

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

Brianna Boe, *et al.*, )  
)  
*Plaintiffs,* )  
)  
and )  
)  
United States of America, )  
)  
*Plaintiff-Intervenor,* )  
)  
v. ) No. 2:22-cv-00184-LCB-CWB  
)  
Hon. Steve Marshall, in his official )  
capacity as Attorney General of the )  
State of Alabama, *et al.*, )  
)  
*Defendants.* )

**PLAINTIFF-INTERVENOR UNITED STATES OF AMERICA'S  
RESPONSE TO DEFENDANTS' NOTICE REGARDING DISCOVERY  
SCHEDULE**

The United States submits this response to apprise the Court of the progress the U.S. Department of Health and Human Services (HHS) has made in complying with the Court's Order, ECF No. 261, and to respond to Defendants' argument that Admiral Rachel Levine, the Assistant Secretary for Health at HHS, must be made a custodian for the purposes of discovery.

**A. HHS Has Made Significant Progress in its Document Production to Defendants.**

The United States and HHS have been working diligently with Defendants so that documents can be produced in accordance with the Court's Fifth Amended Scheduling Order, ECF No. 292. The United States agrees with Defendants that the process is going well overall. In fact, HHS completed its first document production of over 12,000 pages of documents earlier today.

HHS has worked expeditiously to move the discovery process forward. HHS has collected emails from custodians from the National Institutes of Health (NIH), as well as from three divisions within the HHS Office of the Secretary—the Office of Civil Rights (OCR), the Office of the Assistant Secretary for Health (OASH), and the Substance Abuse and Mental Health Services Administration (SAMHSA). These emails are under attorney review, and a subset of these files was produced today as part of the production noted above.

For non-email documents, HHS has been manually collecting files from the Agency for Healthcare Research and Quality (AHRQ), SAMHSA, OCR, and OASH, and, for NIH, HHS has been manually collecting a subset of NIH documents. The manual collection for AHRQ and SAMHSA is complete, and HHS anticipates the remaining manual collections will be completed by June 30, 2023. Document review will begin soon thereafter. For two additional HHS components, the Indian Health Service (IHS) and the Centers for Medicare & Medicaid Services

(CMS), data sought by Defendants was produced today as part of the production referenced above.

**B. There is No Basis to Designate Admiral Levine as an Email Custodian.**

Admiral Levine should not be designated as an email custodian in this matter. Even if she has publicly opined on gender-affirming care in her capacity as a high-ranking HHS official, Admiral Levine is not herself conducting studies related to gender-affirming care nor is she employed at HHS as a researcher. In practice, Admiral Levine has staff in her Immediate Office who prepare documents for her to review or sign and who prepare her for her public appearances and speeches.<sup>1</sup>

As an initial matter, HHS designated nine custodians, all of whom are leaders in their division. For instance, five of the custodians bear the title Director,

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<sup>1</sup> Defendants assert that Admiral Levine “oversees two offices within OASH that relate directly to research protections: the Office of Human Research Protections and the Office of Research Integrity” and that these offices and Admiral Levine would likely have responsive information regarding suicides of two transgender youth, ECF No. 293 at 7-8, but there is no basis for this assertion. The Office of Research Integrity (ORI) has no role in monitoring research studies, reporting adverse events, or the informed consent process. ORI provides oversight review of institutions’ research misconduct proceedings concerning allegations of research misconduct, which is defined as fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. 42 C.F.R. 93.103; *see also* 42 C.F.R. 93.400 (general statement of ORI’s authority). With respect to the Office for Human Research Protections (OHRP), HHS is looking into whether OHRP would have responsive information. To the extent that it does, that information will be manually collected from OHRP, which would have the full scope of potentially responsive documents.

and the remaining four are Team Leader, Deputy Assistant Secretary, Senior Advisor, and Psychologist.<sup>2</sup>

These custodians are more than sufficient to meet HHS's discovery obligations. Defendants cite no authority for the proposition that one party has the authority or ability to decide who another party selects as a custodian. HHS is obligated to comply with this Court's order to produce responsive documents, and the agency has developed a plan for collection of information designed to meet that obligation.

Furthermore, Defendants cite no authority requiring that Admiral Levine must be designated as a custodian, as opposed to any other official within HHS. *Cf. VeroBlue Farms USA v. Wulf*, \_\_\_ F.R.D. \_\_\_, 2021 WL 5176839, at \*9 (N.D. Tex. Nov. 8, 2021) (noting that a responding party is “best situated” to preserve, search, and produce its own electronically stored information without direction from opposing counsel absent a specific deficiency in production). As the United States and HHS have explained to Defendants, there is no reason why HHS should

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<sup>2</sup> The custodians are: Janet Maynard, Director, FDA, Office of Rare Diseases, Pediatrics, Urologic and Reproductive Medicine; Christian Cao, Team Leader, FDA, Division of Pharmacovigilance I; Diana Bianchi, Director, NIH, National Institute of Child Health and Human Development; Rohan Hazra, Director, NIH, National Institute of Child Health and Human Development – Division of Extramural Research; Karen Parker, Director, NIH, Sexual & Gender Minority Research Office; Dr. Joshua A. Gordon, Director, NIH, National Institute of Mental Health; Maura Calsyn, Deputy Assistant Secretary for Policy, OASH, Immediate Office; Dylan Nicole de Kervor, Senior Advisor, OCR; Arlin Hatch, Psychologist, SAMHSA, Center for Mental Health Services.

designate Admiral Levine as a custodian when substantially the same documents are available—and will be produced—from other HHS officials in the same office. As it did with the other relevant divisions, HHS selected the email custodian in OASH who is most likely to have information responsive to Defendants’ discovery requests. That custodian is Deputy Assistant Secretary for Policy Maura Calsyn. Deputy Assistant Secretary Calsyn, until earlier this month, was a member of Admiral Levine’s Immediate Office team.<sup>3</sup> In her role, Deputy Assistant Secretary Calsyn advised “the Assistant Secretary for Health on all aspects of legislation, policy, research, evaluation, and intergovernmental matters.” HHS, *Maura Calsyn* (Aug. 30, 2022), <https://www.hhs.gov/about/leadership/maura-calsyn.html> [<https://perma.cc/5HLZ-ERV6>]. And, importantly, she was the person in the Immediate Office who worked on transgender issues. Defendants fail to explain why the designation of Deputy Assistant Secretary Calsyn as an email custodian would not fulfill HHS’s discovery obligations in this case, when in HHS’s view, Admiral Levine’s emails and records would not be substantially different from Deputy Assistant Secretary Calsyn’s.

For non-email documents from OASH, HHS is using a manual collection process and collecting documents directly from individuals who have responsive

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<sup>3</sup> Deputy Assistant Secretary Calsyn departed OASH for another division just a week before emails were collected. Her records have been preserved pursuant to a litigation hold.

information. Another member of Admiral Levine’s team, Sarah Boateng, the Principal Deputy Assistant Secretary for Health, is leading this process. In her role, Principal Deputy Assistant Secretary Boateng “shares responsibility with the Assistant Secretary for Health, for planning, coordinating, and directing substantive program matters; policy and program development; and determining and setting legislative and program priorities covering the full range of public health activities within the Office of the Assistant Secretary for Health.” HHS, *Sarah Boateng, MHA* (Sept. 6, 2022), <https://www.hhs.gov/about/leadership/sarah-boateng.html> [<https://perma.cc/7V52-87D2>]. HHS reports that Principal Deputy Assistant Secretary Boateng would have substantially the same records as Admiral Levine. Thus, with respect to both the email and non-email collection, adding Admiral Levine to the list of custodians will simply add duplicative documents, increase review time, and delay the date by which the production from HHS will be completed and, overall, have very little added value.

Furthermore, as Defendants noted, HHS has offered to produce to Defendants Admiral Levine’s emails that will be produced in response to a Freedom of Information Act (FOIA) request instead of designating her as a custodian. *See* Exh. A (Mar. 23, 2023 FOIA request). The FOIA request seeks “[a]ll records of communications” to or from Admiral Levine containing numerous terms such as “puberty-blockers,” “hormone replacement therapy,” “medically

necessary,” “WPATH,” and “transgender youth,” among many others, from October 19, 2021, until the date the FOIA request is fully processed. Exh. A at 4. HHS has collected Admiral Levine’s emails pursuant to this FOIA request and is currently reviewing them.

Defendants promptly rejected this compromise offer. In their notice, Defendants contend that agreeing to this production in lieu of making Admiral Levine a custodian would “force Defendants to forfeit their right to come to this Court to resolve any discovery disputes arising from the production.” ECF No. 293 at 10. This is unsupported and incorrect. The United States and HHS made no representations that Defendants would forfeit the right to raise issues related to this compromise offer and would address any legitimate concerns raised by Defendants regarding the scope of this production.

The email custodians designated by HHS are more than sufficient to meet the agency’s discovery obligations in this matter. Defendants have provided no case law or reasoning to require that Admiral Levine, as opposed to another OASH official, be made an email custodian for the purposes of discovery.

### **CONCLUSION**

The United States and HHS have made substantial progress regarding the production of HHS documents. The United States respectfully asks the Court to deny Defendants’ request to designate Admiral Levine as an email custodian.

Dated: June 23, 2023

Respectfully submitted,

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*Attorneys for Plaintiff-Intervenor United  
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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

Respectfully submitted,

/s/ Coty Montag

Deputy Chief, Federal Coordination  
and Compliance Section  
Civil Rights Division  
U.S. Department of Justice

# **EXHIBIT A**



March 23, 2023

**Via FOIA Portal**

Department of Health and Human Services  
200 Independence Ave SW  
Washington, DC 20201

**Freedom of Information Act Request: Correspondence Related to  
Transgender Clinics**

Dear FOIA Officer,

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL's email list contains over 55,000 unique addresses, our Twitter page has 63,100 followers, the Twitter page of our Founder and President has over 421,400 followers, our Facebook page has 118,000 followers, and we have another approximately 31,700 followers on GETTR.

**I. Background**

In the past two years, several European countries have significantly pulled back on what is labeled "gender-affirming care" for minors. In reality, "gender-affirming care" involves the practice of prescribing puberty blockers and cross-sex hormones for children under 18, as well as using life-altering surgeries like mastectomies, vaginoplasty, phalloplasty, and metoidioplasty to give children the irreversible appearance of the opposite sex.

For example, in 2021, Swedish hospitals halted the use of puberty blockers in five out of six clinics, with a single clinic only using them for clinical trials.<sup>1</sup> Sweden also now emphasizes psychotherapy for gender dysphoric minors instead of puberty blockers.

Last year, France’s National Academy of Medicine warned medical professionals that the spike in demand for physicians to perform “gender-affirming care” on children is an “epidemic-like phenomenon” with the hallmarks of a social contagion, exacerbated by the “increasing supply of care.”<sup>2</sup> The Academy stressed that the “risk of over-diagnosis is real” and cited the high number of transgender young adults wishing to detransition. Thus, the Academy concluded that it was crucial to “extend as much as possible the psychological support phase” to guard against providing “irreversible” medical care for “transient dysphoria.”

Finland has made similar findings, and its Council for Choices in Health Care stressed that “[r]esearch data on the treatment of dysphoria due to gender identity conflicts in minors is limited,” that medical intervention should be deemphasized in favor of psychotherapy, and that surgery should not be part of any treatment.<sup>3</sup>

Likewise, England’s National Health Service has also recognized the need to hit the brakes on the medical transition of children given the concerning and abnormal spike in referrals of children claiming to identify as a different sex. It noted that in “most cases gender incongruence does not persist into adolescence” and that social transitioning should no longer be considered a “neutral act” given the risks associated with it. Thus, “social transition should only be considered where the approach is necessary for the alleviation of, or prevention of, clinically significant distress or significant impairment in social functioning and the young person is able to fully comprehend the implications of affirming a social transition.”<sup>4</sup>

Despite the trend in Europe to change course amidst a clear social contagion, the risks of transitioning children socially and medically, and the growing population of detransitioners, HHS Assistant Secretary Rachel Levine is taking an approach diametrically opposed to the trends in Europe and shocking evidence in the United States.

Just last week, Levine praised the social and medical transition of children at the Pediatric Grand Rounds session at Connecticut Children’s Medical Center in

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<sup>1</sup> Mairead Elrodi, *Europe Dialing Back Shocking Policies on Transgender Kids and Medical Intervention*, Daily Wire (June 16, 2022), <https://tinyurl.com/3nmc7ef9>.

<sup>2</sup> *Press Release, Medicine and Gender Transidentity in Children and Adolescents*, FRENCH NAT’L ACAD. MED. (Feb. 25, 2022), <https://tinyurl.com/2p9fpjyd>.

<sup>3</sup> COHERE FINLAND, *Medical Treatment Methods for Dysphoria Associated With Variations in Gender Identity in Minors—Recommendation* (June 16, 2020), <https://tinyurl.com/tzw7pusr>.

<sup>4</sup> Emily Craig & John Ely, *Children Who Think They’re Trans Are Probably Just Going Through a Phase*, NHS Says, DAILY MAIL (Oct. 24, 2022), <https://tinyurl.com/fmxp3acn>.

Hartford, Connecticut.<sup>5</sup> Levine stated that such treatments have support “at the highest levels of the federal government,” including President Biden and Vice President Harris, and that those that question their wisdom or safety are “ideologically and politically motivated.”<sup>6</sup> Levine further claims, despite evidence to the contrary, that hormones and puberty blockers for children are “medically necessary, safe, and effective,” and that the administration will do everything in its power to ensure that these treatments remain easily accessible for children.

Not only is Levine’s position completely contrary to what European nations are saying and doing, but it also ignores recent stories of transgender clinics rushing toward providing irreversible medical treatment for children without proper protocols in place, without patients and parents understanding the risks, and with doctors admitting that “[w]e are building the plane while we are flying it.”<sup>7</sup>

Levine also ignores that this process begins at a young age where thousands of schools are starting children on a school-to-scalpel pipeline by socially transitioning children without parental notice or input.<sup>8</sup>

Given the potentially devastating impact of social and medical transitioning of minors and the irreversible nature of many of the procedures, it is crucial for the public to better understand what Assistant Secretary Levine is doing and saying on these issues, especially when Levine’s public statements are so contrary to children’s health, science, trends, experience of those that have witnessed the process, and common sense.

## II. Requested Records

AFL requests the following records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a):

- A. All records of communications, including e-mail and Microsoft Teams messages, to or from Rachel Levine, containing the following terms: Vanderbilt University, Boston Children’s Hospital, Seattle Children’s Hospital, Children’s Hospital of Philadelphia, Tavistock, University of Virginia, Connecticut Children’s and/or Washington University Transgender Center. The timeframe for this item is October 19, 2021, to the date this item is fully processed.

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<sup>5</sup> Joshua Q. Nelson, *Dr. Rachel Levine Says Changing Kids’ Genders Will Soon Be Fully Embraced: ‘Wheels Will Turn On This’*, FOX NEWS (Mar. 16, 2023), <https://tinyurl.com/4b49s3fd>.

<sup>6</sup> Lee Brown, *Hormone Therapy for Trans Kids Supported at ‘Highest Levels’ of Biden Admin: HHS*, N.Y. POST (Mar. 17, 2023), <https://tinyurl.com/msjkzxh7>.

<sup>7</sup> Jamie Reed, *I Thought I Was Saving Trans Kids. Now I’m Blowing the Whistle*, FREE PRESS (Feb. 9, 2023), <https://tinyurl.com/z4wvwhv2>.

<sup>8</sup> PARENTS DEFENDING EDUC., *List of School District Transgender–Gender Nonconforming Student Policies* (Mar. 7, 2023), <https://tinyurl.com/563xzhjy>.

B. All records of communications, including e-mail and Microsoft Teams messages, to or from Rachel Levine, containing the following terms: “gender-affirming care,” “puberty blockers,” “testosterone,” “hormone replacement therapy,” “HRT,” “transgender clinics,” “gender dysphoria,” “transition surgery,” “gender identity,” “detransitioning,” “detransitioned,” “detransitioner,” “medically transitioned,” “suicide prevention care,” “supportive adult(s),” “gag rule,” “medically necessary,” “parental rights,” “anti-LGBTQIA legislation,” “anti-trans legislation,” “anti-trans bills,” “transgender clinic(s),” “mastectomies,” “vaginoplasty,” “phalloplasty,” “access to bathrooms,” “parental consent,” “Title IX,” “access to sports,” “metoidioplasty,” “transgender youth,” “WPATH,” and/or “Protect Children’s Innocence Act.” The timeframe for this item is October 19, 2021, to the date this item is fully processed.

### **III. Custodians**

A. Rachel Levine, Assistant Secretary for Health

### **IV. Fee Waiver Request**

Per 5 U.S.C. § 552(a)(4)(A)(iii), AFL requests a waiver of all search and duplication fees associated with this request. Furthermore, AFL has a demonstrated ability and intention to effectively convey the information broadly to the public. AFL’s status as a representative of the news media has been recognized by other agencies for granting fee waivers by the Departments of Defense, Education, Energy, Health and Human Services, Justice, Interior, and Homeland Security. Finally, as a non-profit organization, AFL has no commercial interest, and the request is made entirely to serve the public interest. We are, of course, available to provide additional information in writing or offline in support of this request. If AFL’s request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

### **V. Processing and Production**

Processing should occur in strict compliance with the processing guidance in the Attorney General’s Memorandum on Freedom of Information Act Guidelines.<sup>9</sup> If you have any questions about our request or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, then please contact me at FOIA@aflegal.org.

[Signature page follows]

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<sup>9</sup> U.S. Dep’t Just. (Mar. 15, 2022), <https://tinyurl.com/ypms987t>.

Thank you in advance for your cooperation.

Sincerely,

/s/ Ian D. Prior

Ian D. Prior

America First Legal Foundation