NO. _____

IN THE
Supreme Court of the United States

SHENANDOAH VALLEY
JUVENILE CENTER COMMISSION,

Petitioner,

v.

JOHN DOE 4, by and through his next friend,
NELSON LOPEZ, on behalf of himself and all persons
similarly situated,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1910

JOHN DOE 4, by and through his next friend, NELSON LOPEZ, on behalf of himself and all persons similarly situated,

Plaintiff – Appellant,

v.

SHENANDOAH VALLEY JUVENILE CENTER COMMISSION,

Defendant – Appellee.

CURRENT AND FORMER STATE ATTORNEYS GENERAL; ELECTED PROSECUTORS; CORRECTIONS LEADERS, CRIMINAL JUSTICE LEADERS; DISABILITY RIGHTS LEADERS,

Amici Supporting Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Harrisonburg. Elizabeth Kay Dillon, District Judge. (5:17-cv-00097-EKD-JCH)

Argued: October 28, 2020 Decided: January 12, 2021
Amended: January 14, 2021

Before GREGORY, Chief Judge, WILKINSON, and KEENAN, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Keenan joined. Judge Wilkinson wrote a dissenting opinion.

ARGUED: Theodore A. Howard, WILEY REIN, LLP, Washington, D.C., for Appellant. Jason A. Botkins, LITTEN & SIPE, LLP, Harrisonburg, Virginia, for Appellee. **ON BRIEF:** Hannah E.M. Lieberman, Mirela Missova, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, Washington, D.C., for Appellant. Joshua S. Everard, LITTEN & SIPE, LLP, Harrisonburg, Virginia; Harold E. Johnson, Meredith M. Haynes, WILLIAMS MULLEN, Richmond, Virginia, for Appellee. Neil R. Ellis, Mark E. Herzog, David A. Miller, SIDLEY AUSTIN LLP, Washington, D.C., for Amici Current and Former State Attorneys General, Elected Prosecutors, Corrections Leaders, Criminal Justice Leaders, and Disability Rights Leaders.

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GREGORY, Chief Judge:

Appellants are a class of unaccompanied immigrant children detained at Shenandoah Valley Juvenile Center who challenge the adequacy of their medical care. After fleeing their native countries due to harrowing traumas, many of these children struggle with severe mental illnesses, resulting in frequent self-harm and attempted suicide. Appellants filed a class action suit alleging, among other things, that the Shenandoah Valley Juvenile Center Commission fails to provide a constitutionally adequate level of mental health care due to its punitive practices and failure to implement trauma-informed care. The district court granted summary judgment to the Commission after finding that it provides adequate care by offering access to counseling and medication.

But the district court incorrectly applied a standard of deliberate indifference when it should have determined whether the Commission substantially departed from accepted standards of professional judgment. Accordingly, we reverse and remand for further proceedings so that the court may apply the appropriate standard and consider all evidence relevant to it.

I.

Appellants are immigrant children who fled their native countries—mainly Honduras, Guatemala, Mexico, and El Salvador—after experiencing appalling horrors. Some have been brutally assaulted, including by their own families. J.A. 1116–17, 1128, 1246–49. Others have seen their friends and families murdered before their eyes. *Id.* All faced circumstances so dire, they were forced to flee hundreds of miles for safety.

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Under federal law, Appellants are unaccompanied alien children ("UACs"): children under the age of 18 who have no lawful immigration status[1] and no parent or legal guardian in the United States available to care for them. 6 U.S.C. § 279(g)(2). Upon arrival in the United States, they fall under the custody of the Department of Health and Human Service's Office of Refugee Resettlement ("ORR"). 6 U.S.C. § 279(a); 45 C.F.R. § 410.207. ORR coordinates the care and placement of unaccompanied children. It is responsible for identifying qualified individuals, entities, and facilities to house them; placing children in the care of those individuals or facilities; and supervising those individuals and facilities to ensure that they provide adequate care. 6 U.S.C. § 279(b)(1)(A)–(L); 45 C.F.R. § 410.102.

Federal statute requires these children to "be promptly placed in the least restrictive setting that is in the best interest of the child," 8 U.S.C. § 1232(c)(2)(A), and any facility housing them must be "capable of providing for the child's physical and mental well-being." *Id.* § 1232(c)(3)(A). Similarly, federal regulations state that ORR "shall hold UACs in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of minors." 45 C.F.R. § 410.102(c). "Within all placements, UACs shall be treated with dignity, respect, and special concern for their particular vulnerability." *Id.* § 410.102(d).

[1] Some unaccompanied children may eventually gain lawful permanent residency through asylum or special immigrant juvenile status. *See* 8 U.S.C. §§ 1101(a)(27)(J), 1158, 1159(b); 8 C.F.R. §§ 204.11, 209.2.

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A.

The Shenandoah Valley Juvenile Center ("SVJC") is a secure juvenile detention facility in Staunton, Virginia. J.A. 30. It is run by the Shenandoah Valley Juvenile Center Commission ("the Commission"), a governmental entity formed under Virginia law by the Cities of Harrisonburg, Lexington, Staunton, and Waynesboro, and the Counties of Rockingham, Augusta, and Rockbridge. *Id.* SVJC provides education, housing, and medical care to unaccompanied immigrant children who, in the discretion of ORR, require a secure placement due to safety concerns. J.A. 103. SVJC also houses youth from surrounding jurisdictions who have been charged with a crime but have not yet had their cases adjudicated. J.A. 125. The facility houses approximately 20 to 40 unaccompanied immigrant children at any given moment. J.A. 1599, 1650.

When a child is referred to SVJC, licensed clinicians review the child's documentation, including any case summaries, school records, disciplinary history, clinician notes, psychological evaluations, and hospitalization records. J.A. 575, 1299–1301. In some cases, clinicians reject the placement of a child at SVJC if they determine that SVJC cannot provide the necessary services for a child's mental health needs. J.A. 1302–03. If a child is accepted by SVJC, resident supervisors perform an initial intake—including a mental health questionnaire and interview—followed by an assessment by case managers and clinicians. J.A. 569–75, 1207. This assessment allows SVJC's clinicians to learn about the child's social and disciplinary history while in custody. J.A. 1301. Clinicians also learn about the child's family history and journey to the United States. *Id.*

After the follow-up assessment, clinicians may refer a child for evaluation by a psychologist, subject to ORR approval. J.A. 103, 1383–84, 1451.

SVJC recognizes that most of the unaccompanied children it cares for have experienced severe trauma. Its Deputy Director of Programs testified before a Senate Subcommittee on Investigations that "[t]he majority of unaccompanied children in a secure setting [such as SVJC] have histories of repeated and various forms of abuse and neglect; life-threatening accidents or disasters; and interpersonal losses at an early age or for prolonged periods of time." J.A. 1967. SVJC's lead clinician testified that "a high percentage" of the unaccompanied children at SVJC have experienced trauma, J.A. 1455, and the facility's lead case manager affirmed the "high need for mental health treatment" for the children at SVJC "given the background of these minors, what they've witnessed in [their] home countr[ies] . . . prior to undergoing a pretty traumatic journey to the United States." J.A. 1807. Around 2017, SVJC began including in its annual staff trainings a section on trauma, common traumatic experiences of resident children, and ways to engage with those suffering from trauma. J.A. 97, 190–91, 194–98, 205–06, 1192–93, 1961.

The facility also provides certain mental health services to its residents. Each resident is assigned a case manager and licensed mental health clinician.[2] J.A. 100, 881, 1064, 1853. Residents meet with their clinicians for one-on-one counseling for about an hour at least once each week. *See* J.A. 896–963. Residents can request additional visits with their clinicians, though their requests are sometimes denied or ignored. *See* J.A. 700–

[2] The clinicians are licensed professional counselors with master's degrees in social work, psychology, sociology, or another relevant behavioral science. J.A. 881, 1064, 1853.

01, 820–21. Besides one-on-one counseling, clinicians also lead twice-weekly, 5- to 15-minute-long group counseling sessions. J.A. 955–56, 958–59, 1055–58. Additionally, the facility has a psychiatrist, Dr. Timothy Kane, who visits the facility every three to six weeks. J.A. 1385. But Dr. Kane does not provide counseling or any form of psychotherapy—rather, he prescribes medications and offers "medication management." J.A. 822, 1324–25, 1384–85, 1480–81, 1486. Despite the services it offers, SVJC acknowledges that the facility does not have "the internal capacity to deal effectively with the needs of unaccompanied kids who have severe mental illness" because it lacks the treatment capabilities of "a residential treatment center or hospital." J.A. 1357–58. For example, it does not offer prolonged exposure therapy to treat PTSD because its clinicians are not qualified to offer such treatment.[3] J.A. 1487–88.

As a secure juvenile detention facility, SVJC also imposes various forms of discipline upon the children there. The facility's sanctions range from verbal reprimands to removal from daily programming and room confinement. J.A. 1838–37. To enforce these sanctions, SVJC permits staff to engage in the use of force, purportedly as a last resort. J.A. 163–84. Staff are authorized to apply "physical restraint techniques" to physically grab the child in a hold akin to a "full nelson." J.A. 579; *see also* J.A. 1373–74. Staff may also bind a child in handcuffs or shackles; at times, staff will place restraints onto misbehaving children, strapping them onto an "emergency restraint chair," where they

[3] Cognitive behavioral therapy is another common form of psychiatric treatment. When SVJC's lead clinician was asked whether any clinicians at SVJC are qualified to offer cognitive behavioral therapy, she answered, "That, I don't know. Again, we are not a therapeutic setting." J.A. 1497.

are trapped until they "tire themselves out." J.A. 1096, 1375–82. While Appellants initially challenged the constitutionality of these disciplinary practices on other grounds, these forms of punishment also tie into Appellants' claim of inadequate mental health care. Appellants argue that when children at SVJC act out due to untreated trauma, SVJC has shown a pattern and practice of quickly resorting to these harsh and punitive measures, re-traumatizing these children and worsening their underlying conditions. Opening Br. at 19–22, 44; *see also* J.A. 1093–94, 1101, 1107–08, 1133–37.

B.

John Doe 4 was born in Honduras in 2001, where he was raised by his maternal grandparents in San Pedro Sula. J.A. 1115. His father was in prison and his mother abandoned him when he was young. *Id.* As early as age seven or eight, Doe 4 saw gang members kill his friends, beating them with rocks or hacking them apart with machetes. J.A. 1116–17. When defending himself and his friends, Doe 4 was "hacked with a machete . . . and cut with a switchblade on his arm." J.A. 1117. Fearing for his life, he fled with a friend to the United States. *Id.* They journeyed through Guatemala and Mexico for a year, continuing to experience violence along the way. *Id.* Arriving in Mexico, Doe 4 was robbed, beaten, and shot in the foot, and he became separated from his friend when they fled their assailants. J.A. 1118. After recovering at a hospital, Doe 4 traveled to Mexicali. But he found no safe harbor, being beaten again when burglars robbed the house where he was living. J.A. 1118. He then went to an immigration home, where he met two others who crossed with him into the United States. *Id.* When U.S. Customs and Border

Protection officers apprehended him, they slammed his head on the ground while handcuffing him, knocking him nearly unconscious. *Id.*

Doe 4 was brought to a detention center in Southwest Key Estrella in Arizona, and later transferred to Children's Village in New York. *Id.* Due to behavioral problems,[4] he was transferred to SVJC in December 2017.[5] J.A. 896, 1119. At SVJC, Doe 4 was evaluated by Dr. Joseph Gorin, who diagnosed him with post-traumatic stress disorder (PTSD) and attention deficit hyperactivity disorder (ADHD) based upon Doe 4's clinical records. J.A. 894; *see also* J.A. 1120. Dr. Gorin also noted that Doe 4 had punched a wall at SVJC, breaking some bones, causing Dr. Gorin to consider Doe 4's "History of Self-Harm or Suicide Attempts" a "medium risk factor."[6] J.A. 891. Ultimately, Dr. Gorin recommended that Doe 4 be placed in residential treatment. J.A. 894. Despite Dr. Gorin's recommendation, and despite Doe 4's clinician continually advocating for a transfer, SVJC

[4] Dr. Lewis's report confirmed that at one point, however, a staff member at Children's Village physically assaulted Doe 4 without provocation. The staff member was "reprimanded and transferred to another staff secure facility." J.A. 1119.

[5] Doe 4 has since aged out of SVJC, but only after the certification of the class. *See* Resp. Br. at 12 (stating that Doe 4 arrived at SVJC in December 2017 and spent "13 months" there); J.A. 21 (certifying class in June 2018). Because "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]," a live controversy continues to exist, even if the claim of the named plaintiff becomes moot. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) (quoting *Sosna v. Iowa*, 419 U.S. 393, 399 (1975)).

[6] Dr. Gorin stated that Doe 4 punching a wall is the "only report" of his self-harming behavior at SVJC. J.A. 891. But SVJC records demonstrate that, prior to Dr. Gorin's evaluation of Doe 4, Doe 4 tried to tie his shirt around his neck, prompting staff to place Doe 4 in a suicide vest. J.A. 1124, 1982. Because Dr. Gorin missed this fact—along with other acts of self-harm that occurred after his evaluation—the report almost certainly underestimates Doe 4's risk of self-injury.

did not transfer Doe 4 to a residential treatment center and stated that several centers refused to accept him due to his prior violent behavior. J.A. 883–84; 923, 934, 939.

At SVJC, Doe 4 met with his clinician for individual counseling at least once each week. J.A. 896–963. He did not report suicidal thoughts in these sessions, though his clinician observed in July 2018 that Doe 4 had scabbed scratches on his arm; Doe 4 informed the clinician that he had scratched himself over the weekend out of frustration but denied having suicidal thoughts. J.A. 947. Doe 4 also met with SVJC's visiting psychiatrist for prescription medications. Over the course of Doe 4's time at SVJC, the psychiatrist prescribed various ADHD medications, anti-depressants (such as Zoloft), and treatments for insomnia (such as melatonin). J.A. 967– 98.

During his stay at SVJC, Doe 4 was involved in several major disciplinary incidents, a few involving acts of self-harm. On December 28, 2017—less than a month after being transferred to SVJC—Doe 4 did not want to eat his dinner. J.A. 872–73, 1124. SVJC staff ordered him to his room several times, but he refused. J.A. 1124. Eventually, two staff physically grabbed Doe 4 in a full nelson hold and dragged him to his room as he kicked and struggled. *Id.* SVJC then confined him there. *Id.* While he was isolated, Doe 4 tied a shirt around his neck, causing staff to intervene and place him in a suicide blanket. J.A. 1124, 1982.

One month later, Doe 4 was disciplined again, this time for failing to trim his nails. When an SVJC staff member ordered him to do so, and he refused, the supervisor informed

Doe 4 that he would "fail to earn his behavioral point"[7] for that hour. J.A. 1000. Doe 4 asked to speak with a supervisor. When the shift supervisor arrived, he told Doe 4 that he could have his behavioral point if Doe 4 trimmed his nails. *Id.* Doe 4 refused and argued with staff for several minutes before eventually punching a staff member. J.A. 1001, 2004. Staff then grappled Doe 4 in a two-person full-nelson hold before dropping him to the ground and placing him in handcuffs. J.A. 817, 1001. According to SVJC's report of the incident, "[d]ue to [Doe 4's] past history of attempted self[-]injurious behavior, his outer layer of clothing was removed to prevent him from fabricating a ligature[] or covering the window to [his room]." J.A. 2004. Doe 4 nonetheless "engag[ed] in self-harming behaviors (scratching his arms on his bunk and making marks on his wrists)." J.A. 2014.

Another incident occurred in April 2018. Doe 4 and other residents were talking to the staff about whether they had lost behavioral points. J.A. 817, 855. During the conversation, a staff member pushed Doe 4 against the wall and "said he wanted to put [Doe 4] in restraints." J.A. 817. Doe 4 asked if they could just keep talking calmly. *Id.* In response, the staff member told him to go to his room. J.A. 817, 855. Doe 4 agreed, but as he moved toward his room, a staff member punched him in the ribcage, and other staff members grabbed him, causing him to resist. J.A. 817, 1006, 1009. Staff members then twisted Doe 4's wrists behind his back, pinning him against the wall. J.A. 817. As the

[7] Behavioral points are accrued by each resident in SVJC for each hour of good behavior. J.A. 1097 n.10, 1191. After accumulating points, residents would gain certain privileges, such as getting the chance to spend an additional hour outside of their room before bedtime. J.A. 947. Residents can be denied behavioral points for a variety of reasons, including minor infractions. For example, Doe 4 lost behavioral points because he purportedly shared a snack with a peer. J.A. 914.

staff members fell upon Doe 4, he complained that he couldn't breathe. J.A. 817. "Good," staff responded. *Id.* One staff member hit Doe 4 in the face before forcing him inside his room. J.A. 1006. When staff left, Doe 4 began punching the door and sink in his room. J.A. 1004.

Other small infractions escalated into punishment or violence. Once, Doe 4 asked for deodorant, but staff members denied the request, resulting in an argument that ended with Doe 4 punching a staff member, staff members swarming him, grappling him, and restraining him with handcuffs inside his room. J.A. 768, 866–78, 1010–11. Another time, Doe 4 wanted to see his clinician. J.A. 1737–38, 1996. When a guard denied the request, Doe 4 sat in a chair, and the guard ordered him to get out. *Id.* After Doe 4 declined to do so, staff confined him to his room for six hours. *Id.*

Over the course of approximately seven months, SVJC removed him from programming approximately 21 times. J.A. 741–43. In total, Doe 4 spent 176 hours confined alone in his room. *Id.* When combined with approximately 34 days of "modified programming," in which his mobility and contact with others were severely limited, the time he spent alone or restricted from contact with others totaled over 800 hours—or more than a month. *Id.*

C.

Other unaccompanied children at SVJC have also experienced and displayed deep distress from their severe mental health needs.[8] Between June 2015 and May 2018, at least 45 children intentionally hurt themselves or attempted suicide.[9] J.A. 1085–86. John Doe 1 repeatedly cut himself and slammed his head against the wall. J.A. 1096. He talked about suicide on several occasions, and his clinician observed that he became "more and more frequently self-harming while at [SVJC]." J.A. 1661. Another child was hospitalized after he had been placed in a suicide blanket but "removed [the] strings from the blanket and tied them tightly around his neck and wrists"; thirty minutes later, he tried to drown himself in the toilet. J.A. 1484.

A former staff member at SVJC, Anna Wykes, testified that other staff reacted with indifference when children harmed themselves. She testified that when shift supervisors learned of a child self-harming, they responded with comments like "let them cut themselves" and "[l]et them go bleed out." J.A. 1176, 1178. A supervisor once "laughed in [Wykes's] face" when she reported a child's suicidal thoughts, and he refused to check on the child. J.A. 1237. Wykes also described a "happy-go-lucky" youth who arrived at

[8] The Commission argues that evidence relating to other children at SVJC is "irrelevant" because John Doe 4 must present a viable claim before the class can seek relief. Resp. Br. at 5–7. But facts about other class members are plainly relevant to the overall class allegations, and the district court also correctly noted that "[e]vidence related to non-class members is plainly relevant to show an unconstitutional custom or practice," even if Doe 4 were raising a claim solely on his own behalf. J.A. 805.

[9] This figure appears to include "all youth" at SVJC, not just unaccompanied immigrant children. J.A. 1085–86.

SVJC and went "completely [] downhill." J.A. 1188–89. The youth began harming himself, "exhibiting behaviors like writing [in] his own blood." *Id.* When this same child displayed other erratic behavior, like smearing his ejaculate on his face, SVJC staff members "jok[ed] about it." J.A. 1189. She also saw staff "poking fun" at a child "sitting in [the emergency restraint] chair that he can't even move from for six hours . . . while he's [] bleeding from his arm." J.A. 1186. While Wykes testified that SVJC began implementing trauma training for staff around the time she left the facility, in her experience, "the techniques [] suggested were not implemented, and the training did not have any effect on the procedures or practices at SVJC." J.A. 1196.

Appellants' expert, Dr. Gregory Lewis, reviewed the disciplinary records for John Does 1, 2, 3, and 4 and concluded that the facility failed to treat the children there in a manner accounting for the trauma that they had experienced. J.A. 1132–36. Instead, Dr. Lewis observed that the "predominant approach utilized at SVJC is that of punishment and behavioral control through such methods as solitary confinement, physical restraint, strapping to a restraint chair, and loss of behavioral levels. These approaches are not only unsuccessful, but are extremely detrimental to detained, traumatized youth—especially UACs." J.A. 1136.

D.

In October 2017, Appellants filed a class action complaint on behalf of unaccompanied immigrant children detained at SVJC, naming the Shenandoah Valley Juvenile Center Commission as the sole defendant. J.A. 26. Appellants sought declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the Commission engaged in

unlawful patterns of conduct through: (1) excessive use of force, physical restraints, and solitary confinement; (2) failing to provide a constitutionally adequate level of care for plaintiffs' serious mental health needs; and (3) discrimination on the basis of race and national origin. J.A. 26–53.

The district court granted plaintiffs' consent motion for class certification. It defined the class as:

> Latino unaccompanied alien children (UACs) who are currently detained or will be detained in the future at Shenandoah Valley Juvenile Center who either: (i) have been, are, or will be subject to the disciplinary policies and practices used by SVJC staff; or (ii) have needed, currently need, or will in the future need care and treatment for mental health problems while detained at SVJC.

J.A. 24 (footnotes omitted). After certification, named plaintiff Doe 1—along with substitute plaintiffs Does 2 and 3—were transferred or removed from SVJC, and Doe 4 became the substituted class representative. J.A. 10. Following discovery, the Commission filed a motion for summary judgment and motions in limine to exclude Appellants' expert testimony and testimony about non-class members. J.A. 12, 787–806. At the summary judgment hearing, Appellants withdrew their claim of discrimination based on race and national origin. J.A. 762 n.3.

The court granted in part and denied in part the Commission's motion for summary judgment. Treating Appellants' solitary confinement allegation as a conditions of confinement claim, the court denied summary judgment with respect to Appellants' claims for excessive force and unconstitutional conditions of confinement, finding that both claims presented genuine disputes of material fact. J.A. 777–79. But the court granted the

Commission summary judgment with respect to Appellants' claim that SVJC provided inadequate mental health care. J.A. 779–81. In doing so, it applied the deliberate indifference standard, summarily stating that "courts have repeatedly applied the [] standard to civil detainees, including immigrant detainees." J.A. 779. The court then determined that the Commission did not display deliberate indifference because it provided an initial psychological evaluation that diagnosed Doe 4 with PTSD and ADHD, medication for those ailments, individual counseling, group counseling, visits by a psychiatrist at least every six weeks, and "[u]nlimited additional meetings with the psychiatrist." J.A. 781. The court also noted that while the psychologist who diagnosed Doe 4 recommended that he be placed in a residential treatment center, the court found "no indication in that recommendation that failure to secure such a placement would result in any harm or risk of harm to Doe 4." *Id.* Further, the court concluded that SVJC was not "deliberately indifferent" to the recommendation because it attempted to transfer Doe 4 to such a facility, though it was ultimately unsuccessful in doing so. *Id.*

The court also granted in part and denied in part the Commission's motions in limine to exclude expert testimony. Among other things, the court excluded Dr. Gregory Lewis's testimony about the mental health care provided by SVJC, reasoning that Dr. Lewis's testimony was "irrelevant" because the court was granting summary judgment to SVJC with respect to the adequacy of mental health services. J.A. 800. The court also stated that Dr. Lewis's opinions on SVJC's failure to apply trauma-informed care were "inadmissible because this simply is not the minimum constitutional standard." *Id.* But the court did permit Dr. Lewis's testimony "to the extent that he has opinions about harm to members

of the class and the cause of that harm from any unconstitutional custom or practice." J.A. 801. Similarly, the court excluded Dr. Andrea Weisman's opinions about the mental health care provided, considering it irrelevant because the court was granting summary judgment and because the court considered Dr. Weisman's testimony to be about "standards that are inapplicable to the defendant and beyond what is constitutionally required." J.A. 797.

After the court issued summary judgment, Appellants abandoned their excessive force and conditions of confinement claims. J.A. 17–18. Appellants then timely appealed the court's grant of summary judgment with respect to their claim of inadequate mental health care. J.A. 810–12.

II.

We review the district court's grant of summary judgment de novo. *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018). Summary judgment is only appropriate when, viewing the facts in the light most favorable to the nonmoving party, "there is no genuine dispute as to any material facts and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a). The Court must draw "all justifiable inferences . . . in [the nonmoving party's] favor." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

A.

We begin with standing. To satisfy Article III's standing requirements, a plaintiff must show that (1) it has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Friends of the Earth, Inc. v.*

Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). The Commission argues that Appellants lack standing—specifically, redressability—because they did not name ORR as a defendant. According to the Commission, ORR retains ultimate responsibility for Appellants' placement and mental health treatment, and the absence of ORR means that this suit cannot redress Appellants' injuries. Resp. Br. at 17–20. Appellants answer that their injuries result from the actions of SVJC, not ORR, and that Appellants seek relief that would require SVJC to modify how it cares for those within its facility. Reply Br. at 3–5.

Appellants meet the requirements for redressability. These requirements are "not onerous." *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 189 (4th Cir. 2018). Appellants "need not show that a favorable decision will relieve [their] every injury." *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (quoting *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982)). Rather, they "need only show that they personally would benefit in a tangible way from the court's intervention." *Id.* (internal quotation marks omitted). Appellants allege that they have suffered physical and mental harm from the Commission's failure to provide adequate mental health care. To remedy these harms, Appellants seek declaratory and injunctive relief to require the Commission to implement a "trauma-informed" standard of care in its facility. Because Appellants' proposed remedy focuses on the treatment and services provided by SVJC, Appellants seek relief likely to redress their injuries.[10]

[10] The Supreme Court has applied a similar principle in the context of habeas actions. In habeas "challenges to present physical confinement," the Court holds that "the immediate custodian, not a supervisory official who exercises legal control, is the proper

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The Commission insists that ORR retains custody and ultimate authority over mental health care for children at SVJC, pointing to the statutory and regulatory framework governing unaccompanied children, as well as the cooperative agreement between SVJC and ORR. *See* 6 U.S.C. § 279(b)(1)(A); 45 C.F.R. §§ 410.102(a), 410.207; J.A. 126, 136–38. But the Commission overstates the role of ORR in the day-to-day treatment of children at SVJC. Though ORR may be responsible for "coordinating and implementing the care and placement of UACs," ORR coordinates this care by placing children in facilities that meet minimum standards of care. 6 U.S.C. § 279(b)(1)(G)–(H); 45 C.F.R. §§ 410.102(c), 410.200–410.209. Thus, while ORR may be charged with placing children in facilities, 45 C.F.R. § 410.201, and supervising these facilities, 6 U.S.C. § 279(b)(1)(G), ORR is not responsible for directly implementing the care and treatment at the facility—that job is SVJC's. "[SVJC] must provide residential shelter and services for [UACs] in compliance with respective State residential care licensing requirements, the *Flores* settlement agreement, pertinent federal laws and regulations, and the ORR['s] policies and procedures," and "must provide . . . appropriate mental health interventions when necessary." J.A. 130; *see also Flores v. Sessions*, 862 F.3d 863, 877 (9th Cir. 2017) ("The HSA and TVPRA address ORR's obligation to provide for the welfare of unaccompanied minors, but that is not tantamount to giving the agency absolute or exclusive power over their lives while in government custody.").

respondent." *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004); *see also United States v. Moussaoui*, 382 F.3d 453, 464 (4th Cir. 2004).

Appendix
(i)

While ORR approval may be needed for SVJC to hire specialized psychiatrists or to implement particular mental health therapies, J.A. 126, 136–38, Appellants also seek forms of relief not subject to ORR approval—i.e., requiring SVJC staff to comply with the facility's own policies or changes in how SVJC's staff interact with the children in their care, such as minimizing punitive responses in favor of verbal engagement and de-escalation. *See* J.A. 1133 ("[S]taff trained in trauma-informed care rely less on the use of restraint and seclusion . . . .").

Even for the forms of relief that may require ORR approval, ORR's final authorization does not pose a barrier to redressability because ORR's actions are not wholly independent from those of SVJC. The Supreme Court held similarly in *Bennett v. Spear*, 520 U.S. 154, 159 (1997). In *Bennett*, plaintiffs were districts and ranch operators receiving water from an irrigation project, who challenged a biological opinion issued by the Fish and Wildlife Service concerning the effect of that irrigation project on endangered fish. *Id.* at 159. Like the Commission here, the Government challenged plaintiffs' standing, arguing that the challenge to the Fish and Wildlife Service's biological opinion did not redress the claimed injury because the Bureau of Reclamation "retains ultimate responsibility for determining whether and how a proposed action [on the irrigation project] shall go forward." *Id.* at 168. The Court rejected this argument. While redressability is not established if the injury complained of is the result of "*independent* action of some third party not before the court," *id.* at 169 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)) (emphasis added in *Bennett*), the Court observed that the Bureau of Reclamation's action was not independent of the biological opinion, even if

the Bureau had final say. "[W]hile the Service's Biological Opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the [Bureau]" because the statutory scheme "presupposes that the biological opinion will play a central role in the [Bureau's] decisionmaking process." *Id.* (internal citations omitted).

Here, ORR is similarly situated to the Bureau of Reclamation in *Bennett*. While it may have final say over the provision of certain medical or mental health services, its decision is not independent of that made by SVJC. For one, ORR's decision-making is limited to *approving* measures—that necessarily implies that SVJC, the proposing entity, plays the determinative role in deciding what treatment measures are proposed for implementation. *See* J.A. 1452–53 (explaining that while ORR "would have to approve a clinician's referral for a psychological evaluation," "[t]ypically, [ORR] will go with the referral of the clinician"). Additionally, ORR's approval of certain medical staff or services is necessary to ensure that unaccompanied children reside "in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of minors." 45 C.F.R. § 410.102. Thus, Appellants' failure to name ORR as a defendant does not deprive their claims of redressability because ORR would have to approve any changes SVJC proposes to ensure that its unaccompanied children are given a constitutionally adequate level of mental health care.

The Commission also claims that Appellants lack redressability because "ORR could simply transfer class members to another facility which, like SVJC, provides mental health care and other services." Resp. Br. at 19. But Appellants do not challenge their placement in SVJC—they challenge the adequacy of the services they receive at SVJC.

Reply Br. at 3. Though ORR could transfer Appellants from SVJC to other facilities, a defendant cannot challenge a plaintiff's standing on the speculation that a third party might do something that affects the relief provided. *See Sierra Club*, 899 F.3d at 285 ("Just as Petitioners cannot establish redressability via speculation, NPS cannot simply hypothesize as to possible future harm to overcome the fact that a favorable ruling would redress Petitioners' only injury at this time.").

Finally, the Commission argues that "ORR's absence also means that SVJC could be subject to a court order that conflicts with its legal obligations under *Flores* and its Cooperative Agreement with ORR." Resp. Br. at 20. But the *Flores* Settlement[11] imposes a floor, not a ceiling, for the services required for children in the government's care. *See Flores*, 862 F.3d at 866. SVJC's cooperative agreement likewise exists to ensure that SVJC meets those minimum requirements. *See* J.A. 131 (requiring "appropriate mental health interventions when necessary"). Thus, neither the *Flores* Settlement nor SVJC's cooperative agreement prevent Appellants from redressing their alleged injuries through the relief they seek from SVJC.

B.

"[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility

[11] Reached in 1997 with the approval of a federal court, the *Flores* Settlement established a "nationwide policy" setting the "minimum standards for the detention, housing, and release of non-citizen juveniles who are detained by the government," and it requires the government to pursue a "'general policy favoring release' of such juveniles." *Flores v. Sessions*, 862 F.3d 863, 866 (9th Cir. 2017).

for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989). This includes the responsibility to provide for a person's "basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety." *Id.* at 200. The responsibility to provide medical care includes care for a person's mental health: "We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977). While a detainee's right to adequate mental health care is clear, this Court has not yet decided what standard to use to determine the adequacy of mental health care provided to a detained immigrant child.

Appellants urge us to apply *Youngberg*'s standard of professional judgment. In *Youngberg*, the Supreme Court considered the Fourteenth Amendment protections guaranteed to a mentally disabled person involuntarily committed to a state institution. The plaintiff claimed that the institution failed to provide safe conditions of confinement, unduly restricted his physical freedom, and failed to adequately train him in necessary skills. *Youngberg v. Romeo*, 457 U.S. 307, 320–23 (1982). *Youngberg* held that "liability may be imposed only when the decision by the professional" represents a "substantial departure from accepted professional judgment." *Youngberg* 457 U.S. at 320–23.

In *Patten*, this Court applied the *Youngberg* standard to an involuntarily committed psychiatric patient's claim of inadequate medical care. We concluded that there are "sufficient differences" between "pre-trial detainees" and "involuntarily committed psychiatric patients" to justify the application of *Youngberg*'s professional judgment standard for the latter. This Court explained:

> The most obvious and most important difference is the reason for which the person has been taken into custody. . . . One of the main purposes of such commitment is, of course, to provide treatment. A pre-trial detainee, however, is taken into custody because the state believes the detainee has committed a crime, and the detainee is kept in custody to ensure that he appears for trial and serves any sentence that might ultimately be imposed.

Patten, 274 F.3d at 840–41 (internal citations omitted). We then offered two other reasons that justified the use of the *Youngberg* standard instead of deliberate indifference:

> [P]re-trial detainees generally are housed in jails or prisons staffed by law enforcement officials, while involuntarily committed patients generally are housed in hospitals staffed by medical professionals. Finally, while some involuntarily committed patients are confined for short periods of time, many patients face lengthy and even lifelong confinement. Pre-trial detainees, however, usually retain that status for a relatively short period of time, until released on bond or until the resolution of the charges against them.

Id. at 841.

Applying the same analysis, we hold that the *Youngberg* standard governs this case. The statutory and regulatory scheme governing unaccompanied children expressly states that these children are held to give them care. Such children "shall be promptly placed in the least restrictive setting that is in the best interest of the child," 8 U.S.C. § 1232(c)(2)(A), and any facility housing them must be "capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A). *Cf. Youngberg*, 457 U.S. at 320 n.27 ("[T]he purpose of respondent's commitment was to provide reasonable care and safety, conditions not available to him outside an institution."). When placing these children in settings that will care for them, ORR is responsible for ensuring that the children are likely to appear for any legal proceedings, protected from individuals who might victimize them, and not "likely to pose a danger to themselves or others." 6 U.S.C. § 279(b)(2)(A). To

that end, ORR "shall hold UACs in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of minors," 45 C.F.R. § 410.102(c), and "[w]ithin all placements, UACs shall be treated with dignity, respect, and special concern for their particular vulnerability." 45 C.F.R. § 410.102(d). These duties are reflected in SVJC's cooperative agreement with ORR, which tasks SVJC with being a "care provider" that will provide children with "suitable living conditions," including "[a]ppropriate routine medical care . . . emergency health care services . . . [and] appropriate mental health interventions when necessary." J.A. 1846.

The Commission argues that this Court should (as the trial court did) apply the standard of deliberate indifference used when considering claims of inadequate medical care raised by pretrial detainees.[12] Under this standard, a plaintiff must prove: (1) that the detainee had an objectively serious medical need; and (2) that the official subjectively knew

[12] The dissent goes one step further, citing *Reno v. Flores*, 507 U.S. 292 (1993), to suggest that substantive due process claims by an unaccompanied child might be subject to rational basis review. But *Flores* did not go so far. In *Flores*, the Supreme Court observed that "substantive due process analysis must begin with a careful description of the asserted right." *Id.* at 302 (internal quotation marks omitted). There, the right being claimed was "the alleged right of a child who has no available parent, close relative, or legal guardian . . . to be placed in the custody of a willing-and-able private custodian rather than of [the] government[.]" *Id.* Because the Court did not consider that to be a fundamental right, the Court approved of the policy maintaining government custody as rationally connected to the government's interest in preserving child welfare. *Id.*

Here, in contrast, Appellants assert the right of unaccompanied immigrant children to receive adequate care for their serious medical needs while held by the government. The fundamental right to adequate medical care while in government custody is well established. *See, e.g.*, *DeShaney*, 489 U.S. at 199–200. The question here is therefore not whether the asserted right is supported by substantive due process, but what measurement of culpability to use to determine when an unaccompanied child has been deprived of that fundamental right.

of the need and disregarded it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *see also Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001) (applying the same standard to a pretrial detainee under the Fourteenth Amendment); *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir. 1988) (same).

The Commission further argues that *Patten*'s reasoning counsels against applying *Youngberg* here. First, the Commission claims that children are placed in SVJC primarily for security reasons, not for treatment. Resp. Br. at 23 (citing 45 C.F.R. § 410.203(a)). But this argument presents a false binary. In *Youngberg*, the plaintiff was likewise institutionalized because his mother could not "control his violence." *Youngberg*, 457 U.S. at 309. Yet, the need to institutionalize the plaintiff for security reasons did not undermine the fact that he also needed to be committed for treatment. The Supreme Court explained that "the purpose of respondent's commitment was to provide reasonable care *and* safety"—making plain that the two purposes are not mutually exclusive. *Id.* at 320 n.27 (emphasis added). Indeed, the aims of treatment and safety are intertwined in this case. If a child is held at SVJC until he no longer behaves aggressively, and this aggressive behavior arises from an underlying traumatic condition, then it follows that SVJC's efforts to improve a child's behavior should also treat the child's underlying trauma that gives rise to the misbehavior. *See, e.g.*, J.A. 1967 ("For unaccompanied children, [their history of trauma] often plays a role in the legal and behavioral problems that bring them in contact with . . . secure placement.").

Similarly, the Commission contends that children are not placed at SVJC for treatment because they are "not placed at SVJC upon the advice of a medical professional."

Resp. Br. at 24. But the record shows that licensed mental health professionals do provide input on whether a child is placed at SVJC. SVJC's mental health clinicians evaluate prospective referrals to see if their facility can meet those children's mental health needs, and they may decline to accept a child if they determine that SVJC's services provide inadequate treatment. J.A. 1301–03. By explicitly accounting for the mental health needs of the children it accepts, SVJC's intake process confirms its intent to treat those needs for children in its care.

Next, the Commission argues that *Youngberg* does not apply because SVJC is a juvenile detention center, not a hospital or therapeutic setting. Resp. Br. at 25. But the nature of the facility is not dispositive. In *Matherly v. Andrews*, we applied the *Youngberg* standard to a person involuntarily committed to a prison for a program designed to treat his dangerousness as a sexual offender. 859 F.3d 264, 274–75 (4th Cir. 2017). The nature of the facility is secondary to the reason a person is confined in it.

The Commission also argues that children are not placed in SVJC for treatment because the children placed there are released[13] based on criteria unrelated to treatment.

[13] Both parties also discuss the length of detention as a factor relevant to determining whether *Youngberg* should apply. *See* Resp. Br. at 26, 30; Reply Br. at 12. While *Patten* did discuss the length of detention to distinguish individuals involuntarily detained at a psychiatric hospital from pretrial detainees, the length of detention does not necessarily distinguish psychiatric detention from other forms of civil detention, such as immigration detention. "[S]ome involuntarily committed patients are confined for short periods of time." *Patten*, 274 F.3d at 841. And some immigrant detainees are confined for long periods of time. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 860 (2018) (Breyer, J., dissenting) (observing that suit was brought by class of immigrants held for an average of one year in detention); *see also* Reply Br. at 12 (noting that Doe 4 spent about 13 months in SVJC).

But the regulations and cooperative agreement cited by the Commission do consider the child's health and treatment needs in determining whether a child should be released. ORR must review each child's placement every month "to determine whether a new level of care is more appropriate," 45 C.F.R. § 410.203(c), and ORR must make that decision in light of the child's "age and special needs." *See* 45 C.F.R. § 410.203(c)–(d). Meanwhile, SVJC's cooperative agreement requires it to house the children "until they are released to a sponsor, obtain immigration legal relief, age out, or are discharged by the Department of Homeland Security," but it states in the very same sentence that it does so "taking into consideration the risk of harm to the [child] or others." J.A. 127–28; *see also* 45 C.F.R. § 410.301(a) ("ORR releases a UAC to an approved sponsor without unnecessary delay, but may continue to retain custody of a UAC if ORR determines that continued custody is necessary to ensure the UAC's safety or the safety of others . . . ."). These conditions reinforce the conclusion that mental health treatment is a primary objective for the traumatized youth placed at SVJC.

Finally, the Commission asks this Court to follow other circuits that have treated immigrant detainees as equivalent to pretrial detainees, applying the deliberate indifference standard. *See* Resp. Br. at 22–23 (collecting cases). But those cases all dealt with adults detained for enforcement proceedings such as removal. *See, e.g.*, *E. D. v. Sharkey*, 928

F.3d 299, 306–07 (3d Cir. 2019). None dealt with unaccompanied immigrant children, whom the Government holds for the purpose of providing care.[14]

Notably, neither the Commission nor the district court grapple with the fact that this case is about children. The Supreme Court has long recognized that children are psychologically and developmentally different from adults, so much so that in the context of sentencing, "children are constitutionally different." *Miller v. Alabama*, 567 U.S. 460, 471 (2012); *see also, e.g.*, *Graham v. Fla.*, 560 U.S. 48, 67–75 (2010); *Roper v. Simmons*, 543 U.S. 551, 569–75 (2005); *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982). "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage." *Eddings*, 455 U.S. at 115. "It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed" individuals. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). Given "the peculiar vulnerability of children," *Bellotti v. Baird*, 443 U.S. 622, 634 (1979), this Court has likewise recognized the state's strong interest in "protecting the youngest members of society from harm." *Schleifer by*

[14] The Commission does point to two criminal detention cases involving children where the courts did not invoke *Youngberg*. *See* Resp. Br. at 31–32 (citing *A. M. v. Lucerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572 (3d Cir. 2004); *A.J. by L.B. v. Kierst*, 56 F.3d 849 (8th Cir. 1995)). But neither case involved unaccompanied immigrant children. Further, *A.J. by L.B.* stated that it "cannot ignore the reality that assessments of juvenile conditions of confinement are necessarily different from those relevant to assessments of adult conditions of confinement." 56 F.3d at 854. And while *A.M.* applied the deliberate indifference standard, it did so without any analysis addressing the propriety of the standard in a case involving children. 372 F.3d at 587–88.

Schleifer v. City of Charlottesville, 159 F.3d 843, 848 (4th Cir. 1998). These concerns are echoed in the regulatory scheme, which requires unaccompanied children to be treated with "special concern for their particular vulnerability." 45 C.F.R. § 410.102(c)–(d). Thus, the *Youngberg* standard is particularly warranted here, given the unique psychological needs of children and the state's corresponding duty to care for them.

Accordingly, we hold that a facility caring for an unaccompanied child fails to provide a constitutionally adequate level of mental health care if it substantially departs from accepted professional standards. To be clear, this standard requires more than negligence. "[E]vidence establishing mere departures from the applicable standard of care is insufficient to show a constitutional violation[.]" *Patten*, 274 F.3d at 845. The evidence must show "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323. Under this standard, courts do not determine the "correct" or "most appropriate" medical decision. *Patten*, 274 F.3d at 845 (internal citation and quotation marks omitted). "Instead, the proper inquiry is whether the decision was so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one." *Id.* (internal citation and quotation marks omitted). By applying this standard, a court "defers to the necessarily subjective aspects of the decisional process of institutional medical professionals and accords those decisions the presumption of validity due them." *Id.* Nonetheless, a decision earns this deference only if it reflects an actual exercise of medical judgment. *See Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979).

Appendix
(i)

We have not yet explained the precise difference between the standards of professional judgment and deliberate indifference. *See Patten*, 274 F.3d at 843 (declining to determine "how far the professional judgment standard falls from negligence on the culpability continuum"); *see also Bowring*, 551 F.2d at 48 (applying the standard of deliberate indifference to a prisoner's claim of inadequate psychiatric care yet stating that the issue "remains a question of sound professional judgment"). But one difference between the two standards is that *Youngberg* does not require proof of subjective intent. *Compare Youngberg*, 457 U.S. at 323 *with Farmer*, 511 U.S. at 837. *See also* Rosalie Berger Levinson, *Wherefore Art Thou* Romeo: *Revitalizing* Youngberg*'s Protection of Liberty for the Civilly Committed*, 54 B.C. L. Rev. 535, 557, 570–574, 577 (2013) (describing *Youngberg* as an "objective standard" and "objective test"). Thus, the standard of professional judgment presents a lower standard of culpability compared to the Eighth Amendment standard for deliberate indifference.

De'lonta I and *De'lonta II* offer further guidance for determining when a defendant has adequately exercised professional judgment. In *De'lonta I*, a transgender prisoner with gender identity disorder ("GID") brought a § 1983 action alleging that the Virginia Department of Corrections ("VDOC") failed to adequately care for her serious mental health needs. *De'lonta v. Angelone*, 330 F.3d 630, 631 (4th Cir. 2003) ("*De'lonta I*"). The district court granted the prison officials' motion to dismiss the complaint, viewing the suit as "nothing more than a challenge to the medical judgment of VDOC doctors." *Id.* at 634–35. We reversed the district court's dismissal. Though a VDOC doctor wrote a memorandum stating that he did not believe referral to a gender specialist for hormone

therapy to be a "medical necessity," the doctor forwarded the request to VDOC's chief physician for review, and the chief physician's response revealed that the officials did not professionally determine whether the treatment was medically necessary:

> Dr. Smith's response to the memo, which states that there was no gender specialist at MCV and that VDOC's policy is not to provide hormone therapy to prisoners, supports the inference that Appellees' refusal to provide hormone treatment to De'lonta was based solely on the Policy rather than on a medical judgment concerning De'lonta's specific circumstances.

De'lonta I, 330 F.3d at 635. Even applying the higher standard of deliberate indifference, this Court noted that a defendant is required to decide treatment based on a medical judgment concerning the individual's specific needs, not based on policy or what services were ordinarily offered at the facility. *See also Jackson v. Lightsey*, 775 F.3d 170, 179 (4th Cir. 2014) ("[F]ailure to provide the level of care that a treating physician himself believes is necessary . . . clearly present[s] a triable claim of deliberate indifference").

In *De'lonta II*, the same prisoner once again challenged the adequacy of her care. *De'lonta v. Johnson*, 708 F.3d 520, 522 (4th Cir. 2013) ("*De'lonta II*"). Though VDOC provided regular psychological counseling, hormone therapy, and permitted the prisoner to dress and live as a woman to the full extent permitted in prison, the inmate still reported powerful urges to self-mutilate and self-castrate, and she was hospitalized after attempting to do so. *Id.* This time, she challenged VDOC's refusal to allow her consultation for sex reassignment surgery. *Id.* Again, the district court granted VDOC's motion to dismiss—and again, this Court reversed. When determining whether the inmate plausibly alleged that VDOC acted with deliberate indifference, this Court relied upon the "Benjamin Standards of Care," the standards "published by the World Professional Association for

Transgender Health" laying out the "generally accepted protocols for the treatment of GID." *Id.* at 522–23. These standards established a "triadic treatment sequence" of: (1) hormone therapy; (2) real-life experience living as a member of the opposite sex; and (3) sex reassignment surgery. *Id.* at 523. Although VDOC met the first two parts of the Benjamin Standards, "provid[ing] De'lonta with *some* treatment consistent with the GID Standards of Care," we held that "it does not follow that they have necessarily provided her with *constitutionally adequate* treatment." *Id.* at 526 (emphasis in original). While a detainee "does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address the prisoner's serious medical need." *Id.*; *see also De'lonta I*, 330 F.3d at 635 (holding that the plaintiff plausibly alleged a claim for inadequate treatment, even though she "received counseling and anti-depressants"). Though we did not decide *De'lonta II* on the merits, we declined to dismiss the prisoner's claim as a matter of law simply because the prison provided some form of treatment. *Id.*

To apply *Youngberg* to a claim of inadequate medical care, then, a court must do more than determine that some treatment has been provided—it must determine whether the treatment provided is adequate to address a person's needs under a relevant standard of professional judgment.

C.

Having determined that the *Youngberg* standard applies to Appellants' claim, we now consider whether trauma-informed care represents a relevant standard of professional judgment. A trauma-informed system of care is one that "provide[s] an environment in

which youth feel safe, are assisted in coping when past traumatic experiences are triggered, and in which exposure to potentially retraumatizing reminders or events is reduced." J.A. 1132. Implementing a trauma-informed system would require:

> appropriate trauma-informed policies and procedures; appropriate methods of screening, assessing, and treating traumatized youths; culturally sensitive, trauma-informed programs that strengthen the resilience of youth; and culturally sensitive, trauma-informed staff education and training.

Id. Dr. Lewis also states that a trauma-informed approach has three implications: (1) "appropriate [clinical or therapeutic] interventions," (2) "a more global or systems perspective" to consider less restrictive alternatives to detention,[15] and (3) staff "rely[ing] less on the use of restraint and seclusion." J.A. 1132–33; *see also* Reply Br. at 14 n.8 (stating that, in addition to clinical care, a trauma-informed approach "must ensure that non-clinical staff respond to children's behavior in a way that does not inflict additional psychological damage").

The Commission claims that trauma-informed care represents an aspirational standard, not an accepted standard of professional judgment.[16] Resp. Br. at 38–41. The

[15] Appellants do not appear to challenge the decision to place children in SVJC. *See* Reply Br. at 3–5 (stating that Appellants "seek declaratory and injunctive relief that would require SVJC to modify its conduct to satisfy constitutionally adequate standards. Appellants have [not] alleged that ORR violated their rights by transferring them to SVJC").

[16] The Commission suggests that this Court should look instead to the requirements set by the Flores Settlement for the minimum standards of care. Resp. Br. at 40–41. But the Flores Settlement requires facilities to provide "appropriate mental health interventions when necessary" without defining when interventions are "appropriate" or "necessary." Flores Settlement, Ex. 1 at ¶¶ A.2., A.7. The Flores Settlement's minimum standards do not set out an alternative standard of psychiatric care.

district court's order on the Commission's motions in limine suggests that it thought the same. First, both the court and the Commission claim that trauma-informed care "has only been implemented in a handful of states, including Missouri, New York, Ohio, North Carolina, and Kentucky." J.A. 800. But they misread Appellants' supplemental expert report, which lists those five states as examples, not as an exhaustive set. J.A. 557 n.2 ("*For example*, Missouri implemented . . . .") (emphasis added). On appeal, Appellants and *Amici* cite seven additional states as further examples. Reply Br. at 15 n.9 (citing West Virginia and Wisconsin); Br. of Current and Former State Attorneys General, Elected Prosecutors, and Corrections, Criminal Justice, and Disability Rights Leaders, as *Amici Curiae* Supporting Appellants 12 (hereinafter "Br. of Criminal Justice and Disability Rights *Amici*") (citing California, Florida, Massachusetts, Connecticut, and Pennsylvania). Second, the district court cited *Willis v. Palmer* to conclude that trauma-informed care is "cutting edge" rather than well established. No. C12-4086, 2018 WL 3966959, at *12 (N.D. Iowa Aug. 17, 2018). But *Willis* holds little weight because the report it cited described trauma-informed care as "cutting edge" with respect to treatment of sex offenders, not to the treatment of children. *Willis*, 2018 WL 3966959, at *12.

For children, "[t]rauma-informed care is already in widespread use in juvenile detention systems and is considered the accepted standard of professional care." Br. of Criminal Justice and Disability Rights *Amici* at 12; *see also* J.A. 1131. The Department of Justice considers trauma-informed care to be an appropriate standard for juvenile justice, *see* U.S. Dep't of Justice, Report of the Attorney General's National Task Force on Children Exposed to Violence (2012), https://perma.cc/G3F6-ACW2 (saved as

ECF opinion attachment), and multiple national organizations endorse trauma-informed care as a governing professional standard for children in detention, including the Substance Abuse and Mental Health Services Administration, the National Council of Juvenile and Family Court Judges, and the National Center for Mental Health and Juvenile Justice. *See, e.g.*, Elizabeth Stoffel, *et al.*, *Assessing Trauma for Juvenile and Family Courts*, Nat'l Council of Juv. & Fam. Ct. Judges (2019), https://perma.cc/K3SZ-V62X (saved as ECF opinion attachment); Nat'l Ctr. for Mental Health & Juv. Just., *Strengthening Our Future: Key Elements to Developing a Trauma-Informed Juvenile Justice Diversion Program for Youth with Behavioral Health Conditions* (2016), https://perma.cc/4LZ4-BE7M (saved as ECF opinion attachment).

We leave it to the trial court to determine in the first instance to what extent, if any, the trauma-informed approach should be incorporated into the professional judgment standard in this particular case. We observe only that trauma-informed care is part of the landscape of relevant evidence to be considered by the trial court in making this determination.

D.

We now turn to whether summary judgment was appropriate. Because the *Youngberg* standard governs Appellants' claim, the district court erred by applying the standard of deliberate indifference. In doing so, the district court also excluded evidence relevant under *Youngberg*, including Dr. Lewis's opinions concerning trauma-informed care and Dr. Weisman's opinions which were not presented as part of the record on appeal. J.A. 795–801.

Moreover, the district court misread the record and failed to construe it in the light most favorable to the nonmoving party.[17] The court justified summary judgment in part because it did not consider Doe 4 to be at risk of serious harm. It reasoned that Doe 4 did not need additional psychiatric care[18] because he "admits that he never thought of committing suicide, that he had no thoughts of self-harm, and that the only incident where he harmed himself was when he punched a wall in anger." J.A. 781. But SVJC's own records contradict this. They show that Doe 4 once attempted suicide when he tied a shirt around his neck, causing staff to intervene and place him in a suicide vest. J.A. 1124, 1982. A month later, Doe 4 "engag[ed] in self-harming behaviors (scratching his arms on his bunk and making marks on his wrists)." J.A. 2014. This prompted SVJC staff to comment

[17] The dissent accuses the majority of "cherry-picking the testimony it likes from the record," specifically claiming that the majority privileges Dr. Lewis's testimony over Dr. Kane's. It is unclear how the dissent comes to this conclusion, as we cite Dr. Lewis's testimony only to define the standard of trauma-informed care proposed by Appellants and to say that this testimony could be relevant under *Youngberg*.

The dissent also neglects the standard governing summary judgment. Here, we must read the record in the light most favorable to Appellants, the non-moving party. Fed. R. Civ. Proc. 56(a). The dissent does the opposite. To the extent the dissent believes there to be contrary facts in the record—for example, whether Dr. Kane's role was limited to medication management or whether his conversations with Appellants had actual therapeutic value, see Dissenting Op. at 56–57—the dissent simply raises disputes of material fact. Where such disputes arise, summary judgment is inappropriate.

[18] The Commission similarly argues that Doe 4 received adequate care because he "improved" during his time at SVJC. Resp. Br. at 13, 43. To support this claim, it cites Doe 4's self-report to Dr. Gorin during his psychological evaluation, one month after he arrived at SVJC. But the record also shows that, after the evaluation, Doe 4 continued to suffer disciplinary incidents and engage in self-harm throughout his time at SVJC. J.A. 768, 866–78, 947, 1010–11, 2004, 2014. The Commission also cites Doe 4's deposition testimony, but that testimony referred to his anger, not to his PTSD or to his treatment at SVJC. J.A. 872–73. At best, this presents a dispute of material fact.

about Doe 4's "past history of attempted self[-]injurious behavior" and to remove "his outer layer of clothing . . . to prevent him from fabricating a ligature[] or covering the window to [his room]." J.A. 2004. After seven months in SVJC, Doe 4's clinician observed that Doe 4 had "superficial scabbed scratches" on his arms, and Doe 4 reported that he had used his own fingernail to cut himself over the weekend out of frustration. J.A. 947. While Doe 4 testified that he did not recall thoughts or attempts at suicide or self-harm, he also admitted that he sometimes "couldn't remember the things [he] did when [he] was angry." J.A. 872–73.

The district court also did not construe the record in the light most favorable to Appellants when describing the adequacy of existing services at SVJC. The court stated that Doe 4 "saw a psychiatrist at least every six weeks," and that "[m]ore than fifty percent of each visit with Dr. Kane is supposed to be dedicated to one-on-one counseling." J.A. 781. But the Commission's witnesses, including Dr. Kane, testified that he did not provide counseling or therapy and that he was charged solely with prescribing and managing medications. J.A. 822, 1324–25, 1384–85, 1480–81, 1486.

The district court did acknowledge that Dr. Gorin had diagnosed Doe 4 with PTSD and recommended that Doe 4 receive treatment in a residential treatment center.[19] J.A. 894. Doe 4's clinicians likewise advocated on his behalf for placement in such a center.

[19] The Commission argues that Dr. Gorin's diagnosis was limited because "Doe 4 provided inconsistent responses and refused to provide information characterized as 'very important' by [Dr. Gorin]." Resp. Br. at 49. But this merely challenges the weight of Dr. Gorin's diagnosis and recommendation. This presents a dispute of material fact best resolved at trial.

J.A. 883–84; 923, 934, 939. But the court satisfied itself with the fact that SVJC had attempted to transfer Doe 4 to such a facility, J.A. 781, without assessing whether SVJC's services were adequate for Doe 4 once they were unable to do so. Consequently, the court did not consider testimony by SVJC's staff recognizing that they lacked the capacity to treat children whom psychologists recommended for placement in residential treatment. J.A. 1324 (testifying that "if a child needs to be sent to a residential treatment center" but cannot be placed there because "a secure option is not available," such situation presents "a conundrum that's problematic"); J.A. 1357–58 (testifying that SVJC does not have "the internal capacity to deal effectively with the needs of unaccompanied kids who have severe mental illness" because it lacks the treatment capabilities of "a residential treatment center or hospital"). In light of the *Youngberg* standard, the district court must consider this evidence and all other evidence relevant to the professional standards of care necessary to treat Appellants' serious mental health needs.

III.

For all of these reasons, we reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

Appendix
(i)

WILKINSON, Circuit Judge, dissenting:

We judges should stick to what we are good at: applying precedent, interpreting statutes, and exercising traditional equitable powers. Today's case features an invitation to try our hand at institutional governance and to do something we are utterly unqualified to do—determine what constitutes acceptable mental health care. I respect the majority's sincere and humane concerns. But it is staring at a host of unintended consequences. And under what rock is hidden its holding's relationship to law, I have no idea.

Juvenile detention is a tricky business. That is especially true for facilities like appellee Shenandoah Valley Juvenile Center (SVJC), which is specifically designed to house youths too dangerous to be safely housed elsewhere. *See* 45 C.F.R. § 411.5 (defining a "secure facility," like SVJC, "as the most restrictive placement option for [an alien minor] who poses a danger to him or herself or others or has been charged with having committed a criminal offense"). In addition to this difficult charge, SVJC provides its detainees with living accommodations, food, clothing, routine medical and dental care, weekday classroom education, recreation, individual and group counseling sessions, and access to religious services. Appellants have abandoned any challenge to those conditions in this case. Maj. Op. at 21-22. As discussed in Part II, SVJC also provided substantial mental health services to appellant Doe. But SVJC concedes it is not designed to be a mental health treatment center. It prioritizes detainee safety and controlling violent behavior because its residents are dangerous.

The majority has effectively ordered an overhaul of SVJC's very nature from the bench, reasoning that the Constitution somehow—without any textual hook—requires

SVJC to focus on treating the underlying traumas of its residents instead of controlling dangerous behaviors. The majority sees these two things as related, and to some extent they may be. But treatment is a patient long-term project and SVJC faces the urgent short-term task of simply ensuring the safety of those who reside there.

The majority prioritizes its view of what SVJC should be by adopting the professional judgment standard, a loose substantive due process doctrine that has never been expanded to juvenile detention by the Supreme Court, the Fourth Circuit, or any other court of appeals. In the process, the majority establishes the judiciary as the new overseer of mental healthcare in all juvenile detention facilities. The majority pretends to adopt a posture of deference toward SVJC's treatment regimen, but its remand wholly belies that claim. Maj. Op. at 36-39. The majority asserts that trauma-based treatment is only one of many mental health options for the facility, Maj. Op. at 33-36, but its opinion and appendices make clear it is the sole option that has any realistic chance of meeting with the majority's favor. After the Supreme Court rejected decades of judicial attempts to micromanage the nation's prisons and schools, it is startling that the majority opens up a new front of judicial institutional supervision over mental healthcare in juvenile detention systems.

By adopting the more intrusive professional judgment standard, the majority also creates a circuit split. *See A.M. v. Luzerne Cty. Med. Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004). After discussing the realities of the institutional context and recognizing the need for deference, the Third Circuit adopted a deliberate indifference standard for claims by

juvenile detainees. *Id.* at 579-80. Under this standard, only reckless disregard of a serious medical need is actionable. *Id.* at 579.

We deal here with practical possibilities, not judicial wish lists. And even under the majority's erroneous legal standard, the proper course is to affirm. Although the professional judgment standard expands the role of the courts in overseeing mental healthcare in juvenile detention centers, it was still, until now, an exceedingly deferential test. Doe received mental health care treatment from several medical professionals of unquestioned qualifications. Those professionals diagnosed him with psychological disorders, prescribed him medication for those maladies, and focused on controlling Doe's violent behavior. Doe even testified that the course of treatment was successful in reducing his problems with anger management. J.A. 873. By remanding in the face of this record, the majority urges courts to enter the business of second-guessing mental health treatment decisions. Because we are not remotely qualified to do that, I respectfully dissent.

I.

A.

The proper standard of review is crucial here if the role of courts in institutional governance is ever to be cabined. The majority's adoption of the professional judgment standard to adjudicate claims of inadequate mental healthcare by juvenile detainees is foreclosed by precedent and finds no support in written law. Instead, as I have noted, the majority expands substantive due process, needlessly creates a circuit split, and embarks upon an unchartered course.

Appendix
(i)

"As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders." *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982). There are only limited exceptions to this rule. The Eighth Amendment obligates the States to provide medical care to prisoners. *See Farmer v. Brennan*, 511 U.S. 825 (1994). We have held that the Due Process Clause's substantive component requires the government to provide basic medical care to pretrial detainees. *See Martin v. Gentile*, 849 F.2d 863, 870–71 (4th Cir. 1988). In all these instances, we have shown great deference to the government's choices in how it provides medical care to those in its custody. We review such claims only for deliberate indifference to serious medical needs. *See id.* (discussing pretrial detainees). Successful claims under this standard require showing either that prison officials recklessly ignored a serious problem or provided treatment that was utterly unreasonable. *Farmer*, 511 U.S. at 834. This "very high" bar is rarely met. *Young v. City of Mount Ranier*, 238 F.3d 567, 575 (4th Cir. 2001).

The Supreme Court articulated a less deferential standard of review for the provision of medical services in only one case. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court considered a claim by a "profoundly retarded" individual who was involuntarily institutionalized by the State because he was unable to care for himself. *Id.* at 309–10. That individual was injured on at least sixty-three occasions while in the State's care, and it was alleged that the State's doctors were not taking steps to prevent such injuries. *Id.* at 310–11. Explaining that "when a person is institutionalized—and wholly dependent on the State," the Court held that "a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and

scope of its responsibilities." *Id.* at 317. The Court thus established the professional judgment test, which "only requires that the courts make certain that professional judgment in fact was exercised" and does not permit "courts to specify which of several professionally acceptable choices should have been made." *Id.* at 321.

The Supreme Court has never expanded the professional judgment standard beyond the strict confines of *Youngberg*. This is not surprising. Since *Youngberg* was decided, substantial doctrinal shifts have occurred in constitutional law. To start, the Court has expressed anxiety about expanding the scope of substantive due process. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("[W]e have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." (internal quotation marks omitted)). Further, the Court has generally cracked down on attempts by courts to supervise and micromanage conditions at various institutions, including prisons and schools. *See* Douglas Laycock & Richard L. Hasen, Modern American Remedies: Cases and Materials 323–26 (5th ed. 2019).

In fact, the Supreme Court has already held that substantive due process claims by unaccompanied alien minors should be reviewed under the even more deferential rational basis test. In *Reno v. Flores*, 507 U.S. 292 (1993), the Court considered substantive due process claims asserting a right to be released from custodial detention brought by unaccompanied alien minor children in the juvenile detention system. The Court reviewed and rejected these claims under the rational basis test. *Flores*, 507 U.S. at 303 (rejecting claims because government policy was "rationally connected to a governmental interest in

preserving and promoting the welfare of the child and is not punitive since it is not excessive in relation to that valid purpose." (internal quotation marks and citation omitted). Even more to the point in this case, the Court rejected a proposed "best interests of the child" test to review government decisions regarding the children in its care, explaining that the standard was unworkable and not required by the Constitution. *Id.* at 304 (explaining that juvenile institutions "are not constitutionally required to be funded at such a level as to provide the *best* schooling or the *best* health care available"). The rational basis test "demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose." *Id.* at 305. Thus, the level of deference owed to government actions under rational basis doctrine reinforces plainly the deference owed institutions under the deliberate indifference test. *See* Mario L. Barnes & Erwin Chemerinsky, Essay, *The Once and Future Equal Protection Doctrine?*, 43 Conn. L. Rev. 1059, 1077 (2011) (explaining that government actions reviewed under the rational basis test are "overwhelmingly likely to be upheld" because of the deference courts must give them). Whether rational basis review applies or not, *Flores* sends a very strong signal from the Supreme Court that the majority errs in failing to defer to the government's mental healthcare choices in this case.

At a minimum, Fourth Circuit precedent makes clear that the deferential deliberate indifference standard should apply in this case. In *Patten v. Nichols*, 274 F.3d 829 (4th Cir. 2001), we established three factors to determine whether the professional judgment standard should apply. Contrary to the majority's view, all three factors favor application of the deliberate indifference standard. The most important factor is the purpose of the

detention. *Id.* at 840. The professional judgment standard is appropriate only for someone detained for a rehabilitative purpose. Thus, we have applied the professional judgment standard to a sexual predator treatment program, *Christian v. Magill*, No. 17-7025, 724 Fed. Appx. 185 (4th Cir. 2018), and to the Federal Bureau of Prisons' Commitment and Treatment program. *Matherly v. Andrews*, 859 F.3d 264, 274–76 (4th Cir. 2017). But in this case, the purpose of Doe's detention is not rehabilitative. He was transferred to SVJC because he was dangerous, having had nine behavioral incidents at his previous facility. Because of his violent actions toward staff members and other children, he could not be safely housed in a less secure detention facility. SVJC tried four times to transfer Doe to facilities designed to provide more robust mental health treatment, but those facilities would not take him because he was a threat to those around him. *See* J.A. 883-84. SVJC was therefore detaining Doe not to rehabilitate him, but to protect him and other children.

The majority rejects this straightforward conclusion by insisting that safety and rehabilitation are not mutually exclusive. Maj. Op. at 25–26. That *ipse dixit* assertion is belied by the choices the States and the Office of Refugee Resettlement have made in designing a juvenile detention system. Some facilities, like SVJC, are specifically designed to deal with the most dangerous minors in the system. These facilities face overwhelming practical challenges, including the necessity of preventing violence against other detainees or staff and protecting children from self-harm. The majority's insistence that SVJC is capable of prioritizing things other than safety is not substantiated by any practical experience or expertise. And it is belied by the fact that policymakers found it prudent to create a facility designed to house particularly dangerous juveniles.

Second, we must examine the nature of the confining facility. *Patten*, 274 F.3d at 841. SVJC is not a hospital. It is not a residential treatment center or other therapeutic setting. SVJC does not employ specialized medical personnel and SVJC is not required to do so under its contract with the Office of Refugee Resettlement. *See* J.A. 137-40. SVJC relies on third-party providers for most mental healthcare needs, including formal diagnoses and medical prescriptions. As a juvenile detention facility, SVJC is not equipped or staffed to provide the type of mental health services available in a residential treatment center or psychiatric hospital. *Patten's* second factor thus clearly militates against the professional judgment standard, reflecting the practical wisdom that courts should not use vague constitutional ideals to force government facilities to fundamentally alter their mission.

The third *Patten* factor focuses on the duration of the detention, recognizing that the deliberate indifference standard is more appropriate when temporary detentions are at issue. *Patten*, 274 F.3d at 841. SVJC only detains unaccompanied alien minors like Doe temporarily. The Office of Refugee Resettlement reviews the placement of unaccompanied alien minors every thirty days and is charged with keeping them at the least secure facilities possible. *See* 45 C.F.R. § 410.203(c)–(d). Reassignment is premised upon thirty days of good behavior without violent incidents, and it is not based on treatment goals. *See id*. Doe is thus quite unlike the involuntarily committed patient in *Youngberg*, who faced life-long detention and dependence on the government.

Other courts have likewise concluded that the deliberate indifference test governs claims of inadequate medical care by juveniles detained for non-rehabilitative purposes.

Appendix
(i)

The majority begrudgingly acknowledges that the weight of out-of-circuit authority is against it, failing to cite a single case finding the professional judgment standard applicable in a similar case. Maj. Op. at 28-29. For example, recognizing that substantive due process doctrine has traditionally been cabined to bar only behavior that "shocks the conscience," the Third Circuit has adopted the deliberate indifference test to evaluate claims by juvenile detainees. *See Luzerne Cty. Med. Ctr.*, 372 F.3d at 579. By concluding otherwise the majority, as noted, needlessly creates a circuit split.

In short, there is no support for the majority's expansion of the professional judgment standard in Supreme Court, Fourth Circuit, or out-of-circuit precedent. And of course, the majority does not even attempt to argue that constitutional text supports its move. Instead, it ignores the Supreme Court's command to "exercise the utmost care" before "break[ing] new ground" in substantive due process doctrine. *Glucksberg*, 521 U.S. at 720. A deliberate indifference standard is much more faithful to that edict.

B.

In addition to the doctrinal problems with the majority's decision, there are practical problems as well. First, as noted, it forces judges to evaluate what constitutes effective mental health treatment, something we are utterly unqualified to do. We are not medical professionals. We are not psychiatrists with long educational and experiential training in mental health. We know far less about mental health than any of the four medical professionals that treated Doe. The Supreme Court has repeatedly cautioned that judges do not have even the necessary expertise to second-guess institutional governance decisions made by prison administrators. *See, e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)

(explaining that "courts are ill equipped to deal with the" "complex and intractable" "problems of prison administration," which "are not readily susceptible of resolution by decree"). If we are not competent to tell prisons how to operate, how are we capable of telling psychiatrists how to do their jobs?

The majority itself demonstrates the drawbacks of the professional judgment approach. The plaintiff in this case invites us—judges with no medical training—to adopt the "trauma-informed" approach to mental health care treatment. He tells us that "[t]he approach, in essence, is designed (1) to screen, assess for and treat the consequences of prior trauma; and (2) to avoid correctional practices that retraumatize juveniles." Appellant Brief at 35 (internal quotation marks omitted). He further advises us that the trauma-informed approach "achieves those objectives through treatment geared to addressing the experienced trauma and through implementation of detention practices that include ensuring that all staff understand how to recognize the signs of past trauma and to avoid exacerbating trauma through punishment-based responses." *Id.* In accepting this strategy, we are asked to overrule the medical strategy adopted by Dr. Kane, Dr. Gorin, and Doe's two clinicians. We are told to ignore Dr. Gorin's diagnoses, the medication prescribed, the regular meetings with a psychiatrist, and the anger counseling given by the clinicians. We are instructed to ignore Doe's own testimony that this treatment was effective at helping plaintiff control his anger. J.A. 873. We are advised, as though we were public health agencies or legislative committees or anyone with a background in this area, to mandate a new, innovative approach to mental healthcare.

The majority accepts this invitation, delving into scientific literature and cherry-picking the testimony it likes from the record. *See*, *e.g.*, Maj. Op. at 33–36. It prefers the testimony of Dr. Lewis, the expert hired by Doe for this litigation, over that of Dr. Kane, the psychiatrist who actually treated Doe. *See*, *e.g.*, Maj. Op. at 33–34 (crediting Dr. Lewis's testimony but ignoring Dr. Kane's). The majority also relies on the fact that twelve states—hardly an overwhelming number—have implemented the trauma-informed approach. Maj. Op. at 35. But in what form and to what effect these states have acted we have no idea. Apparently the other thirty-eight States lack the majority's wisdom. Finally, we are treated to reports from various advocacy groups, experts, and the Department of Justice from a prior administration pushing the trauma-informed approach to mental healthcare. Maj. Op. at 34–35. The majority does not tell us how it chose these various sources, and that is of course quite telling. But even if the majority is correct that certain advocacy groups favor its approach, such organizational reports "simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." *Bell v. Wolfish*, 441 U.S. 520, 543 n.27 (1979).

Is the majority correct that the trauma-informed approach is the best approach to mental healthcare? Maybe; maybe not. I have no idea. I am neither a psychiatrist nor a legislator. We have not assembled a representative array of experts and medical professionals. We have conducted no committee hearings. We have not assessed the institutional setting or determined this detainee's suitability for the course of treatment we now prescribe. We have not in short balanced costs and benefits. Nor should we. "The calculus of effects, the manner in which a particular [policy] reverberates in a society" is

"not a judicial responsibility." *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). There was once a time, I suppose, for Renaissance judges as there was for Renaissance men and women, but leaps in medical science ought to induce in judges a certain modesty and inhibition. The representative and policy-making branches of our government are in a far better position to consult with medical professionals and decide what preferred mental healthcare looks like than we are.

The heart of the majority's argument is that we judges should second-guess Doe's psychiatrist, psychologist, and clinicians because children are involved. Maj. Op. at 29 ("Notably, neither the Commission nor the district court grapple with the fact that this case is about children."). It is more accurate, of course, to say the case is about juveniles, since a detention facility for the most dangerous would have no need to detain young children. It is telling, moreover, that the cases cited by the majority arise in completely different legal contexts—mostly Eighth Amendment claims concerning the death penalty and other permissible sentences, *see* Maj. Op. at 29-30—and they do not support extending substantive due process in this case. I fail to see why or how our utter lack of qualifications to make mental healthcare decisions is improved by the fact that juveniles are involved. If anything, child mental healthcare is even more complex and even further beyond judicial cognizance.

The majority's decision likewise interferes with the constitutional power of States to design their juvenile detention systems. The Supreme Court has explained that "it is 'difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures than the administration of

its prisons.'" *Woodford v. Ngo*, 548 U.S. 81, 94 (2006) (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 491–92 (1973)). States have a similarly strong interest in being able to design and manage their juvenile detention systems in a manner free from federal judicial fine-tuning. Thus, "institutional reform" cases like this one "often raise sensitive federalism concerns." *Horne v. Flores*, 557 U.S. 433, 448 (2009).

How much is all this going to cost? And from whose pocket is the money for our prescriptions going to come from? The majority will not say. Money is always a scarce commodity in state finance, given that states are usually required to balance their budgets under law. *See* David A. Super, *Rethinking Fiscal Federalism*, 118 Harv. L. Rev. 2544, 2592 (2005). It is not as though there is any absence of needs. Better schools and universities. Improved roads. Safety net health and welfare outlays. Pressing correctional expenditures. So often these institutional reform suits seem nothing so much as an attempt to move a preferred funding request to the head of the line. *See Horne*, 557 U.S. at 448 ("States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs."). But it is the essence of the legislative process to *weigh* some needs against others, a process the majority is all too content to pass by.

Blasting past federalism concerns, the majority also strips SVJC of its autonomy. It must now likely spend substantial sums to hire new medical professionals well versed in the form of healthcare that courts are willing to approve. But that is not all. The majority's decision will likely force a complete redesign of juvenile detention systems. Some juvenile detention facilities, like SVJC, are secure facilities, which means they are specifically

designed to house juvenile detainees that cannot be safely placed at other facilities because they are dangerous. 45 C.F.R. § 411.5 (defining a "secure facility," like SVJC, "as the most restrictive placement option for [an alien minor] who poses a danger to him or herself or others or has been charged with having committed a criminal offense"). Indeed, SVJC is one of just three facilities nationwide specially designed to deal with dangerous immigrant juveniles. *See* J.A. 30. Other facilities are designed with a rehabilitative purpose. Indeed, SVJC tried on multiple occasions to send Doe to such rehabilitative facilities, but they would not take him because he was too dangerous. *See* J.A. 883-84. The majority's decision effectively requires all juvenile detention facilities to adopt rehabilitative mental health treatment and to refrain from imposing any sanctions someone might regard as strict, because that would reawaken some past traumatic episode. But the calibration of discipline is fruitfully left to those actually on the scene. It is best to leave facilities flexibility in gauging when stern measures might be necessary and when they might prove decidedly counterproductive.

This all foreshadows a dramatic change from present practice. No longer is the dichotomy between rehabilitative and non-rehabilitative juvenile detention—the latter likely adopted to keep most children safe from the most dangerous children—constitutionally permissible. But never fear. The majority apparently believes that such dramatic changes to the States' juvenile detention systems are wise. It believes that we federal judges, and not the States retaining the police power in our federalist system, know best, notwithstanding the fact that all correctional systems, state and federal, classify and administer facilities according to the degrees of dangerousness of the populations therein.

Appendix
(i)

To repeat: adopting the professional judgment standard thrusts the courts into ongoing oversight roles they are ill-suited to perform. Every decision by a medical professional at SVJC can now be second-guessed by a court, and we can expect to see more cases arising from detention facilities as litigants continue to dispute what the best course of mental health treatment for institutions and individual residents is. This cycle has played out in other contexts. For several decades, courts around the country used constitutional provisions to micromanage conditions at prisons, encouraging litigants to initiate yet more "institutional reform litigation." *See* Laycock & Hasen, *supra*, at 324. After entering a judgment against an individual facility for a violation, courts found themselves supervising the same institutions for decades. And that supervision led to an endless series of remedial orders governing everything from the number of bunks in a room to the design of prison libraries.

After seeing the deleterious effects of these interventions, the Supreme Court decided a series of cases intended to end them. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343 (1996) (reversing injunction dictating when prison library needed to be open, setting qualifications for prison librarians, and requiring the creating of a legal-research course for inmates); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (reversing district court's injunction against placing two inmates in a cell and cautioning courts not to impose their own policy preferences on prisons). The same dynamic played out in schools, as judges would oversee schools for decades in the name of enforcing constitutional provisions. *See* Laycock and Hasen, *supra*, at 224–25. But the Supreme Court "lost patience" with these efforts in the late 1990s and shut them down as well. *Id.* at 326; *see Missouri v. Jenkins*, 515 U.S. 70

(1995) (calling for an end to eighteen years of judicial supervision over the Kansas City School District that resulted in the ordered expenditure of hundreds of millions of dollars, the renovation of facilities, and the hiring of new personnel). Now the majority opens a new front of judicial institutional supervision, ignoring our own court's recent warning against this. *See Matherly*, 859 F.2d at 275–76 ("[T]he Supreme Court has made clear that the judiciary should not be in the business of administering institutions."). All these interminable interferences began with what the majority undoubtedly sees as some innocuous initial step. But the undertow is strong. Hopefully judges will not have to micromanage juvenile mental healthcare for decades before the Supreme Court steps in.

II.

Even under the majority's erroneous professional judgment standard, we should affirm the district court. Although it is hard to discern from reading the majority's opinion, the Supreme Court bent over backwards to emphasize that the professional judgment standard is highly deferential. The professional judgment standard requires only that a court confirm "that professional judgment in fact was exercised" rather than specifying "which of several professionally acceptable choices should have been made." *Youngberg*, 457 U.S. at 321. This is so because the Supreme Court understood that judges are not well-equipped to second-guess medical decisions. *See id.* And we have stated that "the proper inquiry is whether [a treatment] decision was so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one." *Patten*, 274 F.3d at 845. Professional judgment "does not mean some standard employed by a reasonable expert or a majority of experts in the community . . . but rather that the choice in question was not a sham or

otherwise illegitimate." *Id.* Decisions by mental healthcare providers have a "presumption of validity." *Id.*

Instead of focusing on what treatment SVJC actually provided to Doe, the majority wades through advocacy presentations and plucks evidence to endorse the trauma-informed approach to mental health treatment. Not only is this doctrinally improper, but it fails to show proper respect for the medical professionals who treated Doe.

A review of the record makes clear that SVJC's mental health providers exercised professional judgment in dealing with Doe. Before Doe arrived at SVJC, he was placed at the Children's Village, a non-secured facility in New York. Because he had nine behavioral incidents there and his behavior posed a clear threat to himself and other children, he was moved to SVJC because it was a secure facility designed to house juveniles who posed a threat to those around them. Upon arrival, Dr. Joseph Gorin, a psychologist retained by SVJC, examined Doe. As a result of this examination, Gorin diagnosed Doe with Attention Deficit Hyperactivity Disorder (ADHD) and Post-Traumatic Stress Disorder (PTSD). J.A. 894.

While Doe resided at SVJC, he received extensive mental health treatment that focused on the conditions diagnosed by Dr. Gorin and on his well-documented anger problems. Doe regularly met with Dr. Kane, a licensed psychiatrist. In response to Dr. Gorin's original diagnosis, Doe was prescribed medication for ADHD and PTSD. Doe's medical records reflect twelve visits with Dr. Kane from December 2017 through September 2018. J.A. 964–99. SVJC never denied a request by Doe to see Dr. Kane. And these were not just *pro forma* visits. Dr. Kane's treatment records regarding Doe show that

on each visit he obtained an updated patient history and reviewed any symptoms displayed by Doe. J.A. 964–99. According to Doe's own testimony, Dr. Kane routinely asked how he had been doing since his last appointment and whether Doe had experienced any issues with sleeping, anger, anxiety, or other feelings. J.A. 850. Dr. Kane also provided counseling to Doe on risk reduction, affective mood instability, and anxiety. J.A. 683–843.

Doe also received mental health treatment from two clinicians, Andrew Mayles and Evenor Aleman, who were both licensed professional counselors with master's degrees and who had each completed at least 3,400 supervised clinical hours. J.A. 881. The primary focus of these clinicians was to help control Doe's anger problems. This was sensible because Doe was involved in multiple violent incidents while at SVJC, including one occasion where he punched a wall. Doe also repeatedly attempted to harm himself. J.A. 2014. And he repeatedly punched staff members in the face. J.A. 1000–01, 1010–11. Further, Doe approached another minor from behind and choked him. J.A. 2160. But Doe's clinicians took consistent and proactive steps to prevent Doe from hurting himself during these incidents, and they succeeded except for the instance where Doe punched a wall. Doe himself testified that his anger management improved while he was at SVJC. J.A. 873.

And SVJC tried to transfer Doe to a residential treatment facility where he could have received additional mental health care. *See* J.A. 883-84. But these other facilities would not take him because he posed a threat of violence, as evidenced by his multiple violent incidents at SVJC. In an ideal world, every juvenile detention center would be fully outfitted to provide optimal mental health treatment. But the Constitution does not permit judicial implementation of a perfect world because "[t]he problems of government are

practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69–70 (1913). But I cannot begin to say that SVJC's approach is illogical. We live in a world where some juveniles are especially dangerous, and it makes sense that some facilities like SVJC are designed to prioritize safety and control violent behavior.

The majority apparently believes that the treatment decisions made by the mental health professionals who treated Doe deserve no deference. While largely ignoring the efforts they made, it instead privileges Doe's expert, Dr. Lewis, to insist they should have made different treatment choices that focused on rooting out the underlying causes of alleged past trauma. Maj. Op. at 33–34. But even Dr. Lewis acknowledged that Doe's clinicians made efforts to "appropriately respond to [Doe]," only claiming they didn't "go far enough." J.A. 226. But Dr. Lewis did not observe these clinicians or even meet with them. In contrast, Dr. Kane worked with these same clinicians regularly, and he testified at length about the sufficiency of their efforts. J.A. 672–77. Dr. Lewis's testimony evidences only a professional disagreement with medical decisions made by professionals. That is not enough to overcome the presumption of validity owed to the decisions made by Doe's mental health providers. And it is not enough to survive summary judgment under the professional judgment standard, which permits us only to ensure "that professional judgment in fact was exercised" rather than specifying "which of several professionally acceptable choices should have been made." *Youngberg*, 457 U.S. at 321. The fact that the majority surges forward in the face of such a record speaks volumes about all that lies in store.

Appendix
(i)

III.

Judges are not psychiatrists. Mental health, while highly desirable for all, is a complex and evolving field. For good reasons, mental health professionals must go through a rigorous course of education and licensure before entering their important practice. This is no place for judicial amateurs whose far wanderings from our founding document spell only confusion. By wading into this complex field without textual support, judges will find themselves adrift in a sea of vast debate on a subject whose depths we cannot plumb and do not comprehend. Because the majority's decision is legally unmoored and practically unworkable, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JOHN DOE, by and through his next friend, NELSON LOPEZ, on behalf of himself and all persons similarly situated,

Plaintiffs,

v.

SHENANDOAH VALLEY JUVENILE CENTER COMMISSION,

Defendant.

Civil Action No. 5:17-cv-97

By: Elizabeth K. Dillon
United States District Judge

MEMORANDUM OPINION

Pending before the court and addressed herein is defendant's motion for summary judgment, in which defendant seeks summary judgment on all of John Doe 4's (Doe 4) claims and consequently—according to defendant—summary judgment as to the entirety of plaintiffs' case. (D.'s Br. Supp. Mot. Summ. J., Dkt. No. 100.) The motion was briefed, argued before the court, and supplemental briefs were filed as required by the court. (Pls.' Suppl. Mem. Opp'n Def.'s Mot. Summ. J., Dkt. No. 164; Def.'s Sup. Br., Dkt. No. 165.) For the reasons discussed below, the court concludes summary judgment in defendant's favor is appropriate as to Doe 4's claim regarding inadequate mental health treatment. It further concludes that there are disputed issues of fact precluding summary judgment with regard to Doe 4's excessive force claim (including use of restraints) and his claim based on the use of room confinement, which the court construes as a conditions-of-confinement claim. These disputes exist both as to whether Doe has suffered an underlying constitutional violation and to the remaining elements of his *Monell* claims.[1] If Doe 4 is able to prevail at trial on his underlying constitutional claim alleging

[1] *Monell v. Dept. of Soc. Servs.*, 436 U.S. 568 (1978).

excessive force or his conditions-of-confinement claim, then he and plaintiffs will be permitted to proceed in presenting proof on the other prongs of their *Monell* claims. Accordingly, the court will grant defendant's motion for summary judgment in part and deny it in part.

I. BACKGROUND

On October 4, 2017, plaintiff John Doe 1 filed suit for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, seeking to protect the rights and interests of himself and a putative class of unaccompanied alien children (UACs)[2] detained at the juvenile detention center (Center) operated by defendant Shenandoah Valley Juvenile Detention Center Commission (Commission). Initially, the named plaintiffs consisted of John Does 1, 2, and 3. On August 8, 2018, Doe 4 became the only named plaintiff and class representative. Without objection, the class was certified on June 27, 2018, and is composed of Latino UACs who are currently detained or will be detained in the future at the Center who either: (i) have been, are, or will be subject to the disciplinary policies and practices used by the Center's staff; or (ii) have needed, currently need, or will in the future need care and treatment for mental health problems while detained at the Center (hereinafter Detainees). The second amended complaint, filed July 1, 2018, alleges the Commission violated and violates these Detainees' rights under the Fifth and Fourteenth Amendments through a pattern and practice at the Center of 1) excessive force and restraints, including use of the restraint chair, 2) inadequate mental health care based under both the deliberate indifference standard and, alternatively, the professional judgment standard, and 3) national origin and race discrimination.[3] Plaintiffs also include excessive use of solitary or room

[2] An unaccompanied alien child is a child who: "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom . . . (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

[3] At the summary judgment hearing, plaintiffs' counsel withdrew the national origin and race discrimination claims.

confinement as part of their excessive force claim, but it is properly analyzed as a separate conditions-of-confinement claim.[4]

UACs are in the custody of the Office of Refugee Resettlement (ORR) of the United States Department of Health and Human Services. The Commission provides secure housing and other services at the Center to the UACs pursuant to a cooperative agreement with ORR. The purported objective for the UACs' placement at the Center is to provide a safe and appropriate placement "taking into consideration the risk of harm to the [UAC] or others, the community and the risk of flight." (Cooperative Agreement 1–2, Ex. B-1, Dkt. No. 100-2.)[5] The Center serves as a secure detention facility and provides secure placement "until [the UACs] are released to a sponsor, obtain immigration legal relief, age out, or are discharged by the Department of Homeland Security." *Id.*

It is clear from plaintiffs' complaint, briefing, and expert witness reports, that plaintiffs are frustrated with a system that greets immigrant children fleeing oftentimes violent and traumatic backgrounds by housing them, sometimes for long periods of time, in detention facilities that are designed to house—and do house—juveniles who have been adjudged delinquent and charged juveniles awaiting trial. These circumstances sometimes lead to the immigrant children acting out, that then results in continued or additional restrictions on them. Not surprisingly, plaintiffs desire and advocate for a best practices approach, but the law does not require best practices. Rather, it requires constitutional practices, and that is the issue before the court. So, the court must determine on summary judgment whether the case may proceed to

[4] Defendant has responded and briefed the issue of plaintiffs' room confinement claim and has not objected to its inclusion as part of plaintiffs' excessive force claim. Nonetheless, as discussed below, it is properly construed and analyzed as a conditions-of-confinement claim.

[5] All citations to lettered exhibits are attached to defendant's brief in support of its motion for summary judgment, while all citations to numbered exhibits are attached to plaintiffs' memorandum in opposition to defendant's motion for summary judgment. Exhibit numbers 20 and 24, cited herein, were provided to the court but not docketed. Plaintiffs are asked to promptly docket these exhibits, with redactions, if necessary.

trial with regard to the alleged excessive force and inadequate mental health care claims based on constitutional requirements.

A. Use of Force and Doe 4

Doe 4 is a 17-year-old citizen of Honduras who arrived in the United States on or about May 15, 2017, and was transferred to the Center on or about December 1, 2017. The Center uses a program approved by the Virginia Department of Juvenile Justice called Handle with Care. This program allows the use of force as a last resort and requires use of the least amount of force reasonably necessary. Restraints may be used, not as punishment, but if necessary after less restrictive measures are unsuccessful. A Detainee is not to be left unsupervised while in mechanical restraints, such as handcuffs, and the use of restraints is to be discontinued as soon as safely possible. The Center also notes that use of excessive force is grounds for dismissal and the filing of a child abuse complaint with Child Protective Services. Indeed, the Center has terminated employees for use of force—even in circumstances where the employee was being assaulted and returned punches.

Doe 4 sets forth three instances of alleged excessive use of force while detained at the Center. While the parties' briefing lacked detail about the record evidence regarding the incidents, the court has endeavored to provide a more fulsome account. First, in his response to defendant's interrogatories, Doe 4 recounts an incident where he "got mad at staff," and staff members grabbed him, fell on top of him, and hurt him. Doe 4 states that they put him in handcuffs and placed him in his cell, and he was forced to stay in handcuffs inside his room and lie on the floor without a mattress. Doe 4 stated that the handcuffs left marks and bruises and hurt him. He does not provide a date for this incident. (Doe 4 Resp. to Interrog. 5, 17, Ex. F, Dkt. No. 100-6.)

Defendant highlights that, despite the grievance procedure available to Detainees, it has no reports from Doe 4 regarding his allegations from this particular incident. And, although Doe 4 does not remember the date of this incident, defendant believes that he is describing the events that occurred on February 4, 2018, because that is the only incident in the Center's records during which Doe 4 was placed in mechanical restraints. (Def.'s Br. Supp. Mot. Summ. J. 5; Ropp Aff. ¶¶ 10–11, Dkt. No. 100-8.) In the Center's "Significant Incident Report" (SIR) describing this incident,[6] it states: Doe 4 became frustrated with staff when he was instructed to trim his fingernails and told that he would fail to earn a behavioral point if he did not; when he requested to speak with a supervisor and the supervisor told him he could earn the point back if he trimmed his fingernails, Doe 4 refused and continued arguing; Doe 4 then threatened to assault a staff member and punched a table; Doe 4 was instructed to return to his room to cool down, and when staff members spoke to him to attempt to deescalate his behavior, he continued to argue with them; Doe 4 began punching a staff member in the face and was consequently placed in a two-man physical restraint, which he resisted, and he would not let go of the staff member he had punched; Doe 4 was then lowered to the floor while physically restrained, where he continued to struggle against them; mechanical restraints were put on his wrists and he continued to struggle and was escorted to his room; the restraints were taken off after six minutes and he was secured in his room. (SIR 1–2, Ex. H-4, Dkt. No. 100-8; Ropp Aff. ¶ 9(f).)

In the second incident, Doe 4 recounts that he had reported issues with a staff member, specifically, that on one occasion the staff member hit him "[i]n the ribcage and the face and on

[6] Defendant states in its brief that it offers the SIRs to "supplement testimony that rarely includes details of any substance" and not to contradict Doe 4's testimony. (Def.'s Br. Supp. Mot. Summ. J. 6 n.3.) And it is accurate that there have been instances at the Center where he could not remember what he had done while he was angry. (Doe 4 Dep. 81:25–82:1, Dkt. No. 100-7.) Nonetheless, to the extent that Doe's account of those incidents contradicts the account in the SIRs, the summary judgment standard compels the court to credit Doe's testimony and take reasonable inferences therefrom in his favor.

the arm" when Doe 4 was outside and in his room. Doe 4 stated that when he and other UACs were talking to a staff member about problems they had, staff said they were being disrespectful, and one staff member said he was going to take away a behavioral point. Another staff member then pushed Doe 4 against the wall and said he wanted to put him in restraints, to which Doe 4 replied by asking if they could keep "talking calmly." The staff member then told Doe 4 to go to his room for a time-out. In his deposition testimony, Doe 4 agreed that he stood against the wall and refused to take a time-out at this point because he was angry, but this contradicts his response to interrogatories in which he stated that he pulled himself off the wall. Then, staff members allegedly grabbed him, Doe 4 moved his arms down to protect himself, and staff hit him in the ribs and face and held his hands behind his back while they pinned him against the wall. Doe 4 testified that once he was in his room with more than ten staff members, the Center's staff put his hands behind his back and moved him to the corner of the room, where a staff member twisted his arm and banged him against the cement. When a staff member fell on top of him and Doe 4 said he could not breathe, they allegedly said it was "good" that he could not breathe. Doe 4 stated that a staff member also hit his hand with something hard, he had bruises from this incident, and his face, ribs, and hand really hurt. When asked if he tried to hit or kick staff at any time during this incident, Doe 4 replied, "maybe." (Doe 4 Dep. 50:23–54:18, 87:24–88:18, 91:23–92:5, Dkt. No. 129-4; Doe 4 Resp. to Interrog. 5.)

Defendant points out that Doe 4 reported this incident to his mental health clinician, who reported the allegations to CPS. (Doe 4 Dep. 53:3–9; Doe 4 Resp. to Interrog. 6–7; Letter to Shenandoah Valley Social Services, Ex. H-7, Dkt. No. 100-8.) In response, CPS decided not to conduct an investigation, finding that the incident did not meet the legal definition of child abuse or neglect. (Letter from Shenandoah Valley Social Services, Ex. H-8, Dkt. No. 100-8.)

Defendant states that the date of Doe 4's report to his counselor corresponds with events that occurred on April 1, 2018, for which two SIRs were created. (Def.'s Br. Supp. Mot. Summ. J. 6.) The first SIR describes Doe 4's allegations. It states that Doe 4 was directed to return to his room for time-out after he asked if he had lost any behavioral points, he initially refused but then agreed to a time-out, and as he was walking toward his room, the shift supervisor punched Doe 4 in the rib cage. Thereafter, the SIR states that Doe 4 resisted attempts to put him in physical restraints and he was moved into his room, where the same supervisor punched him on the right side of his face and Doe 4 also sustained a puncture wound to his right hand. (SIR, Ex. H-6, Dkt. No. 100-8.) The second SIR recounting the events on April 1 describes the actions taken by staff members during the incident. It states that during free time, Doe 4 was acting in a disruptive and disrespectful manner and was consequently directed to take a time-out in his room. When he refused and stood against the wall, staff attempted to deescalate the situation. After Doe 4 refused, continued disobeying the staff's instructions, and showed aggressive behavior, staff placed him in a two-man restraint and escorted him to his room, where he struggled against staff and additional staff was needed. Once in the room, Doe 4 scratched and kicked staff and was then placed in a one-man restraint, after which he continued fighting by attempting to kick and headbutt the staff. After five minutes, the staff released Doe 4 and left him in his room. Some of the staff members had scratches and red marks from their interactions with Doe 4. After he was left in his room, Doe 4 started punching the door and sink in his room. (SIR, Ex. H-5, Dkt. No. 100-8.)

In the third instance of alleged excessive force, which Doe 4 believes occurred in mid-July, Doe 4 asked for deodorant spray and was told no because shower time had passed. When the supervisor left, Doe 4 asked a staff member to open the closet so he could get deodorant

spray. The staff member denied Doe 4's request because the supervisor had, and Doe 4 felt angry. Doe 4 stated that five or six staff members then surrounded him, he tried to protect himself as one approached him, and "a lot of staff members" fell on top of him and grabbed him. He says that they then folded his arms up to his neck so it felt like they would break or pull his arms off, and were hitting him, moving him around, and struggling to get a hold on him. Then, Doe 4 alleges that once he was "calm and collected," they brought him into his room, where they tried to restrict his arms and legs, one staff member held his feet, and another hit him with metal handcuffs, leaving a bruise close to his neck. Doe 4 stated that he punched a staff member in the face after the staff members grabbed him. He could not recall if he "head-butted" another staff member. (Doe 4 Resp. to Interrog. 6, 15.)

Defendant states that it has no report of allegations of mistreatment from this incident by Doe 4. (Def.'s Br. Supp. Mot. Summ. J. 7; Ropp Aff. ¶ 15.) In the Center's SIR from this July incident, it states that Doe 4 requested deodorant and refused to go to his room, and when staff unsuccessfully attempted verbal redirection, they called for assistance. After multiple attempts at verbal redirection, a staff member was directed to help guide Doe 4 to his room. As he approached Doe 4, Doe 4 responded aggressively by punching him in the face. Then, because they had exhausted all forms of less intrusive intervention, staff placed Doe 4 in a physical restraint and called for additional assistance. Doe 4 head-butted a staff member as he was trying to open the door to his room. Because of his continued struggle against physical restraint, Doe 4 was placed in a two-man physical restraint. Doe 4 continued struggling and became more aggressive, and staff was thereafter able to place him in his room. (SIR, Ex. H-9, Dkt. No. 100-8.)

B. Solitary Confinement (or Room Confinement) and Doe 4

The Center also uses a technique that it calls room confinement—and plaintiffs call solitary confinement—in which a Detainee is confined for a period of time in the room to which he is otherwise assigned. Prior to the implementation of its current behavioral management program in August 2016, the Center confined Detainees to their rooms for predetermined amounts of time when their behavior crossed certain thresholds. Under the new program, room confinement is only used when necessary to ensure safety. If a Detainee is in room confinement, he or she is supposed to be monitored every 15 minutes, reevaluated at least every four hours, and released as soon as safely possible. Additionally, an SIR is required if the confinement results in removal from programming.

Doe 4 recounts several instances of confinement in his responses to defendant's interrogatories. Doe 4 states that he has been put in restriction in his room for over an hour many times, and often, this was for small things that did not involve fighting. Doe 4 describes several incidents of confinement that he specifically remembers: 1) after the incident described above when he "got mad at staff" and was put in handcuffs, he was "forced to stay in cuffs in [his] cell, [and] forced to lie on the hard floor with no mattress"; 2) after the incident described above when he was hit in the ribs and face, he was in restriction for four hours; 3) on one occasion when he asked to speak with his counselor and his request was denied, he was in restriction for seven or eight hours; 4) when he kept asking staff members why he could not play video games in his pod and became angry and said "a bad word they understood," he was locked in his cell for four or five hours; 5) on two occasions, when he accidentally kicked another child and kicked the ball into a camera while playing soccer, he was placed in restriction for four hours; and 6) the longest time he was put in restriction was for three days. (Doe 4 Resp. to Interrog. 17–19.)

In addition, in his deposition, Doe 4 confirmed that there was an incident where he became upset and dumped his food and drink on the lid of his tray. But in his own words, he did not want to eat and was told by a supervisor to throw away his food, he became confused and said he needed time to think, and the supervisor "grabbed the plate and threw it out." (Doe 4 Dep. 81:2–13.) Dr. Lewis recounts this incident in his report with more detail, noting that after Doe 4 dumped his food, he refused several requests to return to his room. When he struggled and tried to kick staff, he was put in room confinement, where he "became upset and tied a shirt around his neck and was given a suicide blanket." (Dr. Lewis Report ¶ 150, Dkt. No. 106-2.)

Also in his deposition, Doe 4 stated that there were other instances during which he was confined to his room for longer than one day, in addition to the three-day confinement, but he could not remember specifically how many times. When asked if he knew the reasons why he was being confined in those incidents, Doe 4 replied: "just because supposedly I'm not being respectful," and explained that he used the word "supposedly" because "sometimes they do things that are not true." (Doe 4 Dep. 80:5–22.) Doe 4 provided a more thorough explanation in his deposition regarding the incident when he asked to speak to his counselor. Doe 4 stated that he remembered the incident described by defense counsel as the time he became "upset about not being able to sit in the chair and about point losses," but said, contrary to defense counsel's description of the event, that he was not angry. However, in his response to defendant's interrogatories, Doe 4 stated that he was "frustrated about something that staff had done" to him. In his words, Doe 4 stated that he asked to talk to his counselor several times, to which a staff member repeatedly responded no and asked him to get up from the chair. Then, Doe 4 said that he talked to the supervisors, who told him that he was insulting the other staff member and not following his instructions. When the supervisors asked him to take a time-out, Doe 4 says he

responded by stating, "That's okay. I want to talk to my counselor." At this point, Doe 4 states that the staff ignored him when he asked them not to touch him, grabbed his hands and arms, took away everything, and put him in his cell for seven or eight hours. He believes that the only thing he did in this situation was sit in a chair and ask for help. (*Id.* 83:11–84:18; Doe 4 Resp. to Interrog. 8–9.)

As to the time when Doe 4 states he was held in confinement for three days, defendant refers to that period as a "three-day modified programming schedule," and points out that Doe 4 attended educational programming and was given an opportunity for recreation, and that this period of confinement and modified programming resulted from Doe 4's assault of punching a staff member in the face. (Def.'s Br. Supp. Mot. Summ. J. 3; Ropp Aff. ¶¶ 9(c), 20.) Defendant asserts that this was the only instance it knows of during which Doe 4 was held in confinement for a period of 24 hours or more, relying on the lead case manager's statement in her affidavit that "Doe 4 was placed in room confinement for 24 hours after punching a staff member in the face several times and refusing to let go," and he "continued to be disruptive by cursing at staff and banging on the door and wall of his room" after being placed in his room. (Def.'s Br. Supp. Mot. Summ. J. 3–4; Ropp Aff. ¶ 18.) The lead case manager also stated that Doe 4 has been placed on a three-day modified programming schedule on several occasions, including the time he punched a staff member, and had access to education programming and recreation whenever he was on this modified schedule. (Ropp Aff. ¶ 20.)

C. Mental Health Claim and Doe 4

A Detainee, upon arrival at the Center, is given a mental health screening to determine if an assessment is required. If so, an assessment is performed by a mental health clinician. If the assessment indicates a need for a psychological evaluation, then the Center requests approval

from ORR. Each Detainee is provided with a case manager and a mental health clinician, who are bilingual in Spanish. Each Detainee is supposed to have one-on-one counseling with his or her clinician at least once a week, and clinicians are supposed to provide two group counseling sessions each week, although there is some evidence that those informal group sessions are not always run by clinicians and do not always occur. A psychiatrist sees Detainees every three to six weeks, and Detainees may schedule additional appointments with him without limitation.

When Doe 4 arrived at the Center, he underwent a psychological evaluation and, although he was uncooperative, he was diagnosed with post-traumatic stress disorder and attention deficit hyperactivity disorder based on his history. The psychologist that conducted the investigation recommended that Doe 4 be placed in residential treatment. (Psychological Evaluation 10, Ex. H-10, Dkt. No. 100-8.) The Center had attempted to transfer Doe 4 to several residential treatment facilities on several different occasions, but those requests require approval by ORR and acceptance by the receiving facility. Because Doe 4 had a history of violence at the Center, other facilities would not accept him. (Ropp Aff. ¶¶ 21–22.)

While at the Center, Doe 4 met with a mental health clinician, who is a licensed professional counselor with a master's degree in clinical mental health, for about an hour about once a week,[7] (Doe 4 Dep. 34:3–22, 40:8–41:4), and with a psychiatrist who prescribed him medicine once every six weeks,[8] (Doe 4 Dep. 37:11–38:22). More than fifty percent of each visit with Dr. Kane is supposed to be dedicated to one-on-one counseling and coordination of care. (Ex. H-3, at 2–3, Dkt. No. 100-8.) Doe 4 did not report thoughts of suicide or self-harm to

[7] Doe 4 testified that his mental health clinician talked to him about behaving properly in order for him to leave the Center. (Doe 4 Dep. 40:22–24.)

[8] Doe 4 testified that the appointments lasted only one or two minutes, but he also acknowledged that the psychiatrist also asked Doe 4 how he was doing, how he was feeling, how he was sleeping, if he had anxiety, and if he had anger. (Doe 4 Dep. 38:7–18.)

either his mental health clinicians or his psychiatrist. (Exs. H-2, H-3, Dkt. No. 100-8.) The record reflects only one incident where Doe 4 harmed himself by punching a wall. (Doe 4 Dep. 44:4–10, 79:25–80:4.) In addition, Doe 4 testified that he feels better about his anger now and can think of other things to calm down when he feels angry. (*Id.* 81:25–82:9.)

Doe 4 stated that he often asked his case worker and counselor to see a psychologist who he could talk to about his feelings, but the Center did not let him. He stated that he has only seen a psychologist once since arriving at the Center. Because he has not been able to speak with a psychologist, Doe 4 testified that he has been hurt and so angry that he has harmed himself. (Doe 4 Resp. to Interrog. 8, 10.) The Center's lead case manager, however, has no record of any requests from Doe 4 to see a psychologist, and there is no record of such a request in his case file, although it should have been documented as a matter of policy. (Ropp Aff. ¶ 17.) As noted, moreover, the only record of harm is Doe 4's punching of a wall in anger.[9]

II. DISCUSSION

A. Summary Judgment Standard

Under Rule 56, summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists only where the record, taken as a whole, could lead a reasonable jury to return a verdict in favor of the non-moving party. *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). In making that determination, the court must take "the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc) (quoting *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 899 (4th Cir. 2003)).

[9] In any event, it is undisputed that a request to see a psychologist had to be approved by ORR.

A party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial."[10] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citations omitted). Moreover, "[t]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247–48. Instead, the non-moving party must produce "significantly probative" evidence from which a reasonable jury could return a verdict in his favor. *Abcor Corp. v. AM Int'l, Inc.*, 916 F.3d 924 (4th Cir. 1990) (quoting *Anderson*, 477 U.S. at 249–50).

B. *Monell* Standard

Plaintiffs bring their § 1983 claims against the Commission as an entity and not against its employees or agents. They assert liability for unconstitutional policies or customs and practices under a theory first recognized in *Monell v. Dept. of Soc. Servs.*, 436 U.S. 568 (1978). At the summary judgment hearing, plaintiffs' counsel conceded that they are not proceeding with the theory that the Commission's written policies themselves are unconstitutional, but rather that the Commission has an unconstitutional custom or practice. In order to prevail on a *Monell* claim involving unconstitutional customs or practices, a plaintiff must first show an underlying constitutional violation by an employee or agent of the defendant entity.[11] *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam); *S.P. v. City of Takoma Park*, 134 F.3d 260, 272 (4th Cir. 1998). A class representative or named plaintiff is also required to make this showing in a class action *Monell* case. *See Agnew v. District of Columbia*, 263 F. Supp. 3d 89, 95 n.3 &

[10] Ignoring this requirement, plaintiffs' brief often cites to allegations in the second amended complaint and argues that certain matters have been sufficiently pled.

[11] Defendant clearly points out this requirement in its initial brief in support of summary judgment, and the brief then concentrates on the deficiencies in Doe 4's evidence. While defendant did not cite to *Doe v. Obama*, 631 F.3d 157 (4th Cir. 2011), with regard to standing, until its reply brief, in no way could plaintiffs have been surprised by defendant's argument. Rather, it appears that plaintiffs initially choose to ignore the argument with regard to the specifics of Doe 4's claims. Plaintiffs only addressed the specifics of Doe 4's claims in their supplemental brief.

98 n.7 (D.D.C. 2017) (given no constitutional violation suffered by the named plaintiffs and class representatives, findings regarding custom or practice were unnecessary, and the class action was dismissed for failure of the same to show a personal injury in order "to have standing on behalf of a class") (quoting *Spokeo, Inc. v. Robins*, 578 U.S. __, 136 S. Ct. 1540, 1547 n.6 (2016)); *Newberry v. Cty. of San Bernardino*, No. 16-55466, 2018 WL 4450831, at *2 (9th Cir. Sept. 18, 2018) (finding that because the defendant had not violated the constitutional rights of a named plaintiff, the constitutional violation prerequisite to a *Monell* claim was not met and no named plaintiff had a claim against the defendant). *See also Martinez v. Haleas*, No. 07-cv-6112, 2009 WL 2916852, at *4 (N.D. Ill. Sept. 2, 2009) (in proposed class action, absent an underlying constitutional violation, there is no claim under *Monell*).

Plaintiffs rely upon *Whitlock v. Johnson*, 153 F.3d 380, 384 (7th Cir. 1998), in arguing that "[a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff." In *Whitlock*, the class was properly certified, but it was later determined that the class representative could not prove his individual claim, and summary judgment was entered against him on that claim. *Id.* Because of this, the class representative could no longer adequately serve in that capacity. *Id.* The class was not decertified; however, new plaintiffs were named as class representatives. *Id.* The court noted that this was not a case where the initial class representative never had standing, but it was a case where he had standing and ultimately lost on the merits. *Id.* at 385. Thus, the court still had jurisdiction under Article III. *Id.* *Whitlock* certainly does not stand for the proposition that an underlying constitution violation is not a required prong of *Monell* in a class action or that the class representative need not be able to prove his own underlying constitutional violation. Nor does it stand for the

proposition that a class action may continue a claim on its own without an adequate class representative, and the court will not allow this class to do so.

To prevail on a *Monell* claim and after showing an underlying constitutional violation, the plaintiff must show an unconstitutional custom or practice. These "may be found in 'persistent and widespread … practices of … officials [which,] [a]lthough not authorized by written law, [are] so permanent and well-settled as to [have] the force of law.'" *Spell v. McDaniel*, 824 F.2d 1380, 1386 (4th Cir. 1987) (quoting *Monell*, 436 U.S. at 691 (citations omitted)). Of course, a constitutional written policy does not insulate the entity from liability for unconstitutional customs or practices. *See, e.g.*, *Marriott v. Cty. of Montgomery*, 426 F. Supp. 2d 1, 9 (N.D.N.Y. 2006) ("Constitutional words cannot erase unconstitutional conduct").

In addition to proving an unconstitutional custom or practice, a plaintiff must show that the custom or practice "is (1) fairly attributable to the municipality [or entity] as its 'own,' . . . and is (2) the 'moving force' behind the particular constitutional violation." *Spell*, 824 F.2d at 1387 (citations omitted). In order to show attribution, a plaintiff may show "duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the [body] that the practices have become customary among its employees," . . . [or that the entity's] policymaker has actual or constructive knowledge of such a course of customary practices among employees subject to the policymaker's delegated responsibility for oversight and supervision . . . ." *Id.* at 1387. If the entity or policymaker has actual or constructive knowledge, the entity will be liable upon proof that the entity or policymaker failed, "as a matter of specific intent or deliberate indifference, thereafter to correct or stop the practices." *Id.* at 1391. *See also Wright v. Town of Glenarden*, No. 95-2580, 1996 WL 350009, at *3 (4th Cir. June 26, 1996). Finally, "[a] sufficiently close causal link between such a known but uncorrected custom or

usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom." *Spell*, 824 F.2d at 1391.

C. First *Monell* Element—An Underlying Constitutional Violation

Given the above proof requirements for a *Monell* claim, the court first turns to whether Doe 4 has sufficient evidence of underlying constitutional violations for excessive force, room confinement, and inadequate mental health treatment.

1. Excessive Force

In order to prevail on an excessive use of force claim, all parties agree that plaintiffs must show that the force was not objectively reasonable under the circumstances. *Kingsley v. Hendrickson*, 135 U.S. 2466, 2473 (2015). Doe 4's evidence establishes genuine disputes of material fact with regard to whether he was the victim of excessive uses of force. So summary judgment is not available to defendant on its theory that Doe 4 cannot show an underlying constitutional violation in this regard.

With regard to the instances of excessive force and use of restraints, in the first incident described in the background section, there is a dispute of fact about whether Doe 4 was forced to lie on the floor of his room with mechanical restraints and whether the force used in response to his anger was excessive. The length of time that Doe 4 was in handcuffs also is directly in dispute. In the second incident, there is also a dispute of fact about whether the use of force against Doe 4 was excessive because the two SIRs from the incident—one recounting Doe 4's allegations and one recounting the actions of the staff—describe different circumstances that ultimately led to the use of force. Although Doe 4 stated in his deposition that he was angry when the staff members asked him to go to his room, this does not discount his statements that he also asked to "talk calmly" and pulled himself off the wall in response to their requests.

Further, even if Doe 4 did refuse to go to his room and displayed aggressive behavior, there is a dispute of fact as to whether the force used against him—including punching him in the ribcage, which is excluded from the Center's SIR—was excessive in response to his behavior. In the third incident, there is a dispute of fact about whether Doe 4 punched a staff member in the face before or after staff members placed him in a physical restraint following his request for deodorant. Additionally, Doe 4's description of the force used against him in that incident sets forth more aggressive behavior by the Center's staff that caused him pain and bruising, while the SIR does not include a similar description of the force used against Doe 4. Thus, there are disputes of fact as to the incidents of force and whether the use of force was unconstitutional against Doe 4.

2. Room Confinement

Room confinement is not a use of force, and no party suggests the legal standard applicable to confinement. The court looks to *Bell v. Wolfish*, 441 U.S. 520 (1979), which directs courts to examine the constitutionality of a pretrial detainee's conditions of confinement or restrictions under the Fourteenth Amendment by determining "whether those conditions amount to punishment of the detainee." *Id.* at 535. This is required because pretrial detainees "may not be punished prior to an adjudication of guilt . . . ." *Id.* This is not to say that restrictions on liberty may not be imposed because restrictions that are "reasonably related to legitimate government objectives are not tantamount to punishment." *Id.* at 538. *See also Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

In determining whether there are disputes of fact as to the room confinement claim, it is worth noting that defendant simply does not address some of the incidents set forth in Doe 4's responses to interrogatories. For example, defendant does not present any contrary evidence to

Doe 4's description of the incident where he requested to speak to his counselor and was placed in restriction for seven or eight hours after his request was denied. Defendant also does not address the alleged incidents when Doe 4 asked to play video games or accidentally kicked a ball in soccer and was placed in restriction. Further, there is a dispute of fact regarding the nature of Doe 4's confinement following the incident where he allegedly punched a staff member—while Doe 4 states that he had to lie on the hard floor without a mattress and with his handcuffs on, defendant disputes only the handcuff issue and does not address the other specific allegations. Instead, defendant focuses on Doe 4's opportunity for educational programming and recreation during the overall three-day period of confinement.

Thus, there are disputes of material fact regard the circumstances of Doe 4's room confinement. Indeed, based on the record before it, the court cannot say that a reasonable factfinder could not find in Doe 4's favor on this issue, if it were to entirely credit his accounts of these incidents. So, the court will deny summary judgment on defendant's theory that Doe 4 cannot prove an underlying constitutional violation with regard to room confinement.

3. Inadequate Mental Health Care

The complaint alleges a claim for deliberate indifference to Doe 4's serious mental health needs as well as an alternative claim for inadequate mental health care based upon failure to abide by the professional judgment standard. For purposes of summary judgment, plaintiffs' argument focused on the deliberate indifference standard, and the court finds that the deliberate indifference standard applies to plaintiffs' claims. As set forth in defendant's brief, courts have repeatedly applied the deliberate indifference standard to civil detainees, including immigrant detainees.[12] (Def.'s Br. Supp. Mot. Summ. J. 19–20.)

[12] The professional judgment standard is applied to programs with a treatment or rehabilitation objective. See cases cited in defendant's supplemental brief at pages 19–20. (Dkt. No. 165.)

In order to prove deliberate indifference with regard to medical care, a plaintiff must satisfy objective and subjective elements. Objectively, he must show that he had a sufficiently serious medical need. *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014). A serious medical need exists when it has been "diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (internal quotation marks omitted). The subjective element first requires a showing that defendant subjectively recognized a substantial risk of harm. *Parrish v. Cleveland*, 372 F.3d 294, 303 (4th Cir. 2004) ("[T]hey actually must have perceived the risk") (citation omitted). Then, the defendant must subjectively recognize that his actions were "inappropriate in light of that risk." *Id*. This standard is more than "mere negligence or even civil recklessness." *Jackson*, 775 F.3d at 178.

Indeed, under the deliberate indifference standard, negligence or a lapse in professional judgment is insufficient. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also Farmer v. Brennan*, 511 U.S. 825, 844 (1994). Moreover a plaintiff is not entitled, under the constitution, to "the exact mental health treatment, diagnosis, and placement that he might desire." *Price v. Dixon*, 961 F. Supp. 894, 899 (E.D. N.C. 1997) (citing *Wright v. Collins*, 766 F.2d 841, 849 (4th Cir. 1985)). In the Eighth Amendment context, the Supreme Court has recognized that "unqualified access to health care" is not required, *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), nor is access to the "best and most expensive form of treatment," *Taylor v. Barnett*, 105 F. Supp. 2d 483, 489 n.2 (E.D. Va. 2000). A mere disagreement with medical personnel is also insufficient to show deliberate indifference. *Wright*, 766 F.2d at 849. Additionally, officials are entitled to rely upon the judgment and expertise of medical professionals. *See, e.g.*, *Shakka v. Smith*, 71 F.3d 162, 167 (4th Cir. 1995); *Miltier v. Beorn*, 896 F.2d 848, 854–55 (4th Cir. 1990).

Here, Doe 4 was evaluated following his arrival at the Center by a psychologist. He was diagnosed with ADHD and PTSD, for which he received medication. He saw a psychiatrist at least every six weeks, and he met with a licensed mental health clinician for individual counseling for about one hour once each week. Unlimited additional meetings with the psychiatrist were available to him, as was group counseling.

While Doe 4 states that he often asked to see a psychologist instead of his licensed professional counselor, there is no evidence indicating that a medical professional recommended that he see a psychologist in order to adequately treat a serious medical need. Doe 4 admits that he never thought of committing suicide, that he had no thoughts of self-harm, and that the only incident where he harmed himself was when he punched a wall in anger.

There was a recommendation, following Doe 4's initial evaluation, that he be placed in residential treatment.[13] (Psychological Evaluation 10, Ex. H-10, Dkt. No. 100-8.) There is, however, no indication in that recommendation that failure to secure such a placement would result in any harm or risk of harm to Doe 4. Furthermore, the Center was not deliberately indifferent to that recommendation. Instead, it attempted to transfer Doe 4 several times to several residential treatment facilities, but to effect his transfer would require both ORR's approval and the receiving facility's acceptance of Doe 4. As the court has previously noted, the other facilities did not accept Doe 4 due to his history of violence. (Ropp Aff. ¶¶ 21–22.)

[13] Plaintiffs cite to the case of *Scott v. Clarke*, 64 F. Supp. 3d 813, 821–22 (W.D. Va. 2014), for the proposition that a facility cannot delegate its duty to provide mental health services to Doe 4, so the fact that ORR approval is required is irrelevant to the analysis. *Scott*, however, is inapposite. In *Scott*, the court held that the Virginia Department of Corrections, who was the custodian of the inmate, could not escape liability by delegating its duties to a medical contractor. Here, non-party ORR is the custodian of the Detainees, not defendant, and ORR has not delegated its duties. Regardless, nothing indicates that residential placement of Doe 4 was required.

For the above reasons, Doe 4 has not mustered sufficient evidence to show an underlying constitutional violation with regard to his mental health claim, and the court will grant summary judgment to defendant on the mental health claim.

D. Remaining *Monell* Elements

1. An unconstitutional custom or practice

As noted, if a plaintiff asserting a *Monell* claim can establish an underlying constitutional violation, then the inquiry turns to whether there is an unconstitutional custom or practice, attributable to the defendant, that was the "moving force" for the violation of plaintiff's constitutional rights. Given the court's conclusion that Doe 4 has only shown disputes of fact for an underlying constitutional violation for his excessive force and conditions-of-confinement claims, the court looks next to whether plaintiffs have shown an unconstitutional custom or practice, but only with regard to those claims.

Defendant's analysis on this issue is lean. It conclusorily states that there is no unconstitutional custom or practice and takes issue with the report of Paul Driver, Ph.D., an expert statistician proffered by plaintiffs, who concludes that such a practice exists. Mostly, though, defendant relies upon the other prongs of *Monell* in an attempt to show the plaintiffs cannot prevail.

Plaintiffs counter defendant's assertion by first citing to the allegations in their complaint and concluding that they have sufficiently pled a custom or usage. While this may be true, they cannot rely on mere allegations at the summary judgment stage. They also cite to case law regarding supervisory liability, but they admitted at the hearing that they are not pursuing supervisory liability, given that no individual persons are named as defendants. They then turn to Diver's report, in which he examined a spreadsheet prepared by plaintiffs' counsel that

summarizes defendant's reports regarding use of force, use of restraints, and use of room confinement. Using this summary, Diver notes a large number of occasions on which the Center's employees violated the Center's own policies regarding the use of force, restraints, and room confinement. Plaintiffs fail to recognize, however, that a violation of internal policies or procedures does not establish a constitutional violation. *United States v. Caceres*, 440 U.S. 741 (1978). This is even true of violations of state law to the extent it is more demanding than the constitution. *Riccio v. County of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990). For the reasons stated in the court's opinion regarding defendant's motion in limine to exclude the expert testimony of Diver, the court will not consider Diver's opinions with regard to proof of a custom or practice.

Lastly, plaintiffs cite to testimony regarding the Center's practices. This testimony indicates that fairly minor behavioral issues, self-harm, and verbal threats, without the ability to act on them, has resulted in use of restraints. In one circumstance, staff were told to use restraints on a child, without any less-intrusive interventions, if the child attempted to cut himself or "do anything." (Ex. 20, Mahiri Dep. 175:21–176:2, 177:12–20.) A staff member also stated that physical restraint is used if the child's behavior is "interfering with the routine of the other children." (Ex. 4, McCormick Dep. 113:1–14.) Doe 4 also testified to having seen excessive uses of force.

With regard to room confinement, plaintiffs cite to staff testimony that small infractions result in long periods of room confinement, which is also confirmed by some incident reports. For example, incident reports show confinement for eating too slowly. They also provide evidence of failures to remove children from confinement after the need for confinement has ended. The extent of these practices is disputed, but the current record could allow a reasonable

fact-finder—construing all evidence in plaintiffs' favor—to find the existence of an unconstitutional custom or practice as to both the excessive force claim and the room confinement claim.

2. Attribution to the Commission

In addition to proving an unconstitutional custom or practice, plaintiffs must prove that the Commission had or has actual or constructive knowledge of the customs or practices and failed to take action to stop such practices. A showing of sufficient duration and frequency is one method of proving knowledge, and it appears to be the method plaintiffs seek to use.

In support of its motion, defendant points out that Doe 4 has only complained of alleged mistreatment once to the Center's knowledge. It also notes that reports are made to CPS whenever there is a complaint of excessive use of force, even if defendant believes there is no merit to the complaint. Additionally, defendant has terminated employees found to have used excessive force, even a staff member who threw a punch in self-defense while being assaulted.

As an initial matter, and in contrast to defendant's assertion that Doe 4 has only complained of alleged mistreatment once, Doe 4 states in his affidavit that he has filed complaints many times, but nothing happens, and he was told that his complaints would all be put in the archives if he filed one more complaint. Doe 4 also has stated that he does not remember all the complaints he made, including complaints of when staff used "too much force against" him. (Doe 4 Resp. to Interrog. 7, 13.)

In response, plaintiffs rely on the written reports regarding use of force, restraints, and room confinement maintained by the Center. Plaintiffs argue that some of the reports reflect a failure of the Center's employees to abide its internal policies and that there is no evidence of corrective action regarding these incidents. According to plaintiffs, this establishes awareness

and tacit approval on the part of the Commission that the Center engages in a pattern of conduct with regard to force, restraints, and room confinement that is unconstitutional. Moreover, Doe 4 states in his interrogatory responses that he has filed complaints many times, but nothing happens, and he was told that they would all be put in the archives if he filed another complaint. (Doe 4 Resp. to Interrog. 7, 13.) This evidence is sufficient to show a dispute of fact precluding entry of summary judgment.

3. Causal link

Finally, plaintiffs must show a causal link between the custom or practice and the specific violation(s) at issue or, in other words, that the custom or practice was the "moving force" behind the specific harmful acts of which plaintiffs complain. *Milligan v. City of Newport News*, 743 F.2d 227, 230–31 (4th Cir. 1984). "A sufficiently close causal link between such a known but uncorrected custom or usage and a specific violation is established if occurrence of the specific violation was made reasonably probable by permitted continuation of the custom." *Spell*, 824 F.2d at 1391. The same evidence set forth above is also sufficient with regard to this *Monell* prong, so summary judgment is unavailable.

III. CONCLUSION

For all of these reasons, the court will grant in part and deny in part defendant's motion for summary judgment.

An appropriate order will be entered.

Entered: December 13, 2018.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

JOHN DOE 4, by and through his next friend, NELSON LOPEZ, on behalf of himself and all persons similarly situated,

Plaintiffs,

v.

SHENANDOAH VALLEY JUVENILE CENTER COMMISSION,

Defendant.

Case No. 5:17-cv-00097 EKD/JCH
Judge Elizabeth K. Dillon

FINAL JUDGMENT ORDER

This matter comes before the Court for entry of an Order of Final Judgment following the completion of a Fairness Hearing, conducted in accordance with the requirements of Rules 23(e)(1) and 23(e)(2), Fed. R. Civ. P.

The Court has considered: (i) the reasonableness and adequacy of the Notice provided by Plaintiffs' counsel to the members of the Plaintiff Class and all other interested or potentially-interested parties; (ii) the absence of objections to the resolution of this action proposed by Plaintiffs' counsel as described in their Motion for Issuance of Class Notice Concerning Voluntary Dismissal of Certain Class Claims, filed February 11, 2019 (ECF Docket No. 180), which was granted by this Court by Order entered March 19, 2019 (ECF Dkt. No. 183); and (iii) the written and oral submissions of the respective Parties by counsel in the Fairness Hearing conducted by the Court on May 30 and July 16, 2019. Based upon all of the foregoing, the Court finds that Plaintiffs' proposed resolution is fair, reasonable, and adequate under all of the

circumstances of this case. Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

(a) Plaintiffs' claims alleging Defendant's use of excessive force, excessive imposition of restraints and excessive use of solitary confinement, all as set forth in Count I of Plaintiffs' Second Amended Class Action Complaint filed July 11, 2018 (ECF Dkt. No. 68), are hereby DISMISSED, with prejudice, pursuant to Rule 41(a)(2), Fed. R. Civ. P.;

(b) Judgment for the Defendant is hereby ENTERED with respect to Plaintiffs' claims alleging Defendant's failure to provide the Plaintiff Class with constitutionally-adequate mental health treatment, as set forth in Count II of Plaintiffs' Second Amended Class Action Complaint, for the reasons stated in this Court's Memorandum Opinion and Order entered December 13, 2018 (ECF Dkt. Nos. 171, 172), pursuant to Rules 56 and 58(a), Fed. R. Civ. P.; and

(c) Plaintiffs and Defendant shall bear their own costs incurred in litigating this action.

Entered: July 23, 2019.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

Appendix
(iii)

FILED: February 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1910
(5:17-cv-00097-EKD-JCH)

JOHN DOE 4, by and through his next friend, NELSON LOPEZ, on behalf of himself and all persons similarly situated

Plaintiff - Appellant

v.

SHENANDOAH VALLEY JUVENILE CENTER COMMISSION

Defendant - Appellee

CURRENT AND FORMER STATE ATTORNEYS GENERAL; ELECTED PROSECUTORS; CORRECTIONS LEADERS, CRIMINAL JUSTICE LEADERS; DISABILITY RIGHTS LEADERS

Amici Supporting Appellant

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: January 12, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1910
(5:17-cv-00097-EKD-JCH)

JOHN DOE 4, by and through his next friend, NELSON LOPEZ, on behalf of himself and all persons similarly situated

Plaintiff - Appellant

v.

SHENANDOAH VALLEY JUVENILE CENTER COMMISSION

Defendant - Appellee

CURRENT AND FORMER STATE ATTORNEYS GENERAL; ELECTED PROSECUTORS; CORRECTIONS LEADERS, CRIMINAL JUSTICE LEADERS; DISABILITY RIGHTS LEADERS

Amici Supporting Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is reversed. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

1. U.S. CONST. art. III, § 2 provides:

   The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

   In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

   The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. U.S. CONST. amend. V provides:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. U.S. CONST. amend. XIV, § 1 provides:

   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 6 U.S.C. § 279 provides:

(a) Transfer of functions

There are transferred to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services functions under the immigration laws of the United States with respect to the care of unaccompanied alien children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service) immediately before the effective date specified in subsection (d) of this section.

(b) Functions

(1) In general

Pursuant to the transfer made by subsection (a) of this section, the Director of the Office of Refugee Resettlement shall be responsible for—

(A) coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status, including developing a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child, consistent with the law regarding appointment of counsel that is in effect on November 25, 2002;

(B) ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child;

(C) making placement determinations for all unaccompanied alien children who are in Federal custody by reason of their immigration status;

(D) implementing the placement determinations;

(E) implementing policies with respect to the care and placement of unaccompanied alien children;

(F) identifying a sufficient number of qualified individuals, entities, and facilities to house unaccompanied alien children;

(G) overseeing the infrastructure and personnel of facilities in which unaccompanied alien children reside;

(H) reuniting unaccompanied alien children with a parent abroad in appropriate cases;

(I) compiling, updating, and publishing at least annually a state-by-state list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children;

(J) maintaining statistical information and other data on unaccompanied alien children for whose care and placement the Director is responsible, which shall include—

(i) biographical information, such as a child's name, gender, date of birth, country of birth, and country of habitual residence;

(ii) the date on which the child came into Federal custody by reason of his or her immigration status;

(iii) information relating to the child's placement, removal, or release from each facility in which the child has resided;

(iv) in any case in which the child is placed in detention or released, an explanation relating to the detention or release; and

(v) the disposition of any actions in which the child is the subject;

(K) collecting and compiling statistical information from the Department of Justice, the Department of Homeland Security, and the Department of State on each department's actions relating to unaccompanied alien children; and

(L) conducting investigations and inspections of facilities and other entities in which unaccompanied alien children reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements.

(2) Coordination with other entities; no release on own recognizance

In making determinations described in paragraph (1)(C), the Director of the Office of Refugee Resettlement—

(A) shall consult with appropriate juvenile justice professionals, the Director of the Bureau of Citizenship and Immigration Services, and the Assistant Secretary of the Bureau of Border Security to ensure that such determinations ensure that unaccompanied alien children described in such subparagraph—

(i) are likely to appear for all hearings or proceedings in which they are involved;

(ii) are protected from smugglers, traffickers, or others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity; and

(iii) are placed in a setting in which they are not likely to pose a danger to themselves or others; and

(B) shall not release such children upon their own recognizance.

(3) Duties with respect to foster care

In carrying out the duties described in paragraph (1), the Director of the Office of Refugee Resettlement is encouraged to use the refugee children foster care system established pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)) for the placement of unaccompanied alien children.

(4) Rule of construction

Nothing in paragraph (2)(B) may be construed to require that a bond be posted for an unaccompanied alien child who is released to a qualified sponsor.

(c) Rule of construction

Nothing in this section may be construed to transfer the responsibility for adjudicating benefit determinations under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) from the authority of any official of the Department of Justice, the Department of Homeland Security, or the Department of State.

(d) Effective date

Notwithstanding section 4,[1] this section shall take effect on the date on which the transfer of functions specified under section 251 of this title takes effect.

(e) References

With respect to any function transferred by this section, any reference in any other Federal law, Executive order, rule, regulation, or delegation of authority, or any document of or pertaining to a component of government from which such function is transferred—

(1) to the head of such component is deemed to refer to the Director of the Office of Refugee Resettlement; or

(2) to such component is deemed to refer to the Office of Refugee Resettlement of the Department of Health and Human Services.

(f) Other transition issues

(1) Exercise of authorities

Except as otherwise provided by law, a Federal official to whom a function is transferred by this section may, for purposes of performing the function, exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function immediately before the effective date specified in subsection (d) of this section.

(2) Savings provisions

Subsections (a), (b), and (c) of section 552 of this title shall apply to a transfer of functions under this section in the same manner as such provisions apply to a transfer of functions under this chapter to the Department of Homeland Security.

(3) Transfer and allocation of appropriations and personnel

The personnel of the Department of Justice employed in connection with the functions transferred by this section, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available to, the Immigration and Naturalization Service in connection with the functions transferred by this section, subject to section 1531 of title 31, shall be transferred to the Director of the Office of Refugee Resettlement for allocation to the appropriate component of the Department of Health and Human Services. Unexpended funds transferred pursuant to this paragraph shall be used only for the purposes for which the funds were originally authorized and appropriated.

(g) Definitions

As used in this section—

(1) the term "placement" means the placement of an unaccompanied alien child in either a detention facility or an alternative to such a facility; and

(2) the term "unaccompanied alien child" means a child who—

(A) has no lawful immigration status in the United States;

(B) has not attained 18 years of age; and

(C) with respect to whom—

(i) there is no parent or legal guardian in the United States; or

(ii) no parent or legal guardian in the United States is available to provide care and physical custody.

5. 8 U.S.C. § 1232 provides:

(a) Combating child trafficking at the border and ports of entry of the United States

(1) Policies and procedures

In order to enhance the efforts of the United States to prevent trafficking in persons, the Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and

the Secretary of Health and Human Services, shall develop policies and procedures to ensure that unaccompanied alien children in the United States are safely repatriated to their country of nationality or of last habitual residence.

(2) Special rules for children from contiguous countries

(A) Determinations

Any unaccompanied alien child who is a national or habitual resident of a country that is contiguous with the United States shall be treated in accordance with subparagraph (B), if the Secretary of Homeland Security determines, on a case-by-case basis, that—

(i) such child has not been a victim of a severe form of trafficking in persons, and there is no credible evidence that such child is at risk of being trafficked upon return to the child's country of nationality or of last habitual residence;

(ii) such child does not have a fear of returning to the child's country of nationality or of last habitual residence owing to a credible fear of persecution; and

(iii) the child is able to make an independent decision to withdraw the child's application for admission to the United States.

(B) Return

An immigration officer who finds an unaccompanied alien child described in subparagraph (A) at a land border or port of entry of the United States and determines that such child is inadmissible under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) may—

(i) permit such child to withdraw the child's application for admission pursuant to section 235(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1225(a)(4)); and

(ii) return such child to the child's country of nationality or country of last habitual residence.

(C) Contiguous country agreements

The Secretary of State shall negotiate agreements between the United States and countries contiguous to the United States with respect to the repatriation of children. Such agreements shall be designed to protect children from severe forms of trafficking in persons, and shall, at a minimum, provide that—

(i) no child shall be returned to the child's country of nationality or of last habitual residence unless returned to

appropriate employees or officials, including child welfare officials where available, of the accepting country's government;

(ii) no child shall be returned to the child's country of nationality or of last habitual residence outside of reasonable business hours; and

(iii) border personnel of the countries that are parties to such agreements are trained in the terms of such agreements.

(3) Rule for other children

The custody of unaccompanied alien children not described in paragraph (2)(A) who are apprehended at the border of the United States or at a United States port of entry shall be treated in accordance with subsection (b).

(4) Screening

Within 48 hours of the apprehension of a child who is believed to be described in paragraph (2)(A), but in any event prior to returning such child to the child's country of nationality or of last habitual residence, the child shall be screened to determine whether the child meets the criteria listed in paragraph (2)(A). If the child does not meet such criteria, or if no determination can be made within 48 hours of apprehension, the child shall immediately be transferred to the Secretary of Health and Human Services and treated in accordance with subsection (b). Nothing in this paragraph may be construed to preclude an earlier transfer of the child.

(5) Ensuring the safe repatriation of children

(A) Repatriation pilot program

To protect children from trafficking and exploitation, the Secretary of State shall create a pilot program, in conjunction with the Secretary of Health and Human Services and the Secretary of Homeland Security, nongovernmental organizations, and other national and international agencies and experts, to develop and implement best practices to ensure the safe and sustainable repatriation and reintegration of unaccompanied alien children into their country of nationality or of last habitual residence, including placement with their families, legal guardians, or other sponsoring agencies.

(B) Assessment of country conditions

The Secretary of Homeland Security shall consult the Department of State's Country Reports on Human Rights

Practices and the Trafficking in Persons Report in assessing whether to repatriate an unaccompanied alien child to a particular country.

(C) Report on repatriation of unaccompanied alien children

Not later than 18 months after December 23, 2008, and annually thereafter, the Secretary of State and the Secretary of Health and Human Services, with assistance from the Secretary of Homeland Security, shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on efforts to improve repatriation programs for unaccompanied alien children. Such report shall include—

(i) the number of unaccompanied alien children ordered removed and the number of such children actually removed from the United States;

(ii) a statement of the nationalities, ages, and gender of such children;

(iii) a description of the policies and procedures used to effect the removal of such children from the United States and the steps taken to ensure that such children were safely and humanely repatriated to their country of nationality or of last habitual residence, including a description of the repatriation pilot program created pursuant to subparagraph (A);

(iv) a description of the type of immigration relief sought and denied to such children;

(v) any information gathered in assessments of country and local conditions pursuant to paragraph (2); and

(vi) statistical information and other data on unaccompanied alien children as provided for in section 279(b)(1)(J) of title 6.

(D) Placement in removal proceedings

Any unaccompanied alien child sought to be removed by the Department of Homeland Security, except for an unaccompanied alien child from a contiguous country subject to exceptions under subsection (a)(2), shall be—

(i) placed in removal proceedings under section 240 of the Immigration and Nationality Act (8 U.S.C. 1229a);

(ii) eligible for relief under section 240B of such Act (8 U.S.C. 1229c) at no cost to the child; and

(iii) provided access to counsel in accordance with subsection (c)(5).

(b) Combating child trafficking and exploitation in the United States

(1) Care and custody of unaccompanied alien children

Consistent with section 279 of title 6, and except as otherwise provided under subsection (a), the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.

(2) Notification

Each department or agency of the Federal Government shall notify the Department of Health and Human services [1] within 48 hours upon—

(A) the apprehension or discovery of an unaccompanied alien child; or

(B) any claim or suspicion that an alien in the custody of such department or agency is under 18 years of age.

(3) Transfers of unaccompanied alien children

Except in the case of exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied alien child in custody shall transfer the custody of such child to the Secretary of Health and Human Services not later than 72 hours after determining that such child is an unaccompanied alien child.

(4) Age determinations

The Secretary of Health and Human Services, in consultation with the Secretary of Homeland Security, shall develop procedures to make a prompt determination of the age of an alien, which shall be used by the Secretary of Homeland Security and the Secretary of Health and Human Services for children in their respective custody. At a minimum, these procedures shall take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the unaccompanied alien.

(c) Providing safe and secure placements for children

(1) Policies and programs

The Secretary of Health and Human Services, Secretary of Homeland Security, Attorney General, and Secretary of State shall establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity, including

policies and programs reflecting best practices in witness security programs.

(2) Safe and secure placements

(A) Minors in department of health and human services custody

Subject to section 279(b)(2) of title 6, an unaccompanied alien child in the custody of the Secretary of Health and Human Services shall be promptly placed in the least restrictive setting that is in the best interest of the child. In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight. Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care. A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense. The placement of a child in a secure facility shall be reviewed, at a minimum, on a monthly basis, in accordance with procedures prescribed by the Secretary, to determine if such placement remains warranted.

(B) Aliens transferred from Department of Health and Human Services to Department of Homeland Security Custody

If a minor described in subparagraph (A) reaches 18 years of age and is transferred to the custody of the Secretary of Homeland Security, the Secretary shall consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home.

(3) Safety and suitability assessments

(A) In general

Subject to the requirements of subparagraph (B), an unaccompanied alien child may not be placed with a person or entity unless the Secretary of Health and Human Services makes a determination that the proposed custodian is capable of providing for the child's physical and mental well-being. Such determination shall, at a minimum, include verification of the

custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.

(B) Home studies

Before placing the child with an individual, the Secretary of Health and Human Services shall determine whether a home study is first necessary. A home study shall be conducted for a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 12102 of title 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence. The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.

(C) Access to information

Not later than 2 weeks after receiving a request from the Secretary of Health and Human Services, the Secretary of Homeland Security shall provide information necessary to conduct suitability assessments from appropriate Federal, State, and local law enforcement and immigration databases.

(4) Legal orientation presentations

The Secretary of Health and Human Services shall cooperate with the Executive Office for Immigration Review to ensure that custodians receive legal orientation presentations provided through the Legal Orientation Program administered by the Executive Office for Immigration Review. At a minimum, such presentations shall address the custodian's responsibility to attempt to ensure the child's appearance at all immigration proceedings and to protect the child from mistreatment, exploitation, and trafficking.

(5) Access to counsel

The Secretary of Health and Human Services shall ensure, to the greatest extent practicable and consistent with section 292 of

the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking. To the greatest extent practicable, the Secretary of Health and Human Services shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.

(6) Child advocates

(A) In general

The Secretary of Health and Human Services is authorized to appoint independent child advocates for child trafficking victims and other vulnerable unaccompanied alien children. A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child. The child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate. The child advocate shall be presumed to be acting in good faith and be immune from civil and criminal liability for lawful conduct of duties as described in this provision.

(B) Appointment of child advocates.

(i) Initial Sites

Not later than 2 years after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], the Secretary of Health and Human Services shall appoint child advocates at 3 new immigration detention sites to provide independent child advocates for trafficking victims and vulnerable unaccompanied alien children.

(ii) Additional Sites

Not later than 3 years after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], the Secretary shall appoint child advocates at not more than 3 additional immigration detention sites.

(iii) Selection of sites.

Sites at which child advocate programs will be established under this subparagraph shall be located at immigration detention sites at which more than 50 children are held in

immigration custody, and shall be selected sequentially, with priority given to locations with—

I. the largest number of unaccompanied alien children; and

II. the most vulnerable populations of unaccompanied children.

(C) Restrictions

(i) Administrative expenses. A child advocate program may not use more that 10 percent of the Federal funds received under this section for administrative expenses.

(ii) Nonexclusivity. Nothing in this section may be construed to restrict the ability of a child advocate program under this section to apply for or obtain funding from any other source to carry out the programs described in this section.

(iii) Contribution of funds. A child advocate program selected under this section shall contribute non-Federal funds, either directly or through in-kind contributions, to the costs of the child advocate program in an amount that is not less than 25 percent of the total amount of Federal funds received by the child advocate program under this section. In-kind contributions may not exceed 40 percent of the matching requirement under this clause.

(D) Annual report to Congress. Not later than 1 year after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], and annually thereafter, the Secretary of Health and Human Services shall submit a report describing the activities undertaken by the Secretary to authorize the appointment of independent Child Advocates for trafficking victims and vulnerable unaccompanied alien children to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

(E) Assessment of Child Advocate Program

(i) In general. As soon as practicable after the date of the enactment of the Violence Against Women Reauthorization Act of 2013 [enacted March 7, 2013], the Comptroller General of the United States shall conduct a study regarding the effectiveness of the Child Advocate Program operated by the Secretary of Health and Human Services.

(ii) Matters to be studied. In the study required under clause (i), the Comptroller General shall— collect information and analyze the following:

I. analyze the effectiveness of existing child advocate programs in improving outcomes for trafficking victims and other vulnerable unaccompanied alien children;

II. evaluate the implementation of child advocate programs in new sites pursuant to subparagraph (B);

III. evaluate the extent to which eligible trafficking victims and other vulnerable unaccompanied children are receiving child advocate services and assess the possible budgetary implications of increased participation in the program;

IV. evaluate the barriers to improving outcomes for trafficking victims and other vulnerable unaccompanied children; and

V. make recommendations on statutory changes to improve the Child Advocate Program in relation to the matters analyzed under subclauses (I) through (IV).

(iii) GAO report. Not later than 3 years after the date of the enactment of this Act [enacted March 7, 2013], the Comptroller General of the United States shall submit the results of the study required under this subparagraph to—

I. the Committee on the Judiciary of the Senate;

II. the Committee on Health, Education, Labor, and Pensions of the Senate;

III. the Committee on the Judiciary of the House of Representatives; and

IV. the Committee on Education and the Workforce of the House of Representatives

(F) Authorization of appropriations. There are authorized to be appropriated to the Secretary of Health and Human Services to carry out this subsection—

(i) $1,000,000 for each of the fiscal years 2014 and 2015; and

(ii) $2,000,000 for each of the fiscal years 2018 through 2021.

(d) Permanent protection for certain at-risk children

(1) Omitted

(2) Expeditious adjudication

All applications for special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed.

(3) Omitted

(4) Eligibility for assistance

(A) In general

A child who has been granted special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) and who was either in the custody of the Secretary of Health and Human Services at the time a dependency order was granted for such child or who was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980 (8 U.S.C. 1522 note) at the time such dependency order was granted, shall be eligible for placement and services under section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)) until the earlier of—

(i) the date on which the child reaches the age designated in section 412(d)(2)(B) of the Immigration and Nationality Act (8 U.S.C. 1522(d)(2)(B)); or

(ii) the date on which the child is placed in a permanent adoptive home.

(B) State reimbursement

Subject to the availability of appropriations, if State foster care funds are expended on behalf of a child who is not described in subparagraph (A) and has been granted special immigrant status under section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), the Federal Government shall reimburse the State in which the child resides for such expenditures by the State.

(5) State courts acting in loco parentis

A department or agency of a State, or an individual or entity appointed by a State court or juvenile court located in the United States, acting in loco parentis, shall not be considered a legal guardian for purposes of this section or section 279 of title 6.

(6) Transition rule

Notwithstanding any other provision of law, an alien described in section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)), as amended by paragraph (1), may not be denied special immigrant status under such section after December 23, 2008, based on age if the alien was a child on the date on which the alien applied for such status.

(7) Omitted

(8) Specialized needs of unaccompanied alien children

Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.

(e) Training

The Secretary of State, the Secretary of Homeland Security, the Secretary of Health and Human Services, and the Attorney General shall provide specialized training to all Federal personnel, and upon request, state [1] and local personnel, who have substantive contact with unaccompanied alien children. Such personnel shall be trained to work with unaccompanied alien children, including identifying children who are victims of severe forms of trafficking in persons, and children for whom asylum or special immigrant relief may be appropriate, including children described in subsection (a)(2).

(f) Omitted

(g) Definition of unaccompanied alien child

For purposes of this section, the term "unaccompanied alien child" has the meaning given such term in section 279(g) of title 6.

(h) Effective date

This section—

(1) shall take effect on the date that is 90 days after December 23, 2008; and

(2) shall also apply to all aliens in the United States in pending proceedings before the Department of Homeland Security or the Executive Office for Immigration Review, or related administrative or Federal appeals, on December 23, 2008.

(i) Grants and contracts

The Secretary of Health and Human Services may award grants to, and enter into contracts with, voluntary agencies to carry out this section and section 279 of title 6.

6. 28 U.S.C. § 1254 provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

7. 28 U.S.C. § 2242 provides:

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

8. 28 U.S.C. § 2243 provides:

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

9. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

10. 45 C.F.R. § 410.102 provides:

(a) ORR coordinates and implements the care and placement of UAC who are in ORR custody by reason of their immigration status.

(b) For all UACs in ORR custody, DHS and DOJ (Department of Justice) handle other matters, including immigration benefits and enforcement matters, as set forth in their respective statutes, regulations and other authorities.

(c) ORR shall hold UACs in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of minors.

(d) Within all placements, UACs shall be treated with dignity, respect, and special concern for their particular vulnerability.

11. 45 C.F.R. § 410.203 provides:

(a) Notwithstanding §410.202, ORR may place a UAC in a secure facility if the UAC:

(1) Has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act, and where ORR deems those circumstances demonstrate that the UAC poses a danger to self or others. "Chargeable" means that ORR has probable cause to believe that the UAC has committed a specified offense. The provision in this paragraph (a)(1) does not apply to a UAC whose offense is:

(i) An isolated offense that was not within a pattern or practice of criminal activity and did not involve violence against a person or the use or carrying of a weapon; or

(ii) A petty offense, which is not considered grounds for stricter means of detention in any case;

(2) While in DHS or ORR's custody or while in the presence of an immigration officer, has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself/herself or others);

(3) Has engaged, while in a licensed program or staff secure facility, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program or staff secure facility in which he or

she has been placed and removal is necessary to ensure the welfare of the UAC or others, as determined by the staff of the licensed program or staff secure facility (*e.g.,* drug or alcohol abuse, stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the UAC poses a danger to self or others based on such conduct;

(4) For purposes of placement in a secure residential treatment centers (RTC), if a licensed psychologist or psychiatrist determines that the UAC poses a risk of harm to self or others; or

(5) Is otherwise a danger to self or others.

(b) ORR Federal Field Specialists review and approve all placements of UAC in secure facilities consistent with legal requirements.

(c) ORR reviews, at least monthly, the placement of a UAC into a secure, staff secure, or RTC facility to determine whether a new level of care is more appropriate.

(d) Notwithstanding ORR's ability under the rules in this subpart to place UACs who are "otherwise a danger to self or others" in secure placements, the provision in this section does not abrogate any requirements to place UACs in the least restrictive setting appropriate to their age and special needs.

12. 45 C.F.R. § 410.207 provides:

A UAC who is placed in a licensed program pursuant to this subpart remains in the custody of ORR, and may only be transferred or released under its authority. However, in the event of an emergency, a licensed program may transfer temporarily the physical placement of a UAC prior to securing permission from ORR, but must notify ORR of the transfer as soon as possible, but in all cases within eight hours of the transfer. Upon release to an approved sponsor, a UAC is no longer in the custody of ORR.

13. 45 C.F.R. § 411.5 provides:

For the purposes of this part, the following definitions apply:

ACF means the Administration for Children and Families.

Care provider facility means any ORR funded program that is licensed, certified, or accredited by an appropriate State or local agency to provide residential or group services to UCs, including a program of group homes or

facilities for children with special needs or staff-secure services for children. Emergency care provider facilities are included in this definition but may or may not be licensed, certified, or accredited by an appropriate State or local agency.

Contractor means a person who, or entity that, provides services on a recurring basis pursuant to a contractual agreement with ORR or with a care provider facility or has a sub-contractual agreement with the contractor.

DHS means the Department of Homeland Security.

DOJ means the Department of Justice.

Director means the Director of the Office of Refugee Resettlement.

Emergency means a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action.

Emergency care provider facility is a type of care provider facility that is temporarily opened to provide temporary emergency shelter and services for UCs during an influx. Emergency care provider facilities may or may not be licensed by an appropriate State or local agency.

Exigent circumstances means any set of temporary and unforeseen circumstances that require immediate action in order to combat a threat to the security of a care provider facility or a threat to the safety and security of any person.

Gender refers to the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex.

Gender identity refers to one's sense of oneself as male, female, or transgender.

Gender nonconforming means a person whose appearance or manner does not conform to traditional societal gender expectations.

HHS means the Department of Health and Human Services.

Intersex means a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female. Intersex medical conditions are sometimes referred to as disorders of sex development.

LGBTQI means lesbian, gay, bisexual, transgender, questioning, or intersex.

Law enforcement means any local, State, or Federal enforcement agency with the authority and jurisdiction to investigate whether any criminal laws were violated.

Limited English proficient (LEP) means individuals for whom English is not the primary language and who may have a limited ability to read, write, speak, or understand English.

Medical practitioner means a health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A "qualified medical practitioner" refers to a professional who also has successfully completed specialized training for treating sexual abuse victims.

Mental health practitioner means a mental health professional who, by virtue of education, credentials, and experience, is permitted by law to evaluate and care for patients within the scope of his or her professional practice. A "qualified mental health practitioner" refers to a professional who also has successfully completed specialized training for treating sexual abuse victims.

ORR refers to the Office of Refugee Resettlement.

Pat-down search means a sliding or patting of the hands over the clothed body of an unaccompanied child by staff to determine whether the individual possesses contraband.

Secure care provider facility is a type of care provider facility with a physically secure structure and staff responsible for controlling violent behavior. ORR uses a secure care provider facility as the most restrictive placement option for a UC who poses a danger to him or herself or others or has been charged with having committed a criminal offense. A secure care provider facility is a juvenile detention center.

Sex refers to a person's biological status and is typically categorized as male, female, or intersex. There are a number of indicators of biological sex, including sex chromosomes, gonads, internal reproductive organs, and external genitalia.

Sexual Assault Forensic Examiner (SAFE) means a "medical practitioner" who has specialized forensic training in treating sexual assault victims and conducting forensic medical examinations.

Sexual Assault Nurse Examiner (SANE) means a registered nurse who has specialized forensic training in treating sexual assault victims and conducting forensic medical examinations.

Special needs means mental and/or physical conditions that require special services and treatment by staff. A UC may have special needs due to a disability as defined in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102(2).

Staff means employees or contractors of ORR or a care provider facility, including any entity that operates within a care provider facility.

Strip search means a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia.

Substantiated allegation means an allegation that was investigated and determined to have occurred.

Traditional foster care means a type of care provider facility where a UC is placed with a family in a community-based setting. The State or locally licensed foster family is responsible for providing basic needs in addition to responsibilities as outlined by the State or local licensed child placement agency, State and local licensing regulations, and any ORR policies related to foster care. The UC attends public school and receives on-going case management and counseling services. The care provider facility facilitates the provision of additional psychiatric, psychological, or counseling referrals as needed. Traditional foster care may include transitional or short-term foster care as well as long-term foster care providers.

Transgender means a person whose gender identity (*i.e.*, internal sense of feeling male or female) is different from the person's assigned sex at birth.

Unaccompanied child (UC) means a child:

(1) Who has no lawful immigration status in the United States;

(2) Who has not attained 18 years of age; and

(3) With respect to whom there is no parent or legal guardian in the United States or there is no parent or legal guardian in the United States available to provide care and physical custody.

Unfounded allegation means an allegation that was investigated and determined not to have occurred.

Unsubstantiated allegation means an allegation that was investigated and the investigation produced insufficient evidence to make a final determination as to whether or not the event occurred.

Volunteer means an individual who donates time and effort on a recurring basis to enhance the activities and programs of ORR or the care provider facility.

Youth care worker means employees primarily responsible for the supervision and monitoring of UCs in housing units, educational areas, recreational areas, dining areas, and other program areas of a care provider facility.

14. 6 VAC 35-101-1080 provides:

A. Procedures. Written procedures shall govern the disciplinary process that shall contain the following:

1. Graduated sanctions and progressive discipline;

2. Training on the disciplinary process and rules of conduct; and

3. Documentation on the administration of privileges and sanctions as provided in the behavior management program.

B. Disciplinary report. A disciplinary report shall be completed when it is alleged that a resident has violated a rule of conduct for which room confinement, including a bedtime earlier than that provided on the daily schedule, may be imposed as a sanction.

1. All disciplinary reports shall contain the following:

a. A description of the alleged rule violation, including the date, time, and location;

b. A listing of any staff present at the time of the alleged rule violation;

c. The signature of the resident and the staff who completed the report; and

d. The sanctions, if any, imposed.

2. A disciplinary report shall not be required when a resident is placed in his room for a "cooling off" period, in accordance with written procedures, that does not exceed 60 minutes.

C. Review of rule violation. A review of the disciplinary report shall be conducted by an impartial person. After the resident receives notification of the alleged rule violation, the resident shall be provided with the opportunity to admit or deny the charge.

1. The resident may admit the charge, in writing, and accept the sanction (i) prescribed for the offense or (ii) as amended by the impartial person.

2. The resident may deny the charge and the impartial person shall:

a. Meet in person with the resident;

b. Review the allegation with the resident;

c. Provide the resident with the opportunity to present evidence, including witnesses;

d. Provide, upon the request of the resident, for an impartial staff member to assist the resident in the conduct of the review;

e. Render a decision and inform the resident of the decision and rationale supporting this decision;

f. Complete the review within 12 hours of the time of the alleged rule violation, including weekends and holidays, unless the time frame ends during the resident's scheduled sleeping hours. In such circumstances, the delay shall be documented and the review shall be conducted within the same time frame thereafter;

g. Document the review, including any statement of the resident, evidence, witness testimony, the decision, and the rationale for the decision; and

h. Advise the resident of the right to appeal the decision.

D. Appeal. The resident shall have the right to appeal the decision of the impartial person.

1. The resident's claim shall be reviewed by the facility administrator or designee and shall be decided within 24 hours of the alleged rule violation, including weekends and holidays, unless the time frame ends during the resident's scheduled sleeping hours. In such circumstances, the delay shall be documented and the review shall be conducted within the same time frame thereafter. The review by the facility administrator may be conducted via electronic means.

2. The resident shall be notified in writing of the results immediately thereafter.

E. Report retention. If the resident is found guilty of the rule violation, a copy of the disciplinary report shall be placed in the case record. If a resident is found not guilty of the alleged rule violation, the disciplinary report shall be removed from the resident's case record and shall be maintained as required by 6VAC35-101-330 (maintenance of residents' records).

15. 6 VAC 35-101-1090 provides:

A. Physical restraint shall be used as a last resort only after less restrictive interventions have failed or to control residents whose behavior poses a risk to the safety of the resident, others, or the public.

1. Staff shall use the least force deemed reasonable to be necessary to eliminate the risk or to maintain security and order and shall never use physical restraint as punishment or with the intent to inflict injury.

2. Staff may physically restrain a resident only after less restrictive behavior interventions have failed or when failure to restrain would result in harm to the resident or others.

3. Physical restraint may be implemented, monitored, and discontinued only by staff who have been trained in the proper and safe use of restraint.

4. For the purpose of this section, physical restraint shall mean the application of behavior intervention techniques involving a physical intervention to prevent an individual from moving all or part of that individual's body.

B. Written procedures shall govern the use of physical restraint and shall include:

1. The staff position who will write the report and time frame;

2. The staff position who will review the report and time frame;

3. Methods to be followed should physical restraint, less intrusive interventions, or measures permitted by other applicable state regulations prove unsuccessful in calming and moderating the resident's behavior; and

4. An administrative review of the use of physical restraints to ensure conformity with the procedures.

C. Each application of physical restraint shall be fully documented in the resident's record including:

1. Date and time of the incident;

2. Staff involved;

3. Justification for the restraint;

4. Less restrictive behavior interventions that were unsuccessfully attempted prior to using physical restraint;

5. Duration;

6. Description of method or methods of physical restraint techniques used;

7. Signature of the person completing the report and date; and

8. Reviewer's signature and date.

16. 6 VAC 35-101-1100 provides:

A. Written procedures shall govern how and when residents may be confined to a locked room for both segregation and isolation purposes.

B. Whenever a resident is confined to a locked room, including but not limited to being placed in isolation, staff shall check the resident visually at least every 30 minutes and more often if indicated by the circumstances. Staff shall conduct a check at least every 15 minutes in accordance with approved procedures when the resident is on suicide watch.

C. Residents who are confined to a room, including but not limited to being placed in isolation, shall be afforded the opportunity for at least one hour of physical exercise, outside of the locked room, every calendar day unless the resident's behavior or other circumstances justify an exception. The reasons for any such exception shall be documented.

D. If a resident is confined to his room for any reason for more than 24 hours, the facility administrator or designee shall be notified.

E. If the confinement extends to more than 72 hours, the (i) confinement and (ii) steps being taken or planned to resolve the situation shall be immediately reported to the director or designee. If this report is made verbally, it shall be followed immediately with a written, faxed, or secure email report in accordance with written procedures.

F. Room confinement, including isolation or administrative confinement, shall not exceed five consecutive days except when ordered by a medical provider.

G. When confined to a room, the resident shall have a means of communication with staff, either verbally or electronically.

H. The facility administrator or designee shall make personal contact with each resident who is confined to a locked room, including being placed in isolation, each day of confinement.

I. During isolation, the resident is not permitted to participate in activities with other residents and all activities are restricted, with the exception of (i) eating, (ii) sleeping, (iii) personal hygiene, (iv) reading, and (v) writing.

17. 6 VAC 35-101-1110 provides:

A. Residents shall be placed in administrative confinement only by the facility administrator or designee, as a last resort for the safety of the

residents. The reason for such placement shall be documented in the resident's case record.

B. Residents who are placed in administrative confinement shall be housed no more than two to a room. Single occupancy rooms shall be available when indicated for residents with severe medical disabilities, residents suffering from serious mental illness, sexual predators, residents who are likely to be exploited or victimized by others, and residents who have other special needs for single housing.

C. Residents who are placed in administrative confinement shall be afforded basic living conditions approximating those available to the facility's general population and, as provided for in approved procedures, shall be afforded privileges similar to those of the general population. Exceptions may be made in accordance with established procedures when justified by clear and substantiated evidence. If residents who are placed in administrative confinement are confined to a room or placed in isolation, the provisions of 6VAC35-101-1100 (room confinement and isolation) and 6VAC35-1140 (monitoring restrained residents) apply, as applicable.

D. Administrative confinement means the placement of a resident in a special housing unit or designated individual cell that is reserved for special management of residents for purposes of protective custody or the special management of residents whose behavior presents a serious threat to the safety and security of the facility, staff, general population, or themselves. For the purpose of this section, protective custody shall mean the separation of a resident from the general population for protection from or for other residents for reasons of health or safety.

18. 6 VAC 35-101-1130 provides:

A. Written procedure shall govern the use of mechanical restraints. Such procedures shall be approved by the department and shall specify:

1. The conditions under which handcuffs, waist chains, leg irons, disposable plastic cuffs, leather restraints, and a mobile restraint chair may be used;

2. That the facility administrator or designee shall be notified immediately upon using restraints in an emergency situation;

3. That restraints shall never be applied as punishment or a sanction;

4. That residents shall not be restrained to a fixed object or restrained in an unnatural position;

5. That each use of mechanical restraints, except when used to transport a resident or during video court hearing proceedings, shall be recorded in the resident's case file or in a central log book; and

6. That a written record of routine and emergency distribution of restraint equipment be maintained.

B. Written procedure shall provide that (i) all staff who are authorized to use restraints shall receive training in such use, including how to check the resident's circulation and how to check for injuries and (ii) only trained staff shall use restraints.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JENNY LISETTE FLORES, et al, Plaintiffs

v.

JANET RENO, Attorney General of the United States, et al., Defendants

Case No. CV 85-4544-RJK(Px)

STIPULATED SETTLEMENT AGREEMENT

WHEREAS, Plaintiffs have filed this action against Defendants, challenging, *inter alia*, the constitutionality of Defendants' policies, practices and regulations regarding the detention and release of unaccompanied minors taken into the custody of the Immigration and Naturalization Service (INS) in the Western Region; and

WHEREAS, the district court has certified this case as a class action on behalf of all minors apprehended by the INS in the Western Region of the United States; and

WHEREAS, this litigation has been pending for nine (9) years, all parties have conducted extensive discovery, and the United States Supreme Court has upheld the constitutionality of the challenged INS regulations on their face and has remanded for further proceedings consistent with its opinion; and

WHEREAS, on November 30, 1987, the parties reached a settlement agreement requiring that minors in INS custody in the Western Region be housed in facilities meeting certain standards, including state standards for the housing and care of dependent children, and Plaintiffs' motion to enforce compliance with that settlement is currently pending before the court; and

WHEREAS, a trial in this case would be complex, lengthy and costly to all parties concerned, and the decision of the district court would be subject to appeal by the losing parties with the final outcome uncertain; and

WHEREAS, the parties believe that settlement of this action is in their best interests and best serves the interests of justice by avoiding a complex, lengthy and costly trial, and subsequent appeals which could last several more years;

NOW, THEREFORE, Plaintiffs and Defendants enter into this Stipulated Settlement Agreement (the Agreement), stipulate that it constitutes a full and complete resolution of the issues raised in this action, and agree to the following:

I DEFINITIONS

As used throughout this Agreement the following definitions shall apply:

1. The term "party" or "parties" shall apply to Defendants and Plaintiffs. As the term applies to Defendants, it shall include their agents, employees, contractors and/or successors in office. As the term applies to Plaintiffs, it shall include all class members.

2. The term "Plaintiff" or "Plaintiffs" shall apply to the named plaintiffs and all class members.

3. The term "class member" or "class members" shall apply to the persons defined in Paragraph 10 below.

4. The term "minor" shall apply to any person under the age of eighteen (18) years who is detained in the legal custody of the INS. This Agreement shall cease to apply to any person who has reached the age of eighteen years. The term "minor" shall not include an emancipated minor or an individual who has been incarcerated due to a conviction for a criminal offense as an adult. The INS shall treat all persons who are under the age of eighteen but not included within the definition of "minor" as adults for all purposes, including release on bond or recognizance.

5. The term "emancipated minor" shall refer to any minor who has been determined to be emancipated in an appropriate state judicial proceeding.

6. The term "licensed program" shall refer to any program, agency or organization that is licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children, including a program operating group homes, foster homes, or facilities for special needs minors. A licensed program must also meet those standards for licensed programs set forth in Exhibit 1 attached hereto. All homes and facilities operated by licensed programs, including facilities for special needs minors, shall be non-secure as required under state law; provided, however, that a facility for special needs minors may maintain that level of security permitted under state law which is necessary for the protection of a minor or others in appropriate circumstances, *e.g.*, cases in which a minor has drug or alcohol problems or is mentally ill. The INS shall make reasonable efforts to provide licensed placements in those geographical areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.

7. The term "special needs minor" shall refer to a minor whose mental and/or physical condition requires special services and treatment by staff. A minor may have special needs due to drug or alcohol abuse, serious emotional disturbance, mental illness or retardation, or a physical condition or chronic illness that requires special services or treatment. A minor who has suffered serious neglect or abuse may be considered a minor with special needs if the minor requires special services or treatment as a result of the neglect or abuse. The INS shall assess minors to determine if they have special needs and, if so, shall place such minors, whenever possible, in licensed programs in which the INS places children without special needs, but which provide services and treatment for such special needs.

8. The term "medium security facility" shall refer to a facility that is operated by a program, agency or organization licensed by an appropriate State agency and that meets those standards set forth in Exhibit 1 attached hereto. A medium security facility is designed for minors who require close supervision but do not need placement in juvenile correctional facilities. It provides 24-hour awake supervision, custody, care, and treatment. It maintains stricter security measures, such as intensive staff supervision, than a facility operated by a licensed program in order to control problem behavior and to prevent escape. Such a facility may have a secure perimeter but shall not be equipped internally with major restraining construction or procedures typically associated with correctional facilities.

II SCOPE OF SETTLEMENT, EFFECTIVE DATE, AND PUBLICATION

9. This Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS and shall supersede all previous INS policies that are inconsistent with the terms of this Agreement. This Agreement shall become effective upon final court approval, except that those terms of this Agreement regarding placement pursuant to Paragraph 19 shall not become effective until all contracts under the Program Announcement referenced in Paragraph 20 below are negotiated and implemented. The INS shall make its best efforts to execute these contracts within 120 days after the court's final approval of this Agreement. However, the INS will make reasonable efforts to comply with Paragraph 19 prior to full implementation of all such contracts. Once all contracts under the Program Announcement referenced in Paragraph 20 have been implemented, this Agreement shall supersede the agreement entitled Memorandum of Understanding Re Compromise of Class Action: Conditions of Detention (hereinafter "MOU"), entered into by and between the Plaintiffs and Defendants and filed with the United States District Court for the Central District of California on November 30, 1987, and the MOU shall thereafter be null and void. However, Plaintiffs shall not institute any legal action for enforcement of the MOU for a six (6) month period commencing with the final district court approval of this Agreement, except that Plaintiffs may institute enforcement proceedings if the Defendants have engaged in serious violations of the MOU that have caused irreparable harm to a class member for which injunctive relief would be appropriate. Within 120 days of the final district court approval of this Agreement, the INS shall

initiate action to publish the relevant and substantive terms of this Agreement as a Service regulation. The final regulations shall not be inconsistent with the terms of this Agreement. Within 30 days of final court approval of this Agreement, the INS shall distribute to all INS field offices and sub-offices instructions regarding the processing, treatment, and placement of juveniles. Those instructions shall include, but may not be limited to, the provisions summarizing the terms of the Agreement attached hereto as Exhibit 2.

III CLASS DEFINITION

10. The certified class in this action shall be defined as follows: "All minors who are detained in the legal custody of the INS."

IV STATEMENTS OF GENERAL APPLICABILITY

11. The INS treats, and shall continue to treat, all minors in its custody with dignity, respect and special concern for their particular vulnerability as minors. The INS shall place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with its interests to ensure the minor's timely appearance before the INS and the immigration courts and to protect the minor's well-being and that of others. Nothing herein shall require the INS to release a minor to any person or agency whom the INS has reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.

V PROCEDURES AND TEMPORARY PLACEMENT FOLLOWING ARREST

12. Whenever the INS takes a minor into custody, it shall expeditiously process the minor and shall provide the minor with a notice of rights, including the right to a bond redetermination hearing if applicable. Following arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors. Facilities will provide access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor. The INS will segregate unaccompanied minors from unrelated adults. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours. If there is no one to whom the INS may release the minor pursuant to Paragraph 14, and no appropriate licensed program is immediately available for placement pursuant to Paragraph 19, the minor may be placed in an INS detention facility, or other INS-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility. However, minors shall be separated from delinquent offenders. Every effort must be taken to ensure that the safety and well-being of the minors detained in these facilities are satisfactorily provided for by the staff. The INS will transfer a minor from a placement under this paragraph to a placement under Paragraph 19 (i) within three (3) days, if the minor

was apprehended in an INS district in which a licensed program is located and has space available; or (ii) within five (5) days in all other cases; except:

1. as otherwise provided under Paragraph 13 or Paragraph 21;

2. as otherwise required by any court decree or court-approved settlement;

3. in the event of an emergency or influx of minors into the United States, in which case the INS shall place all minors pursuant to Paragraph 19 as expeditiously as possible; or

4. where individuals must be transported from remote areas for processing or speak unusual languages such that the INS must locate interpreters in order to complete processing, in which case the INS shall place all such minors pursuant to Paragraph 19 within five (5) business days.

B. For purposes of this Paragraph, the term "emergency" shall be defined as any act or event that prevents the placement of minors pursuant to Paragraph 19 within the time frame provided. Such emergencies include natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors). The term "influx of minors into the United States" shall be defined as those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program under Paragraph 19, including those who have been so placed or are awaiting such placement.

C. In preparation for an "emergency" or "influx," as described in Subparagraph B, the INS shall have a written plan that describes the reasonable efforts that it will take to place all minors as expeditiously as possible. This plan shall include the identification of 80 beds that are potentially available for INS placements and that are licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children. The plan, without identification of the additional beds available, is attached as Exhibit 3. The INS shall not be obligated to fund these additional beds on an ongoing basis. The INS shall update this listing of additional beds on a quarterly basis and provide Plaintiffs' counsel with a copy of this listing.

13. If a reasonable person would conclude that an alien detained by the INS is an adult despite his claims to be a minor, the INS shall treat the person as an adult for all purposes, including confinement and release on bond or recognizance. The INS may require the alien to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If the INS subsequently determines that such an individual is a minor, he or she will be treated as a minor in accordance with this Agreement for all purposes.

VI GENERAL POLICY FAVORING RELEASE

14. Where the INS determines that the detention of the minor is not required either to secure his or her timely appearance before the INS or the immigration court, or to ensure the minor's safety or that of others, the INS shall release a minor from its custody without unnecessary delay, in the following order of preference, to:

A. a parent;
B. a legal guardian;
C. an adult relative (brother, sister, aunt, uncle, or grandparent);
D. an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer or (ii) such other document(s) that establish(es) to the satisfaction of the INS, in its discretion, the affiant's paternity or guardianship;
E. a licensed program willing to accept legal custody; or
F. an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

15. Before a minor is released from INS custody pursuant to Paragraph 14 above, the custodian must execute an Affidavit of Support (Form I-134) and an agreement to:

A. provide for the minor's physical, mental, and financial well-being;

B. ensure the minor's presence at all future proceedings before the INS and the immigration court;

C. notify the INS of any change of address within five (5) days following a move;

D. in the case of custodians other than parents or legal guardians, not transfer custody of the minor to another party without the prior written permission of the District Director;

E. notify the INS at least five days prior to the custodian's departing the United States of such departure, whether the departure is voluntary or pursuant to a grant of voluntary departure or order of deportation; and

F. if dependency proceedings involving the minor are initiated, notify the INS of the initiation of a such proceedings and the dependency court of any immigration proceedings pending against the minor.

In the event of an emergency, a custodian may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 72 hours. For purposes of this Paragraph, examples of an "emergency" shall include the serious illness of the custodian, destruction of the home, etc. In all cases where the custodian in writing seeks written permission for a transfer, the District Director shall promptly respond to the request.

16. The INS may terminate the custody arrangements and assume legal custody of any minor whose custodian fails to comply with the agreement required under Paragraph 15. The INS, however, shall not terminate the custody arrangements for minor violations of that part of the custodial agreement outlined at Subparagraph 15.C above.

17. A positive suitability assessment may be required prior to release to any individual or program pursuant to Paragraph 14. A suitability assessment may include such components as an investigation of the living conditions in which the minor would be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit. Any such assessment should also take into consideration the wishes and concerns of the minor.

18. Upon taking a minor into custody, the INS, or the licensed program in which the minor is placed, shall make and record the prompt and continuous efforts on its part toward family reunification and the release of the minor pursuant to Paragraph 14 above. Such efforts at family reunification shall continue so long as the minor is in INS custody.

VII INS CUSTODY

19. In any case in which the INS does not release a minor pursuant to Paragraph 14, the minor shall remain in INS legal custody. Except as provided in Paragraphs 12 or 21, such minor shall be placed temporarily in a licensed program until such time as release can be effected in accordance with Paragraph 14 above or until the minor's immigration proceedings are concluded, whichever occurs earlier. All minors placed in such a licensed program remain in the legal custody of the INS and may only be transferred or released under the authority of the INS; provided, however, that in the event of an emergency a licensed program may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 8 hours.

20. Within 60 days of final court approval of this Agreement, the INS shall authorize the United States Department of Justice Community Relations Service to publish in the Commerce Business Daily and/or

the Federal Register a Program Announcement to solicit proposals for the care of 100 minors in licensed programs.

21. A minor may be held in or transferred to a suitable State or county juvenile detention facility or a secure INS detention facility, or INS-contracted facility, having separate accommodations for minors whenever the District Director or Chief Patrol Agent determines that the minor:

A. has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act; provided, however, that this provision shall not apply to any minor whose offense(s) fall(s) within either of the following categories:

i. Isolated offenses that (1) were not within a pattern or practice of criminal activity and (2) did not involve violence against a person or the use or carrying of a weapon (Examples: breaking and entering, vandalism, DUI, etc. This list is not exhaustive.);

ii. Petty offenses, which are not considered grounds for stricter means of detention in any case (Examples: shoplifting, joy riding, disturbing the peace, etc. This list is not exhaustive.);

As used in this paragraph, "chargeable" means that the INS has probable cause to believe that the individual has committed a specified offense;

B. has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;

C. has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc. This list is not exhaustive.);

D. is an escape-risk; or

E. must be held in a secure facility for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.

22. The term "escape-risk" means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to, whether:

A. the minor is currently under a final order of deportation or exclusion;

B. the minor's immigration history includes: a prior breach of a bond; a failure to appear before the INS or the immigration court; evidence that the minor is indebted to organized smugglers for his transport; or a voluntary departure or a previous removal from the United States pursuant to a final order of deportation or exclusion;

C. the minor has previously absconded or attempted to abscond from INS custody.

23. The INS will not place a minor in a secure facility pursuant to Paragraph 21 if there are less restrictive alternatives that are available and appropriate in the circumstances, such as transfer to (a) a medium security facility which would provide intensive staff supervision and counseling services or (b) another licensed program. All determinations to place a minor in a secure facility will be reviewed and approved by the regional juvenile coordinator.

24A. A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination form that he or she refuses such a hearing.

B. Any minor who disagrees with the INS's determination to place that minor in a particular type of facility, or who asserts that the licensed program in which he or she has been placed does not comply with the standards set forth in Exhibit 1 attached hereto, may seek judicial review in any United States District Court with jurisdiction and venue over the matter to challenge that placement determination or to allege noncompliance with the standards set forth in Exhibit 1. In such an action, the United States District Court shall be limited to entering an order solely affecting the individual claims of the minor bringing the action.

C. In order to permit judicial review of Defendants' placement decisions as provided in this Agreement, Defendants shall provide minors not placed in licensed programs with a notice of the reasons for housing the minor in a detention or medium security facility. With respect to placement decisions reviewed under this paragraph, the standard of review for the INS's exercise of its discretion shall be the abuse of discretion standard of review. With respect to all other matters for which this paragraph provides judicial review, the standard of review shall be *de novo* review.

D. The INS shall promptly provide each minor not released with (a) INS Form I-770; (b) an explanation of the right of judicial review as set out in Exhibit 6, and (c) the list of free legal services providers compiled pursuant to INS regulation (unless previously given to the minor).

E. Exhausting the procedures established in Paragraph 37 of this Agreement shall not be a precondition to the bringing of an action under this paragraph in any United District Court. Prior to initiating any such action, however, the minor and/or the minors' attorney shall confer telephonically or in person with the United States Attorney's office in the judicial district where the action is to be filed, in an effort to informally resolve the minor's complaints without the need of federal court intervention.

VIII TRANSPORTATION OF MINORS

25. Unaccompanied minors arrested or taken into custody by the INS should not be transported by the INS in vehicles with detained adults except

A. when being transported from the place of arrest or apprehension to an INS office, or

B. where separate transportation would be otherwise impractical.

When transported together pursuant to Clause (B) minors shall be separated from adults. The INS shall take necessary precautions for the protection of the well-being of such minors when transported with adults.

26. The INS shall assist without undue delay in making transportation arrangements to the INS office nearest the location of the person or facility to whom a minor is to be released pursuant to Paragraph 14. The INS may, in its discretion, provide transportation to minors.

IX TRANSFER OF MINORS

27. Whenever a minor is transferred from one placement to another, the minor shall be transferred with all of his or her possessions and legal papers; provided, however, that if the minor's possessions exceed the amount permitted normally by the carrier in use, the possessions will be shipped to the minor in a timely manner. No minor who is represented by counsel shall be transferred without advance notice to such counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or where counsel has waived such notice, in which cases notice shall be provided to counsel within 24 hours following transfer.

X MONITORING AND REPORTS

28A. An INS Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation shall monitor compliance with the terms of this Agreement and shall maintain an up-to-date

record of all minors who are placed in proceedings and remain in INS custody for longer than 72 hours. Statistical information on such minors shall be collected weekly from all INS district offices and Border Patrol stations. Statistical information will include at least the following: (1) biographical information such as each minor's name, date of birth, and country of birth, (2) date placed in INS custody, (3) each date placed, removed or released, (4) to whom and where placed, transferred, removed or released, (5) immigration status, and (6) hearing dates. The INS, through the Juvenile Coordinator, shall also collect information regarding the reasons for every placement of a minor in a detention facility or medium security facility.

B. Should Plaintiffs' counsel have reasonable cause to believe that a minor in INS legal custody should have been released pursuant to Paragraph 14, Plaintiffs' counsel may contact the Juvenile Coordinator to request that the Coordinator investigate the case and inform Plaintiffs' counsel of the reasons why the minor has not been released.

29. On a semi-annual basis, until two years after the court determines, pursuant to Paragraph 31, that the INS has achieved substantial compliance with the terms of this Agreement, the INS shall provide to Plaintiffs' counsel the information collected pursuant to Paragraph 28, as permitted by law, and each INS policy or instruction issued to INS employees regarding the implementation of this Agreement. In addition, Plaintiffs' counsel shall have the opportunity to submit questions, on a semi-annual basis, to the Juvenile Coordinator in the Office of the Assistant Commissioner for Detention and Deportation with regard to the implementation of this Agreement and the information provided to Plaintiffs' counsel during the preceding six-month period pursuant to Paragraph 28. Plaintiffs' counsel shall present such questions either orally or in writing, at the option of the Juvenile Coordinator. The Juvenile Coordinator shall furnish responses, either orally or in writing at the option of Plaintiffs' counsel, within 30 days of receipt.

30. On an annual basis, commencing one year after final court approval of this Agreement, the INS Juvenile Coordinator shall review, assess, and report to the court regarding compliance with the terms of this Agreement. The Coordinator shall file these reports with the court and provide copies to the parties, including the final report referenced in Paragraph 35, so that they can submit comments on the report to the court. In each report, the Coordinator shall state to the court whether or not the INS is in substantial compliance with the terms of this Agreement, and, if the INS is not in substantial compliance, explain the reasons for the lack of compliance. The Coordinator shall continue to report on an annual basis until three years after the court determines that the INS has achieved substantial compliance with the terms of this Agreement.

31. One year after the court's approval of this Agreement, the Defendants may ask the court to determine whether the INS has achieved substantial compliance with the terms of this Agreement.

XI ATTORNEY-CLIENT VISITS

32. A. Plaintiffs' counsel are entitled to attorney-client visits with class members even though they may not have the names of class members who are housed at a particular location. All visits shall occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff shall provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs' counsel, Plaintiffs' counsel must file a notice of appearance with the INS prior to any attorney-client meeting. Plaintiffs' counsel may limit any such notice of appearance to representation of the minor in connection with this Agreement. Plaintiffs' counsel must submit a copy of the notice of appearance by hand or by mail to the local INS juvenile coordinator and a copy by hand to the staff of the facility.

B. Every six months, Plaintiffs' counsel shall provide the INS with a list of those attorneys who may make such attorney-client visits, as Plaintiffs' counsel, to minors during the following six month period. Attorney-client visits may also be conducted by any staff attorney employed by the Center for Human Rights & Constitutional Law in Los Angeles, California or the National Center for Youth Law in San Francisco, California, provided that such attorney presents credentials establishing his or her employment prior to any visit.

C. Agreements for the placement of minor in non-INS facilities shall permit attorney-client visits, including by class counsel in this case.

D. Nothing in Paragraph 32 shall affect a minor's right to refuse to meet with Plaintiffs' counsel. Further, the minor's parent or legal guardian may deny Plaintiffs' counsel permission to meet with the minor.

XII FACILITY VISITS

33. In addition to the attorney-client visits permitted pursuant to Paragraph 32, Plaintiffs' counsel may request access to any licensed program's facility in which a minor has been placed pursuant to Paragraph 19 or to any medium security facility or detention facility in which a minor has been placed pursuant to Paragraphs 21 or 23. Plaintiffs' counsel shall submit a request to visit a facility under this paragraph to the INS district juvenile coordinator who will provide reasonable assistance to Plaintiffs' counsel by conveying the request to the facility's staff and coordinating the visit. The rules and procedures to be followed in connection with any visit approved by a facility under this paragraph are set forth in Exhibit 4 attached, except as may be otherwise agreed by Plaintiffs' counsel and the facility's staff. In all visits to any facility pursuant to this Agreement, Plaintiffs' counsel and their associated experts shall treat minors and staff with courtesy and dignity and shall not disrupt the normal functioning of the facility.

XIII TRAINING

34. Within 120 days of final court approval of this Agreement, the INS shall provide appropriate guidance and training for designated INS employees regarding the terms of this Agreement. The INS shall develop written and/or audio or video materials for such training. Copies of such written and/or audio or video training materials shall be made available to Plaintiffs' counsel when such training materials are sent to the field, or to the extent practicable, prior to that time.

XIV DISMISSAL

35. After the court has determined that the INS is in substantial compliance with this Agreement and the Coordinator has filed a final report, the court, without further notice, shall dismiss this action. Until such dismissal, the court shall retain jurisdiction over this action.

XV RESERVATION OF RIGHTS

36. Nothing in this agreement shall limit the rights, if any, of individual class members to preserve issues for judicial review in the appeal of an individual case or for class members to exercise any independent rights they may otherwise have.

XVI NOTICE AND DISPUTE RESOLUTION

37. This paragraph provides for the enforcement, in this District Court, of the provisions of this Agreement except for claims brought under Paragraph 24. The parties shall meet telephonically or in person to discuss a complete or partial repudiation of this Agreement or any alleged non-compliance with the terms of the Agreement, prior to bringing any individual or class action to enforce this Agreement. Notice of a claim that defendants have violated the terms of this Agreement shall be served on plaintiffs addressed to:

CENTER FOR HUMAN RIGHTS & CONSTITUTIONAL LAW
Carlos Holguín
Peter A. Schey
256 South Occidental Boulevard
Los Angeles, CA 90057

NATIONAL CENTER FOR YOUTH LAW
Alice Bussiere
James Morales
114 Sansome Street, Suite 905
San Francisco, CA 94104

and on Defendants addressed to:

Michael Johnson
Assistant United States Attorney
300 N. Los Angeles St., Rm. 7516
Los Angeles, CA 90012

Allen Hausman
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

XVII PUBLICITY

38. Plaintiffs and Defendants shall hold a joint press conference to announce this Agreement. The INS shall send copies of this Agreement to social service and voluntary agencies agreed upon by the parties, as set forth in Exhibit 5 attached. The parties shall pursue such other public dissemination of information regarding this Agreement as the parties shall agree.

XVIII ATTORNEYS FEES AND COSTS

39. Within 60 days of final court approval of this Agreement, Defendants shall pay to Plaintiffs the total sum of $_____, in full settlement of all attorneys' fees and costs in this case.

XIX TERMINATION

40. All terms of this Agreement shall terminate the earlier of five years from the date of final court approval of this Agreement or three years after the court determines that the INS is in substantial compliance with the Agreement, except the following: the INS shall continue to house the general population of minors in INS custody in facilities that are state-licensed for the care of dependent minors.

XX REPRESENTATIONS AND WARRANTY

41. Counsel for the respective parties, on behalf of themselves and their clients, represent that they know of nothing in this Agreement that exceeds the legal authority of the parties or is in violation of any law. Defendants' counsel represent and warrant that they are fully authorized and empowered to enter into this Agreement on behalf of the Attorney General, the United States Department of Justice, and the Immigration and Naturalization Service, and acknowledge that Plaintiffs enter into this Agreement in reliance on such representation. Plaintiffs' counsel represent and warrant that they are fully authorized and empowered to enter into this Agreement on behalf of the Plaintiffs, and acknowledge that Defendants enter into this Agreement in reliance on such representation. The undersigned, by their signatures on

behalf of the Plaintiffs and Defendants, warrant that upon execution of this Agreement in their representative capacities, their principals, agents, and successors of such principals and agents shall be fully and unequivocally bound hereunder to the full extent authorized by law.

EXHIBIT 1
Minimum Standards for Licensed Programs

A. Licensed programs shall comply with all applicable state child welfare laws and regulations and all state and local building, fire, health and safety codes and shall provide or arrange for the following services for each minor in its care:

1. Proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items.

2. Appropriate routine medical and dental care, family planning services, and emergency health care services, including a complete medical examination (including screening for infectious disease) within 48 hours of admission, excluding weekends and holidays, unless the minor was recently examined at another facility; appropriate immunizations in accordance with the U.S. Public Health Service (PHS), Center for Disease Control; administration of prescribed medication and special diets; appropriate mental health interventions when necessary.

3. An individualized needs assessment which shall include: (a) various initial intake forms; (b) essential data relating to the identification and history of the minor and family; (c) identification of the minors' special needs including any specific problem(s) which appear to require immediate intervention; (d) an educational assessment and plan; (e) an assessment of family relationships and interaction with adults, peers and authority figures; (f) a statement of religious preference and practice; (g) an assessment of the minor's personal goals, strengths and weaknesses; and (h) identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in family reunification.

4. Educational services appropriate to the minor's level of development, and communication skills in a structured classroom setting, Monday through Friday, which concentrates primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas should include Science, Social Studies, Math, Reading, Writing and Physical Education. The program shall provide minors with

appropriate reading materials in languages other than English for use during the minor's leisure time.

5. Activities according to a recreation and leisure time plan which shall include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (this should not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session.

6. At least one (1) individual counseling session per week conducted by trained social work staff with the specific objectives of reviewing the minor's progress, establishing new short term objectives, and addressing both the developmental and crisis-related needs of each minor.

7. Group counseling sessions at least twice a week. This is usually an informal process and takes place with all the minors present. It is a time when new minors are given the opportunity to get acquainted with the staff, other children, and the rules of the program. It is an open forum where everyone gets a chance to speak. Daily program management is discussed and decisions are made about recreational activities, etc. It is a time for staff and minors to discuss whatever is on their minds and to resolve problems.

8. Acculturation and adaptation services which include information regarding the development of social and inter-personal skills which contribute to those abilities necessary to live independently and responsibly.

9. Upon admission, a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations and the availability of legal assistance.

10. Whenever possible, access to religious services of the minor's choice.

11. Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation. The staff shall respect the minor's privacy while reasonably preventing the unauthorized release of the minor.

12. A reasonable right to privacy, which shall include the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house rules and regulations; and (e) receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

13. Family reunification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the minor.

14. Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the government, the right to a deportation or exclusion hearing before an immigration judge, the right to apply for political asylum or to request voluntary departure in lieu of deportation.

B. Service delivery is to be accomplished in a manner which is sensitive to the age, culture, native language and the complex needs of each minor.

C. Program rules and discipline standards shall be formulated with consideration for the range of ages and maturity in the program and shall be culturally sensitive to the needs of alien minors. Minors shall not be subjected to corporal punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping. Any sanctions employed shall not: (1) adversely affect either a minor's health, or physical or psychological well-being; or (2) deny minors regular meals, sufficient sleep, exercise, medical care, correspondence privileges, or legal assistance.

D. A comprehensive and realistic individual plan for the care of each minor must be developed in accordance with the minor's needs as determined by the individualized need assessment. Individual plans shall be implemented and closely coordinated through an operative case management system.

E. Programs shall develop, maintain and safeguard individual client case records. Agencies and organizations are required to develop a system of accountability which preserves the confidentiality of client information and protects the records from unauthorized use or disclosure.

F. Programs shall maintain adequate records and make regular reports as required by the INS that permit the INS to monitor and enforce this order and other requirements and standards as the INS may determine are in the best interests of the minors.

Exhibit 2
Instructions to Service Officers re:
Processing, Treatment, and Placement of Minors

These instructions are to advise Service officers of INS policy regarding the way in which minors in INS custody are processed, housed and released. These instructions are applicable nationwide and supersede all prior inconsistent instructions regarding minors.

(a) Minors. A minor is a person under the age of eighteen years. However, individuals who have been "emancipated" by a state court or convicted and incarcerated for a criminal offense as an adult are not considered minors. Such individuals must be treated as adults for all purposes, including confinement and release on bond.

Similarly, if a reasonable person would conclude that an individual is an adult despite his claims to be a minor, the INS shall treat such person as an adult for all purposes, including confinement and release on bond or recognizance. The INS may require such an individual to submit to a medical or dental examination conducted by a medical professional or to submit to other appropriate procedures to verify his or her age. If the INS subsequently determines that such an individual is a minor, he or she will be treated as a minor for all purposes.

(b) General policy. The INS treates and shall continued to treat minors with dignity, respect and special concern for their particular vulnerability. INS policy is to place each detained minor in the least restrictive setting appropriate to the minor's age and special needs, provided that such setting is consistent with the need to ensure the minor's timely appearance and to protect the minor's well-being and that of others. INS officers are not required to release a minor to any person or agency whom they have reason to believe may harm or neglect the minor or fail to present him or her before the INS or the immigration courts when requested to do so.

(c) Processing. The INS will expeditiously process minors and will provide them a Form I-770 notice of rights, including the right to a bond redetermination hearing, if applicable.

Following arrest, the INS will hold minors in a facility that is safe and sanitary and that is consistent with the INS's concern for the particular vulnerability of minors. Such facilities will have access to toilets and sinks, drinking water and food as appropriate, medical assistance if the minor is in need of emergency services, adequate temperature control and ventilation, adequate supervision to protect minors from others, and contact with family members who were arrested with the minor. The INS will separate unaccompanied minors from unrelated adults whenever possible. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours.

If the minor cannot be immediately released, and no licensed program (described below) is available to care for him, he should be placed in an INS or INS-contract facility that has separate accommodations for minors, or in a State or county juvenile detention facility that separates minors in INS custody from delinquent offenders. The INS will make every effort to ensure the safety and well-being of juveniles placed in these facilities.

(d) Release. The INS will release minors from its custody without unnecessary delay, unless detention of a juvenile is required to secure her timely appearance or to ensure the minor's safety or that of others. Minors shall be released in the following order of preference, to:

(i) a parent;

(ii) a legal guardian;

(iii) an adult relative (brother, sister, aunt, uncle, or grandparent);

(iv) an adult individual or entity designated by the parent or legal guardian as capable and willing to care for the minor's well-being in (i) a declaration signed under penalty of perjury before an immigration or consular officer, or (ii) such other documentation that establishes to the satisfaction of the INS, in its discretion, that the individual designating the individual or entity as the minor's custodian is in fact the minor's parent or guardian;

(v) a state-licensed juvenile shelter, group home, or foster home willing to accept legal custody; or

(vi) an adult individual or entity seeking custody, in the discretion of the INS, when it appears that there is no other likely alternative to long term detention and family reunification does not appear to be a reasonable possibility.

(e) Certification of custodian. Before a minor is released, the custodian must execute an Affidavit of Support (Form I-134) and an agreement to:

(i) provide for the minor's physical, mental, and financial well-being;

(ii) ensure the minor's presence at all future proceedings before the INS and the immigration court;

(iii) notify the INS of any change of address within five (5) days following a move;

(iv) if the custodian is not a parent or legal guardian, not transfer custody of the minor to another party without the prior written permission of the District Director, except in the event of an emergency;

(v) notify the INS at least five days prior to the custodian's departing the United States of such departure, whether the departure is voluntary or pursuant to a grant of voluntary departure or order of deportation; and

(vi) if dependency proceedings involving the minor are initiated, notify the INS of the initiation of a such proceedings and the dependency court of any deportation proceedings pending against the minor.

In an emergency, a custodian may transfer temporary physical custody of a minor prior to securing permission from the INS, but must notify the INS of the transfer as soon as is practicable, and in all cases within 72 hours. Examples of an "emergency" include the serious illness of the custodian, destruction of the home, etc. In all cases where the custodian seeks written permission for a transfer, the District Director shall promptly respond to the request.

The INS may terminate the custody arrangements and assume legal custody of any minor whose custodian fails to comply with the agreement. However, custody arrangements will not be terminated for minor violations of the custodian's obligation to notify the INS of any change of address within five days following a move.

(f) Suitability assessment. An INS officer may require a positive suitability assessment prior to releasing a minor to any individual or program. A suitability assessment may include an investigation of the living conditions in which the minor is to be placed and the standard of care he would receive, verification of identity and employment of the individuals offering support, interviews of members of the household, and a home visit. The assessment will also take into consideration the wishes and concerns of the minor.

(g) Family reunification. Upon taking a minor into custody, the INS, or the licensed program in which the minor is placed, will promptly attempt to reunite the minor with his or her family to permit the release of the minor under Paragraph (d) above. Such efforts at family reunification will continue so long as the minor is in INS or licensed program custody and will be recorded by the INS or the licensed program in which the minor is placed.

(h) Placement in licensed programs. A "licensed program" is any program, agency or organization licensed by an appropriate state agency to provide residential group, or foster care services for dependent children, including a program operating group homes, foster homes or facilities for special needs minors. Exhibit 1 of the Flores v. Reno Settlement Agreement describes the standards required of licensed programs. Juveniles who remain in INS custody must be placed in a licensed program within three days if the minor was apprehended in an INS district in which a licensed program is located and has space available, or within five days in all other cases, except when:

(i) the minor is an escape risk or delinquent, as defined in Paragraph (l) below;

(ii) a court decree or court-approved settlement requires otherwise;

(iii) an emergency or influx of minors into the United States prevents compliance, in which case all minors should be placed in licensed programs as expeditiously as possible; or

(iv) where the minor must be transported from remote areas for processing or speaks an unusual language such that a special interpreter is required to process the minor, in which case the minor must be placed in a licensed program within five business days.

(i) Secure and supervised detention. A minor may be held in or transferred to a State or county juvenile detention facility or in a secure INS facility or INS-contracted facility having separate accommodations for minors, whenever the District Director or Chief Patrol Agent determines that the minor -

(i) has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act, unless the minor's offense is

(a) an isolated offense not within a pattern of criminal activity which did not involve violence against a person or the use or carrying of a weapon (Examples: breaking and entering, vandalism, DUI, etc.); or

(b) a petty offense, which is not considered grounds for stricter means of detention in any case (Examples: shoplifting, joy riding, disturbing the peace, etc.);

(ii) has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;

(iii) has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc.);

(iv) is an escape-risk; or

(v) must be held in a secure facility for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.

"Chargeable" means that the INS has probable cause to believe that the individual has committed a specified offense.

The term "escape-risk" means that there is a serious risk that the minor will attempt to escape from custody. Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to, whether:

(a) the minor is currently under a final order of deportation or exclusion;

(b) the minor's immigration history includes: a prior breach of a bond; a failure to appear before the INS or the immigration court; evidence that the minor is indebted to organized smugglers for his transport; or a voluntary departure or a previous removal from the United States pursuant to a final order of deportation or exclusion;

(c) the minor has previously absconded or attempted to abscond from INS custody.

The INS will not place a minor in a State or county juvenile detention facility, secure INS detention facility, or secure INS-contracted facility if less restrictive alternatives are available and appropriate in the circumstances, such as transfer to a medium security facility that provides intensive staff supervision and counseling services or transfer to another licensed program. All determinations to place a minor in a secure facility must be reviewed and approved by the regional Juvenile Coordinator.

(j) Notice of right to bond redetermination and judicial review of placement. A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case in which he either affirmatively requests, or fails to request or refuse, such a hearing on the Notice of Custody Determination. A juvenile who is not released or placed in a licensed placement shall be provided (1) a written explanation of the right of judicial review in the form attached, and (2) the list of free legal services providers compiled pursuant to 8 C.F.R. § 292a.

(k) Transportation and transfer. Unaccompanied minors should not be transported in vehicles with detained adults except when being transported from the place of arrest or apprehension to an INS office or where separate transportation would be otherwise impractical, in which case minors shall be separated from adults. INS officers shall take all necessary precautions for the protection of minors during transportation with adults.

When a minor is to be released, the INS will assist him or her in making transportation arrangements to the INS office nearest the location of the person or facility to whom a minor is to be released. The Service may, in its discretion, provide transportation to such minors.

Whenever a minor is transferred from one placement to another, she shall be transferred with all of her possessions and legal papers; provided, however, that if the minor's possessions exceed the amount permitted normally by the carrier in use, the possessions must be shipped to the minor in a timely manner. No minor who is represented by counsel should be transferred without advance notice to counsel, except in unusual and compelling circumstances such as where the safety of the minor or others is threatened or the minor has been determined to be an escape-risk, or where counsel has waived notice, in which cases notice must be provided to counsel within 24 hours following transfer.

(l) Periodic reporting. All INS district offices and Border Patrol stations must report to the Juvenile Coordinator statistical information on minors placed in proceedings who remain in INS custody for longer than 72 hours. Information will include: (a) biographical information, including the minor's name, date of birth, and country of birth, (b) date placed in INS custody, (c) each date placed, removed or released, (d) to whom and where placed, transferred, removed or released, (e) immigration status, and (f) hearing dates. The Juvenile Coordinator must also be informed of the reasons for placing a minor in a medium security facility or detention facility as described in paragraph (i).

(m) Attorney-client visits by Plaintiffs' counsel. The INS will permit lawyers for the *Reno v. Flores* plaintiff class to visit minors even though they may not have the names of minors who are housed at a particular location. A list of Plaintiffs' counsel entitled to make attorney-client visits with minors is available from the district Juvenile Coordinator. Attorney-client visits may also be conducted by any staff attorney employed by the Center for Human Rights & Constitutional Law of Los Angeles, California, or the National Center for Youth Law of San Francisco, California, provided that such attorney presents credentials establishing his or her employment prior to any visit.

Visits must occur in accordance with generally applicable policies and procedures relating to attorney-client visits at the facility in question. Upon Plaintiffs' counsel's arrival at a facility for attorney-client visits, the facility staff must provide Plaintiffs' counsel with a list of names and alien registration numbers for the minors housed at that facility. In all instances, in order to memorialize any visit to a minor by Plaintiffs' counsel, Plaintiffs' counsel must file a notice of appearance with the INS prior to any attorney-client meeting. Plaintiffs' counsel may limit the notice of appearance to representation of the minor in connection with his placement or treatment during INS custody. Plaintiffs' counsel must submit a copy of the notice of appearance by hand or by mail to the local INS juvenile coordinator and a copy by hand to the staff of the facility.

A minor may refuse to meet with Plaintiffs' counsel. Further, the minor's parent or legal guardian may deny Plaintiffs' counsel permission to meet with the minor.

(n) Visits to licensed facilities. In addition to the attorney-client visits, Plaintiffs' counsel may request access to a licensed program's facility (described in paragraph (h)) or to a medium-security facility or detention facility (described in paragraph (i)) in which a minor has been placed. The district juvenile coordinator will convey the request to the facility's staff and coordinate the visit. The rules and procedures to be followed in connection with such visits are set out in Exhibit 4 of the *Flores v. Reno* Settlement Agreement,, unless Plaintiffs' counsel and the facility's staff agree otherwise. In all visits to any facility, Plaintiffs' counsel and their associated experts must treat minors and staff with courtesy and dignity and must not disrupt the normal functioning of the facility.

EXHIBIT 3
Contingency Plan

In the event of an emergency or influx that prevents the prompt placement of minors in licensed programs with which the Community Relations Service has contracted, INS policy is to make all reasonable efforts to place minors in licensed programs licensed by an appropriate state agency as expeditiously as possible. An emergency is an act or event, such as a natural disaster (e.g. earthquake, fire, hurricane), facility fire, civil disturbance, or medical emergency (e.g. a chicken pox epidemic among a group of minors) that prevents the prompt placement of minors in licensed facilities. An influx is defined as any situation in which there are more than 130 minors in the custody of the INS who are eligible for placement in licensed programs.

1. The Juvenile Coordinator will establish and maintain an Emergency Placement List of at least 80 beds at programs licensed by an appropriate state agency that are potentially available to accept emergency placements. These 80 placements would supplement the 130 placements that INS normally has available, and whenever possible, would meet all standards applicable to juvenile placements the INS normally uses. The Juvenile Coordinator may consult with child welfare specialists, group home operators, and others in developing the list. The Emergency Placement List will include the facility name; the number of beds at the facility; the name and telephone number of contact persons; the name and telephone number of contact persons for nights, holidays, and weekends if different; any restrictions on minors accepted (e.g. age); and any special services that are available.

2. The Juvenile Coordinator will maintain a list of minors affected by the emergency or influx, including (1) the minor's name, (2) date and country of birth, and (3) date placed in INS custody.

3. Within one business day of the emergency or influx the Juvenile Coordinator, or his or her designee will contact the programs on the Emergency Placement List to determine available placements. As soon as available placements are identified, the Juvenile Coordinator will advise appropriate INS staff of their

availability. To the extent practicable, the INS will attempt to locate emergency placements in geographic areas where culturally and linguistically appropriate community services are available.

4. In the event that the number of minors needing emergency placement exceeds the available appropriate placements on the Emergency Placement List, the Juvenile Coordinator will work with the Community Relations Service to locate additional placements through licensed programs, county social services departments, and foster family agencies.

5. Each year, the INS will reevaluate the number of regular placements needed for detained minors to determine whether the number of regular placements should be adjusted to accommodate an increased or decreased number of minors eligible for placement in licensed programs. However, any decision to increase the number of placements available shall be subject to the availability of INS resources. The Juvenile Coordinator shall promptly provide Plaintiffs' counsel with any reevaluation made by INS pursuant to this paragraph.

6. The Juvenile Coordinator shall provide to Plaintiffs' counsel copies of the Emergency Placement List within six months after the court's final approval of the Settlement Agreement.

EXHIBIT 4
Agreement Concerning Facility Visits Under Paragraph 33

The purpose of facility visits under paragraph 33 is to interview class members and staff and to observe conditions at the facility. Visits under paragraph 33 shall be conducted in accordance with the generally applicable policies and procedures of the facility to the extent that those policies and procedures are consistent with this Exhibit.

Visits authorized under paragraph 33 shall be scheduled no less than seven (7) business days in advance. The names, positions, credentials, and professional association (e.g., Center for Human Rights and Constitutional Law) of the visitors will be provided at that time.

All visits with class members shall take place during normal business hours.

No video recording equipment or cameras of any type shall be permitted. Audio recording equipment shall be limited to hand-held tape recorders.

The number of visitors will not exceed six (6) or, in the case of a family foster home, four (4), including interpreters, in any instance. Up to two (2) of the visitors may be non-attorney experts in juvenile justice and/or child welfare.

No visit will extend beyond three (3) hours per day in length. Visits shall minimize disruption to the routine that minors and staff follow.

Exhibit 5
List of Organizations to Receive Information re: Settlement Agreement

Eric Cohen, Immig. Legal Resource Center, 1663 Mission St. Suite 602, San Francisco, CA 94103

Cecilia Munoz, Nat'l Council Of La Raza, 810 1st St. NE Suite 300, Washington, D.C. 20002

Susan Alva, Immig. & Citiz. Proj Director, Coalition For Humane Immig Rights of LA, 1521 Wilshire Blvd., Los Angeles, CA 90017

Angela Cornell, Albuquerque Border Cities Proj., Box 35895, Albuquerque, NM 87176-5895

Beth Persky, Executive Director, Centro De Asuntos Migratorios, 1446 Front Street, Suite 305, San Diego, CA 92101

Dan, Kesselbrenner, , National Lawyers Guild, National Immigration Project, 14 Beacon St.,#503, Boston, MA 02108

Lynn Marcus , SWRRP, 64 E. Broadway, Tucson, AZ 85701-1720

Maria Jimenez, , American Friends Service Cmte., ILEMP, 3522 Polk Street, Houston, TX 77003-4844

Wendy Young, , U.S. Cath. Conf., 3211 4th St. NE, , Washington, DC, 20017-1194

Miriam Hayward , International Institute Of The East Bay, 297 Lee Street , Oakland, CA 94610

Emily Goldfarb, , Coalition For Immigrant & Refugee Rights, 995 Market Street, Suite 1108 , San Francisco, CA 94103

Jose De La Paz, Director, California Immigrant Workers Association, 515 S. Shatto Place , Los Angeles, CA, 90020

Annie Wilson, LIRS, 390 Park Avenue South, First Asylum Concerns, New York, NY 10016

Stewart Kwoh, Asian Pacific American Legal Center, 1010 S. Flower St., Suite 302, Los Angeles, CA 90015

Warren Leiden, Executive Director, AILA, 1400 Eye St., N.W., Ste. 1200, Washington, DC, 20005

Frank Sharry, Nat'l Immig Ref & Citiz Forum, 220 I Street N.E., Ste. 220, Washington, D.C. 20002

Reynaldo Guerrero, Executive Director, Center For Immigrant's Rights, 48 St. Marks Place , New York, NY 10003

Charles Wheeler , National Immigration Law Center, 1102 S. Crenshaw Blvd., Suite 101 , Los Angeles, CA 90019

Deborah A. Sanders, Asylum & Ref. Rts Law Project, Washington Lawyers Comm., 1300 19th Street, N.W., Suite 500 , Washington, D.C. 20036

Stanley Mark, Asian American Legal Def.& Ed.Fund, 99 Hudson St, 12th Floor, New York, NY 10013

Sid Mohn, Executive Director, Travelers & Immigrants Aid, 327 S. LaSalle Street, Suite 1500, Chicago, IL, 60604

Bruce Goldstein, Attornet At Law, Farmworker Justice Fund, Inc., 2001 S Street, N.W., Suite 210, Washington, DC 20009

Ninfa Krueger, Director, BARCA, 1701 N. 8th Street, Suite B-28, McAllen, TX 78501

John Goldstein, , Proyecto San Pablo, PO Box 4596,, Yuma, AZ 85364

Valerie Hink, Attorney At Law, Tucson Ecumenical Legal Assistance, P.O. Box 3007 , Tucson, AZ 85702

Pamela Mohr, Executive Director, Alliance For Children's Rights, 3708 Wilshire Blvd. Suite 720, Los Angeles, CA 90010

Pamela Day, Child Welfare League Of America, 440 1st St. N.W., , Washington, DC 20001

Susan Lydon, Esq., Immigrant Legal Resource Center, 1663 Mission St. Ste 602, San Francisco, CA 94103

Patrick Maher, Juvenile Project, Centro De Asuntos Migratorios, 1446 Front Street, # 305, San Diego, CA 92101

Lorena Munoz, Staff Attorney, Legal Aid Foundation of LA-IRO, 1102 Crenshaw Blvd., Los Angeles, CA 90019

Christina Zawisza, Staff Attorney, Legal Services of Greater Miami, 225 N.E. 34th Street, Suite 300, Miami, FL 33137

Miriam Wright Edelman, Executive Director, Children's Defense Fund, 122 C Street N.W. 4th Floor, Washington, DC 20001

Rogelio Nunez, Executive Director, Proyecto Libertad, 113 N. First St., Harlingen, TX 78550

Exhibit 6
Notice of Right to Judicial Review

"The INS usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form."