EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 27 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KESSELE LIVINGSTON,

Plaintiff - Appellee,

v.

LAURI ESSLINGER; et al.,

Defendants - Appellants.

No. 17-16563

D.C. No. 2:16-cv-03295-DLR
U.S. District Court for Arizona, Phoenix

MANDATE

The judgment of this Court, entered September 12, 2018, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

Costs are taxed against the appellee in the amount of $73.60.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rebecca Lopez
Deputy Clerk
Ninth Circuit Rule 27-7

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 12 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KESSELE LIVINGSTON,

Plaintiff-Appellee,

v.

LAURI ESSLINGER; REBECCA OHTON; TERESA PATTERSON,

Defendants-Appellants.

No. 17-16563

D.C. No. 2:16-cv-03295-DLR

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted August 16, 2018
San Francisco, California

Before: O'SCANNLAIN and BEA, Circuit Judges, and McLAUGHLIN,** District Judge.

Several Arizona Department of Child Safety caseworkers appeal the district court's denial of their motion to dismiss Kessele Livingston's claims on the basis

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Mary A. McLaughlin, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

of qualified immunity. Because the facts are known to the parties, we repeat them only as necessary to explain our decision.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam) (internal quotation marks omitted). The asserted "right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. . . . [E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id.* (internal quotation marks omitted). Our inquiry is "fact-specific" and "highly contextualized"; it "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016) (internal quotation marks and emphasis omitted).

The district court erred in rejecting the caseworkers' claim for qualified immunity, because Livingston has not alleged the violation of a constitutional right that is clearly established.[1]

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[1] We conclude only that the rights Livingston asserts are not clearly established and do not consider the underlying question of whether such rights indeed exist. *See Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009).

I

First, the caseworkers had no clearly established duty to discover Livingston's actual age after he entered their care. At most, Livingston can show that the State has a duty to provide children within its custody "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992) (en banc). Even assuming *arguendo* that such duty implies some additional duty to determine the age of a child held by the State, that is not the appropriate question for our analysis. The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Livingston much be able to show, much more specifically, that *in the context of this case* his caseworkers had a clearly established duty to do more to discover his actual age. *See Hamby*, 821 F.3d at 1090–91 & n.3.

Livingston has not identified a single case that opines on the State's alleged duty to determine the age of a child in its custody, let alone in circumstances similar to these. The caseworkers are not the ones who incorrectly determined that Livingston was born in 1994. Upon his entry into the United States, Livingston's own aunt asserted that he was born then, information which was then recorded on

his official federal residency card and which was later relied upon by other State officials. Whether or not the caseworkers had reason to question Livingston's purported age, he has identified no case that shows (or even suggests) they had a constitutional obligation to investigate and somehow to disprove the age under which he had been living for years.

II

Second, even if the caseworkers could be faulted for failing to determine Livingston's actual age, he has not identified any authority that clearly establishes his alleged right to receive "restoration services" from them or to be held within their care until he became an adult. *Cf. DeShaney v. Winnebago Cty. Dep't of Soc'l Servs.*, 489 U.S. 189, 201 (1989) (a State may remove a child from its protective custody so long as it "place[s] him in no worse position than that in which he would have been had [the State] not acted at all"); *Henry A. v. Willden*, 678 F.3d 991, 1000 (9th Cir. 2012) (while in foster care, children have a right to receive "the basic needs identified in *DeShaney*—food, clothing, shelter, medical care, and reasonable safety").

REVERSED.

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kessele Livingston,

Plaintiff,

v.

Lauri Esslinger, Anrise Reeves, Lisa Lucchesi, Rebecca Ohton, Teresa Patterson, Robin E Ance, Brenda Lemley-Spence, and Maria Villagrana,

Defendants.

No. CV-16-03295-PHX-DLR

ORDER

In this civil rights action, Plaintiff Kessele Livingston alleges that Defendants, who are Arizona Child Protective Services (CPS) caseworkers, violated 42 U.S.C. §§ 1981 and 1983 by infringing upon his substantive due process rights and discriminating against him because of his race. (Doc. 21.) Defendants have moved to dismiss Plaintiff's third amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 26.) For reasons stated below, the motion is granted in part.[1]

BACKGROUND[2]

Plaintiff, a Liberian national, came to the United States in 2007 as an eleven-year-

[1] Upon review of the briefs, Plaintiff's request for oral argument is denied because the issues are adequately briefed and oral argument will not assist the Court in resolving the pending motion. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

[2] The well-pled factual allegations in the third amended complaint are accepted as true for purposes of this order. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).

old refugee fleeing civil war. (Doc. 21 ¶¶ 6-8.) He was born May 5, 1996, but upon admission to the United States his aunt incorrectly recorded his birth date as January 2, 1994. (¶¶ 9-11.) As a result, the resident card issued by the United States listed Plaintiff's birth date as January 1, 1994 and he thereafter was deemed two years older than his actual age.[3] (¶ 36.)

CPS obtained custody of Plaintiff in 2011, and in December of that year Plaintiff informed his caseworkers, Defendants Rebecca Ohton, Teresa Patterson, and Lauri Esslinger ("2012 caseworkers"), that he was two years younger than his recorded age. (¶¶ 36, 53.) Plaintiff's GED instructor and a psychiatrist also noted a discrepancy between Plaintiff's recorded age and how he appeared and behaved. (¶¶ 30, 37.) Nevertheless, Plaintiff was "aged out" of CPS more than two years early, had to leave his group home, and was denied restorative services. (¶¶ 39-40, 49.)

Though he was a juvenile, Plaintiff later was convicted of an adult criminal offense based on the erroneously recorded birth date, which compromised his immigration status. (¶¶ 69, 71-72.) Plaintiff was placed into removal proceedings and detained by Immigration and Customs Enforcement (ICE) at its facility in Florence, Arizona. (¶ 74.) While in ICE custody, a forensic dental analysis confirmed that Plaintiff was a minor. (¶ 76.) Plaintiff's federal records were then corrected to reflect a May 5, 1996 birth date. (¶ 77.)

Plaintiff was released from ICE custody and returned to CPS care. (¶ 84.) There, his new caseworkers—Defendants Robin Ance, Brenda Lemley-Spence, Maria Villagrana, Anrise Reeves, and Lisa Lucchesi ("2013 caseworkers")—told him that he need not comply with his probation requirements. (¶ 89.) No attempt was made to correct Plaintiff's criminal record or contact his probation office, and he was subsequently arrested and imprisoned twice for violating his probation. (¶¶ 86, 95, 97.)

Plaintiff's criminal charges eventually were set aside and he was deemed lawfully

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[3] It is not clear why the resident card listed a January 1, rather than a January 2, birth date.

present in the country. (¶¶ 103-104.) After Plaintiff turned eighteen, he brought this action against his 2012 and 2013 caseworkers, who now move to dismiss.

LEGAL STANDARD

A successful Rule 12(b)(6) motion must show that the complaint lacks a cognizable legal theory or fails to allege facts sufficient to support such a theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint that sets forth a cognizable legal theory will survive a motion to dismiss only where it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Although the court must take "the well-pled factual allegations in the complaint as true, [it is] 'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

DISCUSSION

Plaintiff alleges that his 2012 and 2013 caseworkers violated his substantive due process rights and discriminated against him because of his race by failing to confirm his age and correct the error despite being aware of the problem and its potentially serious ramifications. Defendants argue that the complaint does not contain sufficient factual allegations to state plausible claims to relief under 42 U.S.C. §§ 1983 and 1981. Defendants further argue that, even if Plaintiff has adequately alleged civil rights violations, they are entitled to qualified immunity. As explained more fully below, the Court disagrees in part and concludes that Plaintiff has sufficiently stated a claim under § 1983 against the 2012 caseworkers. The Court agrees with Defendants, however, that Plaintiff has not stated a plausible claim under § 1983 against the 2013 caseworkers, nor a plausible claim under § 1981 against any Defendant.

I. Section 1983

To sustain an action under § 1983, a plaintiff must allege that a person acting under color of state law deprived him of a federal constitutional or statutory right. *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989). Plaintiff alleges that Defendants, acting at all relevant times under color of state law, deprived him of his substantive due process rights under the Fourteenth Amendment in three ways: (1) the 2012 caseworkers failed to provide him with age-appropriate care, (2) all Defendants failed to correct his age on official records, and (3) the 2013 caseworkers told him that he need not comply with probation. Defendants contend that these alleged acts and omissions do not amount to a constitutional violation as a matter of law.

By invoking the substantive component of the Due Process Clause, Plaintiff claims that the government was "categorically obligated to protect him in these circumstances." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (9th Cir. 1989). It is well-established, however, that the Due Process Clause provides no general affirmative right to government aid, even where such aid is necessary to secure life, liberty or property interests. *Id.* at 196. There are two exceptions to this general rule: the special relationship and the state-created danger exceptions. The former imposes upon the government some degree of responsibility for a person's safety and well-being when a custodial or other "special" relationship exists between the person and the state. *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012). The latter applies when the government has affirmatively created or placed the individual in peril by acting with deliberate indifference to a known and obvious danger. *Johnson v. City of Seattle*, 474 F.3d 634, 639-40 (9th Cir. 2007). The Court will address whether Defendants' alleged acts or omissions fall within either of these exceptions.

A. Failure to Provide Age-Appropriate Care

Children in foster care have a special relationship with the state and thus a federal constitutional right to state protection. *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010). This protection requires the state to provide "reasonable

safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992). Common sense dictates that a determination of actual age by the state is vital to provide a foster child with his constitutional right to age-appropriate care.

1. Plausible Constitutional Violation

Plaintiff alleges that the 2012 caseworkers' failure to confirm his age resulted in him being denied age-appropriate education and restorative services and ultimately caused him to be denied all services and protection when he was prematurely "aged out" of the system. In light of the alleged indicators that Plaintiff was younger than his residency card reflected, the failure to confirm Plaintiff's true age plausibly constitutes at least negligence. The Due Process Clause, however, "does not transform every tort committed by a state actor into a constitutional violation." *Deshaney*, 489 U.S. at 202. Rather, a plaintiff must allege behavior that is so deliberately indifferent to his constitutional rights that it "shocks the conscience." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Even under this demanding standard, however, the Court finds that Plaintiff has alleged sufficient facts to state a plausible claim against the 2012 caseworkers.

Plaintiff claims that the 2012 caseworkers relied solely upon the age reported by the federal government to determine what services he would be provided. Ohton and Patterson, however, noted in Plaintiff's Permanency Hearing Report that Plaintiff claimed he was only fifteen and that he was fearful of "aging out" of the system. (Doc. 21 ¶¶ 36, 38.) Ohton and Patterson also noted that Plaintiff's instructors at JFCS Real World GED believed him to be fifteen based on his maturity and intellectual ability. (¶ 37.) Esslinger documented that Plaintiff reported his age to be fifteen and knew that he was only functioning at a second grade level. (¶ 40.) Plaintiff alleges that the 2012 caseworkers all knew that he was "diminutive in size," that a juvenile-court-appointed evaluator questioned his age, and that a psychiatrist reported that "he certainly appears younger than the reported age." (¶¶ 18, 30, 43.) Despite recurrent uncertainty as to Plaintiff's age,

Esslinger terminated CPS involvement in 2011. (¶ 39.)

Accepting these allegations as true and construing them in the light most favorable to Plaintiff, as the Court must at this stage, Plaintiff has plausibly alleged that the 2012 caseworkers failed to reasonably investigate his true age and deliberately ignored the fact that he was a minor when they removed him from CPS custody and released him to the streets. The Court therefore concludes that Plaintiff has sufficiently stated a § 1983 claim against the 2012 caseworkers based on their alleged failure to provide him with age-appropriate care.

2. Qualified Immunity

Defendants alternatively contend that a child's right to an accurate determination of his age in order to provide age-appropriate care is not clearly established and, therefore, dismissal is appropriate because they have qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The plaintiff bears the burden to prove that the right allegedly violated was clearly established. *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991).

Here, to resolve the qualified immunity question the Court first must consider the contours of a foster child's clearly established rights, and then examine whether a reasonable official would have understood that the specific conduct alleged by the plaintiff violated those rights. *Henry A.*, 678 F.3d at 1000. Defendants are not entitled to qualified immunity merely because the precise acts or omissions in question have not previously been held unlawful. *Id.*

For children under the state's protection, this Circuit has clearly established a constitutional right to "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." *Lipscomb*, 962 F.2d at 1397. For example, the caseworkers in *Henry A.* failed to transfer a child's medical records between

doctors and, as a result, the child was prescribed drugs that negatively interacted, causing him to be admitted to the intensive care unit (ICU). 678 F.3d at 997. Upon release, he was given the same drugs again and was readmitted to the ICU. *Id.* The 9th Circuit found that the caseworkers' conduct constituted a violation within the "relevant contours of a foster child's clearly established rights" and, further, that a reasonable caseworker would have known that such conduct violated these clearly established rights. *Id.* at 1001. The caseworkers consequently were not shielded by qualified immunity. *Id.*

Here, Plaintiff alleges that the 2012 caseworkers failed to confirm his age despite numerous indications that he was a minor, and as a result provided him with constitutionally inadequate care. The right to reasonable safety and minimally adequate care and treatment is framed with direct reference to the age of the child. The necessity of ascertaining a child's age in order to meet the duty of providing age-appropriate care therefore seems clear enough that a reasonable caseworker would have known that turning a blind eye to evidence that a child was younger than his recorded age likely would result in age-inappropriate care and treatment. The Court declines at this early stage to find that the 2012 caseworkers have qualified immunity.

Nonetheless, the Court is mindful that further factual development might show that the 2012 caseworkers were not sufficiently alerted to Plaintiff's true age. Indeed, "[a] qualified immunity defense is generally not amenable to dismissal under Rule 12(b)(6) because facts necessary to establish this affirmative defense generally must be shown by matters outside the complaint." *Anderson v. Solis*, No. C 12-3855 PJH, 2013 WL 245232, at *4 (N.D. Cal. Jan. 22, 2013). Accordingly, though the Court declines to dismiss Plaintiff's § 1983 claim against the 2012 caseworkers at this juncture, nothing in this order precludes these Defendants from reasserting this affirmative defense after further factual development.

B. Failure to Correct Plaintiff's Age on Official Records

Plaintiff alleges that all Defendants failed to correct his age on official records, and that the 2013 caseworkers failed to resolve his probation violations and assist in

setting aside the adult criminal judgments against him. Although there was a special relationship between Plaintiff and CPS while he was in foster care, Defendants' alleged failures—not correcting Plaintiff's age on official records or resolving his criminal problems—are not within the scope of the state's duty to provide minimally adequate care. Confirming a child's age to provide age-appropriate care is different than correcting a child's age on, for example, a federally issued green card by petitioning the appropriate office to issue a replacement card. Likewise, although CPS caseworkers must provide age-appropriate care to foster children, they are not responsible for ensuring that other government actors satisfy their own duties with respect to those children, for example, by providing due process to a juvenile offender. Further, Defendants' failure to correct Plaintiff's age is an omission, not an affirmative act, and thus cannot be the basis for a "state-created danger" claim. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062-63 (9th Cir. 2006). Accordingly, to the extent Plaintiff's § 1983 claim is premised on allegations that Defendants failed to correct his age on official records or to assist in clearing his adult criminal record, the claim is dismissed.

C. Statements Regarding Probation Compliance

Finally, Plaintiff alleges that the 2013 caseworkers told him that he did not have to comply with his probation requirements. Defendants superficially argue that this allegation is implausible. The Court disagrees, and under the applicable standards this allegation must be accepted as true and construed in the light most favorable to Plaintiff.

Nevertheless, the Court finds that the special relationship between Plaintiff and CPS did not impose upon the 2013 caseworkers a constitutional duty to provide accurate legal advice. As previously noted, the special relationship gives rise only to a duty to provide reasonable safety and minimally adequate, age-appropriate treatment and care.

Nor does the alleged conduct fall within the state-created danger exception. For this exception to apply, the state actor must leave the individual in a situation that was more dangerous than the one in which the actor found him. *Munger v. City of Glasgow Police Dept.*, 227 F.3d 1082, 1086 (9th Cir. 2000). For example, in *Munger*, police

officers ejected an intoxicated man from a bar when he was inadequately clothed for the cold weather and had no way to get home. *Id.* at 1085. The man subsequently died of hypothermia. *Id.* Under these circumstances, the Ninth Circuit concluded that the officers affirmatively placed the man in a more dangerous situation than the one in which they found him. *Id.* at 1087.

Assuming that by advising Plaintiff that he did not have to comply with the terms of his probation the 2013 caseworkers affirmatively placed him in a situation that was more dangerous than the one in which they found him, dismissal of this claim still is appropriate. As previously noted, to sustain a claim under the Due Process Clause a plaintiff must allege behavior that is so deliberately indifferent to his constitutional rights that it shocks the conscience. Plaintiff's allegations do not rise to this level. Plaintiff alleges no facts plausibly showing that the 2013 caseworkers knew their advice was false or were deliberately indifferent to a known risk of harsh legal consequences. At most, Plaintiff's allegations suggest that Defendants negligently advised him on a legal matter outside their area of expertise. To the extent Plaintiff's § 1983 claim is premised on allegations that the 2013 caseworkers advised him that he need not comply with his probation, the claim is dismissed.

II. Section 1981

To sustain an action under § 1981, a plaintiff must plausibly allege "intentional discrimination on account of race." *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989). Here, Plaintiff contends that racial animus may be inferred simply from the fact that he is of a racial minority. The Court disagrees. Plaintiff must allege "some facts that plausibly give rise to an inference that race was the reason for Defendants' actions." *Gray v. Apple Inc.*, No. 16-cv-04421-HSG, 2017 WL 1709327, at *3 (N.D. Cal. May 3, 2017). The mere fact that Plaintiff is of a racial minority does not, of itself, plausibly show that Defendants' conduct was racially-motivated. Plaintiff therefore fails to state a plausible § 1981 claim against Defendants.

CONCLUSION

For the foregoing reasons, Plaintiff plausibly alleges that the 2012 caseworkers acted with deliberate indifference by failing to provide age-appropriate care to a child in their custody. The motion to dismiss is denied in this regard. The motion is granted, however, with respect to the 2013 caseworkers because Plaintiff has not plausibly alleged that they acted with deliberate indifference. Moreover, Plaintiff has not stated a plausible § 1981 claim.

IT IS ORDERED that Defendants' motion to dismiss (Doc. 26) is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. All claims against Defendants Ance, Spence, Villagrana, Reeves, and Lucchesi are dismissed;

2. The § 1981 claim against Defendants Ohton, Patterson, and Esslinger is dismissed;

3. The § 1983 claim against Defendants Ohton, Patterson, and Esslinger may proceed as specified in this order.

Dated this 5th day of July, 2017.

Douglas L. Rayes
United States District Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kessele Livingston, Plaintiff, v. Lauri Esslinger, Rebecca Ohton, and Teresa Patterson, Defendants.	No. CV-16-03295-PHX-DLR **ORDER**

Before the Court is Defendants Lauri Esslinger, Rebecca Ohton, and Teresa Patterson's Motion for Reconsideration of the Court's July 6, 2017 order denying their motion to dismiss the 42 U.S.C. § 1983 claim against them. (Doc. 49.) For the following reasons, Defendants' motion is denied.

I. Background[1]

Plaintiff, a Liberian national, came to the United States in 2007 as a refugee fleeing civil war. He was born in May 1996, but upon admission to the United States his aunt incorrectly recorded his birth date as January 1994. As a result, the resident card issued by the United States listed Plaintiff's birth date as January 1994 and he thereafter was deemed two years older than his actual age.

Arizona Child Protective Services (CPS) obtained custody of Plaintiff in 2011,

[1] The facts underlying Plaintiff's claim are discussed more thoroughly in the Court's July 6, 2017 order. (Doc. 48.)

and, in December of that year, Plaintiff informed Defendants, who were his CPS caseworkers, that he was two years younger than his recorded age. Plaintiff's GED instructor and a psychiatrist also noted a discrepancy between Plaintiff's recorded age and how he appeared and behaved. Nevertheless, Plaintiff was "aged out" of CPS more than two years early, had to leave his group home, and was denied restorative services.

Plaintiff brought this action against Defendants in 2016, alleging claims under 42 U.S.C. §§ 1983 and 1985. Defendants later moved to dismiss, which the Court granted in part. Specifically, the Court dismissed Plaintiff's § 1985 claim but allowed his § 1983 to proceed, finding that he alleged a plausible violation of his substantive due process rights and that Defendants had not shown an entitlement to qualified immunity at this stage. Defendants seek reconsideration of the Court's order as it pertains to the § 1983 claim.

II. Legal Standard

Motions for reconsideration should be granted only in rare circumstances. *Defs. of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Mere disagreement with a previous order is an insufficient basis for reconsideration. *See Leong v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J, Multnomah Cty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Such motions should not be used for the purpose of asking a court "'to rethink what the court had already thought through—rightly or wrongly.'" *Defs. of Wildlife*, 909 F. Supp. at 1351 (quoting *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). Indeed, this Court's local rules explicitly provide that no motion for reconsideration "may repeat any oral or written argument made by the movant in support of . . . the motion that resulted in the Order." LRCiv 7.2(g)(1).

III. Discussion

Defendants do not present newly discovered evidence or argue that there has been

an intervening change in controlling law. They, instead, argue that the Court committed clear error and its order was manifestly unjust. They raise three arguments, none of which warrant reconsideration.

First, Defendants contend that the Court erroneously expanded the scope of *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992). They characterize as dicta the Ninth Circuit's statement that the rights of a foster child extend to "reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child." (Doc. 49 at 2.) Defendants also argue that *Lipscomb* was "not intended to expand a foster child's rights beyond basic human needs like food, shelter, and adequate medical care." (*Id.* at 5.) *Lipscomb*, however, characterized these duties as "basic principles." 962 F.2d at 1379. Moreover, this Court's order did not expand Plaintiff's rights beyond those enumerated in *Lipscomb*. It merely found that Defendants plausibly failed to provide Plaintiff with "minimally adequate care and treatment appropriate to the age and circumstances of the child" when they prematurely aged him out of CPS care.

Next, Defendants argue that the contours of Plaintiff's right to age appropriate care are not clear enough that a reasonable official would know her conduct was unlawful. *See Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 846 (9th Cir. 2010). Defendants assert that the Court's order is manifestly unjust because it would subject caseworkers to § 1983 liability "merely by failing to determine with exactitude each child's age." (Doc. 49 at 6-7.) Plaintiff alleges more than this, however. As the Court explained in its prior order, Plaintiff alleges that he looked noticeably younger than his reported age, and that Defendants were aware that his instructors, juvenile-court-appointed evaluators, and psychiatrist all questioned the accuracy of the age listed on his resident card. Construing these facts in Plaintiff's favor, the Court found it plausible that Defendants failed to reasonably investigate his true age and deliberately ignored the fact that he was a minor when they removed him from CPS custody and released him to the streets. The Court did not suggest that a caseworker could be liable simply by failing to determine with precision a child's exact age. Instead, the Court stated that a caseworker

cannot "turn a blind eye to evidence that a child is younger than his recorded age" where it likely would "result in age-inappropriate care and treatment." (Doc. 48 at 7.)

Lastly, Defendants argue that this Court's qualified immunity analysis failed to account for the risk of harm to the foster child. Stated differently, Defendants contend that the Court failed to address whether they were deliberately indifferent to a known or obvious danger. The Court, however, noted that Plaintiff was placed in a relatively less secure position when he was prematurely aged out of CPS custody and released to the streets.

Though Defendants may genuinely disagree with the Court's order, they have not shown that the Court committed clear error or that its order is manifestly unjust. Moreover, the Court did not find, definitively, that Defendants are not entitled to qualified immunity. It merely concluded that a qualified immunity finding was premature and would benefit from fuller factual development. Accordingly,

IT IS ORDERED that Defendants' motion for reconsideration (Doc. 49) is **DENIED.**

Dated this 15th day of August, 2017.

Douglas L. Rayes
United States District Judge

EXHIBIT D

FILED

NOV 19 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KESSELE LIVINGSTON, Plaintiff-Appellee, v. LAURI ESSLINGER; REBECCA OHTON; TERESA PATTERSON, Defendants-Appellants.	No. 17-16563 D.C. No. 2:16-cv-03295-DLR District of Arizona, Phoenix ORDER

Before: O'SCANNLAIN and BEA, Circuit Judges, and McLAUGHLIN,* District Judge.

Judge Bea has voted to deny Livingston's petition for rehearing en banc and Judges O'Scannlain and McLaughlin have so recommended. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable Mary A. McLaughlin, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.