

March 6, 2021

Mary B. Jones  
ACF/OPRE Certifying Officer  
Administration for Children and Families  
Office of Planning, Research and Evaluation (OPRE)  
330 C Street SW  
Washington, D.C. 20201  
[infocollection@acf.hhs.gov](mailto:infocollection@acf.hhs.gov)

**Re: 86 Fed. Reg. 5196-5199; Request for Comments in Response to Proposed Information Collection Activity: Placement and Transfer of Unaccompanied Alien Children into ORR Care Provider Facilities (OMB #0970-0554)**

Dear Ms. Jones,

The Legal Aid Justice Center appreciates the opportunity to provide the following comments in response to the Notice of Proposed Information Collection Activity, published on January 6, 2021. *See* FR Doc. 2021-01085. The Legal Aid Justice Center (LAJC) opposes certain aspects of the proposed revisions, and supports others. For the reasons detailed in the comments that follow, LAJC urges the Department of Health and Human Services (HHS) to provide clarification and make changes to several of its proposal forms.

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

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

LAJC has a strong interest in the proposed changes to the placement and transfer forms proposed by ORR, particularly in the areas of privacy and the criminalization of children. We offer the following comments to ensure HHS' continued ability to comply with its sole mandate to provide for children's welfare and well-being, and not to carry out law-enforcement activities.

For the following reasons, we urge ORR not to implement the proposed information collection discussed below, to re-center child welfare of all children in ORR care at every level of its proposed regulatory changes, to remove itself completely from law-enforcement activities, including investigation and reporting, and to advance the rights and interests of unaccompanied children. In general, LAJC urges ORR to take a more child-centered, trauma-informed approach to child placement and transfer instead of further criminalizing children's migration and the trauma histories.

Sincerely,

A handwritten signature in black ink that reads "Rebecca Wolozin". The script is cursive and fluid, with the first name "Rebecca" and last name "Wolozin" clearly legible.

Rebecca Wolozin, Esq.  
Legal Aid Justice Center  
6066 Leesburg Pike, Suite 520  
Falls Church, VA 22041  
Cel: 571-373-0518  
Tel: 703-720-5606  
Fax: 703-778-3454  
[becky@justice4all.org](mailto:becky@justice4all.org)

## General Comments Applicable to Multiple Forms

**I. Forms that collect, record, or communicate information regarding children's alleged criminal or gang histories or behaviors, like forms P-4 and P-7, lack safeguards against false allegations and error and violate children's rights.**

**a. Criminal histories and gang-affiliations recorded and reported by ORR and by DHS enforcement units are unreliable and prone to error.**

ORR has a history of incorrectly labeling children as dangerous based on inaccurate allegations of gang involvement, past criminal activity, or criminalizing behavior that is typical for a traumatized child in federal custody. LAJC has represented several children in cases seeking writs of habeas corpus, *Flores* bond hearings seeking release from custody, and *Saravia* bond hearings also seeking release from custody in which ORR's reporting mechanisms indicated gang involvement and criminality that was exaggerated or entirely inaccurate.<sup>1</sup>

It remains unclear what the required threshold is for an individual to be identified as gang- or cartel-affiliated. ORR does not define gang-affiliation or cartel-affiliation (or how to determine whether something is gang- or cartel-related) in its Guide to Terms.<sup>2</sup> There is also no definition of gang or cartel membership or gang or cartel association in immigration statutes.<sup>3</sup> In fact, neither law enforcement nor scholars agree on a uniform definition of a "gang".<sup>4</sup>

Despite this lack of definition, standard, or guidance, ORR records, reports, and shares information accusing children of being involved with gangs, cartels, or other criminal activity. In LAJC's experience reviewing unaccompanied children's ORR files, this designation may be based on information from a number of sources. First, ORR relies on information from the Initial Placement Referral Form provided by CBP/ICE to make its placement decisions.<sup>5</sup> Agents may identify an immigrant youth as gang- or cartel-affiliated based on tattoos, "self-disclosures" and reports of the violence the child is fleeing, or if a "reliable source" identifies the child as gang- or cartel-affiliated.<sup>6</sup> ICE frequently misidentifies immigrant youth as gang members for the purpose of deporting them.<sup>7</sup> For the past four years, official rhetoric about immigrant youth has

---

<sup>1</sup> See, e.g., *Beltran v. Cardall*, 222 F.Supp.3d 476 (E.D. Va. 2016); *Santos v. Smith*, 260 F. Supp.3d 598 (W.D. Va. 2017); *O.D.T.M. v. Lloyd*, 1:18-cv-524 (May 2018).

<sup>2</sup> Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Guide to Terms* (Mar. 3, 2021), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms>.

<sup>3</sup> See 8 U.S.C. § 1101 (Supp. 2014) (providing definitions).

<sup>4</sup> See Nat'l Gang Ctr., *National Youth Gang Survey Analysis*, <https://www.nationalgangcenter.gov/Survey-Analysis> ("There is no widely or universally accepted definition of a 'gang' among law enforcement agencies.").

<sup>5</sup> Nat'l Ctr. For Border Sec. & Immigration, Univ. of Tex. At El Paso, *Unaccompanied Alien Children (UAC) Project 9-10* (Mar. 20, 2014), <http://ncbsi.utep.edu/documents/UAC%20Project%20Site%20Visits/UTEP%20NCBSI%20Final%20Report%20March%2020%202014.pdf> [http://perma.cc/36YJ-G4XP].

<sup>6</sup> Press Release, U.S. Immigration & Customs Enft, *Operation Matador Nets 39 MS-13 Arrests in Last 30 days* (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days>.

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

been focused on identifying them as criminals and gang members, either overtly or using coded language.<sup>8</sup>

Finally, there are no discernable standards or criteria that indicate what characterizes a child as having committed “gang/cartel crimes, activities, or affiliation.” Labeling an incident as gang related may perpetuate false information about the child (see above). For example, if a child discloses that he or she is fleeing from forced gang involvement, subsequent behavior in ORR custody may be designated as gang-related regardless of whether that is accurate. The threshold for what conduct necessitates a formal incident report is left to the discretion of ORR’s care provider staff, resulting in children being threatened with write-ups for all kinds of common behaviors.<sup>9</sup>

**b. ORR should not elicit potentially self-incriminating information from children.**

Information collected by ICE is provided to ORR to use during the intake and placement process, notwithstanding its questionable reliability and the motives and objectives ICE has when recording and sharing this information. In LAJC’s, experience, ORR has accepted these accusations from ICE as true without verification. LAJC’s clients routinely report that these interviews take place within hours after they are apprehended by ICE, and often just hours after crossing the border. Children are exhausted, dehydrated, hungry, and afraid. Many of them have been exposed to extreme violence and loss, and are struggling with severe trauma symptoms. CBP facilities are not child-friendly spaces. To the contrary, children report being held in very cold holding cells with strangers and getting little food or water. This is the environment in which interviews take place prior to placement in ORR custody. All of these factors, together with the fear children feel when interrogated by law enforcement officers, makes the stories and details they recount frequently inaccurate. **The information collected during these interviews should never be the basis for a placement or release decision.** If ORR inappropriately and unlawfully uses this information in placement or transfer decisions, notices of transfer or placement must indicate the source of any information motivating the transfer or placement to ensure that children’s due process rights are protected by providing them with meaningful notice.

In addition, during initial arrests and interviews prior to being placed in ORR custody, children generally are asked questions that elicit incriminating information with no prior Miranda advisal that the information they divulge can result in criminal and/or immigration consequences, as well as impact their placement at ORR, including but not limited to placing them in a secure juvenile jail. The privilege against self-incrimination is not limited to the trial setting, but extends to “any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [a

---

<sup>8</sup> Celest Gomez et al., *The President’s Intent: Preliminary Findings of a Critical Discourse Analysis of Trump’s Speeches and Tweets from the Date of his Candidacy to Mid-September 2017* (2017), <https://www.thepresidentsintent.com/full-report/>.

<sup>9</sup> See, e.g. John Burnett, *Inside the Largest and Most Controversial Shelter for Migrant Children in The U.S.*, NPR (Feb. 13, 2019), <https://www.npr.org/2019/02/13/694138106/inside-the-largest-and-most-controversial-shelter-for-migrant-children-in-the-u->.

person] in future criminal proceedings.”<sup>10</sup> Miranda warnings are required in civil investigations that *may* result in criminal prosecutions.<sup>11</sup> In the broader immigration context, while Miranda warnings may not be required in “booking exception” settings involving routine questions generally unlikely to elicit incriminating responses,<sup>12</sup> they do apply to booking questions designed to elicit incriminating responses.<sup>13</sup> Because of this, “[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the Miranda warnings.”<sup>14</sup> Immigration officers’ statements that the interview was meant to obtain biographical information for a “routine, civil investigation” are irrelevant in light of the objective factors suggesting that the questions are likely to elicit an incriminating response.<sup>15</sup>

**For these reasons, ORR must not rely or report on information collected in a manner that violates children’s rights against self-incrimination, whether that information was collected outside of ORR or by ORR staff or grantees. To the extent that the source of information regarding criminal history, gang-involvement, or cartel-involvement originated from interviews in which the child was not Mirandized, it should not be memorialized in any ORR child record, nor should it be shared with law enforcement. This ill-gotten information is fruit of the poisonous tree.**

ORR staff also conduct an intake assessment (discussed in greater detail in separate comments responding to revisions to the proposed intake forms). In LAJC’s experience, disclosures and observations made during the intake process that relate to gangs, cartels, or criminal histories are recorded both in the intake forms and significant incident reports (“SIRs”) labeling the child as gang- or cartel-affiliated (or as a child with a criminal history, regardless of whether charges were brought or the child has been adjudicated delinquent of any offense.) The intake includes subjective assessments of whether tattoos, clothing, art, or other personal items are gang- or cartel-related. Typically, it relies primarily on information children report themselves in addition to the more limited information provided by ICE, which likewise relies primarily on children’s

---

<sup>10</sup> *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984) (quoting *Lefkowitz v. Turley*, 414 U.S. 70 (1973)).

<sup>11</sup> *See, e.g., Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (requiring Miranda warnings where petitioner was questioned by the IRS regarding a civil matter because tax investigations often lead to criminal prosecutions, just as it did in this case); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1279 (9th Cir. 1983) (finding INS investigator’s failure to give Miranda warnings rendered detainee’s citizenship response inadmissible where the INS officer had reason to suspect that the question asked would likely elicit an incriminating response).

<sup>12</sup> *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

<sup>13</sup> *See United States v. Arellano-Banuelos*, 912 F.3d 862, 868 (5th Cir. 2019) (holding that an ICE Agent’s questioning exceeded the scope of the routine booking exception when it went beyond basic biographical information to include inquiries into whether or not Arellano-Banuelos had been previously deported and whether he had received permission from the Attorney General to reenter the United States); *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) (finding that in this case the routine booking questions were not subject to Miranda, while still recognizing that routine booking questions could be subject to Miranda if they are designed to elicit incriminating responses).

<sup>14</sup> *United States v. Mata-Abundiz*, 717 F.2d 1277, 1279 (9th Cir. 1983).

<sup>15</sup> *Id.* at 1278-79.

own reports. Children's self-disclosures, particularly when made in a detained setting, are unreliable measures of gang-involvement and criminal history.<sup>16</sup>

For the same reasons explained above, **ORR must provide Miranda advisals prior to eliciting potentially incriminating information from children.** If it does not do so, information gathered in the intake interview related to criminal history, gang-involvement, and cartel-involvement must not be memorialized, recorded, or reported.

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

Several of the proposed forms' labels identifying children's behavior as gang- or cartel-related, or criminal results in four major harms to children: (i) children get transferred to more secure facilities; (ii) it interferes with family reunification and unnecessarily and/or unjustifiably delays or prevents family reunification; (iii) children are subjected to prolonged detention; and (iv) gang-, cartel-, and criminal allegations against children undermine their immigration cases. This applies especially to proposed form P-7.

**i. Children are inappropriately be placed in more restrictive settings**

While in ORR custody, ORR must place children in the least restrictive setting in their best interests.<sup>17</sup> No child may be placed in a secure detention facility unless ORR determines the minor "poses a danger to self or others or has been charged with having committed a criminal offense."<sup>18</sup> ORR places children in staff-secure facilities if a child "[h]as reported gang involvement or displays gang affiliation while in care [or] [h]as self-disclosed violent criminal history or gang involvement prior to placement in ORR custody that requires further assessment."<sup>19</sup> In the past, children have been labeled as gang members and placed into staff-secure or secure facilities after confiding in ORR therapists about their previous exposure to deadly gang violence.<sup>20</sup> Although ORR no longer relies on unverified and error-ridden self-

---

<sup>16</sup> See, *Joseph H. v. California*, 137 S.Ct. 34 (2016), Br. Of *Amici Curiae* Juvenile Law Center and the Center on Wrongful Convictions of Youth in Support of Petitioner, available at <https://www.scotusblog.com/wp-content/uploads/2016/04/15-1086-JLC-Amicus-Brief.pdf>.

<sup>17</sup> Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), 8 U.S.C. § 1232(c)(2)(A) (The federal government must ensure that children are "promptly placed in the least restrictive setting that is in the best interest of the child").

<sup>18</sup> The Flores Settlement Agreement, *Flores v. Reno*, 507 U.S. 292, 316 (1993), ¶¶ 6, 19, 21, 23; 8 U.S.C. § 1232(C)(2)(A).

<sup>19</sup> Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1.2.4* (Jan. 30, 2015), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.4>.

<sup>20</sup> Bob Ortega et al., *For One Teen Asylum Seeker, Confessing Fears Led to Months in Detention*, CNN (June 29, 2018), <https://www.cnn.com/2018/06/29/us/teenage-asylum-seeker-migrant-describes-months-in-detention-invs/index.html> ("A teenage minor under ORR custody reported that he was assigned a therapist who told him that she would help him. However, every time he would share his exposure to deadly violence, he was labeled a "gang member" by the therapist. Further, the confidential information he shared with the therapist, including the dangers he faced in Guatemala and the fear he experienced, was used against him.")

disclosures for placing children in secure facilities, it continues to use them to place children in staff-secure facilities. In LAJC's experience with clients and reviewing ORR case files, staff-secure facilities are highly restrictive and frequently exacerbate children's negative behavior leading to placement in a secure facility.

In addition, ORR still places children in secure settings based on self-disclosures of "violent criminal history". The proposed SIR forms now contain sections to designate and categorize children's behavior as "criminal history". Pursuant to section 1.2.4 of the UAC Policy Guide, ORR considers unaccompanied children's self-disclosures of "violent criminal history" requiring further assessment as a factor in evaluating whether the child will be placed in a secure facility because he or she poses a danger to self or others. In addition to the intake forms, the proposed SIR forms serve as the instruments that would identify and designate these disclosures as "violent criminal history" requiring assessment. In addition, SIRs that identify and designate disclosures and behavior in ORR custody as criminal have a cumulative effect when used to determine whether a child's in-custody behavior is "a pattern or practice of criminal activity." Evaluating whether in-custody behavior warrants transfer to a secure facility depends heavily on this "pattern and practice" evaluation.<sup>21</sup> These designations and categorizations will cause children to be inappropriately placed in staff-secure and secure placements, with the concomitant delays to reunification and harms to their immigration cases that come with those placements. (See below.)

ORR itself agrees that detaining children is detrimental to their welfare. Detaining children, especially in staff-secure and secure settings, causes profound and negative impacts on their welfare and development.<sup>22</sup>

Nonetheless, the proposed forms invite ORR to perpetuate unverified gang or cartel allegations against the children in its care and to characterize children's past experiences as criminal history. This is likely to contribute to the transfer of those children to more restrictive or jail-like settings. As other organizations have pointed out, "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."<sup>23</sup> Likewise, in LAJC's experience, ORR conducts little if any inquiry into the veracity of allegations made by staff or other children in ORR facilities.

In addition to being harmful to children's psychological and physical wellbeing, and to their healthy development, transferring children to more restrictive placements may further delay reunification and compromise their ability to secure long-term immigration relief.

---

<sup>21</sup> Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 1.2.4* (Jan. 30, 2015).

<sup>22</sup> See, Barry Holman and Jason Ziedenberg, Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2006), <http://www.justicepolicy.org/research/1978>.

<sup>23</sup> Letter from New York Civil Liberties Union to Scott Lloyd, Director, Off. of Refugee Resettlement, et al (July 27, 2017), [https://www.nyclu.org/sites/default/files/field\\_documents/nyclu-letter-to-orr.pdf](https://www.nyclu.org/sites/default/files/field_documents/nyclu-letter-to-orr.pdf).



## **ii. Family reunification may be unnecessarily or unjustifiably delayed**

ORR is required to ensure that children are released in a timely and safe manner from ORR custody to sponsors, most commonly parents or close relatives, who can care for them pending their immigration proceedings.<sup>24</sup> Family unity, or keeping children with family members, is a key factor in determining the best interest of children in custody.<sup>25</sup> However, ORR will not release a child from custody if it determines that the child poses a threat to the safety of himself or others.<sup>26</sup> This is true regardless of whether they have an appropriate sponsor, even if that sponsor is a parent.<sup>27</sup> Allegation that a child is involved in gang or cartel related activities, makes it significantly harder to win release from custody. This is highly concerning especially because of the unreliability of these types of allegations or designations on the proposed forms, especially form P-7, as explained above.

A second implication of labeling a child as gang-involved or having a criminal history is that ORR then adds additional requirements and barriers to reunification. In LAJC's experience, ORR has required significantly more of sponsors of children who have been labeled as gang-involved or having a history of criminal activity, including requiring a family to provide constant surveillance of the child regardless of age or enrolling the child in mental health services prior to release (which is often not possible to do for bureaucratic reasons). In many cases, there seems to be no way for a sponsor to prove their ability to care for a child that ORR has alleged to be gang-involved or cartel-involved.

Children are more likely to experience physical and emotional well-being, safety, and stability when they are living with and being cared for by family members.<sup>28</sup> Family unity is particularly important for immigrant children, who are more likely to be disadvantaged in navigating a new country, language, and culture.<sup>29</sup> Recording and reporting incidents as gang- or cartel-related and

---

<sup>24</sup> Flores Settlement Agreement, at ¶¶ 14-18.

<sup>25</sup> *State Statutes, Determining the Best Interests of the Child*, Child Welfare Information Gateway, Children's Bureau (Mar. 2016)

[https://www.childwelfare.gov/pubPDFs/best\\_interest.pdf#page=2&view=Best%20interests%20definition](https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition).

<sup>26</sup> See Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 2.7.4*, <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.7.4> ("ORR will deny release to a potential sponsor if . . . Release of the unaccompanied alien child would present a risk to him or herself, the sponsor, household, or the community")

<sup>27</sup> See *Santos v. Smith*, 260 F. Supp. 3d 598 (W.D. Va. 2017).

<sup>28</sup> See The Annie E. Casey Foundation, *Stepping Up for Kids: What Government and Communities Should Do to Support Kinship Families 2* (2012), <https://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf>.

<sup>29</sup> See United Nations High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interest of the Child* (May 2008), <http://www.unhcr.org/4566b16b2.pdf> ("unaccompanied and separated children require special attention in identifying their best interests, given the particular risks that they face."); see also United Nations High Commissioner for Refugees, *UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (Feb. 1997), <https://www.unhcr.org/en-us/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html> ("Considering their vulnerability and special needs, it is essential that children's refugee status applications be given priority and that every effort be made to reach a decision promptly and fairly."); Nancy Landale et al., *The Living Arrangements of*



recording and reporting children's alleged criminal histories compromises a child's best interests instead of safeguarding them as ORR is mandated to do.

### **iii. Being placed in more restrictive settings and delays in family reunification lead to prolonged child detention**

ORR data confirms LAJC's experience working with detained children. Children who receive SIRs in which they are accused of gang- or cartel-involvement or of having a criminal history remain in ORR custody for significantly longer than other children, regardless of the reliability of reporting or severity of the incidents. SIRs often form the basis of gang or criminal labels on notices of placement and throughout a child's file, including forms like proposed form P-7. The National Center for Youth Law published a report analyzing recent data on release factors. The report showed that children detained in more restrictive facilities remain in custody for prolonged periods of time, causing serious harm to children's well-being.<sup>30</sup>

LAJC has represented multiple children who were ultimately released after being held for upwards of a year, or multiple years, because of ORR's allegations that the child had in the past been gang- or cartel- involved (usually based on the child's own forthcoming disclosures while explaining why they were fleeing their home country). These children's behavior always deteriorated as they spent more time in secure or staff-secure facilities, where they did not receive appropriate trauma-based mental health care (in part because ORR is not designed to provide long-term treatment because it is not supposed to be holding children for long periods of time), and where they were treated as the criminals they were fleeing from. These forms only increase the likelihood that ORR will unnecessarily and unlawfully place children in overly restrictive settings that are detrimental to their wellbeing.

### **iv. Children's access to immigration relief may be undermined**

Gang allegations increase the chance that immigrant youth will be denied immigration benefits and deported.<sup>38</sup> 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. ORR discloses all gang-tagged SIRs to DHS per the ORR UAC Policy Guide.<sup>31</sup> Once the gang activity is reported, HSI places gang memoranda in individuals' A-files and explicitly directs all future immigration services and applications for benefits or relief be

---

*Children of Immigrants, NIH Public Access, Future Child* 1 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3241619/pdf/nihms-341452.pdf> ("Immigrant families face unique challenges as they adapt to their new country ... Mexican immigrant families [for example] face challenges with respect to assimilation because of low parental education, poverty, and language barriers, and because a relatively high share of parents are unauthorized.").

<sup>30</sup> National Center for Youth Law, *Briefing: Child Welfare & Unaccompanied Children in Federal Immigration Custody* (Dec 2019), <https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf>

<sup>31</sup> Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied: Section 5.8.4* (Mar. 3, 2021), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5#5.8.4>

denied.<sup>32</sup> In LAJC's experience, DHS *always* submits these SIRs in immigration proceedings, whether to prevent an adult who was in ORR custody as a child from being released on bond, to prevent a favorable exercise of discretion in asylum and in other forms of relief, or in some cases to argue that the child is barred from relief altogether based on unverified SIRs from when the child was in ORR custody. ORR's insistence on labeling and documenting activities as gang-related, cartel-related, or criminal does little to protect children in ORR's care but actively harms the children ORR accuses. Further, when children are transferred to secure placements, they are more likely to accrue additional SIRs related to rule breaking or other resistant behavior in the highly restrictive settings in which they are placed. These, in turn, are incorporated into forms like P-4 and P-7. These multiple references and recordings have a compounding effect on the harm children suffer as a result of these labels and accusations.

Gang allegations may also be used to deny DACA renewal, U-visas, or other adjustment of status applications before USCIS.<sup>33</sup> If a child has reported gang affiliation, judges will likely opt to remove that child rather than grant him or her voluntary departure, a discretionary form of relief.<sup>34</sup> 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.<sup>35</sup>

The rise of gang allegations within the immigration context has been met with intense criticism about information integrity.<sup>36</sup> Cases involving gang allegations have challenged the lack of due consideration of the reliability or veracity of the suspicions used to deny immigration benefits.<sup>37</sup>

---

<sup>32</sup> STUCK WITH SUSPICION [https://www.nyclu.org/sites/default/files/field\\_documents/020819-nyclu-nyic-report.pdf](https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf) (Pg. 14-16)

<sup>33</sup> 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](https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf).

<sup>34</sup> K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-trial Detention*, 23 St. Thomas L. Rev. 620 (2011); 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).

<sup>35</sup> Imm. Legal Res. Ctr., *Deportation by Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members* (2018), [https://www.ilrc.org/sites/default/files/resources/deport\\_by\\_any\\_means\\_nec-20180521.pdf](https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf)

<sup>36</sup> E.g., Aviva Stahl, *How Immigrants Get Deported for Alleged Gang Involvement*, VICE (Aug. 12, 2016 10:02 AM), [https://www.vice.com/en\\_us/article/yvedev/how-immigrants-get-deported-for-alleged-gang-involvement](https://www.vice.com/en_us/article/yvedev/how-immigrants-get-deported-for-alleged-gang-involvement); Ali Winston, *Marked for Life: U.S. Government Using Gang Databases to Deport Undocumented Immigrants*, INTERCEPT (Aug. 11, 2016, 10:34 AM), <https://theintercept.com/2016/08/11/u-s-government-using-gang-databases-to-deport-undocumented-immigrants/>; Ali Winston, *Vague Rules Let ICE Deport Undocumented Immigrants as Gang Members*, INTERCEPT (Feb. 17, 2017, 6:12 PM), <https://theintercept.com/2017/02/17/loose-classification-rules-give-ice-broad-authority-to-classify-immigrants-as-gang-members/>.

<sup>37</sup> First Amended Petition for Writ of Habeas Corpus & Class Action Complaint for Injunctive and Declaratory Relief at 1, 10-11, 17-18, *Gomez v. Session*, No. 3:17-cv-03615-VC (N.D. Cal. Aug. 11, 2017) (discussing false claims); Jennifer Medina, *Gang Databases Criticized for Denying Due Process May Be Used for Deportations*, N.Y. TIMES (Jan. 10, 2017, 9:10 PM), [https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html?pagewanted=all&\\_r=0](https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html?pagewanted=all&_r=0); Richard Winton, *California Gang Database Plagued with Errors, Unsubstantiated Entries, State Auditor Finds*, L.A. TIMES (Aug. 11, 2016, 9:10 PM), <http://www.latimes.com/local/lanow/la-me-ln-calgangs-audit-20160811-snap-story.html>.

The prolonged detention that often results from gang- or cartel-related SIRs also harms children's immigration cases. It is much more difficult for detained children to obtain full immigration representation. Further, they are very likely to be reunified in a state different than one in which they are being held, meaning that their case will likely be transferred to a different court upon release from ORR custody. This impedes both the ability to secure representation, and the ability of the judge to effectively adjudicate any case. Finally, many detained children have to appear in immigration court via VTC conferencing instead of in person. Appearing via video is harmful to children's cases and they are less likely to succeed than if they appear in person.<sup>38</sup> Additionally, detained cases move more quickly than cases for non-detained immigrants, which can be harmful to a child's case, forcing them to move forward while detained rather than with the support of a caring adult and an attorney after release.

The responsibility of caring for unaccompanied immigrant children was specifically placed under an agency that had no responsibility for enforcing immigration laws or working to remove immigrant children from the United States. But the proposed SIRs focus on collecting information about gang- and cartel- involvement and criminal history, together with designating children's in-custody behavior as falling into those categories does more to contribute to children's removal to dangerous places than to their protection and care.<sup>39</sup> The direct impact of gang-tagged SIRs and SIR designations of behavior as criminal on children's immigration proceedings essentially erodes the important divide between protection and law enforcement, and raises serious questions about conflicts of interest with ORR in possible violation of its mandate to care for the wellbeing of unaccompanied children.

**d. The proposed changes in form P-7 focusing on criminal history and gang- and cartel-involvement raise serious due process concerns**

For many of the reasons explained above, the proposed modifications to ORR's placement and transfer information collection instruments (hereafter "forms") raise serious due process concerns. Adding fields that allege that an "incident is related to gang/cartel crimes, activities, or affiliation" and including extensive criminal history sections on form P-7 are designations that can result in the deprivation of children and their sponsors fundamental rights to liberty and family unity.<sup>40</sup>

---

<sup>38</sup> Erica Bryant, *Unaccompanied Children Suffer as Hearings are Sped Up, Switched to Video During COVID-19 Crisis*, Vera Institute of Justice (April 14, 2020), <https://www.vera.org/blog/covid-19-1/unaccompanied-children-suffer-as-hearings-are-sped-up-switched-to-video-during-covid-19-crisis>; Young Center for Immigrant Children's Rights, *Immigration Hearings by Video: A Threat to Children's Right to Fair Proceedings* (Jan. 2020), [https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/5e4d5c0cc48abe2cc9bd102a/1582128140439/YOUNG+Center+VTC+Report\\_Updated+January+2020.pdf](https://static1.squarespace.com/static/597ab5f3beba0a625aaf45/t/5e4d5c0cc48abe2cc9bd102a/1582128140439/YOUNG+Center+VTC+Report_Updated+January+2020.pdf).

<sup>39</sup> See e.g., 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, p. 11 (2015)

<sup>40</sup> See *J.E.C.M. v. Lloyd* 352 F.Supp.3d 559 (E.D.Va. 2018); see also, United Nations Rules for the Protection of Juveniles Deprived of their Liberty, (I)(2) (The United Nations Rules for Children Deprived of their Liberty further express that "deprivation of liberty of a juvenile should be a disposition of last resort and for the minimum necessary

These proposed forms fail to provide notice to a child in custody or their adult caregiver/sponsor or legal representative that they are identified as being gang- or cartel-affiliated, fail to ensure the reasoning behind the designation is well documented with the evidence used to make the determination<sup>41</sup>, and fail to provide a child or their representative any opportunity to challenge the designation<sup>42</sup>.

Worse, without any of these protections and with a very high risk of error, these SIRs are required to be sent to DHS (and in some cases DOJ), where they will have hugely harmful effects on multiple aspects of the child's life. When subjected to the *Mathews* due process analysis, there are clear violations here.<sup>43</sup> Children's liberty and family interests are implicated. There is an extremely high risk of error, as explained above. And there appears to be little benefit to the government or public interest, particularly given the high risk of error. Like being placed on a "no fly" list, ORR's forms would brand children as gang- or cartel-affiliated or as criminals, and share that label far and wide in a way that would deprive them of their fundamental rights.<sup>44</sup>

**To comply with the law, ORR must develop a process for providing children and their sponsors and legal representatives meaningful notice of any and all gang allegations, and of attempts to illicit a child's criminal history.** ORR must also develop internal oversight over issuing and reporting these allegations, and an opportunity for children and their sponsors and legal representatives to challenge them *before* they are shared outside of ORR or used to change a child's placement.<sup>45</sup> LAJC has serious concerns that all SIRs are not provided to children or their legal representatives pursuant to UAC Policy Guide Section 5.8.9, particularly in light of the significant impact they may have on a child's fundamental and constitutional rights. If challenged, there must be a neutral adjudicator to evaluate the allegation based on the evidence presented by both the child (and any adult caregiver or legal representative) and the individual making the allegation.

## **II. ORR should not criminalize complex child behavior, particularly given the trauma histories of the majority of the children it cares for.**

The majority of children entering ORR custody are from the Northern Triangle of Central America, and have experienced severe trauma before coming to the United States.<sup>46</sup> Often, they have

---

period and should be limited to exceptional cases."); UN Convention on Rights of the Child, Article 9, (The UN Convention on the Rights of Children state that "a child not be separated from his or her parents against their will except when competent authorities *subject to judicial review* determine ... that such separation is necessary for the best interests of the child") (emphasis added).

<sup>41</sup> While LAJC notes that the form contains a small "If yes, explain" box, it does require any documentary evidence nor does it provide any guidance on standards for documenting and making such a determination.

<sup>42</sup> Off. of Refugee Resettlement, *Children Entering the United States Unaccompanied*, <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied>

<sup>43</sup> *Mathews*, 424 U.S. at 335; *Mullane*, 339 U.S. 306.

<sup>44</sup> See, e.g., *Elhady*, 2019 WL 4194545 (holding that lack of criteria for inclusion on a terrorist watch list contributed to a violation of procedural due process).

<sup>45</sup> If safety requires an immediate change in placement, this opportunity must be provided promptly following the transfer.

<sup>46</sup> UNHCR, *Children on the Run*, <https://www.unhcr.org/56fc266f4.html>.

recently experienced or witnessed violence at least once in their home countries, and commonly long-lasting or chronic violence or neglect.<sup>47</sup> Many of them also experience traumatic events on the journey to the United States.<sup>48</sup> This will be particularly true for children arriving in the United States after fleeing not only their home countries, but the horrific conditions in the migrant camps caused by the Migration Protection Protocols program.<sup>49</sup> The United Nations refugee agency has found that the majority of children coming to the southern border merit protection under international law.<sup>50</sup> All of this creates an essential backdrop to understanding the psychological needs and the behaviors of children in ORR custody.

**a. All ORR placement and transfer forms should take a child-centric approach and structure accounting for child development and past trauma**

The forms generally fail to take into account any kind of trauma-informed understanding of child behavior or communication. Viewing these forms, it appears that gang allegations are made and used with no youth-specific safeguards. Furthermore, although the forms record “criminal history”, most child behaviors are not, in fact, criminal. The distinction between juvenile delinquency and adult crimes is clear and consistent across Supreme Court jurisprudence, the juvenile justice systems in all 50 states and the District of Columbia, and BIA case law in *Matter of Devison-Charles*.<sup>51</sup>

Studies have illustrated how the immigration agency has wrongfully conflated gang and immigration enforcement, calling Latino boys gang members in immigration proceedings without evidentiary support.<sup>52</sup> The forms’ emphasis on recording and reporting gang- and cartel-involvement and criminal history furthers the growing and ugly discourse equating immigrant children with criminals.<sup>53</sup>

Instead, the forms should be restructured to use a more nuanced, child-centric framing of events by focusing on behavioral and health risk factors rather than criminality. Surely ORR has the

---

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Camilo Montoya-Galvez, *700 children crossed the U.S. border alone after being required to wait in Mexico with their families*, CBS News (Jan. 15, 2021), <https://www.cbsnews.com/news/children-who-crossed-the-u-s-border-after-their-families-were-required-to-wait-in-mexico-are-being-denied-legal-safeguards-suit-says/>

<sup>50</sup> UNHCR, *Children on the Run*, <https://www.unhcr.org/56fc266f4.html>.

<sup>51</sup> Philip Desgranges, New York Civil Liberties Union, *Trump Is Locking Up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation*, Aug. 2, 2017; Liz Robbins, N.Y. Times, *Teenagers' Arrests Are Unconstitutional, A.C.L.U. Lawsuit Says*, Aug. 11, 2017.

<sup>52</sup> N.Y. Imm. Coalition & CUNY Sch. Of Law, *Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers* (2018), available at [https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp\\_Report\\_Final-1.pdf](https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf); Imm. Legal Res. Ctr., *Deportation by Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members* (2018), [https://www.ilrc.org/sites/default/files/resources/deport\\_by\\_any\\_means\\_nec-20180521.pdf](https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf)

<sup>53</sup> Karla M. McKanders, *America's Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L.J. 197 (2015) (examining the conceptualization of immigrant youth who are subject to delinquency adjudications); Hlass, *The School to Deportation Pipeline*, *supra* (examining how gang allegations against immigrant youth work to push young people into a school-to-deportation pipeline).



resources to incorporate evidence-based and child-centric strategies for ensuring the safety and well-being of all of the vulnerable children in its care. ORR should have no part furthering the false narrative of immigrant children as criminals nor should it participate in any activity that does not further the welfare of all the children in its care, including those unable to constructively process their trauma.

**b. ORR's focus on alleging, recording, and reporting gang or cartel involvement and criminal history in form P-7 has a disproportionate negative impact on children of color and promotes racial inequality**

The extensive alleging, recording, and reporting gang or cartel allegations inherent to the proposed forms will be necessarily, and almost exclusively, applied to children of color. People of color, including youth, are disproportionately negatively impacted by their race in educational, juvenile justice, and immigration settings.<sup>54</sup> Children of color are not afforded the protections ordinarily understood to attach to children, both in context of juvenile and immigration proceedings.<sup>55</sup> This is all the more true for those who do not speak English.<sup>56</sup> The conflating of criminality with immigration grows out of a system steeped with racism that has not been acknowledged or addressed.<sup>57</sup> Mark Morgan's comments about his ability to unequivocally identify future gang members simply by looking at children in immigration custody is just a disturbingly public expression of the pernicious racism that underlies our immigration system.<sup>58</sup> Both domestic and international scholarship has long criticized gang taskforce initiatives as a

---

<sup>54</sup> See e.g., LAJC, *Decriminalizing Childhood: Ending School-Based Arrest for Disorderly Conduct*, Oct. 2019, <https://www.justice4all.org/wp-content/uploads/2019/10/LAJC-DC-policy-brief-FINAL.pdf>; Kristen Weir, *Policing in Black & White* (Dec. 2016), <https://www.apa.org/monitor/2016/12/cover-policing>; Emily Ryo, *Predicting Danger in Immigration Courts*, 44 Law & Social Inquiry 227, 245 (2019).

<sup>55</sup> See, Nat'l Inst. For Bldg. Cmty. Tr. & Justice, *Implicit Bias*, <https://trustandjustice.org/resources/intervention/implicit-bias>; Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officers with Caution*, 44 Pepp. L. Rev. 245, 293-294 (2017); Mari McKanders, *Immigration Enforcement and the Fugitive Slave Acts: Exploring Their Similarities*, 61 Cath. U.L. Rev. 921, 949 (2012); Ctr. For Child Law & Policy, *Red Practice Manual: Introduction and Chapter 1: Beginning or Restarting Work to Reduce Racial and Ethnic Disparities* 14-15 (2015), <http://www.cclp.org/wp-content/uploads/2016/06/Introduction-and-Chapter-1-Beginning-or-Restarting-Work-to-Reduce-Racial-and-Ethnic-Disparities.pdf> ("Black and Latinx youth confront particular hardships in the juvenile justice system, including overrepresentation, more severe treatment than white youth for similar offenses, unnecessary entry and entrenchment into the system, and overbroad antigang laws.")

<sup>56</sup> See Anastasia Coppersmith, *Lost in Translation: Persons with Limited English Proficiency and Police Interaction in the United States*, 10 N. Ill. U. L. Rev. 1, 14 (2018).

<sup>57</sup> Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a 'Post-Racial' World*, 76 OHIO STATE L.J. 599, 608 (2015) ("[W]hile overt racism has played a role in its [crimmigration's] development, structural inequality works to mask and entrench racism within the system as it allows for the continued racial disparities in a post-racial world--court decisions refuse to recognize it, society refuses to acknowledge it, and individuals can forcefully insist that they support the system as it stands because it is not based on race or racism.").

<sup>58</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> ("Mark Morgan, the White House choice to lead [ICE] ... said ... 'I've been to detention facilities where I've walked up to these individuals that are so-called minors, 17 or under ... I've looked at them and I've looked at their eyes ... and I've said that is a soon-to-be MS-13 gang member. It's unequivocal.'").

cause of [extrajudicial killings](#), [police corruption](#), and an [ineffective public safety tool](#). In fact, U.S. incarceration and deportation policies have proven to be “not only failed strategies for combating gang violence” but also key generators of gang violence in Central America.<sup>59</sup> History also shows us, that despite this scholarship, politicians continue to vilify youth of color in order to justify pro-incarceration and pro-deportation policies.<sup>60</sup>

**ORR’s emphasis and focus on gang- and cartel-involvement and on criminal history only serves to promote and preserve racial inequality in the United States and its severe impact on children, many whom have only just arrived.**

### III. Privacy and Third Party Reporting

#### a. Children are generally entitled to greater privacy protections and ORR should protect the privacy of the children in its care

The proposed forms contain fields related to children’s criminal history and real or perceived involvement in gang activity. The proposed forms for use by mental health practitioners will likewise contain information that ORR must protect. It is unclear if ORR considers these forms to be subject to state and federal laws governing the protection of children’s information and privacy. Children’s information and privacy is protected broadly under numerous state and federal laws.<sup>61</sup> Legislatures have chosen to restrict access to children’s records in this manner in recognition of the inherent vulnerability of children and related policy concerns. Protecting children’s information and privacy promotes rehabilitation and removes barriers to seeking employment, housing, and other opportunities.<sup>62</sup> Additionally, restricting access to children’s information is consistent with the U.S. Supreme Court’s longstanding recognition that children should not be stigmatized for “youthful indiscretions.”<sup>63</sup> In recognition of these longstanding norms and policies, ORR should ensure that the information collected on the proposed forms are adequately safeguarded and comply with state and federal laws governing the protection of children’s health and criminal information.

---

<sup>59</sup> See Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 Case W. Res. 993, 998 (2016).

<sup>60</sup> See Priscilla A. Ocen, *(E)racing Childhood: Examining The Racialized Construction of Childhood and Innocence*, 62 UCLA L. REV. 1586, 1594 (2015); Kevin Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 Case W. Res. 993, 998 (2016); The Sentencing Project, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies* (Sep. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/>; Carrie Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. St. Thomas L.J. 532, 555 (2017); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 Am. Crim. L. Rev. 105, 110 (2012).

<sup>61</sup> See, e.g., 5 U.S.C. § 552(a); 20 U.S.C. § 1232g; Health Insurance Portability and Accountability Act, H.R. 3103, 104<sup>th</sup> Cong. (1996); CA WIC.

<sup>62</sup> Riya Saha et al., *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*, 6 (2014)

<sup>63</sup> *In re Gault*, 387 U.S. 1, 60 (1967) (J. Black concurring) (“The juvenile court planners envisaged a system that would practically immunize juveniles from ‘punishment’ for ‘crimes’ in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions.”).



As noted above, the forms specifically contain information regarding children’s alleged criminal or gang history. In general, sharing information about children’s criminal history outside of ORR is inconsistent with the policy rationale underlying protections for juvenile criminal information. In Virginia, for example, juvenile confidentiality laws have long protected juvenile information arising from certain proceeding, including juvenile delinquency.<sup>64</sup> Any agencies or individuals not statutorily authorized to review a child’s file must obtain a court order to do so.<sup>65</sup> Children’s law enforcement records are likewise restricted, and a court order must be obtained for most outside agencies or personnel to access the record.<sup>66</sup> A violation of the juvenile confidentiality provisions is a class 3 misdemeanor.<sup>67</sup>

**b. HIPAA and ORR Policy require that ORR keep children’s medical information history confidential**

Social workers, who serve as clinicians for children at ORR care provider facilities, are subject to HIPAA.<sup>68</sup> The Commenting Parties are concerned that these clinicians, though subject to HIPAA, freely share their psychotherapy notes with ORR, who in turn use the psychotherapy notes to determine whether to place a child in a restrictive setting or release a child to a sponsor. This practice must end and Form P-1 should be updated to provide clear guidance to care provider clinicians that their psychotherapy notes cannot be shared without a valid HIPAA release.

Psychotherapy notes are any notes “recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversations during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individuals’ medical record.”<sup>69</sup> Under 45 C.F.R. § 164.508(a)(2), psychotherapy notes cannot be used or disclosed without a valid authorization except in limited circumstances, such as reporting of abuse, neglect or domestic violence or a threat of serious and imminent harm made by the patient during his or her session.<sup>70</sup> Moreover, according to the American Psychological Association Practice Organization, “as a result of states protecting psychotherapist-patient communications, information acquired in the course of the

---

<sup>64</sup> VA Code Ann. § 16.1-305

<sup>65</sup> *Id.*

<sup>66</sup> VA Code Ann. § 16.1-301

<sup>67</sup> VA Code Ann. § 16.1-309

<sup>68</sup> Soc. Worker Res., *Basic HIPAA Overview* (July 18, 2012),

[<sup>69</sup> 45 C.F.R. § 164.501 \(2020\).](https://www.socialworkerresource.com/articles/view.php?article_id=6287#:~:text=Social%20workers%20are%20among%20the,to%20fully%20understand%20HIPAA%20regulations; see Nat'l Ass'n of Soc. Workers, HIPAA Help for Social Workers, https://www.socialworkers.org/About/Legal/HIPAA-Help (last visited Mar. 10, 2021); see also Section III.A.3.b.</a></p></div><div data-bbox=)

<sup>70</sup> *Id.* at § 164.508(a)(2); see also U.S. Department of Health & Human Services, *Does HIPAA Provide Extra Protections for Mental Health Information Compared with Other Health Information?* (Sept. 12, 2017), <https://www.hhs.gov/hipaa/for-professionals/faq/2088/does-hipaa-provide-extra-protections-mental-health-information-compared-other-health.html>.

psychotherapy relationship cannot be disclosed without a HIPAA-compliant authorization signed by the patient or a court order.”<sup>71</sup> Despite these protections, clinicians at ORR care provider facilities routinely share psychotherapy notes with ORR and other third-parties, like DHS and the DOJ, without a valid authorization. Disclosing information learned in mandatory, confidential therapy sessions violates a therapists’ duty to HIPAA and the privacy and confidentiality of their child patients.

Due to past violations and a concern that lack of clarity may lead to further HIPAA violations by ORR care provider staff, the Commenting Parties recommend that Form P-1 clearly indicate that care provider staff, such as clinicians and therapists, must maintain the confidentiality of their clinical notes and must not share them with any individual or entity, including ORR, without valid authorization from the child, a court order, or a special circumstance enumerated in 45 C.F.R. § 164.508(a)(2).

In order to comply with HIPAA, ORR’s own policies, and align with the principles of exemplar Patient Bill of Rights, Form P-1 should be updated to include a clear and unambiguous statement that “The care provider must protect the confidentiality of children’s medical information by complying with HIPAA and ORR Policy Guide section 3.4.7.”

As for a child’s medical records, ORR Policy Guide 3.4.7 requires care providers to “maintain the children’s individual health files separately from the children’s case files, unless State licensing requirements dictate otherwise.”<sup>72</sup> The guidelines require care providers to “have written policies, procedures, and practices that protect the confidentiality of medical information.”<sup>73</sup> As an instructive source for ORR processes, the American Hospital Association created a Patient Bill of Rights that has been adopted by other organizations and hospitals.<sup>74</sup> Applied in the context of ORR, the Bill of Rights states, “the patient has the right to every consideration of privacy” and “has the right to expect all communications and records pertaining to [their] care will be treated as confidential by [ORR].”<sup>75</sup> In order to align with these best practices, children should receive a notice from ORR that explains the child’s rights in detail and how ORR may use and disclose the child’s protected health information.<sup>76</sup>

In accordance with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”),<sup>77</sup> children’s health information generally cannot be used for purposes not directly related to their care without permission.<sup>78</sup> HIPAA applies to ORR’s medical professionals,

---

<sup>71</sup> Am. Psychological Ass’n Practice Org., *HIPAA What You Need to Know The Privacy Rule: A Primer for Psychologists* 8 (2013), <https://www.apaservices.org/practice/business/hipaa/hippa-privacy-primer.pdf>.

<sup>72</sup> ORR Policy Guide, *supra* note 4, § 3.4.7.

<sup>73</sup> *Id.*

<sup>74</sup> See Am. Patient’s Rights Ass’n, *supra*. See, e.g., Am. Cancer Soc’y, *supra*.

<sup>75</sup> See Am. Patient’s Rights Ass’n, *supra*.

<sup>76</sup> Cal. Hosp. Ass’n, *supra* note 64.

<sup>77</sup> *Your Health Information Privacy*, *supra*.

<sup>78</sup> See *Summary of the HIPAA Privacy*, *supra*.

including psychologists, dentists, and doctors.<sup>79</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>80</sup> the medical professionals working within ORR are covered entities and, thus, subject to HIPAA. According to the American Psychological Association Practice Organization, it is recommended that all psychologists make their practices compliant with HIPAA, even if a psychologist does not trigger HIPAA’s application.<sup>81</sup>

According to Centers for Medicare & Medicaid Services, doctors, clinics, psychologists, and dentists are “covered entities” because they are healthcare providers who submit HIPAA transactions.<sup>82</sup> A “transaction” is an electronic exchange of information between two parties to carry out financial or administrative activities related to health care.<sup>83</sup> Because ORR hires medical professionals to conduct the health-related evaluations for children in custody, these professionals are engaging in transactions with ORR to carry out ORR’s administrative duty to provide the “appropriate routine medical and dental care, family planning services, and emergency health care services.”<sup>84</sup>

HIPAA ensures each patient has rights over their own health information, no matter what form it is in, including Electronic Health Information (“EHI”).<sup>85</sup> The HIPAA Security Rule requires specific protections to safeguard a patient’s EHI.<sup>86</sup> Given ORR’s creation of the UAC Portal and the general movement towards the use of EHI, a child’s medical records must be kept confidential and protected from unauthorized use or disclosure.

One of the dangerous consequences of not protecting the confidentiality of a child’s ORR file is the misuse of information by third parties, which can impede the release and family reunification of children in ORR custody and negatively impact their immigration cases. The larger problem is that notes taken during mandatory therapy sessions with immigrant children are being passed onto ICE, information which can then be used against them in court. This violates psychologists’ duty to HIPAA and the privacy and confidentiality of their child patients.<sup>87</sup>

---

<sup>79</sup> Health Insurance Portability and Accountability Act of 1996, H.R. 3103, 104th Cong. (1996).

<sup>80</sup> See 45 C.F.R. § 160.103 (2020) (defining “covered entity” within the meaning of HIPAA).

<sup>81</sup> Am. Psychological Ass’n Practice Org., *HIPAA Privacy Rule: A Primer for Psychologists* 2 (2013) <https://www.apaservices.org/practice/business/hipaa/hippa-privacy-primer.pdf> [hereinafter *A Primer for Psychologists*].

<sup>82</sup> *Are You a Covered Entity?*, *supra*.

<sup>83</sup> 45 C.F.R. § 160.103 (2020); see also *Transactions Overview*, *supra*.

<sup>84</sup> *Flores Settlement Agreement*, *supra*, at ¶ 2, Ex. 1.

<sup>85</sup> U.S. Dep’t of Health & Human Servs., Office for Civil Rights, *Privacy, Security, and Electronic Health Records* 2, <https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/privacy-security-electronic-records.pdf?language=en>.

<sup>86</sup> *Id.*

<sup>87</sup> *A Primer for Psychologists*, *supra*.

Psychologists have both forensic and therapeutic roles, which are critically different from one another. According to the American Psychological Association Practice Organization, “as a result of states protecting psychotherapist-patient communications, information acquired in the course of the psychotherapy relationship cannot be disclosed without a HIPAA-compliant authorization signed by the patient or a court order.”<sup>88</sup> In other words, psychologists, within their therapeutic role, must not share the information revealed from confidential conversations with children in ORR custody. Breaches of confidentiality can result in civil liability or licensure revocation.

The only information that may be shared, outside of HIPAA protection, are reports written by a psychologist operating within a forensic role for a court or child’s attorney.<sup>89</sup> The psychologist, in their forensic role, must inform the subject of the forensic evaluation that their evaluations will be shared with the child’s attorney or the court and that the evaluator may be called to testify regarding the evaluation.<sup>90</sup> We are unaware of any forensic psychological reports of children in ORR custody being ordered by a court or requested by children’s attorneys. Therefore, this exception to HIPAA is inapplicable and the information obtained about children by psychologists in their therapeutic role must be protected from access by third parties including, but not limited to DHS, ICE, USCIS, or any other state or federal agencies. Children’s health information shared with ORR is subject to HIPAA and must be handled accordingly.

Unfortunately, nearly all allegations against LAJC’s child clients originated in a child’s revelation of experiences or fears to a therapist or other trusted adult staff member while in ORR custody. Additionally, in *every* instance in which LAJC’s clients have been gang involved, their involvement was coerced, under duress, or both. No children have been formally accused of, charged with, or convicted of gang activity. Instead, they have volunteered information about what they have seen or done as victims of a ruthless strategy of targeting and forcibly recruiting children by different gangs or cartels in the child’s home country. ORR should not view, identify, or treat these children as criminals or gang-members. Instead, ORR must be engaged in recognizing trauma, and helping children heal from and move on from their traumatic past experiences.

**Thus, in order to promote rehabilitation and align with child welfare principles, ORR should not share criminal history or allegations of criminal activity information with outside agencies and should have strict firewalls on ability to access the information.**

The *Flores* Agreement requires ORR facilities to “develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which *preserves the confidentiality of client information and protects the records from unauthorized use or disclosure.*”<sup>91</sup> The ORR website states, “HHS does not release information about individual children or their sponsors that could compromise the child’s

---

<sup>88</sup> *Id.* at 8.

<sup>89</sup> Kaplan, *supra.*

<sup>90</sup> *Id.*

<sup>91</sup> Flores Settlement Agreement, Ex. 1 at ¶ E (emphasis added).

location or identity.”<sup>92</sup> The website also states, “HHS has strong policies in place to ensure the confidentiality of [UACs] personal information.”<sup>93</sup> ORR’s promises reflect the *Flores* Agreement’s provision that the child has “a reasonable right to privacy.”<sup>94</sup> From the rights listed in the provision, naturally, the child must also have the right to privacy of their own records. A child’s ORR file’s information should not be accessible by third parties without the child’s authorization, especially USCIS and ICE. Accordingly, the proposed forms should indicate that the child’s ORR file is separate from the child’s “Alien File,” and the documents as well as the information in a child’s ORR file must not be accessible by any entity within DHS or the DOJ. Additionally, LAJC notes that Section V of the MOA establishing broad information-sharing with DHS remains active and has not been rescinded, in violation of law as outlined in the briefing and argument in *J.E.C.M. v. Stirrup*.

#### **IV. Reporting to law-enforcement (DOJ/FBI/Local Law Enforcement) and ICE impermissibly turns ORR into a law enforcement agency.**

**ORR is not a law enforcement agency.** It does not have law enforcement responsibilities with respect to unaccompanied immigrant children. In fact, the responsibility of providing for unaccompanied immigrant children was transferred to ORR from DHS (formerly INS) precisely to remove the responsibility for safeguarding children’s welfare from the law-enforcement focused DHS.<sup>95</sup> The proposed forms place ORR squarely into a law enforcement role, violating its obligations to the children in its care and revealing a serious conflict of interest that it must immediately reconcile. The mandatory law enforcement reporting in UAC Policy Guide Section 5 reveal that through these forms, ORR is little more than an arm of DHS, and specifically ICE and HSI. According to an ICE-ORR memoranda, DHS will train ORR staff on how to identify MS-13 and other gang colors and signs, how to report suspected gang affiliation, and become integrated into local anti-gang task forces.<sup>96</sup> The mandatory rapid reporting to DHS, and in some cases DOJ and the FBI, of criminal histories and gang and cartel allegations leaves no room for a child-centric analysis of the event, nor does it leave any room for any holistic consideration of the welfare of all children involved.

**ORR has failed to explain or justify its expanded focus on collecting and documenting gang- and cartel-affiliation and criminal history and how it comports with its mandate to provide for the welfare of all the children in its care.** The structure and use of the proposed forms, especially form P-7, are all the more concerning when reviewed in conjunction with the parallel

---

<sup>92</sup> Office of Refugee Resettlement, *Health and Safety*, <https://www.acf.hhs.gov/orr/about/ucs/health-and-safety> (last visited Feb. 19, 2021) (citing to the text under “Privacy” heading).

<sup>93</sup> Office of Refugee Resettlement, *Health and Safety*, <https://www.acf.hhs.gov/orr/about/ucs/health-and-safety> (last visited Feb. 19, 2021) (citing to the text under “Privacy” heading).

<sup>94</sup> *Flores* Settlement Agreement, Ex. 1 at ¶ A.12 (“A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house and regulations; and (e) receive and send uncensored mail unless there is reasonable belief that the mail contains contraband.”).

<sup>95</sup> See Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199 (2020)

<sup>96</sup> Laila Hlass, *The Adultification of Immigrant Children*, 34 Geo. Immigr. L.J. 199, 233 (2020)

notices of proposed forms to elicit and record information from children that may be self-incriminating without any protections that would normally accompany such law-enforcement activities.<sup>97</sup>

LAJC urges ORR to withdraw from any law-enforcement activities and to instead focus on serving all of the children in its care, including those who have suffered severe trauma related to gang- or cartel-violence in their home countries.

## **V. Selected Comments/changes specific to certain proposed form**

### **a. UAC Referral (P-7)**

#### ***i. Including Sexual Predation as a Secure Placement Criteria is Inconsistent with the Placement Conditions for Secure Care in Paragraph 21 of the Flores Settlement Agreement and Is too Vague to Prevent Arbitrary Implementation.***

The Sexual Predation criteria for secure placement violates Paragraph 21 of the FSA, are too vague to put children on fair notice of the conduct that would result in placement into a secure facility and fail to guard against arbitrary or discriminatory implementation of this criterion by ORR and/or ORR grantee staff. This is especially true where ORR is able to use self-disclosed behavior to determine that the child satisfies this criterion, and where ORR's definition for inappropriate sexual behavior is broad and ambiguous.

The "Sexual Predation" section under "Section C: Secure Criteria" indicates that "ORR may consider case history" including "self-disclosures related to the UAC's history to determine whether their conduct is predatory in nature." However, none of the conditions enumerated in Paragraph 21 of the FSA for secure placement capture self-disclosure of sexual predation. In fact, in order to capture sexual predation or sexual behavior of any sort under Paragraph 21, the criteria would need to indicate that the minor is a danger to self or others based on his or her sexual behavior. But, unlike the sections on "Criminal History" and "Conduct in ORR Custody" under "Section C: Secure Criteria" on the Intakes Placement Checklist, the section on "Sexual Predation" makes no reference to a dangerousness requirement. Without such a reference to dangerousness, the placement criteria for "Sexual Predation" fails to satisfy the conditions for secure care under the FSA. Accordingly, ORR should either (1) remove sexual predation as criteria for secure placement or (2) require a dangerousness component, such as listing specific circumstances that make the individual a present danger to others, thus warranting secure placement.

Also, as previously noted in Section III.B.1.c., 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

---

<sup>97</sup> LAJC and others will submit more detailed comments in response to those proposed forms, which frequently are the source of information that generate an SIR. However, those comments should be read together with these comments regarding the administrative forms ORR proposes.

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<sup>98</sup> and the TVPRA.<sup>99</sup> 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).<sup>100</sup> Doing so will ensure that this placement 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.

**b. Care Provider Checklist (P-8)**

- i. The Proposed “Care Provider Checklist for Transfers to Influx Care Facilities” Form P-8 should include the “Care Provider Family Reunification Checklist” to promote expedient sponsorship processes for children.**

**The Proposed “Care Provider Checklist for Transfers to Influx Care Facilities” Form P-8 should include the “Care Provider Family Reunification Checklist” to promote expedient sponsorship processes for children.** Form P-8 is used by care providers to ensure that all criteria for transfer of a UAC to an influx care facility have been met. ORR revised the formatting, reworded some field labels, and made changes to the content.

**In the “Transfer Documentation and Items” section, the “Care Provider Family Reunification Checklist” was removed from the previous version of the form. The field must be reincluded in the form to ensure that any sponsorship efforts are transferred with the child to avoid delays in the sponsorship process.**

In the “Case Manager Affirmation” section, there is a typographical error for the “save in” field. The field should read as “saved in.” The added field for “Case Manager Name” will help properly identify the case manager who signed the form, as opposed to only requiring signatures, which may be illegible. We recommend adding further transparency where possible, especially with regard to Influx Facilities.

**c. Events and SIRs Sections in Form P-12**

---

<sup>98</sup> *Flores* Settlement Agreement at ¶¶ 6, 19, 21, 23.

<sup>99</sup> 8 U.S.C. § 1232(c)(2)(A) (2018).

<sup>100</sup> [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;  
(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.

18 U.S.C. § 2246(2) (2018).



According to the Proposed Collection, Form P-12 has a section that “list[s] all events and incident reports created for the program (cleared as separate instruments in OMB#0970-0547).<sup>101</sup> It is not clear from this description which specific forms the Agencies are referring to with respect to the Proposed Information Collection Activity relating to the Administrative and Oversight of the Unaccompanied Alien Children Program (OMB #0970-0547).<sup>102</sup> That said, it appears likely that the Agencies are referring to the Proposed Administrative and Oversight Forms A-9 (Event), A-10A (Emergency SIR and Addendum), A-10B (SIR and Addendum), A-10C (Sexual Abuse SIR and Addendum), and A-10D (Program Level Event Report and Addendum).<sup>103</sup> If this is the case, it still remains unclear whether all events and SIRs documented through the use of Proposed Forms A-9 and A-10A-10D would be captured in the “Program Entity Page - Census Page.” For example, would every SIR for every child at that facility be listed here? Or would this only capture SIRs related to the care provider staff, such as a sexual abuse allegation against a case manager or other staff member? The former seems unnecessary, whereas the latter seems important and relevant to future monitoring and potential grant awards. Similarly, would every event captured in Proposed Form A-9 be captured in the “Program Entity Page - Census Page,” or would the “Event” section of Form P-12 only capture Program Level Events documented in Proposed Form A-10D, such as active shooters, natural disasters or other events that impact the entire facility? Again, the former seems less necessary to achieve the purpose behind Form P-12, whereas the latter seems important and relevant.

Without clarification on what the “Events” and “SIRs” sections of Form P-12 are meant to capture, time and resources might be wasted including events and SIRs that are irrelevant to the purpose behind Form P-12. These resources should be spent ensuring that important and relevant information related to the facility itself are documented, such as SIRs regarding care provider staff behavior, program level events impacting the entire facility, and more importantly, as noted in the preceding section, adequate and timely monitoring, timely issuance of corrective actions and timely resolution of corrective actions by the program. Clarifications on these sections can go a long way to ensure the proper documentation of relevant information that will aid future decision-making, such as whether ORR should award a subsequent grant.

**d. The Proposed “ORR Transfer Notice—Notice of Transfer to ICE Chief Counsel—Change of Address/Change of Venue” P-14 Requires Children to Divulge Confidential Information that Is Not Needed to Assess a Change of Address/Change of Venue.**

The “Change of Venue (fill out only if also requesting a Change of Venue)” section requires ORR to indicate that “Good cause exists to change venue in this matter pursuant to 8 C.F.R. 1003.20(b)” for a set number of reasons. Those reasons include limited bed space at a

---

<sup>101</sup> Proposed Collection, at 5198.

<sup>102</sup> See Proposed Information Collection Activity; Administration and Oversight of the Unaccompanied Alien Children Program (OMB #0970-0547), 86 Fed. Reg. 545-547 (Jan. 6, 2021).

<sup>103</sup> See *id.*

certain facility, special needs for a UAC, and specific information regarding the levels of restrictive care. However, divulging this information seriously compromises the child's right to privacy in ORR, as explained above. For Change of Venue, changing residence generally satisfies the good cause requirement, especially if the individual is detained and/or in government custody. More relevant and nondiscriminatory options should be provided instead of options that divulge a child's confidential information to ICE and the immigration court. For example, the available options should be: "ORR has transferred the child to a placement in [city, state]" and/or "the child has been released to a sponsor in [city, state]." Information related to a child's health or special needs is irrelevant to a request to change the venue of their immigration hearing, unless it causes a change in residency, in which case indicating the new address to which the government has sent the child should be sufficiently good cause to change venue.

In addition, the "Next Court Appearance" section should include which court the child has a scheduled court appearance for and the court's location information. This information is relevant to indicate where the UC will need to be transported and ensure the UC's new location is appropriate for the child's pending court proceedings. Therefore, the Form must include "Court Name" and "Court Address" fields.