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**RE: Request for Comments: Proposed Information Collection Activity;  
Administration and Oversight of Unaccompanied Alien Children Program (April  
16, 2020)**

**HHS Docket No. ACF-2020-07995, 85 FR 21240**

June 15, 2020

Dear Ms. Jones,

The undersigned organizations respectfully submit this comment in connection with the Proposed Information Collection Activity published April 16, 2020 by the Department of Health and Human Services (HHS). We appreciate the opportunity to provide this feedback to the Department and its component the Office of Refugee Resettlement (ORR).

These comments are based upon the expertise and contributions of organizations that advocate for the rights and wellbeing of unaccompanied immigrant children (“children” or “unaccompanied children”), including direct legal services providers (LSP) and policy advocacy organizations. The organizations have a vested interest in ensuring that the proposed information collection by ORR safeguards the full spectrum of rights as well as the best interests of unaccompanied immigrant children and their families and caregivers.

While this comment focuses primarily on the proposed changes to the “Authorization for Release of Records” (Part I), it also includes comments on the newly proposed instrument “UAC Satisfaction Survey” (Part II). Part I, on the proposed Authorization for Release of Records (ARR), discusses the scope of investigatory requests, processing time, the expansion of categories of requesting parties, and the inadequacy of the safeguards currently provided regarding the limitations on disclosure. Part I then ends by analyzing concerns relating to the absence of language and electronic access protections for form users. Part II discusses concerns raised by the new Satisfaction Survey.

## **I. Proposed Authorization for Release of Records (A-5)**

### **A. ORR should define and limit the scope of investigatory requests**

(Proposed Section B: Reason for Request).

The proposed form permits requesting a child's records for investigatory purposes. Failing to define which agency may conduct the investigation potentially obfuscates ORR's commitment to confidentiality of children's records, which we discuss further in Parts C and D below.

Investigation may include allegations of child abuse or neglect by a child welfare agency or allegations of trafficking by local law enforcement—both of which are permissible under ORR's guidelines. However, a situation may arise where local law enforcement, absent the critical independent neutral review of a subpoena, seeks to access a child's records in what amounts to a fishing expedition, and shares their findings with federal immigration enforcement.<sup>1</sup> Without proper limits and clear guidelines<sup>2</sup> on the acceptable investigatory scope of records requests, ORR will not safeguard children's rights and confidential information.

### **B. Processing time for file requests fails to account for detained children's urgent need to evaluate their legal eligibility** (Proposed Section C: Type of Request).

Like the current ORR form, Proposed Section C splits requests into two categories: standard and urgent. We appreciate the addition of medical and educational needs to expedite processing of the form—two circumstances that may be key for released children's health and school adaptation.

We encourage the agency to consider additional factors, such as the fact that the child is detained or expecting a Flores bond hearing, for urgent processing. Children's length of detention varies widely, but in nearly every case detention places greater urgency for counsel to evaluate the child's records for purposes of assessing relief or eligibility for Flores bond hearing. Currently, such requests would fall under the discretionary "other" category" or become standard requests, which can greatly delay the child's legal trajectory. For many children, a 40-day waiting period in detention may be an insurmountable time period that deters them from developing their viable, *bona fide* claims or bond requests, especially given EOIR's 60-day case completion requirements

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<sup>1</sup> See N.Y. Immigration Coalition, *When Help Is Nowhere to Be Found: What Government Documents Reveal About MS-13 Operations in Long Island, New York City, and the Lower Hudson Valley* (May 20), at 8-12, <https://www.nyic.org/2020/05/when-help-is-nowhere-to-be-found-what-government-documents-reveal-about-ms-13-operations-in-long-island-new-york-city-and-the-lower-hudson-valley/> (exposing extensive entanglement between local law enforcement agencies and federal immigration authorities).

<sup>2</sup> For example, this proposed ARR, like the policy found at ORR Policy Guide Section 5.8, makes no distinction between circumstances where records are sought by federal or state law enforcement for child protection purposes (i.e., law enforcement, trafficking or child welfare investigation of others in which child is a possible victim) versus where the child himself or herself is the *subject* of a law enforcement investigation. This is a critical distinction as these two purposes raise different concerns relevant to safeguarding the child's welfare and rights.

for detained children.<sup>3</sup> Since ORR recognizes that these are routine purposes for file requests in Section B, we recommend that ORR consider widening the urgent request categories to reflect the needs of detained children to promptly evaluate their claims or bond requests with their LSPs or counsel.

**C. Expanded categories of requesting parties risks undermining children’s confidentiality (Proposed Section D: Requesting Party).**

Maintaining confidentiality of children’s records is paramount to ORR’s provision of child-centered services.<sup>4</sup> The proposed form undermines this principle with the expanded list of individuals and agencies who are authorized to seek access to a child’s records under Section D. Types of requesting parties previously included the child’s counsel,<sup>5</sup> ORR-funded LSPs, a child welfare agency representative, or an otherwise specified party. The new form adds representatives of “federal or state government agency,” “educational institution,” and “medical provider” to this list. We are particularly concerned that the addition of federal and state government agencies opens the door for many agencies, including local law enforcement agencies, to access children’s ORR files without the authorization of the child and/or legal guardian or other critical safeguards for purposes not specifically defined or authorized in ORR policy.<sup>6</sup>

Such an expansive addition to the list of authorized requesting parties can become a vehicle for information-sharing that undermines the bifurcated scheme Congress enacted with the Homeland Security Act of 2002<sup>7</sup> and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).<sup>8</sup> This is not just a hypothetical concern; recent news revealed that the statutory firewall between ORR and other federal agencies was previously compromised when DHS shared private confidences that a child made during clinical sessions before an immigration judge.<sup>9</sup> Additionally, recent reports indicate that local law enforcement may seek access to children’s records for purposes of assisting federal immigration

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<sup>3</sup> Memorandum from James R. McHenry III, Director, EOIR, to The Office of the Chief Immigration Judge, *Case Priorities and Immigration Court Performance Measures*, App. A (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download>.

<sup>4</sup> ORR Policy Guide, Section 3.3.

<sup>5</sup> The proposed ARR references a “*Notice of Attorney Representation*” as acceptable supporting documentation in addition to the forms G-28, EOIR-27 and EOIR-28. It is unclear what document this title may reference.

<sup>6</sup> As explained below, the signature requirements do not provide sufficient safeguards for instances such as an agency’s appeal to ORR’s discretion for release of records or an agency’s effort to obtain a vulnerable child’s inadvertent acquiescence to such release. For example, a child or young adult currently held in DHS custody may feel pressure to sign an authorization to release previous ORR records to an ICE Deportation Officer, while lacking support or counsel to understand the repercussions of such a signature.

<sup>7</sup> 6 U.S.C. § 279.

<sup>8</sup> 8 U.S.C. § 1232.

<sup>9</sup> See Hannah Dreier, Truth and Consequences, Washington Post (Feb. 15, 2020), [available at https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/](https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/).

enforcement.<sup>10</sup> That is why we are concerned that the form’s expansion to other requesting agencies can undermine the full panoply of confidential protections under our laws. Absent significant oversight and specific language to prevent such information sharing, we recommend that the broad category of “Representative of a Federal/State government agency” be removed.

We recommend that ORR revise the form and its instructions to require a court-issued subpoena or order as supporting documentation for any records request from a law enforcement agency absent an authorizing signature from the unaccompanied child or their legal guardian. Such a safeguard is essential given the inadequacy of the current limitations on records disclosure to government agencies without an authorizing signature (page 7 of the instructions regarding Section G: Authorization). The inadequacies of the current limitations are described above and below in Part D.

**D. Scope of authorization for release fails to adequately protect rights and interests of unaccompanied children** (Proposed Section G: Authorization).

i. *Signature requirements do not adequately protect children’s privacy.*

The signature requirements for this form rightly specify that children with developmental disabilities may be less capable of formulating consent.<sup>11</sup> We believe this added inclusion with respect to developmental disability can be a meaningful safeguard for children’s equal and fair treatment. Our recommendation in that respect is to specify what definition ORR uses to evaluate if a child falls under this category.<sup>12</sup> We further appreciate that ORR has included a best interest determination as part of its discretionary review of authorization forms that do not bear a vulnerable child’s discretion.

Our organizations are concerned, however, that ORR retains ample discretion to process claims for tender-age children and children with disabilities. Without more guidance on the bounds of such discretion, a request from a child’s LSP, counsel, or sponsor could be met with a summary denial.<sup>13</sup> On the other hand, DHS or EOIR could request those children’s files and receive ORR’s approval.<sup>14</sup> Without clarifying the limits and oversight on such decision-making, it is

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<sup>10</sup> See N.Y. Immigration Coalition, *supra*.

<sup>11</sup> ORR previously did not specify developmental disability as a factor to waive a child’s signature requirement. See <https://www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information>.

<sup>12</sup> For example, two agencies of the Department of Health and Human Services do not provide consistent definitions of the same term. The Centers for Disease Control and Prevention (CDC) includes a separate list of developmental disabilities (see <https://ephtracking.cdc.gov/showDevelopmentalDisabilitiesDefinitions>) than the National Institute of Child Health and Human Development (see *Intellectual and Developmental Disabilities (IDDs): Condition Information* (<https://www.nichd.nih.gov/health/topics/idds/conditioninfo/default>)).

<sup>13</sup> Although the new form clarifies that “ORR normally presumes consent and will release records needed for the provision of services,” it is unclear whether legal services would be included in such presumed consent policy or discretionary best interest determination.

<sup>14</sup> As discussed in the next section as well, this situation may also arise where a child who is 14 or older and does not have a developmental disability inadvertently authorizes DHS or EOIR to access their file. We recommend

unclear how ORR will determine whether releasing such confidential records may be in the child's best interest. Such broad discretion may also lead ORR to violate constitutional due process protections for unaccompanied children, as would occur were ORR to release records to DHS or EOIR but not to the child's attorney of record as a matter of discretion.

ii. *Limitations on disclosure of certain records represent a welcome step in the right direction but room for improvement remains.*

The proposed updated ARR contains important limitations on the disclosure of home study and Clinical/Mental Health records, for which we commend ORR. In the instructions regarding Section G: Authorization on page 7, the form prohibits the disclosure of home study reports as well as other information pertaining to the sponsor absent the authorizing signature of the sponsor in question, a safeguard that respects the privacy interests of sponsors.

The instructions on Section G: Authorization also lay out limitations on the disclosure of Clinical/Mental Health records. These make clear that government agencies may not obtain these sensitive clinical records absent the authorization of the unaccompanied child in question or, for those unaccompanied children under 14 or with a diagnosed developmental disability, the authorization of the parent or legal guardian. Provided that all DHS and EOIR components are required to use this form to obtain unaccompanied child case file records from ORR, these safeguards would appear to help prevent recurrence of the harms and ethical violations occasioned by the prior sharing of confidential clinical/mental health records with DHS.<sup>15</sup>

To ensure maximum clarity, ORR should update its Policy Guide to reflect that all government agencies, including DHS and EOIR, are required to use this Authorization for Release of Records in order to request the records of an current or former unaccompanied child, and that the child subject to the record request have a documented opportunity to consult with counsel prior to granting such authorization. Otherwise, a vulnerable youth or child in DHS custody can be persuaded to grant such authorization.<sup>16</sup> If DHS, EOIR, and/or local or state law enforcement agencies retain any alternative avenues to obtain records of an individual unaccompanied child

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safeguards (documented opportunity to consult with counsel for such requesting agencies) in the next section that would also apply to this scenario.

<sup>15</sup> This practice has been condemned by a [broad coalition of expert professional and child welfare organizations](#), including the [American Psychological Association](#), the [National Association of Social Workers](#) and the American Academy of Pediatrics. *See, e.g.*, Hannah Dreier, "Bill would end practice of using confidential therapy notes against detained immigrant children", Washington Post (Mar. 4, 2020), *available at* [https://www.washingtonpost.com/national/bill-would-end-practice-of-using-confidential-therapy-notes-against-detained-migrant-children/2020/03/04/0ab73d52-5e46-11ea-9055-5fa12981bbbf\\_story.html](https://www.washingtonpost.com/national/bill-would-end-practice-of-using-confidential-therapy-notes-against-detained-migrant-children/2020/03/04/0ab73d52-5e46-11ea-9055-5fa12981bbbf_story.html); Hannah Dreier, "Truth and Consequences", Washington Post (Feb. 15, 2020), *available at* <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/>.

<sup>16</sup> *See supra* n. 4. There is ample research and analysis on the susceptibility of youth to waive their privacy rights due to their developmental stage. *See generally*, Elizabeth Scott, Natasha Duell, & Laurence Steinberg, Brain Development, Social Context, and Justice Policy, 57 Wash. U. J. L. & Pol'y 013 (2018), [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol57/iss1/8](https://openscholarship.wustl.edu/law_journal_law_policy/vol57/iss1/8).

that are not otherwise covered by Policy Guide 5.8.5, ORR must update its Policy Guide accordingly and clarify the basis for the continued existence of such information-sharing vessels.<sup>17</sup>

While commendable, the form’s restrictions on the disclosure of Clinical/Mental Health records fail to address the related harms occasioned by ORR’s affirmative information sharing with ICE pursuant to memoranda of agreement.<sup>18</sup> This policy is currently reflected in ORR Policy Guide Section 5.8.5, through which ORR affirmatively shares sensitive behavioral and mental health-related information with ICE through Significant Incident Reports (SIRs), including information obtained through the individual therapy sessions that are mandatory for unaccompanied children in ORR care. ORR has failed to demonstrate that such information sharing with ICE is consistent with ORR’s child welfare and best interest of the child mandate under the HSA and the TVPRA. Instead, such information sharing forces a program intended to ensure child welfare into the service of immigration enforcement that demonstrably runs counter to child welfare.<sup>19</sup> To eliminate these harms and to ensure the full promise of the restrictions on disclosure of Clinical/Mental Health records, HHS should withdraw from the 2018 Memorandum of Agreement with DHS and rescind Section 5.8.5 of the ORR Policy Guide.

iii. *The proposed form may contravene state confidentiality laws for juvenile records.*

The records category “Legal Information” as defined on page 5 of the proposed form includes “EOIR documents, court documents, criminal history records.” As EOIR documents are separately identified, “court documents” necessarily includes any non-immigration court related documents. This would include documents from state court for those unaccompanied children who have had cases in state courts in the U.S., most typically either in the juvenile justice system or the child abuse and neglect system. “Criminal history records” would also appear to include documents related to the juvenile justice or adult criminal justice system, and not limited to court records but extended to case management, probation and other records.

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<sup>17</sup> We note that the proposed ARR’s reference on page 8 to ORR Policy Guide Section 5.9 appears incomplete if not misleading. Section 5.9 is limited to describing ORR’s discretion to releasing information of unaccompanied children to local law enforcement in cursorily- and vaguely-defined circumstances. As described throughout this comment, this proposed ARR covers a much broader range of circumstances contemplating the disclosure of a child’s records.

<sup>18</sup> See Memorandum of Agreement among the ORR, ICE, and U.S. Customs and Border Protection (CBP) of the U.S. Department of Homeland Security regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters, Apr. 13, 2018.

<sup>19</sup> See, e.g., NIJC and WRC, [Backgrounder: Memorandum of Agreement Between DHS and HHS Emphasizes Immigration Enforcement Over Child Safety](#), June 2018; Neha Desai, Melissa Adamson, Elizabeth Pirrotta, Lewis Cohen & N. Ewen Wang, *Child Welfare & Unaccompanied Children in Federal Immigration Custody: A Data and Research Based Guide for Federal Policymakers*, Dec. 2019, at 19-20, <https://youthlaw.org/publication/guide-federal-lawmakers-unaccompanied-children-immigration-custody/>.

By allowing for the inclusion of state records under the category of Legal Information, therefore permitting government agencies, whether state or federal, to obtain these records without an authorizing signature from the unaccompanied child (or the parent or legal guardian in cases of children under 14 or those with a diagnosed developmental disability), ORR exposes itself to violations of state records confidentiality laws. While some state laws allow for release of certain records to specific agencies performing duties related to the subject matter (such as child abuse investigations), numerous state laws prohibit the release of juvenile or child protective service records to be released to any government agency, which would include ICE, EOIR, and others. Although some state laws may allow records to be released to an educational institute, they limit the type of information made available and impose strict regulations on where the information is stored, who in the institute can view the information, and when it must be erased from the institute's record.

Furthermore, in numerous states, a court or state department has exclusive and ultimate control over the release of confidential state records. While statutes list the entities that may view records automatically, unauthorized entities—including parties allowed to request information through ORR's form—must request records information from a controlling state authority. In Arizona, New York, and Florida, any party seeking information must petition the state court; in California, the juvenile court; and in Texas, the juvenile court or the Texas Department of Family and Protective Services (DFPS).<sup>20</sup> Therefore, if ORR allows parties unauthorized by a state law to request a confidential record through this form and provides the record without the review and permission of the court or department as statutorily required, ORR's action contravenes state law. Additionally, some state laws have higher barriers and more in-depth procedures to access confidential records. No relevant procedural safeguards exist in this form, impermissibly allowing for access by parties unauthorized under numerous state laws.

ORR should substantially revise this form in order to avoid conflicts with state laws. One important safeguard would be to ensure that agencies or entities are limited to accessing records pertinent to their duties. For example, medical or education providers should only be able to access medical or education records, respectively.

**E. By failing to provide for any translation or interpretation, the form runs afoul of ORR's obligations to provide for language accessibility for non-English speakers.**

While this proposed ARR may require the signature of an unaccompanied child or their legal guardian, it includes no requirements for language accessibility for Limited English Proficiency (LEP) individuals. The HHS Office for Civil Rights (OCR) states that any HHS or federally

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<sup>20</sup> A survey of the juvenile and child abuse and neglect records confidentiality laws of these five states—Arizona, New York, Florida, California and Texas—is included as an appendix to this comment. This appendix is meant to present a sampling of state juvenile records confidentiality laws, on the basis that the rest of the U.S. states and the District of Columbia oversee similar laws.

funded programs or activities are prohibited from discriminating against people based on their national origin under Title VI and the Affordable Care Act.<sup>21</sup> This includes providing a different service or benefit to someone because of their national origin. HHS specifically states that Spanish-speakers (as well as other non-English speakers) have access to free language access services provided by HHS, including interpreters and translation of written material.<sup>22</sup>

Under Section 4.2.2 of “Children Entering the United States Unaccompanied,” ORR itself requires that unaccompanied children who are LEP or disabled have access to “effective communication...including access to in-person, telephonic, or video interpretive services that enable effective, accurate, and impartial interpretation” and requires that “any written materials, including but not limited to notifications, orientation materials, and instruction, are translated either verbally or in written form in the child or youth’s preferred language.”<sup>23</sup> Section 3.3.7 of ORR’s “Children Entering the United States Unaccompanied” similarly states that “[a]ll ORR-required documents provided to unaccompanied alien children must be translated in the unaccompanied alien child’s preferred language, either written or verbally.”<sup>24</sup>

The legal authority for these language requirements is derived from, in addition to Title VI of the Civil Rights Act and the Affordable Care Act, Executive Order 13166, “Improving Access to Services for Persons with Limited English Proficiency.”<sup>25</sup> Executive Order 13166 requires federal agencies to “prepare a plan to improve access to [] federally conducted programs and activities by eligible LEP persons.” In accordance with this Executive Order, HHS published a “Revised HHS LEP Guidance” in 2004.<sup>26</sup> The document defines LEP individuals and states that “[t]he greater the number or proportion of these LEP persons [in the eligible service population], the more likely language services are needed.”

Neither the form nor its supporting statement contains language about language accessibility or services for LEP individuals. There is no requirement that the form be translated for LEP unaccompanied children or their guardians before they provide their signature, and there is no requirement ensuring that LEP unaccompanied children or their guardians fully understand the contents of the form before consenting to release certain records to the requesting individual or

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<sup>21</sup> Title VI of the Civil Rights Act of 1964, Office for Civil Rights, 42 U.S.C. § 2000d *et seq.*; *see also* “Discrimination on the Basis of Race, Color, or National Origin (including LEP), U.S. Department of Health & Human Services (Dec. 3, 2015), <https://www.hhs.gov/civil-rights/for-individuals/race/index.html>

<sup>22</sup> Office for Civil Rights, “Language Assistance Services,” U.S. Department of Health & Human Services (Jan. 4, 2017), <https://www.hhs.gov/civil-rights/for-individuals/language-assistance/index.html#english>

<sup>23</sup> ORR Policy Guide, Section 4

<sup>24</sup> ORR Policy Guide, Section 3.1

<sup>25</sup> William Clinton, Executive Order 13166 of August 11, 2000, “Improving Access to Services for Persons with Limited English Proficiency,” Code of Federal Regulations, Title 3 (2000), <https://www.justice.gov/crt/federal-coordination-and-compliance-section-180>

<sup>26</sup> Office for Civil Rights, “Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons,” U.S. Department of Health & Human Services (Jul. 26, 2013), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/limited-english-proficiency/guidance-federal-financial-assistance-recipients-title-vi/index.html>



group. Therefore, it is possible that LEP unaccompanied children or their guardians will sign the form with inadequate understanding of its consequences and without giving their fully informed consent. This lack of language accessibility requirements represents a potential breach of legal requirements. As stated above, ORR’s policies require the availability of translation services for “ORR-required documents,” which this form makes no provision for. These ORR and broader HHS policies are in accordance with the legal authorities previously stated, including Title VI of the Civil Rights Act and Executive Order 13166. Because the form does not require language accessibility for those providing their signature, it may deprive them of the legally required “meaningful access” to ORR’s services and programs otherwise available to English speakers.

Pursuant to ORR policy, HHS Office of Civil Rights requirements, and applicable legal authority, ORR should amend the form to include a written requirement that language services be provided specifically to LEP individuals asked to sign the form. This written requirement should include at minimum a version of the form in Spanish and potentially other languages spoken by LEP unaccompanied children and their guardians, as well as information about how to access HHS-provided translation and interpretation services.

**F. By requiring electronic completion of the forms, this form also unfairly prejudices families who do not have the resources or skills to use the ARR.**

Additional accessibility issues arise from the requirement of electronic completion and the lack of accommodations for unaccompanied children and sponsors/caregivers with limited literacy. The electronic completion requirement assumes access to a computer and a printer, which may be difficult if not impossible for some released unaccompanied children and their sponsors. This difficulty is especially relevant given the expansion of the potential uses of this form, which increases the probability that unaccompanied children and their legal guardians will need to use this form.

We recommend that ORR revise the requirement of electronic completion of the form to allow for individuals to submit the form when completed by hand.

**G. Typographical errors obscure clear meaning in some portions of form (Proposed Sections F, G)**

There are a few typographical errors in the current proposed form that impact its clear meaning and should be corrected.<sup>27</sup> First, in Section F: Supporting Documentation, “if” has inadvertently replaced “is”.

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<sup>27</sup> While we do not focus on typographical errors that do not go to the document’s clarity, we would note that there are others ORR should correct prior to finalizing this form, especially given the prevalence of LEP speakers who will use this form. For example, the instructions refer to “documents in category” [*sic*] (p.5) which can be confusing for LEPs.

- A statement on the organization’s official letterhead verifying that the requesting party **if** the legal representative of the subject of the record request, signed by the subject of the record request
- A court document (e.g., Notice of Appearance) verifying that the requesting party **if** the legal representative of the subject of the record request

Second, Section G: Authorization appears to be missing entire words, or possibly blank spaces meant to be completed by the person executing the form. These three occurrences are underlined in bold below.

- I hereby authorize ORR to provide copies of the records requested in Section E to **or** any of its duly authorized representatives, including **.** I further authorize ORR to provide **with** records created after submission of this initial request that fall into the categories of records requested in Section E upon receipt of a request for updated records.

Finally, the instructions to the form misplace the Requesting Party chart (corresponding to Section D) immediately following Section F on page 6; this organization makes it harder to navigate the instructions.

## **II. UAC Satisfaction Proposed Survey (A-11 and A-11s)**

The new UAC Satisfaction Survey forms (Forms A-11 and A-11s), together with the UAC Satisfaction Survey Aggregate Data spreadsheet raise concerns about the use and confidentiality of the information gathered through these forms. While it appears that the responses corresponding to degrees of satisfaction (*e.g.*, Yes very much, Mostly, It was okay, Not much, Not at all) will be shared in an aggregate fashion without identifying information, no explanation is provided in this Proposed Information Collection Activity regarding how the narrative answers in these forms will be used. Absent information on the guidelines and protocols that will guide the use of these surveys, it is impossible to ascertain what safeguards, if any, may be put in place to protect the best interests and welfare of the children who complete the surveys. Further questions raised by the survey instrument include:

- Will the completion of these surveys be optional or mandatory?
- Will children in all levels of care complete these surveys?
  - As the surveys use the word “shelter” exclusively, it appears that only those children in shelter care may be presented with these surveys, but the matter goes unaddressed in the Proposed Information Collection Activity. This lack of clarity raises concerns under both possibilities. On one hand, if only shelter-level children are to be the subjects of this survey instrument, what analogous efforts does ORR plan to make to “identify areas where it can make programmatic improvements” in staff secure, secure, residential treatment centers, and long-term foster care? On the other hand, if this instrument is to be used across levels of

care, on what basis does ORR believe that this instrument can be universalized to include restrictive settings such as secure, staff secure, and residential treatment center?

- Will any perceived inconsistencies between a child’s responses and other information possessed by ORR be held against the child, including the disclosure of such information to law enforcement authorities, whether DHS, DOJ, or state/local?
- Will ORR create protocols requiring care providers to explain what confidentiality protections, if any, exist for these surveys?<sup>28</sup>

Although the Supporting Statement Part A – Justification explains that the HHS Deputy Secretary requested this instrument, no details are provided on how these surveys will be used to “identify areas where [ORR] can make programmatic improvements”. For example, no explanation is provided as to why this survey instrument is superior to confidential interviews with unaccompanied children conducted by independent and experienced professional auditors.

In light of these concerns, we strongly recommend that ORR reconsider its use of this survey instrument in favor of comprehensive and independent evaluation and monitoring to achieve its programmatic improvement goals. ORR should contract with independent nongovernmental or professional organizations that have expertise in monitoring and evaluating residential youth programs and are unaffiliated with ORR. Such monitoring and evaluation by independent entities unaffiliated with ORR should include monitoring of facilities for compliance with ORR policies and procedures and the Flores Settlement. ORR must ensure that such monitoring includes conversations with field coordinators, staff, advocates, attorneys and children in custody.

Should ORR proceed with these surveys, we recommend that ORR develop and release for public comment a comprehensive policy and protocol governing the use of these surveys.

### **III. Conclusion**

The proposed update to the Authorization for Release of Records form presents significant threats to the confidentiality of sensitive records of unaccompanied immigrant children. While ORR has included some commendable safeguards, they remain insufficient to adequately protect the interests at stake, not least ORR’s interest in avoiding liability for the violation of state records confidentiality laws. Especially notable are the absence of language accessibility safeguards, despite the significant interests at stake and the reality that the majority of unaccompanied children intended to use this form are of limited English proficiency. We urge ORR to reconsider the proposed forms and to adopt measures that adequately protect the rights

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<sup>28</sup> See, e.g., ORR Policy Guide, Section 3.2.1, Admissions for Unaccompanied Alien Children: “Prior to interviewing the UAC using the *Initial Intakes Assessment*, the care provider informs the youth that providing honest answers to all assessments is essential. The care provider also informs the UAC that self-disclosure of previously unreported criminal history or violent behavior to any other children, care provider staff, ORR, or others, may result in the child’s transfer to another care provider facility and may affect their release.”

and interests of unaccompanied children in the management of access to individual case records and in program evaluation and improvement.

Sincerely,

Americans for Immigrant Justice  
Capital Area Immigrants' Rights Coalition  
Casa Cornelia Law Center  
The Door  
Human Rights Initiative of North Texas  
The Immigrant Legal Resource Center  
Kids In Need of Defense  
Legal Aid Justice Center  
Lively Law Firm  
Michigan Immigrant Rights Center  
National Immigrant Justice Center  
Project South  
Public Counsel  
RAICES  
Women's Refugee Commission  
Young Center for Immigrant Children's Rights

## Appendix: State Juvenile Records Confidentiality Laws

### i. Arizona

In Arizona, while juvenile records are generally open to the public, records relating to child welfare and the Department of Child Services (DCS) are not. Arizona DCS may provide the following parties with DCS information on a child: federal or state auditors; persons conducting accreditation deemed necessary by DCS; a standing committee of the legislature or a legislator; a citizen review panel, child fatality review team, or office of ombudsman-citizens aide; an independent oversight committee created by state law; or the governor. Ariz. Rev. Stat. § 8-807(I). An unauthorized party may obtain confidential DCS information only by providing notice to the county attorney and attorney and guardian for the child, and petitioning a judge of the superior court, who must balance the child's right to confidentiality against the petitioner's potential right to information. Ariz. Rev. Stat. § 8-807(K).

### ii. California

In California, juvenile records are confidential. Under 2020 California Rules of Court 5.552(b), the petitioner must request from the juvenile court specific juvenile case files "based on knowledge, information, and belief that such files exist and are relevant to the purpose for which they are being sought." The petitioner must describe "in detail the reasons the files are being sought and their relevancy to the proceeding or purpose for which petitioner wishes to inspect or obtain the files;" furthermore, the petitioner must show a "preponderance of the evidence that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner." Cal. R. Court, 5.552(b), 5.552(d)(6). The petitioner must further serve the request to a number of parties before submitting the request, including the child in question, the child's parents or guardians, and in some cases the child's attorney of record, the district attorney, and the state child welfare agency or probation department. Cal. R. Court, 5.552(c). Under California law, probation officers or law enforcement officers actively participating in proceedings involving the child; court personnel; child protective agencies and the California Department of Social Services; and the child or their parent or guardian may review or copy a child's law enforcement or court records.<sup>29</sup> Any other parties, including other federal/state government agencies, educational institutes, medical providers, and attorneys, must go through the aforementioned rigorous petition process to view any such records.

Records about a child relating to public social services are not open to examination by the public. Cal. Welfare and Institutions Code § 10850(a). Records concerning children receiving public social services may only be viewed by the State Department of Social Services and county welfare departments for purposes "directly connected with the administration of public social services," as well as governmental entities for the specific purpose of conducting an "audit or similar activity in connection with the administration of public social services." Cal. Welf. & Inst. Code § 10850(c). Such entities given access to case files "shall not disclose the identity of any applicant or recipient except in the case of a criminal or civil proceeding conducted in

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<sup>29</sup> "State Fact Sheet: California," Juvenile Law Center (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/factsheet-CA.pdf>

connection with the administration of public social services.” Cal. Welf. & Inst. Code § 10850(c).

Under a different part of California’s Welfare and Institutions Code, a ward or dependent child’s records may be inspected by court personnel; the district attorney, city attorney, or city prosecutor; the child or their parent or guardian; attorneys, judges, and officers actively participating in proceedings involving the child; county counsel, city attorney, or other attorney representing the petitioning agency in a dependency action; the superintendent or designee of the school the child is enrolled in; members of child protective agencies; the State Department of Social Services or authorized staff; members of the team/agency providing treatment or supervision of the minor; a judge, commissioner, or other hearing officer assigned to a family law case concerning custody or visitation; a court-appointed investigator; a local child support agency to establish paternity and child support orders; juvenile justice commissions; the Department of Justice, to update its sex offender list in California; or a probation officer preparing a report for a child seeking discharge from the Department of Corrections and Rehabilitation. Cal. Welf. & Inst. Code § 827(a)(1). Any other party who wishes to gain access to a child’s case file must obtain a court order from the judge of the juvenile court. Cal. Welf. & Inst. Code § 827(a)(1)(Q).

### iii. Florida

In Florida, juvenile records are not open to the public.<sup>30</sup> Records are viewable by the child in question; their parents, guardians, or legal custodians; their attorneys; law enforcement agencies; and the Department of Juvenile Justice, Department of Corrections, and Parole Commission. Fla. Stat. § 985.045(2). Such confidential records may also be available to school superintendents and licensed professional or community agency representative “participating in the assessment or treatment of a juvenile.” Fla. Stat. § 985.04(1)(b). Any other party wishing to view such records must have a “proper interest” as judged by the court and must obtain an order of the court. Fla. Stat. § 985.045(2).

Similar to juvenile records, records related to child proceedings are not open to inspection to the public, but may be inspected and copied by a child; their parents or guardian; their attorney; law agencies; and the Department of Children and Families. Fla Stat. § 39.0132. Confidential information includes medical and mental health, child care, education, law enforcement, court, and social service records. Reports and records in cases of child abuse or neglect are similarly protected and only available to persons, officials, and agencies responsible for protective investigations, protective and preventive services, licensure, and employment screening. Fla. Stat. § 39.202(2). A person or organization may petition the court for an order making public records from the Department of Children and Families; the court must balance the rights and interests of the petitioner against those of the child and any others identified in the reports. Fla. Stat. § 39.2021.

### iv. New York

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<sup>30</sup> “State Fact Sheet: Florida,” Juvenile Law Center (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/factsheet-FL.pdf>

In New York, juvenile records are withheld from public inspection. N.Y. Fam. Ct. Act § 381.3.1. These records may be available to a child or their parent/guardian; an institution to which a minor has been committed; the Division of Parole and Probation; court personnel if a child is later convicted of a crime; the Commissioner of Mental Health; the Commissioner of Mental Retardation and Developmental Disabilities; a case review panel; or the Attorney General.<sup>31</sup> Records may be available to a designated educational official at the child's school, but only a notice of adjudication is available in this case, only for purposes related to the student's educational plan, and the notification must be kept separate from the child's school records. N.Y. Crim. Proc. § 720.35.3. Any other release of such juvenile records can only be made "upon specific authorization of the [state] court," and by no other agency. N.Y. Crim. Proc. § 720.35.2.

State child records, including records in relation to abandoned, delinquent, destitute, neglected, or dependent children; reports of child abuse or mistreatment; and social services investigations, are confidential. These records and motions may be made available to the child, their parent/guardian, their attorney, or an authorized agency upon application to the New York Supreme Court. N.Y. Soc. Serv. Law § 372.3. Such confidential records generally, including notices and motions for discovery in legal actions, are not available upon application to the other parties. Reports of child abuse, specifically, may be viewed by the following: a physician suspecting abuse of their minor patient; a person authorized to place a child in protective custody who needs relevant information to make their decision; an authorized agency caring for a child; a person who is the subject of the report; a court or grand jury, if the record is necessary to determine an issue or charges; a state legislative committee responsible for child protective legislation; a researcher, provided that no identifying information is shared; a provider or licensing agency; the justice center for the protection of people with special needs or an investigatory entity in connection with an investigation; a probation service, to make an informed recommendation to the court; a district attorney or other criminal justice agency to conduct a criminal or missing child investigation; the New York City Department of Investigation, if no identifying information is included; agency officers or day care directors in connection with an employee disciplinary investigation; a provider or coordinator of services a child has been referred to; another state's child protective service in order to conduct a child abuse investigation; a child's attorney; a child care resource and referral program; officers of the state or city comptroller to conduct an authorized performance audit; a fatality review team or multidisciplinary investigative team approved by the Office of Children and Family Services; a citizen review panel; an entity with legal authority in another state to license or approve prospective foster/adoptive parents; or a social services official investigating whether an adult needs protective services. N.Y. Soc. Serv. Law § 422.4.

v. Texas

In Texas, juvenile records are generally confidential.<sup>32</sup> They may be seen and copied by the child's parent, guardian, or custodian; the child's attorney; the Texas Department of Criminal

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<sup>31</sup> "State Fact Sheet: New York," Juvenile Law Center (2014), <https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/factsheet-NY.pdf>

<sup>32</sup> "State Fact Sheet: Texas," Juvenile Law Center (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/factsheet-TX.pdf>

Justice, Juvenile Probation Commission, and probation officers; juvenile court personnel; a district school superintendent; agencies or persons treating the child, if and only if they sign a written confidentiality agreement; and other government agencies, only if disclosure is required by law. Tex. Fam. Code § 58.005. Other individuals, agencies, or institutions may view a juvenile record only with permission specifically from the juvenile court, and only if the court determines them to have a “legitimate interest in the proceeding or in the work of the court.” Tex. Fam. Code § 58.005(a-1)(10).

The Texas Department of Family and Protective Services (DFPS) may release confidential child case record information to the following: DFPS staff to perform assigned duties; a multidisciplinary team authorized to investigate, prosecute, or resolve cases of suspected child abuse or provide services to the child; law enforcement officials for the purpose of investigation; a physician suspecting abuse of their minor patient; a government official when deemed necessary for the protection and care of a child; a grand jury; an attorney, guardian, or court-appointed special advocate; a court with a case arising from a child abuse investigation; a DFPS attorney, state attorney general, or county or district attorney representing the state in a child abuse proceeding; a member of the state legislature to carry out official duties; the person authorized to give medical or educational consent for the child; or another person or entity responsible for the protection, diagnosis, care, treatment, supervision, or education of a child as authorized by DFPS. Tex. Admin. Code § 700.203(a). Child case records are also available, upon submitted request to DFPS, to the child, their parent or guardian, a prospective adoptive parent, or an individual who contributed to an investigation of child abuse, though in all these cases the records must be redacted accordingly. Tex. Admin. Code § 700.203(b-e). Child case records are not available upon submitted request to other parties.