

Aldea – The People’s Justice Center
American Gateways – Legal Advocacy for Immigrant Survivors
Angry Tias and Abuelas
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Immigrant Defenders Law Center
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Justice Action Center
Northwest Immigration Rights Project
Physicians for Human Rights
Project Amplify
Refugee and Immigrant Center for Education and Legal Services (RAICES)
UC Davis Immigration Law Clinic
Willamette University College of Law Clinical Law Program

June 3, 2021

The University of Texas System
c/o Kevin P. Eltife (Chairman)
Board of Regents
210 West 7th Street
Austin, Texas 78701-2982

The University of Texas Health Science Center at Houston (UT Health)
c/o Giuseppe N. Colasurdo, M.D. (President)
7000 Fannin Street
Houston, Texas 77030

UT Health San Antonio
c/o William L. Henrich, M.D., MACP (President)
7703 Floyd Curl Drive
San Antonio, TX 78229

UT Health School of Dentistry
c/o John A. Valenza, DDS
7500 Cambridge St.
Houston, TX 77054

Re: Unlawful and Unethical Use of “Dental Age Estimation” X-Rays on Asylum Applicants to Justify the Jailing and Deporting of Children

Ladies and Gentlemen:

The undersigned are a group of immigrants' rights organizations, criminal justice reform advocates, and others involved in such issues who are concerned about the violation of children's rights and bodily integrity by some of your employees. We demand that the University of Texas Health Science Center at San Antonio ("UTHSCSA"), now known as UT Health San Antonio, and its faculty and staff, immediately cease and desist from their practice and sponsorship of forced dental radiography and attendant odontological "age estimation" imposed on children, many of whom are seeking asylum. These procedures are requested by the U.S. Government to wrongly and erroneously reclassify children as adults, which often leads to the child being placed in detention with adults and possibly deported. The procedures are not initiated or intended for any diagnostic, treatment or other health-related purpose (or other benefit) for the children.

These "age estimation" practices not only have been found scientifically untenable by judicial tribunals in the U.S. and in Europe, but also grossly violate children's common law and constitutional rights, and basic human rights in their bodies' personal integrity. Odontological age estimation procedures, depending on the circumstances in which they are authorized or performed on these children, also contravene medical and dental ethical obligations that are owed by UTHSCSA, its clinics, and its faculty and other personnel, to those upon whom they practice and conduct (or direct) procedures. In addition, the procedures have serious racial bias implications as applied to individual asylum seekers.

We find it difficult to believe that the University of Texas System Board of Regents (the "Board") has knowingly permitted such conduct at all, especially in light of UT's mission to "improve the human condition in Texas, our nation and our world" and its ethos to "build trust through our actions—personal and professional" and to ensure that "[o]ur actions are moral, legal and ethical."¹ But despite whatever was previously understood by you (or perhaps hidden from you) about these practices, they should be brought to a complete and immediate halt.

Background of the Issues

Our organizations assist children seeking asylum. They have all of the rights, protections, and benefits attendant to such status, including seeking asylum and resettlement in the United States. Many of these children have documentary evidence that makes them readily identifiable as legal minors, under the age of 18, in the form of a passport, valid birth certificates, or baptismal certificates, in addition to representations by their family members and themselves as to their ages. Despite such proof, immigration officials often dispute a child's age,² and seek procedures to reclassify the child as an adult, which leads

¹ See <https://www.utsystem.edu/about/mission>.

² The Department of Homeland Security ("DHS"), the Department of Health and Human Services ("HHS"), the Office of Refugee Resettlement ("ORR"), and Immigration and Customs Enforcement ("ICE"), or organizations with which they contract concerning refugees, have all

to the loss of heightened legal protections the law gives them as children. Dental “age determination” (or “age redetermination”) is among the most prominent techniques used to try to reclassify children as adults in the immigration system. Specifically, following a determination (or redetermination) “opinion” that an individual is 18 or older, the child loses juvenile status and the protections and rights that accompany that status, such as rights to education, health care, family placement, legal counsel, and more. Moreover, such children face a greatly increased risk of being detained in an unsafe manner with adults while they are presenting their requests for asylum, or even deported. The consequences of these examinations could not be more devastating for children seeking asylum.³

The Conduct of UT/UTHSCSA and Dr. David Senn

UTHSCSA has become a prominent participant in this unethical and unlawful practice. Government agencies (and/or public and private organizations, acting pursuant to government contracts, in Texas and around the country) rely on UTHSCSA facilities and faculty for such age estimations.⁴ Children are taken to dental clinics for the express purpose of having their teeth x-rayed (sometimes in conjunction with having had their wrists x-rayed, as well); and the government or contracting agencies then send those x-rays to dentists or “forensic odontologists” for purported “age estimation” opinions.

UTHSCSA is so deeply entrenched in this process that it even has standard fee schedules, both for radiography and for issuing opinions and reports. *See* Ex. 1. It provides facilities – *see, e.g.*, Exhibit 2 – dentists, and forensic odontologists. These include Dr. David Senn, Clinical Assistant Professor, UTHSCSA School of Dentistry; Director of the Center for Education and Research in Forensics at UTHSCSA; and Director of the Southwest Symposium on Forensic Dentistry at UTHSCSA. Indeed, one government contractor referred to Dr. Senn as the “go-to” odontologist for age determination. *See* Ex. 3.

The sole purpose of x-raying these children is to provide the federal government with an “expert” opinion that the child is 18 or older despite their representations and/or documentation to the contrary. Neither the children nor their parents or guardians are asked for consent or even told the actual purpose of the dental x-rays, which have no medical

ordered and then used the dental age determination procedures and techniques described below in efforts to “prove” that these children are 18 or older.

³ For further background and analysis of methodological, ethical, and health issues implicated in this practice, including the real impact it can have on the physical and mental health of children, such as “anxiety, depression, suicidal ideation, and posttraumatic stress disorder” that can result from “mislabeling minors as adults” using methods with a “high rate of misclassification of minors as adults based on third molar radiograph,” *see* Kapadia, Farzana, Jacqueline Stevens, and Diana Silver, “Dental Radiographs for Age Estimation in US Asylum Seekers: Methodological, Ethical, and Health Issues,” *American Journal of Public Health* 110.12 (2020): 1786-1789, attached as Exhibit 21.

⁴ *See, e.g.*, Exhibit 22 (Contract between UTHSCSA and Gateway Community Health Center “for the purpose of providing age estimation health services for detainees of the Immigration and Customs Enforcement agency”).

benefit to the children. These procedures are *not* requested or conducted for purposes of diagnosis, medical/dental treatment or anything health related. In certain instances, Dr. Senn actually has directed the relevant U.S. government agencies or their contractors to take a child back to a clinic to be x-rayed *again*, and subjected to further radiation, in order to obtain clearer images, solely for purposes of Dr. Senn then issuing an age estimation report (and not for either diagnosis or treatment). *See* Ex. 4.

The odontologists or dentists, consistent with the government’s purpose in ordering the radiography, repeatedly generate misleading “forensic reports” that, in boilerplate language and form, provide scientifically indefensible age “estimates,” which claim the ability to estimate age and the likelihood that an individual is over 18, to *one hundredth percentile*. *See, e.g.*, redacted reports attached as Exhibits 5-7. These findings have no credible scientific basis. *At best*, and as discussed more thoroughly below, this technique is capable of estimating age within a wide range of 3 to 5 years, and even then, only assuming that there is a scientifically appropriate reference population database – which, in fact, does not exist for many refugee/asylum seeking populations. *See* Ex. 8 (age estimation report issued despite there being no relevant comparative database.)

The Courts Do Not Find Dr. Senn’s and Other Odontologists’ “Age Estimation” Reports and “Opinions” To Be “Credible Scientific Evidence”

The problems inherent in the foregoing process are clear. Most obvious – and, we would think, embarrassing to the UT system – is that the scientific basis purportedly underlying these age estimation opinions is dubious, to say the least, as is the purported application of such “science” by forensic odontologists and dentists in specific individual asylum seekers’ situations.⁵

Various tribunals have so held, in rejecting such opinions—including where Dr. Senn (of UTHSCSA) is concerned. For example, one court observed, in rejecting an age determination opinion by Dr. Senn, that the opinion was “not supported by credible scientific evidence and best practices.” *See L.B. v. Charles Keeton, et al.*, No. CV-18-03435-PHX-JJT (MHB), at *2-3 (D. Ariz., Oct. 26, 2018) (*quoting* Pima County Superior Court Findings of Fact and Conclusions of Law) (copy of District Court opinion attached as Exhibit 9). Accordingly, the Court overturned an age determination decision by the federal government based on an opinion by Dr. Senn that the asylum seeker was older than 18—but not before the child had spent nearly two months incarcerated with grown men.⁶

We cannot understand why the UT System would be involved in, much less teach, sponsor, promote and profit from, such travesties of science, forensics, medicine, and dentistry –

⁵ *See*, fn. 3, *supra*, and attached Exhibit 21, describing the “Methodological Concerns” with the practice.

⁶ For a detailed explanation of the inherent shortcomings in such age estimation opinions, *see* The Innocence Project’s Submission in that case, attached as Exhibit 10.

but especially where the lives, liberty, and basic human rights of innocent children are at stake.⁷

The UTHSCSA Procedures Are Conducted Without Consent of the Children or Their Parents or Guardians

In addition to the lack of a valid substantive scientific basis for these “age estimation” opinions, the travesty is compounded by the denial of legal and basic human rights – as well as the blatant disregard of medical/dental ethics – that underlies and infects the entire process. Yet, in our experience, the agencies, clinics, forensic odontologists, and dentists who participate in this process – including UTHSCSA and Dr. Senn – do not either seek or obtain the requisite informed consent from the children themselves (or from their parents or guardians charged with protecting their rights and interests, as opposed to the Government’s) before embarking on these radiography/age estimation procedures, in the first place.

In our experience, the rule (not the exception) is that:

- no one explains to the child that any purpose (much less the sole purpose) of taking them for, and exposing them to, x-rays is for the U.S. Government to try to establish that they are not children—as a result of which, they will lose many rights and protections that children have in the immigration process, including being housed with other children in conditions appropriate for their age, being released to family members or other caregivers where appropriate, and additional protections in the asylum process, rather than being imprisoned with adults while applying for asylum and being placed at higher risk of deportation because of the lack of additional protections extended to children;
- no one explains the health risks of the process (which involves exposure to radiation);
- no one explains to the children their right to refuse to undergo such procedures, or obtains their informed consent to such procedures (in addition, no one could seriously think that anyone, much less children, in Border Patrol or ICE custody and detention, would dare to refuse the government agents’ commands or desires);
- as many of these children have limited English proficiency, and may have limited educational backgrounds, they likely need assistance from a parent or guardian to ensure they have a meaningful understanding of risks and requests for consent, even if the warnings and requests were provided; and

⁷ The American Board of Forensic Odontology (“ABFO”) – of which Dr. Senn is a member – also recognizes what is at stake for these children. A draft of the ABFO’s “Guidelines and Standards for Dental Age Assessment” acknowledged that “[t]he consequences of inappropriate assessment of age can have emotional and legal ramifications.” *See* Ex. 11. This language does not appear in the “final” version of ABFO’s guidelines, however, as Dr. Senn chose to delete it for unknown reasons during the drafting process. *Id.*; *compare* fn. 3, *supra*.

- no permission is given by the child or the child’s parent or guardian for the sharing of the child’s health care records created in connection with the procedure, as is normally required in compliance with health privacy rights.

Moreover, the children are not represented by adults (parents, guardians, independent refugee assistance personnel, child advocates or attorneys) who are charged with acting in the child’s interests in connection with these procedures, despite the need for such protection. As medical ethicists have explained, “[t]he X-rays foisted on immigrant children expose them to radiation, and thus to medical risk. Doing that is ethical only when there is a compensating benefit that is ‘in the best interest of the child.’”⁸ Plainly, that is not the case here. Rather, “[i]nstigating a medical procedure for the purpose of depriving a child of the right to be treated as a child — or for the purpose of facilitating and permitting imprisonment — is absolutely prohibited by the ethics of medicine, not to mention by the notions of fairness and decency.”⁹

The Violations of Rights Implicated by the Actions of UTHSCSA and Dr. Senn

In short, the actions of forensic odontologists, dentists, and clinics (including UT, UTHSCSA, Dr. Senn, and their clinics and employees), violate any number of rights of children seeking asylum and any number of ethical/professional obligations of those conducting or participating in the process, as well; and such conduct may expose UTHSCSA to exposure for damages.

In particular, and recognizing that the many different, but potentially relevant, jurisdictions may address conduct in different ways:¹⁰

- (i) conducting a procedure – but especially a physically invasive medical or dental procedure, such as radiography – without the informed consent of the individual (including advising the subject individual of the medical and non-medical consequences and risks, and of the individual’s right to deny consent and refuse the procedure) could well be, at the least, malpractice both from the perspective of private actions by the individual subjected to same, and ethics proceedings against the dentist or others. *See, e.g.,* American Dental Association, Principles of Ethics & Code of

⁸ Brendan Parent and Nancy Neveloff Dubler, *The Unethical Behavior Of Forensic Dentists At Our Southern Border*, Stat (Feb. 13, 2019), available at <https://www.statnews.com/2019/02/13/unethical-behavior-forensic-dentists-southern-border/>.

⁹ *Id.*

¹⁰ Dr. Senn, for example, using UTHSCSA letterhead, credentials and facilities, orders and examines radiographs, and then issues his reports and opinions affecting refugees not only in Texas, but across the United States. *See* Exhs. 12-19 (Dr. Senn communications with ICE, ORR and other government agents, contractors, and personnel regarding refugees in California, Florida, Georgia, Arizona, Oregon, Illinois, Virginia and New York); *see also* Ex. 20 (Dr. Senn stating “[w]e perform age assessments for agencies in several areas of the USA.”)

Professional Conduct, pt. 3, §1 (2018); *Cruzan v. Dir. Mo. Dep't. of Health*, 497 U.S. 261, 269 (1990);

- (ii) to the extent these procedures are performed without the requisite informed consent (including advising the subject individual of the medical/health and other non-medical consequences and risks she faces, and of her right to refuse treatment and deny consent) – and are not for purposes of healthcare, diagnosis, and treatment of the child – the conduct may well constitute the common law tort of battery (and not merely malpractice), so as to give rise not only to compensatory, but also punitive damages (*see, e.g.*, in addition to the above authorities, *Kohoutek v. Hafner*, 383 N.W. 2d 295, 299 (Minn. 1986) (“[F]ailure to disclose a very material aspect of the nature and character of the touching will undermine the consent, and the touching will constitute a battery.”));
- (iii) applicable medical and dental ethics rules require that the subject individual’s consent to physical procedures not only be obtained, but also be documented,¹¹ such that the failure to create and maintain such documentation may give rise to ethical/professional sanctions, as well – and we are unaware of such consent-related documentation by UTHSCSA or Dr. Senn¹²;
- (iv) use of such radiography-based procedures and age determination opinions fails to provide a valid scientific basis for the deprivation of due process rights that asylum seekers have in connection with deportation procedures. *See Marincas v. Lewis*, 92 F. 3d 195, 203 (3d Cir. 1996) (asylum procedures must “provide the most basic of due process”). Traditionally, “the Fourth Amendment protects people, not places.” *Katz v. United States*, 389 U.S. 347, 351 (1967). Thus, to the extent that the conduct at issue is deemed State action (as obviously is the case here, given the involvement of UT, UTHSCSA and Dr. Senn), then, depending upon the precise circumstances regarding the children seeking asylum and the conduct of the radiography-related procedures, claims for injunctive or other relief, including damages, may arise.
- (v) Moreover, due to these unlawful and unethical actions of the University of Texas System, UTHSCSA, and its faculty and staff, the undersigned have had to divert our limited funds and other resources of our organizations and employees from our mission,

¹¹ The Texas Civil Practice and Remedies Codes clearly state that before a patient, or an authorized person, can even give consent for a medical procedure, a physician or health care provider must disclose to the patient, or authorized person, the risks and hazards involved with the procedure. *See TCPRC Sec. 74.104*. The Texas State Board of Dental Examiners has mandated that minimum standards of care for dentists require that they “maintain a written informed consent signed by the patient, or a parent or legal guardian of the patient, if the patient is a minor.... A signed written informed consent is required for all treatment plans and procedures where a reasonable possibility of complications from the treatment planned or a procedure exists or the treatment plans and procedures involve risks or hazards that could influence a reasonable person in making a decision to give or withhold consent.” *See Title 22 TAC, Part 5, Ch. 108, Sub Ch. A, Rule §108.7*.

¹² *See also*, fn. 3, *supra*, and attached Ex. 21, describing the “Ethical Concerns” with the practice.

in order to deal with and attempt to redress the deportation proceedings and like consequences of the foregoing “age determination” procedures, and to assist children seeking asylum in protecting and enforcing their rights under applicable state and federal laws, as well as international law, against such unlawful action. So, too, has the Innocence Project been forced to turn attention away from its core criminal justice mission, in order to prevent the continual use and spread of the dangerous and unscientific practice here in issue. Accordingly, the undersigned may have causes of action and claims for relief of their own, and wholly apart from the claims of the children seeking asylum, in seeking relief from the foregoing practices, if they are not voluntarily terminated. *See, e.g., Havens Realty Corp. v. Coleman*, 445 U.S. 363 (1982); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (en banc).

* * * * *

For all the foregoing reasons, each of the undersigned hereby demands that the University of Texas System and UTHSCSA, and their facilities, faculty and other employees (including but not limited to Dr. Senn), promptly cease and desist from conducting, authorizing, directing or otherwise participating in any further “age determination procedures,” including but not limited to conducting or ordering x-rays or other dental procedures and/or issuing opinions and reports on age estimation involving children seeking asylum. We reserve all rights and remedies, including but not limited to equitable relief and money damages.

Finally, we leave it to you to decide whether, in light of the foregoing, you believe your institutions, or any of your employees or faculty members, either have any obligation, or simply believe it prudent or appropriate, to notify any relevant local, state or other medical/dental/professional ethics authorities, or any professional liability or other insurance carriers, or any persons or entities with or upon whom procedures have been performed or to which you provided reports, or directed or requested procedures or the like.

We look forward to your prompt response.

Sincerely,

/s/

Aldea – The People’s Justice Center

Bridget Cambria

bridget@aldeapjc.org

American Gateways – Legal Advocacy for Immigrant Survivors

Edna Yang

Co-Executive Director

ednay@americangateways.org

Laura Flores-Dixit, Esq.
Staff Attorney
laurafd@americangateways.org

Angry Tias and Abuelas
Jennifer Harbury
Founding Director
jharbury@gmail.com

Austin Border Relief
Austinborderrelief@gmail.com

Capital Area Immigrants' Rights (CAIR) Coalition
Kathy Doan
Executive Director
kathy.doan@caircoalition.org

Cardozo Immigration Justice Clinic
Peter L. Markowitz
peter.markowitz@yu.edu

Every Last One
Dr. Amy J. Cohen
Child, Adolescent, Adult and Family Psychiatrist
Co-Founder and Executive Director
amy@everylastone.org

Florence Immigrant and Refugee Rights Project
Laura Belous, Esq.
Advocacy Attorney
lbelous@firrp.org

Houston Immigration Legal Services Collaborative
Julie Pasch, Esq.
Managing Attorney – Deportation Defense Houston
julie@houstonimmigration.org

Immigrant Defenders Law Center
Yliana Johansen-Mendez
Legal Services Director
Yliana@ImmDef.org

Innocence Project, Inc.
M. Chris Fabricant
cfabricant@innocencerproject.org

Justice Action Center

Karen Tumlin

karen.tumlin@justiceactioncenter.org

Northwest Immigration Rights Project

Matt Adams

Legal Director, Seattle Office

matt@nwirp.org

Physicians for Human Rights

Kathryn Hampton

Senior Asylum Officer

khampton@phr.org

Dr. Ranit Mishori

Senior Medical Advisor

rmishori@phr.org

Project Amplify

Hope Frye

Executive Director and Co-Founder

hopefrye@gmail.com

Refugee and Immigrant Center for Education and Legal Services (RAICES) Texas

Tami Goodlette

Director of Litigation

tami.goodlette@raicestexas.org

Willamette University College of Law

Warren Binford

Director of Clinical Law Program

wbinford@willamette.edu

UC Davis Immigration Law Clinic

Holly Cooper

Co-Director

hscooper@ucdavis.edu

Dr. Elena Jiménez Gutiérrez

Assistant Professor

The University of Texas Health Science Center at San Antonio

ej5de@virginia.edu

Dr. Lisa Fortuna

Child, Adolescent, and Adult Psychiatrist

dr.lisa.fortuna@gmail.com

cc:

Dr. David Senn

UT Health San Antonio, School of Dentistry
7703 Floyd Curl Drive
San Antonio, TX 78229

American Academy of Forensic Sciences

c/o Ethics Committee
410 North 21st Street
Colorado Springs, CO 80904
www.aafs.org

American Bar Association

Attn: Patricia Lee Refo, President
Attn: Kristi Gaines, Senior Legislative Counsel, Governmental Affairs Office
321 North Clark Street
Chicago, IL 60654

American Board of Forensic Odontology

Attn: Roger Metcalf, President
contact@abfo.org

American Civil Liberties Union

Attn: Lee Gelernt
125 Broad Street, 18th Floor
New York NY 10004

Attn: Jay Stanley
915 15th St. NW
Washington DC 20005

American Dental Association

Attn: Daniel J. Klemmedson, D.D.S., M.D., President
211 East Chicago Ave.
Chicago, IL 60611-2678

Amnesty International USA

311 W 43rd St, 7th Floor
New York, NY 10036
www.amnestyusa.org

Doctors Without Borders

Attn: Dr. Africa Stewart, President
Attn: Victoria B. Bjorklund, Esq., Ph.D. (Chair of the Board)
Attn: Avril Benoît, Executive Director
40 Rector St., 16th Floor

New York, NY 10006

U.S. Department of Homeland Security

Attn: The Honorable Alejandro Mayorkas
Secretary of Homeland Security
Washington, DC 20528

U.S. Department of Health & Human Services

Attn: Xavier Becerra, Secretary
200 Independence Avenue, S.W.
Washington, D.C. 20201

U.S. Immigration and Customs Enforcement

Attn: Tae D. Johnson, Acting Director
500 12th St, SW
Washington, D.C. 20536

U.S. Office of Refugee Resettlement

Attn: Dr. Cindy Huang, Director
U.S. Department of Health & Human Services
330 C Street, S.W., Washington, D.C. 20201

Weil, Gotshal & Manges LLP

Attn: Paul Genender
200 Crescent Court (Suite 300)
Dallas, TX 75201-6950