

United States Senate

WASHINGTON, DC 20510

March 3, 2020

Jonathan H. Hayes
Director, Office of Refugee Resettlement
Administration for Children and Families
U.S. Department of Health & Human Services
330 C Street, S.W.
Washington, D.C. 20201

Dear Director Hayes:

We write to express our strong concern about reports that the Office of Refugee Resettlement (ORR) is sharing with U.S. Immigration and Customs Enforcement (ICE) confidential psychotherapy notes pertaining to immigrant youth in ORR's custody, and that ICE is using this information to argue against these young immigrants' asylum claims. This practice suggests that ORR is not providing adequate care for minors in its custody, and that ORR's actions are at odds with its statutory mandate.

According to a recent report in the Washington Post, ORR has been sharing with ICE officials confidential information from unaccompanied minors' psychotherapy sessions, which ICE is then using in removal proceedings.¹ The Department of Justice (DOJ) has also cited this information in federal court filings arguing against the release of an asylum seeker from custody.² In at least one case highlighted in the Washington Post report, ICE weaponized an asylum-seeking child's self-disclosed trauma to argue for the minor's continued detention and deportation. Astonishingly, ICE continued to selectively present — and arguably distort — information from the child's psychotherapy sessions to pursue deportation, even after the government certified the individual in question as a victim of severe human trafficking eligible for humanitarian protection.³

The 2018 Memorandum of Agreement between ORR and the Department of Homeland Security authorizing information sharing does not address sharing information collected by licensed health care providers or information pertaining to psychotherapy notes.⁴ Although you have answered questions on numerous occasions about information sharing practices with ICE, you

¹ Hannah Dreier, *Trust and Consequences*, Wash. Post (Feb. 15, 2020), <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/>.

² *See id.*

³ *See id.*

⁴ *See* Memorandum of Agreement between ORR and ICE and CBP Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Apr. 13, 2018), available at <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/%2316%20-%202018.04.13%20MOA%20between%20HHS%20and%20DHS.pdf>.

have failed to make clear that shared information may include confidential psychotherapy notes.⁵ Further, in a Senate Appropriations Subcommittee hearing last week, Department of Health and Human Services Secretary Alex Azar acknowledged this practice, but represented that sharing of psychotherapy notes, outside of narrowly tailored disclosures in instances where an unaccompanied minor is a threat to themselves or others, was “in error,” “a mistake” that was corrected in August 2019 and “going forward . . . shouldn't be happening.” Nonetheless, reports suggest that this practice may be continuing today.

ORR's practice of sharing confidential psychotherapy information undermines its mission and violates the rights of minors under its custody and care. For one, the practice is a significant violation of the right of unaccompanied children to receive health care that meets minimal standards of care. The practice is at odds with professional norms, and “destroys the bond of trust between patient and therapist that is vital to helping the patient.”⁶ Doctors, other health care providers, and mental health care workers in particular require some ability to discuss issues privately with patients. At the very least, minors in ORR's custody should be provided notice that these communications lack confidentiality, and ORR therapists must stop falsely assuring immigrant children that their therapy sessions will remain confidential, as the Washington Post report documents.⁷

Moreover, this practice wrongfully exploits ORR's dual role as a health care provider, including of mental health care, and as a custodian of immigrant minors. Sharing confidential psychotherapy information violates ORR's charge to ensure that “the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child.”⁸ In testimony last spring, you went further, stating that you “are committed to making decisions that are in the best interest of each child in ORR's care and custody.”⁹ It is difficult to believe that the practice of sharing psychotherapy notes with ICE is somehow in the best interests of a child in ORR's custody.

⁵ See *Hearing on Protecting Unaccompanied Children: the Ongoing Impact of the Trump Administration's Cruel Policies Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. (2019) (testimony of Jonathan H. Hayes Dir., Office of Refugee Resettlement), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony%20-%20Hayes%20OI%2020190919.pdf>; *Hearing on Oversight of HHS And DHS Efforts to Protect Unaccompanied Alien Children from Human Trafficking and Abuse Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Security and Governmental Affairs*, 115th Cong. (2018), <https://www.govinfo.gov/content/pkg/CHRG-115shrg36157/pdf/CHRG-115shrg36157.pdf>.

⁶ Press Release, American Psychological Association Calls for Immediate Halt to Sharing Immigrant Youths' Confidential Psychotherapy Notes with ICE (Feb. 17, 2020), <https://www.apa.org/news/press/releases/2020/02/sharing-therapy-notes>.

⁷ Hannah Dreier, *Trust and Consequences*, Wash. Post (Feb. 15, 2020) <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/>.

⁸ 6 U.S.C. § 279(b)(1)(B).

⁹ *Hearing on Protecting Unaccompanied Children: the Ongoing Impact of the Trump Administration's Cruel Policies Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 116th Cong. (2019) (testimony of Jonathan H. Hayes Dir., Office of Refugee Resettlement), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony%20-%20Hayes%20OI%2020190919.pdf>.

This practice is deeply concerning to us. Accordingly, we request that, by March 24, 2020, you respond to the following questions and provide the information requested:

1. Has ORR halted the practice of sharing information from confidential psychotherapy notes with ICE, as suggested by Secretary Azar? If so, what steps has ORR taken to ensure that ORR staff and contractors have stopped this practice? Please provide any communication to grantees on this topic.
2. Does ORR have clear documentation of every instance in which therapy notes were shared? What percentage of unaccompanied minors in ORR's custody have had psychotherapy notes shared with ICE? To the extent that ORR has halted this practice, what are the relevant percentages for the time when ORR conducted this practice?
3. Has ORR conducted any analysis of its legal authority to provide this information to ICE, or of the information-sharing policy's impact on its mission?
 - a. If so, please provide that analysis. If not, why not?
4. Does sharing with ICE information from psychotherapy notes pertaining to an unaccompanied minor in ORR's care and custody promote the best interest of the child? If so, how?
5. Does ORR provide any notice to unaccompanied minors in its custody that they have no expectation of privacy or confidentiality in any information provided to staff at ORR facilities, including licensed mental health care providers?
 - a. If so, please provide documentation of this notice, as well as any policies, practices, or procedures directing ORR staff or contractors on how to provide such notice.
 - b. If not, please explain why ORR does not provide such notice.
6. Does ORR allow unaccompanied minors in its custody to opt out of mental health care?
7. What procedures, if any, does ORR have in place to obtain a minor's consent to share information disclosed as part of their mental health care?
8. Many state laws afford confidentiality to interactions between licensed mental health care workers and their patients. In states with such confidentiality restrictions, do state-licensed mental health providers at ORR facilities comply with these state laws?

Thank you for your attention to this matter. If you have any questions, please contact Adam Axler at adam_axler@markey.senate.gov or 202-224-2742.

Sincerely,



EDWARD J. MARKEY
United States Senator



RICHARD BLUMENTHAL
United States Senator



ROBERT P. CASEY, JR.
United States Senator



TINA SMITH
United States Senator



ELIZABETH WARREN
United States Senator



BERNARD SANDERS
United States Senator



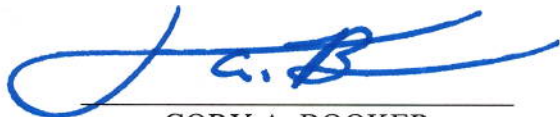
KIRSTEN GILLIBRAND
United States Senator



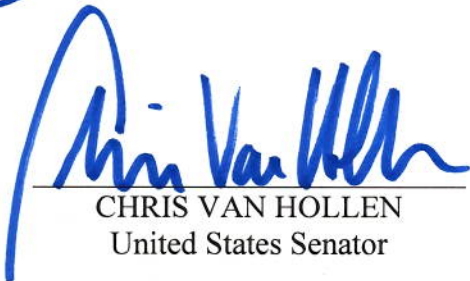
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