

# United States Senate

WASHINGTON, DC 20510

March 4, 2020

Ms. Christi Grimm  
Principal Deputy Inspector General  
U.S. Department of Health & Human Services  
330 Independence Avenue SW  
Washington, DC 20201

The Honorable Joseph V. Cuffari  
Inspector General  
U.S. Department of Homeland Security  
245 Murray Lane SW  
Washington, DC 20528

Dear Principal Deputy Inspector General Grimm and Inspector General Cuffari:

We respectfully request that you investigate two specific issues as part of your ongoing review of U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) and U.S. Department of Homeland Security (DHS) programs and policies for the care and custody of unaccompanied children.

First, we ask that you review to what extent ORR has shared confidential and/or privileged information about children with U.S. Immigration and Customs Enforcement (ICE) and whether that information was inappropriately used by ICE in their efforts to deport those children. It has recently come to light that ICE attorneys used information revealed by children to their therapists as they sought to remove those children from the United States. We have serious concerns about whether use of information shared between children and their therapists comports with internal policy, ethics requirements, and professional norms.

The American Psychological Association's president strongly criticized the "weaponizing" of therapy sessions, stating, "ORR's sharing of confidential therapy notes of traumatized children destroys the bond of trust between patient and therapist that is vital to helping the patient."<sup>1</sup> The United States Supreme Court has recognized the psychotherapist-patient privilege, holding that conversations and notes taken during counseling sessions are protected from compelled disclosure.<sup>2</sup> The Court noted that "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." The reported breach of confidentiality as it relates to traumatized children is particularly egregious.

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<sup>1</sup>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>.

<sup>2</sup>*Jaffee v. Redmond*, 518 US 1 (1996).

At a recent Senate Appropriations Committee hearing, Senators Murray and Durbin asked HHS Secretary Alex Azar about this and related issues involving HHS's treatment of migrant children in the agency's care.<sup>3</sup> Senator Murray asked Secretary Azar whether HHS is now making clear that anything children share in therapy sessions will be shared with ICE, to which he responded, "Those notes from therapists or mental health counselors should not be disclosed absent the child's consent or limited, the most limited information possible, in the event of a threat to themselves or others that's disclosed." Senator Durbin asked Secretary Azar how a child could consent to such disclosure, to which he responded, "Our children have legal counsel that we pay for and so we would be working with them on that." Secretary Azar concluded by stating that "the most important issue is this was a mistake, it should not have been happening, as it was identified it was stopped, we do respect the privacy of these mental health conversations ... it was a mistake, we fixed it, and on a going forward basis it shouldn't be happening." However, the agency's own rules, which were revised in 2018, appear to require reporting to ICE of criminal history and other "Significant Incidents," and may suggest broader discretion than suggested by Secretary Azar about the scope and ongoing nature of therapy disclosures.<sup>4</sup>

Second, we ask that you review whether unaccompanied children are being inappropriately placed in secure facilities and whether all placements of children in secure facilities are being regularly reviewed to determine whether they are justified. The Trafficking Victims Protection Reauthorization Act (TVPRA) specifies that an unaccompanied child in ORR custody must be "promptly placed in the least restrictive setting that is in the best interest of the child," and requires that before placement in a secure facility, a determination must be made that the child either poses a danger to self or others or has been charged with a criminal offense. Furthermore, the TVPRA requires that the placement of a child in a secure facility must be regularly reviewed, at a minimum on a monthly basis.

A report by the National Center for Youth Law found children are "stepped-up [to secure facilities] due to allegations by staff or clinicians that may be arbitrary and unfounded."<sup>5</sup> Children with disabilities are particularly targeted for placement in secure facilities.<sup>6</sup> A 2017 federal court order detailed the cases of multiple children who had been released from ORR custody and then subsequently arrested by ICE and placed in ORR secure facilities. These children were only released after the court ruled that it was unlawful for the government to continue to detain them without prompt hearings before an immigration judge.<sup>7</sup> These are not isolated cases; according to a

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<sup>3</sup> Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, Senate Committee on Appropriations, *Hearing on Review of the FY2021 Budget Request for HHS*, Feb. 25, 2020, <https://www.appropriations.senate.gov/hearings/review-of-the-fy2021-budget-request-for-hhs>.

<sup>4</sup> ORR Policy Guide: Children Entering the United States Unaccompanied, Sections 5.8.2 Significant Incidents (Revised 6/7/18) and 5.8.5 Reporting SIRs to DHS (Revised 8/2/18), available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>.

<sup>5</sup> Child Welfare & Unaccompanied Children in Federal Immigration Custody: A Data and Research Based Guide for Federal Policy Makers, National Center for Youth Law, Dec. 2019, <https://youthlaw.org/wp-content/uploads/2019/12/Briefing-Child-Welfare-Unaccompanied-Children-in-Federal-Immigration-Custody-A-Data-Research-Based-Guide-for-Federal-Policy-Makers.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> *Saravia v. Sessions*, No. 17-CV-03615-VC (N.D. Cal. Nov. 20, 2017), Order Granting Motion for Preliminary Injunction, available at <https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/saravia-v-whitaker-vc/Order-granting-motion-for-preliminary-injunction-100.pdf> ("The minors and their sponsors have the right to participate in a prompt hearing before an immigration judge in which the government's evidence of changed circumstances is put to the

recent investigative report, a therapy service provider at a secure facility contracted by ORR personally observed “a “fear-based” push to keep children detained on shaky allegations of dangerousness.”<sup>8</sup>

Federal agencies must treat children in their care with humanity and in accordance with the law. Unfortunately, as your offices have repeatedly documented, agency decisions and practices have failed migrant children, including children ripped apart from their parents at the border due to the cruel family separation policy and children who have languished in dangerous, overcrowded facilities at the southwest border. We therefore request that you closely examine the actions taken by HHS and DHS regarding the two issues we have highlighted.

Thank you for your time and consideration. We look forward to a prompt response.

Sincerely,



RICHARD J. DURBIN  
United States Senator



PATTY MURRAY  
United States Senator



DIANNE FEINSTEIN  
United States Senator



PATRICK LEAHY  
United States Senator



SHELDON WHITEHOUSE  
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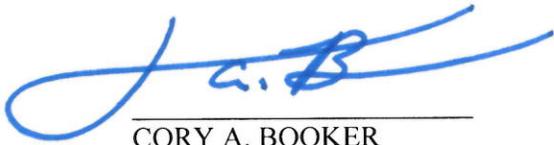


MAZIE K. HIRONO  
United States Senator

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test. By shipping the minors across the country for indefinite detention in a high-security facility before providing that hearing, the government has violated their due process rights.”).

<sup>8</sup> Trust and Consequences, *The Washington Post*, by Hannah Dreier, Feb. 15, 2020, available at <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice/>.



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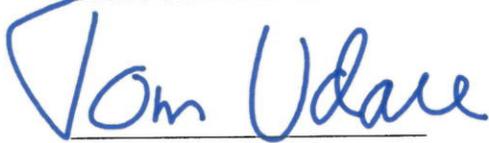
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United States Senator



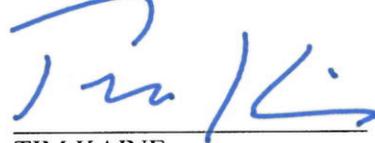
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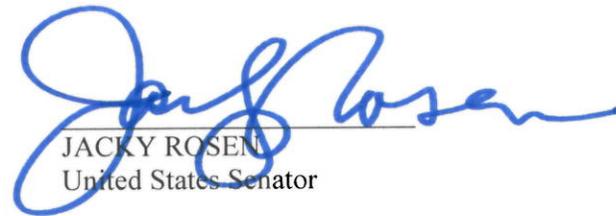
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