Family unity, or keeping children with family members, is a key factor in determining the best interest of children in custody.¹⁶ However, ORR will not reunify a child from custody if it determines that the child poses a threat to the safety of himself or others.¹⁷ Any SIR, but especially an SIR that has an allegation that a child is involved in gang or cartel related activities, makes it significantly harder to ensure reunification. This is highly concerning especially because of the unreliability of these types of allegations or designations on the proposed SIR forms, as explained above.

A second implication of marking an SIR as gang-related is that ORR then adds additional requirements and barriers to reunification. In the Florence Project’s experience, unaccompanied children with multiple SIRs are already subject to multiple transfers around the U.S. between shelter, secure, and staff-secure facilities, further prolonging their reunification. For example,

Antonio (all names changed to protect privacy) was brought to the U.S. as a toddler where he grew up with his parents, siblings, and grandmother. He lived the majority of life with his violent father who would beat his mother in front of him and his siblings. Antonio would escape to his grandmother’s house to avoid his father’s wrath. Antonio was detained for over a year in ORR custody and subject to multiple transfers between numerous levels of placement due to behavior and/or juvenile delinquency history stemming his turbulent upbringing.

¹⁴ Philip Desgranges, Et Al., New York Civil Liberties Union, Letter “RE: ORR’s Practice of Placing Minors in highly Restrictive Settings Based on Untested Allegations of Gang Membership,” (Jul. 27, 2017), available at https://www.nyclu.org/sites/default/files/field_documents/nyclu-letter-to-orr.pdf.

¹⁵ Flores Settlement Agreement, at ¶ 14-18.

¹⁶ State Statutes, *Determining the Best Interests of the Child*, Child Welfare Information Gateway, Children’s Bureau (Mar. 2016). available at https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition.

¹⁷ See UAC Policy Guide, § 2.7.4 (“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”).

The Florence Project is very concerned that these questions will only increase stories like Antonio's, subjecting children to many months of restrictive custody and separation from their loved ones.

In addition, children who turn 18 years old will be at higher risk of being denied release on their own recognizance and instead will be detained in ICE detention facilities, which are often in remote areas. Under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA of 2008"), when an unaccompanied child turns 18, DHS "shall consider placement in the least restrictive setting available after taking account the alien's danger to self, danger to the community, and risk of flight."¹⁸ The Florence Project regularly works with children who arrive to the U.S. close to their 18th birthdays and who have viable sponsors ready and able to care for them. For these teenagers, these unverified labels could be the deciding factor in determining whether they will be released to their sponsor or be held in an ICE detention facility.¹⁹

Unaccompanied minors, including those who turn 18, should be under the care of their sponsors, who are often family members. Children are more likely to experience physical and emotional well-being, safety, and stability when they are living with and being cared for by family members.²⁰ Family unity is particularly important for immigrant children, who are more likely to be disadvantaged as they navigate a new country, language, and culture.²¹ Recording and reporting incidents as gang- or cartel-related and recording and reporting children's alleged criminal histories on SIRs compromises a child's best interests instead of safeguarding them as ORR is mandated to do.

- c. These allegations will inappropriately make children's immigration cases more adversarial.

Gang/cartel and/or criminal allegations increase the chance that immigrant youth will be denied immigration benefits and deported. The Florence Project is particularly concerned about the allegations of gang or cartel activity because such allegations become a permanent part of a child's ORR file, which typically remains available to DHS and follows them as part of their file through the culmination of immigration proceedings. ORR discloses all gang-tagged SIRs

¹⁸ 8 U.S.C. § 1232(c)(2)(B).

¹⁹ It is also unclear how these labels will continue to affect unaccompanied children who age-out of ORR custody with ICE's recently released guidance which seems to indicate that children 16 and older can intentionally participate in organized criminal gang or transnational criminal activities. See Tae Johnson, U.S. Immigration & Customs Enf't, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, Page 5, (Feb. 18, 2021). The Florence Project strongly condemns HHS's gang/cartel questions and ICE's unsubstantiated cut-off at age 16 that will have harmful consequences for teenage children who are fleeing gang violence.

²⁰ See *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families*, The Annie E. Casey Foundation 2 (2012), available at <https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>.

²¹ See G.A. Res. 44/25, Convention on the Rights of the Child, art. 8. (Nov. 20, 1989) ("States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference"); *Id.* at preamble ("Convinced that the family, as a fundamental group of society and the natural environment for the growth and well-being of all its members and particularly, children...").

to DHS per the ORR UAC Policy Guide.²² Once the gang activity is reported, Homeland Security Investigations (“HSI”) places gang memoranda in individuals’ A-files. 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 in their removal proceedings.

Gang allegations may also be used to deny DACA renewal, U-visas, or other adjustment of status applications before USCIS.²³ 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.²⁴ These allegations often have an outsized impact in immigration court as immigration judges will often accept the allegations as fact without recognizing issues of unreliability underlying gang identification protocols.²⁵ In addition, Florence Project unaccompanied minor clients who have been subjected to these gang-tags have experienced significant delays in the adjudication of their asylum applications, leaving them for months on end in limbo.

The rise of gang allegations within the immigration context has been met with intense criticism about information integrity.²⁶ Cases involving gang allegations have challenged the lack of due consideration of the reliability or veracity of the suspicions [used to deny immigration benefits].²⁷ Nonetheless, the proposed revisions to these forms will further exacerbate and institutionalize the many existing flaws in allowing unreliable gang affiliation allegations in legal proceedings.

²² ORR UAC Policy Guide, § 5.8.5

²³ N.Y. Civil Liberties Union & N.Y. Immigration Coal., *Stuck With Suspicion: How Vague Gang Allegations Impact Relief And Bond For Immigrant New Yorkers* (2019), available at www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf.

²⁴ 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 (2015) p. 22.

²⁵ Hlass, Immigrant Legal Res. Ctr., *supra*, at 5.

²⁶ E.g., Aviva Stahl, *How Immigrants Get Deported for Alleged Gang Involvement*, VICE (Aug. 12, 2016 10:02 AM), available at 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), available at <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), available at <https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/>.

²⁷ 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), available at <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), available at <http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-story.html>.

These additional questions are also likely to result in prolonged custody (detention), which will further harm children’s immigration cases. This is not only because such allegations can delay or prevent timely reunification processes. For example, when a child in Arizona is stepped up to a secure facility, the child has to be transferred out of state because Arizona does not have any secure facilities. The Florence Project has worked with multiple children who have been subjected to these transfers, and our staff has seen first-hand the harm caused by the disruption of legal services and break of bonds that children have formed with their attorney(s). The child is forced to start a new relationship with another legal service provider, if any exists in the receiving location, and/or start their legal case in the new jurisdiction (new immigration court, new USCIS office, and/or new juvenile court). In certain cases, transfers can result in children even being barred from being able to obtain relief from deportation because of lack of access to juvenile court proceedings²⁸ in connection with special immigrant juvenile status applications.

Thus, 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.

4. The Florence Project urges ORR to take a child-centric approach rather than criminalizing complex child behavior.

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. Often, they have recently experienced or witnessed violence at least once in their home countries and commonly have experienced long-lasting or chronic violence or neglect. Many of them also endure traumatic events on the journey to the United States. This will be particularly true for children arriving in the United States after fleeing not only their home countries but also the horrific conditions in the migrant camps caused by the Migration Protection Protocols (MPP) program.²⁹ All of this creates an essential backdrop to understanding the psychological needs and behaviors of children in ORR custody.

SIR forms should take a child-centric approach and structure that accounts for child development and past trauma. The forms recording events and SIRs fail to consider 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*.³⁰

²⁸ The Florence Project has had multiple conversations with stakeholders about lack of access to juvenile court in certain states. These juvenile court proceedings are crucial for unaccompanied immigrant children who wish to obtain necessary predicate findings for their special immigrant juvenile status application before USCIS. See 8 U.S.C. § 1101(a)(27)(J).

²⁹ “Like I’m Drowning:” *Children and Families Sent to Harm by the US ‘Remain in Mexico’ Program*, Human Rights Watch, (Jan. 6, 2021), available at <https://www.hrw.org/report/2021/01/06/like-im-drowning/children-and-families-sent-harm-us-remain-mexico-program#>.

³⁰ *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000).

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.³¹ The SIR forms listing children as victims or perpetrators inappropriately and misleadingly categorize child behavior.³² 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.³³ The form’s emphasis on recording and reporting gang- and cartel-involvement and criminal history furthers the growing and ugly discourse equating immigrants with criminals.³⁴

The Florence Project urges ORR to remove the “perpetrator” designation from the forms. Instead, the forms should be restructured to use a more nuanced, child-centric framing of events. 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 immigrants 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.

5. 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 of gang or cartel allegations inherent to the proposed SIR forms will be necessarily, and almost exclusively, applied to children of color. Youth of color are disproportionately negatively impacted by their race in both the juvenile justice and immigration systems.³⁵ Children of color are not afforded the protections ordinarily

³¹ 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).

³² See Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020).

³³ New York Immigration Coalition & Cuny School Of Law Immigrant And Non-Citizen Rights Clinic, *Swept Up In The Sweep: The Impact Of Gang Allegations Of Immigrant New Yorkers* (2018), available at https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf; Laila L. Hlass & Rachel Prandini, Immigration 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.

³⁴ 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, *The School to Deportation Pipeline*, *supra* (examining how gang allegations against immigrant youth work to push young people into a school-to-deportation pipeline).

³⁵ See e.g., LAJC, *Decriminalizing Childhood: Ending School-Based Arrest for Disorderly Conduct*, Oct. 2019, available at <https://www.justice4all.org/wp-content/uploads/2019/10/LAJC-DC-policy-brief-FINAL.pdf>; Kristen Weir, *Policing in Black & White* (Dec. 2016), available

understood to attach to children, both in context of juvenile and immigration proceedings.³⁶ 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.³⁷ Both domestic and international scholarship have 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 deportation policies have proven to be “not only failed strategies for combating gang violence” but also key generators of gang violence in Central American.³⁸ 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.³⁹ 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.

6. Reporting to law-enforcement (DOJ/FBI/local) 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 the former INS precisely to remove the responsibility for safeguarding immigrant children’s welfare from the law-enforcement agency tasked with their arrest and removal (a role now held by DHS). The proposed event and SIR forms place ORR 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 ORR 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 memorandum, 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.⁴⁰ The mandatory rapid reporting to DHS, and in some cases DOJ and the FBI, of criminal histories and gang and cartel

at <https://www.apa.org/monitor/2016/12/cover-policing>; Emily Ryo, *Predicting Danger in Immigration Courts*, 44 Law & Social Inquiry 227, 245 (2019).

³⁶ See, Nat’l Inst. For Bldg. Cnty. Tr. & Justice, *Implicit Bias*, available at <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); Karla Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 Cath. U.L. Rev. 921, 949 (2012).

³⁷ 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), available at <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.’”).

³⁸ See Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 Case W. Res. 993, 998 (2016).

³⁹ *Id.*; 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).

⁴⁰ Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020).

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.

IV. AUTHORIZATION OF RELEASE OF RECORDS (FORM A-5)

As a preliminary matter, the Florence Project has simply not had time to identify all the potential impact this form will have on access, because of the lack of clarity in the commenting process as described *supra*, Part II. However, the Florence Project raises the concerns identified below.

- 1. We urge HHS to not incorporate Section G: “ORR-Funded Legal Service Provider Certification,” as it will inappropriately restrict Legal Service Providers, like the Florence Project, from providing certain legal services to unaccompanied children.**

The Florence Project regularly uses the Authorization of Release of Records form to request documents in the ORR file that are necessary to provide legal services to unaccompanied minors in a variety of matters, including matters that do not involve hearings or proceedings. The proposed certification will limit legal service providers (“LSPs”), like the Florence Project, by **requiring** a signature certifying that the LSP, including pro bono attorneys, are “representing” the child “before immigration court; in an ORR bond hearing other ORR adjudication related to placement in a restrictive setting or release from ORR custody; or, in another hearing or proceeding in which the child is a party.” We strongly urge HHS to retract this section.

This certification will severely restrict the services that we can provide and will result in unaccompanied children not being able to access counsel. It ignores the varying scope of services LSPs provide, depending on the child’s unique circumstances and how LSPs best advocate for the child in those circumstances. For example, LSPs may seek information in order to investigate an issue or advise the child whose reunification is pending outside of the LSPs’ jurisdiction. It might not be practical for the LSP or the immigration court for the attorney to enter representation because the child is in the process of reunifying; doing so would create unnecessary paperwork for the immigration court to process.

- 2. ORR has wide discretion to deny records to a child and their counsel under the broad categories of “for safety reasons” or “for other reasons, as necessary”**

The Florence Project is concerned that HHS is inappropriately giving ORR unfettered discretion to deny a request for records from a child, and their counsel, for any reason without any recourse for the denial. For a child’s legal representative, access to the child’s records is

often essential to advocate for the child’s interests. The Florence Project regularly serves children under 14 years of age, including children as young as months old. 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. The attorney should be allowed to address those concerns and be able to obtain some or all of the records they request in order to adequately advocate for them. In addition, HHS should also provide a mechanism by which children may seek administrative review of decisions to withhold their files, whether in whole or in part.

In addition, 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 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.

Finally, the Florence Project generally commends ORR’s 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 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 UAC 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.

V. ADDITIONAL COMMENTS ON SEXUAL ABUSE - SIGNIFICANT INCIDENT REPORT (“SA-SIR”) (FORM 10A-C)

“Sexual abuse” and “Sexual Abuse Significant Incident Report” are not defined in ORR’s Guide to Terms.⁸⁸ 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 unaccompanied children in ORR custody. For the purposes of this comment, we will refer to allegations against unaccompanied children of sexual abuse.⁸⁹ Sexual abuse by an unaccompanied child against another child is defined as follows:

Sexual abuse of a UC by another UC includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse:

- (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;
- (2) Contact between the mouth and the penis, vulva, or anus;
- (3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and
- (4) Any other 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.

However, the ORR 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. For example, Florence Project learned about the following inappropriate uses of SA-SIRs:

- ORR shelter staff threatened to write SA-SIRs (Form A-10C) for children who were smacking each other’s butts; and
- A child received a SA-SIR for drawing a penis.

These examples are very telling about how broadly inappropriate sexual behavior can be interpreted leading to inappropriate SA-SIRs.

The Florence Project asks that HHS clarifies if inappropriate sexual behavior, as defined in the UAC Policy Guide, would be the subject of a SA-SIR. Similarly, we strongly urge ORR to clarify that “code of conduct violation” as a category of behavior that could ever, alone, result in a SA-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.

VI. CONCLUSION

We urge HHS to reconsider the changes aforementioned because they will very likely have harmful consequences for the hundreds of unaccompanied immigrant children that we serve. We also ask that HHS seek additional feedback from organizations, like the Florence Project, that did not have time to meaningfully review the impact of these proposed changes.

Submitted on behalf of the Florence Immigrant & Refugee Rights Project
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