ADMINISTRATION FOR CHILDREN & FAMILIES
Office of Refugee Resettlement | 330 C Street, S.W., Washington, DC 20201
www.acf.hhs.gov/programs/orr

TO: E. Scott Lloyd
Director
Office of Refugee Resettlement

FROM: Jonathan White
Deputy Director for Children's Programs
Office of Refugee Resettlement

DATE: December 6, 2017

SUBJECT: Use of Federal Funds to Terminate a Pregnancy for [redacted] – DECISION

Issue

[redacted]

Discussion

UAC states that she was raped by a stranger in her home country of [redacted] prior to her journey to the United States, resulting in this pregnancy. [redacted], she had a positive pregnancy test during her IME on [redacted] and due to program licensing was transferred to [redacted] in [redacted] on [redacted]. The UAC was referred to an OB-GYN for further management. The UAC has informed the medical staff that she would like an abortion on the grounds of being raped. She has restated this request to medical personnel, as described in the attached Significant Incident Reports (SIRs).

Minor is a [redacted] year-old female from [redacted] who came into ORR custody for the first time on [redacted]. The minor is from [redacted] and her primary language is [redacted]. She is [redacted] and does not have any viable sponsors at this time.

The minor was placed at [redacted]. During the initial assessment at [redacted], the minor disclosed that she was sexually abused by an unknown man in her home country approximately four months ago. On [redacted], a SIR was submitted for the sexual abuse disclosure. On [redacted], the urine test results came back positive for pregnancy, and the minor indicated that she was eight weeks pregnant. Since [redacted] is not licensed by the state to provide care to pregnant teenagers and/or children under the age of 14, the program requested an emergency transfer the same day the urine tests came back. The minor was transferred to [redacted], which is licensed to shelter pregnant youth, on [redacted].

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When she arrived, the minor disclosed that she was two months pregnant, and reported that she wanted to terminate the pregnancy. [redacted] submitted a SIR for the pregnancy with the minor's request to have the pregnancy terminated, and a SIR for the disclosure of sexual abuse.

On [redacted], the minor had her first OB/GYN appointment for pre-natal care. As part of the examination, the minor received an interview in the presence of an interpreter, medical doctor, and nursing staff at [redacted] The results of the medical exam indicated that the minor had 20 weeks of gestation. The minor had first reported that she believed that the pregnancy was a product of consensual relations with her ex-boyfriend. However, upon learning that she was 20 weeks pregnant, she realized that her pregnancy was a product of the previously reported rape by an unknown man in home country. The minor requested termination, and disclosed to the medical doctor that she preferred to harm herself rather than to continue with the pregnancy. Based on the reported self-harm concern, the program put in place a safety plan and has been monitoring the minor. Another SIR was submitted for the incident.

On [redacted] the minor had a second pre-natal visit with the OB/GYN at [redacted] At this visit, the minor disclosed that she was being threatened by her biological and potential sponsor to keep the baby or they would inflict physical harm on her, and that she wanted to continue with the pregnancy. On [redacted], the minor went to her third pre-natal visit at [redacted] In the hospital, the minor requested to speak with the hospital social worker in private. The hospital social worker then informed [redacted] that the minor had requested to have her pregnancy terminated. The minor confirmed this information to the program clinician, and stated that she felt pressured by her mother and potential sponsor to continue the pregnancy, but she wants to terminate the pregnancy. This is the third time the minor is requesting to terminate her pregnancy.

The minor is at 21 weeks of gestation. Under the laws of [redacted] any termination procedure is banned after [redacted] weeks. Therefore, it is critical that a decision to approve or deny her request as soon as possible.

Minor's pregnancy was the result of:

☒ An act of rape

See attached clinical notes and/or other relevant documents documenting that the minor's pregnancy was the result of rape

☐ An act of incest

See attached clinical notes and/or other relevant documents documenting that the minor's pregnancy was the result of incest

OR

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☐ Minor 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 attached the physician certification form

ORR may allow the use of Federal funds to pay for this minor's pregnancy termination because the pregnancy resulted from an act or condition that is an exception to the Hyde amendment.

Background

Funding
Section 506 of the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, prohibits the use of federal funds to pay for an abortion. Section 507 of the Appropriations Act, however, permits federal funds to be used for an abortion "(1) if the pregnancy is the result of an act of rape or incest; or (2) 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 Continuing Appropriations Act, 2016, Pub. L. No. 114-53.

Consent
[redacted] law does not require that women under the age of 18 seeking a termination of pregnancy to obtain consent from parents/legal guardians or to pursue a waiver of notification.

Recommendation

[redacted]

DECISION

I authorize pregnancy termination for this minor.

Approved _____ Disapproved E. Scott Lloyd Date 12/16/17

I approve the use of Federal funds to pay for a pregnancy termination for this minor. Federal funds may also be used to pay for transportation, staff time, and after-care as part of the normal course of business for any minor receiving medical care in ORR custody.

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Approved _____ Disapproved E. Scott Lloyd 12/16/17 Date _____

Attachments: SIR
OB Clinical Notes

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NOTE TO FILE

December 17, 2017

Scott Lloyd, Director

Background

We have in our custody an unaccompanied alien child (UAC) who is [redacted] years old and who reported that she was sexually assaulted in her home country. Based on the timeframe she provided for the sexual assault, we have reason to believe that this assault resulted in her current pregnancy. While she also reported that she had a boyfriend in her home country with whom she had intercourse, the UAC also now believes she is pregnant with the child of her attacker.

Several weeks after the assault, she made the journey to the United States where she attempted to cross the border illegally, but was apprehended at the border, and is now in our care. She originally requested an abortion upon confirmation that she was pregnant, but rescinded the request after she reported that her mother, and the [redacted] who was to serve as her sponsor, threatened to "beat" her if she did so. She renewed her request after a few days, although language difficulties and other circumstances made it unclear that she knew what she was requesting. She has had an information session that imparted information about fetal development and the abortion procedure she requests, and we can now say with a reasonable amount of certainty that she has an understanding of both. She still desires an abortion, and has on at least one occasion threatened to harm herself if she does not obtain it. Shelter staff has taken appropriate measures to mitigate that risk, and she has since made at least one statement denying that she is a threat to herself. There is no indication that the pregnancy threatens her physical health in any way.

At nearly 22 weeks, the child has at least a fighting chance at survival if born.[1] The most likely method of abortion in this instance is Dilation and Evacuation abortion.[2] This particular form of abortion is one that even many abortionists find troublesome.[3] [4]

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[1] *See, e.g.* Jacqueline Howard, *Born Before 22 Weeks 'Most Premature Baby' is Now Thriving*, CNN.COM at http://www.cnn.com/2017/11/08/health/premature-baby-21-weeks-survivor-profile/index.html.

[2] Supreme Court Justice Anthony Kennedy, writing for a majority of justices, described Dilation and Evacuation abortion in the following way:

> A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. […] After sufficient dilation, a doctor inserts grasping forceps through the woman's cervix and into the uterus to grab a living fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn apart limb by limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. The process of dismembering the fetus continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Gonzales v. Carhart, 550 U.S. 124 at 135-36 (2007) (citations omitted); *see also Stenberg v. Carhart*, 530 U.S. 914 958-59 (2000) (Kennedy, A., dissenting).

[3] *See, e.g.,* Warren M. Hern, M.D., and Billie Corrigan, R.N., "What About Us? Staff Reactions to the D&E Procedure," paper presented at the Annual Meeting of the Association of Planned Parenthood Physicians, San Diego, California (October 26, 1978); George Flesh, M.D., "Why I No Longer Do Abortions: Tearing a second-trimester fetus apart simply at a mother's request is depravity that should not be permitted", Los Angeles Times (Perspective on Human Life), September 12, 1991, at http://articles.latimes.com/1991-09-12/ local/me-2729_1_human-life/2; Vincent Argent, M.D., "Why this abortion doctor wants to see time limits reduced to 16 weeks," The Telegraph, May 28, 2008, at http://www.telegraph.co.uk/news/uknews/1976846/Why-thisabortion-doctor-wants-to-see-time-limits-reduced-to-16-weeks.html.

[4] Dr. Lisa Harris, an abortionist and Assistant Professor in the Departments of Obstetrics and Gynecology and Women's Studies at the University of Michigan, captured well the human dimension of performing late-term abortions in a piece she wrote in 2008. After describing the phenomenon of aborting an 18week-old fetus while she was 18 weeks pregnant herself, admits that "there is violence in abortion, especially in second trimester procedures. Certain moments make this particularly apparent." She goes on to describe aborting a 23 week-old fetus on one floor, and then rushing to the aid of a baby born prematurely at 23 weeks, and puzzling over how it was legal for her to kill the first, but it would be a crime to kill the second. *See*, Lisa H. Harris, "Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse," 16 Reproductive Health Matters, 74-81 (2008).

To obtain the abortion, program staff would have to accompany her before, during, and after the procedure, as our statutory authorities forbid us from releasing a UAC on her own recognizance.[5]

At least one senior program staff person recommends that the program assist her in obtaining the abortion. The program awaits my authorization for this assistance to occur, which I have denied in a separate document. I am convinced that assisting with an abortion in this case is not in her best interest.

Analysis

Sexual assault is among the gravest offenses in the catalogue of offenses man can commit against his fellow man, or in this case, a teenaged young woman. Every compassionate society, including our own, seeks to provide protection against such brutality, to prosecute it vigorously, and to provide aid and comfort to its victims. The UAC program has no prosecutorial authority, but is very strong both in protecting UACs from rape and also providing comfort to those who have the tragic misfortune of experiencing such an offense against their person and their dignity.

Over and above the trauma of the assault itself, a pregnancy that results from a rape is itself a continuous reminder of the attack. Women who experience pregnancy from rape must wrestle with the phenomenon of being the mother of a child whose other parent brutally terrorized and did violence to her. Certainly, it is understandable that a woman who is pregnant from the vile actions of a criminal would want to terminate her pregnancy. I do not, and am in no position to, judge anyone who has taken such an action or supported another in doing so.

But I cannot authorize our program to participate in the abortion requested here, even in this most difficult case. Here, where the pregnancy is advanced to such a late stage, we have in stark relief the reality that abortion entails, as Dr. Harris candidly admitted, violence that has the ultimate destruction of another human being as its goal.

Even supposing it was possible to justify abortion in this context, abortion does not here cure the reality that she is the victim of an assault. It also carries with it significant risk of further complicating the matter. It is possible, and perhaps likely, that this young woman would go on to experience an abortion as an additional trauma on top of the trauma she experiences as a result of her sexual assault. Although formal research on this matter appears to be sparse, those who have worked with women who have experienced abortion have compiled a catalogue of anecdotal evidence, impossible to ignore, that shows that many women go on to experience it as a devastating trauma, even in the instance of rape.[6] If the young woman was to go on to regret her abortion and experience it as a trauma, ORR will

[5] Homeland Security Act of 2002, 6 U.S.C. § 462 (b)(2)(B).

[6] *See*, *e.g.*, *Gonzales*, 550 U.S. at 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."); *See also,* Hope After Abortion, at http://hopeafterabortion.com. (Brenda's Story: "Nothing was touching it — nothing was helping me put down the bottle and take control of my life. I sought mental health treatment for the trauma I experienced around the rape and the abortion, but I was still suffering, and I was still

have had a hand in causing that trauma, and I am unwilling to put this young woman or ORR in that position.

I am mindful that abortion is offered by some as a solution to a rape. In fact, some would suggest that, by declining to assist in the abortion we are in some way engaging in a form of violence against the mother, as in the notion that ORR is forcing her to carry her pregnancy to term.

I disagree. Implicit here are the dubious notions that it is possible to cure violence with further violence, and that the destruction of an unborn child's life can in some instances be acceptable as a means to an end. To decline to assist in an abortion here is to decline to participate in violence against an innocent life. She remains pregnant, but this is not the intent of our actions. Moral and criminal responsibility for the pregnancy lies with the attacker, and no one else.

Others might suggest that abortion is justified as a form of self-defense in this instance, but this gets it wrong again. The child—the one who is destroyed—is not an aggressor. The aggressor, again, was the rapist.

At bottom, this is a question of what is in the interest of the young woman and her child. How could abortion be in their best interest where other options are available, and where the child might even survive outside the womb at this stage of pregnancy? Here there is no medical reason for abortion, it will not undo or erase the memory of the violence committed against her, and it may further traumatize her. I conclude it is not her interest.

Regarding any further legal questions, I defer to the various attorneys representing our position in this and related litigation that this is a legally permissible path. There is nothing in the law or in the Constitution that requires this program to participate in providing abortion for UAC, and the Department of Justice has argued that ORR does not impose an undue burden by declining to authorize abortions that are not medically indicated.

Conclusion

The Office of Refugee Resettlement serves a large number of persons who have experienced some sort of violence. Refuge is the basis of our name and is at the core of what we provide, and we provide this to all the minors in our care, including their unborn children, every day. In this request, we are being asked to participate in killing a human being in our care. I cannot direct the program to proceed in this manner. We cannot be a place of refuge while we are at the same time a place of violence. We have to choose, and we ought to choose protect life rather than to destroy it.

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drinking. It constantly weighed on my mind that I was in a state of mortal sin — I had killed my baby.")(Georgia's Story: "I was pregnant from a date rape…. Before I had time to think about what I wanted, the abortion was over…Not a day goes by that the abortion doesn't cross my mind. It is a constant struggle trying to overcome my guilt and depression, even knowing I have been forgiven. I dread the day when I have to come face to face with my little child and explain to her why mamma took her life. But I also think I am a softer, more caring person than I might have been.")