

March 6, 2021

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ACF/OPRE Certifying Officer
Administration for Children and Families
Office of Planning, Research and Evaluation (OPRE)
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Re: FR Doc. 2020-29276; Request for Comments in Response to Proposed Information Collection Activity: Administration and Oversight Instruments (OMB #0970-0547); [86 FR 545](#)

Dear Ms. Jones,

The Legal Aid Justice Center appreciates the opportunity to provide the following comments in response to the Notice of Proposed Information Collection Activity, published on January 6, 2021. *See* FR Doc. 2020-29276. The Legal Aid Justice Center (LAJC) opposes certain aspects of the proposed revisions, and supports others. For the reasons detailed in the comments that follow, LAJC urges the Department of Health and Human Services (HHS) to provide clarification and make changes to several of its proposal forms.

The Legal Aid Justice Center (LAJC) has provided legal representation for low-income individuals in Virginia since 1967. Our mission is to seek equal justice for all by solving client's legal problems, strengthening the voices of low-income communities, and rooting out the inequities that keep people in poverty. LAJC's Immigrant Advocacy Program supports low-income immigrants in their efforts to find justice and fair treatment. In addition to representing clients with individual legal issues, we promote systemic reforms to reduce the abuse and exploitation of immigrants, and advocate for state and local policies that promote integration and protect immigrants from overly aggressive immigration enforcement. Our work aims to end the mass detention and deportation of immigrants, with a special focus on child refugees fleeing violence and individuals and communities targeted for enforcement by overzealous federal immigration agents. LAJC combats family separation by working with children and families throughout the reunification process to ensure prompt reunification of children with their families. As class counsel in *J.E.C.M. et al., v. Stirrup et al.*, we also represent children who have been in the custody of the Office of Refugee Resettlement for sixty days or longer, and for whom a Category 1 or 2 sponsor has expressed a desire to sponsor the child. Through this work, LAJC works with families in the community who are potential sponsors of children in ORR custody and represents children who are in ORR custody.

LAJC also hosts the Antonin Scalia Law School Immigration and Litigation Clinic. Through the clinic, students represent immigrants in a range of cases, including children in ORR custody and children who have been released from ORR custody.

LAJC 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 comply with its sole mandate to provide for children's welfare and well-being, and not to carry out law-enforcement activities.

For the following reasons, we urge ORR not to implement the proposed information collection discussed below, to re-center child welfare of all children in ORR care at every level of its proposed regulatory changes, to remove itself completely from law-enforcement activities, including investigation and reporting, and to advance the rights and interests of unaccompanied children.

Sincerely,

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- I. The following proposed forms [A-9; A-10A; A-10B (SIR); A-10C (SA/SIR)], which propose extensive recording and reporting of alleged gang or cartel involvement and criminal activity by unaccompanied children, 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. LAJC has represented several children in cases seeking writs of habeas corpus, *Flores* bond hearings seeking release from custody, and *Saravia* bond hearings also seeking release from custody in which ORR’s reporting mechanisms indicated gang involvement and criminality that was exaggerated or entirely inaccurate.¹

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.² There is also no definition of gang or cartel membership or gang or cartel association in immigration statutes.³ In fact, neither law enforcement nor scholars agree on a uniform definition of a “gang”.⁴

Despite this lack of definition, standard, or guidance, ORR records, reports, and shares information accusing children of being involved with gangs, cartels, or other criminal activity. In LAJC’s experience reviewing unaccompanied children’s ORR files, this designation may be based on information from a number of sources. First, ORR relies on information from the Initial Placement Referral Form provided by CBP/ICE to make its placement decisions.⁵ 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.⁶ ICE frequently misidentifies immigrant youth as gang members for the

¹ See, e.g., *Beltran v. Cardall*, 222 F.Supp.3d 476 (E.D. Va. 2016); *Santos v. Smith*, 260 F. Supp.3d 598 (W.D. Va. 2017); *O.D.T.M. v. Lloyd*, 1:18-cv-524 (May 2018).

² 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>.

³ See 8 U.S.C. § 1101 (Supp. 2014) (providing definitions).

⁴ 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.”).

⁵ Nat’l Ctr. For Border Sec. & Immigration, Univ. of Tex. At El Paso, *Unaccompanied Alien Children (UAC) Project 9-10* (Mar. 20, 2014), <http://ncbsi.utep.edu/documents/UAC%20Project%20Site%20Visits/UTEP%20NCBSI%20Final%20Report%20March%2020%202014.pdf> [http://perma.cc/36YJ-G4XP].

⁶ Press Release, U.S. Immigration & Customs Enft, Operation Matador Nets 39 MS-13 Arrests in Last 30 days (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days>.

purpose of deporting them.⁷ For the past four years, official rhetoric about immigrant youth has been focused on identifying them as criminals and gang members, either overtly or using coded language.⁸

Information collected by ICE is provided to ORR to use during the intake and placement process, notwithstanding its questionable reliability and the motives and objectives ICE has when recording and sharing this information. In LAJC's experience, ORR has accepted these accusations from ICE as true without verification. LAJC's clients routinely report that these interviews take place within hours after they are apprehended by ICE, and often just hours after crossing the border. Children are exhausted, dehydrated, hungry, and afraid. Many of them have been exposed to extreme violence and loss, and are struggling with severe trauma symptoms. CBP facilities are not child-friendly spaces. To the contrary, children report being held in very cold holding cells with strangers and getting little food or water. This is the environment in which interviews take place prior to placement in ORR custody. All of these factors, together with the fear children feel when interrogated by law enforcement officers, makes the stories and details they recount frequently inaccurate. **The information collected during these interviews should never be the basis for any event, SIR, or placement or release decision.**

In addition, during initial arrests and interviews prior to being placed in ORR custody, children generally are asked questions that elicit incriminating information with no prior Miranda advisal that the information they divulge can result in criminal and/or immigration consequences, as well as impact their placement at ORR, including but not limited to placing them in a secure juvenile jail. The privilege against self-incrimination is not limited to the trial setting, but extends to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [a person] in future criminal proceedings."⁹ Miranda warnings are required in civil investigations that *may* result in criminal prosecutions.¹⁰ In the broader immigration context, while Miranda warnings may not be required in "booking exception" settings involving routine questions generally unlikely to elicit incriminating responses,¹¹ they do apply to booking questions designed to elicit incriminating responses.¹² Because of this, "[c]ivil as well as criminal

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

⁸ Celest Gomez et al., *The President's Intent: Preliminary Findings of a Critical Discourse Analysis of Trump's Speeches and Tweets from the Date of his Candidacy to Mid-September 2017* (2017), <https://www.thepresidentsintent.com/full-report/>.

⁹ *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*), 414 U.S. 70 (1973).

¹⁰ 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).

¹¹ *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

¹² See *United States v. Arellano-Banuelos*, 912 F.3d 862, 868 (5th Cir. 2019) (holding that an ICE Agent's questioning exceeded the scope of the routine booking exception when it went beyond basic biographical information to include inquiries into whether or not Arellano-Banuelos had been previously deported and whether he had received permission from the Attorney General to reenter the United States); *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (finding that in this case the routine booking questions were not subject to Miranda, while still

interrogation of in-custody defendants by INS investigators should generally be accompanied by the Miranda warnings.”¹³ Immigration officers’ statements that the interview was meant to obtain biographical information for a “routine, civil investigation” are irrelevant in light of the objective factors suggesting that the questions are likely to elicit an incriminating response.¹⁴

For these reasons, ORR must not rely or report on information collected in a manner that violates children’s rights against self-incrimination, whether that information was collected outside of ORR or by ORR staff or grantees. To the extent that the source of information regarding criminal history, gang-involvement, or cartel-involvement originated from interviews in which the child was not Mirandized, it should not be memorialized in an SIR of any kind or any other ORR child record, nor should it be shared with law enforcement. This ill-gotten information is fruit of the poisonous tree.

ORR staff also conduct an intake assessment (discussed in greater detail in separate comments responding to revisions to the proposed intake forms). In LAJC’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.¹⁵

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

recognizing that routine booking questions could be subject to Miranda if they are designed to elicit incriminating responses).

¹³ *United States v. Mata-Abundiz*, 717 F.2d 1277, 1279 (9th Cir. 1983).

¹⁴ *Id.* at 1278-79.

¹⁵ 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>.

discretion of ORR's care provider staff, resulting in children being threatened with write-ups for all kinds of common behaviors.¹⁶

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-provider staff member or therapist.¹⁷ 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.¹⁸ Nearly all allegations against LAJC's child clients originated in a child's revelation of experiences or fears to a therapist or other trusted adult staff member while in ORR custody. Additionally, in *every* instance in which LAJC's clients have been gang involved, their involvement was coerced, under duress, or both. No children have been formally accused of, charged with, or convicted of gang activity. Instead, they have volunteered information about what they have seen or done as victims of a ruthless strategy of targeting and forcibly recruiting children by different gangs or cartels in the child's home country. ORR should not view, identify, or treat these children as criminals or gang-members. Instead, ORR must be engaged in recognizing trauma, and helping children heal from and move on from their traumatic past experiences.

In other contexts outside of ORR, a similar lack of uniformity of criteria and oversight exacerbates the level of error in tools used to identify gang affiliation.¹⁹ The broad and subjective criteria inevitably leads to misclassification and racial profiling of youth of color based on how they look.²⁰ For example, school authorities have mislabeled students involved in physical fights or verbal altercations as gang members or classify them as gang related even though none of students were members of a gang.²¹

LAJC and others have repeatedly criticized ORR for conducting an entirely subjective process while operating within an opaque system without neutral oversight.¹² Youth from Latin America

¹⁶ 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->.

¹⁷ 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.")

¹⁸ 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>.

¹⁹ Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 733 (2018).

²⁰ *National Youth Gang Survey Analysis*, NAT'L GANG CTR., <https://www.nationalgangcenter.gov/Survey-Analysis> ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies."); Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 732 (2018).

²¹ Yvette Cabrera, *Troubled Past Force Hard Choices for Some Undocumented Immigrants*, VOICE OF OC (Feb. 28, 2016), <http://voiceofoc.org/2016/02/troubled-pasts-force-hard-choices-for-some-undocumented-immigrants>.

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.²² That training has resulted in teens from Central America being mislabeled as gang members and erroneously held in ORR secure facilities.²³

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.²⁴ 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

In many of LAJC’s cases in which a child was subjected to prolonged detention despite having an appropriate and willing sponsor, ORR refused to release a child because of alleged gang- or cartel-involvement *from which the child had fled*. Nonetheless, ORR spent countless resources further documenting and probing these allegations and the child’s experiences, without mirandizing them and from the stance of a law enforcement agency instead of a child protection agency. Unfortunately with these forms ORR continues in this harmful direction.

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.

²² See Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020)

²³ Alice Sperti, *Federal Judge Frees Salvadoran Teen Accused of Gang Ties, Pens Lengthy Rebuke of His Detention by ICE*, INTERCEPT (June 27, 2018), <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 (August 17, 2017), <https://www.npr.org/2017/08/17/544081085/teens-in-u-s-illegally-say-theyre-falsely-accused-of-being-in-a-gang>.

²⁴ 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”).)

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.²⁵ 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.”²⁶ 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.”²⁷ 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.²⁸ 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 LAJC’s experience with clients and reviewing ORR case files, staff-secure facilities are highly restrictive and frequently exacerbate children’s negative behavior leading to placement in a secure facility.

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, 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

²⁵ Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), 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”).

²⁶ 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).

²⁷ 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>.

²⁸ 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.”)

this “pattern and practice” evaluation.²⁹ 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.³⁰

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. 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 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.”³¹ Likewise, in LAJC’s experience, ORR conducts little if any inquiry into the veracity of allegations made by staff or other children in ORR facilities.

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. Family reunification may be unnecessarily or unjustifiably delayed

ORR is required to ensure that children are released 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.³² Family unity, or keeping children with family members, is a key factor in determining the best interest of children in custody.³³ However, ORR will not release a child from custody if it determines that the child poses a threat to the safety of himself or others.³⁴ This is true regardless of whether they have an appropriate sponsor, even if that sponsor is a parent.³⁵

²⁹ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1.2.4* (Jan. 30, 2015).

³⁰ 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>.

³¹ Letter from New York Civil Liberties Union to Scott Lloyd, Director, Off. of Refugee Resettlement, et al (July 27, 2017), https://www.nyclu.org/sites/default/files/field_documents/nyclu-letter-to-orr.pdf.

³² Flores Settlement Agreement, at ¶¶ 14-18.

³³ *State Statutes, Determining the Best Interests of the Child*, Child Welfare Information Gateway, Children’s Bureau (Mar. 2016) https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition.

³⁴ See Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 2.7.4*, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#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”)

³⁵ See *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017).

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 win release from custody. 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 LAJC's experience, ORR has required significantly more of sponsors of children who have an SIR that is marked as gang-related, including requiring a family to provide constant surveillance of the child regardless of age or enrolling the child in mental health services prior to release (which is often not possible to do for bureaucratic reasons). In many cases, there seems to be no way for a sponsor to prove their ability to care for a child that ORR has alleged to be gang-involved or cartel-involved through SIRs.

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.³⁶ Family unity is particular important for immigrant children, who are more likely to be disadvantaged in navigating a new country, language, and culture.³⁷ 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.

iii. Being placed in more restrictive settings and delays in family reunification lead to prolonged child detention

ORR data confirms LAJC's experience working with detained children. Children who receive SIRs in which they are accused of gang- or cartel-involvement or of having a criminal history remain in ORR custody for significantly longer than other children, regardless of the reliability of reporting or severity of the incidents. The National Center for Youth Law published a report analyzing recent data on release factors. The report showed that children detained in more

³⁶ See The Annie E. Casey Foundation, *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families* 2 (2012), <https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>.

³⁷ See United Nations High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interest of the Child* (May 2008), <http://www.unhcr.org/4566b16b2.pdf> ("unaccompanied and separated children require special attention in identifying their best interests, given the particular risks that they face."); see also United Nations High Commissioner for Refugees, *UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Feb. 1997), <https://www.unhcr.org/en-us/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html> ("Considering their vulnerability and special needs, it is essential that children's refugee status applications be given priority and that every effort be made to reach a decision promptly and fairly."); Nancy Landale et al., *The Living Arrangements of Children of Immigrants*, *NIH Public Access, Future Child* 1 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3241619/pdf/nihms-341452.pdf> ("Immigrant families face unique challenges as they adapt to their new country ... Mexican immigrant families [for example] face challenges with respect to assimilation because of low parental education, poverty, and language barriers, and because a relatively high share of parents are unauthorized.").

restrictive facilities remain in custody for prolonged periods of time, causing serious harm to children's well-being.³⁸

LAJC has represented multiple children who were ultimately released after being held for upwards of a year, or multiple years, because of ORR's allegations that the child had in the past been gang- or cartel- involved (usually based on the child's own forthcoming disclosures while explaining why they were fleeing their home country). These children's behavior always deteriorated as they spent more time in secure or staff-secure facilities, where they did not receive appropriate trauma-based mental health care (in part because ORR is not designed to provide long-term treatment because it is not supposed to be holding children for long periods of time), and where they were treated as the criminals they were fleeing from. These forms only increase the likelihood that ORR will unnecessarily and unlawfully place children in overly restrictive settings that are detrimental to their wellbeing.

iv. 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.³⁹ 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.⁴⁰ In LAJC'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.⁴¹ 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

³⁸ National Center for Youth Law, *Briefing: Child Welfare & Unaccompanied Children in Federal Immigration Custody* (Dec 2019), <https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf>

³⁹ 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>

⁴⁰ STUCK WITH SUSPICION https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf (Pg. 14-16)

⁴¹ 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.

relief.⁴² 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.⁴³

The rise of gang allegations within the immigration context has been met with intense criticism about information integrity.⁴⁴ Cases involving gang allegations have challenged the lack of due consideration of the reliability or veracity of the suspicions used to deny immigration benefits.⁴⁵

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.⁴⁶ 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.

⁴² 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).

⁴³ 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

⁴⁴ 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/>.

⁴⁵ 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>.

⁴⁶ 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>.

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.⁴⁷ 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 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.⁴⁸

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 determination⁴⁹, and fail to provide a child or their representative any opportunity to challenge the designation⁵⁰.

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.⁵¹ Children's liberty and family interests are implicated.

⁴⁷ 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)

⁴⁸ 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).

⁴⁹ While LAJC 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.

⁵⁰ Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied*, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied>

⁵¹ *Mathews*, 424 U.S. at 335; *Mullane*, 339 U.S. 306.

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.⁵²

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.⁵³ LAJC has serious concerns that all SIRs are not provided to children or their legal representatives pursuant to UAC Policy Guide Section 5.8.9, particularly in light of the significant impact they may have on a child’s fundamental and constitutional rights. If challenged, there must be a neutral adjudicator to evaluate the allegation based on the evidence presented by both the child (and any adult caregiver or legal representative) and the individual making the allegation.

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

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.⁵⁴ Often, they have recently experienced or witnessed violence at least once in their home countries, and commonly long-lasting or chronic violence or neglect.⁵⁵ Many of them also experience traumatic events on the journey to the United States.⁵⁶ 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.⁵⁷ The United Nations refugee agency has found that the majority of children coming to the southern border merit protection under international law.⁵⁸ 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

⁵² 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).

⁵³ If safety requires an immediate change in placement, this opportunity must be provided promptly following the transfer.

⁵⁴ UNHCR, *Children on the Run*, <https://www.unhcr.org/56fc266f4.html>.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 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/>

⁵⁸ UNHCR, *Children on the Run*, <https://www.unhcr.org/56fc266f4.html>.

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*.⁵⁹

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.⁶⁰ The SIR forms listing children as victims or perpetrators inappropriately and misleadingly categorize child behavior.⁶¹ 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.⁶² 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.⁶³

Instead, the forms should be restructured to use a more nuanced, child-centric framing of events. LAJC urges ORR to 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.

⁵⁹ 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.

⁶⁰ 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).

⁶¹ See Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020)

⁶² 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

⁶³ 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).

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.⁶⁴ Children of color are not afforded the protections ordinarily understood to attach to children, both in context of juvenile and immigration proceedings.⁶⁵ This is all the more true for those who do not speak English.⁶⁶ The conflating of criminality with immigration grows out of a system steeped with racism that has not been acknowledged or addressed.⁶⁷ 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.⁶⁸ 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 deportation policies have proven to be “not only failed strategies for combating gang violence” but also key generators of gang violence in

⁶⁴ 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).

⁶⁵ 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); Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 Cath. U.L. Rev. 921, 949 (2012); Ctr. For Child Law & Policy, *Red Practice Manual: Introduction and Chapter 1: Beginning or Restarting Work to Reduce Racial and Ethnic Disparities* 14-15 (2015), <http://www.cclp.org/wp-content/uploads/2016/06/Introduction-and-Chapter-1-Beginning-or-Restarting-Work-to-Reduce-Racial-and-Ethnic-Disparities.pdf> (“Black and Latinx youth confront particular hardships in the juvenile justice system, including overrepresentation, more severe treatment than white youth for similar offenses, unnecessary entry and entrenchment into the system, and overbroad antigang laws.”)

⁶⁶ 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).

⁶⁷ Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a ‘Post-Racial’ World*, 76 OHIO STATE L.J. 599, 608 (2015) (“[W]hile overt racism has played a role in its [crimmigration’s] development, structural inequality works to mask and entrench racism within the system as it allows for the continued racial disparities in a post-racial world—court decisions refuse to recognize it, society refuses to acknowledge it, and individuals can forcefully insist that they support the system as it stands because it is not based on race or racism.”).

⁶⁸ 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.’”).

Central America.⁶⁹ 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.⁷⁰

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 children, many whom 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.⁷¹ 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.⁷² 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."⁷³ 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 proceeding, including juvenile delinquency.⁷⁴ Any agencies or individuals

⁶⁹ See Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 Case W. Res. 993, 998 (2016).

⁷⁰ See Priscilla A. Ocen, *(E)racing Childhood: Examining The Racialized Construction of Childhood and Innocence*, 62 UCLA L. REV. 1586, 1594 (2015); 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).

⁷¹ 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.

⁷² Riya Saha et al., *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*, 6 (2014)

⁷³ *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.").

⁷⁴ VA Code Ann. § 16.1-305

not statutorily authorized to review a child's file must obtain a court order to do so.⁷⁵ Children's law enforcement records are likewise restricted, and a court order must be obtained for most outside agencies or personnel to access the record.⁷⁶ A violation of the juvenile confidentiality provisions is a class 3 misdemeanor.⁷⁷

Although the "Collaborators Data Entry Window" restricts read/write access to the UAC Path where this information is inputted, it does nothing to remove ORR's current policy requiring the reporting of the content of these forms (SIRs) to ICE. See ORR Policy 5.8.5 (care providers have to report arrests to FOJC, and FFS have to report gang related activities to ICE/HSI Tip line). Therefore the restrictions that apply to accessing UAC Path does 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.*"⁷⁸ The ORR website states, "HHS does not release information about individual children or their sponsors that could compromise the child's location or identity."⁷⁹ The website also states, "HHS has strong policies in place to ensure the confidentiality of [UACs] personal information."⁸⁰ ORR's promises reflect the *Flores* Agreement's provision that the child has "a reasonable right to privacy."⁸¹ 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 "Alien File," and the documents as well as the information in a child's ORR file must not be accessible by any entity within DHS or the DOJ.

⁷⁵ *Id.*

⁷⁶ VA Code Ann. § 16.1-301

⁷⁷ VA Code Ann. § 16.1-309

⁷⁸ Flores Settlement Agreement, Ex. 1 at ¶ E (emphasis added).

⁷⁹ 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).

⁸⁰ 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).

⁸¹ *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.").

Additionally, LAJC notes that Section V of the MOA establishing broad information-sharing with DHS remains active and has not been rescinded, in violation of law as outlined in the briefing and argument in *J.E.C.M. v. Stirrup*.

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 DHS.⁸² 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.⁸³ 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.⁸⁴

LAJC urges ORR to withdraw from any law-enforcement activities and to instead focus on serving all of the children in its care, including those who have suffered severe trauma related to gang- or cartel-violence in their home countries.

V. Comments/changes specific to certain proposed form **a. Care Provider Facility Tour Request**

LAJC seeks clarification that this form only applies to facility tours, and not to meetings with individual children for purposes of representation either in individual cases or as class members.

⁸² See Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199 (2020)

⁸³ Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020)

⁸⁴ LAJC and others will submit more detailed comments in response to those proposed forms, which frequently are the source of information that generate an SIR. However, those comments should be read together with these comments regarding the administrative forms ORR proposes.

b. Notice to UAC 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.

c. 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 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.⁸⁵ When

⁸⁵ 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.

individuals, including children in ORR custody, request their records from the federal government, including ORR, FOIA broad access possible regardless of immigration status.⁸⁶ 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."⁸⁷ 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]."⁸⁸ Likewise, HHS should respond to the records request within 20 days, unless "unusual circumstances" exist and require an extended deadline.⁸⁹

ii. Children must have access to their own records

To ensure minor's also have access to their own files, there should be a clear provision in this form that unaccompanied children themselves have a right to *free* and *prompt* access to their case files *and* any information collected about them by ORR. The procedures to request UAC case file information are outlined on ORR's website. A requesting party, including a child in ORR, may seek copies of a UAC's case file by writing to ORR/DCS Division Director at Requests.DUCS@acf.hhs.gov, and they must also file an Authorization for Release of Records (ORR UAC/C-5).⁹⁰ However, these instructions do not provide guidance about how a child would request their own case file information *while in custody*.⁹¹ The proposed Authorization for Release of Records or an accompanying notice to detained children should clearly explain the process for a detained child to request their own ORR file, and care providers should both notify children of this right and assist them if they want to request their files themselves.

iii. LAJC suggests the following specific changes to the form

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

- Sponsor contact information: This information is often unknown or inaccessible to the unaccompanied child, held by ORR, and essential for providing services related to reunification advocacy. With the child's consent, ORR should share basic Sponsor contact information with attorneys representing children in order to facilitate representation and

⁸⁶ 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.

⁸⁷ 5 U.S.C. Section 552(a)(2)(D).

⁸⁸ 5 USC Section 552(a)(6)(A)(i)(I).

⁸⁹ See 5 USC Section 552(a)(6)(B).

⁹⁰ 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>.

⁹¹ 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>.

enable attorneys to request the sponsor signatures required for release of any sponsor information, per the form instructions.

- Complete case file: A box labeled “Complete Case File” will promote clarity rather than requiring requestors to check all of the boxes or simply write “complete case file” in the “other” section.
- Sponsorship/Reunification Records: A box indicating a request specifically for all information related to reunification appears to be missing. Reunification information is essential for exercising children’s rights to be promptly placed with appropriate sponsors, and for sponsor’s rights to bring their children home. A child’s attorney should have access to a home study report, for example, without the sponsor’s signature, as that information is often critical to advocating for the child’s safe and prompt release. This would further promote clarity rather than requiring requestors to attempt to explain in the “other” box.

Generally, LAJC 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 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.

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.

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, LAJC 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.

d. Notification of Concern (A-7)

LAJC 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 other than document them and share individuals' personal information with law enforcement agencies. LAJC's understanding is that ORR does not have the authority to take children back into custody based on a notification of concern. For these reasons, LAJC requests that ORR provide possible outcomes that may result from a Notification of Concern for children and for sponsors and caregivers. LAJC also requests justifications and explanations for including information that, if not reported by a child seeking help (e.g. with substance abuse or criminal or gang allegations), does not implicate ORR's child welfare mandate and instead appears to veer dangerously into a law enforcement activity.

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

e. Event (A-9)

LAJC requests clarification regarding options to respond to the section "Event occurred in ORR Care". Does this refer to whether the child was in the custody of ORR at the time of the event (as

opposed to prior to when the child came into ORR custody)? Or does it refer to whether the child was physically in an ORR facility or was instead with a foster family through temporary foster care, or in a school, doctor's visit, etc. Clarification may also respond to LAJC's comment below regarding separating out events that occurred prior to when a child came into ORR custody from events occurring while in ORR custody.

f. 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? LAJC 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.

LAJC has represented clients who have received SIRs for clothing violations (e.g. wearing two pairs of shorts instead of one), for saying something rude, for refusing to engage in leisure activities, and for a number of other behaviors that were non-threatening typical behaviors for children being held indefinitely in federal custody. Many other children we have represented have received SIRs based on completely unverified (and often absurd) statements they made about their histories or equally absurd threats they made in outbursts of frustration, untied to any physical threat of harm. Children should be viewed and treated as children, especially in ORR where their welfare is the guiding principal that governs the agency. Where there is no threat and/or unverified statements, those incidents or statements should not be recorded in or shared through an SIR.

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. LAJC suggests clearly marking whether the event occurred while in custody or occurred prior to being taken into custody (even if it was disclosed while in custody). This could be achieved by using a form with a different heading, or by clearly indicating in the initial sections of the form when the event occurred.

LAJC suggests better defining what constitutes "harm to others" under "Behavioral incidents that threaten...". Breaking the harm down into further categories might be a way to address this. For example, bullying, physical harm, emotional harm, etc.

As explained above, 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 (against LAJC’s recommendations), should include a drop-down or narrative option to record *how* that determination was made. This should include a required field for “Source of Information” with a text box intended to detail where this information came from. For example, whether the information came from the child him or herself or whether it was obtained through documents. If obtained through the child, the source of information field should note whether the child was Mirandized prior to obtaining this information. If the information was obtained through documents, the source of information field should note whether ORR had a court order to obtain this information. This will provide accountability to ensure ORR is documenting not only the criminal information but the source of information and ensure it is obtaining the information legally. There should also be a function or field to add related documents. This will further ensure accountability and provide the child information he or she may need in order to challenge his or her restrictive placement determination based on charges or criminal adjudications. 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.

For example, LAJC has represented children who self-disclosed criminal history or gang involvement, who recanted self-disclosures, who had been taken back into ORR custody after law enforcement agencies in the United States had brought charges or gang allegations against them, or for whom ORR became independently aware of accusations of gang-affiliation or criminal histories in their home countries. We have also represented children accused of gang-involvement or criminal activity by other children in custody. The source of information used to allege any criminal history or gang involvement should be available to the child and/or the attorney representing them, and as such should be included in the form if ORR refuses to remove this section of the form.

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

In Form A-10B, we suggest adding “separation from a family member or primary caregiver as a category to include under SIR details. It is relevant to the trauma children experience at the border and can inform not only the care they need in custody but also the reunification process.

g. 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

First, LAJC 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.⁹² 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.⁹³ 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 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. LAJC 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, LAJC 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

⁹² 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>.

⁹³ 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.

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.

For example, LAJC has had clients who have received SIRs where sexual abuse was indicated for childlike behavior like holding hands, passing love letters between teens, or smiling and waving at a young person of the opposite sex in class, all in circumstances where there was no indication that either party did not consent to the interaction. Although these behaviors may be prohibited in any given code of conduct, they do not rise anywhere near the level of sexual abuse.]

Further, children and young adults are still developing their executive functioning skills.⁹⁴ 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.⁹⁵ 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.

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

If ORR maintains this section of the form and does not revise the structure of the form along LAJC’s above general comments, LAJC suggests including options like “suspected” or “possible” rather than only including “yes/no”, which are definitive in situations which may be far from clear. An erroneous “yes” could significantly harm children involved in the event, whether perpetrator, victim, or both.

⁹⁴ 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>.

⁹⁵ 45 C.F.R. 411.6

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

LAJC 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.), LAJC 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).