

June 7, 2018

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Via Federal e-Rulemaking Portal: <http://www.regulations.gov>

RE: DHS Notice of Modified System of Records, Docket Number DHS-2018-0013

Dear Chief Privacy Officer:

The National Immigrant Justice Center (NIJC) appreciates the opportunity to comment on the Notice of Modified System of Records published May 8, 2018 (the “Notice”) by the Department of Homeland Security (DHS, or the “Department”).

The National Immigrant Justice Center (NIJC) is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC has been unique in blending individual client advocacy with broad-based systemic change. NIJC is the largest legal service provider for unaccompanied immigrant children in Illinois, Indiana and Wisconsin, including children held in or released from the custody of the Office of Refugee Resettlement (ORR). More broadly, NIJC provides legal services to more than 10,000 individuals each year, including numerous caregivers of citizen and noncitizen children.

The release of unaccompanied children from Office of Refugee Resettlement (ORR) custody to the care of safe and capable sponsors, most often parents or close family members, plays a critical role in the ability of children to process and work through painful experiences, adapt to a new country and community, and coordinate with legal counsel to prepare their legal cases. As such, NIJC has a strong interest in the content and proposed use of the system currently titled “Department of Homeland Security (DHS)/U.S. Immigration and Customs Enforcement (ICE)–007 Alien Criminal Response Information Management (ACRIME)” (hereinafter, the “System”), which proposes new information collections from potential sponsors of unaccompanied children and other adults in the potential sponsors’ households.

NIJC appreciates the Department’s detailed description of proposed changes to the

referenced System of Records, which seeks to implement the Department’s recently signed Memorandum of Agreement (MOA) with the U.S. Department of Health and Human Services (HHS) regarding the sharing of information related to sponsors. The proposed changes, like the MOA, would advance a dramatic shift in DHS’ participation in the evaluation of potential sponsors of unaccompanied children, including the use of ORR’s family reunification process to identify individuals for immigration enforcement and deportation.

We are concerned about immigration screening and enforcement against individuals who might be deemed the safest and most capable caregivers for unaccompanied children. The proposed information collections will alter longstanding practice and frustrate the ability of the Office of Refugee Resettlement (ORR) to place children in the “least restrictive setting” in their best interests pursuant to the Homeland Security Act of 2002, the Trafficking Victims Protection Reauthorization of 2008 (TVPRA), and the *Flores* Settlement Agreement.

NIJC offers the following comments to ensure HHS’ continued ability to comply with its legal responsibility for identifying, vetting, and placing children with safe and capable caregivers, independent of DHS’ distinct responsibilities and priorities in enforcing U.S. immigration law.

A. The Notice’s new category of records covering potential sponsors and their adult household members will create a pronounced chilling effect deterring sponsorship of unaccompanied children for release from government detention.

Among its four outlined purposes, the modified System of Records proposes “[t]o screen individuals to verify or ascertain citizenship or immigration status, immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children who are in the care and custody of HHS and to identify and arrest those who may be subject to removal.”¹ The Notice clarifies that the proposed information collection covers “[i]ndividuals seeking approval from HHS to sponsor an unaccompanied alien child and/or other adult members of the potential sponsor’s household.”²

The proposed changes would effect a broad and troubling shift in the focus of the sponsor review process from child welfare and family reunification to immigration enforcement. In addition to disregarding the best interests of children, the use of this information to arrest and deport capable caregivers increases the vulnerability of children to trafficking and other harm.

In vetting potential sponsors for unaccompanied children, ORR requires interviews and background checks of potential sponsors, along with the completion of a family reunification application. Fingerprinting is also required for some sponsors, including non-parents and those seeking to sponsor children identified as victims of trafficking and abuse. As part of routine background checks, immigration status information may appear and be documented in ORR’s

¹ 83 Fed. Reg. 20846 (May 8, 2018).

² *Id.*

system, but is used for child welfare rather than enforcement purposes.³ Under current requirements, within 24 hours of a child’s release, ORR routinely provides DHS with demographic information and the child’s and sponsor’s names, address, and relationship, for use in connection with the child’s immigration proceedings. DHS is generally treated similarly to all other individuals and entities, and is required to submit a detailed, individualized request for all other information.⁴

The new MOA between ORR and DHS markedly expands the universe of information readily available to DHS about children in ORR care, their potential sponsors, and others living in the sponsors’ homes. In implementing this agreement, the modified System of Records proposes to collect and share with ORR and other government agencies the criminal and immigration history and status of potential sponsors as well as any adults residing in the potential sponsors’ homes.⁵ To accomplish this end, DHS will receive from ORR biographic and biometric information, names, addresses, and other documents.⁶ More than a mere technicality, this expansion will act as a powerful deterrent to individuals seeking to sponsor their children or relatives out of ORR custody.

In addition to foreclosing the reunification of children with safe and capable caregivers who may be undocumented, the proposed changes may deter individuals who are lawfully present, including U.S. citizens, from sponsoring unaccompanied children in order to avoid interacting with ICE or exposing others living with or near them to potential interaction or enforcement.⁷ A similar chilling effect emerged during the summer of 2017, following ICE’s enforcement actions against sponsors as part of the agency’s “Human Smuggling Disruption Initiative.” Despite lacking any involvement in smuggling, the fear of immigration or criminal enforcement, or mere interaction with DHS, caused some potential caregivers with legal status to forgo sponsoring children out of ORR custody.⁸

Widespread fear among adults of interacting with ORR’s sponsorship process poses significant consequences for the well-being of children in federal care. Absent the participation and trust of unaccompanied children and potential sponsors in this process, ORR will be unable to promptly identify safe and appropriate placements for unaccompanied children. As ORR seeks to locate alternate sponsors, children will remain confined in federal facilities at taxpayer

³ ORR, Sponsors and Placement: Release of Unaccompanied Alien Children to Sponsors in the U.S., <https://www.acf.hhs.gov/orr/about/ucs/sponsors>.

⁴ ORR, *Request for UAC Case File Information*, <https://www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information> (ast updated Dec. 8, 2017).

⁵ 83 Fed. Reg. at 20846 (noting among purposes of the system “[t]o screen individuals to verify or ascertain citizenship or immigration status and immigration history, and criminal history to inform determinations regarding sponsorship of unaccompanied alien children . . . and to identify and arrest those who may be subject to removal”). Categories of individuals covered by the proposed system include “[i]ndividuals seeking approval from HHS to sponsor an unaccompanied alien child, and/or other adult members of the potential sponsor’s household.” *Id.*

⁶ See Eli Hager, *Trump’s Quiet War on Migrant Kids: How the administration is turning child protection into law enforcement* (May 1, 2018), <https://www.themarshallproject.org/2018/05/01/trump-s-quiet-war-on-migrant-kids>.

⁷ See KIND, *Targeting Families* (Dec. 2017), https://supportkind.org/wp-content/uploads/2017/12/Targeting-Families_-December-2017_Final-v.2.pdf.

⁸ See *Id.* at 12-13.

expense, exacerbating the trauma and distress of survivors of violence and abuse in particular.⁹ Far from protecting children, as the MOA's information-sharing purports to intend, these outcomes will increase the risk that children, isolated and fatigued by prolonged detention, will be forced into a false choice between indefinite detention and a return to the same dangers from which they fled. This result would not only endanger children, but also may render hollow critical humanitarian protections enacted by Congress and run contrary to our country's obligations under international law.¹⁰

Alternatively, if parents or other trusted prospective caregivers are deported, ORR will be required to depend on the willingness of other, unfamiliar individuals to serve the role of sponsor. The placement of children with sponsors with whom they do not have a familial or personal relationship may, however, put children at greater risk of trafficking or other harm upon their release from ORR custody, and may otherwise negatively impact children's welfare.¹¹ We urge DHS to rescind the Notice as it relates to potential sponsors and other adults in the sponsors' households to ensure ORR's ability to identify and place children with the best and safest caregivers for them, pursuant to federal law, unimpeded by DHS' competing immigration enforcement priorities.

⁹ See, e.g., U.N. Convention on the Rights of the Child (September 2, 1990); General Comment 6 to the Convention pgh. 47, "Treatment of Unaccompanied and Separated Children Outside their Country of Origin" (CRC 2005) ("[States] should, in particular, take into account the fact that unaccompanied children have undergone separation from family members and have also, to varying degrees, experienced loss, trauma, disruption and violence. Many of such children, in particular, those who are refugees, have further experienced pervasive violence and the stress associated with a country afflicted by war. This may have created deep-rooted feelings of helplessness and undermined a child's trust in others. . . . The profound trauma experienced by many affected children calls for special sensitivity and attention in their care and rehabilitation."); Am. Academy of Pediatrics, *Detention of Immigrant Children*, Pediatrics (Apr. 2017), at 6-7, <http://pediatrics.aappublications.org/content/pediatrics/early/2017/03/09/peds.2017-0483.full.pdf> (discussing research finding "high rates of posttraumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems" among unaccompanied immigrant children who are detained and noting the vulnerability of children who have experienced trauma and violence to additional trauma and fear); see Am. Psychological Ass'n, *Disrupting Young Lives: How Detention and Deportation Affect US-born Children of Immigrants*, CFY News (Nov. 2016, <http://www.apa.org/pi/families/resources/newsletter/2016/11/detention-deportation.aspx> (noting that immigrant detention "is related to persistent negative mental health outcomes, including depression, PTSD and anxiety").

¹⁰ See 8 U.S.C. § 1158 (asylum); Article 33 (1) of the 1951 Convention Relating to the Status of Refugees, which states that:

No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Id. (While the U.S. is not a signatory to the 1951 Convention, it has acceded to the 1967 Protocol Relating to the Status of Refugees, which incorporates this obligation through Article I(1) of that agreement).

¹¹ See, e.g., FBI, *New Fraud Schemes Targeting Families of Unaccompanied Children* (July 19, 2014), <https://www.fbi.gov/contact-us/field-offices/sanantonio/news/press-releases/new-fraud-schemes-targeting-families-of-unaccompanied-children>.

B. The Notice frustrates the ability of the Office of Refugee Resettlement to place unaccompanied children in the “least restrictive setting” in their best interests consistent with federal law and settlement authority.

The Homeland Security Act of 2002 transferred most of the duties and responsibilities of the former Immigration and Naturalization Service to the Department of Homeland Security. Congress recognized, however, that assigning care and custody of the most vulnerable migrant children to an enforcement agency would not be “appropriate” and instead transferred these responsibilities to ORR, in light of its extensive and specialized experience working with refugee children.¹² Since that time, ORR has provided care for unaccompanied children through a network of contracted shelters and facilities nationwide.

Pursuant to the TVPRA, ORR is obligated to ensure that unaccompanied children are “promptly placed in the least restrictive setting that is in the best interest of the child.”¹³ ORR evaluates potential sponsors for their ability to provide for a child’s safety and well-being¹⁴ and to ensure the child’s appearance at immigration proceedings.¹⁵ Pursuant to the *Flores* Settlement Agreement, parents and legal guardians receive priority among potential sponsors, who may also include other immediate relatives, distant relatives, or unrelated individuals.¹⁶ Lawful immigration status is not a prerequisite for sponsorship, in recognition that children are better served with safe and capable caretakers in a home than by remaining in federal detention and that a potential caretaker’s immigration status is not relevant to his or her fitness to care appropriately for a child. Indeed, ORR has explained that while the agency has received information about a potential sponsor’s immigration status since 2005, it has been the agency’s policy to enable “the release of unaccompanied alien children (UAC) to undocumented sponsors, in appropriate circumstances and subject to certain safeguards.”¹⁷

¹² See, e.g., 148 Cong. Rec. S8180 (2002) (letter from Sen. Lieberman & Sen. Thompson):

Currently, INS has responsibility for the care and custody of these children. It would not be appropriate to transfer this responsibility to Department of Homeland Security. This legislation transfers responsibility for the care and custody of unaccompanied alien children who are in Federal custody . . . to the Office of Refugee Resettlement . . . ORR has decades of experience working with foreign-born children, and ORR administers a specialized resettlement program for unaccompanied refugee children.

Id.

¹³ 8 U.S.C. § 1232(c)(2)(A).

¹⁴ 8 U.S.C. § 1232(c)(3)(A). “[A]n unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child’s physical and mental well-being. Such determination shall, at a minimum, include verification of the custodian’s identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.”

¹⁵ 6 U.S.C. § 279(b)(2)(A).

¹⁶ *Flores Settlement Agreement* ¶ 14; 8 U.S.C. § 1232(c); ORR, Sponsors and Placement: Release of Unaccompanied Alien Children to Sponsors in the U.S., <https://www.acf.hhs.gov/orr/about/ucs/sponsors>; U.S. Dep’t of Health and Human Services, Office of Inspector General, HHS’s Office of Refugee Resettlement Improved Coordination and Outreach to Promote the Safety and Well-Being of Unaccompanied Alien Children (July 2017) (“ORR releases most children to their parents or an immediate relative.”).

¹⁷ ORR, Sponsors and Placement: Release of Unaccompanied Alien Children to Sponsors in the U.S.,

The proposed use of immigration status information from the sponsorship process to identify targets for immigration enforcement will likely prevent many children from reunifying with the best and safest caregivers for them, either as a result of their relatives' arrest or deportation, or more general fear of interaction with or potential mistreatment by ICE.¹⁸

Enforcement against potential sponsors and others living with them poses significant and enduring psychological and emotional trauma, and mental health consequences for children, as documented in a December 2017 complaint to DHS' Office of Inspector General and Office of Civil Rights and Civil Liberties regarding the agency's targeted enforcement actions against sponsors last year.¹⁹ Indeed, the use of information provided for sponsorship purposes for immigration enforcement increases the likelihood that children will interpret their own search for protection as the cause of their sponsor's interaction with ICE, or potential detention or deportation. Compounding this trauma, children likely will be detained for prolonged periods of time if potential sponsors decline to come forward or are detained or deported. In addition to imposing significant costs on ORR,²⁰ prolonged detention and the unavailability of familial sponsors increase the likelihood that children will be placed with unrelated or unfamiliar caregivers, at increased risk of trafficking and other harm. This result, far from being in the best interests of children, is the very opposite of that intended by both *Flores* and the TVPRA.²¹

While criminal information available through ORR's existing background checks may be useful in evaluating a sponsor's ability to offer a safe home, an individual's immigration history and status offers little such benefit. The unique bonds and support shared by parents and their

<https://www.acf.hhs.gov/orr/about/ucs/sponsors>.

¹⁸ See, e.g., Janell Ross, Aaron C. Davis & Joel Achenbach, *Immigrant community on high alert, fearing Trump's 'deportation force,'* Wash. Post., Feb. 11, 2017 ("Fear and panic have gripped America's immigrant community as reports circulate that federal agents have become newly aggressive under President Trump, who campaigned for office with a vow to create a 'deportation force.'"); Kathleen M. Roche, et. al, *Impacts of Immigration Actions and News and the Psychological Distress of U.S. Latino Parents Raising Adolescents*, J. of Adolescent Health (2018) at p. 5, http://www.jahonline.org/pb/assets/raw/Health%20Advance/journals/jah/jah_10367.pdf ("Evidence for adverse consequences of immigration actions and news across residency statuses is consistent with research indicating that immigration policy can be equally harmful to documented and undocumented Latinos.").

¹⁹ See, e.g., Nat'l Immigrant Justice Center, et al., *Complaint to DHS Acting Inspector General and DHS Office of Civil Rights and Civil Liberties Re: ICE and CBP Coercive Enforcement Actions against Sponsors of Unaccompanied Children Conducted in Violation of Family Unity, Protection, and Due Process Rights*, at 3 (Dec. 6, 2017), http://www.immigrantjustice.org/sites/default/files/content-type/press-release/documents/201712/Sponsor%20Enforcement-OIG_CRCL_Complaint_Cover_Letter-FINAL_PUBLIC.pdf; Wendy Cervantes and Christina Walker, Center for Law and Social Policy (CLASP), *Five Reasons Trump's Immigration Orders Harm Children*, Apr. 2017; Leila Schochet, Center for American Progress, *Trump's Immigration Policies Are Harming American Children*, Jul. 31, 2017.

²⁰ See Government Accountability Office, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody*, at 66 (July 2015), available at <https://www.gao.gov/assets/680/671393.pdf> (estimating the average daily cost per bed in a basic shelter at \$248 for fiscal year 2014).

²¹ See Cong. Record (House), William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Dec. 10, 2008, at H10902, Statement of Rep. Smith (NJ) ("By protecting the victims and not sending them back to their home country where they are often exploited in a vicious cycle of exploitation, we say to the victims we will make every effort to make you safe and secure."); *id.* at 10903, Statement of Rep. Loretta Sanchez (CA) (The TVPRA "provides additional protections for trafficking survivors who are threatened by trafficking perpetrators, and for children who are at risk of being repatriated into the hands of traffickers or abusers.").

children, and the benefits of family reunification, exist *regardless* of one's immigration status. This recognition is reflected in child welfare practice throughout the country and informs Immigration and Customs Enforcement's (ICE) own Parental Interests Directive on facilitating custody and visitation by detained parents.²² The proposed use of sponsor information for enforcement would effectively disrupt family reunification in the absence of evidence indicating any correlation between a proposed sponsor's immigration status and danger to a child. Determinations about the most appropriate sponsors for vulnerable children should be based on a child welfare professional's individualized assessment of a child's unique needs and best interests, *not* on DHS' immigration enforcement priorities.

C. Enforcement against sponsors and other adults in the potential sponsors' households will frustrate access to due process for unaccompanied children.

The proposed use of ORR's family reunification process for enforcement also creates significant barriers for the legal cases of unaccompanied children. Given the pervasive fear caused by targeted enforcement, potential sponsors may hesitate to interact with children in ORR custody. In addition to erecting hurdles to routine communication, enforcement and its related chilling effect will deprive children of access to information and documentation that may be necessary to prove their legal cases.

Parents and other close family members frequently possess contextual information and evidence that is essential to substantiate children's asylum cases but that may be unavailable to children, owing to their tender age or their parents' efforts to shield them from the dangers facing their families.²³ The detention and deportation of proposed caregivers will make it more difficult for children to obtain critical information and documents to prove their cases, due to difficulties in communicating with parents who are detained or residing in remote areas in foreign countries.

Adding to these challenges, enforcement against caregivers will require that children navigate their legal cases while in detention awaiting others who might step forward to sponsor them out of ORR custody. In addition to frustrating access to attorneys and social services, detention imposes significant psychological and emotional burdens on children who have endured past trauma and who are seeking humanitarian relief.²⁴ With uncertainty about the whereabouts of their loved ones and when they will be released from detention, children will be faced with the false choice of remaining confined indefinitely or returning to the dangers from which they fled. A process designed to reunite children with caregivers while they await immigration proceedings should never be used to undermine children's very participation in

²² See, e.g., ICE, Policy 11064.2 Detention and Removal of Alien Parents and Legal Guardians (Aug. 29, 2017), <https://www.ice.gov/doclib/detention-reform/pdf/directiveDetainedParents.pdf>, at 3 ("Where practicable the [Field Office Director] must arrange for a detained alien parent or legal guardian's in-person appearance at a family court or child welfare proceeding when the detained alien parent or legal guardian's presence is required in order for him or her to maintain or regain custody of his or her minor child(ren)...").

²³ See, e.g. KIND, *Betraying Family Values: How Immigration Policy at the United States Border is Separating Families* (Jan. 2017), https://supportkind.org/wp-content/uploads/2017/04/BetrayingFamilyValues_April-2017.pdf at 13-14 (discussing the due process implications of separating family members).

²⁴ See *supra* note 9.

these proceedings, which may determine their safety and their futures.

D. The proposal’s vague reference to the use of records “for other purposes consistent with [DHS’s] statutory authorities” fails to provide sponsors with adequate notice to enable their meaningful consent to the collection of personal and biometric information.²⁵

The Notice provides an expansive list of routine uses and categories of users for information contained in the modified System of Records, and states generally that records may be used “for other purposes consistent with DHS’ statutory authorities.”²⁶ The proposed records would include not only personally identifying information such as names and addresses, but also biometrics for potential sponsors and other adults living in a potential sponsors’ homes. The agency’s vague reference to additional purposes for using this information fails to provide sponsors with adequate notice of how and for what means their personal information will be collected and disseminated. In the absence of such clarity, sponsors will be unable to provide meaningful consent to the collection of their information by DHS directly or by ORR, which pursuant to the new MOA will routinely share information with DHS.

E. The proposal compromises the welfare of unaccompanied immigrant children in order to pursue their potential sponsors and family members for civil immigration enforcement.

Although the Notice claims that DHS seeks the biographical and biometric information of potential sponsors and their adult household members to “inform determinations regarding sponsorship of unaccompanied alien children who are in the care and custody of HHS”, the Notice fails to demonstrate that the proposed immigration and criminal background checks by DHS safeguard the best interests of children in HHS custody. This silence is particularly notable in the face of the other stated purpose for collecting potential sponsor information: “to identify and arrest those who may be subject to removal”. No information or analysis is proffered of the likely effects, beneficial or deleterious, on the unaccompanied children.

Elsewhere in the public record, DHS claims that this new system of records is meant to protect children.²⁷ However, as in this proposal, these claims lack any detailed or evidence-based justification for using information obtained from unaccompanied children to take civil immigration enforcement action against the very adults with whom these children hoped to find safety. When considered in the context of DHS’s poor track record of safeguarding the safety and rights of children²⁸ and coupled with DHS’s stated purpose of using unaccompanied children

²⁵ 83 Fed. Reg. at 20845.

²⁶ *Id.*

²⁷ *See, e.g.*, Nick Miroff, WASH. POST, *Trump’s ‘zero tolerance’ at the border is causing child shelters to fill up fast*, May 29, 2018, at https://www.washingtonpost.com/world/national-security/trumps-zero-tolerance-at-the-border-is-causing-child-shelters-to-fill-up-fast/2018/05/29/7aab0ae4-636b-11e8-a69c-b944de66d9e7_story.html?utm_term=.bfc26eccc3ea.

²⁸ *See, e.g.*, Government Accountability Office, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody*, July 14, 2015, at <https://www.gao.gov/products/GAO-15-521>; Am. Academy of Pediatrics, *PEDIATRICS, Detention of Immigrant Children* (Apr. 2017), at

as conduits for civil immigration enforcement actions against their families, circumstances suggest that DHS is using lip service to child welfare concerns as a shield to obscure practices that disregard children's wellbeing.

NIJC is deeply concerned by the proposed use of ORR's process for reunifying unaccompanied children with family members to identify and arrest potential sponsors and other adults living in the potential sponsors' homes. Such enforcement actions—and fear of them—would have far-reaching emotional and psychological consequences for children and frustrate the ability of ORR to identify and promptly place children with the best and safest caregivers. This result would run contrary to both *Flores* and the TVPRA, and negatively impact children. We urge DHS to rescind the Notice as it relates to sponsors and other adults in the sponsors' home to ensure the best interests of children remain the overarching and unimpeded priority of ORR's sponsorship review process.

Sincerely,

/s/

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