

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION,

Plaintiff,

v.

OFFICE OF REFUGEE RESETTLEMENT,
ADMINISTRATION FOR CHILDREN AND
FAMILIES, and U.S. DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Defendants.

Case No. 20-5573

COMPLAINT

INTRODUCTION

1. The New York Civil Liberties Union brings this action under the Freedom of Information Act to vindicate the public’s right to know about a recent federal policy change that strips unaccompanied immigrant children in federal custody of their ability to meet with attorneys—and, by extension, to pursue immigration relief and protect themselves from abuse while the government detains them.

2. The Office of Refugee Resettlement (“ORR”) is the federal agency responsible for caring for immigrant children who enter the U.S. unaccompanied, often after fleeing violence and persecution in their home countries. Federal law requires ORR to shelter and care for children while their immigration cases proceed through the courts, until they can be placed safely with parents or other sponsors. To do so, ORR contracts with state-licensed “care providers” or “shelters,” ranging from group homes to long-term foster care providers, which house and care for children in ORR custody. ORR also contracts with a number of “legal service providers” to provide “know-your-rights” trainings, and in many areas legal representation, to children in its

custody. Access to counsel is crucial for this extremely vulnerable population to pursue available avenues for immigration relief, obtain release to available sponsors, and protect against potential mistreatment or abuse while in ORR custody.

3. Historically, many ORR shelters had a practice of transporting children in their custody to the offices of legal service providers for legal visits, during which children were permitted to meet in private with their attorneys. On or about February 25, 2020, however, ORR issued guidance announcing a policy change regarding the terms under which children in its custody are permitted to meet with their attorneys. Among other provisions, the guidance prohibits ORR shelters from transporting children to the offices of their attorneys for legal visits, and instead requires the children's attorneys to travel to the shelters to meet with their clients. It also requires that children meet with their attorneys within the line of sight and hearing range of a shelter official.

4. This policy change threatens to substantially hamper the ability of children in ORR custody to meet with their attorneys and vindicate their legal rights. By no longer allowing shelters to transport children for legal visits, the guidance imposes substantial new logistical burdens on children and their attorneys, making it more difficult and costly to arrange legal visits. By requiring legal visits to take place in the presence of shelter officials, ORR compromises the ability of children to develop trusting relationships with their counsel, share often traumatic details relating to their immigration cases, and, above all, divulge information regarding their treatment by shelter officials or others while in ORR custody.

5. After issuing the guidance, ORR subsequently modified or clarified some of its terms. But ORR has shared no information regarding the guidance, any prior policy, or the reasons for the policy change with the public, who remain gravely concerned about the treatment

and care of unaccompanied immigrant children, including their ability to access legal representation.

6. On May 5, 2020, the New York Civil Liberties Union (“NYCLU”) filed a FOIA request with the Administration for Children and Families (“ACF”) seeking records concerning the policy change. In its request, the NYCLU sought expedited processing and a waiver or reduction of fees. To date, over two months since the NYCLU’s original FOIA request, neither ACF nor any of the other defendants has released records or substantively responded to the NYCLU’s FOIA request or administrative appeal. This denial of the NYCLU’s request flouts the defendants’ obligations under FOIA.

7. The public is entitled to know ORR’s policies regarding the terms under which children in its custody are permitted to meet with their attorneys, including any change in those policies and the basis for that change. Accordingly, the NYCLU seeks an injunction requiring the defendants to conduct a reasonable search for documents responsive to the FOIA request; make the requested records promptly available to the NYCLU; justify with detail and specificity the withholding of any information, including the basis or bases of any claimed FOIA exemptions; waive any processing fees; and grant the NYCLU’s request for expedited processing. The NYCLU also seeks reasonable attorney’s fees and costs.

JURISDICTION AND VENUE

8. The Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(E)(iii), 702, 704, and 706; and 28 U.S.C. § 1331.

9. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

PARTIES

10. Plaintiff the New York Civil Liberties Union is a non-partisan, non-profit organization incorporated under the laws of New York and with its principal place of business in New York, New York. The NYCLU is the New York State affiliate of the American Civil Liberties Union and has approximately 140,000 members statewide. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Constitution. As part of this mission, the NYCLU is committed to ensuring governmental accountability and transparency, and seeks to inform the public about the conduct and integrity of its government in matters of civil liberties and civil rights. Obtaining information about governmental activity, analyzing that information, and disseminating it widely to the press and the public are critical and substantial aspects of the NYCLU's work.

11. Defendant U.S. Department of Health and Human Services ("HHS") is a department of the Executive Branch of the U.S. government and is headquartered in the District of Columbia. HHS is an agency within the meaning of FOIA.

12. Defendant Administration for Children and Families is a component of HHS and is headquartered in the District of Columbia. ACF is an agency within the meaning of FOIA.

13. Defendant Office of Refugee Resettlement is an office within ACF and is headquartered in the District of Columbia. ORR is an agency within the meaning of FOIA.

FACTS

ORR's Role in Caring for Unaccompanied Children

14. Each year, thousands of children travel to the United States from foreign countries. In recent years, many of these children have come from Central America and Mexico, fleeing violence, persecution, and abuse. Some children come with family members, but many make the perilous journey to the United States alone, seeking refuge from dangerous

circumstances in their home countries.

15. This extremely vulnerable population is typically transferred to ORR custody shortly after entering the United States. Unaccompanied children remain in the agency's custody until ORR is able to safely place them with a parent, relative, or other sponsor during the pendency of their immigration cases.

16. The unaccompanied children in ORR's care, who often have endured high levels of trauma, rely on ORR and ORR shelters to provide for their basic needs, including food, clothing, housing, education, and medical and mental health care.

Legal Representation for Children in ORR Custody

17. In addition to providing for other basic needs, ORR is required by statute to “ensure[] to the greatest extent practicable” that all children in its custody “have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.” ORR is also specifically required to provide legal orientation or “know-your-rights” trainings.

18. As part of fulfilling these statutory obligations, ORR contracts with legal service providers to provide know-your-rights trainings to children in its custody, and, in many geographic areas, to provide legal representation. In New York City, for example, three ORR subcontractors—nonprofit legal service organizations—provide such trainings and representation to children housed at the several ORR care providers throughout the area.

19. Access to counsel is crucial for children in ORR custody to pursue available avenues for immigration relief. ORR legal service providers also frequently aid their clients in identifying potential sponsors, navigating the ORR sponsor reunification process, and obtaining release to their sponsors.

20. Access to counsel is also critical to ensuring that children receive adequate care while in ORR custody. For example, numerous reports and legal cases have identified mistreatment of children in ORR custody, including sexual abuse, forced medication, inadequate provision of medical and mental health care, and inadequate provision of educational resources.

21. In recent years, many ORR shelters had a practice of transporting children to the offices of legal service providers for legal visits, during which children were permitted to meet in private with their attorneys.

22. On or about February 25, 2020, however, ORR issued guidance (“the Guidance”)¹ announcing a policy change or clarification regarding the terms under which children in ORR custody are permitted to meet with their attorneys. The Guidance prohibits ORR shelters from transporting children to the offices of their attorneys for legal visits. Instead, it requires the children’s attorneys to travel to the shelters to meet with their clients. It also requires that children meet with their attorneys within the line of sight and hearing range of a shelter official.

23. ORR subsequently has modified or clarified some of the Guidance’s requirements. But ORR has shared no information with the public regarding the Guidance, any prior policy or subsequent changes, or the reasons for the policy change or clarification.

The NYCLU’s FOIA Request

24. On May 5, 2020, the NYCLU submitted a FOIA request (the “Request”) to ACF (attached hereto, with email cover letter, as Exhibit A).

25. The Request sought two categories of records related to the Guidance. Specifically, the NYCLU sought:

1. *Any and all records concerning the Guidance, including, but not limited to:*

¹ As stated in the FOIA request, the term “guidance” refers to any guidance, policy, memorandum, procedure, protocol, or rule, whether or not termed “guidance.”

- a. *The Guidance, including any attachments or exhibits thereto;*
 - b. *Any subsequent addenda, qualifications, modifications, or changes to the Guidance, including any communications regarding the foregoing;*
 - c. *Any records contemporaneous with or subsequent to the decision to issue the Guidance that announce, explain, or describe the Guidance;*
 - d. *Any records relied upon in the decision to adopt the Guidance;*
 - e. *Any and all records sent by ORR to any LSP representing children in ORR custody in New York State, or sent by any such LSP to ORR, concerning the Guidance;*
 - f. *Any and all records sent by ORR to any prime contractor for independent legal services, or sent by any such prime contractor to ORR, concerning the Guidance;*
 - g. *Any and all records sent by ORR to any ORR care provider in New York State, or sent by any such care provider to ORR, concerning the Guidance;*
 - h. *Any and all records sent by ORR to any other federal agency or department, or sent by any other federal agency or department to ORR, concerning the Guidance;*
2. *For the period beginning January 1, 2019, and ending the date the Guidance was issued: Any and all ORR guidance, policies, memoranda, procedures, protocols, or other rules in effect governing the conditions under which LSPs and/or non-LSP attorneys may have legal meetings with children in ORR custody, including, but not limited to, any and all emails sent from UACPolicy@acf.hhs.gov concerning the above.*

26. The NYCLU applied for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 45 C.F.R. § 5.27.

27. The NYCLU also applied for a waiver of search, review, and duplication fees under 5 U.S.C. § 552(a)(4)(A)(iii).

ACF's Constructive Denial and the NYCLU's Exhaustion of Administrative Remedies

28. The defendants have failed to respond to the Request, other than providing an initial acknowledgement of receipt (attached hereto as Exhibit B).

29. On June 12, 2020, the NYCLU submitted to ACF via email a letter appealing ACF's constructive denial of the Request, including the NYCLU's applications for expedited processing and a waiver or limitation of fees (attached hereto, with email cover letter, as Exhibit

C).

30. The defendants have failed to acknowledge or respond to the NYCLU's appeal letter.

31. The plaintiff has exhausted all applicable administrative remedies.

32. As of the filing of this Complaint, 76 days have passed since the NYCLU submitted the Request.

CLAIM

33. The defendants' actions, including their constructive denial of the NYCLU's FOIA request and applications for expedited processing and waiver of fees, violate FOIA and HHS's corresponding regulations.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request that the Court:

- a. Order the defendants immediately to conduct a reasonable search for all records responsive to the Request;
- b. Order the defendants to disclose to the NYCLU all nonexempt records responsive to the Request;
- c. Order the defendants to waive any search, review, and duplication fees associated with the Request;
- d. Order the defendants to process the Request on an expedited basis;
- e. Award the NYCLU costs and reasonable attorneys' fees incurred in this action;
and
- f. Grant such other relief as the Court may deem just and proper.

Dated: July 20, 2020
New York, New York

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION

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