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 sponsor (usually a family member), as well as anyone else living with the sponsor. While certain exceptions to this policy have been subsequently announced by ORR, which we understand led to the release of some children and are steps in the right direction, the MOA remains largely in place and continues to represent a dramatic change from past practice. The amended MOA continues to result 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.

In December 2018, ORR announced that it would limit the household members to which the information-sharing policy applies (though the policy would continue to apply to all sponsors). And, in March 2019, ORR announced that it would *temporarily* limit the MOA's application to certain sponsor designated as "Category 1," defined to include parents and legal guardians. These modifications currently limit the MOA's application to parents and legal guardians and 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]. DHS has not made any formal announcement regarding ORR's amended understanding of the MOA.

ORR has also 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.

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FY 19 LIMITATION ON CERTAIN MOA-RELATED ENFORCEMENT

The Fiscal Year (FY) 2019 appropriations agreement for DHS included language limiting the ability of DHS to utilize information obtained via the MOA for enforcement actions against certain sponsors and household members [8]. While these limitations are a positive development, they are temporal and would expire at the end of FY 2019. Service providers also remain concerned that without a full rescission of the agreement, sponsors will continue to be fearful to come forward during the sponsorship process. Additionally, there are still several exceptions to the limitation - allowing DHS to engage in enforcement actions against those with certain pending criminal charges. Ultimately, questions remain about whether or how, in practice, ICE is abiding by these limitations and ORR is communicating them to potential sponsors and household members. Because the federal rules of evidence and the exclusionary rule do not fully apply in immigration court, it will be difficult for individuals to vindicate their rights if the limitation is violated.

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 [9]. In addition, a national survey of service providers who work with unaccompanied children and their families, conducted at the end of 2018, found that 75% of survey participants observed fewer potential sponsors – including parents, legal guardians, and close relatives, such as siblings – coming forward or completing the sponsorship vetting process out of fear that their information would be sent to CBP or ICE for immigration enforcement purposes [10]. And, ICE stated it has utilized information obtained via the MOA for enforcement actions against sponsors and their household members. Between July and November 2018, ICE arrested 170 individuals as a result of the information sharing [11]. Of these individuals, 64 percent were arrested only on immigration-related violations [12].

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 [13], it had dropped to 41% in fiscal year 2018 as of April [14]. 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 the 2018 average of 60 days [15]. 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. Not only does this prevent ORR from adequately vetting the actual placement, but, 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.

A Service Provider's Perspective

"[The] arrest and deportation of sponsors and their adult household members puts children at risk for trafficking [and] unsafe placements. … [F]amilies are forced to find alternate sponsors who are not their first choice or when previously safe and stable placements are disrupted." *(Survey participant who works with 20 to 40 unaccompanied children per month; survey administered by WRC and NIJC)* [16].

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 the average in 2017 despite the number of unaccompanied children arriving on the border holding relatively steady over that same time period [17]. 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 [18]. While the soft-sided tent influx facility in Tornillo, Texas has closed [19], ORR has announced plans to expand its other influx facility in Homestead, Florida, which will reportedly have capacity for 3,200 children [20].

Heightened Possibility of Being Transferred to an Adult ICE Detention Center. The MOA may also lead to children, with viable sponsors who are afraid to come forward, aging-out of ORR custody (i.e., turning 18) and being placed into ICE adult detention centers [21]. And, while DHS is required by law to consider placing such youth in the least restrictive setting available (such as reunification with a sponsor, use of alternatives to detention, or placement in a group home) [22] this does not appear to be occurring in many cases. For example, two-thirds of 1,531 age-out cases resulted in the youth's transfer to adult ICE detention from April 2016 to February 2018 [23]. With the MOA in place, the number of children who will unnecessarily be placed into an adult ICE detention center is likely to increase even further.

Increased Cost to the U.S. Taxpayer. Children remaining in custody for longer periods is not only contrary to the TVPRA's recognition that it is in a child's best interests to be with a family member [24], 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 [25], 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 $775 per night or more [26].

Return of Children to Danger. 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 [27]. 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 [28]. 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, was referred to ORR custody in 2018. Junior's reunification with his father, Mario,* was delayed by 84 days due to the MOA. Mario and Junior have a strong relationship and, as his biological father, Mario was clearly best suited to care for his son – particularly as Mario understands Junior's unique medical needs, including the fact that his son was born with HIV. Unfortunately, timely reunification could not occur because Mario's partner is undocumented and was afraid to have her fingerprints collected and shared with ICE under the MOA. Even under ORR's recent policy changes, Mario's partner was required to be fingerprinted and have her information shared with ICE. And, while Junior was eventually able to be released to his father due to a case-specific waiver of the MOA requirements, he had to stay in ORR shelter care for a total of 130 days – a heartbreaking situation for him and unnecessary cost for HHS and the U.S. taxpayer. The significant delays with Junior's reunification was a direct result of the fear the MOA policy has created. *(*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.
- Consider including another restriction in the FY 2020 DHS appropriations bill limiting the ability of ICE to use appropriated funds to initiate enforcement actions against potential or current sponsors or members of their households based on information obtained via the MOA, but without any exclusions.
- 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.

FOR ADDITIONAL INFORMATION OR QUESTIONS PLEASE CONTACT:

• Melissa Hastings, Policy Advisor, U.S. Conference of Catholic Bishops / Migration and Refugee Services – 202.541.3207, mhastings@usccb.org

• Leah Chavla, Policy Advisor, Women's Refugee Commission – 202.750.8598, leahc@wrcommission.org

• Heidi Altman, Director of Policy, National Immigrant Justice Center – 202.879.4311, haltman@heartlandalliance.org

• Jennifer Nagda, Policy Director, Young Center for Immigrant Children's Rights – 773.844.2368, jnagda@theyoungcenter.org

• Hillary Kipnis, Migrant Children and Families Advocacy Officer, Lutheran Immigration and Refugee Services – 202.381.1036, hkipnis@lirs.org

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