

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

Proposed Information Collection Activity;)
Release of Unaccompanied Alien Children)
From ORR Custody (OMB #0970-0552)) (Feb. 25, 2021)

***Joint Comments of—
Counsel to Plaintiff Class in
Lucas R. v. Becerra, No. 18-CV-05741-DMG, (C.D. Cal.)***

April 26, 2021

Carlos Holguin, General Counsel
CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
256 S. Occidental Blvd
Los Angeles, CA 90057

Holly S. Cooper
Co-Director, Immigration Law Clinic
Daisy O. Felt
Monica J. Julian
Jonathan P. Mulligan
Staff Attorneys, Immigration Law Clinic
UNIVERSITY OF CALIFORNIA DAVIS SCHOOL OF LAW
One Shields Ave, TB 30
Davis, CA 95616

Summer J. Wynn
Michael J. McMahon
Alexandra R. Mayhugh
Jayme B. Staten
COOLEY, LLP
4401 Eastgate Mall
San Diego, CA 92121

I. INTRODUCTION

The Office of Refugee Resettlement (“ORR”), Administration for Children and Families (“ACF”), U.S. Department of Health and Human Services (“HHS”) (collectively, “the Agencies”), propose several forms that the Agencies intend to use to process the release of Unaccompanied Children (“UC”) from ORR care provider facilities and provide services after release (collectively, “Proposed Forms”).¹

The Proposed Forms include four revised forms and one reinstated form that the Agencies intend to incorporate into ORR’s case management system, UAC Path.² The Commenting Parties have numerous objections and concerns related to Proposed Forms R-2, R-4, and R-6.

Extending Time in ORR Custody. As currently drafted, Proposed Forms R-2, R-4, and R-6 violate the rights of children in ORR custody provided by the *Flores* Settlement Agreement (“FSA”),³ the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”),⁴ and the Fifth Amendment Due Process Clause. The Proposed Forms request and allow ORR to share irrelevant and unnecessary information about sponsors with other government agencies which is likely to have a severe chilling effect on potential sponsors, and thereby unnecessarily prolong a child’s time in ORR custody. Moreover, the Proposed Forms fail to provide constitutionally required procedural protections to children including, among other things, requiring ORR Case Managers to notify a child’s attorney regarding placement and release decisions.

Privacy Concerns. Proposed Forms R-2, R-4, and R-6 would allow ORR and care provider personnel to elicit and document information regarding a child’s medical history, criminal history and other information without providing required protections against self-incrimination, and without required privacy and confidentiality protections under state and federal law. Children

¹ Proposed Information Collection Activity; Release of Unaccompanied Alien Children From ORR Custody (OMB #0970-0552), 86 Fed. Reg. 11536-11537 (Feb. 25, 2021) (hereinafter “Federal Register”).

² The Agencies use “UAC” to refer to “Unaccompanied Alien Child.” “UAC” and “UC” are used interchangeably herein.

³ *Lucas R., et al. v. Becerra*, No. 18-CV-05741-DMG, (C.D. Cal.), Dkt. 272-2 at 565 *et seq.*, also available at https://youthlaw.org/wp-content/uploads/2015/05/Flores_Settlement_Final011797.pdf.

⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), H.R. 7311, 110th Cong. (2008), 8 U.S.C. § 1232(c) (2018).

especially must be properly advised of the potential consequences of disclosing personal information, and any disclosures must be kept confidential in accordance with state laws and policies protecting children. Sharing the information contained within Proposed Forms R-2, R-4, and R-6 by ORR or others who may have access to this information, including but not limited to the Department of Homeland Security (“DHS”), Immigration and Customs Enforcement (“ICE”), the Department of Justice (“DOJ”), and United States Citizenship and Immigration Services (“USCIS”), impermissibly turns ORR into a law enforcement agency, may result in the violation of state laws and policies, and can have severe consequences for a child’s placement, reunification, and immigration case. Thus, Proposed Forms R-2, R-4, and R-6 must be revised in a manner that clearly obliges ORR to follow the FSA, state confidentiality laws, the U.S. Constitution, and other laws, regulations, and policies, including ORR’s Policy Guide, regarding the release of information contained within a child’s ORR file. *See, e.g., infra* at n. 7.

The Commenting Parties also object to the issuance of Proposed Forms R-2, R-4, and R-6 to the extent they include one or more fields with drop-down menu options for which we were unable to examine and analyze the predetermined menu options. The Commenting Parties made multiple attempts to obtain copies of the drop-down menu options, including by emailing InfoCollection@acf.hhs.gov on March 22, 2021, April 12, 2021, and April 23, 2021. Despite these repeated contacts, we have not received the information requested as of the time of filing this comment. As such, we note when this issue arises in each form below, and further note that as a result we are unable to fully comment on the affected sections and fields. The Agencies’ failure to provide all relevant information necessary to comment is itself a violation of the Administrative Procedure Act (“APA”), and as such, Proposed Forms R-2, R-4, and R-6 cannot be implemented. *See* 5 U.S.C. § 553(b)(3) (2018) (notice of proposed rule making “shall include either the terms or substance of the proposed rule or a description of the subjects and issues involved”); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973) (“In order that rule-making proceedings to determine standards be conducted in orderly fashion, information should generally be disclosed as to the basis of a proposed rule at the time of issuance.”); *see also Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

II. COMMENTING PARTIES

The Center for Human Rights and Constitutional Law (“CHRCL”) is a non-profit, public interest law foundation dedicated to furthering the legal, civil, human, and constitutional rights of

immigrants, refugees, children, indigenous peoples, and the indigent. CHRCL is counsel to the plaintiff class in *Flores v. Sessions*, No. 85-CV-4544 (C.D. Cal) (“*Flores*”) and *Lucas R. v. Becerra*, No. 18-CV-05741-DMG, (C.D. Cal.) (“*Lucas R.*”). CHRCL has nationally recognized expertise in law and policy affecting its target populations. CHRCL devotes a majority of its resources to major class action litigation. CHRCL also conducts administrative and legislative advocacy, and policy analysis on behalf of its target populations. CHRCL also serves as a resource for policy makers, advocacy coalitions, and community-based organizations in the areas of migration, refugees, and labor-related immigration law and policy.

The *University of California Davis School of Law, Immigration Clinic* (“the Clinic”) is a nonprofit, public interest clinic dedicated to serving detained immigrants and educating law students. The Clinic is counsel to the plaintiff class in *Lucas R.* and has national expertise in federal litigation, criminal defense, and immigration law. The Clinic is the second oldest immigration law clinic in the United States and has decades of experience defending asylum seekers, immigrant children, and vindicating the rights of immigrants in federal court.

Cooley LLP is a global law firm specializing in a range of practice areas and industries. Clients partner with Cooley on transformative deals, complex IP and regulatory matters, and high-stakes litigation, where innovation meets the law. Cooley is also committed to giving back and serves its communities by representing hundreds of pro bono clients annually. Cooley helps clients overcome obstacles that appear insurmountable without legal assistance. Through pro bono work, Cooley empowers individuals to seek justice and opportunity, provides nonprofit organizations the tools they need to effect change, and supports the economic development of underserved communities. Consistent with this charge, Cooley has collaborated with local and national legal services organizations to serve as counsel to the plaintiff class in *Lucas R.*

III. COMMENTS ON PROPOSED FORMS R-2, R-4, and R-6

A. Proposed “Discharge Notification” Form R-2 Must Be Modified To Protect A UC’s ORR File or Information From Disclosure To Third-Parties.

According to the Federal Register, the Discharge Notification (“Proposed Form R-2”) is used by care provider facilities to notify stakeholders of the transfer of a UC to another care provider facility or the release of a UC from ORR custody. ORR removed certain fields and added or replaced others.

The FSA 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.”⁵ ORR’s website states, “HHS does not release information about individual children or their sponsors that could compromise the child’s location or identity.”⁶ ORR’s statements reinforce the FSA’s requirement that the child has “a reasonable right to privacy.”⁷ This right naturally includes the right to privacy of the child’s own records and, more broadly, all the information a child provides to ORR.

Including documents from a child’s ORR file in the child’s “Alien File” (“A-File”) or allowing DHS access to a child’s ORR file and private information, may allow confidential records to be used to prejudice the child’s immigration case to the detriment of the child without their consent or understanding. As such, a child’s ORR file and information should not be accessible by third-parties unless ORR and its care providers have complied with applicable state and federal laws and policies and any disclosures must be kept confidential in accordance with state laws.⁸ Additionally, sponsors should also be advised of the potential consequences of disclosing their personal information.

The Commenting Parties are concerned that Proposed Form R-2 may authorize ORR to broadly release information about a child to third parties. The Federal Register fails to identify which “stakeholders” may receive or have access to Proposed Form R-2 or who are otherwise notified of the transfer or release of a UC. It appears from ORR’s current policies and procedures that the Discharge Notification may be provided to the following stakeholders: (1) ICE Field Office Juvenile Coordinator, (2) ICE Office of Chief Counsel, (3) EOIR Immigration Court Administrator, (4) UC’s legal services provider or atty of record, (5) VOLAG, if applicable, and (6) Child Advocate, if applicable.⁹ A child’s ORR file information and the private and confidential

⁵ FSA, *supra* note 2, at ¶ E.

⁶ *Health and Safety*, Office of Refugee Resettlement, <https://www.acf.hhs.gov/orr/about/ucs/health-and-safety> (last visited April 26, 2021) (citing the text under “Privacy” heading)

⁷ FSA, *supra* note 2 ¶ A.12.

⁸ *See, e.g.*, 20 U.S.C. § 1232g (2018); Ariz. Rev. Stat. § 8-807(K) (West); Cal. Welf. & Inst. Code § 825-836 (Deering 2021); Fla. Stat. § 985.045(2) (2020); Fla. Stat. § 39.0132; Fla. Stat. § 39.2021. N.Y. Crim. Proc. Law § 720.35.2 (Consol. 2021); N.Y. Soc. Serv. Law § 372.3; Tex. Fam. Code Ann. § 58.005(a-1)(10) (West); Tex. Fam. Code Ann § 700.203 (a)-(e); VA Code Ann. § 16.1-305.

⁹ *See* ORR Policy Guide, section 2.8.1, available at <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-2#2.8.1> (last visited April 26,

information contained therein should not be accessible by third-parties, specifically ICE, DHS, and DOJ. In order to protect a UC's confidential and private information, Proposed Form R-2 must be accompanied by changes to ORR's policies and procedures limiting which stakeholders have access to this information or an express statement in Proposed Form R-2 prohibiting the sharing of this information outside of ORR or its grantees.

To protect UCs' confidential information, we recommend that ORR add the following language, or something similar, to Proposed Form R-2:

This form is restricted to ORR staff or ORR grantee staff (e.g., care provider staff) who require access to make placement or release recommendations or decisions. This information, as well as access to this information, cannot be shared with any individual or agency outside of ORR, including but not limited to DHS, without a court order or compliance with applicable state and federal laws and policies.

ORR should further clarify that information related to a UC that may be shared with outside agencies is limited to basic information such as name, address, and age. This information should also be limited in duration to a UC's custody in ORR except to the extent that name, address, and age information is necessary post-release to facilitate the transfer of any immigration court case to the proper venue and for the provision of post-release services, as appropriate.

Finally, Proposed Form R-2 appears to have pre-selected items to choose from for the following fields: "Type of Discharge", "Discharge Delay", "DHS Age Out Plan", "Referral to services in COO", "Completed Referral Services COO?", and several fields in the "Transportation Details" section. However, the Commenting Parties cannot see the list of options available for response to these fields. Despite multiple requests, ORR has failed to provide the Commenting Parties with the pre-selected drop-down menu options, and as such, we are unable to comment on these fields.¹⁰

2021); *see also Lucas R., et al. v. Becerra*, No. 18-CV-05741-DMG, (C.D. Cal.), Dkt. 272-1 at 204-207, 214-215 [UAC Manual of Procedures, section 2 at p. 70-73, 80-81].

¹⁰ The Commenting Parties note that nearly every proposed form identified in the Federal Register fails to provide dropdown menu information. Absent this additional information, the public is unable to effectively comment on the proposed forms and thus each such failure constitutes a violation of the APA.

B. Proposed “Release Request” Form R-4.

According to the Federal Register, the Release Request (“Proposed Form R-4”) is used by care provider facilities, ORR contractor staff, and ORR federal staff, to process recommendations and decisions for release of a UC from ORR custody. Several fields were removed from the proposed form and others were added. As explained below, the Commenting Parties have concerns, including Proposed Form R-4’s (1) failure to document important information regarding a Child Advocate’s recommendation on release; (2) failure to require notification of a release recommendation to a child’s attorney of record; (3) failure to provide sufficient information to comment on some sections; and (4) requests for irrelevant and unnecessary information from sponsors.

1. The new “Child Advocate” section is missing important and necessary information.

Proposed Form R-4 contains a new section related to an assigned “Child Advocate.” The new section contains only two fields: is a Child Advocate assigned; and a text entry box for “Child Advocate recommendation.” This section is missing vital information that would permit users to verify and document necessary information, including the basis of the recommendation, the name and contact information of the Child Advocate, or date of recommendation. This same information is requested and/or provided elsewhere in Proposed Form R-4 for Case Manager, Case Coordinator, and Federal Field Specialist recommendations. ORR provides no explanation or justification for why the same information that is required for Case Manager, Case Coordinator, and Federal Field Specialist recommendations should not be required for Child Advocate recommendations.¹¹

2. “Attorney Contacted” field must be replaced.

Although not identified as a change in the Federal Register, the current version of Form R-4 appears to have a field labeled “Is Attorney Contacted?” This field has been removed from Proposed Form R-4 without any explanation or justification by ORR identified in the Federal Register. A child’s attorney, if any, must be notified if a Case Manager makes a release

¹¹ The Commenting Parties note that although the names of Case Manager, Case Coordinators, and Federal Field Specialist are not requested in their respective recommendation sections, these individuals are identified in the “Release Request Routing” section. The Commenting Parties suggest that the name of the Child Advocate be provided either in the Child Advocate section, or in the Release Request Routing section.

recommendation. This is critical to ensure that the child's Fifth Amendment Due Process rights are protected, any denial of release can be appropriately challenged, and the child's immigration or other case can proceed in an orderly fashion. Proposed Form R-4 should document whether a child's attorney was notified of the release request in order to ensure their Due Process rights are protected.

3. The "ORR Decision" section lacks sufficient information to allow for adequate comment.

As an initial matter, and as discussed *supra*, many of the Proposed Forms contain questions with pre-populated drop-down menus for responses. Despite multiple requests, the Commenting Parties were not provided with the information contained in the drop-down menus and consequently are unable to comprehensively comment on the Proposed Forms. This is particularly true in the "ORR Decision" section of Proposed Form R-4 in which eight of the eleven total fields contain drop-down menus. For example, the question "waive third party review" provides only for a pre-populated drop-down response. It is unclear what is meant by "third party review", who is "waiv[ing]" the review, and what, if any, implications such a waiver might have on a child's Due Process rights and rights under the TVPRA, FSA or other applicable statute. ORR should either provide an explanation or justification for the questions and information it seeks, or provide information sufficient to allow the Commenting Parties to understand the purpose of the Proposed Forms and questions therein.

The Commenting Parties also note that, in the interest of efficiently tracking release recommendations, certain fields should be added to this section. For example, the Proposed Form as drafted does not contain a field for the date that a case is remanded to the Case Manager or Case Coordinator for further information. Documenting the date for any remand will provide a clear timeline for release recommendations and decision-making. Similarly, a field should be added to document the date ORR makes a decision on a home study request. Proposed Form R-4 separately requests dates on which the Case Manager and Case Coordinator make recommendations for home studies. ORR provides no justification or explanation as to why the date it (or the FFS) makes the final home study decision should not also be documented.

4. Proposed Form R-4 requests irrelevant and unnecessary information about proposed sponsors.

The Sponsor Information section of Proposed Form R-4 requests country of birth and legal status information of sponsors. This highly sensitive information is irrelevant to the family

reunification and release process, may unnecessarily prolong a child's stay in ORR custody, and appears to be motivated by immigration enforcement goals rather than protection of children in ORR custody. Historically, information collected by ORR on potential sponsors was sent to ICE.¹² On March 12, 2021, DHS and HHS publicly recognized that sharing this information “undermined the interest of children and had a chilling effect on potential sponsors (usually a parent or close relative) from stepping up to sponsor an unaccompanied child placed in the care of HHS.”¹³ Although the 2018 MOA requiring the release of sponsor information to ICE is no longer in effect, it is unclear whether ORR can or will provide information about sponsors to DHS, ICE, or other agencies upon request. For example, it appears that via a proposed form included in a separate request for comment, proposed form A-5 (“Release of Records”), a state or federal government agency may request information simply by providing “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.”¹⁴ If state or federal agencies are permitted to access sponsor information from ORR, through access to forms like Proposed Form R-4, it will have a significant chilling effect on sponsors, which will result in longer detentions for children in ORR custody. Like the 2018 MOA, such policy and/or practice would contravene the child’s best interests.

The Commenting Parties urge the Agencies to remove these irrelevant and unnecessary questions about sponsors from Proposed Form R-4. If the Agencies do not remove these questions, ORR must add clear language that this information may not be shared outside ORR and/or will be redacted if provided to outside agencies.

¹² In April 2018, HHS and DHS entered into a Memorandum of Agreement (“2018 MOA”) that required ORR to send the information it collects on potential sponsors to ICE. *See Mem. of Agreement Among the Office of Refugee Resettlement of the U.S. Dep’t of Health & Hum. Servs. & U.S. Immigration & Customs Enf’t, U.S. Customs & Border Prot. of the U.S. Dep’t of Homeland Sec. Regarding Consultation & Information Sharing in Unaccompanied Alien Children Matters* (2018), <https://www.texasmonthly.com/wp-content/uploads/2018/06/Read-the-Memo-of-Agreement.pdf>.

¹³ Dept. of Homeland Sec., *HHS and DHS Joint Statement on Termination of 2018 Agreement* (Mar. 12, 2021), <https://www.dhs.gov/news/2021/03/12/hhs-and-dhs-joint-statement-termination-2018-agreement>.

¹⁴ *See* Ex. 1 [Joint Comments of University of California Davis School of Law, Immigration Law Clinic and The Center for Human Rights and Constitutional Law in response to Proposed Information Collection Activity, Administration and Oversight of the Unaccompanied Alien Children Program, OMB #0970-0547 (submitted March 5, 2021)] at 21-24.

C. Proposed “Safety and Well-Being Call Report” Form R-6.

According to the Federal Register, the Safety and Well-Being Call Report (“Proposed Form R-6”) is used by care provider facilities to document the outcome of calls made to ensure the child is safe and to refer the sponsor to additional resources as needed.

This instrument raises serious concerns about privacy protections for children and concerns about inappropriate post-release surveillance by ORR. Among other questions, Proposed Form R-6 broadly asks the sponsor if the “[UC] demonstrates behavioral concerns.” This information is irrelevant, invasive, and unreliable to the extent it is based solely on reports by sponsors and is not corroborated by any documentation or firsthand observation by ORR. The scope of this question may implicate not only minor behavioral incidents, but also more serious post-release criminal allegations, substance abuse, or other behavior that, absent a request for assistance by a child or sponsor, does not implicate ORR’s child welfare mandate. Moreover, it is not clear, what, if anything, ORR has the authority or capacity to do in response to this question other than document and share the information with law enforcement or other agencies. The Commenting Parties recognize that ORR should report any concerns of immediate danger to local child protective services and refer children and sponsors to requested community services, but it should not become involved in documenting the behavior and actions of children no longer in its custody.

The Commenting Parties urge ORR to remove this question from Form R-6 or provide justifications and explanations for requesting broad and overly invasive information about a child’s behavior that is not reported by a child seeking help and does not implicate ORR’s child welfare mandate.

IV. CONCLUSION

The Commenting Parties urge the Agencies not to promulgate Proposed Forms R-2, R-4, and R-6 as published for public comment. As detailed above, several of the Proposed Forms raise serious privacy and confidentiality concerns. Additionally, the Proposed Forms should not be implemented because the Agencies failed to provide sufficient notice under the APA.

EXHIBIT 1

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

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

Joint Comments of —

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

March 5, 2021

Holly S. Cooper
Co-Director, Immigration Law Clinic
Daisy O. Felt, Jonathan P. Mulligan, & Monica J. Julian
Staff Attorneys, Immigration Law Clinic
UNIVERSITY OF CALIFORNIA DAVIS SCHOOL OF LAW
One Shields Ave, TB 30
Davis, CA 95616

Carlos Holguin, General Counsel
CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
256 S. Occidental Blvd
Los Angeles, CA 90057

I. INTRODUCTION

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

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

II. COMMENTING PARTIES

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

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

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

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

III. COMMENTS

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

According to the Proposed Admin & Oversight Instruments, Form A-9 (“Event” instrument), is a new instrument that is intended to be “used by ORR care provider programs to document high-level information about situations that must be reported to ORR.”² Completing an Event instrument is the first step in creating any type of incident report, such as the significant incident reports (“SIRs”) under proposed instruments A-10A through A-10D or a Notification of Concern under proposed instrument A-7.³ Once an Event form is created, an SIR, Program-Level Event Report or Notification of Concern is created for each child involved in the incident and is linked to the Event.⁴ Proposed instruments A-10A, A-10B, A-10C, and A-10D all add a new field asking the following about the incident being recorded: “Was this incident related to gang/cartel crimes, activities, or affiliation?” and “If yes, Explain.” The concerns discussed in this section relate to the inclusion of these fields, which result in the collecting, recording and reporting of gang- and/or cartel-involvement and/or criminal information.

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

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

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

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

² *Id.* at 545.

³ *Id.*

⁴ *Id.*

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

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

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

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

⁶ See 8 U.S.C. § 1101 (2018) (providing definitions for the “Act,” referring to the Immigration and Nationality Act).

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

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

⁹ Press Release, U.S. Immigration & Customs 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>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The high-stakes consequences of gang allegations within ORR custody and beyond requires, at a minimum, that if ORR is to collect this type of information on the proposed instruments, ORR provide clarity that untested allegations of gang- or cartel-affiliation (1) cannot be used to deny a child release, (2) cannot be used to transfer a child to a more restrictive placement, and (3) are not reportable "gang-related activity" within the meaning of ORR Policy Guide Section 5.8.5.²³ The proposed instrument, itself, must also be updated to ensure that untested allegations of gang- or cartel-affiliation are not reportable, particularly under the FFS reporting section in A-10A, A-10B, and A-10C, which currently reflect the reporting requirements under ORR Policy Guide Section 5.8.5.

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷ See *supra* note 21.

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

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

b. Family reunification may be unnecessarily or unjustifiably delayed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁹ *Id.*; see Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL'Y INST. (2006), <http://www.justicepolicy.org/research/1978>; see also Sarah MacLean, *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCIENCE & MED. 303 (2019); Martha von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, 18 BMC PSYCHIATRY 382 (2018).

⁴⁰ *Lucas R. v. Azar* (Case No. 2:18-CV-05741) DMG PLA, Excerpts from the Expert Report of Dr. Emily Ryo (June 16, 2020), Docket 272-3 at 143-158 (Exhibit A), at 154.

⁴¹ *Id.*

⁴² *Id.* at 155.

⁴³ *Id.*

⁴⁴ *Id.*

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

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

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

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

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

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

⁴⁵ *Id.*

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

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

⁴⁸ *Id.*

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

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

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

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

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

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

⁵¹ Erica Bryant, *Unaccompanied Children Suffer as Hearings Are Sped Up, Switched to Video During COVID-19 Crisis*, VERA INST. JUST. (April 14, 2020), <https://www.vera.org/blog/covid-19-1/unaccompanied-children-suffer-as-hearings-are-sped-up-switched-to-video-during-covid-19-crisis>; YOUNG CTR. FOR IMMIGRANT CHILDREN'S RIGHTS, IMMIGRATION HEARINGS BY VIDEO: A THREAT TO CHILDREN'S RIGHT TO FAIR PROCEEDINGS (Jan. 2020), https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/5e4d5c0cc48abe2cc9bd102a/1582128140439/YOUNG+Center+VTC+Report_Updated+January+2020.pdf.

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

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

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

provide notice to a child in custody or their adult caregiver/sponsor or legal representative that they are being identified as gang- or cartel-affiliated, fail to ensure that the veracity of the reasoning behind the designation is well documented and that there is equal access to the evidence used to make the determination⁵⁵, and fail to provide a child or their representative any opportunity to challenge the designation or rebut the alleged evidence.

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

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

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

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

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

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

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

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

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

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

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

⁶⁰ *Saravia v. Sessions*, 905 F.3d 1137, 1144-45 (9th Cir. 2018) (finding no abuse of discretion where district court required prompt hearing before a neutral decisionmaker at which the minors could contest gang allegations and government would need to justify detention based on allegations).

⁶¹ See *supra* Section III.A.1. for the requirements of *Miranda* in such circumstances.

⁶² See *Zinerman v. Burch*, 494 U.S. 113, 127-28 (1990) (noting that due process generally requires “some kind of a hearing” before a deprivation of protected liberty interests).

⁶³ See Nat'l Ctr. for Youth Law, *supra* note 38, at 20 (“Childhood traumatic experiences can alter the brain's responses to stress and cause children to lose their sense of safety and control. Unaccompanied children often experience trauma before, during, and after migration.”).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Camilo Montoya-Galvez, *700 Children Crossed the U.S. Border Alone After Being Required to Wait in Mexico with Their Families*, CBS News (Jan. 15, 2021), <https://www.cbsnews.com/news/children-who-crossed-the-u-s-border-after-their-families-were-required-to-wait-in-mexico-are-being-denied-legal-safeguards-suit-says/>.

⁶⁷ See Nat'l Ctr for Youth Law, *supra* note 38.

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

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

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

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

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

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

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

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

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

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

the growing and ugly discourse equating immigrant children with criminals⁷⁴, repeating behavior that the Ninth Circuit already enjoined in *Saravia v. Sessions*.

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

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

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

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

⁷⁴ See generally Laila L. Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697 (2018) (examining how gang allegations against immigrant youth work to push young people into a school-to-deportation pipeline); Karla M. McKanders, *America’s Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L.J. 197 (2015) (examining the conceptualization of immigrant youth who are subject to delinquency adjudications).

⁷⁵ IMMIGRANT LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING YOUTH AS GANG MEMBERS (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf.

⁷⁶ Philip Marcelo, *Gang Database Made Up Mostly of Young Black, Latino Men*, AP NEWS (July 30, 2019), <https://apnews.com/article/dd5643e358c3456dbe14c16ade03711d>.

⁷⁷ NAT’L IMMIGRANT JUSTICE CTR., DISENTANGLING LOCAL LAW ENFORCEMENT FROM FEDERAL IMMIGRATION ENFORCEMENT (2021), <https://immigrantjustice.org/research-items/policy-brief-disentangling-local-law-enforcement-federal-immigration-enforcement>.

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

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

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

C. The Proposed Instruments Raise Privacy and Confidentiality Concerns.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁶ See, e.g., Ella Nilsen, *Kids Who Cross the Border Meet with Therapists and Social Workers. What They Say Can Be Used Against Them*, Vox (June 19, 2018, 8:51 AM), <https://www.vox.com/policy-and-politics/2018/6/18/17449150/family-separation-policy-immigration-dhs-orr-health-records-undocumented-kids>.

⁸⁷ *Id.*

⁸⁸ CA WIC, *supra* note 84, at § 827.

⁸⁹ *Id.*

⁹⁰ *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 776-77 (Cal. 1971).

⁹¹ CA WIC, *supra* note 43, at § 827.

⁹² *Id.* at § 827(a)(4); See also *In re Tiffany G.*, 29 Cal. App. 4th 443, 451 (Cal. App. Ct. 1994).

⁹³ CA WIC, *supra* note 84, at § 827(b)(2).

⁹⁴ The Juvenile Court has the exclusive authority to determine the extent to which juvenile case records can be disclosed. *In re Elijah S.*, 125 Cal. App. 4th 1532 (Cal. App. Ct. 2005).

⁹⁵ CA WIC, *supra* note 84, at § 831(a) (emphasis added).

⁹⁶ *Id.* at § 831(e).

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

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

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

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

⁹⁷ *Flores* Settlement Agreement, *supra* note 25, at Ex. 1 at ¶ E (emphasis added).

⁹⁸ Office of Refugee Resettlement, *Health and Safety*, <https://www.acf.hhs.gov/orr/about/ucs/health-and-safety> (citing to the text under “Privacy” heading) (last visited Feb. 19, 2021).

⁹⁹ *Id.*

¹⁰⁰ *Flores* Settlement Agreement, *supra* note 25, at Ex. 1 at ¶ A.12 (“A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house and regulations; and (e) receive and send uncensored mail unless there is reasonable belief that the mail contains contraband.”).

¹⁰¹ See ORR Policy Guide § 5.8.5 (care providers have to report arrests to FOJC, and FFS have to report gang related activities to the ICE/HSI Tip line).

¹⁰² See generally Hlass, *supra* note 19.

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

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

E. Additional Comments and Changes to Certain Proposed Instrument.

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

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

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

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

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

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

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

¹⁰³ *Id.* at 233.

¹⁰⁴ The Commenting Parties will be submitting more detailed comments in response to those proposed forms, which frequently are the source of information that generate an SIR. However, those comments should be read together with these comments regarding the administrative forms ORR proposes.

¹⁰⁵ *Flores* Settlement Agreement, *supra* note 25, at ¶ 32A (“Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff shall provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility.”).

¹⁰⁶ *Id.* at ¶ 32D.

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

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

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

ii. Children must have access to their own records.

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

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

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

¹⁰⁹ *Id.* at 25.

¹¹⁰ 5 U.S.C. § 552(a)(2)(D) (2018).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. Additional Concerns regarding Proposed Instrument A-10B

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

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

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

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

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

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

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

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

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

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

Sexual abuse of a minor by another MINOR includes the following acts:

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

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

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

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

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

Sexual harassment is similarly defined through interactions between children and interactions between staff and children in ORR custody, and through incorporation of 45 C.F.R. § 411.6.¹¹⁶ Again, we focus on the definition based on interactions between children in ORR custody. Unlike sexual abuse, “[s]exual harassment of a minor by another MINOR includes: repeated and unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, phone calls, emails, texts, social media messages, pictures sent or shown, other electronic communication, or actions of a derogatory or offensive sexual nature.” In other words, sexual harassment captures a broader range of behavior than is captured in the definition of sexual abuse.

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

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

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

¹¹⁵ ORR Policy Guide, *supra* note 8, at § 4.1.1.

¹¹⁶ ORR Policy Guide, *supra* note 8, at § 4.1.3.

¹¹⁷ ORR Policy Guide, *supra* note 8, at § 4.1.4.

¹¹⁸ See Ellen Barlow, *Under the Hood of the Adolescent Brain*, HARV. CTR. DEVELOPING CHILD (Oct. 17, 2014), <https://hms.harvard.edu/news/under-hood-adolescent-brain>; HARVARD CTR. DEVELOPING CHILD, WHAT IS EXECUTIVE FUNCTION? AND HOW DOES IT RELATE TO CHILD DEVELOPMENT?, https://46y5eh11fhgw3ve3ytpwxt9r-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/ExecutiveFunctionInfographic_FINAL.pdf.

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

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

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

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

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

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

¹¹⁹ ORR Policy Guide, *supra* note 8, at § 4.1.4.

¹²⁰ See ORR Policy Guide, *supra* note 8, at § 1.2.4.

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

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

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

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

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

IV. CONCLUSION

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