



THE ORR AND DHS INFORMATION-SHARING AGREEMENT AND ITS CONSEQUENCES

The Office of Refugee Resettlement (ORR), within the Department of Health and Human Services (HHS), bears responsibility for the care and custody of immigrant children who arrive in the United States unaccompanied until they are reunited 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 sponsors designated as "Category 1," defined to include parents and legal guardians. Further, in June 2019, ORR issued a directive noting that certain sponsors designated as "Category 2A" (grandparents, adult siblings, and other close relatives who acted as primary caregivers) would also not be subject to the policy. These modifications currently limit the MOA's application to parents and legal guardians, grandparents, adult siblings, and other qualifying close relatives, as well as 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 [4].

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 [5].

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](#) [6], by turning safe placement screening into a mechanism for immigration enforcement.

FY 19 LIMITATION ON CERTAIN MOA-RELATED ENFORCEMENT

The Fiscal Year (FY) 2019 appropriations agreement for DHS, which was signed into law on February 15, 2019, included language limiting the ability of DHS to utilize information obtained via the MOA for enforcement actions against *certain* sponsors and household members [7]. While these limitations are a positive development, they are temporal and will 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.

In a letter to the plaintiffs in *JECM v. Hayes* dated August 30, 2019, ICE stated that it “previously used the information [received under the MOA] to generate leads to field offices on removable individuals” but that that practice “was discontinued in April of 2019” [8]. This represents an unexplained gap of at least a month and a half between when the enforcement restrictions in the appropriations bill went into effect and when ICE discontinued use of the information. Later in the same letter, ICE clarified that “...since April 2019, no such enforcement action against an individual is being taken that is *inconsistent* with Section 224 of the Consolidated Appropriations Act” [9] (emphasis added). In Congressional testimony, however, ICE Acting Director Matthew Albence stated that “...we [at ICE] haven’t made any arrests [of sponsors] since the appropriations bill that was passed preventing us from utilizing that information” [10].

Given that the appropriations bill does not bar all enforcement based on information shared under the MOA, questions remain over whether ICE is conducting any enforcement actions that may be consistent with the terms of the appropriations text – as the letter leaves open – and, if so, whether ICE is appropriately recording these enforcement activities and their corresponding costs.

CONSEQUENCES OF THE MOA

Reporting suggests that many parents and close caregivers of unaccompanied children—those best placed to provide care—are afraid to come forward to serve as sponsors out of fear of immigration enforcement pursuant to the MOA [11]. 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 [12]. And, in recent Congressional testimony, ICE Acting Director Albence stated that prior to the FY 19 appropriations bill, ICE arrested approximately 330 sponsors, potential sponsors, or members of their household based on the information sharing [13].

The number of sponsors who are unable or afraid to step forward has led to some unaccompanied children remaining in ORR custody longer – 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 [14], it had dropped to [41% in fiscal year 2018 as of April](#) [15]. Reporting indicates that the MOA is further contributing to this slowed rate of release of children to parents and has contributed to an increase in the length of children’s stay in ORR custody from approximately 35 days in 2016 [16] to 50 days in September 2019 [17]. A study conducted by the HHS Office of Inspector General (OIG) confirms these reports, noting that the implementation of the MOA resulted in an increase in the length of time children stayed in ORR custody and that it became more difficult for facilities to identify sponsors willing to accept children. The HHS OIG cited a “marked[.]” increase in length of stay after the MOA was implemented, reaching a high of 93 days for children who were released from custody in November 2018 [18]. Additionally, 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.

[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) [19].

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. Increased lengths of stay led to a ballooning in the number of children in ORR custody, propelling it to historic levels. In response, and in order to accommodate the high number of children in

A Service Provider’s Perspective

“[The] arrest and deportation of sponsors and their adult household members puts children at risk for trafficking

care, the government resorted to the use of “emergency” or “influx” facilities to hold thousands of children with limited access to educational, mental health, or legal services [20]. While, as of September 2019, no influx facility is currently in use, certain influx facilities, including the one in Homestead, Florida (with capacity for up to 1,200 children), remain in ‘warm’ status [21].

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 [22]. 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) [23] 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 [24]. 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 [TVPRAs recognition](#) that it is in a child’s best interests to be with a family member [25], 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 [26], 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 [27].

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 [28]. 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 [29]. 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.
- Conduct oversight on: 1) DHS’s delay in adhering to the MOA-related enforcement restrictions in the FY 19 appropriations bill; 2) whether ICE has conducted any enforcement actions since April 2019 that may be consistent with the terms of the Consolidated Appropriations Act of 2019; and 3) the scope and frequency of the information that ORR shares with DHS (ICE and CBP) now (after implementing the limitations noted above) as compared to prior to the implementation of the MOA.
- 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>.
- [3] 2.5.1 *Criteria for Background Checks*, OFFICE OF REFUGEE RESETTLEMENT (Dec. 18, 2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.5>; ORR Division of Policy and Procedures, *ORR Operational Directive to Care Providers on MOA* (March 23, 2019) (on file with authors).
- [4] In response to a question on the particular information exchanged under the MOA, since its execution to present, an August 2019 letter from the ICE Office of the Principal Legal Advisor to the litigants in *JECM v. Hayes* states that in addition to biometric data and other biographic information, “[a]ddress information is periodically received in a separate Excel document, recently averaging once per month.” The letter neither specifies which sponsors’ addresses are shared nor the purpose of the monthly spreadsheet. Letter from Shiraz Panthaky, Chief, Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement, to Rebecca Wolozin, Legal Aid Justice Center (Aug. 30, 2019) (regarding Touhy Request/Testimony Subpoena to ICE related to *J.E.C.M. et al v. Jonathan Hayes et al.*, 1:18-cv-903 (E.D. Va.)).
- [5] 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>.
- [6] See, e.g., ADMINISTRATION FOR CHILDREN AND FAMILIES - CHILD WELFARE INFORMATION GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2016), https://www.childwelfare.gov/pub-PDFs/best_interest.pdf.
- [7] H.J.Res.31, Consolidated Appropriations Act 2019 § 224 (Feb. 25, 2019), available at <https://www.congress.gov/116/bills/hjres31/BILLS-116hjres31enr.pdf>.
- [8] Letter from Shiraz Panthaky, *supra* note 4, at 5.
- [9] *Id.*
- [10] Testimony of Matthew T. Albence, Acting Director, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, before the U.S. House of Representatives, Committee on Appropriations, Subcommittee on Homeland Security, “Immigration and Customs Enforcement Oversight Hearing” (July 25, 2019), <https://www.c-span.org/video/?463002-1/immigration-customs-enforcement-oversight-hearing>.
- [11] 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).
- [12] National Immigrant Justice Center and Women’s Refugee Commission, *Children as Bait: Impacts of the ORR-DHS Information-Sharing Agreement* (MAR. 26, 2019), available at <https://wrc.ms/bait>.
- [13] Testimony of Matthew T. Albence, *supra* note 10.
- [14] 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>.
- [15] Statement of Steven Wagner, Admin. for Children and Families, U.S. Dep’t of Health & Human Services, Before the Permanent Subcommittee on Investigations, Senate Committee on Homeland Security and Governmental Affairs, 3 (2018), available at <https://www.hsgac.senate.gov/imo/media/doc/Wagner%20Testimony.pdf>.
- [16] *Fact and Data*, Office of Refugee Resettlement (Feb. 13, 2019), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.
- [17] See Testimony of Jonathan Hayes, Director of the Office of Refugee Resettlement, Department of Health and Human Services, before the House Committee on Appropriations, Subcommittee on the Departments of Labor, Health and Human Services, Education, and Related Agencies, “Oversight Hearing: Mental Health Needs of Children in HHS custody” (Sept. 18, 2019), <https://appropriations.house.gov/events/hearings/oversight-hearing-mental-health-needs-of-children-in-hhs-custody>.
- [18] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF THE INSPECTOR GENERAL, CARE PROVIDER FACILITIES DESCRIBED CHALLENGES OF ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY, OEI-09-18-00431, 13 (SEPT. 2019).
- [19] National Immigrant Justice Center and Women’s Refugee Commission, *supra* note 12 at 1.
- [20] Caitlin Dickerson, *The Government Is Moving Migrant Children to a Texas Tent City. Here’s What’s Behind It.*, THE NEW YORK TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/migrant-children-tent-city-camp-texas.html>.
- [21] See Testimony of Jonathan Hayes, *supra* note 17; see also U.S. Dep’t of Health and Human Services, *Unaccompanied Alien Children sheltered at Homestead Job Corps Site, Homestead, Florida* (Aug. 6, 2019), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/homestead-job-corps-site-fact-sheet/index.html>; U.S. Dep’t of Health and Human Services, *Carrizo Springs Temporary Influx Facility* (July 30, 2019), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/carrizo-springs-temporary-influx-facility-update.html>; Asher Stockler, *Oklahoma Army Base Fort Sill Will Not House Migrant Children, For Now*, Newsweek (July 27, 2019), <https://www.newsweek.com/hhs-orr-immigration-fort-sill-migrant-children-1451438>.
- [22] National Immigrant Justice Center and Women’s Refugee Commission, *supra* note 12 at 7.
- [23] 8 U.S.C. § 1232(c)(2)(B).
- [24] John Burnett, *Migrant Youth Go From A Children’s Shelter To Adult Detention On Their 18th Birthday*, NPR (Feb. 22, 2019), <https://www.npr.org/2019/02/22/696834560/migrant-youth-go-from-a-childrens-shelter-to-adult-detention-on-their-18th-birth>.
- [25] See 8 U.S.C. § 1232(c).
- [26] 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>.
- [27] John Burnett, *supra* note 24.
- [28] 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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