

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.D., on behalf of herself and others similarly situated, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 17-cv-02122-TSC
)	
ALEX M. AZAR, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), the parties, by and through their undersigned counsel, hereby jointly stipulate and agree that the above-captioned case shall be, and is hereby, dismissed without prejudice, subject to the following conditions:

1. Defendants’ adoption of the revised policy on Medical Services Requiring Heightened ORR Involvement, attached hereto as Exhibit A, and communication of this revised policy to all Office of Refugee Resettlement (“ORR”) federal field officers and ORR-funded shelters housing unaccompanied immigrant minors (hereinafter “UACs” or “minors”).
2. Defendants shall notify Plaintiffs’ counsel at least fourteen (14) calendar days in advance of making any change to the Medical Services Requiring Heightened ORR Involvement policy, Exhibit A, or to any other relevant ORR policy or practice, as it relates to a minor’s access to non-directive options counseling, including abortion counseling, state judicial bypass proceedings, and abortion, and/or to the communication of information about a minor’s pregnancy and/or abortion decision to third parties, including, but not limited to, sponsors, prospective sponsors and parents, unless an emergency or applicable law makes

providing fourteen (14) days' notice impracticable, in which case Defendants shall provide notice as soon as possible. This notification requirement will remain in place for two years from the date of filing this Joint Stipulation with the Court.

3. Defendants shall require all ORR-funded shelters to post the Know Your Rights notice, attached hereto as Exhibit B, on all housing bulletin boards in both English and Spanish, adjacent to the notice required by the Prison Rape Elimination Act ("PREA"), 34 U.S.C. 30301 *et seq.*
4. Defendants shall pay Plaintiffs' counsel \$336,710.19 in fees and costs for this matter. Plaintiffs' counsel agrees to cooperate with Defendants' counsel in promptly providing additional reasonable information needed for requesting payment and transmission of funds. The parties agree that this Joint Stipulation shall resolve all claims for attorneys' fees and costs accrued as of the time of this Joint Stipulation.
5. This Joint Stipulation shall be binding upon and inure to the benefit of the parties hereto and their respective successors in office, officers, agents, servants, employees, attorneys, and anyone acting in concert with them.

September 29, 2020

Respectfully submitted,

/s/ Brigitte Amiri

Brigitte Amiri*

Meagan Burrows

Jennifer Dalven

Lindsey Kaley

American Civil Liberties Union Foundation

125 Broad Street, 18th Floor

New York, NY 10004

Tel. (212) 549-2633

Fax (212) 549-2652
bamiri@aclu.org
mburrows@aclu.org
jdalven@aclu.org
lkaley@aclu.org

Arthur B. Spitzer (D.C. Bar No. 235960)
Scott Michelman (D.C. Bar No. 1006945)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
Tel. 202-457-0800
aspitzer@acludc.org
smichelman@acludc.org

Daniel Mach (D.C. Bar No. 461652)
American Civil Liberties Union
Foundation
915 15th Street NW
Washington, DC 20005
Tel. (202) 675-2330
dmach@aclu.org

Elizabeth Gill
American Civil Liberties Union Foundation
of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Tel. (415) 621-2493
Fax (415) 255-8437
egill@aclunc.org

Melissa Goodman
American Civil Liberties Union Foundation
of Southern California
1313 West 8th Street
Los Angeles, California 90017
Tel. (213) 977-9500
Fax (213) 977-5299
mgoodman@aclusocal.org

**Admitted pro hac vice*

Attorneys for Plaintiffs

/s/ W. Daniel Shieh

W. Daniel Shieh

Christina P. Greer

Senior Litigation Counsels

Office of Immigration Litigation

Civil Division, U.S. Department of Justice

P.O. Box 878, Ben Franklin Station

Washington, D.C. 20044

Phone: (202) 598-8770

Fax: (202) 616-4975

Daniel.Shieh@usdoj.gov

Christina.P.Greer@usdoj.gov

Attorneys for Defendants

Exhibit A

Medical Services Requiring Heightened ORR Involvement

Applicability

This policy brings up to date the March 21, 2008, policy on medical procedures requiring heightened ORR involvement (hereinafter “Medical Procedures 2008 policy”) as it applies to unaccompanied alien children (“UAC”), as defined in 6 U.S.C. § 279(g)(2). ORR issued the Medical Procedures 2008 policy stating that certain decisions would require heightened ORR involvement and limited decision-making by grantees. This document updates the cross-references in the Medical Procedures 2008 policy and otherwise brings that policy up to date to reflect current policy, including policy on abortion.

General Policy

Serious medical services, including significant surgical or medical procedures, abortions, and services that may threaten the life of a UAC, require heightened ORR involvement and limited decision-making by grantees.

General Procedures

When a grantee learns that a UAC has been advised by a doctor to undergo or wishes to seek serious medical services requiring heightened ORR involvement (i.e., significant surgical or medical procedures, abortions, and services that may threaten the life of a UAC), the grantee must follow the procedures for Significant Incident Documentation and Reporting at section 5.8 of the ORR Policy Guide (<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-5#5.8>) and for Medical Services at section 3.4 (<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.4>). In addition, for all serious medical services that require heightened ORR involvement other than abortions, the grantee must immediately notify the Deputy Director for Children’s Programs and provide all available details about the situation. If the grantee is uncertain whether a serious medical service requires heightened ORR involvement, the grantee should notify the Division of Health for Unaccompanied Children and request guidance.

As the situation progresses, grantees must respond to requests from the Deputy Director for Children’s Programs for information and updates as soon as possible and no later than within 24 hours of such requests. Further, for medical services and procedures governed by this policy other than abortion, grantees are prohibited from taking any actions in these cases without direction and approval from ORR. (Note: This does not include emergency medical situations. Follow procedures at section 3.4.5 for responding to medical emergencies.)

For all medical services and procedures governed by this policy (subject to the exceptions for abortion discussed below) in cases requiring heightened ORR involvement, ORR may contact or may require the grantee to contact the UAC’s parent or legal guardian. Depending upon the particular circumstances, ORR (or the grantee at ORR’s request) may inform the parent or legal guardian of the UAC’s medical situation and ask the parent or legal guardian how he/she wishes the situation to be resolved.

Medical Related Costs

In instances where the cost of the medical procedure or the medical service requires a Treatment Authorization Request (TAR), the grantee must follow ORR policies related to obtaining a TAR, subject to any congressionally imposed appropriations restrictions. See ORR Policy Guide, 3.4.9 Provider Reimbursement (<https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.4.3.9>).

Approval to cover the related costs in no way implies consent to conduct the procedure or provide the medical service when consent by a parent or legal guardian is required and cannot be obtained. In addition, ORR funds may not be used for legal services or court costs related to the case of a UAC seeking an abortion through a state judicial bypass procedure.

Procedures Specific to Requests for Abortion and Alignment with State Law:

Congress made the Secretary of HHS responsible for the care and custody of all unaccompanied alien children. 8 U.S.C. § 1232(b)(1).

Given the authority that Congress vested in HHS, the legal position of HHS is that state courts cannot lawfully compel the ORR federal staff or ORR care providers to: consent to the provision of abortions to UAC; bring UAC to state court; facilitate access to UAC by state-appointed guardians or attorneys ad litem; or provide a state court, or a state-appointed guardian or attorney ad litem, with access to federal records.

Nevertheless, HHS has determined as a matter of policy that HHS and ORR federal staff will exercise their delegated federal custodial authority in a manner informed by child welfare principles and in alignment with state law governing the conduct of medical providers who provide abortions to minors. For example, some states require that physicians provide parental notification of the intent to perform an abortion, receive a state judicial bypass order, or certify that a medical emergency exists, before providing an abortion to a minor. *See, e.g.*, Tex. Occ. Code Ann. § 164.052; Tex. Fam. Code §§ 33.002, 33.003, 33.004. These statutory requirements typically apply to the physicians who provide the abortions and not to the parents, guardians, or conservators of the minors. *See id.*

If a state-licensed physician seeks consent from ORR or ORR care provider staff to provide an abortion to a UAC, the policy of ORR remains that “neither ORR nor the care provider may provide consent.”

If a physician seeks the assistance of ORR or ORR care provider staff in providing parental notification before performing an abortion, in compliance with state law, then ORR shall support the efforts of the physician to comply with state law. Such assistance may involve providing the parent’s last known contact information to the physician, or facilitating communication between the physician and the parent. Subject to the exceptions listed below, neither the ORR federal staff nor ORR care providers shall require parental notification of the UAC’s intent.

If the UAC obtains a state judicial bypass order authorizing the physician to provide an abortion to the UAC, and the UAC still wishes to have the abortion, then the ORR federal staff shall not undertake actions to prevent the UAC from obtaining the abortion. In that scenario, the ORR federal staff shall instruct the care provider sheltering the UAC that it shall not take actions to prevent the UAC from obtaining the abortion.

If the physician certifies that a medical emergency exists, and the UAC still wishes to have the abortion, then the ORR federal staff shall not undertake actions to prevent the UAC from obtaining the abortion. The ORR federal staff shall instruct care providers that they shall not take actions to prevent a UAC from obtaining an abortion in the event of such certified medical emergency.

No Obstruction or Interference

ORR care providers must notify the ORR federal staff of any UAC who is pregnant or requesting an abortion using the Significant Incident Reporting mechanism in section 5.8 of the ORR Policy Guide. ORR federal staff and ORR care providers shall not take actions to obstruct or interfere with UAC access to state judicial bypass proceedings (however ORR is not required to fund representation in those hearings), non-directive options counseling, abortion counseling, or an abortion. ORR federal staff and ORR care providers shall ensure UAC have access to medical appointments related to pregnancy in the same way they would with respect to other medical conditions.

Notification

ORR federal staff and care providers shall not communicate information about a UAC's pregnancy (including the fact of the pregnancy) or decision whether to have an abortion (before or after the abortion) to individuals other than staff members or the UAC, except that they may nevertheless communicate such information to an applicant or approved sponsor subject to the conditions discussed in the following paragraph, and to others if the UAC: needs emergency medical care and is unable to inform an emergency medical provider herself; or authorizes the ORR federal staff or care providers to communicate the information to a specific individual.

Nothing in this provision prohibits the ORR federal staff from communicating information to an applicant or approved sponsor regarding a serious health complication arising from pregnancy, birth or abortion that ORR finds in good faith the UAC may experience or require follow-up care to address after having been transferred to the custody of that applicant or approved sponsor. In addition, nothing in this provision prohibits the ORR federal staff from communicating information regarding the UAC's pregnancy to an applicant or approved sponsor if the ORR federal staff has found in good faith that ORR must communicate the information to confirm that the applicant or approved sponsor can provide the financial and emotional support needed by the UAC associated with carrying the pregnancy to term, giving birth, and/or parenting.

If the ORR federal staff makes either finding in good faith, then they shall document the finding in a declaration executed pursuant to 28 U.S.C. § 1746, and shall document attempts to first secure the UAC's consent to the disclosure and promptly notify the UAC when the disclosure has been made. Moreover, in all such cases, the information disclosed to the applicant or approved sponsor

should be limited to that which is appropriate to ensure that the sponsor is equipped to adequately care for the UAC, and communicated as close to the conclusion of the sponsorship vetting and approval process as reasonably possible and in time to ensure the sponsor can provide the financial and emotional support needed by the UAC associated with carrying the pregnancy to term, giving birth, or parenting.

When an ORR care provider is required, as a matter of state licensing requirements, to communicate information about a UAC's abortion-related decision to individuals other than the UAC, the ORR care provider acts in consultation with its own legal counsel and without the involvement of the ORR federal staff. The care provider will notify ORR of any communication with individuals other than the UAC that it makes pursuant to a state licensing requirement.

Applicability of Hyde Amendment

Nothing in this policy supersedes applicable Federal appropriations restrictions (known as the "Hyde Amendment"), prohibiting the Federal Government from paying for abortions other than in cases where the pregnancy is the result of an act of rape or incest; or in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. *See, e.g.*, sections 506 and 507, Title V of Pub. L. 116-94, "Further Consolidated Appropriations Act, 2020." Nothing in this policy may be read to prohibit ORR or HHS from requesting documentation and otherwise reasonably ensuring that requests for Federal payment adhere to the Hyde Amendment restrictions.

Care Providers with Sincerely Held Religious Objections to Pregnancy Termination

Nothing in this policy prohibits ORR from providing accommodations to care providers who maintain a sincerely held religious objection to abortion. If a UAC in the care of such a provider is discovered to be pregnant, ORR's field staff will personally deliver any legally required notice to the UAC orally and in writing, along with other pregnancy-related information required by ORR policy.

Exhibit B

Please read this notice

If you are pregnant, no one who works for the government or the shelter can stop you from accessing counseling about all the options you have regarding your pregnancy, including birth (for parenting or adoption) or abortion. You have the right to decide whether to continue your pregnancy and give birth or to have a legal abortion. If you want a legal abortion, no one who works for the government or the shelter can stop you from getting one. Depending on the location of your shelter, you might need permission from a judge to get an abortion. No one who works for the government or the shelter can stop you from going to court if you need to. No one who works for the government or the shelter can stop you from going to appointments related to your pregnancy, including appointments for prenatal care, birth (for parenting or adoption), or to obtain an abortion.

No one who works for the government or the shelter can tell anyone about your pregnancy or your decision whether to have an abortion, without your permission, except:

- 1) They can tell an emergency medical provider if you need emergency medical care and your medical condition prevents you from telling the emergency medical provider yourself.
- 2) The government can tell your sponsor information about your pregnancy or abortion, but only if your sponsor will need to know about your pregnancy or abortion to help you with a serious health complication after you are released to them or to make sure that your sponsor can support you with your pregnancy, having a baby, or being a parent. Before the government tells your sponsor information about your pregnancy or abortion, they must first try to ask for your permission to tell your sponsor and they must tell you after they have informed your sponsor.

Por favor lea este aviso

Si está embarazada, ninguna persona que trabaje para el gobierno o el albergue puede impedir que usted tenga acceso a asesoramiento sobre todas las opciones que tiene con relación a su embarazo, incluyendo el nacimiento (para criar o dar en adopción) o el aborto. Usted tiene el derecho de decidir si quiere continuar su embarazo y dar a luz o tener un aborto legal. Si desea un aborto legal, ninguna persona que trabaje para el gobierno o el albergue puede impedir que usted lo consiga. Dependiendo de la ubicación de su albergue, es posible que usted necesite la autorización de un juez para realizarse un aborto. Ninguna persona que trabaje para el gobierno o el albergue puede impedir que usted vaya a un tribunal si es necesario. Ninguna persona que trabaje para el gobierno o el albergue puede impedir que usted vaya a las citas relacionadas con su embarazo, incluidas las citas de cuidado prenatal, para el nacimiento (ya sea para la crianza o adopción) o las citas para obtener un aborto.

Ninguna persona que trabaje para el gobierno o el albergue puede decirle a nadie acerca de su embarazo o decisión de obtener un aborto sin su autorización, excepto en las siguientes situaciones:

- 1) Le pueden decir a un proveedor de servicios médicos de emergencia si usted necesita cuidados médicos urgentes y su estado médico le impide a usted decírselo por sí misma al proveedor de los servicios médicos de emergencia.
- 2) El gobierno puede darle a su patrocinador información respecto a su embarazo o aborto, pero sólo si su patrocinador necesita saber sobre su embarazo o aborto para ayudarla a usted con una complicación grave de salud después de que usted haya sido transferida a su cuidado, o para asegurar de que su patrocinador la pueda ayudar con su embarazo, a tener un bebé, o en el aspecto de la crianza. Antes de que el gobierno le dé a su patrocinador información acerca de su embarazo o aborto, primero debe intentar pedirle su autorización para decirle esto a su patrocinador, y debe avisarle a usted cuando se lo haya informado a su patrocinador.

emergency or applicable law makes providing fourteen (14) days' notice impracticable, in which case Defendants shall provide notice as soon as possible. This notification requirement will remain in place for two years from the date of the filing of the parties' Joint Stipulation with this Court.

- c. Defendants' agreement to require all ORR-funded shelters to post the Know Your Rights notice, attached to the parties' Joint Stipulation as Exhibit B, on all housing bulletin boards in both English and Spanish, adjacent to the notice required by the Prison Rape Elimination Act ("PREA"), 34 U.S.C. 30301 *et seq.*
- d. Defendants' payment to Plaintiffs' counsel a sum of \$336,710.19 in attorneys' fees and costs for this matter; Plaintiffs' counsels' agreement to cooperate with Defendants' counsel in promptly providing additional reasonable information needed for requesting payment and transmission of funds; and the parties' agreement that the payment of the \$336,710.19 sum resolves all claims for attorneys' fees and costs accrued as of the time of the filing of the Joint Stipulation.

Dated: September ___, 2020

Tanya S. Chutkan
United States District Judge