

THE ORR AND DHS INFORMATION-SHARING AGREEMENT AND ITS CONSEQUENCES

The Office of Refugee Resettlement (ORR), within the Department of Health and Human Services, bears responsibility for the care and custody of immigrant children who arrive in the United States unaccompanied until they are reunified with a loved one pending their immigration court proceedings. Unaccompanied children are usually transferred to ORR's care after their apprehension and processing by Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE).

In May 2018, ORR, ICE, and CBP entered into a [Memorandum of Agreement \(MOA\)](#) [1] mandating continuous information-sharing on unaccompanied immigrant children beginning when CBP or ICE takes them into custody through their release from ORR custody. Initially, this included information on each child's potential sponsors (usually family members), as well as anyone else living with the sponsor. In December 2018, ORR announced that it would limit the household members to which the information-sharing policy now applies (though the policy would continue to apply to all sponsors). Despite this change, which we understand led to the release of some children and is a step in the right direction, the MOA represents a dramatic change from past practice. Further, it is resulting in severe consequences, including prolonged lengths of stay of children in federal custody, increased costs, family separation, and increased risk of abuse or trafficking of vulnerable children. The following summarizes the MOA's changes and their impact on children, families, and the U.S. taxpayer:

OVERVIEW OF THE MOA

Initial Referral - The MOA delineates what information and forms CBP or ICE must share with ORR upon initial transfer of the unaccompanied child into ORR custody.

Analysis: This provision will likely be beneficial in ensuring that ORR is provided with adequate and uniform data.

Children in ORR Custody - The MOA requires ORR to report a great deal of information about children in its custody to ICE or CBP. The list of mandatory reporting requirements is long, with broad, undefined terms and insufficient explanation regarding how ICE and CBP will use the reported information. Some of the reporting categories relate to behavioral information that is critical for ORR's child welfare mission but that could prove harmful when shared with an enforcement agency.

History: Previously, DHS has been able to obtain case files on individual children through a [delineated request process](#) [2] - a process that did not require child welfare professionals to act in a law enforcement capacity.

Sponsor Vetting - Under the MOA, while ORR is still responsible for processing and vetting a potential sponsor, ICE will run background checks (criminal and immigration) and then provide that information to ORR for their determination of the suitability of the sponsor. The MOA stipulates that ORR will also provide ICE with the name, date of birth, address, fingerprints, and any available documents or biographic information about not only the sponsor but all adult members of

the potential sponsor's household. ORR recently announced a minor modification in its implementation of the MOA that limits its application to the adult household members of sponsors only in cases where: i) there are indications of risk to the child; ii) a public records check reveals risks; iii) the child is "especially vulnerable"; or iv) a home study is required for the case [3]. ORR and DHS will continue to share information about all potential sponsors, however, and DHS has not made any formal announcement regarding ORR's amended understanding of the MOA.

ORR has proposed [4] and begun using new sponsorship application forms that purport to alert prospective sponsors of this information-sharing agreement with ICE; however, these forms are complex and vague. The forms neither explicitly refer to CBP or ICE nor mention the possible consequences of providing personal information [5]. Further, the Department of Homeland Security accompanied the MOA with a System of Records Notice providing that the biometric data obtained regarding sponsors and their household members will now be stored by DHS in its Criminal History and Immigration Verification system, and explicitly permitting ICE and CBP to use such information for enforcement purposes [6].

Analysis: While thorough vetting of sponsors is beneficial to ensure the welfare of unaccompanied children, the MOA fails to place any limitations on the use of this data by ICE and CBP and DHS's accompanying System of Records Notice permits its use for immigration enforcement, without any temporal restrictions. Using the sponsorship process to facilitate enforcement undermines family reunification, [the fundamental principle of child welfare](#) [7], by turning safe placement screening into a mechanism for immigration enforcement.

CONSEQUENCES OF THE MOA

Recent reporting suggests that parents and close caregivers of unaccompanied children—those best placed to provide care—are increasingly afraid to come forward to serve as sponsors out of fear of immigration enforcement pursuant to the MOA [8]. Already, ICE has begun to utilize information obtained via the MOA for enforcement actions against sponsors and their household members. As of November 2018, ICE had arrested 170 individuals as a result of the information sharing [9]. Of these individuals, 64 percent were arrested only on immigration-related violations [10].

The increasing number of sponsors who are unable or afraid to step forward has led to some unaccompanied children remaining in ORR custody longer and is contributing to a ballooning population of children in ORR care - putting these children at risk of prolonged family separation. While the share of unaccompanied children being released to parents was [nearly 60%](#) from 2014 to 2015 [11], it had dropped to [41% in fiscal year 2018 as of April](#) [12]. Reporting indicates that the MOA is further contributing to this slowed rate of release of children to parents and has contributed to a dramatic increase in the length of children's stay in ORR custody from approximately 35 days in 2016 to today's average of 59 days [13] (with some HHS officials anonymously stating that the length of stay has since increased to 74 days) [14]. For some children, it is expected that their undocumented family members may resort to asking documented third-party sponsors to come forward, resulting in reunifications with distant relatives or other individuals, rather than the child's own family.

Consequently, providers and advocates have seen or expect to see:

Increased Risk of Trafficking and Exploitation of Children.

Providers are highly concerned that, given the MOA, undocumented family members will fear coming forward to sponsor their children, instead seeking - or even paying - documented distant relatives or individuals in the community to come forward and claim to be a child's sponsor. In some instances, this type of arrangement can put the families and children at increased risk of exploitation and trafficking by the third-party sponsor.

Prolonged Lengths of Stay for Children. The inevitable result of a slow-down in reunifications is the prolonged lengths of stay of unaccompanied children in ORR custody. In recent months, the number of children in ORR custody has skyrocketed to historic levels, reaching more than five times last year's average despite the number of unaccompanied children arriving on the border holding relatively steady over that same time period [15]. To accommodate the high number of children in care, the government has resorted to the use of "emergency" or "influx" facilities to hold thousands of children with limited access to educational, mental health, or legal services [16]. While no children remain in care at the soft-sided tent facilities in the remote town of Tornillo, Texas, which is in the process of closing [17], ORR has announced plans to expand its other "influx" facility in Homestead, Florida, which will reportedly have capacity for more than 2,300 children [18].

Increased Cost to the U.S. Taxpayer. Children remaining in custody for longer periods is not only contrary to the [TVPA's recognition](#) that it is in a child's best interests to be with a family member [19], it also raises fiscal concerns. A 2015 Government Accountability Office [report](#) estimates that the average cost to the taxpayer to keep an unaccompanied child in an ORR shelter is \$248 per day [20], and we know this cost has only increased since that time. Moreover, when the government resorts to the use of influx facilities like Tornillo and Homestead, the costs become even more exorbitant; the cost of detaining a child at an influx facility is reported to be \$750 per night [21].

Return of Children to Danger. For those children with no sponsor willing to come forward, [indefinite time in federal custody will lead children to abandon](#) valid protection claims to request return to their home countries despite risks of serious harm and death [22]. Furthermore, the success of a child's claim for protection often [depends on facts and documentation from her parent](#), especially when she is of tender age [23]. Arrest, detention, and deportation of the parent increases the likelihood the child will be deported to danger and erodes the child's right to due process.

Junior's Case

Junior,* an unaccompanied child from rural Central America, is currently in ORR custody. He is hopeful to reunify with his father, Mario,* who has come forward to sponsor Junior. Mario and Junior have a strong relationship and, as his biological father, Mario is best suited to care for his son. Mario also understands some of Junior's unique needs, including the fact that his son was born with HIV – a disease they both face. Unfortunately, Junior and his father have been unable to be reunified because Mario's partner is undocumented and afraid to have her fingerprints collected and shared with ICE under the MOA. Even under ORR's recent policy change, Mario's partner is required to be fingerprinted and have her information shared with ICE. Due to the fear this policy has created, Junior is and likely will remain in ORR care – a heartbreaking situation for him and his father and an unnecessary cost for HHS and the U.S. taxpayer. (*Client name and identifying information changed to protect confidentiality; case served by USCCB affiliate).

HOW MEMBERS OF CONGRESS CAN TAKE ACTION

- Publicly and privately urge DHS and HHS to rescind the MOA and accompanying Federal Register notices, in recognition of the harms and cost to children, families, and the U.S. taxpayer, as well as the ways in which the implementation is hampering the protections provided to unaccompanied children by the TVPRA.
- Insist that ORR provide clear and complete information to unaccompanied children, potential sponsors, and their impacted household members on how their data may be used. This information should be provided when the family reunification process is initiated.
- Support robust funding of ORR's programs that are serving the best interests of unaccompanied immigrant children, including community-based residential care, home studies, child advocates, and post-release services.

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- [2] *Requests for UAC Case File Information*, OFFICE OF REFUGEE RESETTLEMENT (April 14, 2014), <https://www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information>.
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- [4] Sponsorship Review Procedures for Approval for Unaccompanied Alien Children, 83 Fed. Reg. 52,221 (Oct. 16, 2018).
- [5] *See ORR Family Reunification Packet for Sponsors*, OFFICE OF REFUGEE RESETTLEMENT (Oct. 16, 2018), <https://www.acf.hhs.gov/orr/resource/unaccompanied-childrens-services>.
- [6] *See* Notice of Modified Systems of Records, 83 Fed. Reg. 20,844 (May 8, 2018); *see also* National Immigrant Justice Center, Comments on DHS Notice of Modified System of Records (June 7, 2018), <https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2018-06/NIJC%20Comments%20on%20DHS-2018-0013%20System%20of%20Records%20Notice.pdf>.
- [7] *See, e.g.*, ADMINISTRATION FOR CHILDREN AND FAMILIES - CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf.
- [8] Tal Kopan, *The Simple Reason More Immigrant Kids are in Custody Than Ever Before*, CNN (Sept. 14, 2018), <https://www.cnn.com/2018/09/14/politics/immigrant-children-kept-detention/index.html>. (“The current [anonymous HHS] official, [Bob] Carey, and another former HHS official all pointed to the administration’s heavier vetting procedures as a primary cause” of the increasing length of time children are having to stay in ORR custody).
- [9] Tal Kopan, *ICE Arrested Undocumented Adults Who Sought to Take in Immigrant Children*, SAN FRANCISCO CHRONICLE (Dec. 10, 2018), <https://www.sfchronicle.com/politics/article/ICE-arrested-undocumented-adults-who-sought-to-13455142.php>.
- [10] *Id.*
- [11] Statement of Kathryn A. Larin, Government Accountability Office, Testimony Before the Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs, Unaccompanied Children: DHS and HHS Have Taken Steps to Improve Transfers and Monitoring of Care, but Actions Still Needed 9 (2018), *available at* <https://www.hsgac.senate.gov/imo/media/doc/Larin%20Testimony.pdf>.
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- [13] Tal Kopan, *supra* note 7.
- [14] Jonathan Blitzer, *To Free Detained Children, Immigrant Families Are Forced to Risk Everything*, THE NEW YORKER (Oct. 16, 2018), <https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything> (“Officially, the H.H.S. claims that the average time is fifty-nine days, but according to one of the department’s own officials, who agreed to speak with me on the condition of anonymity, detained children now spend an average of seventy-four days in federal custody, more than double what it was at the start of 2016.”).
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- [19] *See* 8 U.S.C. § 1232(c).
- [20] *See* GOVERNMENT ACCOUNTABILITY OFFICE, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 66 (JULY 2015), *available at* <https://www.gao.gov/assets/680/671393.pdf>.
- [21] Caitlin Dickerson, *supra* note 14.
- [22] *See, e.g.*, Julie Linton *et al.*, Am. Academy of Pediatrics, *Detention of Immigrant Children*, 139 PEDIATRICS 4, 6-7 (Apr. 2017), *available at* <http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf>.
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