

*Submitted via email*

Administration for Children and Families  
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Attn: ACF Reports Clearance Officer

March 18, 2021

**RE: ORR Proposed Information Collection Activity, 86 FR 5196; Comments in  
Opposition to Proposed Information Collection Activity; Placement and Transfer of  
Unaccompanied Alien Children Into ORR Care Provider Facilities (0970-0554)**

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; Placement and Transfer of Unaccompanied Alien Children Into ORR Care Provider Facilities (0970-0554)," published January 19, 2021, by the Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).<sup>1</sup>

The Young Center has significant concerns regarding several 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 impact these proposed forms will have on children, we respectfully urge ORR to withdraw these proposed forms, give incoming officials 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).<sup>2</sup> 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.

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<sup>1</sup> See Federal Register No. 11, Vol. 86 at 5196-5199.

<sup>2</sup> 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 17 forms and instruments, including the introduction of three new forms, related to the transfer and placement of unaccompanied immigrant children in ORR custody. While we recognize the critical need for ORR to establish policies and procedures to adequately document the placement and transfer of children in its care, particularly to ensure that children are placed in the least restrictive setting in their best interests, several 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 for ORR to consider in placement or transfer decisions. 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 a new Administration is just beginning its transition and the ORR system is near capacity. ORR has recently indicated that it has reached its available bed capacity for children in its custody, and several weeks ago, it began placing unaccompanied immigrant children in an unlicensed influx facility to address capacity constraints.<sup>3</sup> 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 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 lengthy forms for all children arriving at ORR facilities without measures

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<sup>3</sup> 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](https://www.washingtonpost.com/national/immigrant-children-camp-texas-biden/2021/02/22/05dfd58c-7533-11eb-8115-9ad5e9c02117_story.html).

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 Proposed "Influx Transfer Request" Form P-IOB, the Proposed "UAC Referral" Form P-7, the Proposed "Transfer Notification Form" Form P-14, and the Proposed "Transfer Request" Form P-IOA, request information regarding a child's criminal history and mental health, as well as ORR staff and providers' opinions regarding a child's behavior while in custody and whether a child is affiliated or suspected of being affiliated with a gang. Although we recognize the importance of ORR supporting its placement and transfer decisions with documentation of its reasoning, 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 supporting a specific placement or transfer decision 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."<sup>4</sup> 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.<sup>5</sup> 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 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 DHS custody when they turn 18. Recent litigation has revealed the serious harm that unaccompanied children suffer upon

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<sup>4</sup> 8 U.S.C. § 1232(c)(2).

<sup>5</sup> 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).

transfer to DHS custody in violation of the TVPRA.<sup>6</sup> Such transfers are predicated on dangerousness determinations that are often hastily made by DHS based on evidence and representations made by ORR staff.

Critically, the information 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 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,<sup>7</sup> 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 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.

Additionally, the largely “checkbox” format and auto-populated response format of these forms 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 space to provide 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 decisions that restrict their freedom while in custody.

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, the Child Advocate, and the ORR-funded legal services provider, so that they can

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<sup>6</sup> 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](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).

<sup>7</sup> 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](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).

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.

### **A. Questions Eliciting Opinions on Gang Affiliation Should be Eliminated**

We are particularly troubled by the addition of questions eliciting opinions and information regarding a child's alleged membership or affiliation with a gang. Proposed "UAC Referral" Form P-7 includes "Gang/Cartel Membership" as a possible reason a care provider may reject placement of a child at its facility. In addition, under a section titled "Criminal Information," the form includes fields for "Gang Affiliation?," "Gang Name," "Gang Affiliation Notes," and "Gang Affiliation Determined By," with options in a drop-down menu of "Self-Admission of UAC," "Gang Tattoos," "Criminal History," "Family/Peers Known [ ]"<sup>8</sup> and "Other." ORR should eliminate these questions because: (1) they lead ORR astray from its child welfare mandate and do not align with the roles and responsibilities of staff; (2) they raise serious racial justice concerns and 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. Instead of prosecuting children, HHS, through ORR, is tasked with prioritizing the welfare of immigrant children while DHS acts as children's adversary in removal proceedings or 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.

Additionally, staff in ORR contracted facilities 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 immediate safety in ORR custody. ORR staff (including case managers and clinicians, as well as staff who interact daily with unaccompanied children) are not equipped to make findings about whether a child is gang-affiliated. 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

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<sup>8</sup> The copy of the proposed form that we have reviewed only partially shows this option.



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 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.<sup>9</sup> In other words, agencies whose practice centers on crime prevention commit 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.<sup>10</sup> 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 Patrol<sup>11</sup>—a profoundly unremarkable figure to pivot policy or practice, even for a law enforcement agency that is steeped in histories of racial animus<sup>12</sup> and profiling.<sup>13</sup>

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<sup>9</sup> 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/2021/01/27/0dec3d4-5bfd-11eb-b8bd-ee36b1cd18bf\\_story.html](https://www.washingtonpost.com/local/public-safety/gangnet-database-controversy/2021/01/27/0dec3d4-5bfd-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-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").

<sup>10</sup> *Id.*

<sup>11</sup> *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.").

<sup>12</sup> 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](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_legacy_of_racism_within_the_u.s._border_patrol.pdf).

<sup>13</sup> 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>.

We urge ORR not to repeat the harmful practices of the past administration, which consistently villainized Black and Latinx children. The rhetoric of the past four years betrayed impermissible racial animus towards immigrant children. Former Attorney General Jeff Sessions called immigrant children “wolves in sheep clothing.”<sup>14</sup> The former President also called immigrant children “animals,”<sup>15</sup> 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 staring into children’s eyes.<sup>16</sup> The language is reflective of the racist rhetoric relating to “super predators” of the 1990s, when political figures demonized Black communities by characterizing children as less than humane, and undeserving of empathy.<sup>17</sup> Unfortunately, ORR imported this rhetoric by requiring gang awareness and prevention information and a focus on criminal activity as elements of children’s release from its custody.<sup>18</sup> We urge ORR to end the criminalization and vilification of children in all its forms.

## **B. Information regarding Dismissed Criminal Charges and Juvenile Charges and Delinquency Findings Should Not be Collected**

We also oppose questions in the “UAC Referral” Form P-7 regarding criminal charges, particularly those that have been dismissed or withdrawn, and juvenile delinquency findings. ORR should not consider criminal charges that have not resulted in 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 deemed to lack probable cause, 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, 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 within the United States are subject to state confidentiality laws and disclosing information about them on these forms could violate those

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<sup>14</sup> 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>.

<sup>15</sup> *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>.

<sup>16</sup> 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>.

<sup>17</sup> Kevin Drum, *A Very Brief History of Super-Predators*, MOTHER JONES, March 3, 2016, <https://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators>. See also Laila L. Hlass, *Our immigration system must treat immigrant children as children*, THE HILL, December 28, 2018, <https://thehill.com/opinion/immigration/422351-our-immigration-system-must-treat-immigrant-children-as-children>.

<sup>18</sup> *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>

laws. Moreover, per the Immigration and Nationality Act and *Matter of Devinson*,<sup>19</sup> juvenile charges or delinquency findings are not considered criminal convictions.

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 them to something less serious. The original charges will still appear on the child’s record, even if 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 the form 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.

## **II. 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.<sup>20</sup>

As noted above, the Proposed “Influx Transfer Request” Form P10B, Proposed “UAC Referral” Form P-7, the Proposed “Transfer Notification Form” Form P-14, and the Proposed “Transfer Request” Form P-10A specifically elicit information about a child’s prior, allegedly bad acts. While we urge ORR to remove or reword these questions, ORR should nevertheless safeguard

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<sup>19</sup> *Matter of Devinson*, 22 I&N Dec. 1362 (BIA 2000).

<sup>20</sup> 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](https://www.ilrc.org/sites/default/files/resources/confidentiality_of_juvenile_records_advisory_ilrc_4.21.16_final.pdf).



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.<sup>21</sup> Incorporating this protection into these forms is particularly important in light of ORR's current policies that require ORR care provider staff and ORR Federal Field Specialists (FFS) to report certain information to DHS.<sup>22</sup> For example, if ORR collects and records information about prior, allegedly bad acts in the proposed 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 (SIR) form.<sup>23</sup> Once an SIR is created based on prior, allegedly bad acts, ORR policy places a mandatory reporting obligation on the care provider staff and ORR FFS to report this information to DHS<sup>24</sup> in direct contravention of state and federal policies and laws protecting children's confidential information. We urge ORR to eliminate this information-sharing policy 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 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"),<sup>25</sup> which generally prohibits children's health information being used for purposes not directly related to their care without permission.<sup>26</sup>

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<sup>21</sup> A child's informed consent requires an opportunity for the child to consult with counsel. Otherwise, the ability of children in ORR custody to provide fully informed consent to releasing their private, medical information when asked by an adult authority figure is tenuous at best.

<sup>22</sup> 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*, § 5.8.5 (2015) <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied>. [hereinafter ORR GUIDE ON UNACCOMPANIED CHILDREN].

<sup>23</sup> See ORR GUIDE ON UNACCOMPANIED CHILDREN, *supra* note 22, § 5.8.

<sup>24</sup> See ORR GUIDE ON UNACCOMPANIED CHILDREN, *supra* note 22, § 5.8.5 ("In addition to submitting a SIR to ORR, care providers must report some significant incidents to DHS"). 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.*

<sup>25</sup> 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](https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf?language=en).

<sup>26</sup> 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).

HIPAA applies to ORR's medical professionals, including psychologists, dentists, and doctors.<sup>27</sup> 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,<sup>28</sup> the medical professionals working within ORR are covered entities and therefore subject to HIPAA.

### **III. 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. Proposed "Notice of Placement in a Restrictive Setting" Form P-4/4s**

Although ORR has made no changes to the content of the "Notice of Placement in a Restrictive Setting" Form P-4/4s and has only revised its formatting, we recommend that ORR revise the content of this form and establish procedures to ensure that ORR providers convey the information contained in the form to children in a child-appropriate and trauma-informed manner. Because ORR's placement of children in a restrictive setting significantly impacts the conditions of custody, including restricting a child's ability to move freely, notice is critical to ensure the child's right to due process and to guarantee a fair opportunity to be heard when they are placed in a more restrictive setting. Children have a right to notice of the reasons for why they are being placed in a more restrictive setting. ORR policy requires that "[w]hen a UAC is stepped up to a more restrictive setting (secure, staff-secure or RTC facility), he/she is provided with a Notice of Placement in Restrictive Setting in a language that he/she understands within a reasonable time either before or after ORR's placement decision."<sup>29</sup>

However, the proposed written notice does not contain language that a child would understand. The form requires an ORR provider to select the reason for placing a child in a specific restrictive setting from a number of auto-populated options. These options essentially state verbatim the criteria, as set forth in ORR policy, that can provide the basis for placement in a secure or staff-secure facility or a residential treatment center. This language uses complicated language and technical terms that are difficult for a child to understand. For instance, one of the options for placement in a staff-secure facility states, "[You] [h]ave been unacceptably disruptive to the normal functioning of a shelter care facility such that transfer is necessary to ensure the welfare of others. The options for placement in a RTC include: "[You] [h]ave not shown reasonable progress in the alleviation of your mental health symptoms after a significant period of time in outpatient treatment' and "[You] [r]equire therapeutic-based intensive supervision as a result of mental health symptoms and/or diagnosis that prevent you from independent participation in the daily schedule of activities[.]" We recommend that the language be revised to

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<sup>27</sup> 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>.

<sup>28</sup> See 45 C.F.R. § 160.103 (Definition of a Covered Entity).

<sup>29</sup> ORR GUIDE ON UNACCOMPANIED CHILDREN, *supra* note 22, § 1.4.2.

include child-appropriate language that is comprehensible to children and adequately explains the reasons for placement in a restrictive setting with specific examples and information.

Furthermore, this notice is not trauma informed and could harm children's self-perception. For instance, the notice to children placed in a secure facility begins with the statement: "[Y]ou pose a danger to self or others." The notice to children placed in a RTC begins with the statement "[Y]ou have a serious psychiatric or psychological issue that cannot be addressed in an outpatient setting and you are a danger to self or others." These kinds of negative, conclusory statements and the complete absence of space to address each child's strengths can have an extremely harmful impact on the self-esteem and self-perception of children in ORR custody. Children's feelings of self-worth are closely entangled with the judgment of adults who surround them; stigmatizing and criminalizing labels can thus have lasting impacts on children, even post-detention. In addition, 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 negative language in these forms is likely to trigger children and exacerbate the stress they are likely already experiencing. In our experience, the language in these forms have a deeply negative impact on children's self-esteem. Children have reported being told by staff that they were a "risk" and that they were "going to harm other kids." For teenagers, such language may even prompt them to engage in negative behaviors, in conformity with the judgments that they perceive staff have already made about them.

In addition to revising the form language, it is critical that ORR issue procedures on how the information in this notice is conveyed to children. If ORR provider staff are orally speaking with children regarding the reason(s) that they are being placed in a restrictive setting, it is important that the staff have received proper training and instruction in how to do so in a child-sensitive and trauma-informed manner.

## **B. Proposed "UAC Referral" Form P-7**

The "UAC Referral" Form P-7's "Placement Request" section allows an ORR provider to reject placement of a child for numerous reasons, including "Aggressive to peers," "Aggressive to staff," "Disruptive behavior," and "Gang or Cartel Membership." However, ORR Policy states:

After ORR requests a placement in a particular facility, the care provider may only deny ORR's request for placement based on the following reasons:

- Lack of available bed space.
- Placement of the unaccompanied alien child would conflict with the care provider's State or local licensing rules.
- Placement of an unaccompanied alien child with a significant physical or mental illness for which the referring Federal agency does not provide a medical clearance

and/or medications that would conflict with the care provider's state or local licensing requirements.<sup>30</sup>

Therefore, the form is inconsistent with ORR Policy and should be amended to reflect the three permissible reasons for which a care provider may deny ORR's request for placement.

The "UAC Referral" form also includes a section titled "Criminal Information." However, this section does not request information that is related to criminal charges or convictions. It contains fields for "Behavioral Concerns," "Gang Affiliation," and "Foot Guide." The questions do not specify or clarify whether this information should be related to criminal charges or convictions. As discussed above, we oppose the collection of information regarding children's affiliation with gangs (particularly without confidentiality protections to prevent sharing of information with DHS and other agencies), as well as information regarding dismissed criminal charges and juvenile delinquency findings. To the extent that this form requests this information, however, it should characterize the information it seeks properly so as to avoid incorrect characterizations of children as "criminal".

We are also concerned about the inclusion of certain offenses for placement in a staff secure facility under the Intakes Placement Checklist Tab of the "UAC Referral" Form. The "Criminal History" section includes a field with a drop-down menu of specific offenses. A child should only be placed in a staff secure facility if the child presents a moderate risk of danger to himself/herself or others. However, a number of the offenses included in the drop-down menu do not support a finding that a child presents such a risk, including "[s]tatus offense," "[m]oving violation," "[s]hoplifting," and "soliciting a prostitute." Moreover, since the children are in ORR custody, they would not be able to access the settings in which many of these offenses would occur. These offenses should be removed from the list so as to prevent unnecessary placement of a child in a staff secure facility.

### **C. Proposed "Transfer Notification Form" Form P-14 and Proposed "Transfer Request" Form P-IOA**

We are also concerned that the Proposed "Transfer Notification Form" Form P-14 and the Proposed "Transfer Request Form P-IOA" could result in the disclosure of unnecessary and potentially harmful information to immigration courts related to requesting a change of venue. On page 4 of the Transfer Notification Form, the form states: "Good cause exists to change venue in this matter pursuant to 8 C.F.R 1003.20(b) for the following reason(s):" and provides several options that include "the UAC had special needs (pregnancy of juvenile, medical needs, etc.)," "Juvenile respondent is suitable for a less restrictive level of care," and "Juvenile respondent requires a more restricted level of care." The wording of these questions suggests to ORR that it must select one of these reasons in order to justify a request to change venue. However, it is completely unnecessary for ORR to provide this kind of information to justify a change of venue. A change of venue is being requested pursuant to the transfer of the child to a different facility; this reason is sufficient good cause to warrant a change of venue. No other

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<sup>30</sup> ORR GUIDE ON UNACCOMPANIED CHILDREN, *supra* note 22, § 1.3.3.

reason needs to or should be provided to the court, particularly not information regarding special needs or the fact that a child requires a more restricted level of care which could be used against the child in their immigration cases.

Similarly, the COA-COV section of the Proposed “Transfer Request Form” Form P-IOA includes a field “Good Charge Exists to Change Venue” with a drop-down menu of options that include “limited juvenile detention,” “UAC Has Special Need,” and “Other.” There is also a query that states “Specify UAC Special Needs.” Again, the wording of these questions suggests to ORR providers that these kinds of reasons are necessary to justify a request to change venue. As explained above, given that this Change of Venue is being requested in the context of a transfer, the reason for the change request is due to the change in the child’s placement location, and this is sufficient to establish good cause for a COV. These questions are unnecessary, could have an unanticipated negative impact on the child’s case, and should be removed.

For the Transfer Request Form, we also recommend adding a field under Casefile Summaries to indicate that a child’s Child Advocate, if they have been appointed one, has been notified of the transfer. It currently includes fields related to contacting the child’s attorney regarding the transfer, but the Child Advocate should also be notified of the transfer. In addition, we recommend adding a field seeking the Child Advocate’s determination regarding whether the transfer is in the child’s best interests: “If appointed Child Advocate, what is Child Advocate’s Best Interest Determination regarding transfer?” The Child Advocate should be permitted to upload their Best Interest Determination to be included with the transfer request. This would ensure that ORR staff can consider the Child Advocate’s Best Interest Determination as they consider the proposed transfer.

#### **IV. Conclusion**

Far from proposing minor changes to existing forms, these proposed forms reflect policy changes that directly affect the safety, well-being, and rights 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. 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.

Respectfully submitted,



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