

AMERICAN
PSYCHIATRIC
ASSOCIATION



February 25, 2020

The Honorable Alex Azar
Secretary
U.S. Department of Health and Human Services
2707 Martin Luther King Jr Avenue, SE
Washington, DC 20528-0525

The Honorable Chad F. Wolf
Acting Secretary
U.S. Department of Homeland Security
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Azar and Acting Secretary Wolf:

On behalf of the American Psychiatric Association (APA), the national medical specialty society representing 38,800 physicians specializing in psychiatry, and NAMI (National Alliance on Mental Illness), the nation's largest grassroots mental health organization dedicated to building better lives for people affected by mental illness, we are writing to request a meeting with you to discuss our concerns regarding recent reports indicating that confidential mental health information between patients and providers is illegally and unethically being used by agencies against patients. This practice undermines efforts to ethically treat individuals with mental health needs and should be prohibited immediately. We are extremely concerned that confidential mental health information obtained during treatment of unaccompanied alien children (UAC) in the Office of Refugee Resettlement's (ORR) care is being used against them by U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) agents in immigration proceedings. This practice violates the *Flores v. Reno* Settlement (1997) ("Flores"), HHS' stated policy, and medical ethics.

The stipulated settlement agreement reached in *Flores* clearly mandates that HHS should act in the best interest of UACs in ORR care and that UACs are entitled to mental health treatment. In doing so, it contemplates a confidential treatment relationship between the detainee and the mental health treatment provider. For example, *Flores* requires that all shelter programs into which UACs are placed provide "appropriate mental health interventions when necessary" and at "least one (1) individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing the minor's progress, establishing new short term objectives, and addressing both the developmental and crisis-related needs of a minor" *Flores*, at Exhibit 1 (Paragraphs A.2 & A.6). *Flores* also makes explicit that the mental health records created under the treatment provided to UACs are confidential, stating "programs shall develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which preserves the confidentiality of client information and protects records from unauthorized use or disclosure" *Flores* at Exhibit 1 (Paragraph E).

The April 2018 *Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters* (MOA) does not alter the legal

requirements that mental health treatment be provided to UACs and that the records of such treatment be protected as confidential. Instead, the MOA requires that ORR notify ICE and/or CBP of certain activities, including “alleged or suspected fraud, human smuggling, human trafficking, drug trafficking, weapons trafficking, or gang-related activity” while an UAC is in ORR care *within “48 hours after the occurrence”* (MOA at Section IV.B.1, emphasis added). Furthermore, the MOA states that its contents are not intended to conflict with current law, which includes the legal requirements of *Flores* regarding mental health treatment. If “a term of MOA is inconsistent with such authority, then that term shall be invalid” (MOA at Section VI). Rather than require reporting of past experiences shared by a UAC during therapy, the MOA merely calls for the reporting of current activities that take place while the UAC is in ORR care.

HHS and DHS’s confirmed in the *Final Rule on Apprehension, Processing, Care and Custody of Alien Minors and Unaccompanied Alien Children* (84 Fed. Reg. 44,392 August 23, 2019 at 44¹), that detainee health records would be confidential and released only for purposes consistent with the purpose of the initial information collection. They represented: “although ICE health records are not subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), ICE detainee *health records are kept confidential as a matter of policy*, and access to such records is restricted...[when disclosed without consent such] information *may only be released for a purpose consistent with the purpose of the initial information collection*. Thus, concerns that detainee health records will somehow always be relevant to a minor’s removal proceeding such that an immigration judge will allow routine use of such records as part of a removal case are purely speculative and unfounded.” *Id.* At 441 (emphasis added).

Children in ORR custody require access to mental health care in order to assist them in dealing with the serious emotional and mental stressors they have experienced. Many of these children experience significant trauma, which has the potential to cause life-long negative consequences on their physical and mental health and should be treated using trauma-informed approaches. Trauma-informed care includes understanding a patient’s life experiences in order to deliver effective care.² The purpose of the initial information collection between a patient and mental health care provider is to gather information needed for a diagnosis and treatment of mental illness, not to gather evidence for immigration proceedings. It is vital that children are able to share their experiences candidly and entirely with mental health practitioners in order to achieve this goal. The perception of mental health care providers sharing confidential information from patient therapy sessions that could be used against the UAC later will cause distrust, impeding and discouraging children from accessing evidence-based mental health care.

The current application and interpretation of the MOA is having a harmful impact on immigrant children in ORR custody. Aside from violating federal law, it contradicts broadly accepted mental health ethical privacy and disclosure standards. It is a fundamental ethical value of mental health providers to maintain the confidentiality of such records, absent the patient’s consent. The limited exceptions to this rule (e.g. to prevent harm to the patient or identifiable third parties) are not applicable here.

In addition, there are numerous psychiatrist physicians who are interested in providing much needed mental health treatment to children in ORR custody. Over the last several months APA has been working

¹ The Central District of California permanently enjoined enforcement of the Final Rule in *Flores v. Barr*, Case No. CV 85-4544 DMG, (September 27, 2019). That government appealed the injunction to the Ninth Circuit Court of Appeals where the parties have been ordered to mediation.

² Center for Health Care Strategies (April 2016) Key Ingredients for Successful Trauma-Informed Care Implementation. Retrieved from <https://www.chcs.org/resource/key-ingredients-for-successful-trauma-informed-care-implementation/>

with HHS's Agency for Children and Families to assist our members in linking up with facilities in need of psychiatric expertise. The current practice of mandating that therapy notes be shared between agencies and allowing for use of the notes to the detriment of the patient, however, will preclude psychiatrists from providing care at the border. The APA Ethics Committee has considered this situation and advised that it would unethical for psychiatrists acting in a clinical capacity to share their therapy notes with the government for use in deportation proceedings. (See attached decision.)

Our organizations hope to meet with you, share the ethics opinion, and discuss how we can collaborate to correct this practice and clarify this for your employees and agents in order to respect professional ethics and the confidentiality of therapy records, and to ensure that immigrant children in U.S. custody are able to access necessary mental health services. Please contact Kristin Kroeger, Chief of Policy, Programs, and Partnerships kkroeger@psych.org).

Sincerely,



Saul Levin, MD, MPA, FRCP-E
CEO and Medical Director
American Psychiatric Association



Daniel H. Gillison, Jr.
Chief Executive Officer
NAMI

cc: Lynn Johnson, Assistant Secretary for the Administration for Children and Families
Jonathan H. Hayes, Director of the Office of Refugee Resettlement
Mark A. Morgan, Acting Commissioner, U.S. Customs and Border Protection
Mathew T. Albence, Acting Director, U.S. Immigration and Customs Enforcement