

C A M P A I G N F O R

ACCOUNTABILITY

October 20, 2017

By Fax: (800) 223-8164

Daniel R. Levinson, Inspector General
U.S. Department of Health & Human Services
Office of Inspector General
330 Independence Avenue SW
Washington, DC 20201

Re: Scott Lloyd, Director, Office of Refugee Resettlement

Dear Mr. Levinson:

Campaign for Accountability (“CfA”) respectfully requests that you open an investigation into the actions of Scott Lloyd, Director of the Office of Refugee Resettlement (“ORR”), in revising and implementing Department policy regarding access to abortion for unaccompanied immigrant minors. For the reasons set forth below, CfA believes that Mr. Lloyd may have violated the law and must be held accountable.

Background

Prior to March of this year, the policy of ORR regarding unaccompanied immigrant minors’ access to abortion was detailed in a March 21, 2008 memorandum from then-Acting Director David Siegel.¹ Under that policy, an ORR grantee was required to notify the Division of Unaccompanied Children’s Services when an unaccompanied immigrant minor sought abortion services, and to respond to requests from the Division as updates became available.² Where parental consent was required, the grantee either obtained consent or followed relevant state law in seeking judicial bypass.³ ORR deferred to “individuals (e.g., parents) and institutions (e.g., state courts) that are required to act in the children’s best interests in cases where serious medical services are involved.”⁴ Consequently, according to Robert Carey, former Director of ORR, ORR only got involved in an unaccompanied immigrant minor’s decision to have an abortion when the minor sought federal funding for the procedure.⁵ Pursuant to federal law, federal funds may be used only in cases of rape, incest, or when the woman’s life is in danger.⁶

¹ Memorandum from David Siegel, Acting Director, ORR to DUCS Staff, DUCS funded Shelters, DUCS Service Providers (Mar. 21, 2008), *available at*

https://www.acf.hhs.gov/sites/default/files/orr/medical_services_requiring_heightened_orr_involvement.pdf.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Renuka Rayasam, Trump official halts abortions among undocumented, pregnant teens, *Politico*, Oct. 16, 2017, *available at* <http://www.politico.com/story/2017/10/16/undocumented-pregnant-girl-trump-abortion-texas-243844>.

⁶ *Id.*

Soon after President Trump took office, then-Acting Director of ORR Kenneth Tota issued a memorandum on March 4, 2017 amending the policy to state that “the Director of ORR is empowered by Congress to make all medical decisions for the unaccompanied alien child (UAC) in place of the child’s parents.”⁷ As such, a signed authorization from the Director of ORR “would be required before taking any next steps (i.e., scheduling appointments, pursuing a judicial bypass, or any other facilitative step)” in the process of facilitating an abortion for an unaccompanied immigrant minor.⁸ Notably, one recipient of the email announcing the new policy responded by asking whether the new policy was “contrary to state law” and inquiring whether the policy had been “vetted by [ORR’s] legal department.”⁹ In particular, the recipient argued “the judicial bypass was created specifically so that the young lady does not need approval from her guardian (in our case the Director of ORR) to move forward with a term[ination] of pregnancy.”¹⁰ Nevertheless, the policy was implemented.

Shortly thereafter, Scott Lloyd became Director of ORR¹¹ and began forcefully pursuing the new policy to make it difficult, if not impossible for unaccompanied, pregnant immigrant minors to obtain abortions. In fact, it was Mr. Lloyd’s position that ORR grantee shelters “should not be supporting abortion services pre or post-release; only pregnancy services and life-affirming options counseling.”¹² Mr. Lloyd began personally contacting unaccompanied, pregnant immigrant minors in grantee shelters and attempting to coerce them into continuing their pregnancies. On numerous occasions, it is well-documented that Mr. Lloyd visited refugee shelters and spoke directly with unaccompanied, pregnant immigrant minors.¹³ Following his visits, Mr. Lloyd instructed grantee shelters to send the pregnant minors to “crisis pregnancy centers,” which offer biased, misleading, and inaccurate information about abortion, and which often proselytize to women and girls in an attempt to dissuade them from having abortions.¹⁴ Mr. Lloyd requested that grantee shelters “keep a close eye”¹⁵ on pregnant minors and keep him personally updated on their status.¹⁶

Mr. Lloyd frequently directed ORR and grantee shelter staff to notify the parents and immigration sponsors of unaccompanied immigrant minors’ pregnancies,¹⁷ despite the minors’

⁷ Plaintiff’s Memorandum in Support of Her Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, Ex. A at 2, *Garza v. Hargan*, No. 17-02122 (D.D.C. Oct. 14, 2017).

⁸ *Id.*, Ex. B at 3, 5.

⁹ *Id.*, Ex. B at 4.

¹⁰ *Id.*

¹¹ President Appoints New Director of the Office of Refugee Resettlement, *This Week in Immigration*, Mar. 28, 2017, available at <http://www.thisweekinimmigration.com/all-news/trump-appoints-new-director-of-orr>.

¹² Plaintiffs’ Memorandum, *supra* note 7, Ex. C at 1.

¹³ *Id.*, Ex. D at 3; Ex. E at 2; Ex. G at 3. *See also* Rayasam, *Politico*, Oct. 16, 2017.

¹⁴ *Id.* Minority Staff of the H. Comm. On Gov’t Reform, False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers, 109th Cong. 1 (2006), available at <https://www.chsourcebook.com/articles/waxman2.pdf>; National Abortion Federation, Crisis Pregnancy Centers: An Affront to Choice, 2006, available at https://www.prochoice.org/pubs_research/publications/downloads/public_policy/cpc_report.pdf.

¹⁵ Plaintiffs’ Memorandum, *supra* note 7, Ex. D at 3.

¹⁶ *Id.*

¹⁷ *Id.*, Ex. G at 3; Ex. H at 3; Ex. I at 2.

requests to keep the information confidential.¹⁸ He did so when a minor had not yet made a decision about her pregnancy,¹⁹ when a minor had decided to have an abortion,²⁰ and when a minor had already obtained an abortion with judicial authorization.²¹ In one case, he even appears to have done so with advance knowledge that it might jeopardize an unaccompanied immigrant minor's placement with her adult brother living in the United States.²²

In addition to becoming personally involved in the decision-making of unaccompanied, pregnant immigrant minors, and divulging confidential information to their parents and sponsors against their will, Mr. Lloyd interjected in other questionable ways. In at least one case, Mr. Lloyd explicitly instructed a shelter to deny an unaccompanied immigrant minor access to legal counsel.²³ In another, Mr. Lloyd suggested that he knew "a few good families with a heart for these situations who would take [a pregnant, unaccompanied immigrant minor] in a heartbeat and see her through her pregnancy and beyond."²⁴ The minor in question apparently was going to live with an aunt in the United States, but Mr. Lloyd suggested alternative sponsorship if "things can't work out with her aunt soon."²⁵ Finally, in the case of J.D., a 17-year-old unaccompanied, pregnant immigrant minor in Texas, Mr. Lloyd sought to categorically deny her access to an abortion after she had procured funding, travel, and a judicial bypass for the procedure.²⁶ In response to a lawsuit filed by the American Civil Liberties Union on the young woman's behalf, a Washington, D.C. federal court ordered ORR to allow her to obtain an abortion.²⁷ The administration appealed to the D.C. Circuit Court, which stayed the lower court's order and scheduled the matter for oral argument on October 20, 2017.²⁸

Legal Violations

Misuse of Position and Government Resources

By statute, the duties of the director of ORR are to "fund and administer" the programs of ORR.²⁹ Specifically, the director makes grants to public and private nonprofit agencies and assists and reimburses the states in providing initial resettlement, English instruction, job training, employment services, health and social services, foster care, placement, and cash

¹⁸ *Id.* at 8; Ex. I at 2.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 8; Ex. G at 3.

²¹ *Id.*, Ex. H at 3; Ex. I at 2.

²² *Id.*, Ex. I at 2.

²³ *Id.*, Ex. G at 3.

²⁴ *Id.*, Ex. D at 3.

²⁵ *Id.*

²⁶ *Id.* at 1-2.

²⁷ Maria Sacchetti, [U.S. Judge Orders Trump Administration to Allow Abortion for Undocumented Teen](https://www.washingtonpost.com/local/immigration/judge-trump-administration-cannot-block-abortion-for-pregnant-undocumented-teen/2017/10/18/82348e08-b406-11e7-be94-fabb0f1e9ffb_story.html), *Washington Post*, Oct. 18, 2017, available at https://www.washingtonpost.com/local/immigration/judge-trump-administration-cannot-block-abortion-for-pregnant-undocumented-teen/2017/10/18/82348e08-b406-11e7-be94-fabb0f1e9ffb_story.html.

²⁸ *Garza v. Hargan*, No. 17-5236, Order (D.C. Cir. Oct. 19, 2017) (per curium) available at <http://www.politico.com/f/?id=0000015f-3509-d77a-a35f-f5698b000002>.

²⁹ 8 U.S.C. § 1521.

assistance for refugees.³⁰ A federal employee is required to “use official time in an honest effort to perform official duties.”³¹ A failure to do so is considered a misuse of position.³² A federal employee must also “protect and conserve Government property” and may not use such property for unauthorized purposes.³³

In personally visiting unaccompanied immigrant minors, pressuring them regarding personal healthcare decisions, and providing individualized, detailed, and at times illegal direction to grantee shelters regarding their care, Mr. Lloyd acted outside of his statutory duties. He used his position and the federal government’s resources to attempt to coerce unaccompanied immigrant minors facing unintended and unwanted pregnancies into making medical decisions in accordance with his personal views. In doing so, Mr. Lloyd misused his position and misused government funds in violation of the law.

Anti-deficiency Act

The Anti-deficiency Act is part of a statutory scheme that limits the ability of federal agencies to spend and obligate money. Specifically, the act provides that an “officer or employee of the United States Government” may not: (1) “make or authorize an expenditure or obligation exceeding the amount available in an appropriation or fund for the expenditure or obligation”; or (2) “involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”³⁴ The Anti-deficiency Act can be violated by making an expenditure for which no appropriation was authorized.³⁵

A government officer or employee who violates the act “shall be subject to” administrative discipline, including suspension from duty without pay or removal from office.³⁶ An officer or employee who “knowingly and willfully” violates these provisions “shall be fined not more than \$ 5,000, imprisoned for not more than 2 years, or both.”³⁷ In addition, when an Anti-deficiency Act violation occurs, the head of the agency must immediately report the violation, all relevant facts, and a statement of actions taken to the President and Congress, and forward a copy of the report to the Comptroller General.³⁸

By traveling to visit and otherwise using federal resources to coerce unaccompanied, pregnant immigrant minors not to have abortions, by using federal resources to arrange for these minors to be subjected to “counseling” at crisis pregnancy centers, and by using federal resources to deny pregnant minor immigrants their right to counsel, Mr. Lloyd appears to have violated the Anti-deficiency Act.

³⁰ 8 U.S.C. § 1522.

³¹ 5 C.F.R. § 2635.705(a).

³² *Id.*

³³ 5 C.F.R. § 2635.704(a).

³⁴ 31 U.S.C. § 1341(a)(1)(A-B). *See also* 2 U.S. Gov’t Accountability Office, *Principles of Federal Appropriations Law*, 6-36 (3d ed. 2010).

³⁵ *Id.*, 6-41.

³⁶ 31 U.S.C. § 1349(a).

³⁷ 31 U.S.C. § 1350.

³⁸ 31 U.S.C. § 1351.

Violation of Constitutional Rights

The Supreme Court recently restated and reaffirmed that a woman has a right to an abortion prior to viability of the fetus and held that placing an undue burden on that right violates the U.S. Constitution.³⁹ The right to an abortion includes the ability of a minor to seek and receive judicial bypass of parental notification laws in some circumstances.⁴⁰ Where a minor has received judicial bypass of a parental notification law in order to obtain an abortion, the government no longer has any legitimate interest in notifying the minor's parents about her pregnancy and/or intent to terminate that pregnancy.⁴¹ As such, notifying the parents after judicial authorization is a violation of the minor's constitutional rights.⁴²

There is no question that Mr. Lloyd, in seeking to impose an absolute bar against J.D.'s access to abortion, violated her constitutional rights. Moreover, when Mr. Lloyd directed ORR and grantee shelter staff to notify the parents and sponsors of unaccompanied immigrant minors that these minors were pregnant or had obtained an abortion, he violated their constitutional rights as well.

Violations of the Flores Settlement Agreement

Many of the rights afforded to unaccompanied immigrant minors flow from the 1997 settlement in *Flores v. Reno*.⁴³ In that case, four unaccompanied immigrant minors challenged the conditions of their detention and the policies regarding their release by the Immigration and Naturalization Service.⁴⁴ The parties reached a settlement agreement in 1997, and that agreement has been applied to ORR since the Immigration and Naturalization Service dissolved.⁴⁵ Among other things, the *Flores* settlement requires ORR to provide proper food, shelter, clothing, and appropriate medical care, education, and counseling.⁴⁶ Most pertinently, the *Flores* settlement specifically requires emergency health care and family planning services.⁴⁷ In addition, ORR must provide unaccompanied immigrant minors with a "reasonable right to privacy" and "legal services information."⁴⁸ The *Flores* settlement also mandates that ORR release minors "without unnecessary delay," and prioritizes placement with family members.⁴⁹

³⁹ *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292 (2016).

⁴⁰ *Bellotti v. Baird*, 443 U.S. 622, 647 (1979).

⁴¹ *Planned Parenthood v. Wasden*, 376 F. Supp. 2d 1012, 1019 (D. Idaho 2005).

⁴² *Id.* at 1022.

⁴³ Stipulated Settlement Agreement, *Flores v. Reno*, No. 85-4544 (C.D. Cal. Jan 17, 1997), available at <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

⁴⁴ *Reno v. Flores*, 507 U.S. 292, 296 (1993).

⁴⁵ Lutheran Immigration and Refugee Service, Women's Refugee Commission, Kids in Need of Defense, *Flores Settlement Agreement & DHS Custody*, available at <https://lirs.org/wp-content/uploads/2014/12/Flores-Family-Detention-Backgrounder-LIRS-WRC-KIND-FINAL1.pdf>.

⁴⁶ Stipulated Settlement Agreement, *supra* note 43, Ex. 1 at 1-2.

⁴⁷ *Id.*, Ex. 1 at 1.

⁴⁸ *Id.*, Ex. 1 at 3.

⁴⁹ *Id.*, Ex. 2 at 2.

Mr. Lloyd appears to have violated the *Flores* settlement in a number of ways. He withheld family planning services from J.D., who was blocked from obtaining an abortion for weeks as Mr. Lloyd directed the grantee shelter to refuse to let her leave for her scheduled appointments. He has blocked at least one unaccompanied immigrant minor from seeking and receiving legal assistance. He has suggested circumventing the placement priorities of the *Flores* agreement in an apparent attempt to prioritize ideological opposition to abortion over the goal of placing unaccompanied immigrant minors with their family members. He has also potentially deprived unaccompanied immigrant minors of their reasonable right to privacy by notifying their parents or sponsors of their pregnancies, and has forced them to undergo “counseling” at crisis pregnancy centers. Mr. Lloyd’s actions appear to violate the terms of the *Flores* settlement.

Right to Counsel

Unaccompanied immigrant minors are also guaranteed access to legal counsel by statute. 8 U.S.C. § 1232(c)(5) states that “[t]he Secretary of Health and Human Services shall ensure... that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security... have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.”

In denying at least one unaccompanied minor access to an attorney, Mr. Lloyd appears to have violated the minor’s statutory right to counsel.

Contempt of Court

Texas law clearly provides a method for minors to seek and obtain an abortion without notification to and consent from a parent. Pursuant to Tex. Fam. Code § 33.003(a), a minor may file an application for “a court order authorizing the minor to consent to the performance of an abortion without notification to and consent of a parent.” When such an application is filed, the court appoints a guardian ad litem to represent the best interest of the minor.⁵⁰ After a hearing regarding the matter, the judge may issue an order authorizing the minor to consent to an abortion without parental notification upon a finding that (1) the minor is capable of making the decision to have an abortion without parental notification; and (2) seeking parental consent would not be in the best interest of the minor.⁵¹ Whether the judge issues an order or not, the court may not notify the parent that the minor is pregnant, and the court records are kept confidential and privileged.⁵²

Under Tex. Gov. Code § 21.001(a), a court “has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders.” Contempt of court is punishable by “a fine of not more than \$500 or confinement in the county jail for not more than six months, or both.”⁵³

⁵⁰ Tex. Fam. Code § 33.003(e).

⁵¹ Tex. Fam. Code § 33.003(i-3).

⁵² Tex. Fam. Code § 33.033(k).

⁵³ Tex. Gov. Code § 21.002(b).

In directing ORR and grantee staff to notify the parents of the unaccompanied immigrant minor who had been appointed a guardian ad litem and sought and obtained judicial authorization to consent to an abortion without parental notification, Mr. Lloyd willfully disregarded the authority of the court and the rights granted to the minor by the court's order, Mr. Lloyd appears to have committed contempt.

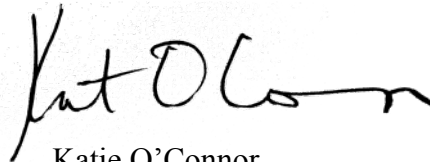
Conclusion

Litigation is currently pending in two federal courts challenging ORR's policy regarding access to abortion for unauthorized immigrant minors.⁵⁴ At the moment, it is unclear whether J.D. will finally be able to access the care that has been wrongfully withheld from her for weeks.⁵⁵ Should she prevail, ORR will be required to comply with the U.S. Constitution, the *Flores* settlement, and relevant laws and regulations in providing access to abortion for unauthorized immigrant minors.

Regardless of the outcome of the litigation, however, Mr. Lloyd appears to have deliberately misused his position and government resources to violate constitutional and federal law, harming unaccompanied immigrant minors in his agency's care. Absent intervention, he may continue to do so.

Therefore, CfA requests an immediate investigation into Mr. Lloyd's actions pertaining to unaccompanied immigrant minors' access to abortion services. Thank you for your attention to this matter.

Sincerely,



Katie O'Connor
Legal Counsel
Campaign for Accountability

cc: The Honorable John Cornyn
The Honorable Richard J. Durbin
Senate Subcommittee on Immigration and the National Interest

The Honorable Raul Labrador
The Honorable Zoe Lofgren
House Subcommittee on Immigration and Border Security

⁵⁴ *American Civil Liberties Union of Northern California v. Burwell*, No. 16-3539 (N.D. Cal. June 24, 2016); *Garza v. Hargan*, No. 17-02122 (D.D.C. filed Oct. 14, 2017).

⁵⁵ Sacchetti, *Washington Post*, Oct. 18, 2017.