

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

EMW WOMEN’S SURGICAL CENTER,
P.S.C., on behalf of itself, its staff, and its
patients; and ERNEST MARSHALL, M.D.,
on behalf of himself and his patients,

Plaintiffs,

and

PLANNED PARENTHOOD OF INDIANA
AND KENTUCKY, INC., on behalf of itself,
its staff, and its patients,

Intervenor-Plaintiff,

v.

MATTHEW BEVIN, Governor of Kentucky,
in his official capacity; VICKIE YATES
BROWN GLISSON, Secretary, Cabinet for
Health and Family Services, in her official
capacity,

Defendants.

Case No. 3:17-cv-00189-GNS

**PLANNED PARENTHOOD OF INDIANA AND KENTUCKY’S REQUEST FOR
FURTHER HEARING RE MOTION FOR ORDER TO SHOW CAUSE WHY
DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT**

I. INTRODUCTION

Defendants have now defied the Court's specific and definite orders on at least six occasions: (1) when CHFS's hearing officer recommended enforcing the enjoined regulations against Planned Parenthood, in violation of the Preliminary Injunction; (2) when CHFS's Secretary denied Planned Parenthood's license based on the enjoined regulations, in violation of the Preliminary Injunction; (3) when CHFS refused to process Planned Parenthood's license application based on the enjoined regulations, in violation of the Permanent Injunction; (4) when CHFS failed immediately to inform the Court that it intended to deny Planned Parenthood's updated license application, despite the Court's clear instructions to provide such notice; (5) when CHFS failed to conduct the court-ordered inspection of Planned Parenthood's Louisville facility by August 19, 2019, as the Court specifically ordered; and (6) when CHFS denied Planned Parenthood's updated license application on August 16, 2019, for a baseless and pretextual reason, in the hopes that the Sixth Circuit will save the enjoined regulations before this Court acts.¹ Defendants' continued defiance of and disrespect for the Court's orders can only be described as contempt.

Defendants' deliberate attempt to evade this Court's orders by relying on an obvious pretext to deny Planned Parenthood's license is in bad faith. The record makes their true motivations clear: Defendants are resorting to self-help, violating the Court's orders at their whim in the hopes that they will ultimately prevail in the Sixth Circuit. But that is not how our judicial system works. Defendants did not seek a stay of the Court's injunction and remain bound by it, and they are subject to this Court's lawful orders even if they disagree with them. Planned

¹ The Commonwealth's strategy of non-compliance with this Court's judgment is far from secret. During an August 1 press conference, Defendant Bevin made the following remarks: "We had a federal judge decide that, you know what, that may be the law, but I think I know better so I'm just going to pretend it doesn't apply. Unbelievable...So here's a guy who just...disregards the law...So that of course has been appealed. That's before the Sixth Circuit appellate court right now, we'll win that case, then ultimately the law will be applied...we are a nation of laws, let's be clear...And so now you have people like a Judge [Stivers] making his own rules, he'll be overturned, we'll win that case, and then there won't be any abortion clinics in this state." <https://www.facebook.com/WKYTTV/videos/2067177823578559/>

Parenthood respectfully requests that the Court order Defendants to show cause why they should not be held in contempt, permit Planned Parenthood an opportunity to respond to Defendants' showing, and hold an in-person hearing to discuss this serious issue as soon as possible.

II. FACTUAL BACKGROUND

Planned Parenthood briefly recounts Planned Parenthood's efforts to obtain a license, the Court's relevant orders, and Defendants defiance of these orders to frame the contempt inquiry.²

A. Administrative History

Planned Parenthood originally applied for a license to conduct abortions on November 19, 2015. "Following its application, Planned Parenthood sought and received confirmation from Kentucky's then-Inspector General Maryellen Mynear that a facility must be performing services for which it seeks licensure so that the survey (i.e., inspection) process may fully evaluate compliance with the applicable regulations." ECF No. 168, Findings of Fact and Conclusions of Law at 7. After the Inspector General confirmed that Planned Parenthood's application materials were all in order, at the Inspector General's direction, "Planned Parenthood began providing abortion services in anticipation of the forthcoming CHFS inspection and performed 23 abortions in December 2015 and January 2016," *id.*, and Planned Parenthood was placed in the queue for a site inspection, ECF No. 157 at ¶ 34-36 (citing record evidence).

Defendant Bevin was inaugurated as Governor of Kentucky on December 7, 2015. S. Davis Vol. 3B at 70:16-24. Shortly thereafter, Governor Bevin's CHFS Chief of Staff Steven Davis learned of Planned Parenthood's pending application for an abortion facility license and paid a personal visit to the Inspector General's office and asked to review Planned Parenthood's entire licensure application file. S. Davis Vol. 3B, 63:4-65:10. Planned Parenthood was taken off the site inspection list, and in early 2016, Davis instructed the acting Inspector General to send to Planned Parenthood an application deficiency letter that Davis had already drafted. S. Hold Vol. 1C, 71:10-22.

² It bears noting here that the Governor's office defied a deposition notice in this case and was sanctioned for such misconduct.

On September 9, 2016, after making Planned Parenthood jump through additional unprecedented hoops regarding submission of documents not even referenced in (let alone required by) the applicable regulations, CHFS Inspector General sent to Planned Parenthood a denial letter identifying three reasons for denial: (1) deficient transfer agreements with a licensed acute-care hospital; (2) deficient transport agreement with a local ambulance service; and (3) failure to file a report with the Commonwealth listing the abortions performed at Planned Parenthood's Louisville facility in December 2015 and January 2016. After Planned Parenthood provided proof to CHFS that Planned Parenthood had indeed filed the required report, the Inspector General acknowledged that CHFS's denial was based on an erroneous report from the Commonwealth's Office of Vital Statistics, and CHFS issued a revised denial letter denying Planned Parenthood's application solely on the basis of the transfer and transport agreements issues. ECF No. 105, Stipulated Facts No. 27-30.

CHFS's initial attempt to deny Planned Parenthood's applications because of a purported failure to *report* the abortions performed at Planned Parenthood's Louisville facility in December 2015 and January 2016 shows that CHFS did not view the fact that Planned Parenthood had *performed* those abortions to be a valid basis for denying licensure. From the time CHFS issued the revised denial letter on September 22, 2016 through the close of the administrative appeal process on July 19, 2017, CHFS never raised the "unlicensed abortion" issue as a basis to deny Planned Parenthood's license. CHFS stood mute on this issue all the way through the Court's order to show cause hearing on June 25, 2019.

B. Defendants' Defiance of the Preliminary Injunction

On March 31, 2017, this Court entered a temporary restraining order ("TRO") pursuant to Fed. R. Civ. P. 65 enjoining the enforcement of KRS 216B.0435 and 902 KAR 20:360 Section 10. (TRO 3-4, ECF No. 6). By agreement of the parties, the Court later transformed the TRO into a Preliminary Injunction that was in place until the Court entered judgment on September 28, 2018 and rendered the preliminary injunction a permanent one. The preliminary injunction provided in pertinent part as follows:

Defendant Vicky Yates Brown Glisson and all those acting in concert with her are TEMPORARILY ENJOINED from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with KRS 216B.0435 and 902 KAR 20:360, Section 10.

ECF No. 6 at 4.

Despite the definite and specific language of the Court's TRO and Preliminary Injunction, on April 20, 2017, CHFS's hearing officer—acting pursuant to the authority vested in him by CHFS and Defendant Glisson—issued an order recommending enforcement of KRS 216B.0435 and 902 KAR 20:360 Section 10 to deny Planned Parenthood's licensure application. On July 19, 2017, in complete disregard of the Court's TRO and Preliminary Injunction, Defendant Glisson personally signed a final denial order adopting the recommended order denying Planned Parenthood's license application on the basis of the enjoined statutes and regulations: KRS 216B.0435 and 902 KAR 20:360 Section 10.

C. Defendants' Contempt of the Court's Preliminary and Permanent Injunctions

On September 18, 2018, the Court issued findings of fact and conclusions of law holding that KRS 216B.0435 and its implementing regulations are unconstitutional, both facially and as applied. ECF No. 168. That same day, the Court entered judgement in Plaintiffs' favor and imposed a permanent injunction providing in pertinent part as follows:

Defendants and their officers, agents, and employees, and those persons in active in concert or participation with Defendants who receive actual notice of this Judgment, are PERMANENTLY ENJOINED and RESTRAINED from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with KRS 216B.0435 and 902 KAR 20:360 Section 10.

ECF No. 170.

On October 31, 2018, Planned Parenthood's counsel sent a letter to CHFS requesting that Planned Parenthood be placed back in the queue for a site inspection. On November 28, 2018, CHFS responded in writing to Planned Parenthood's letter by stating that the CHFS 2017 denial order was final and subjected Planned Parenthood's license application to res judicata on the issue

of the constitutionality of CHFS's denial of Planned Parenthood's application. In other words, CHFS's position was that its administrative denial order—issued in violation of this Court's TRO and preliminary injunction—trumps this Court's judgment and permanent injunction.

D. The Court's June 25, 2019 Hearing and Orders

On June 25, 2019, the Court held a telephonic hearing regarding Planned Parenthood's motion for order to show cause. At the conclusion of that hearing, the Court ordered Planned Parenthood to update its license application to CHFS by July 3, 2019, and ordered Defendants to complete all relevant licensure steps, including a site inspection, by August 19, 2019. The Court also ordered Defendants to notify the Court immediately if there was a reason to deny Planned Parenthood's application after CHFS's receipt of the updated application on July 3, 2019. The following exchange took place between the Court and defense counsel:

THE COURT: If there are grounds to deny, I want to know as soon as possible --

MR. MEREDITH: Yes, sir.

THE COURT: -- following July 3rd, 2019, all right?

MR. MEREDITH: Yes, sir.

6/25/2019 RT at 15:15-19. Once again, however, Defendants flouted the Court's instructions. As discussed further below, Defendants waited until the last moment to deny Planned Parenthood's updated license application based on facts and circumstances that Defendants have known about literally for years and have never invoked as a basis for denying the license.

During the June 25 hearing, Defendants misrepresented to the Court that CHFS would evaluate Planned Parenthood's updated license application and make a licensing determination based on Planned Parenthood's updated documentation. 6/25/2019 RT. at 7:22-24. Defendants further misrepresented to the Court that it would take time to review Planned Parenthood's updated application because “[the] regulation has changed since their application was initially reviewed. We've now got a more detailed licensure process.” 6/25/2019 RT. at 9:3-8.

Despite these representations to the court, it is now clear that CHFS never intended to review Planned Parenthood's updated license application in good faith and never intended to

conduct a site inspection. Rather, Defendants had already decided that they would find a way to deny Planned Parenthood's application no matter what—which is presumably why defense counsel asked the Court about the timing for completing an administrative challenge if the application were to be denied. 6/25/2019 RT. at 14:11-15:14.

1. CHFS Again Applies New and Different Rules to Planned Parenthood

Planned Parenthood complied with the Court's instructions, submitting an updated application on July 3, 2019. Following its July 3 submission, Planned Parenthood's counsel attempted to set up a conference call with CHFS counsel to discuss the logistics of Planned Parenthood's site inspection, as well as additional documentation that CHFS was obligated to provide to Planned Parenthood in connection with the Commonwealth's ultrasound and mandatory counseling laws. After initially stating that they would respond with proposed call times, Defense counsel went completely radio silent for weeks, ignoring repeated calls, emails, and letters seeking information about the licensure process. Declaration of Robert L. Uriarte, Ex. 1 (compendium written correspondence). After ignoring Planned Parenthood's numerous efforts to communicate for approximately three weeks, Planned Parenthood was forced to invoke applicable rules of professional responsibility related to attorney conduct and communications. Only then did CHFS finally responded to Planned Parenthood. CHFS's July 24 letter response—in addition to evading response to several of Planned Parenthood's questions and failing to provide the requested documentation—invoked a new document "checklist" for abortion applications listing various additional documents that Planned Parenthood would need to provide, and rather than attach it to the electronic version of the letter, indicated that the checklist would be enclosed with the hard copy version of the letter once it arrived. It was not. CHFS did not actually provide that checklist until August 1, 2019, and then only after Planned Parenthood asked for it again.

CHFS's new checklist—which is not supported anywhere in the relevant regulations and has never been used with any other applicant besides Planned Parenthood—requested a trove of additional documents, some of which are not even required by the regulations. Nevertheless,

Planned Parenthood complied with CHFS's unreasonable and unprecedented demands on short notice, providing all requested documentation on August 6, 2019.

2. Defendants' Pretextual Denial and Failure to Conduct a Site Inspection

Just after the close of business on August 16, 2019—the last business day before the Court's August 19, 2019 inspection deadline—Defendants informed PPINK that they had denied its application by filing the denial letter on the Court's docket. The denial letter is a complete sham: it purports to deny Planned Parenthood's license application because Planned Parenthood provided “unlicensed abortions” in December 2015. Defendants did so despite this Court's unequivocal rejection of that allegation. ECF No. 43, Findings of Fact and Conclusions of Law at 42 n.26. As the Court well knows, Planned Parenthood provided abortions in December 2015 in direct response to the Inspector General's specific direction to begin doing so to facilitate a licensing inspection. *Id.*

The real reason for the denial letter is found in the penultimate paragraph, in which Defendants purport to “reserve[] the right to amend and supplement this denial” to include “the requirement of written agreements between abortion facilities and acute-care hospitals and ambulance services pursuant to KRS 216B.0435” pending a favorable decision from the Sixth Circuit.

III. LEGAL STANDARD

“Federal courts have broad contempt power, which exists for the ‘preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts.’” *Brown v. City of Upper Arlington*, 637 F.3d 668, 671 (6th Cir. 2011) (quoting *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798 (1987)). Pendency of an appeal does not deprive a district court of its power to supervise its judgment and enforce its order through civil contempt proceedings. *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 440 (6th Cir. 1985); *Brown*, 637 F.3d at 673 (citing *Hovey v. McDonald*, 109 U.S. 150, 161 (1883) (“[A]n appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect.”)).

“A party may be found in contempt if the petitioner shows that the respondent ‘violat[e] a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order.’” *Gnesys, Inc. v. Greene*, 437 F.3d 482, 493 (6th Cir. 2005) (citation omitted). “The district court has inherent authority to fashion the remedy for contumacious conduct.” *United States v. Conces*, 507 F.3d 1028, 1043-1044 (6th Cir. 2007) (citation omitted). Due process requires only notice and an opportunity to be heard before imposition of civil contempt sanctions. *Id.*

IV. ARGUMENT

Defendants’ evasions and attempts to subvert this Court’s judgment cannot go uncorrected. The Court can and should find that Defendants’ stated reason for denying Planned Parenthood’s updated application is a mere pretext for continuing to enforce the enjoined statute. *See, e.g., Harrison v. Metropolitan Gov’t*, 80 F.3d 1107, 1119 (6th Cir. 1996) (affirming contempt sanction based on finding of pretext), *NLRB v. Howard Baer*, No. 94-6260, 1996 U.S. App. LEXIS 42533, *45 (6th Cir. July 10, 1996) (“This Court finds that Respondents’ are clearly in contempt for violating this order, especially given the pretextual nature of their actions.”); *Apple Computer, Inc. v. Formula Int’l, Inc.*, 594 F. Supp. 617, 623 (C.D. Cal. 1984) (issuing contempt order after finding defendant’s alleged interpretation was a “mere pretext” to avoid an injunction).

Defendants were aware of the so-called “unlicensed abortions” issue long before CHFS initially denied Planned Parenthood’s original license application. Defendants knew about those facts when CHFS denied Planned Parenthood’s license application on different grounds, and did not cite those so-called “unlicensed abortions” as the basis for denying the application. Defendants knew about those facts when Planned Parenthood filed an administrative appeal of the license denial, and Defendants did not raise the supposed “unlicensed abortion” issue as a basis for the license denial then, either. Those facts were raised at trial—and this Court rejected Defendants’ allegations concerning those procedures. And Defendants still knew about those facts at the time of the June 25, 2019 telephonic hearing in this case.

Given counsel's duty of candor to the Court, Defendants could not properly stand mute on this issue during the June 25 hearing if they believed it to be a valid preexisting reason to deny Planned Parenthood's license. What has become clear is that Defendants never had *any* intention of processing Planned Parenthood's application in good faith. Defendants either (1) knew they would deny Planned Parenthood's license on the basis of the "unlicensed abortions" issue all along, or (2) knew they would deny Planned Parenthood's license for *some* reason, and were forced to resort to the baseless claim that Planned Parenthood performed "unlicensed abortions" when they were unable to identify any valid basis for denial after scrutinizing Planned Parenthood's documentation. Either way, Defendants withheld this information from the Court on June 25, and violated the Court's clear instructions to apprise the Court immediately after July 3 if there were any grounds to deny the application.³ Defendants should have stated their intentions at that time, rather than making Planned Parenthood engage in a fools' errand of submitting an "updated" license application that Defendants always planned to deny.

Moreover, the "unlicensed abortions" issue is not a valid basis to deny Planned Parenthood's license application: If it were a valid reason to deny Planned Parenthood's license, there can be no doubt that CHFS would have used it as a basis to deny Planned Parenthood's application long ago rather than violating the Court's injunctions. In fact, CHFS is collaterally estopped from asserting this preexisting issue as a basis for denying Planned Parenthood's updated application—it waived the issue during the first round of administrative proceedings. *See, e.g., Golden v. Comm'r*, 548 F.3d 487, 495 (6th Cir. 2008) (party barred from raising argument it could have raised during prior administrative proceeding). Nor is there *any merit* to the claim that Planned Parenthood ever performed "unlicensed abortions." As the Court found after taking evidence on this issue at trial, Defendant's argument on this point is "not well-taken" because "Planned Parenthood was advised by then-Inspector General Myneer that its application was in

³ Notably, Defendants engaged in similar misrepresentations and omissions during oral argument in the Sixth Circuit, disingenuously suggesting that they might grant Planned Parenthood a provisional license if Planned Parenthood were to seek a 90-day extension to comply with the challenged laws.

order such that it could perform abortions in anticipation of an inspection that would complete the licensing process.” ECF No. 168, Findings of Fact and Conclusions of Law at p.42 n.26. There is simply no legal or factual basis for denying the application on this ground.

Indeed, it is clear from the face of the denial itself that Defendants are engaging in self-help by ignoring this Court’s orders in hopes of a win on appeal in the Sixth Circuit. Although Defendants’ notice asserts that CHFS’s “basis for the denial is unrelated to the statute and regulation at issue in this action and therefore outside the scope of the permanent injunction issued in the Court’s final Judgment,” ECF No. 199 at 2, the letter itself makes clear that the denial has everything to do with this case. The denial letter expressly references the enjoined statute and regulation and purports to reserve the right to enforce those provisions against Planned Parenthood. Defendants’ bad faith, pretextual motive for denying Planned Parenthood’s application is thus plain from the face of the denial letter. Defendants’ contemptuous motive is also laid bare by the history in this case and Defendant’s repeated efforts to avoid complying with this Court’s orders (not to mention Defendant Bevin’s disrespectful public comments about the Court and this case, *supra* note 1). The Court’s jurisdiction cannot be escaped using these kinds of tactics. *See, e.g., Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1976) (court may “utilize its contempt powers to preserve its jurisdiction and the integrity of the letter and spirit of its orders”) (citing *United States v. United Mine Workers of Am.* 330 U.S. 258, 293 (1947)) and *Coppedge v. Franklin Cty. Bd. of Educ.*, 293 F. Supp. 356, 364 (E.D.N.C.1968)).⁴

⁴ At a minimum, the Court should issue compensatory contempt sanctions requiring Defendants to pay Planned Parenthood’s reasonable attorney’s fees incurred in bringing Defendants’ contempt to the Court’s attention and complying with Defendants’ sham licensing inquiries, which required, for example, attorney time reviewing and creating documents in response to CHFS’s demand for documents nowhere mentioned in the subject regulation. *See, e.g., Consol Rail Corp. v. Yashinsky*, 170 F.3d 591, 596 (6th Cir. 1999) (affirming compensatory contempt sanction designed to compensate plaintiff for its costs and attorney’s fees attributable to defendant’s contempt); *Bavelis v. Doukas (In re Bavelis)*, 535 B.R. 228, 239 (Bankr. S.D. Ohio 2015) (“The Sixth Circuit has held that courts have the authority to award attorneys’ fees to compensate a party for ‘bringing [another party’s] contempt to the court’s attention’”). However, this compensatory sanction would not remedy the ongoing constitutional injury Defendants are inflicting on Planned Parenthood and its

V. CONCLUSION

For the foregoing reasons, Planned Parenthood respectfully requests an order to show cause why Defendants should not be held in contempt, an opportunity to respond to Defendants' showing, and an in-person hearing.

patients—a coercive contempt sanction is apparently required to bring Defendants into compliance with the Court's various orders.

August 21, 2019

ORRICK HERRINGTON & SUTCLIFFE LLP

/s/ Karen G. Johnson-McKewan

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*Counsel for Planned Parenthood of Indiana and
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CERTIFICATE OF SERVICE

On August 21, 2019, a true and correct copy of the foregoing document was sent via the

Courts CM/ECF system to:

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*Counsel for Vicky Yates Brown Glisson
in her official capacity as Secretary of Kentucky's
Cabinet for Health and Family Services*

Date: August 21, 2019

ORRICK HERRINGTON & SUTCLIFFE LLP

/s/ Karen G. Johnson-McKewan
KAREN G. JOHNSON-MCKEWAN

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

EMW WOMEN'S SURGICAL CENTER,
P.S.C., on behalf of itself, its staff, and its
patients; and ERNEST MARSHALL, M.D.,
on behalf of himself and his patients,

Plaintiffs,

and

PLANNED PARENTHOOD OF INDIANA
AND KENTUCKY, INC., on behalf of itself,
its staff, and its patients,

Intervenor-Plaintiff,

v.

MATTHEW BEVIN, Governor of Kentucky,
in his official capacity; VICKIE YATES
BROWN GLISSON, Secretary, Cabinet for
Health and Family Services, in her official
capacity,

Defendants.

Case No. 3:17-cv-00189-GNS

**DECLARATION OF ROBERT L. URIARTE IN SUPPORT OF PLANNED
PARENTHOOD OF INDIANA AND KENTUCKY'S REQUEST FOR FURTHER
HEARING RE: MOTION FOR ORDER TO SHOW CAUSE**

Exhibit 1

Uriarte, Robert L.

From: Uriarte, Robert L.
Sent: Wednesday, July 3, 2019 1:41 PM
To: Wolsing, Jennifer (CHFS OLS)
Cc: York, Catherine (CHFS OLS); Johnson-McKewan, Karen G.; Meredith, Chad (Gov Office)
Subject: RE: PPINK Application for Abortion Facility License Update

Thanks very much, likewise.

Talk soon

Rob

From: Wolsing, Jennifer (CHFS OLS) [mailto:Jennifer.Wolsing@ky.gov]
Sent: Wednesday, July 3, 2019 1:39 PM
To: Uriarte, Robert L. <ruriarte@orrick.com>
Cc: York, Catherine (CHFS OLS) <Catherine.York@ky.gov>; Johnson-McKewan, Karen G. <kjohnson-mckewan@orrick.com>; Meredith, Chad (Gov Office) <Chad.Meredith@ky.gov>
Subject: RE: PPINK Application for Abortion Facility License Update

Robert,

Good to hear from you. I'll work with CHFS counsel and Steve Davis to schedule that call about Planned Parenthood's licensure application. I hope you all have a nice holiday.

Sincerely,

Jennifer Wolsing

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ATTORNEY/CLIENT PRIVILEGED COMMUNICATION

From: Uriarte, Robert L. <ruriarte@orrick.com>
Sent: Wednesday, July 3, 2019 3:18 PM
To: Meredith, Chad (Gov Office) <Chad.Meredith@ky.gov>; Wolsing, Jennifer (CHFS OLS) <Jennifer.Wolsing@ky.gov>
Cc: York, Catherine (CHFS OLS) <Catherine.York@ky.gov>; Johnson-McKewan, Karen G. <kjohnson-mckewan@orrick.com>
Subject: PPINK Application for Abortion Facility License Update

****CAUTION** PDF attachments may contain links to malicious sites. Please contact the COT Service Desk ServiceCorrespondence@ky.gov for any assistance.**

Hello counsel. Attached is a letter we delivered to the Cabinet today along with Planned Parenthood's license application update. We'd like to discuss the issues raised in this letter with you ASAP to make sure everyone is on the same page. We propose to set up a call next week sometime. Please let us know your availability.

Thanks

Rob

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July 3, 2019

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Re: Planned Parenthood Licensure Application and Federal Court Orders

Mr. Herklotz:

As you may know, last week Judge Stivers held a telephonic hearing on Planned Parenthood's motion for order to show cause regarding contempt and ordered Planned Parenthood to update its license application by July 3, 2019. The Court also ordered the Cabinet to complete its review of Planned Parenthood's application and to make a decision on licensure by August 19, 2019. We write to raise two logistical issues.

First, we note that the Cabinet's current license application continues to include the following language: "I agree to provide written agreements with a Kentucky-licensed, acute care hospital and a local ambulance service with this application as required by KRS 216B.0435(4) and 902 KAR 20:360." Because the referenced statute, regulation, and written agreement requirements have been enjoined as unconstitutional, Planned Parenthood will strike through this language and will not be submitting any transport or transfer agreements. If you have any issue with this course of action, please let us know immediately.

Second, we ask for clarification on the timing and nature of Planned Parenthood's upcoming site inspection. The Cabinet has taken conflicting positions on whether, in order to facilitate a site inspection, Planned Parenthood must begin performing abortions before receiving a license. Although the Cabinet's former Inspector General told Planned Parenthood that it needed to commence performing abortions in order to facilitate a site inspection, in a state court lawsuit subsequently filed against Planned Parenthood, the Cabinet's lawyers took the position that: "Abortion facilities are not allowed to commence performing abortion in Kentucky without a license."

Please confirm the Cabinet's current position on whether Planned Parenthood is required to commence performing abortions to facilitate a site inspection. If the Cabinet requires Planned Parenthood to perform abortions during the inspection, Planned Parenthood's anticipated schedule for providing abortion services while its license application is being evaluated is as follows:

- 7/22/2019 from 8:30 a.m. to 5 p.m.
- 7/23/2019 from 11 a.m. to 6 p.m.



Johann Herklotz
July 3, 2019
Page 2

- 7/30/2019 from 11 a.m. to 6 p.m.
- 8/12/2019 from 8:30 a.m. to 4 p.m.

Alternatively, if Planned Parenthood is not required to be performing abortions at the time of a site inspection, please confirm this position in writing. If this is the Cabinet's position, Planned Parenthood of course will abide by this direction and will not perform any abortions until the approval of its license application. To facilitate the inspection, however, Planned Parenthood's abortion-trained staff members and physician will be on-site during the dates and times listed above. If these dates and times do not work for the Cabinet, please inform us of alternative dates that would work for an inspection so that we can ensure that the appropriate staff members are on-site.

Given the exigencies associated with this application, we ask that you provide us with your response to this letter within five business days.

Very truly yours,

Karen G. Johnson-McKewan

Uriarte, Robert L.

From: Uriarte, Robert L.
Sent: Tuesday, July 9, 2019 4:00 PM
To: Wolsing, Jennifer (CHFS OLS)
Cc: York, Catherine (CHFS OLS); Johnson-McKewan, Karen G.; Meredith, Chad (Gov Office)
Subject: RE: PPINK Application for Abortion Facility License Update

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Robert,

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Sincerely,

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Assistant Counsel
CABINET FOR HEALTH AND FAMILY SERVICES
OFFICE OF LEGAL SERVICES
275 East Main Street 5W-B
Frankfort, Kentucky 40621-0001
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F-502/564-7573

jennifer.wolsing@ky.gov

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Uriarte, Robert L.

From: Uriarte, Robert L.
Sent: Wednesday, July 10, 2019 2:49 PM
To: Wolsing, Jennifer (CHFS OLS)
Subject: RE: PPINK Application for Abortion Facility License Update
Attachments: 2019.07.10 Ltr. to Office of the Inspector General re State Materials.pdf

Thanks Jennifer.

Attached is a courtesy copy of a letter we sent to the Inspector General today regarding another application issue.

Rob

From: Wolsing, Jennifer (CHFS OLS) [mailto:Jennifer.Wolsing@ky.gov]
Sent: Wednesday, July 10, 2019 2:40 PM
To: Uriarte, Robert L. <ruriarte@orrick.com>
Subject: RE: PPINK Application for Abortion Facility License Update

Rob, we're probably going to be shooting for Friday afternoon, but that's still a bit up in the air; I'm waiting for some other folks' availability. I'll get back to you as soon as I can on that.

Sincerely,

Jennifer Wolsing

Assistant Counsel
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Subject: RE: PPINK Application for Abortion Facility License Update

Hi Rob! I did receive your e-mail yesterday and I apologize for not immediately confirming. I have passed on your request and I'm waiting for a response from my client and from co-counsel.

Sincerely,

Jennifer Wolsing

Assistant Counsel

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July 10, 2019

Via E-Mail & U.S. Mail

Office of the Inspector General
Division of Health Care
Kentucky Cabinet for Health and Family Services
275 E. Main Street
Frankfort, KY 40621

Re: Planned Parenthood Licensure Application

Dear Sir or Madam:

As you know, Planned Parenthood's Licensure Application is currently under review by the Cabinet. Pursuant to Ky. Rev. Stat. § 311.725(3), Planned Parenthood requests that the Cabinet provide Planned Parenthood with 25 copies of the updated, printed materials published by the Cabinet pursuant to Ky. Rev. Stat. § 311.725(2). Please advise of any costs associated with this request so that Planned Parenthood can promptly provide payment.

Planned Parenthood further requests that the Cabinet provide Planned Parenthood with a copy of the "form prescribed by the cabinet" for certification of compliance with Ky. Rev. Stat. § 311.727(2)(f).

Planned Parenthood respectfully requests that you send these materials by mail by July 15, 2019. If it is not possible to send these materials by mail by that date, please advise me via email or phone when these materials will be available so that we can arrange for a Planned Parenthood staff member to pick up these materials in person the week of July 15th.

Sincerely,

/s/ Karen G. Johnson-McKewan

Karen G. Johnson-McKewan

Orrick, Herrington & Sutcliffe LLP
The Orrick Building
405 Howard Street
San Francisco, CA 94105-2669
+1 415 773 5700
orrick.com

Karen G. Johnson-McKewan

E kjohnson-mckewan@orrick.com
D +1 415 773 5917
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Uriarte, Robert L.

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Sent: Tuesday, July 16, 2019 10:55 AM
To: Wolsing, Jennifer (CHFS OLS)
Cc: York, Catherine (CHFS OLS); Herklotz, Johann (CHFS OLS); Johnson-McKewan, Karen G.
Subject: RE: Planned Parenthood

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Cc: York, Catherine (CHFS OLS); Herklotz, Johann (CHFS OLS); Johnson-McKewan, Karen G.
Subject: RE: Planned Parenthood

Hi Jennifer. We are getting the distinct impression that CHFS is stonewalling us on our request for a teleconference to discuss issues material to compliance with the Court's order. Are you and your colleagues available for a call this week?

Thanks

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Subject: RE: Planned Parenthood

Thanks Jennifer.

From: Wolsing, Jennifer (CHFS OLS) [<mailto:Jennifer.Wolsing@ky.gov>]
Sent: Friday, July 12, 2019 11:40 AM
To: Uriarte, Robert L. <ruriarte@orrick.com>
Cc: York, Catherine (CHFS OLS) <Catherine.York@ky.gov>; Herklotz, Johann (CHFS OLS) <hans.herklotz@ky.gov>
Subject: Planned Parenthood

Robert, this is a quick e-mail to let you know that we are still working on scheduling the teleconference. I apologize that it is taking so long; a lot of people are out on various matters right now. However, we're working on it and I feel confident that I should get back to you soon.

Sincerely,

Jennifer Wolsing

Assistant Counsel

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ATTORNEY/CLIENT PRIVILEGED COMMUNICATION

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July 23, 2019

Via E-Mail & U.S. Mail

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Chad Meredith
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Re: Planned Parenthood Licensure Application

Dear Johann, Chad, and Jennifer:

We write to document CHFS's ongoing refusal to communicate with Planned Parenthood regarding issues material to compliance with Judge Stivers' June 25, 2019 order, and to apprise CHFS of Planned Parenthood's intent to file a status report with the Court regarding the issues discussed in this letter. We would like to avoid the necessity of another filing, but we view CHFS's refusal to communicate as a continuation of its contemptuous conduct and are duty bound to act unless CHFS changes course.

During the June 25, 2019 hearing, Judge Stivers instructed CHFS to notify the Court immediately if there was any reason to deny Planned Parenthood's application evident from the face of Planned Parenthood's updated application. The following exchange took place at the conclusion of the hearing:

THE COURT: If there are grounds to deny [Planned Parenthood's application], I want to know as soon as possible--

MR. MEREDITH: Yes, sir.

THE COURT: --following July 3rd, 2019, all right?

MR. MEREDITH: Yes, sir.

6/25/2019 Transcript at 15. We presume that Mr. Meredith was earnest in his response to Judge Stivers, and that were there an issue with the application materials Planned Parenthood submitted on July 3rd, CHFS would have already notified the Court. Accordingly, we understand that Planned Parenthood's application materials are sufficient to satisfy the requirements for licensure, and that the only further step



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required to decide Planned Parenthood's application is a site inspection. However, it appears that CHFS is obstructing the site inspection in direct violation of Judge Stiver's order.

First, we have asked CHFS to answer a simple question about the parameters of the inspection on a key issue. Does Planned Parenthood need to be performing abortions in order to facilitate a site inspection—the position the Cabinet took during Planned Parenthood's original licensure process? As you know from our correspondence on July 3, Planned Parenthood committed to have abortion-trained staff members and an abortion-trained physician on site on four specified dates before the Court's August 19 deadline for CHFS's licensure decision. Planned Parenthood also offered to make these staff members available on different days if the initial dates offered did not work for the inspectors' schedules. The offer of these four dates required these professionals to arrange their schedules to assure that Planned Parenthood could meet whatever requirement in this regard that CHFS might impose.

Accordingly, we have been attempting to get CHFS's position on this issue for three weeks now, but CHFS has failed and refused to participate in a teleconference to discuss a path forward. Indeed, we sent written requests for a teleconference with CHFS's counsel on July 3, 9, 10, 15, 16, 18, and 22. The only response we received were emails from Ms. Wolsing (on July 3, 10, and 12) advising that she would "work with CHFS counsel and Steve Davis" to schedule a call (July 3), that she was "waiting for a response from [her] client and co-counsel" (July 10), and was "still working on scheduling" as of July 12. Since then, we have had complete radio silence. There are now only two days left within the court-ordered inspection window when Planned Parenthood's abortion-trained staff members are available for the inspection. If CHFS wants these staff members to be on-site on different dates, Planned Parenthood needs to know this immediately so that it can arrange these staff members schedules accordingly.

It appears to us from CHFS's pattern of silence in the face of repeated requests for a teleconference that the CHFS is obstructing Planned Parenthood's application. Moreover, it appears that CHFS is instructing its litigation counsel not to communicate with Planned Parenthood's counsel, in contravention of the Kentucky Bar Association's Rules of Professional Conduct and W.D. KY Civil Local Rule 83.3. We ask that you reconsider this course of conduct and contact us immediately to have these discussions.

Second, on July 10, 2019, Planned Parenthood formally requested that CHFS provide Planned Parenthood with 25 copies of the updated, printed materials published by the Cabinet pursuant to Ky. Rev. Stat. § 311.725(2). In dereliction of its statutory duties, CHFS refuses to provide these materials or to even discuss the issue with Planned Parenthood. Again, we see this conduct as a continuation of CHFS's long pattern of unconstitutional, contemptuous efforts to obstruct Planned Parenthood's license application.



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We intend to apprise Judge Stivers of CHFS's conduct at the end of this week unless these issues are resolved sooner. We remain available for, and continue to request, a teleconference to discuss these issues.

Sincerely,

/s/ Karen G. Johnson-McKewan

Karen G. Johnson-McKewan



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Adam Meier
Secretary

July 24, 2019

Karen Johnson-McKewan
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Dear Ms. Johnson-McKewan:

We are in receipt of your July 3, July 10, and July 23, 2019 correspondence. We appreciate your desire for clarification and materials prior to site inspection.

As an initial matter, the Cabinet agrees that Planned Parenthood may strike out the license application language regarding KRS 216B.0435(4) and 902 KAR 20:360. This is without prejudice to the Cabinet's right to reinstate this language based upon the resolution of the pending appeal in the Sixth Circuit.

Planned Parenthood may not provide abortions without license. KRS 216B.015; KRS 216B.0431. Nor is Planned Parenthood required to commence performing abortions to facilitate a site inspection. 902 KAR 20:008 Section 2 (12) simply states that an "inspection shall be made at any time during the licensee's hours of operation."

The Cabinet has established a process that enables Cabinet surveyors to conduct initial health care facility inspections while facilities are open. Enclosed, please find the appropriate application and checklist of documents to be submitted for review. Some of these documents may have been submitted with Planned Parenthood's previous November 19, 2015 license application, which was denied. The Cabinet requires updated documentation for the current application.

I have enclosed 25 copies of the KRS 311.727(2)(f) ITOP reporting forms. Those forms are also available at the following URLs:

- **Form VS-913:** <https://chfs.ky.gov/agencies/dph/dehp/vsb/Forms/Vs913AbortionForm.pdf>
- **Form VS-913P:** <https://chfs.ky.gov/agencies/dph/dehp/vsb/Forms/Vs913PAbortionPrescription.pdf>

Additionally, I have enclosed 25 hard copies of the abortion reversal teaching sheet.

Finally, please let me assure you that in the Cabinet intends to comply fully with Judge Stivers' June 26, 2019 Order. If you have any further questions or concerns about this process, I hope you will feel free to contact me.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Johann Herklotz', with a long horizontal stroke extending to the right.

Johann Herklotz
General Counsel



July 26, 2019

Via E-Mail & U.S. Mail

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Re: Planned Parenthood Licensure Application

Dear Johann:

We write in response to your July 24, 2019 letter. Thank you for confirming that (1) Planned Parenthood need not comply with the license application language regarding enjoined KRS 216B.0435(4) and 902 KAR 20:360; and (2) the Cabinet's current position on whether Planned Parenthood needs to be performing abortions at the time of the licensure inspection. Your letter, however, was non-responsive and lacking pertinent information on many fronts.

First, your letter indicates that you had "enclosed . . . the appropriate application and checklist of documents to be submitted for review." However, when the hard copy letter arrived, there was no enclosure with an application or a checklist of documents. Please forward these omitted materials to my attention in due course. In addition, this language in your letter seems to suggest that you have *not* received the licensing application that Planned Parenthood submitted on July 3, 2019. Please advise whether you have indeed received our client's application.

Second, your letter suggests that Planned Parenthood should be submitting documents to CHFS for your review *in advance* of a site inspection. But testimony at trial indicated that CHFS policy is to inspect such documents at the time of the licensing inspection—CHFS does not ordinarily request that licensing applicants submit these documents in advance, which are often quite voluminous. See, e.g., Trial Trans. Vol. 2B, 82:6-15; 1C,60:15-18; 64:8-69:25; 2B, 48:22-50:10. If CHFS is indeed requesting that Planned Parenthood submit these documents in advance, contrary to the ordinary licensing process, please provide me with your statutory or regulatory authority for requiring Planned Parenthood to do so. We will then evaluate whether to provide these materials in advance of the inspection. Rest assured, however, that the documents will be available at the time of the site inspection.

Third, our July 3, 2019 letter provided a list of four dates during the inspection period when Planned Parenthood's abortion-trained staff and physician could be on-site in Louisville to facilitate a site inspection, and asked you to provide alternative dates if the dates listed did not work. Your letter was completely non-responsive on this point. Please advise if you expect Planned Parenthood to have an



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Chad Meredith
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abortion-trained physician and staff members on site at the time of the inspection, and if so, whether the dates provided are workable for CHFS. If not, please provide alternative dates.

Fourth, our July 10, 2019 letter requested that CHFS provide Planned Parenthood with certain materials that you have still failed to provide.

- We requested that you provide Planned Parenthood with the updated, current version of the state-mandated materials published pursuant to § 311.725(2). You have sent the state-mandated “abortion reversal teaching sheet,” but none of the other materials published pursuant to this subsection.
- In addition, we requested that you provide us with the certification form required by KRS § 311.727(f), which you failed to do. This statute requires an abortion provider to “[r]etain in the woman's medical record a signed certification from the pregnant woman that she has been presented with [state mandated materials] . . . and has viewed the ultrasound images, listened to the heartbeat if the heartbeat is audible, or declined to do so,” and indicates that “[t]he signed certification shall be on a form prescribed by the cabinet.” Instead, you provided us with the vital statistics reporting forms promulgated under a different statute, KRS § 213.101.

As requested in my July 10, 2019 letter, please provide us with 25 copies of the remaining state-mandated materials published pursuant to KRS § 311.725(f) and a copy of the certification form mandated by KRS § 311.727(f). Two weeks have passed since our original request. In light of Judge Stivers’ admonition to proceed expeditiously, we ask that you provide these documents to us by no later than Monday, July 30.

We look forward to your prompt response. Since your July 22 letter failed to address most of our long-standing requests—including the request for a teleconference to iron out any issues in real time—we ask that you provide substantive responses to each of these matters no later than the close of business on Monday, July 30 so that we can avoid the necessity of a request for Judge Stivers’ assistance in these matters.

Sincerely,

/s/Karen G. Johnson-McKewan

Karen G. Johnson-McKewan



Johann Herklotz
Chad Meredith
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July 30, 2019

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VIA ELECTRONIC AND REGULAR MAIL

Re: Planned Parenthood Licensure Application

Dear Ms. Johnson-McKewan:

In response to your correspondence of July 26, 2019 copies of the checklist and application referenced in my letter of July 24, 2019 are attached hereto and enclosed with the hard copy of this letter. I apologize for the failure to enclose these documents with my July 24 letter. This will also serve to confirm receipt of your client's licensing application submitted on July 3, 2019.

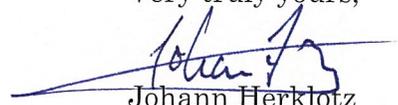
With regard to the Cabinet's authority to collect documents for review prior to any site inspection, please see 902 KAR 20:008. You will note that the process described therein has changed since the date your client's 2015 application was submitted. The changes to that regulation also post-date the trial testimony referenced in your letter.

As to your inquiry regarding dates for an inspection, the Cabinet would again direct you to 902 KAR 20:008. Pursuant to that regulation, site inspections are unannounced, and discussion of specific dates is accordingly not authorized.

Finally, the additional materials requested in your July 26 letter pursuant to KRS 311.725(2) and 311.727(f) are attached and enclosed with the hard copy of this correspondence.



Very truly yours,

A handwritten signature in blue ink, appearing to read "Johann Herklotz", is written over a horizontal line that extends to the left and right.

Johann Herklotz
General Counsel



August 2, 2019

Via E-Mail & U.S. Mail

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Re: Planned Parenthood Licensure Application

Dear Johann:

We write in response to your July 30, 2019 letter. Your letter cites 902 KAR 20:008 as authority for the Cabinet's pre-site-inspection scrutiny of various Planned Parenthood documents. However, 902 KAR 20:008 establishes definitively that the Cabinet's extraordinary scrutiny of Planned Parenthood is contrary to the Cabinet's governing regulations, as well as its longstanding practices.

As an initial matter, we note that 902 KAR 20:008 conspicuously omits the Cabinet's "Application for License to Operate an Abortion Facility" from the list of applications enumerated in 902 KAR 20:008 Section 2. Likewise, the Cabinet's "Application for License to Operate an Abortion Facility" is conspicuously absent from the set of applications enumerated in 902 KAR 20:008 Section 9. Moreover, we note that KRS § 216B.042(c), which is incorporated by reference in 902 KAR 20:008, distinguishes abortion facilities from health facilities. It is also significant that 902 KAR 20:008 contemplates "*an inspection* for determining compliance with the requirements of each applicable administrative regulation"—not *ad hoc* pre-inspection scrutiny of an abortion facility applicant's operational policies, as the Cabinet is subjecting Planned Parenthood to here.

Importantly, KRS § 216B.042(1)(d) mandates that the Cabinet "[c]ompile in a **single document**, maintain, and make available to abortion facilities and the public during regular business hours, all licensure standards **and procedures** promulgated under KRS Chapter 13A related to abortion facilities." (emphasis added) *accord* KRS 216B.0431 (mandating promulgation of written procedures for abortion facility licensure). The "single document" compiled by the Cabinet under the command of KRS § 216B.042(1)(d) is clearly 902 KAR 20:360, which says nothing about pre-inspection scrutiny of the laundry list of documents requested by the Cabinet.

We understand that the Cabinet's empirical practices conform to the plain text of the governing regulations and statutes—that is, except when Planned Parenthood is at issue. To our knowledge, the Cabinet has never previously taken the position that the licensure procedures set forth in 902 KAR 20:008 apply to abortion facilities. In sum, it is clear that the Cabinet is subjecting Planned Parenthood's



Johann Herklotz
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application to heightened scrutiny. Given the history and context of this case, we do not believe the impropriety of the Cabinet's conduct will be lost on Judge Stivers.

Nevertheless, despite the lack of authority for the Cabinet's request, Planned Parenthood will compile and submit the requested documentation so that the Cabinet will have no excuse for not completing the court-ordered site inspection by August 19, 2019. We note that certain of the documents requested by the Cabinet are not required by the applicable regulation, but Planned Parenthood is nevertheless preparing them and will submit the complete set early next week. Planned Parenthood reserves all rights, including the right to take discovery on the Cabinet's continued obstruction of Planned Parenthood's application.

Sincerely,

/s/ Karen G. Johnson-McKewan

Karen G. Johnson-McKewan