

August 19, 2024

Submitted via email to infocollection@acf.hhs.gov.

Mary B. Jones, ACF/OPRE Certifying Officer
U.S. Department of Health & Human Services
Administration for Children and Families
Office of Planning, Research, and Evaluation (OPRE)
330 C Street SW, 4th Floor
Washington, DC 20201

RE: ORR Proposed Information Collection Activity, 89 F.R. 118; Comments on Proposed Information Collection Activity; Legal Advocacy Services for Unaccompanied Children (OMB #0970–0565)

Dear Ms. Jones,

As an organization that advocates for the rights, safety, and wellbeing of children in Office of Refugee Resettlement (ORR) custody, we write regarding the above-referenced proposed information collection activity entitled “Legal Advocacy Services for Unaccompanied Children (OMB #0970–0565),” published on June 18, 2024, by ORR. Specifically, we write to express concerns about the proposed Recommended States List Form (L-11) (hereafter “Proposed RSL Form”), which legal service providers (LSPs) for children who are eligible for long term foster care (LTFC) placements are required to complete to recommend states for children’s LTFC placement.

We appreciate ORR’s efforts through this form to prioritize child-centered considerations for long-term placements. However, children’s access to legal relief is only one factor which ORR should consider in making placement decisions that are in children’s best interests. Moreover, ORR’s policies and procedures related to the Proposed RSL Form – particularly its requirement that LSPs make recommendations based solely on children’s ability to access potential immigration relief in those states – create the risk that the form’s use may hinder access to legal relief and otherwise adversely impact children and their wellbeing. We offer the following recommendations based on our experiences as child advocates to ensure that ORR places children in long-term placements that advance their permanency and stability and are in their best interests.

- I. ORR should provide children and their LSPs with the information they need to actively participate in LTFC placement decisions and for LSPs to advise children and represent their interests.

Honoring children's wishes and agency is paramount for their best interest. As recently codified in its Foundational Rule, ORR "encourages unaccompanied children...to be active participants in decision-making concerning their care and placement."¹ Active participation by children in placement decisions is especially important for children with marginalized identities, particularly LGBTQ+ youth, youth with disabilities, Black youth, and Indigenous youth, who reportedly experience discriminatory treatment and isolation in ORR custody.² Respecting children's preferences and promoting their agency in LTFC placement decisions also help mitigate the risk of failed placements, for instance, where children run away and may experience homelessness.³ Yet the Proposed RSL Form and the current process for LTFC placements, as outlined in ORR Policy Guide Section 1.4.4,⁴ does not ensure that children have the information they need to actively participate in decisions regarding their LTFC placement.

ORR began piloting a version of the Proposed RSL Form in January 2024 after consulting with LSPs. Currently, the RSL Form is the only required step in ORR's LTFC placement process to incorporate children's agency and wishes into the decision-making process. LSPs must meet with children to discuss the RSL Form within the first 10 business days of receiving the care provider's request and then submit the completed RSL Form within 14 calendar days.⁵ However, in our experience, children often have little to no information about their LTFC options prior to meeting with their LSPs. Some children do not even know what an LTFC placement is or that they are eligible for such a placement. Moreover, ORR does not provide children or their LSPs with critical information about specific LTFC placements or their availability. As a result, children cannot meaningfully engage with their LSPs during these meetings.

To ensure that children can be active participants in decision-making about their LTFC placement, ORR should inform children of their eligibility for LTFC placement and provide the child and their LSP with a list of available LTFC programs in advance of the LSP's meeting with the child to discuss the RSL Form.

¹ ORR Policy Guide Section 1.1, Summary of Policies for Placement and Transfer of Unaccompanied Children in ORR Care Provider Facilities, <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1> (Updated Aug. 1, 2024).

² In a recently published policy brief by the Women's Refugee Commission, ORR stakeholders had reported in interviews with WRC that LGBTQI+, Indigenous, and West African youth experienced discriminatory treatment while in ORR custody. Stakeholders also described children simultaneously struggling to cope with the uncertainty of family reunification, procedural opacity, ongoing legal proceedings, and the possibility of deportation. Women's Refugee Commission, *Decreasing ORR's Dependence on Congregate Care: Four Recommendations for Progress*, Pg 2, <https://www.womensrefugeecommission.org/wp-content/uploads/2023/08/Decreasing-ORR-Dependence-on-Congregate-Care.pdf>.

³ LGBTQ+ are at especially high risk of housing instability. Diana Franco, *Creating Safe Schools for LGBTQIA+ Displaced Migrant Youth: A Journey Towards Anti-Oppressive Pedagogy*, International Journal of Progressive Education, Volume 17 Number 2, 2021, Pg 229, <https://files.eric.ed.gov/fulltext/EJ1293330.pdf>. In July 2024, the Department of Health and Human Services codified regulations outlining key considerations for foster placement of LGBTQ+ youth, including the safety and appropriateness of designated placements, and access to education and work opportunities. 89 FR 34818, <https://www.govinfo.gov/content/pkg/FR-2024-04-30/pdf/2024-08982.pdf>.

⁴ ORR Policy Guide Section 1.4.4., Transfer to Long-Term Foster Care, <https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1#1.4.4>.

⁵ *Id.*

II. Because some LSPs may not have the information and expertise they need to advise children on LTFC placement options located across the country, ORR should make the Proposed RSL Form optional.

Under ORR Policy, LSPs are required to recommend states for LTFC placement for a child when requested by ORR, and their recommendations “must be based on the child’s potential for immigration relief in each state, type of immigration relief, and status of court hearings or relief petitions.”⁶ However, LSPs may not have the information and expertise they need to adequately advise children on LTFC placement options, which are located in numerous states across the country, and to make recommendations through the form. Accordingly, LSPs should not be required to complete the form; ORR should make the form optional.

Many children who remain in ORR custody for an “extended stay” of over 3 months are eligible for Special Immigrant Juvenile Status (SIJS). Access to SIJS relief requires obtaining state court factual findings – also known as “special findings” or “predicate orders” – that reunification with one or both parents would be against a child’s best interest due to a history of abuse, abandonment and/or neglect. However, the ability of a child in an LTFC placement to access state court and obtain the required special finding order varies according to each state’s laws on jurisdiction and court practice.

In some states, access to state courts to obtain predicate orders even varies by locality or judge. We have observed that within the same state, courts in some localities are more reluctant than others within the same state to exercise jurisdiction over children in federal custody.⁷ For this reason, LSPs in the same state may have different experiences with representing SIJS-eligible youth and may disagree on whether their state should be a preferred placement. For instance, in New York, judges in Rochester and Onondaga counties where there are fewer children in ORR placements, have been more receptive to petitions for predicate orders than judges in New York City and Westchester County where there are larger and longer-running ORR shelter programs. As a result, LSPs with experience practicing in more receptive New York counties have included the state in their RSL Form recommendations for SIJS-eligible children, without understanding the differences by locality in New York. Similarly, LSPs representing children before judges in Bexar County, Texas, have reported that even within the same locality, some judges will hear petitions for dependency while others refuse to hear the same petitions.

Given these variations by locality and state in terms of accessing SIJS predicate orders, some LSPs may not have the knowledge and experience with the laws and intricacies of legal practice in every jurisdiction to assess a child’s potential for immigration relief in every state where ORR has LTFC placements. Since attorneys are ethically required to provide competent representation, which

⁶ *Id.*

⁷ LSPs in New York, Washington, and Texas report county level variances between court dependency procedures in their states.

requires having the legal knowledge “reasonably necessary” for such representation,⁸ a child’s LSP may conclude that they are foreclosed by their ethical duties to the child from making the recommendations. Accordingly, ORR should not require LSPs to provide such recommendations. Completing the form should be optional, and ORR should draw no inference when an LSP does not submit a form.

Requiring LSPs to make state recommendations based solely on the child’s potential for immigration relief raises other ethical concerns for LSPs as well. Specifically, this requirement fails to account for cases where the child’s preferences for states for LTFC placement differ from the states where the child is best able to access legal relief. Placement preferences involve many considerations, and children often have other priorities and considerations besides their ability to access legal relief. Some children may prefer placements in states where they have better access to community, family, healthcare, education, or other services, even if it would be more difficult for the child to access legal relief in these states. In these cases, the child’s LSP is ethically required to abide by the child’s decisions, if the LSP provides them with the information reasonably necessary for the child to make an informed decision.⁹ In fact, one LSP reported to the Young Center that they have completed the RSL Form based solely on the child’s expressed wishes and irrespective of the child’s eligibility for legal relief in the recommended states. Requiring an attorney to recommend states that are contrary to the child’s wishes would run afoul of the attorney’s ethical duties to the child. Thus, for this reason, LSPs should not be required to complete the RSL Form.

III. ORR should ensure that Child Advocates’ Best Interest Determinations are promptly requested and considered in all placement decisions, including LTFC placement decisions.

As ORR recognizes, relief from deportation is only one of many factors ORR should consider in determining a safe and appropriate placement for a child in its custody.¹⁰ The best interest of the child is paramount in permanency planning, because permanency, safety, and well-being are “interconnected outcomes (that) allow children to thrive.”¹¹ Accordingly, as codified in its recent ORR Foundational Rule, ORR applies a best interest standard in making placement decisions for children in its care.¹² Child Advocates provide independent Best Interest Determinations (BID)

⁸ ABA Model Rules of Professional Conduct R. 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

⁹ *Id.* R. 1.4(b) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”). *See also* R. 1.2 (“A lawyer shall abide by a client’s decisions concerning the objectives of representation”).

¹⁰ 45 C.F.R. 410.1103(b) (listing 17 factors that ORR may consider in placement decisions). *See also* Subcomm. on Best Interests, Interagency Working Group on Unaccompanied and Separated Children, *Framework for Considering the Best Interests of Unaccompanied Children* (2016) [hereinafter *Best Interests Framework*].

¹¹ Dept. Of Health and Human Services, Administration for Children and Families Children’s Bureau, Achieving Permanency for the Well-being of Children and Youth, ACYF-CB-IM-21-01, p. 10, January 5, 2021, <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf>.

¹² *See*, 45 C.F.R. 410.1001.

which consider children's wishes, safety, family unity, and development, including their access to education, wellness, and formation of identity.¹³

While federal regulations require Child Advocates to “[a]dvocat[e] for their unaccompanied child client’s best interest with respect to...placement,” ORR does not ensure that Child Advocates’ BIDs are requested and considered in the LTFC placement process. In fact, ORR Policy regarding long term placements explicitly contemplates Child Advocate involvement only where there are no LTFC placements available in the states that LSPs recommend on the RSL Form, at which point the child is required to be referred for a Child Advocate.¹⁴ However, making a referral to a Child Advocate at that late-stage risks further delaying the placement process, as a Child Advocate, once appointed, would need time to review the child’s case and placement options and meet with the child, to be able to provide a BID.

Even in cases where a child eligible for LTFC has a Child Advocate, care providers have often requested Child Advocate BIDs with very little turnaround time only to disregard the recommendations in the BID altogether. For instance, in one case, an LSP recommended New York as a viable LTFC-placement state for a SIJS-eligible, 17-year-old youth. Even though the child had an appointed Child Advocate, their care provider did not request a BID, nor did the provider notify the Child Advocate that they were considering the child for placement in New York. By the time the Child Advocate learned of the child’s transfer to an LTFC placement in New York, it was too late to advocate for ORR to reconsider the placement and identify an alternative. The child was placed in a foster program in New York City, where they were unable to access state family court to petition for a predicate order before aging out of ORR custody.

ORR should ensure that care providers promptly request and consider a BID regarding LTFC placement in every case where a child eligible for LTFC has been appointed a Child Advocate. Just as with the child and their LSP, the Child Advocate should be provided with information on available LTFC placements to help inform their BID.

IV. Conclusion

We appreciate ORR’s efforts to consider children’s access to legal relief in the LTFC placement process. However, the Proposed RSL Form and its implementation raise significant concerns about LSPs’ ability to meet their ethical duties to children and risk hindering children’s access to legal relief, which directly contravenes the intention and purpose of the form. We urge ORR to adopt the above recommendations so that the form is implemented in a manner that allows LSPs to ethically and zealously represent children’s interests, while at the same time promoting children’s permanency, safety, and wellbeing in the LTFC placement process. Thank you for the opportunity to provide feedback on this form.

¹³ *Best Interests Framework*, *supra* note 10 at 5.

¹⁴ ORR Policy Guide Section 1.2.6 [“If the locations included in the LSP’s recommendation are not available, a Child Advocate referral must be made (see Section 2.3.4 Child Advocates).”]

If you have any questions or concerns about these recommendations, please contact Abena Hutchful at ahutchful@theyoungcenter.org and Jane Liu at jliu@theyoungcenter.org.

Sincerely,



Abena Hutchful
Young Center for Immigrant Children's Rights



Jane Liu
Young Center for Immigrant Children's Rights