UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROCHELLE GARZA, as guardian ad litem to unaccompanied minor J.D., on behalf of J.D. and others similarly situated, Plaintiff, v. ERIC D. HARGAN, *et al*., Defendants.	)	Civil Action No. 17-cv-02122 (TSC)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OF THE COURT'S OCTOBER 30, 2017 ORDER

Plaintiff's Opposition to Defendants' Motion for Reconsideration is without merit for three independent reasons. First, Plaintiff misstates Defendants' consent policy. Second, Plaintiff Jane Doe's right to non-disclosure of her abortion is limited by Defendants' important and legitimate interest in properly executing its statutory custodial duties. Ms. Doe disclosed her desire to obtain an abortion (and the obtaining of the abortion) to the Office of Refugee Resettlement ("ORR"), which operates *in loco parentis* in this instance on Ms. Doe's behalf. Third, Plaintiff's contentions about Defendants' motivations are unsupported and incorrect.

Defendants respectfully resubmit their request for the Court to either decline to extend paragraph 3 of the Amended TRO, or amend it to only restrain Defendants from "revealing Ms. Doe's abortion decision, in connection with her name or other information that would reveal her identity, except insofar as necessary to perform their custodial obligations such as providing medical care, emergency care, or identifying and evaluating potential sponsors."

ARGUMENT

I. ORR's consent policy permits the disclosure of important personal facts about Ms. Doe to medical providers and sponsors when doing so is in her best interests.

Contrary to Plaintiff's assertion, Section 8.101 of ORR's Policies and Procedures, by its very terms, was created to protect minors from outside entities seeking their personal records and information: It is addressed solely to "[o]utside entities, attorneys, or other individuals . . . seeking UC case file information[.]" *See https://www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information*. It makes no mention of how ORR uses this information internally, and in no way prevents ORR from using and disclosing a minor's information as ORR carries out its custodial duties on the minor's behalf, including informing the minor's medical care providers and potential sponsors regarding important and relevant personal and medical facts. Indeed, it would be exceedingly difficult for ORR to carry out its custodial duties without such flexibility.

Plaintiff misstates ORR's consent policy for minors, arguing that "ORR policies regarding the disclosure of similarly sensitive information about minors who are over the age of 14 require that the minor's consent be obtained prior to any disclosure." Plaintiff's Opposition at 4. That is not what the policy says. Nor would it make sense to re-write the policy in that way, as imposing a new consent requirement would complicate real-time communication and frustrate ORR's fulfillment of its custodial responsibilities. The Court should reject Plaintiff's misguided attempt to re-write the policy.

II. ORR can disclose important personal facts about Ms. Doe to medical providers and sponsors, particularly when she has already disclosed that information to ORR.

Ms. Doe's right to non-disclosure of her abortion is not unrestricted. The Supreme Court has been clear in stating that privacy interests do not automatically outweigh the reasonable exercise of the government's legitimate authorities. *See, e.g., Whalen v. Roe,* 429 U.S. 589, 600-

03 (1977). Importantly, Ms. Doe is a minor who is away from her birth parents, and ORR appears *in loco parentis* in this instance for Ms. Doe, as Congress had directed ORR to take care and custody of unaccompanied minors like Ms. Doe, until they can be released to a sponsor. *See* 8 U.S.C. § 1232(b); *see also* 6 U.S.C. § 279(b)(1)(B) (ORR must ensure that "the interests of the child are considered in decisions and actions relating to the care" of an unaccompanied minor); *cf. Parham v. J.R.*, 442 U.S. 584, 619 (1979) ("[T]he state agency having custody and control of the child in *loco parentis* has a duty to consider the best interests of the child . . . ."). The Supreme Court has long recognized "that when a parent or another person has assumed 'primary responsibility' for a minor's well-being, the State may properly enact 'laws designed to aid discharge of that responsibility.'" *Hodgson v. Minn.*, 497 U.S. 417, 448 (1990) (*quoting Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). This is because "[t]he State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely." *Id.* at 444.

Thus, ORR, acting *in loco parentis* for Ms. Doe, has the authority to disclose information to medical providers and sponsors when ORR believes that it is in Ms. Doe's best interests. The fact that Ms. Doe obtained a judicial bypass of the parental notification requirement for an abortion is entirely irrelevant to the execution of ORR's duties. Plaintiff's Opposition at 1, 5. The relevant law is the statutory role created by Congress for ORR. And the relevant fact here is that Ms. Doe disclosed her desire to obtain an abortion to ORR when she requested that ORR help facilitate her abortion. Thus, her limited privacy interest in non-disclosure of the abortion obtained from the judicial bypass has been waived. When a minor who obtains a judicial bypass chooses to disclose to her parents or legal guardians the fact that she wants or obtains and abortion, there is no doubt that the parents or legal guardians may, thereafter, make decisions

based on that disclosure that are in her best interests, including disclosing her abortion decision to medical providers and future caretakers.

Indeed, a content-based prior restraint of the nature imposed by the extended TRO would likely constitute an impermissible abridgement of First Amendment rights, were it imposed on a parent. *See, e.g., Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 101-02 (1979) (disclosure of minor's names lawfully obtained); *Oklahoma Pub. Co. v. District Court*, 430 U.S. 308, 310 (1977) (injunction against media disclosure of information lawfully obtained); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976). Just as the parent of such a minor would be permitted to act based on information lawfully obtained, so, too, may ORR. The government, while acting in the place of the parent or as the legal guardian of an unaccompanied minor, does not transgress the rights of a minor in its care by carrying out its important, legitimate custodial responsibilities in a similar manner based on information voluntarily conveyed.

III. Plaintiff's contentions about Defendants' motivations are unfounded.

Plaintiff contends that ORR wishes to reveal her abortion decision "over her objection and without her consent—to third parties, including her medical providers and prospective sponsors." Plaintiff's Opposition at 1. Plaintiff is wrong. Defendants did not reveal Ms. Doe's abortion decision to random third parties simply to violate her privacy. Nor do Defendants have any desire to do so.

Improper disclosures may not be presumed. *Cf. Whalen*, 429 U.S. at 600-01. Defendants have proffered legitimate custodial reasons for potentially disclosing that information in *limited* circumstances: primarily to medical providers and prospective sponsors. Neither medical providers nor sponsors (who will take up the issue of future medical care) can be reasonably expected to carry out their functions in absence of the disclosed information. These reasons, as

discussed before, include placing her on the appropriate medical regimen; informing medical personnel in the case of an emergency[1]; and identifying a safe sponsor. Jonathan White ("White Decl.") ¶¶ 5-10. These constitute significant ORR custodial responsibilities that indefinite continuation of paragraph 3 of the Amended TRO makes even more difficult to carry out.

[1] Ms. Doe's attempt at Plaintiff's Opposition at 6, fn.5 to amend paragraph 3 of the Amended TRO to require that disclosure of the abortion to be contingent on the emergency care provider signing a waiver fails to appreciate the impracticality of making these assessments during an actual medical emergency, when Ms. Doe, herself, may be incapacitated and where treatment should not rest on the ability to obtain a timely waiver.

CONCLUSION

Defendants again respectfully request that the Court reconsider its October 30, 2017 Order, and deny extension of paragraph 3 the Amended TRO. In the alternative, the Court should not enter an extended provision that goes any further than restraining Defendants from "revealing Ms. Doe's abortion decision, in connection with her name or other information that would reveal her identity, except insofar as necessary to perform their custodial obligations such as providing medical care, emergency care, or identifying and evaluating potential sponsors."

Dated: November 27, 2017

Respectfully submitted,

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