

June 15, 2020

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

Re: **HHS ACF Proposed Information Collection Activity; Administration and Oversight of Unaccompanied Alien Children Program, OMB No.: 0970-0547, HHS Docket No. ACF-2020-07995, 85 FR 21240**

Dear Ms. Jones,

The undersigned organizations advocate for, represent, and serve unaccompanied and separated immigrant children in the custody of the Office of Refugee Resettlement. We appreciate the opportunity to comment on the Proposed Information Collection Activity for Unaccompanied Alien Children, published April 16, 2020 (the “Proposal”) by the office of the Administration for Children (ACF), Office of Refugee Resettlement (ORR), Department of Health and Human Services (HHS, or the “Department”).ⁱ We are concerned that the proposed forms, specifically the Significant Incident Report (“SIR”) Forms (Forms A-10C and A-10D), will limit the ability of ORR to place children in the least restrictive setting in their best interests, as required by federal law, and may adversely—and unnecessarily—impact their ability to seek protection in adversarial immigration proceedings. We therefore respectfully urge the agency to revise the proposed forms and offer the following comments in support of that recommendation.

The Significant Incident Reports (SIRs) document specific moments of a child’s behavior while in ORR custody, but fail to set forth a full portrait of the child or provide the broader context surrounding a child’s behavior during a single incident. While such forms might be routine in the child welfare context, unaccompanied children are not in legal proceedings where their best interests are the guiding principle. Rather, they are in adversarial proceedings where information gathered about them while in government custody can and is often used against them. In our experience, SIR forms often negatively impact children's timely release and/or influence adjudicators in the context of their legal cases even though individuals completing the form may not intend that result or understand it as a possibility.

Unaccompanied children often arrive in custody after fleeing threats to their physical safety in home country and surviving a dangerous journey to our border. Upon apprehension, they are placed in facilities where their day-to-day activities are highly restricted. In these facilities, children are separated from their loved ones and caretakers for months, and in some case years, while they wait to be released. While all children in ORR custody receive information about their legal rights, many do not have individual representation while they wait for release to family,

where they will complete their immigration cases; likewise, only some children are appointed independent, TVPRA Child Advocates to represent their best interests.

The majority of children are teenagers—not yet adults physically, emotionally or intellectually. Under the very best of circumstances children at this age and stage of development are primed to crave autonomy and independence and push back against authority. They are also more likely than adults to be impacted by emotionally stressful circumstances.ⁱⁱ The uncertainty of their situation in ORR custody, including how long they'll be there, seeing other children coming and going, while they remain separated from trusted family members, weighs upon them heavily. This combination of stressors compounds the trauma the children have experienced before their arrival and, unsurprisingly, impacts their presentation and behaviors in a manner which may subsequently be reported in SIRs.ⁱⁱⁱ

But SIRs—which are prepared and reviewed without the broader context of the many challenging circumstances each unaccompanied child confronts—ultimately create impediments to a child's efforts to achieve permanency and safety. SIRs may prompt a child to be stepped up to an even more restrictive environment, which are inappropriate to address a child's trauma and related manifestations of that trauma. They may unduly complicate and delay a child's release to a family member or their transfer to a long-term foster care placement. Critically, SIRs may even be used against the child in their legal proceedings, in an effort to persuade a judge or asylum officer to deny a child the right to remain in the United States, despite the absence of any process to ensure the fairness of these forms when they are first filed.

Staff who complete these forms receive limited training on the use of the forms; they may lack expertise to complete certain sections of the form (regarding the child's mental or physical health) or may lack an understanding of how the form may be used against the child in legal proceedings far in the future. This lack of training is alarming given that each report could follow the child for the duration of their immigration case as a record in the government's file.

The format of SIR forms is insufficient to fully report on any significant incidents within ORR facilities. The checkbox format may make it easier for youth care workers, case managers, and clinicians to complete the form, but the lack of space to provide detail and context make SIR forms a tool that are easily used in a manner against the child's best interests. Moreover, the forms are completed and become part of the child's record without any participation by the child, the child's attorney (if they have one), the independent Child Advocate (if they have one), and the local ORR-funded legal services provider.

We recommend that in every case, ORR promptly provide the form to the child, the child's attorney, the child advocate, and the ORR-funded legal services provider, so that they can identify problems, object to content, propose changes, or submit missing or contextualizing information. Additionally, any time that ORR sends the form to DHS or another agency, it should notify the child, child's attorney, child advocate, and ORR-funded legal services provider. Finally, the form should be modified to document how and when the form is provided to others.

Given the concerns above, we offer the following, specific comments to ensure ORR’s continued ability to comply with its legal responsibilities to identify, vet, and place unaccompanied children in the least restrictive placement with safe and capable caregivers, while tracking information about the child’s behavior or health in a manner that comports with federal and state law and the child’s best interests.

Specific Concerns with Significant Incident Report (SIR) Forms (A-10C and A-10D)

A. UAC Basic Information

The biographical information portion of the SIR forms should be amended. A child’s country of origin is unnecessary for recording information related to the child’s behavior in custody and could negatively impact the child’s ability to seek protection if the SIR forms are submitted to an immigration court in the future. Nor is the country of origin necessarily (or even usually) relevant to the incident that is the subject of the form. Additionally, the “gender” section of the form does not provide any space to identify whether children are transgender. This is a necessary addition to the form if it is to be inclusive of all children in ORR custody.

B. Abuse/Neglect in ORR care

The section on abuse/neglect in ORR care should be amended to record efforts made to keep a child safe after abuse and identify the other person involved in the alleged abuse or neglect when that person is an adult. This is the one area of the form that explicitly focuses on the child as a victim of harm. Yet whereas almost all other sections in this form require more detailed information, this section has two simple drop-down boxes. (Notably, the contents of the drop-down boxes are not visible on the forms published by the government for this comment process.) The section does not require any additional information about the offending adult; nor does it identify the adult, whether the adult was removed from the facility, whether the incident was reported to state licensing officials, and whether law enforcement was contacted. Likewise, the form does not require reporting about whether the child victim was referred to legal counsel and whether the child was provided access to independent (non-ORR) therapeutic counseling and/or supportive services. It is critical to record the efforts made to keep a child safe *after* the abuse in order to hold those responsible for the children’s care and custody accountable and keep all children safe. To the extent that this section would be used to designate not just a child victim, but another child involved in the incident, the form should specify “other child involved” rather than designating that child as an “alleged perpetrator”—the term that is applied in the sexual assault SIR form.^{iv}

C. Past Abuse/Neglect Not in ORR Care

This section of the form solicits information about the child’s time in home country, during the journey to the United States, and in the custody of U.S. agencies including Immigration and

Customs Enforcement (ICE) and Customs and Border Protection (CBP). We recommend that information about abuse, neglect, or abandonment in home country or on the journey be removed entirely from this form; to the extent that ORR or its contracted-providers are required to report that information to state child welfare or licensing authorities, they can do so on a separate form. As noted elsewhere, SIR forms are shared with ICE, immigration courts, and long-term foster care (LTFC) providers. Background information about past abuse or neglect in home country or on the journey is often collected at a time when the child is still in crisis, has unaddressed trauma, or lacks an interpreter in their best language. The child may or may not be in a position to convey past experiences with accuracy. They are most certainly not represented by counsel nor do they have a child advocate with them when this information is solicited and recorded. Moreover, the information is typically solicited and recorded by staff in ORR-contracted facilities who have no role in or training about immigration court proceedings. To the extent that information is not completely accurate for any number of reasons, not least of which is the tremendous stress the child is experiencing, or the lack of understanding or training of the person recording the information, it should not be recorded in any manner that can be—and has been—used against children in adversarial immigration proceedings or used to deny their release to parents or other family members, or placement in a less restrictive setting.

With this change in mind, the title of this section should be re-written as “past abuse/neglect in custody of other government agencies,” or something similar, to account for abuse and neglect outside of ORR, but while children were in the custody of other government agencies. Similar to the prior section, there should be space in which the individual completing the form must report when and where the information was reported to other law enforcement agencies and oversight bodies (such as the Office of Civil Rights and Civil Liberties within the Department of Homeland Security).

D. Major Behavioral Incidents That Threaten Safety

In our experience, the amount of time a child has spent in government custody separated from trusted family members or other adults, as well as their age and prior experiences of trauma are the factors most likely to lead to detention fatigue and corresponding incidents of “acting out.” Yet within the section titled “major behavioral incidents that threaten safety,” there is no specific acknowledgment of the time the child may have spent in custody or their separation from parents or trusted caregivers, even though these specific traumas directly inform how or why a child is acting out. Without any reporting of these underlying factors, the role of adults or systems beyond the child’s control are ignored or the child’s behavior can be taken completely out of context with serious consequences for the child.

We therefore recommend that this section of the form should be revised to: add information about the child’s entire length of custody, including prior periods of custody; limit information to incidents that create direct safety concerns for others; limit those who can designate an incident that will be recorded on the form to those with professional expertise; remove health information that is confidential; remove terms that are vague and potentially harmful to a child’s future; and

limit the ability of staff to provide narrative descriptions that are often written unclearly, or from a subjective point of view, without opportunity for review by the child, the Child Advocate, and the child's attorney or ORR-funded legal services provider.

First, this section of the form should be limited to incidents that create direct safety concerns for others. General behavioral incidents should not be included on the SIR forms due to the impact they may have on the child's placement and immigration case, and the inability of attorneys, child advocates or the children to object to the content, provide contextualizing information, or correct outright errors or misrepresentations.

Moreover, only a qualified mental health professional should be able to report on certain, proposed categories of "major behavioral incidents that threaten safety." Mental health incidents, including suicide attempts and suicidal ideation (a phrase which is problematic since it can be so easily misconstrued against the child) should have their own section on the form, so that specific concerns or incidents can be accurately documented. Mental health issues cannot be accurately represented by checking off a box within a larger portion of the form, particularly when an average staff member filling out the SIR form will not have the background or training to accurately identify problematic behavior, to explain the true risk to the child or to others, and to appropriately intervene if the situation requires it. At a minimum, the section of the form addressing mental health incidents should address how the facility responded to the outcry and whether the child met with or is continuing to meet with mental health experts.

"Verbal aggression" is another category within this section of the form that should be removed. Verbal aggression is much too vague of a term to be accurately documented on the form as it currently stands. Moreover, in our experience serving children in custody, in most cases so-called verbal aggression does not pose any sort of safety risk to ORR and facility staff or other children on its own. It is simply not appropriate to categorize so-called verbal aggression as a "major behavioral incident that threatens safety."

The single checkbox for possession/use of weapon within this portion of the SIR form is also insufficient. The current process of reporting situations in which a child may have possession of a weapon is entirely subjective. For example, ORR-contracted facilities have filed reports when pens were found in a child's drawer and individual staff felt as though the pens could be used as weapons, rather than as tools for writing and drawing. Other children received SIRs for incidents of horseplay in which children sprayed cleaning supplies at each other, without any resulting injury. Filing such reports, especially without any evidence that the children were motivated to use the pens or supplies as a weapon, could have significant impact on their placement within ORR and their immigration case.

Similarly, the inclusion of a checkbox for "use of drugs/alcohol" in custody is also deeply problematic. The form should distinguish between incidents during which children were found to have drugs or alcohol in their possession upon intake and those in which drugs or alcohol are found within a facility. In our experience, there have been very few situations in which children

have successfully hidden these substances in their belongings upon intake. As a result, there are very few situations in which drugs and alcohol make it into a facility without some sort of staff involvement. In the latter situation, drug and alcohol related issues should be treated as a staff issue, rather than as a child behavioral incident.

E. Runaway

This section of the form should be revised to remove reference to incidents that took place in the child's home country. In many cases, the child's decision to run away is both appropriate and protective—for example, if the child ran away from an abuser, a trafficker, or a persecutor. As with other incidents that occurred prior to placement within ORR care, inclusion of attempts to run away in the child's home country may negatively impact a child's placement options and their ability to seek legal relief when those incidents are, in fact, evidence of the child's need and eligibility for protection. We also propose revision of the form to exclude incidents that did not involve an actual runaway. In our experience, the actions of a child may be taken out of context and labeled as attempts or intentions to run away, even when the child did not leave or intend to leave the premises. For example, even if a child simply expresses a desire to be elsewhere, outside of the facility, it could be construed as the intention to run away if the opportunity arose.

F. Incidents Involving Law Enforcement

We recommend that this section of the form be revised to clarify who called law enforcement, which law enforcement agency was called, and what steps were taken to address or de-escalate the situation before law enforcement was called. In our experience, some ORR-contracted facilities will contact law enforcement for incidents that do not pose a risk to the child or others; the lack of any space on the form to provide information about the incident that triggered law enforcement involvement may allow the event to be misconstrued or presumed far worse than it was. For example:

- *In one case, an ORR-contracted facility called law enforcement when a child was found to have a telephone in his or her possession.*
- *In one case, a child who was being restrained said that he couldn't breathe and was in pain; when staff didn't let go of him, he "lashed out." The child was arrested and charged with assault.*
- *In multiple cases, ORR-contracted facilities have called law enforcement when horseplay between children becomes rowdy; even when children respond to requests to dis-engage the police are called, triggering an "event involving law enforcement."*

This portion of the form does not provide any context for such incidents. As in the "runaway" section above, a lack of explanation can result in the incident being misconstrued or misrepresented, possibly leading to negative impacts on the child's placement within ORR custody and immigration case.

Additionally, as the form currently stands, it does not distinguish between situations in which the child is the victim in the incident. Nor does it capture which law enforcement agency is investigating or investigated the incident. For example, in some cases ICE's Homeland Security Investigations (HSI) is contacted about an incident of suspected trafficking in which the child was the victim. The current form lacks any ability to capture this context.

The SIR form would be improved if it included the opportunity to state whether law enforcement was called by ORR staff, and if so, why they were called. This portion of the form would be improved with a section to document what was done before law enforcement was called, such as de-escalation efforts and meetings with a therapist.

G. Safety Measures

The "Safety Measures" portion of the SIR form is wholly inadequate and should either be removed or retitled. Safety measures are limited to "one-on-one supervision," "use of restraints," or "pat-down or other searches." There is no reference to providing counseling or other services. There is no reference to de-escalation strategies that do not involve physical contact. As written the form emphasizes an approach of control and/or physical restraint, rather than inquiry into the underlying causes of behavior. The use of any sort of safety measure should not be punitive and should not feel like punishment for the child involved. To the extent that the form does not reflect best practices with respect to ensuring a child's safety and the safety of others, particularly for children in a restrictive setting where they are separated from family and most likely have a trauma history, this section should either be removed or, at the very least, be revised to require staff to document the trauma-informed, child-appropriate steps taken prior to the use of any of the more restrictive, limiting measures currently listed on the form.

H. Criminal History

The "criminal history" portion of the form should be revised to limit the inclusion of inappropriate information that is not in a child's best interests. Here, the form asks for "significant criminal history in home country," "significant criminal history in United States," "others," and provides space for details. To begin with, the term "significant criminal history" is unacceptably vague and could include everything from alleged or unfounded allegations of behavior (for example, by police against youth of color) to delinquency adjudications, to convictions. The first is wholly unreliable evidence of "criminal history" as there was no conviction nor any procedural protections afforded the young person; in the United States and many countries of origin, law enforcement officials will detain, question, or blacklist (through so-called gang databases) youth of color where there was no underlying bad act. The child may believe he or she was arrested, or their name may appear on a suspect list provided by their country. Neither situation reflects significant criminal history but may be—and have been—recorded as such by staff who lack sufficient training or understanding. Juvenile delinquency adjudications within the United States are subject to state confidentiality laws and disclosing information about them on these forms could violate those laws. In our experience, very few

children are charged in adult, criminal court proceedings; and when they are, it is not necessarily for actions that suggest a risk to others while the child is in ORR custody.

Given this complexity, most if not all ORR staff or staff at ORR-contracted facilities lack the requisite qualifications to characterize a child's criminal history as "significant," regardless of whether that history is in their home country or the United States. ORR and facility staff lack the ability to decode complicated criminal records, and often fail to discern whether a charge was dismissed or broken down to a less serious charge. For example, when children are accused of criminal acts, it is not uncommon for district attorneys to overcharge cases and later break them down. Those charges will still appear on the child's record, even if the final verdict is "not guilty."

If ORR and facility staff are unable to decipher all of the annotations and notes in a child's criminal record, it may lead to the child being placed in an overly restrictive placement or in settings that are not in the best interests of the child or being denied release to a parent, family member or other sponsor who is better able to care for the child within the community. The SIR form does not require the reporting individual to request, review and fully understand the incident report or other documents underlying the criminal or delinquency charges. Those reports will often explain that the underlying incident is not as serious as the criminal charge would otherwise lead them to believe.

We are particularly concerned about possible inclusion of juvenile charges or conviction on the SIR forms. Per the Immigration and Nationality Act and *Matter of Devinson*,^v juvenile charges or convictions are not considered criminal convictions. The use of phrases such as "criminal history" and "significant" allow for broad interpretation and could impact the child's ability to be granted legal relief. Moreover, disclosure of this information, may be a violation of state laws that require that this information be held kept confidential. We recommend that the form be limited to noting confirmed or verified criminal convictions for children charged as adults and only when necessary to appropriately care for the child or others.

I. Pregnancy Related Issues

Pregnancy-related issues should not be included on the SIR form. There is no appropriate reason to treat pregnancy different than all other health conditions. Moreover, including information relating to pregnancy status, history or childbirth, and termination of a pregnancy is a violation of the child's right to privacy about personal health matters and may even violate HIPAA laws. The SIR form as proposed does not provide any opportunity to specify a timeline regarding the checkboxes labeled "pregnancy" and "childbirth." This could lead a case manager to probe into a child's past history in a way that is exceedingly intrusive and unnecessary for ORR purposes.

Additionally, requiring the child to disclose termination is a violation of their right to privacy and could potentially expose the child to prejudice and discrimination by stakeholders in and outside of ORR. Disclosing such information can also be in conflict with the child's best interests.

In 2017, a teenager served by one of the signatory organizations believed that if she was required to share information regarding the termination of her pregnancy, her father would physically retaliate against her mother in their home country. She also believed that if her sponsor in the United States became aware of the termination, he would inform her parents. In the state where the child was located, a minor can have an abortion without parental consent, so long as it is authorized by a judge. The teenager obtained this permission by providing clear and convincing evidence that she was mature and capable of making such a decision without parental consent. State law allowed the medical procedure, as well as the judicial bypass court proceeding for consent, to remain confidential. Legally, the teenager was not required to disclose her medical procedure and was protected from being forced to do so; yet the SIR form could disclose that information—accidentally or intentionally—in violation of her rights.

Requiring that children disclose information regarding termination on the SIR forms violates their right to privacy about health information and could create a potentially dangerous situation for children in the future.

J. Other

There have been numerous reports documenting DHS’s failure to accurately transmit information about parents and other family members from whom children were separated.^{vi} We therefore urge that this section of the form be revised to include separate fields that would track:

- a child’s separation from parents or other family members by DHS, and the names, locations, and contact information (if those persons are in DHS custody) for those individuals;
- a child’s separation from parents or other family members as a result of the so-called “Migrant Protection Protocols” (MPP); and
- a child’s separation from a parent or other family members as a result of other border closures, such as the March 20, 2020 closure of the border based on a Center for Disease Control Order.

As we recommend for any reason an SIR is filed, we again recommend that the child’s attorney, Child Advocate, and ORR-funded legal services provider be notified promptly of a case of family separation and that their notification is documented in this part of the form.

K. Incident Information

This section is wholly insufficient to address the services provided to the child during or after the incident. We recommend that a section for staff response and intervention be added to this portion of the SIR form, and that the child’s clinician is required to be involved in the follow up process after the incident.

L. Reporting (Specifically, to Local Law Enforcement)

As noted in previous sections, this section of the form fails to require a full and accurate accounting of all steps taken before the case was reported to local law enforcement, including efforts to de-escalate and the children’s compliance with those requirements: the form should be amended to include this information.

Conclusion

As presented, the SIR forms invite decisions that are directly contrary to children’s best interests and could result in significant negative outcomes for children, including continued stay in custody, placement in settings that are not the “least restrictive,” denied release to parents, family members and other sponsors, and the denial of benefits ranging from grants of asylum to voluntary departure. Children, their attorneys, Child Advocates, and legal services are not guaranteed an opportunity to review and respond to the forms. We therefore recommend that the forms be revised to address the above concerns and to include space to document that the agency has provided the forms to children, their attorneys, Child Advocates and legal services providers.

This process should be undertaken in collaboration and consultation with all of the organizations that serve children in ORR custody—including but not limited to legal services organizations, the Child Advocate program, *Flores* counsel, and organizations that contract to provide care for children in ORR custody. The undersigned organizations welcome the opportunity to participate in that process.

Sincerely,

Capital Area Immigrants' Rights (CAIR) Coalition
Catholic Legal Services, Archdiocese of Miami, Inc.
Church World Service - Lancaster
HIAS Pennsylvania
Immigrant Defenders Law Center
Kids in Need of Defense
Legal Services for Children
Mid-South Immigration Advocates
National Immigrant Justice Center
Public Counsel
RAICES
The Door
The Florence Immigrant and Refugee Rights Project
Women’s Refugee Commission
Young Center for Immigrant Children’s Rights

ⁱ See Federal Regulation No. 74, Vol. 84 at 21240-41.

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

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

^{iv} Sexual Assault Significant Incident Report, Form A-10E.

^v 22 I&N Dec. 1362 (BIA 2000).

^{vi} OFF. OF THE INSPECTOR GENERAL, DEPT. OF HOMELAND SECURITY, SPECIAL REVIEW – INITIAL OBSERVATIONS REGARDING FAMILY SEPARATION ISSUES UNDER THE ZERO TOLERANCE POLICY 9 (Sept. 27, 2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.

OFF. OF THE INSPECTOR GENERAL, DEPT. OF HEALTH & HUMAN SERV., SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE 5 (Jan. 2019), available at <https://www.oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf>.