Before the
DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, AND OFFICE OF REFUGEE RESETTLEMENT
Washington, D.C.

In the matter of:

Proposed Information Collection Activity; Placement and Transfer of Unaccompanied Alien Children into ORR Care Provider Facilities (OMB #0970-0554)	**)**	**Notice of Proposed Rulemaking 86 Fed. Reg. 5196-5199 Jan. 19, 2021**

COMMENTS OF THE REFUGEE AND IMMIGRANT CENTER FOR EDUCATION AND LEGAL SERVICES

Refugee and Immigrant Center for Education and Legal Services ("RAICES"), a 501(c)(3) non-profit legal services agency based in San Antonio, Texas, that defends the rights of immigrants and refugees, empowers individuals, families, and communities, and advocates for their liberty and justice. RAICES serves tens of thousands of non-citizens per year through direct immigration legal services, social services, advocacy, community engagement, and refugee resettlement. In 2019, RAICES closed over 28,000 immigration cases. With eleven offices throughout Texas, more than 300 staff members, and thousands of active volunteers, RAICES is one of the largest legal service providers for low-income immigrants, asylum seekers, and refugees in the country.

RAICES submits these comments to the proposed information collection activity by the Department of Health and Human Services (HHS). RAICES has serious concerns of the Proposed Form P-7[1] (the "Proposed Form") and its detrimental collateral effects on an unaccompanied minor's well-being and their immigration claim for relief.

I. RAICES Has Extensive Experience Representing the Impacted Immigrant Populations and Is Qualified to Comment on The Proposed Regulation

Each year, RAICES provides thousands of unaccompanied children throughout Texas with representation, information, education, and post-release assistance. RAICES is the only immigration non-profit agency in the country with dedicated staff and resources intended to provide direct representation to detained adults, detained families, and detained unaccompanied minors -- nearly all of whom are in some type of immigration court proceeding. As the largest immigration legal services provider in Texas, and with extensive experience in and knowledge of detained unaccompanied minors, RAICES is uniquely suited to comment on ORR's Placement and Transfer of Unaccompanied Alien Children into ORR Care Provider Facilities.

[1] Proposed Information Collection Activity; Placement and Transfer of Unaccompanied Alien Children into ORR Care Provider Facilities (OMB #0970-0554), 86 Fed. Reg. 5196-5199 (Jan. 19, 2021) at 5197.

Initially, RAICES notes that Proposed Form P-7 does not clarify who can use the form or the process for collection of information. According to ORR, Proposed Form P-7 will be used by 1) Federal agencies to refer unaccompanied minors to ORR custody and 2) by ORR Intakes staff to place unaccompanied minors in an ORR care provider facility. Given the lack of specificity about which party provides and may access the information, RAICES requests further information to understand the implications of the Proposed Form P-7 prior to the enactment of the information collecting activity, to comment fully on the proposed changes.

The information that ORR proposes to gather in Proposed Form P-7 threatens the due process and privacy rights of unaccompanied minors and has no practical utility for the proper functions of the agency. As a result, ORR should not engage in the proposed information collection. However, if the agency decides to proceed, it must put safeguards in place, including providing child-accessible Miranda warnings to unaccompanied minors during intakes and referral intakes, clarify who has access to the collected information, and ensure compliance with state and federal privacy laws.

II. Proposed Form P-7's Solicited Information Is Not Necessary and Has No Practical Utility for The Proper Performance of The Functions of The Agency

Most children entering ORR custody are from the Northern Triangle of Central America—which includes Guatemala, Honduras and El Salvador. Many have experienced severe trauma before coming to the United States.[2] Often, they have experienced or witnessed violence recently in their home countries, and commonly long-lasting or chronic violence or neglect throughout their lives.[3] Many of them also experience traumatic events on the journey to the United States.[4] This is particularly true for children arriving in the United States after fleeing not only their home countries, but the horrific conditions in the migrant camps caused by the Migration Protection Protocols program.[5] Experts across psychiatric fields have found that trauma causes children to misbehave, and this is worsened by detention; in other words, untreated trauma in the context of prolonged detention causes behavior issues.[6] All of this creates an essential backdrop to understanding the psychological needs and the behaviors of children in ORR custody, and the

[2] *See* Neha Desai, Nat'l Ctr. For Youth Law, *Child Welfarce & Unaccompanied Children in Federal Immigration Custody, A Data and Research Based Guide for Federal Policy Makers*, https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf at 20 ("Childhood traumatic experiences can alter the brain's responses to stress and cause children to lose their sense of safety and control. Unaccompanied children often experience trauma before, during, and after migration.").

[3] *Id.*

[4] *Id.*

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

[6] Desai, Nat'l Ctr. for Youth Law, *supra* note 2, at 17.

necessity of appropriately considering mental health issues and treatment in analyzing (and not criminalizing) behaviors.[7]

Proposed Form P-7 fails to consider any kind of trauma-informed understanding of child behavior or communication and it furthers the false narrative of immigrant children as criminals. In addition, information collected and recorded by Proposed Form P-7 is directly tied to Significant Incident Reports[8] ("SIR"), which have consequences for a child's placement, reunification, and eligibility for immigration relief.[9]

a. ORR's Proposed Information Collection Risks Procedural Due Process Violations, Exceeds the Function of the Agency, and Threatens Unaccompanied Children's Right to Privacy.

Proposed Form P-7 creates a new Criminal Information section with the following nine fields: (1) Criminal Concerns?, (2) Behavioral Concerns?, (3) Behavioral Concerns Notes, (4) Gang Affiliation?, (5) Gang Name, (6) Gang Affiliation Notes, (7) Gang Affiliation Determined By, (8) Footguide?, and (9) Footguide Notes. Proposed Form P-7 also adds a Criminal Charges section that captures more detailed information regarding a child's criminal charges and/or arrests. It also includes an updated Intakes Placement Checklist, which elicits information regarding gang affiliation, criminal history and conduct in ORR custody that is violent, malicious, sexually predatory or inappropriate. Each of these new fields seeks to gather information that is either incriminating or potentially incriminating from unaccompanied children.

Proposed Form P-7 threatens the procedural due process rights of unaccompanied minors by gathering incriminating and potentially incriminating information without requiring that ORR inform them of their Miranda rights. Furthermore, the nature of the information collected, if shared with other agencies, transforms ORR into essentially a law enforcement agency, dramatically exceeding the organization's mandate. In addition to these due process concerns, Proposed Form P-7 potentially violates federal and state privacy and confidentiality laws, and the nature of the information is largely irrelevant to ORR's work. For these reasons, ORR must modify its information collection procedures to ensure that they comply with constitutional and statutory due process and privacy rights.

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

[8] *ORR Guide: Children Entering the United States Unaccompanied § 5*, Office of Refugee Resettlement (2015) at § 5.8., https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-5 (Care Providers report and document all significant incidents in accordance with mandatory reporting laws, state licensing requirements, federal laws and regulations, and ORR policies and procedures. Significant incidents include, but are not limited to abuse or neglect in ORR care, including sexual abuse, behavioral incidents that threaten safety, and incidents involving law enforcement).

[9] *See generally* ORR Policy Guide, *supra* note 8, at § 5 et seq. (regarding SIRs and when information related to an SIR must be shared with DHS and other law enforcement agencies).

b. Proposed Form P-7's Solicitation of Self-Incriminating Statements Without Child-Accessible Miranda Warnings Is A Due Process Violation

ORR does not specify how it will collect the information in Proposed Form P-7, but presumably, a large portion of this information, would be collected directly from the child, whether the child provides the information directly to ORR or the child provides the information to the referring federal agency, which transmits the information to ORR.[10] Procedural due process requires that the child receive prior advisal that the information they divulge can result in criminal and/or immigration consequences, as well as impact their placement at ORR, including placing them in a secure juvenile jail. Because the new Criminal Information and Criminal Charges sections in Proposed Form P-7 elicit criminally and civilly incriminating information from unaccompanied children, ORR must provide them with a child-accessible Miranda warning prior to any questioning.

Under the Fifth Amendment, individuals have a privilege against self-incrimination, which extends beyond the trial setting to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [a person] in future criminal proceedings."[11] Even civil investigations that may result in criminal prosecutions require Miranda warnings.[12] While Miranda warnings may not be required in "booking exception" settings involving routine questions generally unlikely to elicit incriminating responses (including certain intakes in the immigration context),[13] they apply to booking questions where the questions may elicit incriminating responses.[14] Because of this, courts have held that "[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the Miranda warnings."[15] Immigration officers' statements that an interview simply seeks to obtain

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[10] *See* ORR Policy Guide, *supra* note 8, at § 1.3.1 ("ORR requests background information from the referring Federal agency.").

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

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

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

[14] *See Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (finding that in this case the routine booking questions were not subject to Miranda, while still recognizing that routine booking questions could be subject to Miranda if they are designed to elicit incriminating responses).

[15] *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006) (affirming district court's decision to require Miranda warning during INS interview of an alien in INS custody where defendant was questioned in a district that has a practice of prosecuting the specific crime at issue and where the prosecutor had a desire to pursue charges against defendant to obtain his cooperation against another defendant); *United States v. Carvajal-Garcia*, 54 F. App'x 732, 734 (3d Cir. 2002) (holding that the Miranda booking exception did not apply to an INS inquiry into an individual's name and date and place of birth because INS's questions elicited information reasonably likely to inculpate the respondent); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046-47 (9th Cir. 1990) (holding that inquiries by Border Patrol agents constituted interrogation in violation of detainee's Miranda rights when questioned about his place of birth, immigration status and use of aliases, which were then used to prove charges of illegal entry and being a deported alien found in the U.S); *United States v. Doe*, 878 F.2d 1546, 1551 (1st Cir. 1989) (holding that the Coast

biographical information for a "routine, civil investigation" is irrelevant in light of the objective factors suggesting that the questions are likely to elicit an incriminating response.[16]

Just as routine questioning by INS/DHS triggers Miranda warnings where it elicits incriminating information, so too does routine questioning for ORR referral purposes. Proposed Form P-7 requires intake staff and referring agency staff go beyond routine biographical questions during the referral intakes process, posing questions that seek incriminating information. For example, the UC Referral Details tab requests information regarding criminal concerns, gang affiliation, as well as whether the child was a footguide (i.e., a smuggler). The Criminal Charges Data Entry window asks about specific details regarding arrests, charges, convictions and/or adjudications. The Intakes Placement Checklist Tab and Form include gang affiliation, criminal history and conduct in ORR custody that is violent, malicious, sexually predatory, or inappropriate. All these fields elicit incriminating information that can have criminal, immigration, or placement implications. In fact, the ORR intakes team collecting this information is explicitly authorized to make a special placement request based on any of the following: criminal charges or chargeability, commission of violent acts or credible threats thereof, self-reported gang involvement or violent criminal history or gang involvement or even inappropriate sexual behavior. The Health and Human Services Department ("HHS") may then make final placement decisions, including a decision to place a child in a juvenile jail.[17] Proposed Form P-7 seeks to unearth incriminating information, which can adversely affect the child's detention and/or immigration relief.

Additionally, to the extent ORR receives information from a referring agency regarding self-reported criminal charges or other criminal acts, violent or malicious acts, gang affiliation, and/or sexual predatory or inappropriate sexual behavior, ORR must ensure that this information was not collected in violation of the child's Miranda rights. During initial arrests and interviews by CBP, ICE, or other referring federal agencies, these agencies generally ask questions that elicit incriminating information, specifically information regarding gang involvement and/or criminal activities. This self-disclosed information is then shared with ORR to complete referral forms, such as Proposed Form P-7, and make initial placement decisions for the child. Children's self-disclosures, particularly when made in a detained setting, are unreliable criminal history.[18]

For all the reasons stated above, ORR should not collect and record information about gang or criminal activities that has been obtained in violation of a child's due process rights or without a Miranda warning.

Guards questioning regarding citizenship was subject to a Miranda warning because the "Coast Guard officers ought to know that answers to such questions may incriminate").

[16] *Mata-Abundiz*, 717 F.2d at 1278-79.

[17] *See* HHS Proposed Form P-7 at 15-18.

[18] *See Brief of Amici Curiae* Juvenile Law Center and the Center on Wrongful Convictions of Youth in Support of Petitioner, Joseph H. v. California, 137 S. Ct. 34 (2016) (No. 15-1086), at 7. https://jlc.org/sites/default/files/case_files/Joseph%20H%20%20Amicus-%20FINAL.pdf

c. Sharing Any Information Gathered from the Proposed Forms with Any Law Enforcement Agency Exceeds ORR's Mandate and Impermissibly Turns ORR into a Law Enforcement Agency.

In addition to the due process issues raised by the lack of Miranda warnings and the unreliability of the information gathered, ORR exceeds its mandate when it shares any of the information gathered with any law enforcement agency, an action which impermissibly transforms ORR into a law enforcement agency. ORR is not a law enforcement agency, and it does not have law enforcement responsibilities with respect to unaccompanied immigrant children. Indeed, Congress transferred the responsibility of providing for unaccompanied immigrant children to ORR from DHS (formerly INS) precisely to separate the responsibility for safeguarding children's welfare from the law-enforcement focused DHS.[19] Proposed Form P-7 places ORR squarely into a law enforcement role, violating its obligations to the children in its care and revealing a serious conflict of interest that it must immediately reconcile.

The mandatory law enforcement reporting attached to any criminal or gang-related SIRs through Section 5 of the ORR Policy Guide reveal that ORR is in danger of becoming—if it is not already—another arm of DHS.[20] Indeed, according to an ICE-ORR Memoranda, DHS trains ORR staff on how to identify MS-13 and other gang colors and signs, report suspected gang affiliation, and become integrated into local anti-gang task forces.[21] The mandatory rapid reporting to DHS, and in some cases DOJ and the FBI, of criminal histories and gang allegations leaves no room for a child-centric analysis of the event, nor does it leave any room for any holistic consideration of the welfare of all children involved.

As further evidence of ORR transforming into a law enforcement agency, RAICES highlights two fields on the "Intake Placement Checklist Tab." First, the field, "UAC has been convicted or is chargeable with a non-violent criminal offense" does not define the term, "chargeable." This question seeks information outside of a child's criminal record, leaving the decision to ORR to determine whether a certain incident meets its conception of a chargeable crime. This decision is outside of ORR's scope of expertise and its mandate, forcing the agency to decide generally reserved for law enforcement officials. It also fails to consider that children may misreport crimes, face confusion caused by their trauma, or commit some minor infraction on the level of jaywalking. Second, the question, "Is there a pattern or practice of criminal activity" similarly does not define "a pattern or practice," and appears to leave it up to the value judgment of the ORR intake officer whether such a pattern exists, a subjective decision outside the scope of ORR's expertise.

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[19] *See generally* Laila L. Hlass, *The School to Deportation Pipeline*, 34 Ga. St. U. L. Rev. 697 (2018) (examining how gang allegations against immigrant youth work to push young people into a school-to-deportation pipeline). Available at: https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2931&context=gsulr

[20] *See* ORR Policy Guide, *supra* note 8, at § 5.8.5 (requiring ORR care providers and HHS to report certain crime and gang-related information to DHS).

[21] *See* Hlass, *supra* note 19, at 732.

ORR has failed to explain or justify its expanded focus on collecting and documenting gang-affiliation and criminal history and how this comports with its mandate to provide for the welfare of all the children in its care. The structure and use of Proposed Form P-7 and SIR instruments are particularly concerning when viewed in conjunction with the parallel notices of proposed forms for administration and oversight and mental health screening, which elicit and record information from children that may be self-incriminating without any protections that would normally accompany such law enforcement activities. For these reasons, ORR must ensure that if it implements Proposed Form P-7 and collects and records information regarding gang or criminal activities (against RAICES' recommendation), it does not share this information with law enforcement agencies.

d. Form P-7 Potentially Violates Federal and State Privacy and Confidentiality Statutes

Proposed Form P-7 raises significant privacy and confidentiality issues. RAICES is concerned that information about children's alleged criminal and gang history may be shared with third-parties, especially in light of the "Entry Team Data Entry Window" in Proposed Form P-7, which allows unknown individuals to grant read and/or write access privileges to these records to other unknown individuals who do not typically "need such privileges for a referral record."[22] It is reasonable to assume that ORR will potentially grant access to a child's electronic case file and/or share criminal or gang-related information in the file with DHS, as it has in the past.[23] Protecting children's information and privacy promotes rehabilitation and removes barriers to seeking employment, housing, and other opportunities.[24] Additionally, providing health services and trauma-informed care to children in ORR custody requires a level of trust and confidentiality. Currently, children in ORR custody legitimately fear that information they disclose regarding health and criminal history will be used against them to justify a transfer to a more restrictive facility or to undermine their immigration case.[25] Immigration attorneys have increasingly observed the government using ORR files containing confidential medical and psychological records as evidence in immigration court.[26]

Numerous state and federal laws broadly protect children's information, recognizing the inherent vulnerability of children.[27] Proposed Form P-7 must be amended to ensure any collection

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[22] Proposed Information Collection Activity; Placement and Transfer of Unaccompanied Alien Children into ORR Care Provider Facilities (OMB #0970-0554), 86 Fed. Reg. 5196-5199 (Jan. 19, 2021) at 5197.
[23] *See e.g.*, ORR Policy Guide, *supra* note 8, at § 5.8.5 (requiring ORR care providers and HHS to report certain crime and gang-related information to DHS).
[24] Riya Saha et al., Juvenile Records: *A National Review of State Laws on Confidentiality, Sealing and Expungement* (2014). Available at: http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf
[25] *See, e.g.*, Ella Nilsen, *Kids Who Cross the Border Meet with Therapists and Social Workers. What They Say Can be Used Against Them*, Vox (June 19, 2018, 8:51 AM), https://www.vox.com/policy-andpolitics/2018/6/18/17449150/family-separation-policy-immigration-dhs-orr-health-records-undocumented-kids.
[26] *Id*.
[27] *See, e.g.*, 5 U.S.C. § 552(a) (2018); 20 U.S.C. § 1232g (2018); Health Insurance Portability and Accountability Act of 1996, H.R. 3103, 104th Cong. (1996); Ariz. Rev. Stat. § 8-807(K) (LexisNexis 2021); Cal. Welf. & Inst. Code §

and recording of this type of information is protected from third-party access and complies with applicable state and federal laws and policies. In general, sharing information about children's criminal history outside of ORR may violate state law. In Texas, any party seeking information contained in a juvenile's court records must petition the juvenile court or the Texas Department of Family and Protective Services. Without a court order granting ORR authorization to share this information specifically with DHS or another third-party, ORR's collection, recording and reporting of this information may violate applicable state laws.

Federal law similarly protects the records of unaccompanied children. The *Flores* Settlement Agreement requires ORR facilities to "develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which preserves the confidentiality of client information and protects the records from unauthorized use or disclosure."[28] The ORR website states, "HHS does not release information about individual children or their sponsors that could compromise the child's location or identity."[29] The website adds, "HHS has strong policies in place to ensure the confidentiality of [unaccompanied minors] personal information."[30] ORR's promises reflect the *Flores* Settlement's provision that the child has "a reasonable right to privacy."[31] Based on this provision, children have a right to privacy concerning their own records.

For the reasons stated above, ORR must not make a child's ORR file and information accessible by any third-parties unless ORR and its care providers have complied with the applicable state and federal laws and policies.

III. ORR's Proposed Information Collection Has No Practical Utility Because It Perpetuates Stereotypes That Will Result in Restrictive Placement of Unaccompanied Minors and Prolong Family Separation

Proposed Form P-7 invites ORR to perpetuate unverified and unreliable gang allegations against the children in its care and to characterize children's past experiences as criminal history. This will lead to the transfer of children to more restrictive or jail-like settings, severely undermining their immigration claim and prolonging family separation.[32] For example, the

825-836 (Deering 2021); Fla. Stat. § 985.045(2) (2020); N.Y. Crim. Proc. Law § 720.35.2 (Consol. 2021); Tex. Fam. Code Ann. § 58.005(a-1)(10) (West 2019).

[28] *Flores v. Reno* (Case No. 85-cv-4544) Stipulated Settlement Agreement, Ex. 1, at ¶ E (Jan. 17, 1997), https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf

[29] Office of Refugee Resettlement, Health and Safety, (citing to the text under "Privacy" heading) https://www.acf.hhs.gov/orr/about/ucs/health-and-safety (last visited March 20, 2021)

[30] *Id.*

[31] Flores Settlement Agreement, *supra* note 28, at ¶ A.12, Ex. 1 ("A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house and regulations; and (e) receive and send uncensored mail unless there is reasonable belief that the mail contains contraband.").

[32] ORR Policy Guide section 1.2.4 allows ORR to place a child in a staff-secure facility if the child "[h]as reported gang involvement (including prior to placement into ORR custody) or displays gang affiliation while in care," and in

"Behavioral Concerns Notes" field appears to be optional rather than a required field. We are concerned that a "Yes" response to the "Behavioral Concerns?" field without more explanation or detail could lead to an inappropriate and more restrictive placement than is warranted and/or in the best interest of the child, which would be a violation of the Flores Settlement Agreement.[33] More information should be provided to ensure that the decision-maker has more than a "Yes" response to reach an appropriate placement decision.

a. Proposed Form P-7's Solicitation Perpetuates Racial Bias and Will Result in Restrictive Placement of Unaccompanied Minors

Proposed Form P-7 adds the following fields: "Gang Affiliation?", "Gang Name", "Gang Affiliation Determined By", "Gang Affiliation Notes". The threshold for identifying an individual as gang-affiliated is unclear. For example, ORR does not define gang-affiliation or how to determine whether something is gang-related in its "Guide to Terms."[34] There is also no definition of gang membership, association, or affiliation in the immigration statutes.[35] In fact, neither law enforcement nor scholars agree on a uniform definition of a "gang."[36] Courts have also recognized the considerable risks of error of determining whether an individual is a gang member.[37] Despite this lack of definition, standard, or guidance, and the risk of error, ORR records and reports information accusing children of being involved with gangs.[38]

Further undermining the reliability of the "Criminal" field and threatening children's Due Process rights, one of the options in the "Gang Affiliation Determined By" menu states, "Family/Peers Known…", with the rest of the phrase cut off. This field appears to permit ORR to determine a child's alleged gang affiliation based on the alleged affiliation of family members or associates, rather than any of the child's own actions. The gang affiliation section also does not account for the fact that children may be coerced or forced to work for gangs, or that they might have left the gang and fear reprisals. As a result, the quality and value of the information gathered in the gang affiliation section is questionable at best. Furthermore, the proposed form fails to provide notice to a child in custody or their adult caregiver/sponsor or legal representative that the

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a secure facility if the child has been charged with, is *chargeable* or has been convicted or adjudicated of a crime or delinquency act. ORR Policy Guide, *supra* note 8, at § 1.2.4

[33] Flores Settlement Agreement, *supra* note 28, generally.

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

[35] *See* 8 U.S.C. § 1101 (2018) (providing definitions for the Immigration and Nationality Act).

[36] *See* Nat'l Gang Ctr., National Youth Gang Survey Analysis, https://www.nationalgangcenter.gov/Survey-Analysis (last visited Mar. 4, 2021) ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies.").

[37] *Saravia v. Sessions*, 905 F. 3d 1137, 1143-44 (9th Cir. 2018) (citing *Vasquez v. Rackauckas*, 734 F. 3d 1025, 1046 (9th Cir. 2013) ("Determining whether an individual is an active gang member presents a considerable risk of error. The informal structure of gangs, the often fleeting nature of gang membership, and the lack of objective criteria in making the assessment all heighten the need for careful fact finding.")).

[38] See ORR Policy Guide, *supra* note 8, at §5.8.5.

child has been identified as gang-affiliated and fails to provide a child or their representative any opportunity to challenge the designation or rebut the alleged evidence.

Gang allegations in and of themselves are fraught with racial bias and have been utilized against immigrant children for the very purpose of securing their deportation. Latino youth are disproportionately accused of gang affiliation, to the extent that even culturally popular clothing and sports team logos for example, are ascribed as gang-related by law enforcement and immigration officials.[39] Notoriously inaccurate gang databases "label, stigmatize, and punish many citizens and non-citizens as "gang members" and there is extraordinary racial disparity in gang databases.[40] In addition, migrant children are often forced to engage in smuggling, sometimes as part of their own trafficking or forced labor conditions, and as a result are victims rather than perpetrators of a crime.

Studies have illustrated that immigration agencies—including ICE and CBP—have wrongfully conflated gang and immigration enforcement, claiming Latino boys are gang members in immigration proceedings without evidentiary support.[41] ICE frequently misidentifies immigrant youth as gang members for the purpose of deporting them.[42] ORR relies on information from the referring agencies, often Customs and Border Protection ("CBP") or ICE, to make initial placement decisions.[43] Agents may identify an immigrant youth as gang-affiliated based on tattoos, "self-disclosures" and reports of the violence the child is fleeing, or if a "reliable source" identifies the child as gang-affiliated.[44]

ORR's definition for "inappropriate sexual behavior" is too broad and ambiguous. Without clear definitions, we have witnessed instances where children in ORR custody have been sent to secure juvenile detention centers for otherwise innocent, or misunderstood, youth behavior (e.g., masturbation of oneself or exposure of genitalia). Subjecting a child to a jail-like environment for innocent or misunderstood youth behavior is inappropriate and fails to ensure a child is placed in the least restrictive setting that is in the best interest of the child, as required by the Flores Settlement Agreement.[45] Accordingly, we recommend that ORR avoid criteria that uses a term like "inappropriate sexual behaviors," and instead use a federally defined term, like nonconsensual sexual act, which is defined in 18 U.S.C. § 2246(2).[46] Doing so will ensure that this placement

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[39] Philip Desgranges, *Trump Is Locking Up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation*, ACLU (Aug. 2, 2017). Available at: https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/trump-locking-and-threatening-deport-children.

[40] Philip Marcelo, *Gang Database Made Up Mostly of Young Black, Latino Men*, AP News (July 30, 2019), https://apnews.com/article/dd5643e358c3456dbe14c16ade03711d

[41] N.Y. Immigration Coal. & CUNY Sch. of Law, *Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers* (2018), http://www1.cuny.edu/mu/law/files/2018/05/SweptUp_Report_Final-1.pdf.

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

[43] *See* ORR Policy Guide, *supra* note 8, at § 1.3.1.

[44] Press Release, U.S. Immigration & Customs Enf't, Operation Matador Nets 39 MS-13 Arrests in Last 30 Days (June 14, 2017), https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days.

[45] Flores Settlement Agreement, *supra* note 28, at ¶¶ 6, 19, 21, 23.

[46] [T]he term 'sexual act' means--
(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
(B)contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

criteria does not devolve into guesswork and speculation and result in erroneous placement of a child in a setting that is more restrictive than is in the child's best interest.

Labeling children as gang-affiliated and recording activity as criminal absent delinquency adjudications has severe and harmful consequences for children that are or have been in ORR custody. Information collected by ICE is provided to ORR to use during the intake and placement process, which includes completing Proposed Form P-7. ORR also has a history of incorrectly labeling children as dangerous based on inaccurate and unreliable allegations of gang involvement, past criminal activity; or criminalizing behavior that is typical for a traumatized child in federal custody.

b. Proposed Form P-7's Criminal and Gang-Affiliated Request for Information Will Result Undermine the Unaccompanied Child's Access to Immigration Relief

The prolonged detention that often results from gang-affiliated designations also harms children's immigration cases. It is much more difficult for detained children to obtain full immigration representation, as government-funded legal service providers generally do not enter their appearance as representative for a detained child due to how often and how quickly children are transferred between facilities. Gang affiliation allegations also increase the likelihood that immigrant youth will be denied immigration relief and subsequently be deported. These allegations of gang activity become a permanent part of a child's ORR file, and typically remain available to DHS, following them through the culmination of immigration proceedings. In fact, ORR requires care providers to document gang allegations in SIRs, which can originate from forms like Form P-7, and then in turn requires care providers and HHS to disclose all gang-tagged SIRs to DHS per the ORR Policy Guide.[47] Once the gang activity is reported, ICE HSI places gang memoranda in individuals' A-files and explicitly directs all future immigration services and applications for benefits or relief be denied.[48]

DHS nearly always submits these SIRs in immigration proceedings, whether to prevent an adult who was in ORR custody as a child from being released on bond, to prevent a favorable exercise of discretion in asylum and in other forms of relief, or in some cases to argue that the child is barred from relief altogether based on unverified SIRs from when the child was in ORR custody. ORR's insistence on labeling and documenting activities as gang-related or criminal does little to protect children while they are in ORR's care but actively harms the children ORR accuses and often mislabels, sometimes long after they have been released from custody.

(C) the penetration, however slight, of the anal or genital opening or another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

[47] ORR Policy Guide, *supra* note 8, at § 5.8.5.

[48] N.Y. Civil Liberties Union & N.Y Immigration Coal., *Stuck with Suspicion*, 14-16 (2019), https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf.

Gang allegations may also be used to deny, among other forms of immigration relief, DACA renewals, U-visas, or adjustment of status applications before USCIS.[49] If ORR has included information in a file regarding a child's alleged self-reported gang affiliation while in ORR custody, judges will not review this information for its veracity, nor inquire into how or where the information was obtained. Instead, more likely than not, immigration judges will opt to remove that child from the U.S. rather than grant them a discretionary form of relief, such as voluntary departure.[50] In other words, these allegations operate as a presumption in immigration court, as immigration judges will often accept the allegations as fact without recognizing issues of unreliability underlying gang identification protocols and due process shortcomings.[51]

Many detained children must appear in immigration court via VTC conferencing instead of in person. Appearing via video is harmful to children's cases where they are less likely to succeed than if they appear in person.[52] Finally, detained cases move more quickly through immigration court than cases for non-detained immigrants, and even more so now during the COVID-19 pandemic.[53] This can be harmful to a child's immigration case, forcing them to move forward while detained, rather than with the support of a caring family member and an attorney dedicated to full-scope representation, after their release.

c. Proposed Form P-7's Criminal and Gang-Affiliated Request for Information Will Result Unnecessary and Prolonged Family Separation

ORR is required to ensure that children are released in a timely and safe manner without unnecessary delay from ORR custody to sponsors, which are often parents (labeled as Category 1 sponsors by ORR), but can also be close or more distant relatives (Categories 2A, 2B and 3).[54] Potential sponsors undergo a difficult application process and subsequent vetting by ORR to determine their fitness to receive a child, even if they are parents that have raised the child since birth. There is no question that detaining and separating children from their family is detrimental

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[49] *Id.*

[50] Lauren R. Aronson, *The Tipping Point: The Failure of Form over Substance in Addressing the Needs of Unaccompanied Immigrant Children*, 18 Harv. Latino L. Rev. 1, 22 (2015), at 22, available at: https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=1386&context=faculty_scholarship.

[51] Immigration Legal Res. Ctr., *Deportation by Any Means Necessary: How Immigration Officials Are Labeling Immigrant Youth as Gang Members* (2018), at 10; available at: https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf

[52] Erica Bryant, *Unaccompanied Children Suffer as Hearings Are Sped Up, Switched to Video During COVID-19 Crisis*, Vera Inst. Just. (April 14, 2020), https://www.vera.org/blog/covid-19-1/unaccompanied-children-suffer-ashearings-are-sped-up-switched-to-video-during-covid-19-crisis.

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

[54] *See Flores* Settlement Agreement, *supra* note 28, at ¶¶ 14-18; see also 8 U.S.C. § 1232(c)(2)(a) (2018) ("[A]n unaccompanied alien child . . . shall be promptly placed in the least restrictive setting that is in the best interest of the child.").

to their welfare,[55] and that detaining children, especially those with a history of trauma, in restrictive settings, causes profound and negative impacts on child welfare and development.[56] However, "ORR has admitted in legal proceedings that it places children in secure detention without any inquiry into the accuracy of information submitted by law enforcement and without any notice to the child, their attorneys, or their parents of the information upon which the determination is being made."[57] Analysis of ORR's data supports that adding gang and criminal information to Proposed Form P-7 will lead to prolonged child detention in ORR custody and worse case outcomes. Namely, children who are labeled as gang-affiliated or as having criminal histories are placed in restrictive facilities without adequate due process.[58] This in turn causes children to remain in ORR custody for significantly longer than other children in ORR custody who have not been transferred to more restrictive facilities, regardless of the reliability of reporting or severity of the incidents.

The U.S. Constitution has recognized and protected the right to family unity,[59] even extending it beyond the rights of parents and their children.[60] Despite this strong legal right, however, ORR will not release a child from its custody if it—in its sole discretion—unilaterally determines that the child poses a threat to the safety of himself or others.[61] This is true regardless

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[55] Nat'l Ctr. for Youth Law, *Briefing: Child Welfare & Unaccompanied Children in Federal Immigration Custody* (2019), https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-inFederal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf.

[56] *Id.*; *see also* Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Just. Pol'y Inst. (2006), http://www.justicepolicy.org/research/1978.

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

[58] ORR Policy Guide Section 1.2.4 allows ORR to place a child in a staff-secure facility if the child "[h]as reported gang involvement (including prior to placement into ORR custody) or displays gang affiliation while in care," and in a secure facility if the child has been charged with, is chargeable or has been convicted or adjudicated of a crime or delinquency act. ORR Policy Guide, *supra* note 8, at §1.2.4. Children placed in these restrictive facilities have no meaningful opportunity to challenge their placement decisions as required under the Fifth Amendment Due Process Clause.

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

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

[61] *See* ORR Policy Guide, *supra* note 8, at § 2.7.4 ("ORR will deny release to a potential sponsor if . . . [r]elease of the unaccompanied alien child would present a risk to him or herself, the sponsor, household, or the community.").

of whether the child has an appropriate and duly approved sponsor, even if that sponsor is a parent.[62] For example, one of the determinative factors in ORR making a finding that a child poses a threat to the safety of themselves or others, is whether there are allegations that a child is involved in gang-related activities. This is true even if the sponsor is a parent. In many cases, there is no way for a sponsor to prove their ability to care for a child that ORR has alleged to be gang-affiliated through unappealable forms like Proposed Form P-7 and SIRs. Likewise, children have no way to contest or appeal these gang-affiliated designations in these forms, which contribute to their prolonged detention and separation from a sponsor.

In closing, RAICES recommends that ORR should not engage in the proposed information collection. The Proposed Form perpetuates racial biases against Latino youth. In addition, Proposed Form P-7 needs safeguards in place, including providing child-accessible Miranda warnings to unaccompanied minors during intakes and referral intakes, it must clarify who has access to the collected information, and ensure compliance with state and federal privacy laws.

Respectfully submitted,

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