

Submitted via email

Administration for Children and Families
Office of Planning, Research, and Evaluation (OPRE)
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Attn: ACF Reports Clearance Officer

April 26, 2021

**RE: ORR Proposed Information Collection Activity, 86 FR 11537; Comments in
Opposition to Proposed Information Collection Activity; Services Provided to
Unaccompanied Alien Children (0970–0553)**

Dear ACF Reports Clearance Officer,

The Young Center for Immigrant Children's Rights (Young Center) writes regarding the above-referenced proposed information collection activity entitled "Proposed Information Collection Activity; Services Provided to Unaccompanied Alien Children (0970-0553)," published February 25, 2021, by the Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).¹

The Young Center has significant concerns regarding a number of the proposed forms and the potentially harmful impact they may have on the health and well-being of unaccompanied children in ORR custody. As written, these proposed forms could result in detrimental changes to conditions of custody for children, prolong their time in government custody, and adversely impact their immigration cases because of insufficient limitations on the use of information gathered by ORR. Given the current urgent priorities of ORR and the significant impact these proposed forms will have on children, we respectfully urge ORR to withdraw these proposed forms, give officials that have recently joined ORR staff sufficient time to review them, and re-issue a revised notice with additional and reasonable time for public comment if the agency deems it appropriate to move forward.

The Young Center serves as the federally-appointed best interests guardian *ad litem* (Child Advocate) for trafficking victims and other vulnerable unaccompanied children in government custody as authorized by the Trafficking Victims Protection Reauthorization Act (TVPRA).² The Young Center is the only organization authorized by ORR to serve in that capacity. The role of the Child Advocate is to advocate for the best interests of the child. A child's best interests are determined by considering the child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity. Since 2004, ORR has appointed Young Center Child Advocates for thousands of unaccompanied children in ORR custody.

¹ See Federal Register Vol. 86, No. 36, at 11537-11541.

² William Wilberforce Trafficking Victims Protection Act of 2008, 8 U.S.C.A. § 1232(c)(6)(A) (Westlaw through Pub. L. No. 115-171) [hereinafter TVPRA].

ORR proposes changes to 23 forms and instruments, including the introduction of 11 new forms, related to the provision of services to unaccompanied children in ORR custody. While we recognize the critical need for ORR to establish policies and procedures to adequately document services provided by ORR to children in its care, particularly to ensure that children are placed in the least restrictive setting in their best interests, many of the proposed forms raise significant concerns.

First, the proposed forms require ORR providers to collect and document information that is often used by the government against the interests of children; specifically, ORR often relies on similar information to change the conditions of a child's custody or to deny release to a family member or sponsor. Second, the information collection may also be used against children in their immigration proceedings before the Department of Justice (DOJ) or the Department of Homeland Security (DHS), adversely impacting their ability to pursue the humanitarian and asylum protections available to them under the law. ORR has failed to outline what steps it will take to ensure that the information it gathers is used only for the purposes of promoting the safety and well-being of children in ORR custody and not to undermine a child's right to be placed in the least restrictive setting in their best interests or to pursue permanent protection in the United States. Third, several of the forms ask for information that is inappropriate or irrelevant for ORR to consider in determining the service needs of children in ORR custody. For all of these reasons, ORR should review these forms and make appropriate changes to ensure that they promote the safety and health of children in ORR care.

Additionally, we object to the issuance of this proposed information collection activity and request for public comments at a time when ORR is almost wholly consumed with the effort to find sufficient and appropriate spaces for children referred from Customs and Border Protection. In February 2021, ORR indicated that it had reached its available bed capacity for children in its custody and began placing unaccompanied children in unlicensed influx facilities to address capacity constraints.³ In the past month, ORR has also begun placing unaccompanied children arriving at the border in an increasing number of unlicensed emergency intake facilities to address ongoing capacity constraints.⁴ Just a week ago, one of these intake facilities was shut down "following allegations that the nonprofit organization running the site failed to provide adequate living conditions for hundreds of young girls" in the facility.⁵ Given this pressing and deeply concerning situation, many organizations serving and advocating for the needs and interests of unaccompanied immigrant children have had to focus their advocacy efforts on

³ Silvia Foster-Frau, *First migrant facility for children opens under Biden*, WASH. POST, Feb. 22, 2021, https://www.washingtonpost.com/national/immigrant-children-camp-texas-biden/2021/02/22/05dfd58c-7533-11eb-8115-9ad5e9c02117_story.html.

⁴ Lauren Giella, *Nine New Migrant Shelters Have Opened Since Biden Took Office*, NEWSWEEK, March 24, 2021, <https://www.newsweek.com/five-new-migrants-shelters-have-opened-since-biden-took-office-1578253>.

⁵ Cecilia Vega, et al., *'Unbearable' conditions push Biden administration to close Houston migrant center*, ABC NEWS, April 19, 2021, <https://abcnews.go.com/US/unbearable-conditions-push-biden-administration-close-houston-migrant/story?id=77156939>.

ensuring unaccompanied children's safety, health, and well-being under these conditions, including ensuring that children are released to relatives and sponsors as expeditiously as possible. As a result, organizations serving unaccompanied children have had little time to devote to considering changes to ORR policies and protocols that may have a substantive impact on children's safety and well-being.

Far from reflecting merely minor changes to forms, the proposed information collection activity reflects changes to ORR procedures and policies that will impact children's health and well-being. The changes will elicit information that would likely impact children's right to be placed in the least restrictive setting. Moreover, given ORR's current capacity constraints, requiring ORR staff to complete longer and additional forms for all children arriving at ORR facilities without measures to ensure that the information is accurate and does not prevent or delay children's release from ORR custody could be counterproductive.

I. The proposed forms elicit information that is likely to be used against children's interests

A number of the proposed forms, including the Sponsor Assessment (Form S-5), Home Study Assessment (Form S-6), Initial Intakes Assessment (Form S-8), Proposed Assessment for Risk (Form S-9), the Proposed UAC Assessment (Form S-11), the Proposed UAC Case Review (Form S-12), the Proposed Home Study/Post-Release Service (HSIPRS) Referral (Form S-19), and the Proposed Post-Release Service (PRS) Event (Form S-22), request extensive information regarding a child's alleged criminal history, substance use, and mental health, as well as ORR staff and providers' opinions regarding a child's behavior while in custody and whether a child is involved or suspected of involvement with a gang. Although we recognize the importance of ORR supporting the provision of services to children with documentation of the child's need for the services, we are concerned that the information in these forms will be used in ways that are detrimental to children's health and safety. ORR should ensure that this information is only used for the purposes of providing services that are in children's best interests and to place children in the least restrictive setting, and is not shared with other federal agencies.

Under the TVPRA, ORR is required to place unaccompanied children in its custody "in the least restrictive setting that is in the best interest of the child."⁶ To meet its obligation to advance the best interests of children, ORR policies and procedures must take into account each child's safety, expressed wishes, right to family integrity, liberty, developmental needs, and identity.⁷ In our experience, criminal history and mental health information, as well as opinions regarding behavioral issues and gang affiliation, in the case files of children in ORR custody, often create impediments to a child's efforts to achieve permanency and safety. This information is often gathered and documented by ORR staff or contractors without the broader context of the many

⁶ 8 U.S.C. § 1232(c)(2).

⁷ SUBCOMM. ON BEST INTERESTS, INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 5 (2016) (citations omitted).

challenging circumstances each unaccompanied child confronts and the significant trauma which many have endured. At the same time, ORR staff or contractors frequently rely upon this information to make critical decisions about children that are detrimental to the safety and well-being of children. This type of information can negatively impact children's timely release or prolong their detention in a restrictive setting. Importantly, information used to support an initial placement or a prior transfer to a more restrictive placement may be relied upon again in the future to step up a child to an even more restrictive environment, even though the information may be inaccurate or incomplete.

The information could also lead to inappropriately designating the child as having a mental disability that warrants additional safeguards, such as a home study under the TVPRA, which ultimately lengthens a child's stay in federal custody. It may also unduly complicate and delay a child's release to a family member or their transfer to a long-term foster care placement. The information could also heighten the risk of a child's improper transfer to Immigration and Customs Enforcement (ICE) custody when they turn 18. Recent litigation has revealed the serious harm that unaccompanied children suffer upon transfer to ICE custody in violation of the TVPRA.⁸ Such transfers are predicated on dangerousness determinations that are often hastily made by ICE based on evidence and representations made by ORR staff.

Critically, the information is often used against the child in their legal proceedings, in an effort to persuade a judge or asylum officer to deny a child the right to remain in the United States, despite the absence of any process to ensure the fairness or accuracy of the information contained in these forms when they are first filed. Unaccompanied children are not in legal proceedings where their best interests are the guiding principle. Rather, they are in adversarial proceedings where information gathered about them while in government custody can and is often used against them,⁹ including in cases where children do not have counsel to challenge the submission of or reliance on that information. Information and disclosures that are included in ORR case files, particularly information regarding alleged criminal history, alleged gang involvement, and alleged substance use, can negatively influence adjudicators in the context of unaccompanied children's legal cases even though individuals completing the form may not intend that result or understand it as a possibility. Moreover, staff who complete forms required by ORR may receive insufficient training on the purpose and use of the forms and may lack an understanding of how the form may be used against the child in immigration and criminal proceedings far in the future.

⁸ See Spencer S. Hsu, *ICE unlawfully jails unaccompanied migrant children once they turn 18, judge rules*, WASH. POST, July 2, 2020, https://www.washingtonpost.com/local/legal-issues/us-judge-rules-ice-unlawfully-jails-unaccompanied-migrant-children-once-they-turn-18/2020/07/02/6a8d6cd4-bc91-11ea-bdaf-a129f921026f_story.html.

⁹ See, e.g., TAE D. JOHNSON, OFFICE OF THE DIRECTOR, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., INTERIM GUIDANCE: CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL PRIORITIES, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf (presuming that noncitizens 16 years or older who "intentionally participated in an organized criminal or transnational criminal organization to further the illegal activity of the gang or transnational criminal organization" is a public safety enforcement and removal priority).

Additionally, many ORR forms utilize a “checkbox” and auto-populated response format that is insufficient to fully report on the background and needs of a child. This format may make it easier for youth care workers, case managers, and clinicians to complete the forms, but the lack of questions and space for detail and context make these forms a tool that are easily used in a manner against the child’s best interests, especially if they are submitted in a different venue to individuals who do not have the same context as those care workers. Moreover, the forms are completed and become part of the child’s record without any participation by the child, the child’s attorney (if they have one), the independent Child Advocate (if they have one), and the local ORR-funded legal services provider. Excluding the perspective of the child from these forms is contrary to ORR’s obligation to treat children with dignity and respect and children’s right to have an opportunity to be heard regarding placement and release decisions that restrict their freedom.

Given the potential use of information collected in these forms against children in ORR custody, we recommend that in every case, ORR promptly provide the form to the child, the child’s attorney (if any), the Child Advocate (if any), and the ORR-funded legal services provider, so that they can identify concerns, object to content, propose changes, or submit missing or contextualizing information. Additionally, any time that ORR sends the form to the Department of Homeland Security (DHS) or another agency, it should notify the child, child’s attorney, Child Advocate, and ORR-funded legal services provider. Finally, the forms should be modified to document how and when information contained in the forms is shared with third parties.

While we recognize ORR’s obligation to better understand and meet the service needs of unaccompanied children in its care, it is important for ORR to recognize that it will best serve the needs of children by providing the services necessary to keep children in the least restrictive setting in their best interests.¹⁰ For children, the conditions of custody, separation from family, and uncertainty regarding their future while in ORR custody all heighten emotional distress and compound underlying mental health needs. Subjecting children to restrictive settings exacerbates rather than addresses children’s trauma, while depriving children of the community, family, and mental health support that would bolster healing and resiliency.¹¹ To the extent that ORR needs

¹⁰ CHADWICK CENTER AND CHAPIN HALL, USING EVIDENCE TO ACCELERATE THE SAFE AND EFFECTIVE REDUCTION OF CONGREGATE CARE FOR YOUTH INVOLVED WITH CHILD WELFARE 5 (2016), https://www.chapinhall.org/wp-content/uploads/effective_reduction_of_congregate_care_0.pdf [hereafter CHADWICK CENTER AND CHAPIN HALL BRIEF ON REDUCTION OF CONGREGATE CARE] (“The use of evidence-based interventions for youth with mental health needs not only effectively addresses those needs, but also aims to reduce the use of congregate care”). See also Mary Dozier, et al., *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 AM. J. ORTHOPSYCHIATRY 219, 219 (2014), <https://www.apa.org/pubs/journals/features/ort-0000005.pdf> (“Group care should be used for children only when it is the least detrimental alternative. That standard is met only when there is no less restrictive setting available to meet a child’s need for therapeutic mental health services. Even in that instance, group care should end when it ceases to be the least detrimental alternative for that child”).

¹¹ See ANTUÑA M. PARIS ET AL., IMMIGRATION PSYCHOLOGY WORKING GROUP, VULNERABLE BUT NOT BROKEN: PSYCHOSOCIAL CHALLENGES AND RESILIENCE PATHWAYS AMONG UNACCOMPANIED

to document psychosocial information to assess unaccompanied children's needs, it should be for the sole purpose of referral, if necessary, for services necessary in order to keep children in the least restrictive setting.¹² ORR's main priority should be to seek to release children, including children with special needs, as expeditiously as possible and to connect the child and their family with community-based services post-release.¹³ The forms fail to demonstrate what steps ORR will take to ensure the forms are used for these purposes and what steps will be taken to mitigate the risks that information gathered in the forms will be used in a manner adverse to the child's interests.

A. ORR should eliminate all questions eliciting opinions on gang affiliation from its services forms

We oppose questions in the Proposed UAC Assessment (Form S-11) and the Proposed UAC Case Review (Form S-12) that elicit information regarding whether a child is affiliated or is suspected of being affiliated with a gang. We also oppose questions in the Proposed Home Study/Post-Release Service (HSIPRS) Referral (Form S-19) and the Proposed Post-Release Service (PRS) Event (Form S-22) that elicit opinions and information regarding a child's need for gang prevention services, as recommendations regarding these services imply that ORR believes the child has a history or record of gang affiliation or membership. As we have expressed in comments opposing other proposed information collection activities recently published by ORR that also seek to collect extensive information regarding a child's alleged affiliation with gangs, we oppose all questions in ORR forms that implicitly or explicitly label children as gang-affiliated or gang members, because: (1) they lead ORR astray from its child

CHILDREN FROM CENTRAL AMERICA 59 (2018), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Vulnerable-But-Not-Broken.pdf> ("At the institutional and structural levels, procedures to release apprehended children from restrictive settings to more supportive, child-appropriate environments (including, whenever possible, to their families) and policies legislating children's access to education, healthcare, and legal representation are important resilience-related resources"); Julie M. Linton et al., American Academy of Pediatrics Council on Community Pediatrics, *Providing Care for Children in Immigrant Families*, 144 PEDIATRICS (2019), <https://pediatrics.aappublications.org/content/144/3/e20192077> ("Resilience is fostered through strong family relationships and community support").

¹² CHADWICK CENTER AND CHAPIN HALL BRIEF ON REDUCTION OF CONGREGATE CARE, *supra* note 10, at 5 ("Careful screening and assessment should be used on all youth entering the child welfare system to identify their individual needs and ensure that placement decisions are data driven using standardized measures and favor the least restrictive placement that meets the child's needs").

¹³ Community and family-based settings are in line with mental health experts' and child welfare recommendations, as well as the United Nations Convention on the Rights of Persons with Disabilities, which requires an absolute ban on deprivation of liberty on the basis of disability. See Human Rights Watch, *Children with disabilities: Deprivation of liberty in the name of care and treatment* (Mar. 7, 2017), available at <https://www.hrw.org/news/2017/03/07/children-disabilities-deprivation-liberty-name-care-and-treatment#>; BAZELON CENTER FOR MENTAL HEALTH LAW, DIVERSION TO WHAT? EVIDENCE-BASED MENTAL HEALTH SERVICES THAT PREVENT NEEDLESS INCARCERATION (Sept. 2019), available at www.bazelon.org/wp-content/uploads/2019/09/Bazelon-Diversion-to-WhatEssential-Services-Publication_September-2019.pdf.

welfare mandate and do not align with the roles and responsibilities of staff; and (2) they raise serious racial justice concerns and can criminalize children in ORR custody.

First, there is no child welfare justification for ascribing gang or cartel labels to children. Congress tasked HHS with the care and custody of unaccompanied children, prioritizing their release to family. Instead of prosecuting children, HHS, through ORR, is tasked with ensuring the welfare of immigrant children while the DHS acts as children's adversary in removal proceedings or as the adjudicator for benefits applications. Bifurcating the care of unaccompanied children from their prosecution or adjudication thus lies at the heart of ORR's brief role in children's lives.

Many unaccompanied children flee their countries of origin due to gangs and cartels, only to become vilified by DHS during their removal proceedings. DHS frequently overlooks plausible questions about children's consent, maturity, and developmental capacity, as well as whether their participation in a gang or gang activity was forced, or whether trafficking was involved, prior to labeling children as gang or cartel members. Similarly, the questions ORR proposes to add to the forms are mostly checkboxes for ORR to label children in a similarly summary fashion—based on a staff member's individual viewpoint or the prior DHS "determination." As such, they serve no legitimate child welfare purpose and have no place in ORR forms, particularly the forms addressed here.

Additionally, staff in ORR-contracted facilities typically lack the necessary expertise to make findings that should only result after a nuanced assessment of the child's background and for a purpose directly related to the child's safety in ORR custody and upon release to a sponsor. ORR staff (including case managers and clinicians, as well as staff who interact daily with unaccompanied children) are not sufficiently trained to make findings about whether a child is gang-involved. Their training and expertise do not prepare them to elicit the information targeted in those questions in the context of a child in government custody and also in removal proceedings. ORR should prioritize training staff to approach every aspect of their work through the prism of child welfare and trauma-informed care, not law enforcement.

ORR's increased use of forms to collect information regarding gang affiliation and involvement or to explicitly or implicitly label children as somehow connected to "gangs" is especially concerning as law enforcement agencies, whose training is more likely to align with these questions, frequently produce gang databases riddled with gross errors that improperly label youth and adults.¹⁴ In other words, agencies whose practice centers on crime prevention commit

¹⁴ See Justin Jouvenal, *Virginia police task force drops use of controversial gang database*, WASH. POST, Jan. 28, 2021, https://www.washingtonpost.com/local/public-safety/gangnet-database-controversy/2021/01/27/0decb3d4-5bfd-11eb-b8bd-ee36b1cd18bf_story.html (Northern Virginia Regional Gang Task Force dropping use of gang database after concerns that "minorities are disproportionately represented in it and its use is shrouded in secrecy"); Mike Dumke, *Chicago's Inspector General Finds the City's Gang Database Is Riddled With Errors*, PROPUBLICA, April 11, 2019, <https://www.propublica.org/article/chicago-police-department-gang-database-inspector-general-report> (Chicago Police Department "cannot confirm that all of its gang designations are accurate and up-to-

consistent errors when labeling individuals as affiliates or participants of gang activities. There is no sound basis for requiring ORR staff, as members of a child welfare agency, to make those findings.

Finally, these questions criminalize primarily Black and Latinx children in ORR's care. Recently, law enforcement agencies have revisited their gang intelligence due to the disproportionate representation of Black and Latinx individuals.¹⁵ Given the established nexus between gang labeling and racial profiling, we strongly urge ORR to eliminate questions that elicit opinions and viewpoints on a child's affiliation or involvement with gangs. In our experience, the children we serve were the victims of gang violence, not their masterminds. Of all unaccompanied minors apprehended at the southwest border between 2011 and 2017, approximately 0.03% were either "confirmed or suspected" to have ties to gangs in their home country, per U.S. Border Patrol¹⁶—a profoundly unremarkable figure to pivot policy or practice, even for a law enforcement agency that is steeped in histories of racial animus¹⁷ and profiling.¹⁸

We urge ORR not to repeat the harmful practices of the past administration, which consistently villainized Black and Latinx children. Former Attorney General Jeff Sessions called immigrant children "wolves in sheep clothing."¹⁹ The former President also called immigrant children "animals,"²⁰ while his Acting U.S. Customs and Border Protection Commissioner proclaimed the power to detect when "so-called minors" are "soon-to-be" gang members by "look[ing] at [children's] eyes".²¹ ORR is at risk of implicitly adopting this rhetoric by requiring gang affiliation and prevention information as elements of providing services to children in ORR

date," per inspector general and it "may not be able to ensure that all gang-related data collection tools serve a legitimate law enforcement purpose and are used appropriately").

¹⁵ *Id.*

¹⁶ *The MS-13 Problem: Investigating Gang Membership, its Nexus to Illegal Immigration, and Federal Efforts to End the Threat*, Hearing Before the U.S. Senate Comm. on the Judiciary (2017) (Testimony of Acting Chief U.S. Border Patrol Carla Provost), <https://www.judiciary.senate.gov/imo/media/doc/06-21-17%20Provost%20Testimony.pdf> ("Of the approximately 5,000 individuals apprehended by USBP with confirmed or suspected gang affiliations since FY 2012, 159 were UACs.").

¹⁷ Katy Murdza & Walter Ewing, *The Legacy of Racism within U.S. Border Patrol*, AMERICAN IMMIGRATION COUNCIL (Feb. 10, 2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_legacy_of_racism_within_the_u.s._border_patrol.pdf.

¹⁸ Sarah Towle, *The Education of a United States Border Patrol Agent*, MEDIUM (Oct. 6, 2020), <https://medium.com/the-first-solution/the-education-of-a-united-states-border-patrol-agent-10ac7f9ea4b9>.

¹⁹ U.S. Department of Justice, Attorney General Sessions Gives Remarks to Federal Law Enforcement in Boston About Transnational Criminal Organizations, September 21, 2017, <https://www.justice.gov/opa/speech/attorney-general-sessions-gives-remarks-federal-law-enforcement-boston-about>.

²⁰ *Trump calls some illegal immigrants 'animals' in meeting with sheriffs*, CBS NEWS, May 16, 2018, <https://www.cbsnews.com/video/trump-calls-some-illegal-immigrants-animals>.

²¹ Ted Hesson, *Trump's pick for ICE director: I can tell which migrant children will become gang members by looking into their eyes*, POLITICO, May 16, 2019, <https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570>.

custody.²² We urge ORR to end the implicit and explicit criminalization and vilification of children in all its forms.

B. Information regarding a child's criminal history should be limited to adult criminal convictions and only when necessary to care for the child or others

For reasons similar to those underlying our opposition to questions regarding gang affiliation, we oppose questions in a number of the forms that elicit extensive and unnecessarily broad information regarding a child's alleged criminality. Both the UAC Assessment (Form S-11) and the UAC Case Review (Form S-12) include a section titled "UAC Criminal Details" with fields for "Criminal Concerns?," "Gang Affiliation," and "Foot guide." Both forms also include a section titled "Criminal Charges," with fields eliciting detailed information regarding each instance of criminal charges brought against a child, including "Charged," "Adjudicated," "Arrested Date," "Arrested For," "List of Charges," "Outcome of Criminal Case," and "Summary of Events." The Assessment for Risk (Form S-9) also includes the following fields: "Does the child have any past or current criminal charges?" and "If yes, list the charges and explain."

The notice of information collection activity fails to provide any explanation for why ORR seeks to document such extensive information regarding a child's alleged criminal history in multiple forms. For instance, while the notice of information collection activity states that the UAC Assessment Form is "used to inform provision of services (e.g., case management, legal, education, medical, mental health, home studies)," ORR does not explain why extensive information regarding all criminal charges brought against a child is needed to inform the provision of services to the child while they are in ORR custody. The query "Criminal Concerns?" in the Proposed UAC Assessment Form is also vague and could be construed by ORR staff very broadly. The notice of information collection states that the Assessment of Risk Form is "administered by care providers to reduce the risk that a child or youth is sexually abused or abuses someone else while in ORR custody." However, ORR does not explain why a list of all of the child's past or current criminal charges and an explanation of the charges is necessary in order to assess the risk of sexual abuse.

To avoid the collection of unnecessary information that could be used against a child's interests, ORR should revise the questions to elicit only the information relevant and necessary in order for ORR to provide services to children to keep them in the least restrictive setting in their best interests. At the very least, ORR should not consider criminal charges that have not resulted in adult convictions in evaluating whether a child presents a risk to others while in ORR custody. In particular, criminal charges that have been dismissed or withdrawn should be excluded, as there was a determination by a criminal court that the charges would not be prosecuted and were likely unfounded. In our experience, very few children are charged in adult, criminal court proceedings,

²² *The MS-13 Problem: Investigating Gang Membership, its Nexus to Illegal Immigration, and Federal Efforts to End the Threat*, Hearing Before the U.S. Senate Comm. on the Judiciary (2017) (Statement of ORR Director Scott Lloyd), <https://www.judiciary.senate.gov/imo/media/doc/06-21-17%20Lloyd%20Testimony.pdf>

and when they are, it is not necessarily for actions that suggest a risk to others while the child is in ORR custody. Juvenile delinquency adjudications should also be excluded, as delinquency adjudications within the United States are subject to state confidentiality laws and disclosing information about them on these forms could violate those laws. Moreover, per the Immigration and Nationality Act and *Matter of Devinson*,²³ juvenile charges or delinquency findings are not considered criminal convictions.

The forms' collection of information regarding criminal charges is particularly problematic, because ORR and facility staff are not, and should not be, trained to decode complicated criminal records. They may also be unable to discern whether a charge was dismissed or changed to a less serious charge. For example, when children are accused of criminal acts, it is not uncommon for district attorneys to overcharge cases and later "break them down" or change the charges to something less serious. The original charges will still appear on the child's record, even if they are dismissed or nolle prossed, or the final verdict is "not guilty." If ORR and facility staff are unable to decipher all of the annotations and notes in a child's criminal record, it may lead to the child being placed in an overly restrictive placement or in settings that are not in the best interests of the child, or being denied release to a parent, family member, or other sponsor who is better able to care for the child within the community. These forms also do not require the reporting individual to request, review, and fully understand the incident report or other documents underlying the criminal or delinquency charges. Those reports will often explain that the underlying incident is not as serious as the criminal charge would otherwise lead them to believe. Therefore, we recommend that ORR forms be limited to noting confirmed or verified criminal convictions for children charged as adults and only when necessary to appropriately care for the child or others.

C. Questions regarding Significant Incident Reports in a child's ORR case file should be removed or limited

We are also concerned that the Proposed UAC Case Review (Form S-12) and the Proposed Home Study Assessment (Form S-6) elicit information regarding Significant Incident Reports (SIRs) in a child's case file. In our experience, the information in SIRs, particularly those that relate to alleged behavioral problems, is often gathered and documented by ORR staff or ORR contractors without the broader context of the many challenging circumstances each unaccompanied child confronts and the significant trauma many have endured and which are important context for the events constituting an alleged "SIR". As a result, this information often creates unjustified impediments to a child's efforts to achieve permanency and safety.

The majority of children in ORR custody are teenagers—not yet adults physically, emotionally or intellectually. Under the very best of circumstances children at this age and stage of development are primed to crave autonomy and independence and push back against authority. They are also more likely than adults to be impacted by emotionally stressful circumstances.²⁴

²³ *Matter of Devinson*, 22 I&N Dec. 1362 (BIA 2000).

²⁴ FRANCES E. JENSEN & AMY ELLIS NUTT, *THE TEENAGE BRAIN: A NEUROSCIENTIST'S SURVIVAL GUIDE TO RAISING ADOLESCENTS AND YOUNG ADULTS* 22 (2015).

The uncertainty of their situation in ORR custody, including how long they will be in custody, seeing other children coming and going while they remain in custody, weighs upon them heavily. This combination of stressors compounds the trauma children have experienced before their arrival and, unsurprisingly, impacts their presentation and behaviors in a manner which may subsequently be reported in SIRs.²⁵

At the same time, SIRs document specific moments of a child's behavior while in ORR custody, but fail to set forth a full portrait of the child or provide the broader context surrounding a child's behavior during a single incident. SIRs may prompt a child to be stepped up to an even more restrictive environment, which is often inappropriate to address a child's trauma and related manifestations of that trauma. Additionally, they often unduly complicate and delay a child's transfer to a long-term foster care placement. Critically, SIRs may even be used against the child in their legal proceedings, in an effort to persuade a judge or asylum officer to deny a child the right to remain in the United States, despite the absence of any process to ensure the fairness of these forms when they are first filed. While such forms might be routine in the child welfare context, those proceedings are governed by the best interests principle, where everyone is working to ensure the child's safety. In contrast, children in immigration proceedings are in adversarial proceedings where information gathered about them while in government custody, including SIRs, can and is often used against them.

As with many other ORR forms, staff who complete SIRs receive limited training on the use of the forms; they may lack expertise to complete certain sections of the form (e.g., regarding the child's mental or physical health) or may lack an understanding of how the form may be used against the child in legal proceedings far in the future. Moreover, the checkbox format of SIR forms is insufficient to fully report on any significant incidents within ORR facilities; the lack of space to provide detail and context make SIR forms a tool that are easily used in a manner against the child's best interests. Additionally, the forms are completed and become part of the child's record without any participation by the child, the child's attorney (if they have one), the independent Child Advocate (if they have one), and the local ORR-funded legal services provider.

Another issue with ORR's broad reliance on SIRs is that they are often used to document incidents that are minor or which should have no bearing on the child's release or placement, despite the fact that ORR policy directs care providers to use SIRs to report incidents that "affect[] a child's health, well-being and safety."²⁶ As just one example, an SIR was written up for a child in ORR custody, because the child brought a beverage to class, which the child is not

²⁵ See Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 CHILD ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AM. 185, 199-200 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3968319/pdf/nihms-555973.pdf> (discussing how childhood trauma can inhibit executive function, memory, and problem solving).

²⁶ OFFICE OF REFUGEE RESETTLEMENT, ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERV., *ORR Guide: Children Entering the United States Unaccompanied* [hereinafter ORR GUIDE ON UNACCOMPANIED CHILDREN], § 5.8 (2015), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied>.

permitted to do under the rules of the ORR facility in which the child is placed. In many cases, children are flagged by ORR staff for “behavioral issues” based on a large number of SIRs in the child’s case file, even though many of the SIRs are for minor incidents or minor infractions of facility rules.

In addition, the inclusion of SIRs in a child’s case file is generally viewed negatively by ORR providers, even though SIRs are used to document many different types of events, not just behavioral incidents. For instance, SIRs document incidents that occurred prior to ORR custody, such as incidents of “[p]ast abuse and neglect.”²⁷ Moreover, when there is an incident involving more than one child in ORR custody, ORR staff will file SIRs for all children involved, regardless of whether the child was the alleged perpetrator or the alleged victim, and regardless of the extent of the child’s involvement in the incident. Despite the broad scope of events recorded as SIRs in children’s case files, ORR staff may rely upon the sheer number or existence of SIRs in a child’s case file to step up a child to more restrictive placement, to deny a step down to a less restrictive placement, or to delay or deny release to a child. Sometimes, providers (including providers of long-term foster care, which is the least restrictive setting for children who do not have sponsors) will deny placement to a child due to the number of SIRs in a child’s case file, or the provider will express concern that a large number of SIRs indicates that the child has particular needs that the provider cannot meet; as a result, children with SIRs in their case files are often denied placement in the least restrictive setting. Given the dangers of SIRs being misused against children’s best interests, ORR should remove broad requests for information regarding SIRs in its forms and limit its questions regarding behavioral incidents to those that are necessary to ensure the safety and well-being of the child and other children in ORR custody.

II. The proposed forms should also be revised to eliminate questions that ask for irrelevant or inappropriate information and to ensure the safety, health, and well-being of children

A. Extensive questions regarding normal adolescent sexual behavior should be removed from the Assessment of Risk Form

The Proposed Assessment for Risk (Form S-9) includes numerous invasive questions regarding a child’s sexual history, including “Do you have a history of sexual activity?”; “Sexual Activity Type” with a drop-down menu of answer options that include “Oral,” “Vaginal,” and “Anal”; “Was the sexual activity consensual?”; “Date of Last Consensual Sexual Encounter,” whether the encounter occurred “In Home Country?,” “During Journey to U.S.?,” “In ORR Custody?,” or “In U.S., not in ORR Custody?” and “Specify Who/When/Where.” ORR fails to explain why any of this information is necessary for the purposes of the assessment, which according to the notice of information collection, is “to reduce the risk that a child or youth is sexually abused or abuses someone else while in ORR custody,” particularly since the form includes numerous other questions regarding whether a child has ever been coerced into sexual activity or experienced sexual abuse or violence.

²⁷ *Id.*, § 5.8.2.

ORR's broad collection of information regarding all sexual activity in the context of assessing risk of sexual abuse may stigmatize or pathologize normal behavior, particularly for adolescents. According to medical experts that specialize in pediatric care, "Sexuality, the expression of interest, orientation, and preference, is a normal part of adolescence...On average, middle adolescence is a time when teens begin to be interested in more intimate relationships and experimentation."²⁸ The American Academy of Pediatrics states, "Developing a healthy sexuality is a key developmental milestone for all children and adolescents that depends on acquiring information and forming attitudes, beliefs, and values about consent, sexual orientation, gender identity, relationships, and intimacy."²⁹ The AAP further states, "All children and adolescents need to receive accurate education about sexuality to understand ultimately how to practice healthy sexual behavior."³⁰ Yet, ORR's inclusion of broad questions regarding all sexual activity in the Assessment of Risk form suggests to youth in ORR custody that any sexual activity is inappropriate, which could be harmful to their healthy development. ORR should limit the questions in the form to those that elicit information relevant and necessary to determining whether a child or youth presents a risk of sexual abuse.

Other aspects of the Proposed Assessment for Risk Form also raise concerns about its validity as a risk assessment tool. In particular, it is unclear if the questions on the form 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 in the assessment, including whether they are derived from evidence-based screening tools that have been validated for use with immigrant children. 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.

In addition, many of the questions in the Assessment of Risk Form are not worded in a child-sensitive manner. For instance, the form includes a number of questions regarding consensual and non-consensual sexual activity. However, the form does not define the term "consensual." At the same time, the term "consensual" is a technical, legal term, and whether sexual activity is legally "consensual" (and whether a minor can legally consent at all to sexual activity) is defined by state law, varying state by state depending on the ages of the individuals involved. As a result, a child – and perhaps even ORR staff -- is unlikely to understand what the term "consensual" means. We recommend removing the words "consensual" and "nonconsensual" from questions and reframing the questions to be understandable to children of all ages.

The form also seeks sensitive information about events that are likely disturbing and even traumatic for a child, but the questions are not worded in a trauma-informed, child-sensitive

²⁸ Trisha Tulloch and Miriam Kaufman, *Adolescent Sexuality*, 34 PEDIATRICS IN REVIEW 29-38 (2013), <https://pedsinreview.aappublications.org/content/34/1/29>.

²⁹ Cora C. Breuner and Gerri Mattson, American Academy of Pediatrics Committee on Adolescence, AAP Committee on Psychosocial Aspects of Child and Family Health, *Sexuality Education for Children and Adolescents*, 138 PEDIATRICS e1, e2 (2016), <https://pediatrics.aappublications.org/content/138/2/e20161348>.

³⁰ *Id.*

manner. For instance, the form includes the questions: “Do you find that people make a lot of sexual comments to you or about you?” and “Has the minor ever agreed to perform a sexual act or allow his or her body to be touched for any of the following: to avoid harm to self or others; to get something he or she needed or wanted; or to be accepted by others?”³¹ The language of these questions should be revised to be child-sensitive and trauma-informed. Children in ORR custody often arrive with trauma histories. The uncertainty of their situation in ORR custody, including how long they will be in custody, seeing other children coming and going, while they remain separated from trusted family members, weighs upon them heavily. It is therefore critical that children receive trauma-informed care that promotes their healing and resilience. Rather than promoting healing and resilience, the language in these forms could trigger children and exacerbate the stress they are likely already experiencing.

B. “Age Determination or Identity Concern” questions should be removed

We oppose the addition of a sub-section of questions titled “Age-Determination or Identity Concern” to the “Basic Information” section of the Proposed UAC Assessment (Form S-11) and the Proposed UAC Case Review (Form S-12), which includes the questions “Concern With UAC’s Age or Identity?”; “AKA A#”; “AKA Name”; “AKA DOB Per Birth Certificate”; and “AKA Age”. ORR fails to provide reasoning for the addition of this sub-section to these forms and does not explain how the questions are relevant to the provision of services to children in ORR custody. At the same time, the collection of this information will likely have a very harmful impact on children in ORR custody. The wording of the title and the questions suggest that the child and/or their family have not been truthful about the child’s age or identity and that ORR staff suspect them of fraud. This information could be used against the child to remove their designation as an “Unaccompanied Alien Child” and to strip a child of their rights under the TVPRA as an unaccompanied child. This would result in the child being placed in an adult detention facility, which is not an appropriate environment for a child, and the denial of child-specific legal protections. Moreover, the addition of the “Age-Determination or Identity Concern” sub-section, to the UAC Assessment Form, which ORR staff must complete for every child that is transferred to ORR custody, will likely prompt ORR staff to be unreasonably suspicious of age-determination and identity issues as they are assessing children, resulting in more children being unnecessarily flagged for age determination and identity issues.

These questions improperly suggest to ORR staff that they should routinely consider whether a child is being truthful about their age or identity in each case. Yet, pursuant to the *Flores* Settlement Agreement³², ORR should start with a presumption that the individual transferred to its custody is a child. The *Flores* Agreement recognizes that there will be circumstances in which the age of a child is not known with certainty but permits the individual to be treated as an adult

³¹ As these two questions illustrate, the form is also not clear as to whom the questions are addressed. Some questions appear to be directly addressed to the child, and other questions are addressed to the ORR Staff completing the assessment. The questions should be revised to be consistent in terms of the expected respondent to the questions.

³² *Flores v. Reno*, No. CV 85-4544-RJK (Px), at 9 (C.D. Cal. Jan. 17, 1997) (Stipulated Settlement Agreement).

only when a reasonable person would hear the individual's claim to childhood but still conclude that the individual was an adult. In other words, the language of the *Flores* Agreement starts with the child's claim and provides a mechanism to override the child's claim only when it would be reasonable to do so.

As proposed, these forms will subject children to the constant fear that ORR may challenge their age or identity at any time and strip them of vital legal protections, which is unfair and contrary to the best interests of children. The TVPRA provides children designated as "unaccompanied" with an array of substantive and procedural protections designed to ensure fair, efficient legal proceedings and the safety and well-being of children. For this reason, these questions should be stricken from the revised form.

C. Forms to assess the suitability of potential sponsors should not ask for the potential sponsor's immigration status and should not elicit unnecessary information about the child that will be improperly used to delay release

The Sponsor Assessment (Form S-5) and the Home Study Assessment (Form S-6) contain unnecessary questions eliciting information that is likely to be used against both the child and the potential sponsor. Specifically, the Sponsor Assessment (Form S-5) includes a field for the "Sponsor's Legal Status," requires the sponsor applicant to provide proof of their legal status with "non-expired documents," and requires ORR to indicate whether they have verified the document with a government agency or consulate. The Home Study Assessment Form S-6 elicits extensive negative information about a child, including SIRs, mental health information, criminal history, substance abuse, and gang involvement.

In our experience, the collection of this information creates unnecessary barriers to a child's release from ORR custody, in contravention of the TVPRA's mandate for children to be placed in the least restrictive setting in their best interests. These forms are critical to the process of evaluating parents and other sponsors as safe placements for unaccompanied children. When determining whether a sponsor is suitable for a child, ORR should consider best practices in child welfare. First, as in child welfare, the goal should be to place a child in an appropriate family setting as quickly as possible. This requires evaluating sponsors to verify their relationship to the child and to ensure the immediate safety of the child. Evaluations that extend beyond child safety, or which invite immigration enforcement against sponsors, will lead to the prolonged detention of children and their prolonged separation from parents and other family members.

ORR should remove questions regarding a sponsor's immigration status from all forms related to sponsor suitability assessments, because this information may unnecessarily delay a child's release from ORR custody. For instance, in 2018, 41 sponsors were arrested after applying to sponsor a child's release from federal custody; fear of immigration enforcement may have been a primary cause of the increased lengths of stay in ORR custody for unaccompanied children.³³ At

³³ Tal Kopan, *ICE arrested undocumented immigrants who came forward to take in undocumented children*, CNN, Sept. 20, 2018, <https://www.cnn.com/2018/09/20/politics/ice-arrested-immigrants->

the same time, there is no known correlation between a sponsor's immigration status and the likelihood that the individual poses a threat to the safety of, or lacks the ability to care for, a child. According to ORR Policy, "ORR uses immigration status information to determine whether a sponsor care plan is necessary in the event the sponsor is required to leave the United States."³⁴ However, there are alternate methods or questions to determine whether a sponsor care plan is necessary that do not require a potential sponsor to disclose their immigration status, and that would not delay reunification of children with their families. Moreover, while the Memorandum of Agreement that precipitated the arrests of more than 40 sponsors has been rescinded, a similar agreement could be instituted in the future. Because the sponsor's immigration status is not necessary to evaluate their ability to sponsor the child, this information should simply not be collected.

We are also concerned that the Home Study Assessment Form S-6 elicits extensive negative information about a child, including SIRs, mental health information, criminal history, substance abuse, and gang involvement. Much of this information is unnecessary to evaluate a child's present needs. Moreover, this information is often documented without the broader context of the child's circumstances and trauma history and will likely paint an incomplete and skewed portrait of a child, particularly since the form fails to elicit any positive information regarding a child's positive development and growth while in ORR custody. In accordance with ORR Policy, the focus of the Home Study Assessment Form S-6 should be on "assess[ing] the potential sponsor's ability to meet the child's needs" and "educat[ing] and prepar[ing] the sponsor for the child's release."³⁵ ORR should revise the form to elicit the information necessary for these purposes. Moreover, ORR should instruct its staff and contractors that a child's mental or behavioral health needs cannot be the sole reason for delaying a child's release to a sponsor. Rather, case managers and FFSs should refer children with mental and behavioral health needs to appropriate services in the community upon release.

III. Other Issues

A. Information regarding a child's disabilities

We are concerned that several of the forms unnecessarily elicit information regarding whether a child has disabilities. The Proposed Assessment for Risk (Form S-9) includes the following questions: "Does the child or youth have any developmental disability or illness or suspected of having any of the above?"; "Does the child or youth have any mental disability or illness or suspected of having any of the above?"; "Does the child or youth have any physical disability or

[sponsor-children/index.html](#); Tal Kopan, *The simple reason more immigrant kids are in custody than ever before*, CNN, Sept. 14, 2018, <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>; Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, THE NEW YORKER, Oct. 16, 2018, <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything>.

³⁴ ORR GUIDE ON UNACCOMPANIED CHILDREN, *supra* note 26, § 2.6.

³⁵ ORR GUIDE ON UNACCOMPANIED CHILDREN, *supra* note 26, § 2.4.2.

illness or suspected of having any of the above?” The Proposed UAC Assessment (Form S-11) and the Proposed UAC Case Review (Form S-12) include the questions: “Based on the most recent screening for disabilities, does the child have a disability as defined in Section 3 of the Americans with Disabilities Act[?]” “If yes, specify disability.” The Admission (Form S-18) also includes the following fields: “Learning Disability” and “Learning Disability Details” under a section titled “Education.”

We support ORR’s screening of children for disabilities to ensure that they receive the services necessary to place them in the least restrictive setting in their best interests and to ensure that children with disabilities can receive educational services and other supports and services to which they are entitled. However, ORR has provided no information as to how they currently screen or plan to screen children for developmental, mental, physical, or learning disabilities. We are not aware of any ORR policies that detail the specific procedures that ORR staff must comply with to identify, assess, and provide services to children with disabilities. ORR should provide their policies and procedures as to disability assessment and the provision of services to children with disabilities, in order for stakeholders to assess the propriety of these questions in ORR forms and to provide feedback on how to ensure that ORR meets its legal obligations as to children with disabilities in ORR custody.

It is particularly important for ORR to provide information regarding the specific screening tools and assessments that staff must use to identify children with developmental, mental, physical, or learning disabilities, so that children are properly identified and diagnosed. In our experience, children with disabilities in ORR custody are not consistently assessed for disabilities, are often incorrectly or improperly diagnosed with mental disabilities, and often do not receive services to address their disabilities while in ORR custody. Moreover, the harm to children in ORR custody due to improper diagnoses and a lack of services is significant. In many cases, children with mental health needs do not receive the services that they need and are instead stepped up and placed in unnecessarily restrictive settings or denied timely release. These step-ups risk further damaging children’s mental health, as restrictive institutional environments increase the trauma of detention. The step-ups also segregate children with disabilities from other children in violation of Section 504 of the Rehabilitation Act instead of putting them in the most integrated setting appropriate to their needs.

In some cases, children are misidentified as having mental disabilities or misdiagnosed with mental health disorders which ORR staff rely upon to step up children or deny timely release. An incorrect designation of a child as having a mental disability may warrant additional safeguards, such as a home study under the TVPRA, which ultimately lengthens a child’s stay in federal custody. It may also unduly complicate and delay a child’s release to a family member or their transfer to a long-term foster care placement. Without proper assessment tools and services in place for children with disabilities, the collection of information regarding children’s disabilities is likely to be inaccurate and increases the risk that such information will be used against the child’s interest.

We are not saying that ORR should not gather information that will help to identify whether a child has a disability. Rather, we recommend that ORR eliminate these questions from its forms,

solicit feedback from stakeholders on its policies and procedures regarding the assessment of children in ORR custody for disabilities and the provision of services to children with disabilities to ensure their placement in the least restrictive setting, amend its policies and procedures in accordance with stakeholder feedback, and if changes to the forms are still necessary, issue a new notice of information collection regarding these changes and provide stakeholders with sufficient time to review and comment.

B. Migrant protection protocols and family separation information

The Proposed Initial Intakes Assessment (Form S-8) and the Proposed Initial UAC Assessment (Form S-11) add queries regarding whether the child was previously subjected to the Migrant Protection Protocols (MPP) and whether the child has experienced “Parent/Legal Guardian Separation.” The question “did you travel with any immediate family that is not present with you now?” was also added to the Proposed Initial Intakes Assessment Form. We approve of the collection of this information to ensure that children receive services and protections to which they are entitled. For instance, we support ORR’s tracking of family separation in order for ORR to ensure that a separated child is reunited with their family member as expeditiously as possible. We also support ORR’s tracking of a child’s prior placement in MPP in order to ensure that the child receives TVPRA protections to which the child is entitled as an unaccompanied child and to prevent unsafe repatriation.

Notably, ORR has not explained how this information will be used, and more specifically, how it will be used in the provision of services to children. Nor has ORR provided its policies and procedures for ORR staff to follow when staff determine that a child in ORR custody was previously subjected to MPP or if a child was separated from a parent or legal guardian. Moreover, ORR has not explained how ORR staff will gather this information—e.g., whether this information will be gathered from other forms or from DHS, or whether the ORR staff will make independent inquiries to ascertain this information. ORR should provide this information so that stakeholders have the information necessary to assess the collection of this information as part of the provision of services to children and if necessary, to provide feedback to ensure that ORR properly and accurately collects and utilizes this information in the best interests of the child.

C. Ohio Youth Assessment System (DYAS) [sic] Reentry Tool

The notice of information collection states that “no changes were made to [the Ohio Youth Assessment System Reentry Tool],” which suggests that this is an existing ORR form. However, we have not been provided with any existing forms that correspond to the three proposed documents³⁶ related to the Ohio Youth Assessment System (DYAS) Reentry Tool. The notice also contains no explanation of the form, including the purpose of the form; who will conduct this assessment; which children in ORR custody will be required to undergo this assessment;

³⁶ The three documents are titled the Ohio Youth Assessment System Reentry Tool (OYAS-RET) Interview Guide; the Ohio Youth Assessment System Self-Report Questionnaire; and the Ohio Youth Assessment System Reentry Tool (OYAS-RET) Score Sheet.

when this assessment will be administered; how the information will be used to provide services to children; and whether this assessment has been validated as an evidence-based screening tool for immigrant children. ORR must provide this critical information to stakeholders before proposing and requesting comments on these forms.

ORR's use of this assessment tool raises significant concerns, because it appears to be designed for use with juvenile offenders and does not appear to be appropriate for use with children in ORR custody. According to the University of Cincinnati Corrections Institute, who developed the Ohio Youth Assessment System (OYAS), OYAS is "a dynamic risk/needs assessment system to be used with juvenile offenders" and "offers juvenile justice actors the ability to assess youths at various decision points across the juvenile justice system."³⁷ The University of Cincinnati also instructs that agencies be trained by them before using OYAS. The proposed Ohio Youth Assessment System Reentry Tool forms are particularly concerning because they elicit extensive information that is likely to be used against the child, including information regarding the child's history of interaction with the juvenile justice system, the child's history of criminal behavior including the child's history of selling drugs, the child's commission of violent offenses and offenses involving weapons, substance abuse, gang affiliation and involvement, and any discipline or consequences imposed on the child while in the facility. For instance, the Ohio Youth Assessment System Reentry Tool (OYAS-RET) Interview Guide includes the following questions: "How old were you the first time you got in trouble?"; "What did you do?"; "How about the most recent offense, tell me about it?"; "How many times altogether have you gotten in trouble with the law?"; "Have you ever sold drugs?"; "Did you ever use a weapon during any of the offenses you got into trouble for?"; "Has anyone gotten hurt during an offense that you have committed?"; "Tell me about any physical fights you have been in with staff"; "Since being in the facility, have you received any consequences?"; "How many times have you been arrested/committed a crime while you have been with your friends?"; "How many of your friends are involved in a gang?"; "Tell me about any drugs that you have used"; "Have you used drugs while in the facility?"; and "Ever carry a loaded gun?"

The OYAS Interview Guide also includes questions that seem to assume the child has committed a criminal offense and is in a prison or juvenile detention facility, such as "Based on what you have told me, what do you think about being on parole?" and "You talked about your offense earlier. Tell me how it affected the people involved." These questions demonstrate that this assessment tool as currently formulated is not appropriate for children who are in ORR custody. The questions reflect a law enforcement and correctional purpose and are entirely inconsistent with ORR's child welfare role. Moreover, the negative, criminalizing nature of the questions and the absence of any questions eliciting information regarding a child's strengths and positive growth while in ORR custody could also have a harmful impact on the self-esteem and self-perception of children who undergo the assessment. Children's feelings of self-worth are closely entangled with the judgment of adults who surround them; questions that assume that the child has engaged in bad acts or criminal activity are stigmatizing and can thus have lasting harmful

³⁷ University of Cincinnati Corrections Institute, *UCCI: OYAS*, <https://cech.uc.edu/content/dam/refresh/cech-62/uccci/overviews/oymas-overview.pdf> (last visited Apr. 26, 2021).

impacts on children, even post-detention. We recommend withdrawing all three forms related to the OYAS.

D. 30 Day Restrictive Placement Case Review (Form S-16)

For the Proposed 30 Day Restrictive Placement Case Review Form, we recommend adding a field to provide the recommendation of the child's Child Advocate (if the child has been appointed one) regarding whether the placement is in the child's best interests: "If appointed Child Advocate, what is Child Advocate's Best Interest Determination regarding current placement?" The Child Advocate should also be permitted to upload their Best Interest Determination to be included with the Case Review. This would ensure that ORR staff can consider the Child Advocate's Best Interest Determination as they review the child's restrictive placement.

IV. Information collected in the proposed forms should be confidential and should not be shared with third parties, including federal agencies other than ORR

Government agencies have an obligation to protect and keep private children's information, particularly when disclosure of that information could be used against the children. Policies regarding the collection of children's information require scrutiny and advance planning. Because the proposed forms seek sensitive information that could be used by government agencies against the child, it is critical that ORR ensure that the information documented and recorded in the forms is kept confidential and is not shared with third parties, including federal agencies such as DHS and DOJ. Protections for children's confidential information are already enshrined in many state and federal laws across a range of issues. For instance, in California, all children, whether citizen or non-citizen, are entitled to the protection of any information or files arising out of dependency and delinquency proceedings; these cannot be disclosed to federal officials, including immigration officials, without the juvenile court's permission.³⁸

As noted above, many of the proposed forms elicit information about a child's prior, allegedly bad acts. While we urge ORR to remove or reword these questions, ORR should nevertheless safeguard children's information about prior acts and should not share this information with third-parties absent the child's fully informed consent, except with the child's counsel and independent Child Advocate. We urge ORR to eliminate information-sharing with DHS and DOJ and instead adopt policies to protect children's information in all personal records, including disclosures to case managers, clinicians, and any other ORR or provider staff, from DHS' access. Only a clear firewall between the agencies that prosecute and the agencies that care for children

³⁸ IMMIGRANT LEGAL RESOURCE CENTER, CONFIDENTIALITY OF JUVENILE RECORDS IN CALIFORNIA: GUIDANCE FOR IMMIGRATION PRACTITIONERS IN LIGHT OF CALIFORNIA'S NEW CONFIDENTIALITY LAW 1 (2016), https://www.ilrc.org/sites/default/files/resources/confidentiality_of_juvenile_records_advisory_ilrc_4.21.16_final.pdf.

comports with ORR's role and mission to care for and serve the best interests of children in its custody.

Protecting the confidentiality of health information is also required under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),³⁹ which generally prohibits children's health information being used for purposes not directly related to their care without permission.⁴⁰ HIPAA applies to ORR's medical professionals, including psychologists, dentists, and doctors.⁴¹ 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,⁴² the medical professionals working within ORR are covered entities and therefore subject to HIPAA.

V. Conclusion

Far from proposing minor changes to existing forms, these proposed forms reflect significant policy changes that directly affect the safety, rights, and best interests of children in ORR custody; as such, ORR should provide further explanation for the information sought and delineate the measures it will take to ensure that the information is used in accordance with children's best interests and will not undermine ORR's ability to meet its legal obligation to place children in the least restrictive setting in their best interests. Without this additional information, we oppose the adoption of the proposed forms in their present form. We recommend that ORR withdraw the proposed forms and review them for potential revision in light of the significant concerns set forth above.

³⁹ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH & HUMAN SERV., YOUR HEALTH INFORMATION PRIVACY RIGHTS, at 1 (content last reviewed Nov. 2, 2020), https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf?language=en.

⁴⁰ See U.S. DEP'T OF HEALTH & HUMAN SERV., 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](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).

⁴¹ Pub. L. 104-191; U.S. DEP'T OF HEALTH & HUMAN SERV., SUMMARY OF THE HIPAA PRIVACY RULE (July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html#:~:text=The%20Health%20Insurance%20Portability%20and,security%20of%20certain%20health%20information>.

⁴² See 45 C.F.R. § 160.103 (Definition of a Covered Entity).

Respectfully submitted,



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