



# ACLU

AMERICAN CIVIL LIBERTIES UNION  
of SOUTH DAKOTA

March 31, 2017

Department of Social Services  
State Office  
700 Governors Drive, 57501-2291  
Phone: 605.773.3165

Local Office  
912 E. Sioux Ave., 57501-3490  
Phone: 605.773.3612  
Fax: 605.773.5390  
ATTN: Child Protective Services

**Re: Catheterization of Children**

Dear Sir or Madam,

We write to you because we were contacted by a parent in Hughes County whose three-year-old son was catheterized and injured both physically and emotionally by the experience. The parent, [REDACTED] was living with a man who was on probation and tested positive for drugs, including marijuana and methamphetamines. Ms. H [REDACTED] has two children, a daughter who is five-years-old and a son who is three. She was compelled by DSS workers to submit to this process as described below.

On Thursday, February 23, 2017, the Pierre police arrived at her house to arrest her boyfriend on the probation violation and to conduct a search. Department of Social Services ("DSS") also came and informed her that if she did not agree to have her children produce a urine sample, the children would be removed from the home. As a result of that threat, she agreed to have them tested the following day at Avera Health in Pierre. The next day – February 24, 2017 -- Ms. H [REDACTED] brought her son and daughter to Avera for the drug test. Her five-year-old daughter was able to produce a urine sample in a cup. Her three-year-old son, [REDACTED] is not toilet-trained and was unable to produce a sample. As a result, he was held down and catheterized by nurses there. During the procedure, he screamed the entire time. The parent wished they had used a bag rather than a catheter and expressed concern about the procedure to hospital staff after realizing the method they would use to procure urine. She did not know, nor



was it reasonable for her to expect, that when she agreed to have her children produce urine samples her children were at risk of being catheterized. While DSS was not present at the hospital on Friday, had they not come to Ms. Hunter's house on Thursday and threatened her with the removal of her children, she would not have been there. Two days later, on Sunday, February 26, 2017, she returned to the hospital because [REDACTED] continued to complain of pain and discomfort. He was diagnosed with a staph infection in his penis and given a course of antibiotics to treat the infection caused by the catheterization.

We write to ask you to stop catheterizing children in these circumstances. It is both unconscionable and inhumane, and it is unreasonable to subject children to the risk of infection when the information you seek can be obtained through less invasive procedures, if it is necessary to conduct the search at all. We also ask that you provide an explanation of why this search was conducted, why this process of catheterization was permitted, and who made the decision to have this child tested. Please also send us your written policies regarding searches of children and catheterization.

Children suspected of being victims of abuse or neglect should not be subjected to the additional trauma, indignity and abuse of catheterization. As a result, we ask you to stop this unreasonable practice and to inform the hospital that if you are seeking a medical exam for an investigation, you are *not authorizing them to use this practice*.

The practice of catheterization against the will of the individual is barbaric and should not be used. Aside from the morality of the practice, forcibly catheterizing an individual adult or child against his or her will also raises serious constitutional concerns that could lead to liability. The compelled production of bodily fluids is a search within the meaning of the Fourth Amendment. If the parent "consents" because she was coerced by the threat of losing her children, the consent is not valid and the government can be held responsible. "For consent to a search to be valid, the totality of the circumstances must indicate that it was voluntarily given." *State v. Fierro*, 2014 S.D. 62, ¶ 19 citing *State v. Almond*, 511 N.W.2d 572, 573 (S.D. 1994). Freely given consent cannot be "the product of *duress or coercion*, express or implied[.]" *Id.* citing *Schneckloth*, 412 U.S. 218, 227 (1973) (Emphasis added).

Here, the government compelled a urine sample and, ultimately, catheterization implicating the Fourth Amendment right to be free from unreasonable search and seizure. The Supreme Court has recently held that *blood draws* are sufficiently invasive to require the police to seek a warrant before doing it, even if the police suspect the individual of driving while intoxicated or under the influence of drugs or alcohol. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (holding, among other things, that a warrant was required for a blood test "which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a

sample of his blood for use as evidence in a criminal investigation.”). The blood draw in *McNeely* was described by the Supreme Court as “such an invasion of bodily integrity [that it] implicates an individual’s “most personal and deep-rooted expectations of privacy.” *Id.* Logic dictates that if a blood draw invades bodily integrity such that the Supreme Court requires the police to seek judicial review prior to getting it, catheterization requires, at a minimum, a warrant and, likely a warrant regarding the method of extraction. Furthermore, federal courts have recognized that a social worker’s warrantless body cavity search of a child violated the Fourth Amendment and “[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principles of human decency.” *Roe v. Texas Dep’t of Protective & Regulatory Servs.*, 299 F.3d 395, 406 (5th Cir. 2002) citing *Doe v. Renfrow*, 631 F.2d 91, 92 93 (7th Cir.1980).

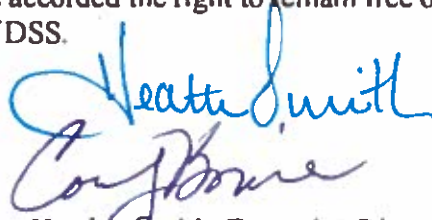
Catheterization is a body cavity search, given the intrusiveness of the process. DSS was acting without any judicial oversight or review at all and very limited cause to believe that this intrusive procedure was justified. At a minimum, this procedure should have been vetted by a judge. The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. The Supreme Court has recognized that ““(t)he security of one’s privacy against arbitrary intrusion by the’ [government] as being ‘at the core of the Fourth Amendment’ and ‘basic to a free society.’” *Schmerber v. California*, 384 U.S. 757, 767 (1966) citing *Wolf v. People of State of Colo.*, 338 U.S. at 27 (1949).

We look forward to hearing from you at your earliest convenience. Individuals have a right to bodily privacy and integrity and a child should be accorded the right to remain free of catheterization in all circumstances related to the work of DSS.

Sincerely,

/s/ Stephen Pevar

Stephen Pevar  
ACLU Racial Justice Program



Heather Smith, Executive Dir.  
Courtney A. Bowie\*, Legal Dir.  
ACLU of South Dakota

\*Admitted in Mississippi, AL (inactive) & MA (inactive)

Cc:

██████████ ██████████

