LEGAL AID JUSTICE CENTER

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ACF/OPRE Certifying Officer
Administration for Children and Families
Office of Planning, Research and Evaluation (OPRE)
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Re: FR Doc. 2021-00001; Request for Comments in Response to Proposed Information Collection Activity: Mental Health Care Services For Unaccompanied Alien Children; 86 Fed. Reg. 1114-1115

Dear Ms. Jones,

The Legal Aid Justice Center appreciates the opportunity to provide the following comments in response to the Notice of Proposed Information Collection Activity, published on January 7, 2021. *See* FR Doc. 2021-00001. The Legal Aid Justice Center (LAJC) opposes certain aspects of the proposed revisions, and supports others. For the reasons detailed in the comments that follow, LAJC urges the Department of Health and Human Services (HHS) to provide clarification and make changes to several of its proposal forms.

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

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

LAJC has a strong interest in the proposed changes to the mental health forms proposed by ORR, particularly in the areas of privacy and the criminalization of children. We offer the following comments to ensure HHS' continued ability to comply with its sole mandate to provide for children's welfare and well-being, and not to carry out law-enforcement activities. Proposed Forms MH-1 through MH-7 include a number of necessary and welcome changes that will help ensure that information about the mental health and related treatment of children in ORR custody is adequately tracked and recorded. The proposed forms also raise a number of concerns. First, the proposed forms contain questions that do not appear to be evidence-based. Second, the proposed forms contain questions that are likely to elicit incriminating information, and ORR does not currently have a policy of providing children with a Miranda warning prior to asking such questions. Lastly, the proposed forms raise concerns about informed consent and how ORR will maintain the confidentiality of the information requested. Our comment highlights these concerns and others and makes suggestions for improvement.

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

Sincerely,

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A. Proposed "Initial Mental Health Evaluation" Form MH-1 and Proposed "Columbia Suicide Severity Rating Scale Risk Assessment" Form MH-2

i. Questions on Forms MH-1 and MH-2 Should be Taken from Evidence-Based Screening Tools and Not Modified in a Way that May Compromise the Questions' Efficacy.

It is unclear if the questions on the evaluation forms have been taken or adapted from an evidence-based screening tool or have been validated for use with immigrant children. ORR should clarify the source of the questions on the evaluation forms, including whether they are derived from evidence-based screening tools and have been validated for use with immigrant children. In some cases, it is also not apparent what questions HHS intends to ask children in relation to certain fields on proposed forms MH-1 and MH-2. For example, Form MH-1 includes questions related to homicidal ideation that only say "plan" and "intent." Moreover, although the proposed rules purport to implement the Columbia Suicide Scale, the proposed questions are a modified list of questions from the scale and do not represent the scale in its entirety. ORR should only ask questions from evidence-based screening tools that have been widely tested on children in order to ensure that children are accurately assessed.

It is also unclear if the screening tool has been translated and validated into multiple languages. LAJC has represented unaccompanied minors who speak a wide variety of languages, including several different indigenous languages. For many children, neither English or Spanish is their primary or best language. In order to reflect accurate results, the screening tool should be translated and validated for as many languages as possible. In addition, the language in which questions were asked and the method of interpretation (e.g. by phone, video, or in person) should be recorded as part of the assessment to better inform those using the information gathered with this tool.

Finally, it is unclear if/how this tool will be used for pre-verbal or non-verbal children. All children must be accommodated regardless of age or disability.

ii. Questions on Form MH-1 Are Unnecessary and Reinforce Harmful Stereotypes.

While ORR has an interest in asking certain questions to ascertain whether children may be a risk to themselves or others, certain questions on Form MH-1 ask for information that is unnecessary for the agency to assess such risk. Specifically, HHS should eliminate the questions about harm to property ("Have you ever given in to an aggressive urge or impulse on more than one occasion that resulted in serious harm to others or led to the destruction of property?") and homicidal intent. Homicide committed by children is a relatively rare phenomenon.[1] Asking unaccompanied children these questions also reinforces harmful stereotypes about immigrants as

[1] Lisa B.E. Shields et al., *Adolescent Homicide*, Forensic Pathology of Infancy and Childhood, at 588 (K.A. Collins & R.W. Byard ed., 2014).

criminals, even though evidence shows that undocumented immigrants in the U.S. are far less likely to be arrested for violent crimes than U.S.-born citizens.[2] Moreover, it is often inaccurate and misleading to identify children as perpetrators.[3] Therefore, ORR should remove these questions from the form. If ORR retains these questions, it should ask whether any such acts were committed as a result of duress or if the child was forced to commit such acts, as some children who are child soldiers or in gangs may commit crimes under threats or duress.

LAJC also questions whether these types of questions are appropriate for an initial mental health assessment that informs ORR about services it should provide the child while in care. LAJC notes that past clients do not receive treatment for trauma or other severe mental illness because of the limitations and anticipated short duration of their custody. Instead, mental health providers focus on supportive psychotherapy specifically to help children cope with being detained. Delving into deep trauma with no intention or ability to help the child process it is both unnecessary and potentially harmful. Furthermore, these specific questions suggest that the initial mental health assessment will instead be used to place children in more restrictive settings based on self-reported past behavior, which may or may not be accurate or appropriately contextualized. LAJC urges HHS to remove these questions from the intake assessment to avoid conflating criminal investigation and dangerousness designations with mental health needs.

iii. ORR should use an Unmodified Version of the Columbia Suicide Severity Rating Scale Risk Assessment to Screen Children for Suicidality.

Proposed Form MH-1 also includes a number of questions designed to assess suicidality:

1) Did you ever attempt to kill yourself?
2) Wished you could sleep and not wake up?
3) Any actual thoughts of killing yourself?
4) Thought about how to kill yourself?
5) Intent on taking action on thoughts?
6) Intent on carrying to kill yourself?
7) Prepared to take action to kill self?
8) Was this within the past 3 months?

Here, again, ORR should only ask questions from evidence-based screening tools that have been widely tested on children. This is especially important when evaluating children for suicidality given the sensitive nature of the questions and varying cultural norms related to suicide. Proposed Form MH-2, the Columbia Suicide Severity Rating Scale Risk Assessment

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[2] Michael T. Light et al., *Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas*, 117 Proceedings of the Nat'l Acad. of Sciences of the United States of America 32340, 32342 (2020).

[3] 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), https://pdfs.semanticscholar.org/e25f/2a7c15c7e789278743fc0610c412edf2c1a9.pdf.

("CSSRS") is one tool that has been widely tested on children from a variety of cultural backgrounds, and we support its use in this context. However, form MH-2 proposes using a shortened version of the CSSRS. It is unclear from the federal register notice and proposed form how exactly ORR plans to shorten the original assessment and whether or not the shortened assessment has been tested for efficacy. Therefore, we recommend that ORR (1) eliminate the questions related to suicide on form MH-1 and (2) replace these questions with an unmodified version of the CSSRS. Using the original version of the CSSRS will ensure that children are only being asked evidence-based questions, which is critical to ensuring that children are not misidentified or under identified as suicidal. Also, given that the CSSRS is a relatively short screening tool, using the full version of the questionnaire would not impose a significant burden on ORR.

Additionally, the form should include the language in which the tool was given and the form of interpretation if applicable.

iv. Children Should be Given a Miranda Warning When Asked Questions that are Likely to Elicit Incriminating Information.

Several fields on form MH-1, including all questions related to drug abuse, raise a concern that children are being asked questions that elicit incriminating information with no prior Miranda advisal that the information they divulge can result in criminal and/or immigration consequences, as well as impact their placement at ORR, including but not limited to placing them in a secure juvenile jail. Specifically, Form MH-1 asks the following questions that are likely to elicit criminally incriminating information:

- Have you ever had nightmares or flashbacks as a result of being involved in some traumatic/terrible event? For example, warfare, gang fights, fire, domestic violence, rape, murder, accident, being killed.
- Have you ever given in to an aggressive urge or impulse on more than one occasion that resulted in serious harm to others or led to the destruction of property?

Additionally, Form MH-1 asks for a detailed history of any and all substance abuse, including the frequency of use and date last used. This, of course, is concerning, especially since we are not aware of any requirement that ORR or any other federal agency eliciting this information provide the child with a Miranda warning.

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."[4] Miranda warnings are required in civil investigations that *may* result in criminal prosecutions.[5] In the broader immigration context,

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

[5] *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.

while Miranda warnings may not be required in "booking exception" settings involving routine questions generally unlikely to elicit incriminating responses,[6] they do apply to booking questions designed to elicit incriminating responses.[7] Because of this, "[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the Miranda warnings."[8] Immigration officers' statements that the interview was meant to obtain biographical information for a "routine, civil investigation" are irrelevant in light of the objective factors suggesting that the questions are likely to elicit an incriminating response.[9] Accordingly, 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*[10] that focuses on whether, based on the totality of the circumstances, the questioner should have known that questioning was likely to elicit incriminating information.[11]

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).

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

[7] *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, 601-602 (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).

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

[9] *Id*. at 1278-79.

[10] 446 U.S. 291 (1980).

[11] *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 immigrant in INS custody where he 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 him 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); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983) (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 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 (2011) ("in 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

Just as routine questioning in the border control context triggers Miranda warnings where it elicits incriminating information, so too does routine questioning for ORR referral and intake purposes. ORR's proposed Form MH-1 demonstrates how ORR staff go beyond routine biographical questions during the intake process, and ask questions that elicit incriminating information. Using the information collected, ORR care provider staff can request to transfer a child to a more restrictive setting based on any of the following: criminal charges or chargeability, commission of violent acts or credible threats thereof, self-reported gang involvement or violent criminal history or gang involvement or even inappropriate sexual behavior. (See LAJC's comment in response to HHS's propose Information Collection Activity: Administration and Oversight Instruments, for further elaboration of this point.) The same information is then used by ORR FFS to make final placement decisions, which can include a decision to place a child in a juvenile jail. Given that a child's response to these questions can satisfy the basis for a restrictive placement recommendation and determination, such questions are, by their nature, likely to elicit an incriminating response. Not only are such questions objectively incriminating, it is reasonable to assume that the referring agency and intakes team ask questions *intending* to unearth such responses. Put simply, ORR's proposed Form MH-1 is *intended* to unearth incriminating information, invoking the necessity of a Miranda warning.

For the reasons stated above, we insist that if a child is going to be asked questions likely to elicit information about criminal charges or other criminal acts, violent or malicious acts, gang affiliation, and/or sexual predatory or inappropriate sexual behavior, the child be advised of his or her right to not self-incriminate prior to any such questioning, and also be advised of the potential consequences of his or her responses. This advisal must be provided in a language and manner the child understands.

B. Proposed "Mental Health Service Report" Form MH-6

i. Proposed Form MH-6 Should Track Information Regarding Consent to the Administration of Psychotropic Medication.

Proposed Form MH-6 includes several fields related to a child's current and prior medications, including: "Associated Diagnosis," "Medication Name," "Reason for Medication," "Date Started," "Date Discontinued," "Dose," "Directions," "Psychotropic," "Discharged with Medication?" and "Associated Health Evaluation."

In 2018, the U.S. District Court of Central California found that ORR had breached the *Flores* Settlement Agreement in the course of administering psychotropic medications to unaccompanied immigrant children at Shiloh Residential Treatment Center in Manvel, Texas.[12]

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relevant but not dispositive") (*quoting United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir. 1997) (internal quotations omitted).

[12] *See Flores v. Sessions*, No. 2:85-cv-04544-DMG, Order re Plaintiffs' Motion to Enforce Class Action Settlement, at 23, 24 (C.D. Cal. July 30, 2018).

Among other things, the court ordered ORR to follow Texas state law, as required in the *Flores* Settlement Agreement, by obtaining the consent of the person legally authorized to give medical consent before administering psychotropic medication to children at Shiloh RTC.[13]

Therefore, we request that HHS consider the revision of Proposed Form MH-6 to include two additional fields regarding informed consent for medications in "Add Medications Data Entry Window." We recommend that HHS add "Date Informed Consent Obtained from Appropriate Consenter," in a calendar drop-down field similar to the current fields "Date Started" and "Date Discontinued." We also recommend that HHS add a text field, titled "Informed Consenter," where the care provider is required to input the name of the person that provided the informed consent for the new medication. We recommend that both the "Date Informed Consent Obtained from Appropriate Consenter" and "Informed Consenter" fields are mandatory for the care provider to input before the record for the new medication is accepted by the database.

While it is not clear which fields in the "Add Medications Data Entry Window" are mandatory for care providers to fill out before entering a new medication into the database, we note that some fields have red asterisks while other field do not. Assuming a red asterisk indicates that a field is mandatory, and that fields without a red asterisk are not mandatory, we recommend that the "Reason for Medication" field be revised to be mandatory. This revision will support both the care provider's medication administration, as well as agency oversight over medication administration throughout the ORR care provider network.

Additionally, LAJC notes that after leaving ORR custody, most unaccompanied children and/or their families do not have medical insurance. This makes continuity of care, including mental health care and medication, difficult. When any ORR care provider, staff, or grantee prescribes medication to a child in custody, they should likewise be required to consider continuity of care and ability for the child to either continue or discontinue medication upon release. Children and their sponsors must be provided with education about the child's medications and how to either continue or discontinue them. Further, children should not be placed on medications that can cause significant withdrawal symptoms if discontinued if at all avoidable. When prescribing medications, prescribers and those administering medication must take into account the realities of medical access and access to medications for children once released from custody and make decisions regarding medication with that perspective in mind.

ii. Proposed Forms MH-1, MH-5, and MH-6 Should Include a Field Indicating Whether or Not a Child Has Been Identified as Having a Disability.

The current UAC assessment form used by HHS includes a field to indicate whether a child has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 and a field to indicate which disabilities, if any, the child has. To the extent that a child has been

[13] *See id.*

identified as having a disability on the UAC assessment form or another ORR form, HHS should also include a field on Proposed Forms MH-1, MH-5, and MH-6 for ORR to indicate that the child has been identified as having a disability, and what the child's disability is. The form should also indicate by whom the child has been identified to have a disability (e.g. self, family-member, physician in home country, ORR staff or care provider, etc.).

C. Privacy and Confidentiality Concerns Regarding Proposed Forms MH-1 through MH-7

i. Proposed Forms MH-1 through MH-7 Should Require a Miranda Warning Prior to Questioning and a Court Order Prior to the Release or Sharing of Confidential Information

Proposed forms MH-1 through MH-7 contain fields related to children's health and criminal history. It is unclear if ORR considers these forms to be subject to state and federal laws governing the protection of children's information and privacy. Children's information and privacy is protected broadly under numerous state and federal laws.[14] Legislatures have chosen to restrict access to children's records in this manner in recognition of the inherent vulnerability of children and related policy concerns. Protecting children's information and privacy promotes rehabilitation and removes barriers to seeking employment, housing, and other opportunities.[15] Additionally, restricting access to children's information is consistent with the U.S. Supreme Court's longstanding recognition that children should not be stigmatized for "youthful indiscretions."[16] In recognition of these longstanding norms and policies, ORR should ensure that the information collected on Forms MH-1 through MH-7 are adequately safeguarded and comply with state and federal laws governing the protection of children's criminal information.

As noted above, Form MH-1 specifically asks several questions that are likely to elicit information about a child's criminal and/or gang history. In addition to providing a Miranda warning to children before asking these questions, ORR should also advise children of their confidentiality rights. ORR should obtain a written waiver of confidentiality from the child after consultation with a lawyer or stop questioning the child if they assert their Miranda rights. ORR should not share children's sensitive criminal and/or gang history information except within the ORR network under very limited circumstances and should never share information with third-parties, including but not limited to Immigration Customs Enforcement ("ICE"), United States

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

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

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

Citizenship and Immigration Services ("USCIS") or other Federal and/or State agencies. For example, if ORR intends to share this information with other ORR staff or contractors, ORR should first ensure that the child has attended a Know Your Rights presentation by contracted legal service providers and advise the child prior to eliciting this information (1) with which ORR staff or contractors the information will be shared and (2) how the information will be used. Additionally, ORR should advise the child to what extent any information they share may be used to step the child up to a more restrictive placement or delay their release from ORR custody.

If, on the other hand, ORR intends to share this information with outside third-parties, including but not limited to ICE, USCIS, or other Federal and/or State agencies, ORR should not share any documents or information contained in those documents, other than basic, directory-type information (name, address, age) limited to the duration of a child's custody in ORR. Any information above and beyond basic, directory-type information, and especially information related to criminal and/or gang involvement or history, should require a court order prior to the release of any of this information to a third-party. This protection is particularly important in light of ORR's current policies that require ORR care provider staff and ORR FFS to report certain information to the Department of Homeland Security ("DHS"),[17] which includes under its agency umbrella ICE and USCIS. For example, if ORR collects and records criminal and/or gang information in the proposed Mental Health Forms, this information will trigger a requirement under ORR policy that the care provider staff collecting and recording this information complete a significant incident report.[18] Once a significant incident report is created based on criminal and/or gang-related information, ORR policy places a mandatory reporting obligation on the care provider staff and ORR FFS to report this information to DHS19 in direct contravention of state and federal policies and laws protecting children's confidential information. (See attached LAJC Comment in Response to Proposed Administrative Forms.)

As noted above, the forms specifically contain information regarding children's alleged criminal, drug, or gang history. In general, sharing information about children's criminal history outside of ORR is inconsistent with the policy rationale underlying protections for juvenile criminal information. In Virginia, for example, juvenile confidentiality laws have long protected

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[17] ORR Policy, *ORR Guide: Children Entering the United States Unaccompanied*, § 5.8.5 Reporting SIRs to DHS, https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied.

[18] *See* ORR Policy § 5.8.

[19] *See* ORR Policy § 5.8.5 ("In addition to submitting a SIR to ORR, care providers must report some significant incidents to DHS."). Indeed, the Quick Reference Chart: Care Provider Reporting Requirements for Significant Incidents to DHS indicates that a care provider must report to DHS any significant incident relating to arrests or incidents of violence by the minor. *Id.* Additionally, the Quick Reference Chart: FFS Reporting Requirements for Significant Incidents to DHS "outlines FFS reporting requirements for significant incidents that must be reported to DHS" and includes gang-related activity, which an FFS must report to "the ICE/HIS Tip Line within one business day of receiving the SIR." *Id.*

juvenile information arising from certain proceeding, including juvenile delinquency.[20] Any agencies or individuals not statutorily authorized to review a child's file must obtain a court order to do so.[21] Children's law enforcement records are likewise restricted, and a court order must be obtained for most outside agencies or personnel to access the record.[22] A violation of the juvenile confidentiality provisions is a class 3 misdemeanor.[23]

ORR should similarly broadly protect children's juvenile information. In order to promote rehabilitation, avoid stigma, and align with the policy rationales underlying heightened confidentiality protections for children, ORR should not share criminal information collected on forms MH-1 through MH-7 with outside agencies and should establish strict firewalls on the ability to access the information, as described above.

LAJC has had multiple clients who have disclosed past experiences in mental health settings believing these relationships to be confidential. Even in the rare cases where children were warned that what they said would not be kept confidential, the children did not understand or fully comprehend the negative repercussions that their statements would have on their placement within ORR custody, the delays to their reunification with family, or the harm to their immigration cases. Particularly in the mental health setting, unless a child reveals themself to be an immediate danger to themselves or others in care, information obtained in a mental health setting should remain confidential and should not be shared with outside agencies nor should it be used to generate SIRs. This practice is misleading, and does long-term damage to a child's ability to trust adult caregivers or mental health providers well beyond any relationship with an ORR staff member or care provider. The information itself can also undermine the child's wellbeing by resulting in restrictive placements, delaying reunification, and harming underlying immigration claims. ORR must consider all of these results when it designs policies and information collection strategies given its mandate to provide for the welfare of the children in its care.

ii. ORR Staff and Care Provider Staff Subject to HIPAA Should Abide by HIPAA When Handling a Child's Medical Information

In accordance with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),[24] children's health information generally cannot be used for purposes not directly related to their care without permission.[25] HIPAA applies to ORR's medical professionals,

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[20] VA Code Ann. § 16.1-305
[21] *Id.*
[22] VA Code Ann. § 16.1-301
[23] VA Code Ann. § 16.1-309

[24] Department of Health & Human Services, Office for Civil Rights, *Your Health Information Privacy Rights*, at 1, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf?language=en.

including psychologists, dentists, and doctors.[26] HIPAA requires the Secretary of HHS to develop regulations protecting the privacy and security of certain health information. Although ORR, as an organization, may not be a "covered entity" within the meaning of HIPAA,[27] the medical professionals working within ORR are covered entities and, thus, subject to HIPAA. According to the American Psychological Association Practice Organization, it is recommended that all psychologists make their practices compliant with HIPAA, even if a psychologist does not trigger HIPAA's application.[28]

According to Centers for Medicare & Medicaid Services, doctors, clinics, psychologists, and dentists are "covered entities" because they are healthcare providers who submit HIPAA transactions.[29] A "transaction" is an electronic exchange of information between two parties to carry out financial or administrative activities related to health care.[30] Because ORR hires medical professionals to conduct the health-related evaluations for minors in custody, these professionals are engaging in transactions with ORR to carry out ORR's administrative duty to provide the "appropriate routine medical and dental care, family planning services, and emergency health care services" and more.[31]

HIPAA ensures each patient has rights over their own health information, no matter what form it is in, including Electronic Health Information ("EHI").[32] The HIPAA Security Rule

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[25] See U.S. Department of Health and Human Services, *Summary of the HIPAA Privacy Rule* (July 26, 2013), https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html#:~:text=The%20U.S.%20Department%20of%20Health,1996%20(%E2%80%9CHIPAA%E2%80%9D).&text=Visit%20our%20Privacy%20Rule%20section,about%20how%20the%20Rule%20applies.

[26] Pub. L. 104-191; U.S. Department of Health and Human Services, *Summary of the HIPPA Security Rule*, https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html#:~:text=The%20Health%20Insurance%20Portability%20and,security%20of%20certain%20health%20information.

[27] *See* 45 C.F.R. § 160.103 (Definition of a Covered Entity).

[28] American Psychological Association Practice Organization, *HIPAA Privacy Rule: A Primer for Psychologists* (2013) at 2, https://www.apaservices.org/practice/business/hipaa/hippa-privacy-primer.pdf.

[29] Centers for Medicare & Medicaid Services, *Are You a Covered Entity?* (Aug. 2, 2020), https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/HIPAA-ACA/AreYouaCoveredEntity.

[30] 45 CFR Section 160.103; *See also* Centers for Medicare & Medicaid Services, *Transactions Overview* (Aug. 10, 2020), https://www.cms.gov/Regulations-and-Guidance/Administrative-Simplification/Transactions/TransactionsOverview.

[31] *Flores* Agreement, Ex. 1 at Paragraph 2.

requires specific protections to safeguard a patient's EHI.[33] Given ORR's creation of the UAC Portal and the general movement towards the use of EHI, a child's medical records must be kept confidential and protected from unauthorized use or disclosure.

One of the dangerous consequences of not protecting the confidentiality of a child's ORR file is the misuse of information by third parties, which can impede the release and family reunification of minors in ORR custody and negatively impact their immigration cases. As one of many examples, the disturbing story of Kevin Euceda illustrates this. Kevin, an adolescent in ORR custody, shared personal information with an ORR-employed therapist relating to his trauma, only to have his confidential conversations shared with ICE officials who used them against him in deportation proceedings.[34] Kevin's therapist informed him that the therapy sessions would be confidential.[35] This demonstrates the larger problem that notes taken during mandatory therapy sessions with immigrant children are being passed onto ICE, information which can then be used against them in court. This violates psychologists' duty to HIPAA and the privacy and confidentiality of their child patients.[36]

Psychologists have both forensic and therapeutic roles, which are critically different from one another. According to the American Psychological Association Practice Organization, "as a result of states protecting psychotherapist-patient communications, information acquired in the course of the psychotherapy relationship cannot be disclosed without a HIPAA-compliant authorization signed by the patient or a court order."[37] In other words, psychologists, within their

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[32] Department of Health & Human Services, Office for Civil Rights, *Privacy, Security, and Electronic Health Records*, at 2, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/privacy-security-electronic-records.pdf?language=en.

[33] Department of Health & Human Services, Office for Civil Rights, *Privacy, Security, and Electronic Health Records*, at 2, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/privacy-security-electronic-records.pdf?language=en.

[34] Hannah Dreier, *Trust and Consequences*, Wash. Post (Feb. 15, 2020), https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/; *See also* Gabrielle A. Carlson, *Letter Condemning ORR and ICE's Betrayal of Confidential Medical Information*, American Academy of Child & Adolescent Psychiatry (Feb. 18, 2020), https://www.aacap.org/App_Themes/AACAP/docs/Advocacy/AACAP-Letter-ORR-ICE.pdf.

[35] Hannah Dreier, *Trust and Consequences*, Wash. Post (Feb. 15, 2020), https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/.

[36] American Psychological Association Practice Organization, *HIPAA Privacy Rule: A Primer for Psychologists* (2013), at 2, https://www.apaservices.org/practice/business/hipaa/hippa-privacy-primer.pdf.

[37] American Psychological Association Practice Organization, *HIPAA Privacy Rule: A Primer for Psychologists* (2013), at 8, https://www.apaservices.org/practice/business/hipaa/hippa-privacy-primer.pdf.

therapeutic role, must not share the information revealed form confidential conversations with children in ORR custody. Breaches of confidentiality can result in civil liability or licensure revocation.

The only information that may be shared, outside of HIPAA protection, are reports written by a psychologist operating within a forensic role for a court or child's attorney.[38] The psychologist, in their forensic role, must inform the subject of the forensic evaluation that their evaluations will be shared with the child's attorney or the court and that the evaluator may be called to testify regarding the evaluation.[39] We are unaware of any forensic psychological reports of children in ORR custody being ordered by a court or requested by children's attorneys. Therefore, this exception to HIPAA is inapplicable and the information obtained about children by psychologists in their therapeutic role must be protected from access by third parties including, but not limited to DHS, ICE, USCIS, or any other state or federal agencies. Children's health information shared with ORR is subject to HIPAA and must be handled accordingly.

iii. ORR Case Files and the Information Obtained Therein Must Remain Separate from a Child's A-File.

Forms MH-1 through MH-7 should be maintained separately from the child's "Alien File." The *Flores* Agreement requires ORR facilities to "develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which *preserves the confidentiality of client information and protects the records from unauthorized use or disclosure*."[40] The ORR website states, "HHS does not release information about individual children or their sponsors that could compromise the child's location or identity."[41] The website also states, "HHS has strong policies in place to ensure the confidentiality of [UACs] personal information."[42] ORR's promises reflect the *Flores*

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[38] Howard Kaplan, *The Forensic Psychology* Report, American Bar Association (2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/the-forensic-psychology-report/#:~:text=Forensic%20psychologists%20are%20commonly%20required,in%20court%20as%20expert%20witnesses.

[39] Howard Kaplan, *The Forensic Psychology Report*, American Bar Assocation (2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/the-forensic-psychology-report/#:~:text=Forensic%20psychologists%20are%20commonly%20required,in%20court%20as%20expert%20witnesses.

[40] *Flores* Settlement Agreement, Ex. 1 at ¶ E (emphasis added).

[41] Office of Refugee Resettlement, *Health and Safety*, https://www.acf.hhs.gov/orr/about/ucs/health-and-safety.

[42] *Id.*

Agreement's provision that the child has "a reasonable right to privacy."[43] From the rights listed in the provision, naturally, the child must also have the right to privacy of their own records and ultimately, all the information they provide to ORR. A child's ORR file's information should not be accessible by third parties without the child's authorization, especially USCIS and ICE. Accordingly, Forms MH-1 through MH-7 should indicate that the child's ORR file is separate from the child's "Alien File," and the information in a child's ORR file must not be accessible by USCIS or ICE.

One of the alarming consequences of including a child's ORR file with the child's "Alien File", or allowing USCIS access to a child's ORR file, is the impediment to sponsorship and family reunification. ORR is required to ensure that children are released in a timely and safe manner from ORR custody to sponsors, most commonly parents or close relatives, who can care for them pending their immigration proceedings.[44] Family unity, or keeping children with family members, is a key factor in determining the best interest of children in custody.[45] Children are more likely to experience physical and emotional well-being, safety, and stability when they are living with and being cared for by family members.[46] Family unity is particular important for immigrant children, who are more likely to be disadvantaged in navigating a new country, language, and culture.[47] The best interests of children are compromised by information sharing between HHS and DHS.

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

[44] *Flores* Settlement Agreement, at ¶¶ 14-18.

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

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

[47] *See UNHCR Guidelines on Determining the Best Interest of the Child*, United Nations High Commissioner for Refugees (May 2008), http://www.unhcr.org/4566b16b2.pdf ("unaccompanied and separated children require special attention in identifying their best interests, given the particular risks that they face."); *see also UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, United Nations High Commissioner for Refugees (Feb. 1997), http://www.unhcr.org/enus/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompaniedchildren-seeking-asylum.html ("Considering their vulnerability and special needs, it is essential

Thus, ORR should maintain forms MH-1 through MH-7 separately from the child's "Alien File" and should not provide the records to DHS or other law-enforcement agencies without a subpoena or court order.

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that children's refugee status applications be given priority and that every effort be made to reach a decision promptly and fairly."); *see also* Nancy Landale et al., *The Living Arrangements of Children of Immigrants*, NIH Public Access, Future Child 1 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3241619/pdf/nihms-341452.pdf.