495. The Eight Amendment guarantees Plaintiffs' right to be free from cruel and unusual punishment.

496. Defendants were vested with control over the custody and care of Plaintiffs.

497. In addition, Defendants Schatz, Shea, Gooley, Wolcott, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, D'Amico, Hamlin, and Brice owed Plaintiffs a duty of care to ensure their custody was reasonably safe and to detect and correct problems that could cause injury to Plaintiffs.

498. Between 2017 and 2020, while Plaintiffs were detained at Woodside and the Middlesex Adolescent Program, Defendants Schatz, Shea, Gooley, Wolcott, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice either unlawfully isolated Plaintiffs in seclusion cells in Woodside's North Unit, physically restrained them in violation of Plaintiffs' constitutional rights and engaged in wanton and willful conduct that violated Plaintiffs' right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution in violation of 42 U.S.C. §1983, or failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe, and to detect and correct problems that could cause injury to Plaintiffs.

COUNT TWO

Violations of the Eighth Amendment's and Fourteenth Amendment's ban on the use of excessive force

499. Plaintiffs repeat and incorporate herein paragraphs 1 through 579.

500. At all times material hereto, Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice were acting under color of state law.

501. The Eighth Amendment and Fourteenth Amendment guarantees Plaintiffs' right to bodily integrity and to be secure in their person and free from excessive force.

502. The actions and use of force, or their failure to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs. as described herein, of Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin,

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and Brice were also malicious and/or involved reckless, callous, and deliberate indifference to Plaintiffs' federally protected rights.

503. The use of force by Defendants shocks the conscience.

504. Defendants Simons, Steward, Bunnell, Cathcart, Dubuc, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Hamlin, and Brice used such force as was objectively unreasonable, excessive, and conscience-shocking physical force.

505. Defendants Schatz, Shea, Gooley, Wolcott, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice failed to take reasonable steps to protect Plaintiffs from the objectively unreasonable and conscience shocking excessive force of other Defendants despite being in a position to do so.

506. The individual Defendants acted in concert and joint action with each other.

507. The aforementioned acts of Defendants were perpetrated against Plaintiffs without legal justification. The acts were excessive, done with actual malice towards Plaintiffs, and with willful and wanton indifference to, and deliberate disregard for human life and the constitutional rights of Plaintiffs.

508. Plaintiffs were detained at Woodside and the Middlesex Adolescent Program, Defendants Schatz, Shea, Gooley, Wolcott, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice either unlawfully isolated Plaintiffs in seclusion cells in Woodside North Unit, to physically restrain them in violation of Plaintiffs' constitutional rights, and engaged in wanton and willful conduct that violated Plaintiffs' right to be free from excessive force as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution in violation of 42 U.S.C. §1983 or failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs.

COUNT THREE

Deprivation of Plaintiffs' rights to due process of law as guaranteed by the Fourteenth Amendment

509. Plaintiffs repeat and incorporate herein paragraphs 1 through 589.

510. At all times material hereto, Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice were acting under color of state law.

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511. The Fourteenth Amendment guarantees that no person shall be deprived of life, liberty, or property, without due process of law.

512. Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice were vested with control over the custody and care of Plaintiffs.

513. Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice owed Plaintiffs a duty of care to ensure their custody was reasonably safe and to detect and correct problems that could cause injury to Plaintiffs.

514. Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice violated Plaintiffs' Fourteenth Amendment rights when they confined, restrained, treated, and punished Plaintiffs in the aforementioned manner or failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs.

515. Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice deprived Plaintiffs of their protected liberty interest by punishing, restraining, and confining Plaintiffs in the manner aforementioned or failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs.

516. The aforementioned acts of Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice were perpetrated against Plaintiffs without legal justification. The acts were excessive, done with actual malice towards Plaintiffs, and with willful and wanton indifference to, and deliberate disregard for human life and the constitutional rights of Plaintiffs.

517. Between 2016 and 2020, while Plaintiffs were detained at Woodside and the Middlesex Adolescent Program, Defendants Schatz, Shea, Gooley, Wolcott, D'Amico, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice either unlawfully isolated Plaintiffs in seclusion cells in Woodside North Unit, physically restrained them in violation of Plaintiffs' constitutional rights, and engaged in wanton and willful conduct that violated Plaintiffs' right to substantive and procedural due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. §1983 or failed to fulfill their constitutional

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duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs.

COUNT FOUR

Defendants Schatz, Dale, D'Amico, Longchamp, Harriman and Wolcott violated R.H.'s and D.H.'s Eighth Amendment right against cruel and unusual punishment and their Fourteenth Amendment right to due process of law and were deliberately indifferent to the abuse perpetrated against R.H. and D.H. by staff members at the Natchez Trace Youth Academy

518. Plaintiffs repeat and incorporate herein paragraphs 1 through 598.

519. At all times material hereto, Defendants Schatz, Dale, D'Amico, Longchamp, Harriman, and Wolcott were acting under color of state law.

520. The Fourteenth Amendment guarantees that no person shall be deprived of life, liberty, or property, without due process of law.

521. Defendants Schatz, Dale, D'Amico, Longchamp, Harriman, and Wolcott were vested with control over the custody and care of Plaintiffs.

522. Defendants Schatz, Dale, D'Amico, Longchamp, Harriman, and Wolcott owed Plaintiffs a duty of care to ensure their custody was reasonably safe and to detect and correct problems that could cause injury to Plaintiffs.

523. Defendants Schatz, Dale, D'Amico, Longchamp, Harriman, and Wolcott ignored complaints about the inhumane conditions at the Natchez Trace Youth Academy registered by Plaintiffs R.H. and D.H., demonstrating deliberate indifference to the repeated violations of R.H.'s and D.H's civil and constitutional rights which directly and negatively impacted their physical safety and emotional well-being in violation of their (a) right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution; (b) right to be free from excessive force as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution; and (c) right to substantive and procedural due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. §1983.

COUNT FIVE

Defendants Simons, Steward, and Bunnell violated R.H.'s and T.F.'s First Amendment's Right to Petition the Government for a Redress of Grievances

524. Plaintiffs repeat and incorporate herein paragraphs 1 through 604.

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525. At all times material hereto, Defendants Simon, Steward, and Bunnell were acting under color of state law.

526. The First Amendment guarantees Plaintiff R.H.'s and T.F.'s right to petition the government for a redress of grievances.

527. Defendants Simons, Steward, and Bunnell were vested with control over the custody and care of Plaintiffs R.H. and T.F..

528. From July 2018 through September 2018, Defendant Steward unlawfully interfered with R.H.'s right to counsel by blocking his access to his attorney and threatening to retaliate against him if he continued to pursue the case his attorney filed in the Vermont Superior Court on July 6, 2018.

529. At the same time, Defendant Steward unlawfully promised R.H. that he would receive certain additional privileges if he dropped his lawsuit.

530. In August and September 2018, Defendants Simons and Steward unlawfully pressured R.H. to contact his attorney and tell her to dismiss the case his attorney filed in the Vermont Superior Court on July 6, 2018.

531. On September 11, 2018, R.H. finally succumbed to Defendants Simons' and Steward's unlawful pressure campaign and informed his attorneys he wanted his case dismissed.

532. In response to R.H.'s September 11, 2018 letter, his attorneys dismissed the Complaint.

533. On July 5, 2018, T.F.'s attorney filed a Motion for a Protective Order in the Vermont Superior Court, Caledonia Family Division, in which T.F. alleged that Defendant Bunnell had assaulted her on June 27, 2018 by punching her in the face.

534. T.F. told Defendant Steward about the assault, but Steward did not report Bunnell's assault to the appropriate authorities even though she was mandated to do so.

535. After T.F. filed the Motion for a Protective Order, Defendants Steward and Bunnell unlawfully pressured T.F. as described above to dismiss her lawsuit.

536. While she was still detained at Woodside, T.F. ultimately succumbed to Defendants Steward's and Bunnell's unlawful pressure campaign, and instructed her attorney to dismiss the case in a letter Defendant Steward advised her to write.

537. Defendants Simons, Steward, and Bunnell retaliated against R.H. and T.F. after they registered complaints about the abuse their suffered at Woodside in

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violation of Plaintiffs' constitutional rights, and engaged in wanton and willful conduct that violated Plaintiffs' First Amendment rights in violation of 42 U.S.C. §1983.

COUNT SIX

Supervisory liability for the failing to supervise subordinates who violated Plaintiffs' constitutional rights

538. Plaintiffs repeat and incorporate herein paragraphs 1 through 618.

539. Defendants Schatz, Shea, Gooley, Wolcott, and Simons, after receiving repeated reports, complaints, grievances, and investigatory reports prepared by RLSIU about the abuse of Woodside detainees, demonstrated deliberate indifference to Plaintiffs' rights to be free from cruel and unusual punishment, excessive force, and solitary confinement failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs in violation of Plaintiffs' Eighth Amendment rights against excessive force and cruel and unusual punishment and their right to substantive and procedural due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. §1983.

DAMAGES – COUNTS ONE THROUGH SIX

540. Plaintiffs repeat and incorporate herein paragraphs 1 through 620.

541. As a result of Defendants outrageous, illegal, unconstitutional, assaultive, and unlawful conduct as detailed above, Plaintiffs suffered serious physical and psychological injuries, both temporary and permanent, and are entitled to compensatory damages resulting from those injuries.

542. Based on Defendants' willful and wanton disregard for, and deliberate indifference to, Plaintiff's constitutional rights, Plaintiffs are entitled to exemplary damages.

543. In addition, Defendants are liable to Plaintiffs for those damages pursuant to 42 U.S.C. §1983 and for their attorney's fees and litigation expenses pursuant to 42 U.S.C. §1988.

PENDENT STATE CLAIMS

COUNT SEVEN
Assault and Battery

544. Plaintiffs repeat and incorporate herein paragraphs 1 through 624.

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545. While Plaintiffs were detained at Woodside and the Middlesex Adolescent Program between 2016 and 2020, Defendants Simons, Steward, Bunnell, Cathcart, Martinez, Weiner, Piette, Rochon, Hamlin, Ruggles, Hatin, and Bryce repeatedly placed them in isolation cells in the North Unit and physically assaulted them.

Damages for Assault and Battery

546. As a result of Defendants' outrageous, illegal, unconstitutional, and unlawful conduct, Plaintiffs suffered serious physical and psychological injuries, both temporary and permanent and are entitled to compensatory damages resulting from those injuries.

547. Based on Defendants' intentional misconduct, Plaintiffs are also entitled to exemplary damages.

COUNT EIGHT

Intentional Infliction of Emotional Harm

548. Plaintiffs repeat and incorporate herein paragraphs 1 through 628.

549. Defendants were vested with control over the custody and care of Plaintiffs.

550. The conduct of Defendants Simons, Steward, Dubuc, Hatin, Cathcart's, Bunnell, Weiner, Hamlin, Martinez, Piette, Ruggles, and Brice, whereby they unlawfully confined, restrained, mistreated, and punished Plaintiffs and failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs was so outrageous and extreme as to go beyond all possible bounds of decency.

551. These Defendants intended to cause emotional distress to Plaintiffs and/or acted in reckless disregard of the probability of causing emotional distress to Plaintiffs.

552. Plaintiffs have suffered and continue to suffer emotional distress.

553. The aforementioned acts of Defendants Simons, Steward, Dubuc, Hatin, Cathcart's, Bunnell, Weiner, Hamlin, Martinez, Piette, Ruggles, and Brice were perpetrated against Plaintiffs without legal justification. The acts were excessive, done with actual malice towards Plaintiffs, and with willful and wanton indifference to, and deliberate disregard for human life and the constitutional rights of Plaintiffs.

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554. By repeatedly placing Plaintiffs in isolation cells in Woodside North Unit and by physically assaulting them, the outrageous and inexcusable conduct of Defendants Simons, Steward, Dubuc, Hatin, Cathcart's, Bunnell, Weiner, Hamlin, Martinez, Piette, Ruggles, and Brice caused Plaintiffs to suffer from extreme emotional distress.

DAMAGES

Intentional Infliction of Emotional Harm

555. As a result of Defendants' intentional infliction of emotion harm, Plaintiffs are entitled to both compensatory and exemplary damages.

COUNT NINE

Defendants' grossly negligent and reckless supervision of persons in their custody and control

556. Plaintiffs repeat and incorporate herein paragraphs 1 through 636.

557. By statute, Defendants Schatz, Shea, Gooley, Wolcott, Simons were vested with control, custody, and supervision of Plaintiffs and had a duty to protect Plaintiffs from foreseeable harm.

558. Defendants Schatz, Shea, Gooley, Wolcott, and Simons owed Plaintiffs a duty of care to ensure their custody was reasonably safe and to detect and correct problems that could cause injury to Plaintiffs

559. As a result of their grossly negligent and reckless conduct, Defendants breached their duty of care to Plaintiffs.

DAMAGES

Grossly negligent and reckless supervision

560. As a result of Defendants' breach of their duty of care to Plaintiffs, Plaintiffs suffered physical and emotional harm, both temporary and permanent, for which they are entitled damages and other compensation in an amount to be determined by the jury.

WHEREFORE, Plaintiffs request that this Court:

1. enter judgment in their favor on all counts of the Complaint;

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2. award Plaintiffs compensatory damages in an amount to be determined by the Court;

3. award medical expenses related to the treatment of Plaintiffs' injuries, which are claimed as special damages, Fed.R.Civ.Pro. 9(g);

4. award exemplary damages for Defendants' outrageous and illegal conduct;

5. award Plaintiffs attorney's fees and expenses pursuant to 42 U.S.C. § 1988;

6. grant such other and further relief as this Court deems proper.

Plaintiffs hereby demand a trial by jury.

DATED at Burlington, Vermont this 28th day of June, 2022.

Respectfully submitted,

Brooks G. McArthur, Esq.
Jarvis, McArthur & Williams

David J. Williams, Esq.
Jarvis, McArthur & Williams

Counsel for Plaintiffs

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, Administrator of the Estate of G.W., R.H., T.W., T.F., D.H., B.C., and A.L., by Next Friend Norma Labounty, Plaintiffs, v. KENNETH SCHATZ, KAREN SHEA, CINDY WOLCOTT, BRENDA GOOLEY, JAY SIMONS, KEVIN HATIN, ARON STEWARD, MARCUS BRUNNELL, JOHN DUBUC, WILLIAM CATHCART, BRYAN SCRUBB, NICHOLAS WEINER, DAVID MARTINEZ, CAROL RUGGLES, TIM PIETTE, DEVIN ROCHON, AMELIA HARRIMAN, MELANIE D'AMICO, EDWIN DALE, ERIN LONGCHAMP, CHRISTOPHER HAMLIN, and ANTHONY BRICE, all in their individual capacities, Defendants.	Civil Action No. 5:21-cv-00283

STIPULATED MOTION TO CONTINUE DEADLINE FOR FILING RULE 12 MOTIONS TO DISMISS AND OPPOSITIONS THERETO

The parties stipulate and jointly move the Court for short extensions of time for Defendants to revise, amend and refile their Rule 12 motions and for Plaintiffs to oppose these motions, pursuant to F.R.C.P. 6(b)(1)(A). The parties request that Defendants' deadline for filing Rule 12 motions (or answers) be extended from August 1st to August 15th and that Plaintiffs' opposition deadline be extended from September 1st to September 30th.

In support of this motion, the parties state as follows:

1. "When an act may or must be done within a specified time, the court may, for good cause, extend the time . . . if a request is made before the original time or its extension expires."

2. F.R.C.P. 6(b)(1)(A). There is good cause to extend the time for Defendants to respond file Rule 12 motions and for Plaintiffs to file oppositions.
3. In Order Re Stipulated Motion to Amend Complaint (Document 64), the Court extended the filing deadline for Defendants' Rule 12 motions to August 1st and extended Plaintiffs' opposition deadline to September 1st.
4. While the Court generously offered that Defendants may simply file "a supplemental memorandum incorporating the existing [Rule 12] motions (Doc. 49-58)," in some cases, Defendants' counsel believe this may create an administrative nightmare for the Court. *Id.* Some counsel plan to revise their motions for clarity. This will take a little longer but may save time in the long run.
5. Additionally, Plaintiffs have significantly expanded the scope of the case in the number of factual allegations. Further, there are allegations connecting specific defendants to different plaintiffs and different facilities.
6. Attorney Williams, on behalf of the Plaintiffs, needs some additional time for the anticipated oppositions, given the number of parties and motions being filed.
7. Finally, as it is July, the ordered dates conflict with the vacation schedules of counsel on both sides, and more importantly, with the vacation schedules of their paralegals and administrative staff.
8. For these reasons, the parties stipulate to and request that Defendants' deadline for filing Rule 12 motions (or answers) be extended to August 15th and that Plaintiffs' opposition deadline be extended to September 30th.

WHEREFORE, Defendants respectfully request that the Court grant this Motion and extend the deadlines as requested herein.

DATED at Springfield, Vermont, this 19th day of July, 2022.

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Attorneys for Defendants
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Cindy Wolcott & Brenda Gooley

By: Andrew C. Boxer
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DATED at Burlington, Vermont, this 19th day of July, 2022.

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DATED at Burlington, Vermont, this 19th day of July, 2022.

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DATED at Montpelier, Vermont, this 19th day of July, 2022.

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DATED at Woodstock, Vermont, this 19th day of July, 2022.

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DATED at Burlington, Vermont, this 19th day of July, 2022.

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DATED at Rutland, Vermont, this 19th day of July, 2022.

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DATED at Burlington, Vermont, this 19th day of July, 2022.

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DATED at Burlington, Vermont, this 19th day of July, 2022.

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From: cmecfhelpdesk@vtd.uscourts.gov
Sent: Wednesday, July 20, 2022 2:49 PM
To: Courtmail@vtd.uscourts.gov
Subject: Activity in Case 5:21-cv-00283-gwc Welch et al v. Schatz et al Order on Motion for Extension of Time to File

U.S. District Court

District of Vermont

Notice of Electronic Filing

The following transaction was entered on 7/20/2022 at 2:48 PM EDT and filed on 7/20/2022
Case Name: Welch et al v. Schatz et al
Case Number: 5:21-cv-00283-gwc
Filer:
Document Number: 67(No document attached)

Docket Text:
ORDER granting [66] MOTION for Extension of Time to File Rule 12 Motions to Dismiss and Oppositions Thereto. Time extended to August 15, 2022, for filing Rule 12 motions and extended to September 30, 2022, for Plaintiffs to file any opposition. Signed by Chief Judge Geoffrey W. Crawford on 7/20/2022. (This is a text-only Order.) (jal)

5:21-cv-00283-gwc Notice has been electronically mailed to:

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5:21-cv-00283-gwc Notice has been delivered by other means to:

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, Administrator of The Estate of G.W., R.H., T.W., T.F. D.H., B.C., and A.L. by next friend Norma Labounty, Plaintiffs,	)	
v.	)	Civil Action No. 5:21-CV-00283
KENNETH SCHATZ, KAREN SHEA, CINDY WALCOTT, BRENDA GOOLEY, JAY SIMONS, ARON STEWARD, MARCUS BUNNELL, JOHN DUBUC, WILLIAM CATHCART, BRYAN SCRUBB, KEVIN HATIN, NICHOLAS WEINER, DAVID MARTINEZ, CAROL RUGGLES, TIM PIETTE, DEVIN ROCHON, AMELIA HARRIMAN, EDWIN DALE, MELANIE D'AMICO, ERIN LONGCHAMP, CHRISTOPHER HAMLIN, and ANTHONY BRICE, all in their individual capacities, Defendants.	)	

DEFENDANTS SCHATZ, SHEA, WALCOTT, AND GOOLEYS' AMENDED MOTION TO DISMISS

Defendants Kenneth Schatz, Karen Shea, Cindy Walcott, and Brenda Gooley move per V.R.C.P. 12(b)(6) to dismiss Plaintiffs' complaint against them. Plaintiffs, former residents of a juvenile detention and treatment center, contend that Defendants, former and current government officials, violated their constitutional rights and committed common law torts in connection with abuse they allegedly suffered while detained at the center. But because Plaintiffs have failed to allege these Defendants' personal involvement and overcome the presumption they were exercising professional judgment, these supervisory officials cannot be held liable. Additionally, Plaintiffs have failed to state a claim for relief with respect to several counts. And as a result,

Plaintiffs' claims against Schatz, Shea, Walcott, and Gooley should be dismissed.

Background

Plaintiffs are former residents of Vermont's Woodside Juvenile Rehabilitation Center (Woodside) in the town of Essex. During that time the Department for Children and Families (the Department) operated Woodside as a residential treatment facility that provided in-patient psychiatric, mental health, and substance abuse services in a secure setting.[1] Woodside accepted adolescents who had been adjudicated or charged with a delinquency or criminal act.[2]

But before 2011, and the events of this matter, Woodside was run solely as a secure detention and treatment facility for youthful offenders.[3] Reflecting this original role, and as the Plaintiffs' Complaint notes, Woodside has the appearance and layout of a prison.

Up until its closure in 2020, and throughout the Plaintiffs' respective time there, Woodside was Vermont's only locked-door juvenile facility. Hospitals could provide involuntary treatment—but at their discretion. Woodside, on the other hand, could not turn away residents—the only limit being the age of the potential resident.[4] As a result, Woodside had to take in the highest needs youths involved in the juvenile justice system even if Woodside could not meet the needs of those youths.[5]

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[1] 33 V.S.A. § 5801(a) (2018) (repealed Jul. 1, 2021) ("The Woodside Juvenile Rehabilitation Center in the town of Essex shall be operated by the Department for Children and Families as a residential treatment facility that provides in-patient psychiatric, mental health, and substance abuse services in a secure setting").

[2] *Id*.

[3] 2011 Vermont Laws, No. 3 (eff. Feb. 17, 2011) (amending 33 V.S.A. § 5801) (("The Woodside juvenile rehabilitation center in the town of Essex shall be operated by the department for children and families *solely as a secure detention and treatment facility for juvenile offenders*.") (emphasis added)).

[4] *See e.g.* 33 V.S.A. § 5801(d) (2018).

[5] *See* Ex. A, Ltr. frm. DCF Defs. Schatz & Shea to RLSIU, Nov. 16, 2018 ("Woodside is specifically exempt from the application of Rule 5.08, which provides: A Residential Treatment Program shall accept and serve only those children/youth whose needs can be met by the services provided by the program. Woodside is exempt from this rule as an acknowledgement that it is the only program in the state that

Defendant Kenneth Schatz was the Commissioner of the Department from September 2014 through June 2020. Within the Department, Defendant Cindy Walcott served as Deputy Commissioner with the Family Services Division up until June 2016. She then retired from regular service and worked as a temporary employee from July 2016 through September 2019, as Senior Policy and Operations Manager with the Family Services Division. Defendant Karen Shea was also a Deputy Commissioner, and Walcott's successor to the Family Services Division, serving from July 2016 to June 2019. And Defendant Brenda Gooley worked in the Department as the Family Services Division Director of Operations throughout the relevant 2016 to 2020 period.

Plaintiffs have now sued the Commissioner, Deputy Commissioners, and Director (collectively, the Officials), among many others, in their personal capacities for alleged abuse Plaintiffs suffered while residents at Woodside from 2016 to 2020. Plaintiffs' claims, in general, assert alleged instances of confinement, restraint, treatment, and punishment. Plaintiffs argue that these claimed abuses amount to constitutional violations entitling them to relief under 42 U.S.C. §§ 1983, 1985, as well as common-law torts.

In their original complaint, Plaintiffs nominally asserted a total of 12 counts. In response to several motions to dismiss filed by the 22 named defendants, Plaintiffs filed an amended complaint. This new complaint contains 9 counts. Like the original complaint though, these counts are overlapping and contain multiple causes of action. These listed counts are:

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cannot reject youth for admission.").

This letter is cited by Plaintiffs in their complaint. As a result, it (along with several other documents relied on by Plaintiffs and attached here as exhibits) can be properly considered without the need for the Court to convert this motion to dismiss to one for summary judgment. *See Levy v. Southbrook Inter. Investments, Ltd.*, 263 F.3d 10, 13, n.3 (2d Cir. 2001); *see also Kaplan v. Morgan Stanley & Co., Inc.*, 2009 VT 78, ¶ 10, n. 4, 186 Vt. 605, 987 A.2d 258.

(1) § 1983 violation of the Eighth Amendment's ban on cruel and unusual punishment;
(2) § 1983 violation of the Eighth and Fourteenth Amendments' ban on the use of excessive force;
(3) § 1983 deprivation of Plaintiffs' right to due process of law as guaranteed by the Fourteenth Amendment;
(4) § 1983 deliberate indifference to violations of Plaintiffs' rights perpetrated by staff members at the Natchez Trace Youth Academy;
(5) § 1983 violation of R.H. and T.F.s' First Amendment right to petition the government for a redress of grievances;
(6) § 1983 supervisory liability;
(7) assault and battery;
(8) intentional infliction of emotional harm; and
(9) gross negligence and reckless supervision of persons in their custody and control.

Legal Standard

Under Rule 12(b)(6), a complaint or any portion thereof may be dismissed at any time when it is apparent from the face of the pleadings that the plaintiff has failed to state a claim upon which relief can be granted. In evaluating motions under Rule 12(b)(6), courts are "not bound to accept as true a legal conclusion couched as a factual allegation."[6] A complaint must "state a claim to relief that is plausible on its face."[7] This means that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable

[6] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

[7] *Twombly*, 550 U.S. at 570.

for the misconduct alleged."[8]

Discussion

Accepting Plaintiffs' well plead allegations as true, they have failed to make their case for the Officials' liability. First, the Officials' exercise of professional judgment entitles them to good-faith immunity barring Plaintiffs' claims of Fourteenth Amendment Due Process violations (Count 3). Second, Plaintiffs have failed to state a claim in regard to the Officials' alleged deliberate indifference to excessive force (Counts 2 & 4). Third, Plaintiffs have failed to plead the Officials' personal involvement for alleged violations of the ban on cruel and usual punishment and the ban on excessive force; nor does the law permit § 1983 supervisory liability (Counts 1, 2, 4, 6). Fourth, absolute immunity shields the Officials from Plaintiffs' common law torts (Counts 7 & 9). Fifth, given the Plaintiffs were not criminal convicts, they have failed to state a claim for violations of the Eighth Amendment (Counts 1, 2, 4, 6). And sixth, the Estate of G.W.'s claims did not survive G.W.'s death (Counts 1-3, 6-9).

1. **The Officials' exercise of professional judgment shields them from liability for alleged Fourteenth Amendment violations**.

In Count 3 of their Complaint, Plaintiffs allege that the Officials[9] violated their Fourteenth Amendment Due Process rights in that they confined, restrained, treated, and punished Plaintiffs. These alleged acts, Plaintiffs contend, deprived them of their protected liberty interest, entitling them to relief under § 1983.

In *Youngberg v. Romeo*, the U.S. Supreme Court held that as with convicted criminals, individuals involuntarily committed have a protected Due Process liberty interest in being free

[8] *Iqbal*, 556 U.S. at 678.

[9] This count is not directed to the Officials alone.

from bodily restraint.[10] But while *Youngberg* Court recognized this right, it cautioned that the right is "not absolute."[11] In operating institutions, the Court explained, "there are occasions where it is necessary for the state to restrain the movement of residents."[12] For example, restraint is often needed to protect not only the residents but others as well from violence.[13] As a result, the question is not whether a liberty interest has been infringed, but rather, whether the extent of- or nature of- the restraint is a constitutional violation of a due process.[14]

To make this assessment, one must balance "the liberty of the individual and the demands of organized society."[15] That said, "[i]f there is to be any uniformity to protecting these interests"—"this balancing cannot be left to the unguided discretion of a judge or jury."[16] Thus, per *Youngberg*, "the Constitution requires only that Courts make certain that professional judgment *in fact was exercised*."[17] *In other words, it is not for the courts to decide which professional acceptable choices should have been made*.[18]

In announcing this standard, the *Youngberg* Court acknowledged that persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals (whose conditions of confinement are meant to punish).[19] Nevertheless, the standard the state must meet to justify restraints or conditions of less than

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[10] *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982).

[11] *Id*., 457 U.S. at 319-20.

[12] *Id*., 457 U.S. at 320.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*., 457 U.S. at 321.

[17] *Id*. (emphasis added).

[18] *Id*. (emphasis added).

[19] *Id*., 457 U.S. at 321-22.

absolute safety are "lower than compelling or substantial."[20] Using those tests would place too undue a burden on administering institutions and unnecessarily restrict the exercise of professional judgment.[21]

So, the Court mandated that interference by the federal judiciary with the internal operations of these institutions should be minimized.[22] And the Court explained that there is no reason to think that judges or juries are better qualified than the appropriate professionals in making such decisions.[23]

Finally, the *Youngberg* Court also held that in an action for damages against a professional in their individual capacity—"the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints."[24] In that situation, the Court elucidated, good-faith immunity would also bar liability.[25]

A. The policies and procedures that led to the confinement and restraint Plaintiffs complain-of show that professional judgment was used.

Presently, per *Youngberg*, for Plaintiffs' claims that they were confined, restrained, etc. to survive, they must overcome the presumption that the Officials exercised professional judgment. Plaintiffs have failed, however, to allege sufficient facts to overcome that presumption.

First, Plaintiffs have failed to allege (and cannot in any event) sufficient facts to show

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[20] *Id*., 457 U.S. at 322.

[21] *Youngberg*, 457 U.S. at 322. *See also P.C. v. McLaughlin*, 913 F.2d 1033, 1039 (2d Cir. 1990) ("The doctrine nicely balances the need to provide redress when an official abuses his or her public office against the costs of compelling government officials to shoulder the burden of defending themselves against suit. These costs include deterring individuals from accepting public employment, inhibiting officials in the discharge of their duties, diverting employees' energies from public duties and forcing them to bear the expense of litigation.").

[22] *Youngberg*, 457 U.S. at 322.

[23] *Id*., 457 U.S. at 323.

[24] *Id.*

[25] *Id.*

that the policies at Woodside regarding seclusion and restraint were not based on the exercise of professional judgment.

Rather, Plaintiffs appear to acknowledge that professional judgment was used in that they cite to the system of control tactics used at Woodside.[26] Yet as the *Youngberg* Court admonished, it is not for the courts to decide whether the best course was taken. Indeed, that the Officials exercised professional judgment is reflected in that Woodside had licenses to operate.[27]

Per 33 V.S.A. § 306(b) the Department is responsible for the promulgation of standards governing the regulation of residential treatment programs for children and youths. These standards require, among other things, that a:

> Residential Treatment Program shall ensure children/youth the following rights:
> - to be served under humane conditions with respect for their dignity and privacy;
> - to receive services that promotes their growth and development;
> - to receive gender specific, culturally competent and linguistically appropriate service;
> - to receive services in the least restrictive and most appropriate environment;
> - to access written information about the providers policies and procedures

[26] Pls. Compl. at ¶ 48.

[27] *See* Ex. B, 2015-2016 Lic.; Ex. C, 2016-2017 Lic. The Plaintiffs do not reference these licenses in their Complaint. Nonetheless it is settled that materials that are a matter of public record may be considered in a motion to dismiss. *See Byrd v. City of New York*, No. 04-1396-CV, 2005 WL 1349876, at * 1 (2d Cir. Jun. 8, 2005) (citing *Blue Tree Hotel Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir.2004) (stating that courts "may also look to public records, including complaints filed in state court, in deciding a motion to dismiss"); *Kramer v. Time Warner, Inc*., 937 F.2d 767, 774 (2d Cir.1991) (noting that documents filed with the court are subject to judicial notice, and affirming Rule 12(b)(6) dismissal of securities fraud case where the district court considered documents filed with the Securities and Exchange Commission without expressly taking judicial notice of them); *Cowen v. Ernest Codelia, P.C*., No. 98 Civ. 5548, 2001 WL 856606, at *1 (S.D.N.Y. July 30, 2001) (citing court of appeals cases in explaining that court may consider public documents on Rule 12(c) motion based on res judicata to determine whether claims are barred by prior litigation)). *See also Kaplan*, 2009 VT 78, ¶ 10, n. 4, ("it is well settled that, in ruling on a Rule 12(b)(6) motion to dismiss, courts may properly consider matters subject to judicial notice, such as statutes and regulations, and matters of public record") (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (in ruling on a motion to dismiss, "courts must consider the complaint in its entirety, as well as ... documents incorporated into the complaint by reference, and matters of which a court may take judicial notice")).

that pertain to the care and supervision of children, including a description of behavior management practices;
- to be served with respect for confidentiality;
- to be involved, as appropriate to age, development and ability, in assessment and service planning;
- to be free from harm by caregivers or others, and from unnecessary or excessive use of restraint and seclusion/isolation;
- to file complaints and grievances without fear of retaliation.[28]

In furtherance of these rights, the regulations prescribe exhaustive rules regarding medical care,[29] behavior management,[30] physical restraint,[31] seclusion,[32] documentation,[33] and restraint and seclusion monitoring.[34] Additionally, these regulations also cover the physical environment and safety, including sleeping areas, and seclusion rooms.[35] And under these regulations, a program cannot operate without a license from the Department's Residential Licensing Unit.[36]

That the Residential Licensing Unit granted Woodside licenses shows that Woodside had in place the policies and procedures required to operate the institution. Additionally, the licenses show that in the areas where the licensing authority found compliance issues—Woodside and its leadership were taking the necessary corrective action.[37] That the instances of restraint, seclusion, etc. complained of arose under these policies is immaterial. Having secured a license

[28] Vt. Admin. Code 12-3-508:201.

[29] Vt. Admin. Code 12-3-508:633-636.

[30] *Id*. at 648-649.

[31] *Id*. at 650-657.

[32] *Id*. at 658-666.

[33] *Id*. at 667-669.

[34] *Id*. at 670.

[35] Vt. Admin. Code 12-3-508:700 Physical Environment and Safety.

[36] Vt. Admin. Code 12-3-508:101 ("A Residential Treatment Program shall not be operated without the formal prior approval of the Department for Children and Families, Residential Licensing Unit (hereafter "Licensing Authority").").

[37] *See* Ex. B, 2015-2016 Lic. at p. 15-21; Ex. C, 2016-2017 Lic. at p. 14-15.

to operate after an exhaustive assessment by the RLI, it would be impossible for Plaintiffs to establish that the Officials did not exercise professional judgment. [38]

All the Constitution requires is that there was some professional judgment exercised. And here the Plaintiffs have failed to allege any facts showing no professional judgment was exercised.

B. Because Woodside could not refuse admission regardless of a person's needs, the Officials lacked viable alternatives.

Second, in addition to Plaintiffs' failure to allege sufficient facts rebutting the presumption of professional judgment, Plaintiffs also overlook the practicalities at issue with their placement at Woodside.

The Constitution does not guarantee an institutionalized person the least restrictive environment.[39] This principle comes into play here in that Woodside, regardless of whether it can serve their needs, was the only program in the State that cannot reject youth for admission.[40] Woodside even had an exemption from a regulation requiring residential treatment programs to accept only those children whose needs could be met by the program.[41]

This facet of Woodside reflected the larger issue of the lack of viable alternatives for many of Woodside's residents. Woodside was a melting pot of residents with different high-level needs. As Plaintiffs themselves note in their complaint, per the layout and characteristics of

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[38] That these regulations exist and by statute are promulgated by the Commissioner arguably means that the Commissioner and his Deputies exercised their professional judgment in any event.

[39] *P.C. v. McLaughlin*, 913 F.2d 1033, 1042 (2d. 1990) (citing *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1249 (2d Cir. 1984)).

[40] *See* Ex. A, Ltr. frm. DCF Defs. Schatz & Shea to RLSIU, Nov. 16, 2018 ("Woodside is specifically exempt from the application of Rule 5.08, which provides: A Residential Treatment Program shall accept and serve only those children/youth whose needs can be met by the services provided by the program. *Woodside is exempt from this rule as an acknowledgement that it is the only program in the state that cannot reject youth for admission*.") (emphasis added).

[41] *See* Ex. B, 2015-2016 Lic. at p. 7; Ex. C, 2016-2017 Lic. at p. 7.

Woodside, it was designed as a detention facility for juveniles. As cited above, in 2011, however, Woodside's statute was amended, and it became a residential treatment program. Yet this statutory mandate did not come with a change to the layout of Woodside. Woodside was not originally designed and constructed for the role later foisted on it.

Despite these inherent limitations, Woodside nevertheless had an interest in maintaining order and security at the facility.[42] This interest is not punitive as the Plaintiffs claim.[43] Rather it is a valid interest even in places of civil confinement (as opposed to criminal lockups). So, while Plaintiffs allege instances of restraint, seclusion, or treatment that may not have been the best or least restrictive option given their individual treatment needs—these instances reflected the professional judgment of what Woodside and the Officials could offer given the collision of incompatible design principles, roles, and lack of alternatives.

In *P.C. v. McLaughlin*, the Second Circuit held that various Vermont state employees, including the Commissioner of Mental Health and various directors, assistants, and division chiefs were entitled to immunity on a young man's statutory and constitutional rights violation claims.[44]

The Department of Mental Health had placed P.C. at Brandon Training School, "a state-owned residential school for severely retarded individuals."[45] A later administrative hearing determined that P.C. did not need to be confined at Brandon because he was not a danger to

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[42] *Rosado v. Maxymillian*, No. 20-3965-cv, 2022 WL 54181, at * 3 (2d Cir. 2022) (quoting *Ahlers v. Rabinowitz*, 684 F.3d 53, 61 (2d Cir. 2012)).

[43] *Id*.

[44] *See P.C. v. McLaughlin*, 913 F.2d at 1042-43 (holding that exercise of professional judgment barred claims against Vermont Department of Mental Health employees, including the Commissioner, for the placement and alleged liberty deprivations because of "the total lack of any viable alternative, and compelled by the necessity to provide [plaintiff] with food, shelter, clothing and medical care").

[45] *Id*., 913 F.2d at 1038.

himself and since Brandon could not provide the appropriate level of care, treatment, and habilitation for him. As a result, Brandon denied P.C. admission. Nevertheless, because the Department of Mental Health did not have a residential placement available, P.C. remained at Brandon. While at Brandon, P.C. was then sexually assaulted.

The *McLaughlin* Court held that the various officials were entitled to immunity on P.C.'s claim that their placement of him at Brandon violated his rights. The Court explained that the officials' decision to place P.C. at Brandon "was prompted by the total lack of any viable alternative, and compelled by the necessity to provide him with food, shelter, clothing and medical care."[46] Then citing *Youngberg*, the *McLaughin* Court held that the officials were entitled to immunity.[47]

In reaching this decision, the *McLaughlin* Court noted that P.C.'s life had been hard—but it emphasized that those hardships were not due to the various state employees' actions.[48] The appellate court acknowledged that it understood how the district court judge viewing the unfortunate scenario believed that it needed to deny the employees' request for immunity.[49] But at the end of the day, it is not for the court to fix the problems, only decide whether the laws were violated.[50]

Presently, as in *McLaughlin*, the Officials lacked a viable alternative and were at the mercy of circumstances beyond their control, i.e., budget, design, statutory obligations, etc. As a result, immunity bars liability for Fourteenth Amendment violations.

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[46] *Id*., 913 F.2d at 1043.

[47] *Id*.

[48] *Id*. 913 F.2d at 1037.

[49] *Id*., 913 F.2d at 1036.

[50] *Id*., 913 F.2d at 1037.

2. There is no recognized claim for deliberate indifference to excessive force and even if there was, Plaintiffs' allegations do not rise to the level of deliberate indifference.

The Plaintiffs contend at Count 2 of their complaint that the Officials[51] were deliberately indifferent to excessive force used against them at Woodside. This force, Plaintiffs maintain, violated the Fourteenth Amendment's ban on excessive force. Similarly, Plaintiffs also allege at Count 4 that the Officials were deliberately indifferent to excessive force used against them while they were detained at an out-of-state facility. But there are several problems with these claims.

First, § 1983 jurisprudence does not recognize an excessive-force claim based on deliberate indifference. Deliberate indifference applies to conditions of confinement that violate Due Process[52]. Courts do recognize a § 1983 claim for excessive force. But there are no instances of a court combining the two causes of action, as Plaintiffs attempt to do here.[53]

That there is no hybrid claim makes sense when one considers how it would apply to defendants like the Officials.

Excessive force § 1983 claims are directed at instances where a government actor purposely or knowingly uses force that was objectively unreasonable.[54] These claims generally concern discrete affirmative events, e.g. a takedown, restraint, hold, etc. by a police officer or

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[51] The claim of deliberate indifference to excessive force is subsumed within the stated claim of excessive force.

[52] *See e.g. Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) ("[a] pretrial detainee may establish a § 1983 claim for allegedly unconstitutional conditions of confinement by showing that the officers acted with deliberate indifference to the challenged conditions").

[53] *See Hooks v. Atoki*, 983 F.3d 1193, 1203 (10th Cir. 2020) (distinguishing claims for excessive force and deliberate indifference); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) (same); *Castro v. Los Angeles Cnty.*, 833 F.3d 1060, 1069 (9th Cir. 2016) (distinguishing excessive force and failure to protect claims); *Andrews v. Neers*, 253 F.3d 1052, 1059 (8th Cir. 2001) (same).

[54] *See Kingsley v. Hendrickson*, 576 U.S. 389, 396-97 (2015) ("we agree with the dissenting appeals court judge, the Seventh Circuit's jury instruction committee, and Kingsley, that a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable").

prison guard. In other words, the act giving rise to the claim occurs without time for deliberation, or for the actor to report to a supervisor that he intends to use excessive force.

Meanwhile for an official to be at fault for deliberate indifference they must be aware of a substantial risk of harm and do nothing about it, i.e., an omission.[55] This requirement that the official be aware of the risk of harm precludes an excessive force violation from also giving rise to a deliberate indifference claim. In almost every instance, the official cannot be aware of the act of excessive force before it happens. And in cases where the alleged excessive force is pervasive, for example restraint methods in a prison, then the claim is for violation of Fourteenth Amendment Due Process rights regarding conditions of confinement.[56]

But even assuming arguendo that § 1983 jurisprudence recognized a deliberate indifference to excessive force claim, Plaintiffs' claims would still fail.

In their complaint, Plaintiffs aver that the RLSIU's investigations found instances of painful compliance techniques, use of physical restraints without due course, as well as other issues of confinement.[57] After noting that these reports were provided to the Officials, Plaintiffs summarily suggest that the Officials failed to do anything in response.[58]

While Plaintiffs do note that the Officials provided a letter is response to the reports,

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[55] *See generally Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) ("to establish a claim for deliberate indifference to conditions of confinement under the Due Process Clause of the Fourteenth Amendment, the pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety").

[56] *See generally Darnell*, 849 F.3d at 29 ("A pretrial detainee may establish a § 1983 claim for allegedly unconstitutional conditions of confinement by showing that the officers acted with deliberate indifference to the challenged conditions.").

[57] Pls.' Compl. at ¶¶ 142-47.

[58] *Id*. at ¶¶ 160-64.

Plaintiffs maintain that this response was not detailed enough.[59] There are several problems with this characterization.

First, the letter itself is not the flippant brushoff Plaintiffs' complaint suggests. Rather, the letter provides a detailed explanation of the nature of Woodside's role[60] as well as addressing the main areas of concern raised by the reports: retaliation, grievance procedure, de-escalation, restraint approach, the North Unit, supervision documentation, and placements.[61] In fairness to Plaintiffs, the letter did identify some findings from the reports that the Department disagreed with.[62] But the Department provided an 11-page table of RLSIU's findings and Woodside/the Department's responses to the same.[63] Whether by mere inadvertence, or by design, however, Plaintiffs fail to note that the Department provided this attachment. In any event, this document shows that once the Department, including the Officials, were made aware of issues at Woodside, or at least allegations of problems, they responded.

Under these circumstances, it cannot be said that the Department or the Officials were deliberately indifferent to instances of excessive force at Woodside.

Deliberate indifference is the same as recklessly disregarding a risk.[64] To be liable the official must know of and disregard an excessive risk to a person's health and safety.[65] Even then though, officials who actually know of a substantial risk to a person's "health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was

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[59] *Id*. at ¶¶ 161, 163.

[60] *See* Ex. A, Ltr. frm. DCF Defs. Schatz & Shea to RLSIU at p. 1-2, Nov. 16, 2018.

[61] *Id*. at p. 2-3.

[62] *Id*. at p. 3.

[63] *Id*. (attachment).

[64] *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

[65] *Id*., 511 U.S. at 837.

not averted."[66]

Here, Plaintiffs have not even alleged facts that show they faced an excessive risk to their health and safety. Instead, all they have alleged are isolated instances of staff employing control techniques and seclusion in response to extreme behavior from the Plaintiffs.

But even assuming arguendo that there was an excessive risk, they still cannot show that such a risk was disregarded. Rather, as outlined above, once the concerns were brought to the Department's attention via the RLSIU reports, the Officials responded reasonably addressing each issue and where necessary, indicating that action will be taken—including re-evaluating relevant policies.[67]

In addition to Woodside, Plaintiffs also contend the Officials were deliberately indifferent to instances of excessive force at Natchez Trace Youth Academy.

Natchez Trace is a residential treatment facility for young men in Tennessee. Per the complaint, D.H. & R.H. were sent by the Department to Natchez Trace.

In support of their claim here, Plaintiffs cite West Virginia Department of Education's decision in 2015 to stop placing WV youth at Natchez Trace.[68] Additionally, they aver that in 2017, the Vermont Office of Juvenile Defender told Defendants Longchamp and D'Amico of abuse at the facility,[69] and that in the same year, a mother of a child at Natchez told Defendants Schatz, Walcott, and D'Amico that her child was abused there.[70] Then Plaintiffs summarily conclude that Schatz, Walcott, and D'Amico didn't take the complaints seriously and placed

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[66] *Id*., 511 U.S. at 844.

[67] *See* Ex. A, Ltr. frm. DCF Defs. Schatz & Shea to RLSIU & Attachment, Nov. 16, 2018. *See also* Ex. C, 2016-2017 Lic. at p. 14.

[68] Pls.' Compl. at ¶ 85.

[69] *Id*. at ¶ 171.

[70] *Id*. at ¶ 176.

Plaintiff R.H. at Natchez Trace nonetheless.[71]

Again, assuming arguendo that the WV report establishes there was an excessive risk of harm to health and safety—Plaintiffs still have not alleged facts sufficient to show that the Defendants were aware of that risk. At most, Plaintiffs allege that the Defendants were aware of a single complaint from the mother and the Office of the Juvenile Defender.

But it is well-established that an allegation that an official ignored a letter of protest and request for investigation is insufficient to hold the official liable for the allegation.[72] And as a result, Plaintiffs have failed to plead that the Officials were deliberately indifferent to excessive force at Natchez.

3. Plaintiffs have failed to plead the Officials' personal involvement.

Plaintiffs assert several claims against the Officials that are not predicated on any action that these specific defendants took. To wit, at Count 4 Plaintiffs allege that "Defendants" secluded and restrained Plaintiffs in violation of the Eighth Amendment's ban on cruel and unusual punishment. While at Count 5 they argue that "Defendants" used force in violation of the Eighth and Fourteenth Amendments' ban on excessive force. Plaintiffs do not allege that the Officials did any of the acts giving rise to these claims. Rather, it appears that Plaintiffs claim the Officials are liable as the supervisors of those persons who did act.

To make out a § 1983 claim, however, a plaintiff must plead that each government official defendant—through the official's own actions—has violated the Constitution.[73] In other

[71] *Id*. at ¶ 175.

[72] *Walters v. Hofmann*, No. 1:09-cv-84, 2009 WL 6329145, at * 5 (quoting *Greenwald v. Coughlin*, 1995 WL 232736, at * 8 (S.D.N.Y. Apr. 19, 1995)).

[73] *Tangreti v. Bachman*, 983 F.3d 609, 616 (2d Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)).

words, there is no special rule for supervisor liability.[74] Instead, a plaintiff must plead and prove that each defendant through their own actions violated the Constitution.[75] The factors necessary to establish a violation will necessarily vary with the Constitutional provision at issue—because the elements of the different Constitutional violations also vary.[76] Thus, in analyzing whether a supervisory official can be liable for injuries inflicted by others, courts "must analyze the same elements that define the Constitutional tort for the direct actors."[77]

Presently, Plaintiffs have failed to plead how the Officials satisfy the elements for any of these alleged Constitutional violations.

To show excessive force under the Fourteenth Amendment, a plaintiff must show that the defendant used force purposefully or knowingly against them that was objectively unreasonable.[78] Yet there are no facts in the complaint that demonstrate that the Officials used force against the Plaintiffs—let alone being purposeful, knowing, or unreasonable.

4. Plaintiffs' common-law tort claims fail against the Officials.

In addition to the nine federal law claims, Plaintiffs also assert three pendant state law claims. These claims are for assault and battery, and reckless supervision. But all of these tort claims fail due to a combination of the Officials' absolute immunity; Plaintiffs' failure to plead vicarious liability; and the Officials' qualified immunity, along with Vermont's Tort Claims Act.

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[74] *Id*., *Tangreti*, 983 F.3d at 618 ("Simply put, there's no special rule of liability for supervisors. The test for them is the same as the test for everyone else") (quoting *Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010)).

[75] *Id*. (quoting *Iqbal*, 556 U.S. at 676).

[76] *Id*. (quoting *Iqbal*, 556 U.S. at 676).

[77] *Stinson v. City of New York*, No, 18-CV-0027, 2021 WL 3438284, at * 11 (S.D.N.Y. Jul. 6, 2021).

[78] *See Kingsley v. Hendrickson*, 576 U.S. 389, 396-97 (2015).

A. The Officials are entitled to absolute immunity.

Absolute immunity applies to judges, legislators, and the state's highest executive officers when they are acting within their respective authorities.[79]

Turning to the defendant Officials, Commissioner Schatz was at all relevant times the highest executive officer at the Department. Thus, he is entitled to absolute immunity if he was acting within the scope of his authority.

Per 3 V.S.A. § 3052, the Commissioner administers the law of the Department and supervises and controls all staff functions. While under 33 V.S.A. § 104, the Department is responsible for administering a program for youthful offenders, including secure detention and treatment programs.[80] Plaintiffs contend that Schatz committed these torts in the placement and supervision of Plaintiffs at Woodside. Thus, all of these actions fall within the scope of 3 V.S.A. § 3052 and 33 V.S.A. § 104. And so, Defendant Schatz is entitled to absolute immunity on these claims.

In addition to Commissioner Schatz, the Deputies, Shea and Walcott, are also protected by absolute immunity. While these two defendants are not *the* highest executive at the Department, nonetheless, the nature of their positions and work entitle them to the same protection.

In general, Department Deputies are discretionary appointments made by the

[79] *See Levinsky v. Diamond*, 151 Vt. 178, 185, 559 A.2d 1073, 1078 (1989).

[80] 33 V.S.A. § 104(c) ("The Department for Children and Families, in cooperation with the Department of Corrections, shall have the responsibility to administer a comprehensive program for youthful offenders and children who commit delinquent acts, including utilization of probation services; of a range of community-based and other treatment, training, and rehabilitation programs; and of secure detention and treatment programs when necessary in the interests of public safety, designed with the objective of preparing those children to live in their communities as productive and mature adults.").

Commissioner with the approval of the Secretary of the Agency of Human Services.[81] Shea and Walcott, however, were appointed to the Family Services Division of the Department.

In contrast to an ordinary Deputy, these division deputies—like the Commissioner—are statutorily mandatory appointments made by the Secretary with the approval of the Governor.[82] Thus, not only because they are appointed to these separate Divisions within the Department, but also because the nature of their appointments—Shea and Walcott are also entitled to absolute immunity.[83]

B. Plaintiffs have failed to plead vicarious liability.

Additionally with respect to Counts 10 & 11, and irrespective of immunity, Plaintiffs have failed to plead any theory of vicarious liability.

As with the alleged constitutional violations, the Officials did not take part in any act that would give rise to claims for assault and battery or intentional infliction of emotional harm. Thus, Plaintiffs must plead some form of vicarious liability that would allow the Court to hold the Officials liable for the acts of others. But since Plaintiffs have not plead how the Officials are liable for the alleged assault and battery and intentional inflectional infliction of emotional distress, these claims fail.

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[81] 3 V.S.A. § 3053 ("The commissioner may, with the approval of the Secretary…(6) Appoint a deputy commissioner.").

[82] *Id*., § 3051(c) ("For the Department for Children and Families, the Secretary, with the approval of the Governor, shall appoint deputy commissioners for the following divisions of the Department: (1) Economic Services; (2) Child Development; (3) Family Services.").

[83] *See e.g. Harlow v. State Dept. Human Srvcs*., 883 N.W.2d 561, 572-73 (Minn. 2016) (holding that Deputy commissioner of Department of Human Services functions as a top-level cabinet-equivalent official and is entitled to the protection of absolute immunity from defamation claims when making statements within the scope of his or her statutory authority); *Montgomery v. City of Philadelphia*, 392 Pa. 178, 188, 140 A.2d 100, 105 (Penn. 1958) (ruling that Deputy Commissioner of Public Property and City Architect are high public officials entitled to absolute immunity);

C. Qualified immunity and Vermont's Tort Claims Act shield the Officials.

Qualified immunity protects lower-level government employees from tort liability when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority.[84] In applying qualified immunity to state law tort claims, Vermont Courts use the federal objective good-faith standard.[85] This standard is used to prevent exposing state employees to the distraction and expense in defending themselves in the courtroom.[86] Under the standard, if an official's conduct does not violate clearly established rights of which a reasonable person would have known, the official is protected by qualified immunity.[87]

Presently, Plaintiffs have not plead what acts the Officials took that gave rise to their common-law tort claims. Instead, as with the majority of their claims against them, Plaintiffs appear to hold the Officials liable by virtue of their supervisory roles.

As noted above, per 33 V.S.A. § 104 the Department is responsible for administering secure detention programs for youthful offenders. The Commissioner in turn: is responsible for administering the Department, 3 V.S.A. § 3052; has the power to appoint deputies, § 3052; and can delegate his duties, 33 V.S.A. § 105. Thus, the Officials were in the course of their employment and within their scope of authority for purposes of Plaintiffs' common-law tort claims.

As for whether the Officials were performing discretionary acts, under 33 V.S.A. § 104(b)(9), the Department "may…supervise and control children under its care and custody and

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[84] *Levisnky*, 151 Vt. 178, 185, 559 A.2d 1073, 1078 (citing *Libercent v. Aldrich*, 149 VT, 76, 81, 539 A.2d 981, 984 (1987)).

[85] *Id*., 151 Vt. at 190, 559 A.2d at 1081.

[86] *Sprague v. Nally*, 2005 VT 85, ¶ 4, 178 Vt. 222.

[87] *Id*., 151 Vt. at 190, 559 A.2d at 1081-82 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982)).

provide for their care, maintenance, and education." Given that Plaintiffs' claims revolve around their alleged treatment, the Officials were also performing discretionary acts.

Turning to the final component, good faith, for the same reasons the Officials' professional judgment protects them on the Fourteenth Amendment Due Process claims, the Officials are protected here. As discussed above, the complaint and its incorporated facts show that when the Officials were made aware of alleged issues at Woodside via the RLSIU reports, they responded and took action to address the concerns.[88] Thus, it cannot be said that the Officials violated clearly established rights. Instead, the record reflects that the Officials discharged their statutory duty to administer a secure detention program as well as their discretionary duty to supervise and control children under the Department's care. And so, the Officials are shielded from liability by qualified immunity.

Finally, even if the Officials' response did not meet the good-faith standard, Plaintiffs' have failed to plead how the Officials were grossly negligent.

Gross negligence is negligence that is more than an error of judgment.[89] Rather, it is a failure to exercise even a slight degree of care owed to another.[90] In general, assessing gross negligence is a question of fact for the jury.[91] But where reasonable minds cannot differ, the court may dismiss the claim.[92]

In this case, as noted above, the Officials received licenses to operate Woodside from the RLSIU. These licenses covered the same aspects of confinement, restraint, seclusion, etc. that are

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[88] *See* Ex. A, Ltr. frm. DCF Defs. Schatz & Shea to RLSIU & Attachment, Nov. 16, 2018. *See also* Ex. C, 2016-2017 Lic. at p. 14.

[89] *Kennery v. State*, 2011 VT 121, ¶ 41, 191 Vt. 44, 64, 38 A.3d 35, 47.

[90] *Id*.

[91] *Id*.

[92] *Id*.

at issue in this matter. Meanwhile the RLSIU is the same organization whose reports the Plaintiffs rely on for establishing the Officials' alleged gross negligence. As a result, it cannot be said that the Officials were grossly negligent, given that the same oversight authority that authored the reports on which Plaintiffs rely to support their claims—previously saw fit to license the facility.

Furthermore, as discussed above, the Officials were not personally involved in the complained of acts. The only active participation that the Plaintiffs can point to, therefore, is how the Officials responded to the RSLIU reports.

The Officials responded by submitting a letter outlining the issues facing Woodside as a whole, in addition to the 11-page spreadsheet responding to each claim and where needed to identifying areas for change, reevaluation, etc,[93] A response of this thoroughness does not show the failure to exercise even a slight degree of care owed. And thus, it cannot be said that the Officials were grossly negligent.

5. The Eighth Amendment does not apply to Plaintiffs.

Counts 1, 2, 4, and 6 of Plaintiffs' complaint invoke the Eighth Amendment's protections. The Eighth Amendment, however, applies only to those convicted of a crime.[94] Per former 33 V.S.A. § 5801, Woodside accepted adolescents who have been adjudicated or charged with a delinquency or criminal act.[95] By law, an adjudication of delinquency is not a criminal

[93] *See* Ex. A, Ltr. frm. DCF Defs. Schatz & Shea to RLSIU & Attachment, Nov. 16, 2018.

[94] *See e.g. Ingraham v. Wright*, 430 U.S. 651, 664, 87 S.Ct. 1401, 1408-09 (1977) (noting that Eighth Amendement's "proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes").

[95] 33 V.S.A. §5801 (eff. Jul. 1, 2018 to Jun. 30, 2021).

conviction.[96] And juvenile proceedings are non-criminal in nature.[97]

In this case, all the Plaintiffs were placed at Woodside by adjudication of delinquency or juvenile proceeding.[98] As a result, detained juveniles are protected by the Fourteenth and not the Eighth Amendment.[99]

Counts 1 and 4 of the Plaintiffs' complaint should be dismissed in whole, since they rely on the Eighth Amendment alone. While Counts 2, 5, and 7 should be limited to the extent that they assert other applicable constitutional rights.

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[96] 33 V.S.A. § 5202(a)(1)(A) ("(a)(1) An order of the Family Division of the Superior Court in proceedings under this chapter shall not: (A) be deemed a conviction of crime").

[97] *Northern Sec. Ins. Co. v. Perron*, 172 Vt. 204, 225-26, 777 A.2d 151, 166-67 (2001) ("Under Vermont law, a juvenile delinquency adjudication is not a violation of penal law. *See* 33 V.S.A. §§ 5535(a) ("[a]n order of the juvenile court in proceedings under this chapter shall not be deemed a conviction of crime"); 5501(a)(2) (purpose of juvenile proceedings is "to remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to provide a program of treatment, training, and rehabilitation consistent with the protection of the public interest"); *In re R.S.*, 143 Vt. 565, 571, 469 A.2d 751, 755 (1983) ("[p]roceedings under the Juvenile Procedure Act are protective, not penal"); *In re Rich*, 125 Vt. 373, 375, 216 A.2d 266, 267–68 (1966) (juvenile proceeding "is a protective proceeding entirely concerned with the welfare of the child, and is not punitive.... The inquiry relates to proper custody for the child, not his guilt or innocence as a criminal offender."); *In re Hook*, 95 Vt. 497, 499, 115 A. 730, 731 (1922) (juvenile proceeding "is not penal, but protective").").

[98] *In Re: AL*, Nos. 104-3-17, 347-9-17, 353-9-17 Cnjv; *In Re: BC*, Nos. 48-7-13 Osjv, 56-9-16 Osjv; *In Re: DH*, Nos. 290-8-17 Cnjv, 58-10-18 Oejv; *In Re: GW*, No. 222-5-19 Cnjv; *In Re: RH*, No. 114-4-18 Frjv; *In Re: TF*, No. 10-1-17 Cajv; *In Re: TW*, No. 29-2-18 Rdjv.

[99] *See e.g. J.S.X. Through D.S.X. v. Foxhoven*, 361 F. Supp. 3d 822, 830-32 (S.D. Iowa 2019) (holding that protections of Fourteenth Amendment due process clause, rather than of Eighth Amendment, applied to claims by students at Iowa institution for male juveniles who had been adjudicated delinquent, which alleged unconstitutional and illegal treatment practices with respect to students with significant mental illness; Iowa law expressly ascribed a non-penal, non-criminal nature to juvenile delinquency adjudications and dispositions).

6. Under 14 V.S.A. § 1452, the Estate of G.W.'s claims did not survive G.W.'s death.

Per Vermont's survival statute, 14 V.S.A. § 1452, "in an action for the recovery of damages for a bodily injury…if either party dies during the *pendency* of the action, the action shall survive…."[100]

'Pendency' is not defined by the statute. But it's meaning can be discerned from common sources. Per *Black's Law Dictionary*, 'pendency' is defined as "the quality, state, or condition of being pending or continuing undecided."[101] Meanwhile, *Merriam-Webster* provides that 'pendency' is "state of being pending / the pendency of the litigation."[102]

In this case, per the Complaint, G.W. died of a drug overdose in October 2021. The Complaint was not filed, however, until December 13, 2021.

Thus, G.W. did not die during the pendency of this action. Or, in other words, her claims and the present suit were not pending at the time of her death. And as a result, per § 1452, G.W.'s claims did not survive her death and cannot be asserted by her Estate in this matter.

Conclusion

In sum, the majority of the Plaintiffs' claims against Defendant Department of Children and Families Officials fail because the Plaintiffs' have failed to plead the Officials personal

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[100] Additionally, Vermont also has a tolling statute at 12 V.S.A. § 557, governing how long after the death of a person a suit may be brought by their estate. But this tolling provision is contingent upon "if the cause of action survives." And whether a cause of action survives death is controlled by § 1452 above.

[101] *Pendency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[102] *Pendency*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/pendency (last visited Apr. 19 2022).

Merriam-Webster also offers several examples, such as: "Slobodan died during pendency of the trial, while Karadzic and Mladic were convicted in 2016 and 2017 and are currently serving long sentences. — Ruti Teitel, *CNN*, 6 Apr. 2022; The charges were filed in 2018 and Porter argued the case's pendency violated McDougall's speedy trial rights. — Cory Shaffer, *cleveland*, 23 Nov. 2021; He was ultimately placed on house arrest during the pendency of the murder case, with several conditions including submitting to GPS monitoring. — *BostonGlobe.com*, 10 Aug. 2021."

involvement in the alleged offensive acts. Furthermore, the Plaintiffs have failed to rebut the presumption that Officials used their professional judgment in implementing the various policies at Woodside that Plaintiffs contend violated their constitutional rights. And as a result, the Officials ask that the Court dismiss the claims against them.

DATED at Springfield, Vermont, this 11th day of August, 2022.

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EXHIBIT A

VERMONT

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Agency of Human Services

November 16, 2018

Brenda Dawson, Senior Family Services Worker
Residential Licensing and Special Investigations
Department for Children and Families
Family Services Division
280 State Drive
Waterbury, VT 05671-2401

Dear Ms. Dawson:

Please accept this response to letters (eleven in total) dated October 12, 2018 addressed to Brenda Gooley, DCF Family Services Director of Operations.

First and foremost, we want to thank you for the work that you did to respond to these licensing reports. It is clear that you take your role seriously and are interested in improving the experiences of youth at Woodside.

Attached to this letter is a spreadsheet that documents Woodside's response to the individual findings in each report. Before addressing the individual findings, we think that it is important to provide some overarching context to Woodside's response to these findings and the plan to come into compliance.

Because Woodside is a locked program providing residential treatment to extremely high needs youth with juvenile justice involvement, its program and policies have never fit squarely within the framework of the current residential treatment program rules. The residential treatment program rules attempt to address this problem by including a specific section specifically exempting secure facilities, i.e. Woodside, from certain program rules applicable to all other residential treatment programs. For example, Woodside is specifically exempt from the application of Rule 5.08, which provides: ***A Residential Treatment Program shall accept and serve only those children/youth whose needs can be met by the services provided by the program.*** Woodside is exempt from this rule as an acknowledgement that it is the only program in the state that cannot reject youth for admission. Woodside has been asked to serve all youth referred to the program, without respect to whether the youth's needs can be met by the program. Woodside has accepted that responsibility, but sometimes to its detriment. Some of the findings in these reports are a direct result of the fact that Vermont's system of care lacks all of the necessary resources to meet the needs of youth in this state.

Woodside is currently in the process of evolving. The Department has been on a path for the past two years to regain Medicaid funding for Woodside but has just recently made the decision to change course because of unpredictability of federal requirements. Now, the Department is reevaluating the purpose of Woodside and its role in Vermont's system of care. The decision to not pursue Medicaid funding for Woodside has been difficult on many levels. However, there are also some positive aspects to the decision that include a fresh look at the system of care and gaps for care. No matter the future of Woodside, it is clear that it cannot be the only program to accept the hardest to serve youth in our state.

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The number of youth served at Woodside has been trending downward. Woodside served a total of 84 individual youth (with 121 different admissions) in SFY17 and 82 in SFY18 (with 129 different admissions). Recent legislative changes that only allow courts to place youth at Woodside pre-disposition in their delinquency case have also contributed to a more recent decline since July 1, 2018. Woodside is licensed for 30 beds. The average daily population over the last year has been 20 youth as a high in September 2017 and a low average of 12 youth in September 2018. This declining population is important to consider as we decide next steps.

In evaluating Woodside's role in the future, the Department also expects to consider what framework makes the most sense for the regulation and monitoring of Woodside, both for Woodside and the Residential Licensing and Special Investigations Unit (RLSI). The Department takes full responsibility for the decision to place Woodside within the monitoring and regulation of RLSI. A decision that has not been easy for either Woodside or RLSI.

While Woodside has a number of substantive issues regarding the regulatory investigation findings, the Department is committed to undertake a number of voluntary corrective action measures to address concerns that were highlighted in the reports:

- Retaliation - Retaliation is not acceptable and we do not believe that it is a pervasive issue at Woodside. We met with both staff and youth on October 31 to hear viewpoints on a variety of issues. Youth who are living in a locked setting may view decisions by adults who work in the program as retaliatory as there is a power differential inherent in that relationship. We discussed with staff the need to be sensitive to that perception and to reinforce the message that retaliation is not acceptable. Karen Shea followed up with Woodside staff in writing to confirm these messages.

- Grievance Procedure - Woodside appreciates and values the role of the grievance process in giving youth a voice to air concerns and a process by which they may be heard. This is an important part of the program and one that helps build life skills and confidence for youth. The grievance process has been a topic at Woodside stakeholder meetings during 2018 and the process refined with respect to the appeal process to ensure that RLSI is forwarded all grievance appeals so that RLSI may review for potential regulatory violations. With respect to any findings that the Woodside Director cannot review a grievance about an incident that he or she was involved in, the grievance process allows for residents to send grievances directly to DCF central office if the grievance involves the Director. We are also interested in creating a process that has a feedback loop for youth to ensure that they know their concern has been heard.

- De-escalation - Trauma informed de-escalation strategies are an important component to the program that hopefully will result in very few to zero incidents of restraint and seclusion. Woodside is examining and re-evaluating its current de-escalation strategies as part of the review of restraint modality at Woodside.

- Restraint Approach – The use of emergency safety interventions is an area that Woodside is committed to continuously improve. To that end, in 2015, Woodside adopted a policy to require clinical orders by licensed clinical psychologists or physicians for all emergency safety interventions, including restraint and seclusion. Woodside also increased the number of staff on the floor working with youth. The result of these policy changes has been a dramatic reduction in the numbers of high-level interventions. For the first 18 months following this change in practice, the number of incidents of restraint and seclusion dropped from on average 46 per month to 18 per month. During calendar year 2017, there were on average only two incidents of restraint and seclusion per month. In 2018, so far there have been on average three incidents of restraint and five incidents of seclusion per month. There is some concern that the current Woodside policies on restraint and seclusion and compliance with these policies were not mentioned as part of the documentation reviewed by the licensing agency.

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There is also some concern that Woodside has not received notice that its restraint modality is not approved by RLSI. RLSI did issue concerns in 2016 that the Woodside restraint modality included pain compliance, but RLSI subsequently found that Woodside immediately responded to that concern and modified its training and methodology appropriately. The current Woodside license finds Woodside in compliance with Regulation 650, which provides that a program "shall not use any form of restraint without prior approval of the Licensing Authority." The current Woodside license also notes with respect to compliance with Regulation 651 that "Woodside continues to demonstrate reduction of physical restraint." That being said, the modality of restraint, including the concern around pain compliance, is something that Woodside is examining and re-evaluating and will report back to stakeholders and RLSI on this topic.

- North Unit – With respect to concerns regarding Woodside's use of the North Unit, we do not have any specific corrective actions with respect to these observations until we decide the future of Woodside and its role in the system of care. Corrective action is complete with respect to plumbing issues in the North Unit.
- Supervision Documentation – Woodside will continue to work to ensure that provisional plans of care are developed and disseminated to ensure staff are aware of the plans and implementing them appropriately.
- Appropriate and available placements for actively suicidal and other high needs youth – The Department is examining the role of Woodside in the system of care. The Department plans to also engage other players in the system to evaluate the current system and needs to ensure that appropriate placements are available for youth who are self-harming and/or have other high-level mental health needs, but who may also be aggressive and assaultive. Youth presenting with these characteristics have historically been rejected by other in-state residential placements and hospitals.

With these thoughts in mind, Woodside respectfully disagrees with a number of the individual findings and conclusions drawn in the eleven reports. The basis for these disagreements differs in individual reports but can be summarized as follows:

- Failure to review policies adopted by Woodside and Woodside's compliance with these policies in the analysis of findings.
- Inappropriate acceptance of allegations as specified in court filings requesting protective orders as conclusive findings of fact without including any additional follow up regarding court findings or orders related to those filings. In fact, no court has issued a protective order.
- Concern with the inappropriate application of some particular regulations to specific set of circumstances.
- Lack of details and input from all individuals involved in specific situations to provide context for decisions made that should have been factored into the analysis.
- Lack of analysis related to the impact of individual residents and their behaviors on the overall milieu and the competing responsibility Woodside staff must deal with in managing the behaviors of individual youth while keeping programming as normal for other youth as possible.
- Lack of understanding or analysis related to the traumatic impact staff experience in these situations or the obligation of Woodside to manage the needs of the youth while supporting staff who have experienced trauma to learn and grow.
- Reliance on and comparison to practices in programs that serve youth who do not pose the degree of physical risk the youth at Woodside pose to staff.

VERMONT

The attached document details Woodside's response to each finding. As you will see, there are some findings with which Woodside agrees. Thank you.

Sincerely,

Ken Schatz – on behalf of Karen Shea & myself

Ken Schatz, Commissioner, and Karen Shea, Deputy Commissioner of Family Services
for Woodside Juvenile Rehabilitation Center

cc: Jay Simons, Director, Woodside Juvenile Rehabilitation Center
Brenda Gooley, Family Services Division Director of Operations

Woodside Response to RLSI Findings
November 16, 2018

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
Complaint dated 12/15/2017	TF						
		635	X				No response is required.
		635		X		Woodside disagrees with this finding.	The ace bandage was not medically necessary. It was essentially a comfort object. Use of this regulation is inappropriate under the circumstances. Additionally, regarding birth control, the narrative offered in the report does not match the finding.
Incident date of 6/27/2018	TF						
		201 648 651			X X X	Woodside disagrees with the findings related to Regulations 201 and 648 based on a lack of complete and accurate information relied upon in the analysis. Woodside disagrees with findings related to regulation 651.	Woodside staff believed that their co-worker's life was in danger. Their actions in initiating a restraint under those circumstances appear aligned with licensing regulation 651. The Department has significant concerns about the findings in this report and the omissions in considering (1) other children in the facility and (2) the safety of staff in the report in any way. Additionally, there were serious omissions of information including the fact that staff who were responding to the individual resident subject in the report were afraid for the safety of a staff person that they could not assist. The report lacks any appreciation of the risk to the staff person outside, alone, with the resident who had a recent history of aggravated assault with life threatening injuries resulting and suggests that it was known to those inside the building that the youth who was thought to be alone with the staff person had escaped. That was not known to people inside the facility that were involved in the restraint of the individual subject to this report. The RLSI report creates the impression that staff moved immediately to restraint. During the emergency staff used de-escalation techniques, commands and presence to motivate TF to cooperate. When staff attempted to utilize a physical prompt, TF decided to assault the supervisor. Only after the assault did staff move to restrain TF.

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
							The Department takes seriously its responsibility to keep children at Woodside safe. The Department also takes seriously our role to keep Woodside staff safe as well. It must be noted that after this incident TF advised her Family Services Worker and clinicians that she purposely assaulted staff to acquire charges to ensure future Woodside placement. Notwithstanding the disagreement with these findings, Woodside is examining its de-escalation strategies and restraint modality in order to improve these practices.
Complaint dated 5/24/2018	BC						
		201 601		X	X	Woodside disagrees with the analysis offered regarding Regulation 201 and 601.	The individual youth in question was provided feminine hygiene products. Licensing regulations do not require that a program must provide the product of the youth's choosing to meet the need. Additionally, there is no indication in regulation that a youth has the right to shave a part of their body at a specific frequency or as desired. The analysis suggests that DCF Family Services Policy 75 would allow access to tampons and a razor pursuant to the Reasonable and Prudent Parent Standard (RPPS). The Department disagrees with this assertion as the policy is clear that "the standard characterized by careful and sensible parental decision that maintain the health, safety, and best interests of the child or youth in DCF custody". DCF Family Services Policy 75 is clear that these having feminine hygiene products of the youth's choice is at the discretion of the caretaker. The youth in question has a history of being acutely suicidal and has been assessed as having a high degree of lethality. Allowing access to items that could be used for self-harm (even if closely supervised) or result in a power struggle that could escalate to restraint is incongruent with the RPPS. Furthermore, regulation 601 is related to supervision. The compliance with reservation presumes that the program must provide feminine hygiene products of the youth's choice.
		613	X				No response required.
		626	X				No response required.
Incident dated 6/12/2018	BC						

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
		601			X	Woodside disagrees with the analysis offered regarding Regulation 601.	Woodside increased supervision based on a call of concern from the youth's attorney, which lacked any specific details about the risk. The degree of supervision of the youth resulted in the intervention occurring.
		635			X	Woodside agrees with the finding related to Regulation 635.	At the time of the incident, it was unclear if youth should be transported for medical clearance. On 5/18/18 Dr. Steward was advised by First Call that acutely suicidal residents who have been EE'd from Woodside should remain at Woodside until an appropriate bed becomes available. The analysis offered in the licensing report that the memo from Melanie D'Amico dated 5/29/2018 was applicable to Woodside is incorrect. It was not the expectation of DCF Family Services leadership that this memo be controlling for Woodside. This confusion has since been clarified and youth will be transported for medical clearance following an attempt to complete suicide if medical clearance cannot occur at Woodside.
Incident dated 8/25/2018	BC						
		650			X	Woodside disagrees with the finding regarding regulation 650.	RLSI has issued no prior notice to Woodside indicating that the restraint model is no longer approved. The current Woodside license finds Woodside in compliance with Regulation 650. Notwithstanding the disagreement with these findings, Woodside is examining its de-escalation strategies and restraint modality in order to improve these practices.
		201 651 718			X X X	Woodside disputes the finding in Regulations 201, 651 and 718 stating that there was no justification for the removal of clothing.	Woodside strongly disagrees with the findings considering the assessments provided by both UVMMC and the Brattleboro Retreat that safety focused treatment was essential for this youth. Woodside has significant concerns about the findings in this report and the omissions in considering the circumstances that resulted in this youth being at Woodside. This youth was screened and determined in need of involuntary psychiatric treatment due to being acutely suicidal. This youth has a history of repeated attempts at suicide while in settings generally considered safe - hospitals, Woodside. The report references several things that were done in the interest of keeping this youth alive in a way that lacks appreciation for the degree of lethality posed by this youth as documented by medical professionals at both UVMMC and at the Brattleboro Retreat.

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
		648			X	Woodside disputes the finding of a violation for Regulation 648.	As stated above, Woodside disputes the finding that there was no justification for the removal of items with which the youth could use to harm herself. In addition to examining its current restraint model and de-escalation strategies, the Department is also examining system of care needs for youth who may not be appropriate for Woodside.
		601 660			X X	Woodside disputes the finding of a violation for Regulations 601 and 660.	Woodside maintains that supervision of BC was conducted in accordance with 601 and 660. It is also important to note that Woodside strongly disagrees with and takes offense to the statement in the licensing report that states that the video footage is concerning "because, whether due to its quality or actuality, it appears to be spliced or to have breaks in footage." Woodside does not splice or in any way tamper with video footage. Woodside respectfully requests that this statement is retracted.
Complaint dated 9/20/2017	CM						
		201	X				No response required.
Complaint dated 10/30/2017	CM						
		651		X		Woodside disputes the finding of compliance with reservations for Regulation 651	Regulation 651 is not applicable to transports from Woodside. This regulation is applicable to emergency safety interventions. In addition, as a secure facility, Woodside is exempt from prohibitions on mechanical restraint under the "Exemptions and Additional Regulations for Secure Facilities" on page 42. Regulation 905 addresses the use of mechanical restraints at secure facilities during transportation. Woodside disagrees that there is a presumption that youth must be transported with restraints. Woodside Policy 518 Transportation states, "Prior to departure the team responsible for the youth shall decide on the type of security necessary to safely transport the youth, taking into account the risk the youth presents. If the team decides the youth should be transported with restraints, the team will decide if leg restraints alone are sufficient or if additional restraints are required." Paragraph f. of Woodside policy states, "Transportation for most youth in the Treatment Program will generally be considered "non-secure" and will be provided by one or

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
							two staff without any restraints..." In addition, the Woodside Transportation Policy regularly references DCF/FSD Policy 150. CM did require mechanical restraint per policy 150. He met criteria under form 653. A review of Woodside transports showed that most Woodside residents are transported "non-securely."
Complaint dated 5/29/2018	TW						
		201			X	Woodside disagrees with the findings regarding Regulation 201.	Specifically, the analysis in the findings offered indicates that "it is not common practice among other Residential Treatment Programs to have the Director of the program involved in restraints. Youth must grieve to the person who possibly restrained them". There is nothing specific in Regulation 201 that prohibits Director involvement in significant incidents including restraints. It is also not feasible to assume that the Director would never be involved in any program response or activity that could give rise to a grievance. The grievance process allows for residents to send grievances directly to DCF central office if the grievance involves the director. Additionally, there is no other RTP in the state of Vermont that serves this population so the comparison to other RTP is problematic as it underestimates the risk posed to staff and the need for the expertise of the Director to be brought to bear in certain situations. Woodside disagrees that there are examples of restraints that were not warranted. However, the Department will voluntarily be working to explore available restraint and de-escalation approaches that could be implemented at Woodside. Woodside has addressed toileting concerns through the installation of a remote flushing device for each NU room.
		520		X		Woodside disagrees with the conclusion rendered regarding Regulation 520.	The analysis points toward direct evidence of Provisional Plans of Care and then states that there is concern that plans are not disseminated without providing evidence to support this concern. Woodside will continue to work to ensure that PPCs are developed and disseminated to ensure staff are aware of the plans and implementing them appropriately.
		609		X		Woodside disagrees with the finding of compliance with reservation for Regulation 609.	The report states that the provisional plan of care demonstrates that the youth was offered educational activities. The finding states that the Agency of Education contact has been the issue of concern. The Department has no authority over the Agency of Education and holding Woodside accountable for this issue is inappropriate.
		635	X				No response required.

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
		648			X	Woodside disagrees with the analysis offered regarding Regulation 648.	Woodside disputes that the current restraint techniques are used to induce pain to gain compliance. However, as stated previously, the Department will voluntarily explore available restraint and de-escalation approaches that could be implemented at Woodside.
		650			X	Woodside disagrees with this finding.	RLSI has issued no prior notice to Woodside indicating that the restraint model is no longer approved. The current Woodside license finds Woodside in compliance with Regulation 650. Notwithstanding the disagreement with this finding, Woodside is examining its de-escalation strategies and restraint modality in order to improve these practices.
		651 654		X	X	Woodside disputes the findings of violations for Regulations 651 and 654.	Woodside uses restraint as a last resort and Woodside followed its policy on this topic. The report states that there was no evidence that restraint of this youth was used for coercion, retaliation, humiliation, punishment or staff convenience. The violation is not supported by the findings. Notwithstanding the disagreement with this finding, Woodside is examining its de-escalation strategies and restraint modality in order to improve these practices.
		660			X	Woodside disputes the violation of Regulation 660.	The report indicates that TW was secluded at this time when in fact the daily log book is clear that TW was refusing time with staff and was self-isolating, and therefore was not secluded. The definition of Seclusion in the RLSI regulations manual states that "Voluntary time-out is not considered seclusion." TW could have been with staff had she indicated that she wanted that when the multiple offers were made that morning. In addition, the reports sites an entry where TW is resistant to entering her room at quiet time. Quiet time is a long-standing program component at Woodside where all residents are in their rooms awaiting showers, phone calls etc. and is not seclusion. There is also concern regarding statements on page 5 in the third paragraph of this report. The report indicates that the daily log book shows that TW had stated that she will commit suicide by starvation and will be dead within two days. The report author states that she doesn't understand the rational for not having a First Call screening. This is concerning on two levels. 1. A threat to commit suicide by not eating is not an imminent threat, and 2. The daily log clearly shows that TW eats bacon and hash browns within the next few minutes. Describing the suicidal comments cited in the daily log book without mentioning the very next entry is taking the situation out of context and is misleading.

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
Complaints dated 7/5/2018 and 8/3/2018	AA						
		201 423 621 630	X		 X X X	Woodside agrees that efforts made to address the youth's religious practices were insufficient.	No response is required. Woodside agrees to address the issue through on-going training and consultation with The Association of Africans Living in Vermont and the Refugee Resettlement Program. Woodside will also develop policy and procedure to guide staff in the service of alternative diets.
Complaint dated 7/5/2018	RH						
		201			X	Woodside disagrees with the conclusion rendered regarding Regulation 201 and retaliation.	The RLSI report highlights a Motion for Protective Order filed by the Juvenile Defender's office. The motion went before the court and no such order was issued. In addition, RH requested that the motion be withdrawn. When the Juvenile Defender attorney did not follow his wishes, RH wrote a hand-written letter to her supervisor requesting that he intervene and withdraw the motion. The report attributes RH's body language and behavior during the interview with RLSI staff as evidence that he is being retaliated against. RH demonstrates low level paranoia across all domains of his life as evidenced by Woodside staff observations, staff from prior placement observations and interviews with his foster parents. The RLSI report relies on the "Office of the Juvenile Defender **intern's** report" as evidence that RH was secluded excessively. The RLSI report does not explain the intern's expertise nor the evidence that the intern used to make the determination. The Juvenile Defender's report had not been validated as fact.

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
							While the RLSI gave weight to RH's affect during the interview, RLSI neglected to interview staff to assess affect and/or add weight to their perspective.
		201			X	Woodside agrees with the finding related to the toilets in the NU not being flushed regularly enough.	To address the North Unit toilet flushing issue Woodside installed an updated computer-controlled system. The system malfunctioned resulting in unsanitary conditions. The system was repaired as quickly as possible.
		520			X	Woodside disagrees with the conclusion rendered regarding Regulation 520.	The analysis points toward direct evidence of Provisional Plans of Care and then states that there is concern that interventions in the PPC are not being documented in staff reports. The specific intervention mentioned in this licensing report is providing "time and space." The reporter states that since time and space were not afforded RH the reporter concluded that the staff did not follow the PPC. This conclusion fails to recognize that RH was afforded "time and space" and was left with his favorite staff member after refusing to re-enter his unit. While taking time and space he continued to escalate up to and including assaulting the staff member with a table. According to staff reports and the video footage upon entering the conference room staff did not close the distance with RH leaving him with space and time. ADO Cathcart walked away from RH and went to the NU door. Once there he afforded RH the option of entering the NU on his own. RH responded by taking a fight stance and throwing a chair at staff. He was not able to de-escalate himself after multiple opportunities to use time and space. Woodside will continue to work to ensure that PPCs are developed and disseminated to ensure staff are aware of the plans and implementing them appropriately. The report lacks any appreciation of the risk to the staff person alone with resident RH and suggests that it was the staff person's fault that RH rammed a table into him multiple times. The staff positioned himself to prevent RH using the table to destroy the conference room door (an essential piece of equipment). RH also has a history of weaponizing broken items. Had he smashed the table into pieces he would have had multiple deadly weapons available to him

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
							increasing the level of dangerousness for all involved. Staff use their presence regularly to prevent residents from destroying property to weaponize.
		609	X				No response required.
		614		X		Woodside disagrees with the conclusion rendered regarding Regulation 614.	The report failed to show that RH was restricted from telephoning his parent(s), custodian, attorney etc. To the contrary the report identifies that residents can contact people outside the facility when the residents are safe. Woodside records show regular and consistent contact between RH and his attorney despite regular and consistent dysregulation and dangerousness on RH's part. The compliance with reservation creates the impression that residents have a right to contact their attorney when actively dangerous.
		648			X	Woodside disagrees with the conclusion rendered regarding Regulation 648.	Woodside disputes that the current restraint techniques are used to induce pain to gain compliance. The report references several things that were done in the interest of keeping this youth alive in a way that lacks appreciation for the degree of lethality that is involved in situations when a resident is strangling and secreting themselves from staff. RH had been observed using his T shirt to strangle himself and had acquired towels to cover his window to prevent staff from seeing him while strangling. Regarding the toilet in RH's room not being flushed the report fails to state that the water had been shut off due to RH flooding his room and attempting to contaminate staff with soiled water from his toilet. The towels were in place to keep the dirty toilet water from getting on staff as they checked on RH. Had RH been safe his toilet would have been flushed as the water would have been turned on. Woodside does recognize that the old flush system was not adequate to serve residents at this level of care. Woodside has replaced the system with an upgrade that allows toilets to be flushed regardless of resident behavior. As stated previously, the Department will voluntarily explore available restraint and de-escalation approaches that could be implemented at Woodside.
		650			X	Woodside disagrees with this finding.	RLSI has issued no prior notice to Woodside indicating that the restraint model is no longer approved. The current Woodside license finds Woodside in compliance with Regulation 650.

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
							Notwithstanding the disagreement with this finding, Woodside is examining its de-escalation strategies and restraint modality in order to improve these practices.
		651			X	Woodside disputes the finding related to violations of regulation 651.	Woodside maintains that restraint is always used as a last resort and Woodside followed its policy on this topic. The Woodside incident report describes staff intervening in destructive behaviors by using time and space, time with RH's favorite staff person, communication techniques, choices and directions. When time and space and less restrictive interventions are not successful to prevent escalation staff presence is employed. RH continued to escalate, and staff are assaulted. Staff continue to persist with low level interventions until yet more staff are assaulted. The RLSI staff mistakenly characterize these assaults as the Woodside staff member's responsibility.
		654			X	Woodside disagrees with the conclusion rendered regarding Regulation 654.	The RLSI report states that property damage has been listed on incident reports as reasons for restraint yet provides no examples. The report creates the impression that restraint is used to protect property versus protecting the resident(s) and others from weapons made from destroyed property. The RLSI report continues by stating that the 4/18/18 incident where resident RH was strangling himself with his t shirt and was covering his windows with towels did not involve imminent risk. The department disagrees with this assessment. It is also worthy of noting that the incident took place in the very early morning hours and was triggering to other residents who suffer from significant trauma. RH's verbal threats of violence are triggering and re-traumatizing to other residents in the unit.
		660			X	Woodside disagrees with the conclusion rendered regarding Regulation 660.	The RLSI report describes the author observing residents in locked rooms in the North Unit without staff constantly observing them. The RLSI report does not state that these residents were secluded during this time. Residents in the North Unit are provided the choice of being one on one with staff or remaining in their rooms. When residents choose to remain in their rooms they are not secluded, and constant observation is not required. Page 49 of the RLSI regulations states that voluntary time-out is not considered seclusion.
		661	X				No response needed.

RLSI Finding						Woodside Response to Findings of Compliance with Reservation or Violation	
Date	Youth	Regulation	No Violation / Compliance	Compliance with Reservations	Violation	Commissioner's Determination	Comments
		701			X	Woodside agrees with the finding related to Regulation 701.	To address the North Unit toilet flushing issue Woodside installed an updated computer-controlled system. The system malfunctioned resulting in unsanitary conditions. The system was repaired as quickly as possible.
		718			X	Woodside agrees with the finding related to Regulation 718.	Woodside has had incidents where multiple residents require seclusion to prevent imminent harm. Woodside has one safe room. In such circumstances resident rooms are stripped of items that the resident is using in dangerous ways and the resident is left in place. This practice is also used to avoid restraint when a resident is using an item(s) in dangerous ways and moving the resident into a safer space will require restraint. The department is reviewing this practice and solutions to prevent future violations.
Undated	ALL						
		401	X				No response needed.
		411	X				No response needed.

EXHIBIT B

VERMONT

State of Vermont
Department for Children and Families
Family Services Division
103 S. Main Street
Waterbury, VT 05671-2401

October 12, 2015

Jay Simons, Director
Woodside Juvenile Rehabilitation Center
26 Woodside Drive
Colchester, Vermont 05446

Dear Mr. Simons,

Please find enclosed the license and licensing report reflecting the May 2015 site visits. Please note the license is effective August 1, 2015 and expires July 30, 2016.

If you have any questions, please feel free to give me a call.

Sincerely,

Christopher Ward, LICSW, Social Worker
Residential Licensing & Special Investigations

Brenda Dawson Crocket

Brenda Dawson Crocket, MSW, Senior Social Worker
Residential Licensing & Special Investigations

Enclosure

C: Ken Schatz, Commissioner, Department for Children & Families via email
Leslie Wisdom, General Counsel, Department for Children & Families via email
Karen Shea, Child Protection & Field Operations Director, DCF via e-mail
Marion Paris, Residential Services Manager, DCF via e-mail
Melanie D'Amico, Child Placement Specialist, DCF via e-mail
Janet Dunigan, Child Placement Specialist, DCF via e-mail
Alicia Hanrahan, Education Programs Manager, Agency of Education, via e-mail
Pat Pallas-Gray, Independent Schools Consultant, Agency of Education, via email
Laurel Omland, Department of Mental Health via e-mail
RLSI-electronic file

State of Vermont

AGENCY OF HUMAN SERVICES
DEPARTMENT FOR CHILDREN & FAMILIES

License to Operate a Residential Treatment Program

Granted to

Woodside Juvenile Rehabilitation Center
26 Woodside Drive
Colchester, Vermont 05446

in accordance with Title 33, Vermont Statutes Annotated, as amended, Section 2851.

TERMS OF THE LICENSE

MAXIMUM NUMBER OF CHILDREN: 30 youth, male & female
10 – up to 18 years of age

CONDITIONS: The conditions include the following summarized corrective actions.

Woodside will:

- Report and consult licensing authority regarding program changes.
- Hold Treatment Team Meetings quarterly.
- Initiate restraint as a last resort.
- Youth restricted to rooms will be considered in seclusion and program must adhere to applicable regulations
- Develop policy regarding purpose and procedures governing the ISU.
- Request a variance to regulation prohibiting use of mechanical restraints inside the facility.

The Governing Authority will:

- Pursue adoption of PRTF conforming rules to govern the future regulation of Woodside.

This license is granted in consideration of the application thereof, and said application and all statements, information, answers, promises and agreements therein contained are hereby referred to and made a part hereof.

Commissioner, Ken Schatz

Effective: August 1, 2015
Expires: July 30, 2016

UNLESS SOONER REVOKED OR SUSPENDED

RESIDENTIAL TREATMENT PROGRAM
Licensing Report

	Woodside Juvenile Rehabilitation Center	Original:	
Address:	26 Woodside Drive	First Relicense:	
	Colchester, Vermont 05446	Renewal:	X
Telephone:	(802) 655-4990		
		Licensed Capacity:	30
		Gender:	Male & Female
Date(s) of Site Visit:	5/9/15, 5/11/15, 5/18/15, 5/19/15, 5/21/15	Age:	10 up to 18
Licensor(s):	Brenda Dawson, MSW and Chris Ward, LICSW		

Methodology

Review:	Review:	Interview:
X Application Documents	X Program Description	X Children/Youth
Fire Safety Inspection documents	X Program Policies & Procedures	X Parents
Minutes of Board Meetings	X Organizational Chart	X Direct Care Staff
X Communication logs	X Staff Roster/files/background Checks	X Supervisory Staff
Medication logs	X Staff Schedules	X Clinicians
Evacuation drill logs	X Staff Training Records/Supervision	X Administrators
X Secretary of State Website	X Client files	X Collateral agencies/departments
		X Inspect physical facility(ies)

PROGRAM SUMMARY: According to Woodside's program description "*Woodside Juvenile Rehabilitation Center is a secure residential treatment facility located in the Town of Essex in the State of Vermont. Operation of the facility is the responsibility of the Agency of Human Services (AHS), Department for Children and Families (DCF), Family Services Division (FSD).*

The goal of Woodside is to provide evidence-based practices using strength-based, goal-directed, and resident-led treatment in a safe and secure environment. It is the highest level of care in the state for youths adjudicated or pre-adjudicated delinquents, whose needs for supervision cannot be adequately addressed in the community.

Woodside incorporates a consistent treatment milieu essentially offering residents constant therapeutic services, staff accessibility, and the opportunity for social learning. Combined with this therapeutic milieu, evidenced-based therapy and assessment services are employed through individual and group delivery. To strengthen the opportunity for resident to be successful upon transition, Woodside is closely linked to the surrounding community through expert consultation, re-engagement programming and activities, treatment provider linkage, and volunteering.

The Green and Blue Units contain 12 and 14 (respectively) single occupancy resident rooms surrounding an open living day room. There are two bathrooms with showers available for resident use on each unit. The staff office walls are primarily safety glass to increase supervision.

The Intensive Stabilization Unit is comprised of three self-contained single occupancy rooms that have toilets and sinks within the room, and one padded safe room. These rooms are connected to a dayroom. The unit is equipped with shatterproof safety-glass windows, shatterproof lights and steel door for security purposes. All door locks can be electronically or manually controlled."

Information supporting this report and its conclusions was gathered by two Residential Licensing and Special Investigations social workers. On site interviews and document reviews were conducted over the course of 5 days. Significant additional time was spent conducting off site interviews on the telephone and in person.

Those interviewed included the Director, Assistant Operations Director, Quality Assurance Administrator, Clinical Director, Educational Coordinator, all three Operations Supervisors, all three Clinicians, Contracted Psychiatrist, Contracted Psychologist, eight Youth Counselors, four Teachers, a Cook, Financial Specialist, and two former employees. A majority of individuals interviewed requested anonymity.

Six current residents and two former residents were interviewed. RLSI asked Woodside to provide the name of social workers who have placed youth at Woodside during the last year. RLSI solicited feedback from 21 social worker and supervisors by email. No written responses were received. Two supervisors and six social workers spoke in person on condition of anonymity.

Five parents who are active in their child's treatment and the DCF Family Placement Specialist were contacted by telephone.

Additional comments are found at the conclusion of this report for specific and noted regulations.

On June 19, 2015 RLSI provided an initial licensing report draft for program response. On July22, 2015 we received the Woodside response. This final report is resultant of this exchange.

REGULATORY OVERSIGHT

	Compliance	Recommendations/Comments
101 A Residential Treatment Program shall not be operated without the formal prior approval of the Department for Children and Families, Residential Licensing Unit (hereafter "Licensing Authority").	C	Detention Unit opened in Colchester in 1986 and Treatment Unit in 1987.
102 A program, which was already operational before the need for a license was determined, may be considered to be in compliance if the program has applied for and is making satisfactory progress toward licensure.	C	Current licensing period with no lapse began 1996
103 A Residential Treatment Program shall allow the Licensing Authority to inspect all aspects of a program's operation which may impact children/youth.	C	RLSI has found Woodside Administration and staff to be open and accommodating during licensing activities and investigations.
104 A Residential Treatment Program shall allow the Licensing Authority to interview any employee of the program and any child/youth in the care of the Residential Treatment Program.	C	
105 These regulations are not meant to supersede State or Federal mandates.	C	
PROCEDURES		
106 An applicant shall apply for a license on a form provided by the Licensing Authority and provide requested information.	C	
107 When a Residential Treatment Program has made timely and sufficient application for licensing renewal, the existing license does not expire until the application for renewal has been acted upon by the department.	C	Signed application received on 06/01/2015
108 A license may be issued with conditions when regulations have not been met, provided that the non-compliance does not constitute an unsafe situation or a major programmatic weakness and the program acts immediately to address the identified non-compliance.	C	
VARIANCE		
112 A Residential Treatment Program shall comply with all applicable regulations unless a variance for a specific regulation(s) has been granted through a prior written agreement with the Licensing Authority.	C	

113 A variance for specific regulation(s) shall be granted only when the Residential Treatment Program has documented that the intent of these regulation(s) will be satisfactorily achieved in a manner other than that prescribed by the regulation(s).	C	Variance granted to Regulation 904 March 2013, continues.
114 When a Residential Treatment Program fails to comply with the variance agreement, the agreement shall be subject to immediate cancellation.	C	
RENEWAL		
115 Application for renewal of a Residential Treatment Program license shall be made in accordance with the policies and procedures of the licensing authority.	C	06/01/2015
CHANGES		
116 A Residential Treatment Program shall notify the Licensing Authority at least 60 days before any of the following: **A substantial change in services provided** or population served; A planned change in staffing pattern; A planned change in the Administration; A planned change of ownership and/or governance; A planned change of location; A planned change in the name of the Residential Treatment Program.	C*	See comment section
117 A Residential Treatment Program shall notify the licensing authority as soon as the change is known, if any of the above mentioned changes occur without prior planning.	C	RLSI was notified of the entire unit "lock down" in April 2015.
REPORTING		
118 A Residential Treatment Program shall report any suspected or alleged incident of child abuse or neglect within 24 hours, to the Department for Children and Families, Centralized Intake Unit. (33 V.S.A., Chapter 49, §4913).	C	
119 A Residential Treatment Program will supervise and separate the accused individual(s) and the victim(s) whose behavior caused report to the Department for Children and Families unless or until otherwise instructed by the Special Investigation Unit and/or Residential Licensing Unit.	C	
120 A Residential Treatment Program shall report incidents of sexual activity between residents, as defined in these regulations, within 24 hours to the Department for Children and Families, Centralized Intake Unit; (800) 649-5285.	C	
INVESTIGATIONS		
121 A Residential Treatment Program shall cooperate fully in investigations of any complaint or allegation associated with the program. This may include, but is not limited to the Department for Children and Families Special Investigations Unit, and the Licensing Authority.	C	
NOTIFICATION		
122 A Residential Treatment Program shall immediately, or as soon as reasonable, report to the Licensing Authority incidents that could potentially affect the safety, physical or emotional welfare of children/youth within the program. Written report shall follow verbal report within 24 hours.	C	
123 Incidents of restraint which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than within 24 hours. (see regulation 657)	C	
124 Incidents of seclusion which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than within 24 hours. (see regulation 666).	C	
125 Residential Treatment Program shall report, **verbally** and in writing, within 24 hours to the Licensing Authority incidents where the program knowingly or negligently violates licensing regulations.	C*	See comment section
200 GENERAL PROVISIONS		
THE RIGHTS OF CHILDREN/YOUTH AND FAMILIES		
201 A Residential Treatment Program shall ensure children/youth the following rights: to be served under humane conditions with respect for their dignity and privacy; to receive services that promotes their growth and development; to receive gender specific, culturally competent and linguistically appropriate service; to receive services in the least restrictive and most appropriate environment; to access written information about the providers policies and procedures that pertain to the care and supervision of children, including a description of behavior management practices; to be served with respect for confidentiality; **to be involved, as appropriate to age, development and ability, in assessment and service planning;** to be free from harm by caregivers or others, and from **unnecessary or excessive use of restraint and seclusion/isolation;** to file complaints and grievances without fear of retaliation.	C*	See bold print 50% (4 out of 8) of youth interviewed indicated they have a role in treatment planning and review. Addressed in Plan of Care/Treatment Planning section (with 521,522,525) Restraint and Seclusion addressed in separate comments section

202 A Residential Treatment Program shall ensure families and custodians the following rights: to access written information about the providers policies and procedures that pertain to the care and supervision of children, including a description of behavior management practices; to receive services with respect for confidentiality; **to be involved in assessment and service planning**; to give and to withhold informed consent; to be notified immediately or as soon as reasonable of any runaway, attempted suicide, suicide, or medical emergency requiring the services of an Emergency Room or hospitalization, death or any other seminal event in the life of their child/youth; **to be notified within 24 hours following the restraint or seclusion of their child/youth; to file complaints and grievances without fear of retaliation.**	C*	3 out of 3 parents and 5 out of 5 social workers, representing 5 different districts, interviewed indicate a lack of inclusion in the treatment planning and review process. Addressed in Plan of Care/Treatment Planning section (with 521,522,525)
203 A Residential Treatment Program shall document prohibitions and limitations regarding parental involvement in the child/youth's Plan of Care and review such prohibitions and limitations at least every 90 days.	N	See Comment Section (visitation policy not enough – should be individualized)
300 THE GOVERNING AUTHORITY		
301 A Residential Treatment Program shall be incorporated. If incorporated outside the State of Vermont, it shall secure authorization from the Secretary of State to do business in Vermont.	C	
302 The Governing Authority is ultimately responsible for all aspects of the Residential Treatment Program.	C	n/a. There is no Board of Directors. Woodside is operated by the State of Vermont, Department for Children and Families. Ultimate authority within DCF resides with the Commissioner of DCF.
303 The Governing Authority shall make available to the Licensing Authority, upon written request, a list of directors and officers of the board.	C	
304 The Governing Authority shall: Review major operational decisions; Have provisions which preclude both the fact and appearance of conflict of interest; Specify the terms of appointment or election of members, officers, and chairperson(s) of committees; Specify the frequency of meetings and attendance requirements; Prohibit board members from being paid members of the staff.	C	
305 The Governing Authority of a Residential Treatment Program shall appoint a qualified administrator.	C	Jay Simons, Director
306 The Governing Authority is responsible for ensuring the writing of an annual evaluation of the Program Administrator, based on the job description which delineates the responsibilities and authority of the Program Administrator.	C	Last evaluation 07/07/2015 of Director Jay Simons
307 The Governing Authority is responsible for assuring the Residential Treatment Program's continual compliance and conformity with the following: The program's stated goals and objectives; Relevant laws and/or regulations, whether federal, state, local or municipal, governing the operation of the Residential Treatment Program. This may include, but is not limited to Zoning; Department of Public Safety, Fire Prevention; Department of Health; Interstate and International Placement of Children; The Prison Rape Elimination Act of 2003.	C	
308 The Governing Authority shall ensure: Development and on-going review of program policies and procedures; Development and review of annual budgets to carry out the objectives of the Residential Treatment Program; Any fund raising, community activity, publicity or research involving children/youth is conducted in a manner which respects the dignity and rights of children, youth and their families and complies with all relevant state and federal laws regarding confidentiality.	C	
309 The Governing Authority shall require and review an annual report, written by the administrator of the program which evaluates the program in relation to the program description, with the goal of continuous quality improvement.	C	
310 The annual assessment shall identify indicators that measure the program's ability to deliver the services described in the program description. These indicators may consider (but are not restricted to) the following: The number and circumstances of planned discharges; The number and circumstances of unplanned discharges; Consumer feedback; Provision of adequate supervision as evidenced by all reports of child abuse, sexual contact between children/youth; Grievances heard, resolved and unresolved; Personnel actions taken; Staff turnover; and Employee satisfaction surveys.	C	While report is positive it doesn't include the suggested indicators i.e. staff turnover, employee satisfaction, consumer feedback, etc. Important information available that could be easily cited.
400 PERSONNEL		
GENERAL		
401 A Residential Treatment Program shall not hire, or continue to employ, any person whose health, behavior, actions or judgment might endanger the physical or emotional well-being of the children/youth served.	C	
402 A Residential Treatment Program shall not hire, or continue to employ, any person substantiated for child abuse or neglect.	C	

403 There shall be a sufficient number of personnel qualified by education, training and experience with sufficient authority to adequately perform the following functions: Administrative; Financial; Supervisory; Clinical; Case Management; Direct child care; Housekeeping; Maintenance; Food service; Maintenance of records.	C	
404 A Residential Treatment Program shall have written job descriptions for all positions within the program, including lines of authority, which are accessible to all employees.	C	
405 A Residential Treatment Program shall ensure that direct child care employees have regularly scheduled hours of work.	C*	Many employees interviewed report needing to find own coverage for time off.
406 A Residential Treatment Program shall establish policies governing employee conduct. These policies shall be designed to promote: Good role modeling; Adequate supervision of children/youth; The development of healthy relationships between adults, children/youth.	C	See Code of Conduct
QUALIFICATIONS		
407 The credentials of the program administrator, directly responsible for the therapeutic milieu within the residential treatment program, regardless of job title will include at minimum: Master's degree in a relevant field and, Four years direct care, including supervisory experience in a residential treatment program or therapeutic setting for children and/or youth. Or, Bachelor's degree in a relevant field and, Five years direct care, including two years supervisory experience in a residential treatment program or therapeutic setting for children and youth.	C	
408 The credentials of those providing supervision of direct care staff, regardless of job title will include at minimum: Master's degree in a relevant field and, One year experience providing direct care in residential treatment programs for children/youth. or, Bachelor's degree and, Two years experience providing direct care in residential treatment programs for children/youth. or, High School Diploma or GED and, Four years experience working with children/youth in residential treatment programs.	C	Operations and Clinical Supervisors meet or exceed this criteria
409 The credentials of those providing direct care for children/youth, regardless of job title will include at minimum: Bachelor's degree and, 21 years of age and, Experience working with children/youth. or, High School Diploma or GED and, 21 years of age and, Two years experience interacting with children/youth. This may include, but is not restricted to camp counselor, coach, babysitting.	C	Direct care employees meet or exceed the criteria
410 Individuals providing clinical services for children/youth and families shall have experience working with children/youth and families shall meet current Vermont licensing and certification requirements and professional standards.	C	Per Secretary of State Website
HIRING		
411 A Residential Treatment Program shall have written personnel policies and procedures for the hiring, orientation, training, supervision, evaluation, recognition, discipline and termination of employees.	C	State of Vermont Human Resources
412 Residential Treatment Program shall conduct background checks, upon hire and every three years thereafter, on all employees, board member/trustees, volunteers, student interns, and others who may have unsupervised contact with children/youth in the program. Minimally, the background checks shall include the Vermont Criminal Information Center, Vermont Child Protection Registry and the Adult Abuse Registry.	C	
413 The results of background checks must be received and evaluated by the program administrator prior to the individual being hired and prior to having any unsupervised contact with children/youth. Documentation of completed background checks and administrative review must be maintained and available to licensing upon request.	C	
EMPLOYEE ORIENTATION AND TRAINING		
414 A Residential Treatment Program shall have written policies and procedures for the orientation of new staff to the program. This orientation must occur within the first 30 days of employment and include, but is not limited to: Program description and population served; A tour of the facility; Overall program treatment philosophy and approach; Program philosophy of behavior management; Child/youth grievance process; Basic information about behavior children/youth may exhibit; Identification of early warning signs that indicate child/youth may become disruptive or aggressive and how these observations are to be reported; Professionalism in dealing with children/youth, families, and others; Confidentiality; Program policies and procedure relating to interventions employed by staff to prevent, deescalate, safely manage child/youth acting out behaviors; Roles and expectation of various personnel in preventing and responding to crisis situations; Documentation requirements; Working as part of a team; Policies regarding zero-tolerance for sexual abuse; Procedures for reporting suspected incidents of child abuse and neglect; Policies and procedures regarding runaway children/youth Policies and procedures regarding the acquisition,	C*	Provision of training is delegated to individuals with demonstrated competence in the subject area i.e. Chris Hoffman Strength Based Assessment, Aron Steward, Suicidality. Confirmed by Administrator responsible for tracking training, Spring 2015 hires have received abbreviated and limited training prior to working due to high staff turnover

storage, administration, documentation and disposal of medication; Emergency response procedures; Emergency evacuation procedures; Residential Treatment Program regulations.		and staff shortage,
415 During orientation, each employee should be made aware of the plan for his or her particular on-going training and professional development. Plans should be developed between the employee and supervisor, and should be based on their roles and responsibilities in the program.	C	
416 Staff who may work with children/youth shall receive training in the prevention and use of restraint prior to participating in the use of restraint. Staff will be competent in (but not limited to) the following: Relationship building, group processes, restraint prevention, de-escalation methods, avoidance of power struggles, and threshold for use of restraint; The physiological effect of restraint, monitoring physical distress signs and obtaining medical assistance, and positional asphyxia; Legal issues and idiosyncratic conditions that may affect the way children/youth and staff may respond to restraint (e.g., cultural sensitivity, age, gender, developmental delays, history of trauma, symptoms related to substance abuse, health risks, etc.), and; Escape and evasion techniques, time limits, the process for obtaining approval for continued restraints, the procedure to address problematic restraints, documentation, debriefing with children/youth, follow-up with staff, and investigations of injuries and complaints.	C	Confidence Assessment and Protection Systems (CAPS) and Advanced Communication Techniques (ACT), Dangerous Behavior Control Techniques (DBCT) Due to the need to hire quickly, recent hires have received abbreviated training prior working.
417 A Residential Treatment Program shall ensure supervisors and those who provide direct care receive on-going training and develop competencies relevant to the population served including (but not limited to): Relationship Building; Listening and communication; Family Engagement; Understanding and analyzing problem behaviors; Trauma informed practices; Positive behavior support; Designing and implementing routines; Setting clear limits; Praising and reinforcing behavior; Early detections of conflict situations; Interventions to minimize potential conflicts; Designing and implementing activity programs; Teaching social and anger management skills; Managing transitions; Managing personal boundaries; Harassment; Conflict resolution; First Aid and emergency medical procedures; Administration of medication and the documentation thereof.	C	Agency of Human Services and Department for Children and Families Training is available to employees as well as "outside" conferences and training opportunities.
418 A Residential Treatment Program shall ensure annual training for every employee responsible for direct child care effective de-escalation techniques, appropriate use of restraint, seclusion and expectations regarding the documentation of the use of restraint and seclusion.	C	Tracked by Lisa Jennison
EVALUATION		
419 A Residential Treatment Program shall conduct, at minimum, an annual performance evaluation based on performance expectations in the context of each employee's' job description and plan for on-going profession development.	C	Within 6 months of initial hire and annually thereafter.
420 The evaluation will identify areas of competence and document targets for growth and development to be reviewed at established intervals.	C	
421 The evaluation will be signed by the employee and his/her immediate supervisor. There must be an opportunity for the employee to express his/her agreement or disagreement with the evaluation in writing. The employee shall be given a copy of his/her evaluation.	C	
PERSONNEL FILES		
422 A Residential Treatment Program shall maintain a personnel file for each employee containing: The application for employment and/or resume; Documentation of reference checks; Employee's starting and termination dates; Applicable professional credentials/certifications; A signed job description, acknowledging receipt; Employee's plan for on-going training and professional development; Documentation of training; All annual performance evaluations; Commendations and disciplinary actions relating to the individual's job performance.	C	
STAFF COMMUNICATIONS		
423 A Residential Treatment Program shall establish procedures to assure adequate communication and support among staff to provide safety, continuity and integration of services to the children/youth. This may include logs, shift notes, minutes of meetings, etc.	N	7 out of 8 Direct Care staff report unclear and conflicting information regarding supervision and care needs for youth
VOLUNTEER SERVICES AND STUDENT INTERNS		
424 A Residential Treatment Program may utilize volunteers and student interns to work directly with a particular child/youth or group of children/youth under the supervision of an employee of the program.	C	
425 Volunteers will not provide essential services which would otherwise be unavailable.	C	
426 A Residential Treatment Program shall ensure that the needs and learning experiences of volunteers and student interns do not interfere with the care of	C	

children/youth.		
427 Volunteers and interns are subject to the same background, character and reference checks as employees.	C	
428 Volunteers shall receive training relevant to the work they will be doing and issues of confidentiality.	C	
429 Student Interns shall receive training relevant to the work they will be doing, including (but not limited to) the training provided employees within the first 30 days of hire. See regulation 415	C	
500 TREATMENT AND CASE MANAGEMENT SERVICES		
PROGRAM DESCRIPTION		
501 A Residential Treatment Program shall have a written program description, accessible to prospective residents, parents, custodians, placing agencies and the general public upon request.	C	
502 The program description shall include: Description of the population served; Criteria for admission; Exclusionary criteria; Description of the milieu; Description of the treatment modalities; Description of the clinical services provided; Description of the educational services provided.	C	
CASE RECORDS		
503 A Residential Treatment Program shall have written policies and procedures for protection of the confidentiality of all children/youth's records.	C	
504 A Residential Treatment Program shall maintain record(s) for each child/youth. The content and format of these records shall be uniform within the program and minimally include: The name of the child/youth; Gender; Date of birth; Date of Admission; Legal custody and custodianship status; Informed consent signed by the parent(s) and custodian to provide emergency medical treatment and for the administration of medication; Contact information for the parent(s), caretakers; Documented acknowledgement from the child/youth, parent(s) and custodian that they have been informed of the program's policies and procedures regarding the use of restraint and seclusion; Informed consent signed by parent(s) and custodian regarding the policies and procedures guiding the use of restraint and seclusion that may occur while the child/youth is in the program; De-escalation intervention plan; Referral and Intake information; Treatment/clinical records; Education records; Cumulative medical records including date and results of last physical and dental examinations; Plan of Care, amendments and reviews; Incident Reports; Discharge Plan; Date of Discharge; and Contact information of the person or program to which the child/youth was discharged.	C	
505 When information is in the possession of another person or agency and unavailable to the program, the program shall document attempts to acquire that information.	C	
506 A Residential Treatment Program shall establish policies and procedures regarding the retention, storage and disposal of records.	C	Destroyed upon 18th birthday except treatment plan for which Medicaid has been billed, per DCF policy
REFERRAL/ADMISSION PROCESS		
507 Residential Treatment Program shall accept youth into care only when a current intake evaluation has been completed. The evaluation shall include information and assessments regarding the family, the child/youth's developmental, social, behavioral, psychological, and medical histories, allergies and any special needs.	C	
508 A Residential Treatment Program shall accept and serve only those children/youth whose needs can be met by the services provided by the program.	C	EXEMPT
509 A Residential Treatment Program shall have written referral and admission policies and procedures.	C	
510 A Residential Treatment Program shall ensure that the child/youth, his/her parent(s) and custodian are provided reasonable opportunity to participate in the admission process and decisions, and that due consideration is given to any questions/concerns.	C	
511 A Residential Treatment Program shall provide children, youth, families and custodians upon placement a clear and simple written statement that includes: The procedure used to report complaints or grievances, including timelines and accessible reporting formats; Assurance that the complaint may be submitted to someone other than the individual named in the complaint; Assurance that retaliation will not be tolerated; An opportunity for the child, youth, family member, custodian or staff member to present his or her version of events and to present witnesses; A process for informing the complainant of the results; A process for appeal; Contact information for the licensing authority; and Contact information for the State-designated protection and advocacy system.	C	Client Orientation Handbook
512 A Residential Treatment Program shall ensure that upon placement, each		

child/youth is asked if he/she has any physical complaints and is checked for obvious signs of illness, fever, rashes, bruises and injury. The results of this interview shall be documented and kept in the child/youth's record.	C	
513 Depending on the age, gender and needs of the child/youth an inventory and/or search of a child/youth's belongings as part of the admission process activity will be conducted by a same gender staff person as the child/youth being admitted and in the child/youth's presence.	C	Health Screening upon admission. Found in Intake Procedure
514 A Residential Treatment Program shall obtain the written informed consent of a child or youth, their parent(s) and custodian before the child or youth is photographed and/or recorded for research and/or program publicity purposes.	C	
515 A Residential Treatment Program shall assign a staff member to orient the child/youth and his/her parent(s) and custodian, to life at the program; including a verbal review of emergency evacuation procedures, the child/youth's rights and program expectations.	C	Client Orientation Handbook
516 A Residential Treatment Program shall make available to each child/youth, parent(s), and custodian, a simply written list of rules and expectations governing children/youth's behavior.	C	
517 The program will inform the child/youth, parent(s) and custodian of the policies and procedures regarding the use of restraint and seclusion. While this orientation will include the following content, the mode of delivery is dependent on the population served. Explanation of de-escalation techniques staff members may employ to defuse the situation in an attempt to avoid the use of restraint or seclusion; Description of situations and criteria for the use of restraint or seclusion; Who is authorized to approve and initiate the use of restraint or seclusion; A description of the restraint techniques authorized for use; A viewing of rooms used for seclusion; The protocol for the monitoring of the child/youth's health and well-being during the restraint, including time frames; The protocol for supervision and monitoring of the child/youth's health and well-being while secluded, including time frames; The decision-making process used by staff for the discontinuation of the use of restraint or seclusion; The internal grievance procedure to report inappropriate use restraint or seclusion; and Contact information for the Licensing Authority.	C	Client Orientation Handbook
518 A Residential Treatment Program will obtain written acknowledgement from the child/youth, parent(s) and custodian that they have been informed of the program's policies and procedures regarding the use of restraint and seclusion.	C	
519 A Residential Treatment Program that uses restraint or seclusion shall offer the child/youth, parent(s) and custodian the opportunity to provide information about the child/youth that may help prevent the use of restraint and seclusion.	C	
520 A Residential Treatment Program shall gather and assess the following information to develop an individualized de-escalation plan for each child/youth to avoid the use of restraint and seclusion. The child/youth's history of violence; The child/youth's history of suicidal ideation or attempts; Events that may trigger aggressive or suicidal behavior; Techniques to regain control, self regulate, self-sooth that have been successful in the past; Preexisting medical conditions or physical disabilities that place the child/youth at increased risk of harm, and History of trauma that places the child/youth at increased risk of psychological harm if he/she is restrained or secluded.	C	
PLAN OF CARE		
521 A Residential Treatment Program shall develop a Plan of Care based on the review of the referral information and input from the referral source, the child/youth, parent(s) and custodian within seven days.	C	Preliminary Plan of Care completed within 3 days per policy ranges from 42.86%-100%, most recently 63% according to Woodside Quality Assurance Administrator.
522 The Plan of Care shall include: Reason for Admission, Preliminary Goals and Objectives; Services/Interventions to be provided, by whom, and frequency; How progress will be measured; Family contact and level of involvement; Mental Health status; Physical Health status; Social Skills; Family relationships; Recreation/Activities/Interests; Education; Activities of daily living/Independent living skills; De-escalation Intervention Plan; Plan for discharge; Aftercare planning.	C*	See Comments
523 Plans of Care shall be signed by the administrator of the program (or designee).	C	
524 A Residential Treatment Program shall demonstrate child/youth, parental and custodial participate in the development of the Plan of Care.	C	
525 A Residential Treatment Program shall review and revise the Plan of Care at least once every 90 days and shall evaluate the degree to which the goals have been achieved, identify successful interventions, progress toward discharge planning and recommendations.	N	Corrective action in comments
526 A Residential Treatment Program shall ensure that the Plan of Care and	C	

subsequent revisions are explained to the child/youth, his/her parent(s) and custodian in language understandable to everyone.		
527 The current Plan of Care shall be available upon request at the time of discharge.	C	
600 RESIDENTIAL LIFE		
SUPERVISION		
601 A Residential Treatment Program shall provide adequate supervision appropriate to the treatment and developmental needs of children/youth.	C	
602 A Residential Treatment Program shall ensure that each child/youth has ready access to a responsible staff member throughout the night.	C	
603 A Residential Treatment Program shall provide adequate overnight supervision consistent with the needs of the children/youth.	C	
FAMILY INVOLVEMENT		
604 A Residential Treatment Program shall make every possible effort to facilitate opportunities for children/youth to communicate with parent(s), siblings, and custodian to foster permanent relationships with family, in accordance with the Plan of Care.	C*	Client Orientation Handbook is good, but individualized plan is absent from Plan of Care. See Reg 522
605 Alternative visiting hours shall be provided for families who are unable to visit at the prescribed times, consistent with the Plan of Care.	C	
606 A Residential Treatment Program shall not use family contact as an incentive to elicit desired behavior; likewise family contact shall not be withheld as a consequence for misbehavior.	C	
607 A Residential Treatment Program shall have written procedures for overnight visits outside the program which includes; The child/youth's location; Length of stay; Plan for transportation; Plan for conveying medication; Discussion of medication regime; Recommendations for supervision; Name, address and contact information for person responsible for the child/youth while they are away from the program; Relationship to the person responsible for the child/youth; Plan for the unforeseen return of the child/youth, and Documentation of above activities.	C	
608 A Residential Treatment Program shall not place a child/youth in a foster home unless the Residential Treatment Program is also a licensed Child Placing Agency.	C	
EDUCATION		
609 A Residential Treatment Program shall ensure that every child/youth is provided an appropriate educational program in accordance with state law and approved by the Vermont Department of Education.	C	While not an "Approved Independent School" Woodside follows the Independent School Guide & PbS standards.
DAILY ROUTINE		
610 A Residential Treatment Program shall follow a written daily routine, including weekends and vacations.	C	
611 Daily routines shall not conflict with the implementation of a child/youth's Plan of Care.	C	
COMMUNICATION AND PRIVACY		
612 A Residential Treatment Program shall permit children/youth to send and receive mail, make telephone calls and e-mail, consistent with the Plan of Care.	C	
613 Program staff shall read a child/youth's mail and e-mail or listen in on telephone conversations only with the child/youth's full knowledge and understanding of the reasons for this action, consistent with the Plan of Care.	C	
614 A Residential Treatment Program shall not bar contact between a child/youth and their parent(s), custodian, attorney, *guardian ad litem*, clergy and State-designated protection and advocacy system.	N	Some DCF staff interviewed report being denied access, communication with the youth.
615 When the right of a child/youth to communicate in any manner with any person outside the program must be curtailed, or monitored a residential program shall: Document the decision, including who was involved in the decision making process, reasons for limitations of his/her right to communicate with the specified individual(s); Inform the child/youth of the decision making process; Review this decision minimally at each review of the Plan of Care.	C*	Client Orientation Handbook and Comments
MONEY/FINES		
616 A Residential Treatment Program shall permit children/youth to access his/her own money consistent with his/her Plan of Care.	C	
617 Fines shall not be levied except in accordance with a written Program Description which includes a description of how revenues from fines are used for the benefit of the children/youth residing in the program.	C	
CHORES		

618 The Residential Treatment Program may assign chores that provide for the development of life skills and not used as punishment.	C	
619 Children/youth participation in chores shall not be a substitute for housekeeping and maintenance staff.	C	
RELIGION		
620 A Residential Treatment Program with religious affiliation(s) or expectations for participation shall include such information in the program description.	C	
621 A Residential Treatment Program shall make every effort to accommodate a child/youth's desire to attend and/or participate in religious activities and services in accordance with his/her own faith.	C	
PERSONAL BELONGINGS		
622 A Residential Treatment Program shall ensure that children/youth have his/her own adequate, clean, and appropriate clothing.	C	EXEMPT - See Regulation 906
623 A Residential Treatment Program shall allow children/youth to bring his/her personal belongings to the program e.g. comfort items, memorabilia.	C	
624 Limitations on the quantity of personal items shall be discussed during the referral/admission process.	C	
625 Provisions shall be made for the protection of children/youth's personal property.	C	
626 Any search of a child/youth's personal belongings for contraband deemed necessary for the safety of the child/youth or others within the program will be conducted in the presence of the child/youth, by same gender staff as the child/youth unless contraindicated and documented.	C	
PERSONAL CARE AND HYGIENE		
627 A Residential Treatment Program shall ensure children/youth receive guidance in healthy personal care and hygiene habits.	C	
FOOD SERVICES		
628 A Residential Treatment Program shall ensure that a child/youth are provided at least three nutritional meals, available daily at regular times.	C	
629 There shall be no more than 14 hours between the evening meal and breakfast, unless nutritional snacks are offered during the evening.	C	
630 No child/youth in a Residential Treatment Program shall be denied a meal for any reason, except by a documented doctor's order.	C	
631 No child/youth shall be required to eat anything they do not want to eat, nor there be consequences for food preferences.	C	
632 Special dietary needs shall be discussed during the referral/intake process and the Residential Treatment Program shall make healthy accommodations for children/youth with special dietary needs.	C	
MEDICAL CARE		
633 A Residential Treatment Program shall ensure a routine physical examination by a medical practitioner for each child/youth within 30 days of admission unless the child/youth received such an examination within 12 months prior to admission.	C	
634 A Residential Treatment Program shall have written procedures for staff members to follow in case of medical emergencies, including the administration of first aid.	C	
635 A Residential Treatment Program must ensure that children/youth receive timely, competent routine and emergency medical care when they are ill or injured and that they continue to receive necessary follow-up medical care with parent(s) and custodians' consent.	C	
636 A Residential Treatment Program shall maintain a cumulative record of medical care. This record shall include: The name of the resident; The reason for the visit; Name and contact information for the provider; Results of examination, tests and recommendations; Medication(s) prescribed; The time and date the medication is administered.	C	
DENTAL CARE		
637 A Residential Treatment Program shall make reasonable effort to ensure each child/youth has had a dental examination by a dentist within 30 days of the child/youth's admission unless the child/youth has been examined within 6 months prior to admission and the program.	C	
638 Residential Treatment Program shall make reasonable effort to ensure children/youth receive timely, competent routine and emergency dental care and that they continue to receive necessary follow-up dental care.	C	
ADMINISTRATION OF MEDICATION		
639 A Residential Treatment Program shall have written policies and procedures governing the use and administration of medication to children/youth.	C	Procedures 405a – 405e

640 Policies and procedures governing the use and administration of medication shall be disseminated to all staff responsible for prescribing and administering medication.	C	
641 These policies shall specify who can administer medication, under what circumstances and procedures for documenting the administration of medication.	C	
642 A Residential Treatment Program shall ascertain all medication a child/youth is taking when coming into care and obtain parental and custodial consent for the administration of medication and any changes in medication(s).	C	
643 Medication will be administered as prescribed by a licensed practitioner.	C	
644 Medication errors shall be documented on an incident report.	C	
PETS		
645 A Residential Treatment Program shall have written policies and procedures address the presence and supervision of pets in the program.	C	
646 A Residential Treatment Program will ensure that the presence of any pet does not have an adverse effect on any child/youth residing in the program, for example allergies or fear.	C	
647 A Residential Treatment Program will maintain a separate record on each pet that includes: Identifying information; Owner(s) contact information; Record of vaccinations; Record of registration; Statement of good health from a Veterinarian; Veterinarian's contact information and; Incidents involving the pet, for example if the pet is abused by a child/youth, or if the pet bites a child/youth or staff member.	C	
BEHAVIOR MANAGEMENT		
648 A Residential Treatment Program shall prohibit all cruel, severe, unusual or unnecessary practices including, but not limited to: Strip searches; Body cavity searches; Restraints that impede a child/youth's ability to breathe or communicate; Chemical restraint; Mechanical restraint; Pain inducement to obtain compliance; Hyperextension of joints; Peer restraints; Locked buildings, rooms, closets, boxes, recreation areas or other structures from which a child/youth can not readily exit; Discipline or punishment which is intended to frighten or humiliate a child/youth; Requiring or forcing a child/youth to take an uncomfortable position, such as squatting or bending, or requiring or forcing the child/youth to repeat physical movements; Spanking, hitting, shaking, or otherwise engaging in aggressive physical contact (horseplay) with a child/youth; Physical exercises such as running laps or performing push-ups; Excessive denial of on-grounds program services or denial of any essential program services; Depriving a child/youth of meals, water, rest, or opportunity for toileting; Denial of shelter, clothing, or bedding; Withholding of personal interaction, emotional response or stimulation; Exclusion of the child/youth from entry to the residence; Any act defined as abuse or neglect by 33 V.S.A., Chapter 28, §4912.	C	Exempt from: Strip Searches Mechanical Restraints Locked buildings, rooms, recreations area. See "Additional Regulations" Section of this report, specifically Regulations 903, 904 and 905.
649 A Residential Treatment Program shall ensure that behavior management is not delegated to persons who are not known to the child/youth.	C	
PHYSICAL RESTRAINT		
650 A Residential Treatment Program shall not use any form of restraint without prior approval of the Licensing Authority.	C	
651 Restraint shall be used only to ensure that immediate safety of the child/youth or others when no less restrictive intervention has been, or is likely to be, effective in averting danger. Restraint shall be used only as a last resort.	C*	See 654
652 Any restraint lasting more than 10 minutes requires supervisory consultation, approval and oversight.	C	
653 Any restraint lasting more that 30 minutes requires clinical/administrative consultation, approval and oversight.	C	
654 Restraint shall never be used for coercion, retaliation, humiliation, as a threat of punishment or a form of discipline, **in lieu of adequate staffing**, for staff convenience, or for property damage not involving imminent danger.	C*	Insufficient staffing level is offered as the explanation for incidents of noncompliance.
655 A Residential Treatment Program shall develop and implement written policies and procedure that govern the circumstances in which restraint is used. These policies and procedures shall contain and address the following: The threshold for initiating restraint; Forms of restraint that are permitted; Staff members authorized and qualified to order or apply restraint; Procedures for monitoring the child/youth placed in restraint for signs of discomfort and medical issues; Time limitations on the use of restraint; The immediate and continuous review of the decision to restrain; Documentation of the use of restraint; Record keeping of incidents of restraint; Debriefing with the child/youth; Debriefing with all witnesses; Debriefing staff; Notification of parent(s) and custodian; and Administrative review of all restraints.	C	FSD Policy 177
656 Incidents of restraint shall be reported to the parent(s) and the person legally responsible for the child/youth as soon as possible, and not later than 24 hours.	C	

657 Incidents of restraint which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than 24 hours.	C	
SECLUSION		
658 A Residential Treatment Program shall not use any form of seclusion without prior approval of the Licensing Authority.	N	Modality has not been described or approved.
659 Seclusion shall be used only to ensure that immediate safety of the child/youth or others when no less restrictive intervention has been, or is likely to be, effective in averting danger.	N	Seclusion is used inappropriately and corrective action is needed.
660 Children/youth in seclusion will be provided constant, uninterrupted supervision by qualified staff, employed by the program and familiar to the child/youth.	N	
661 Seclusion lasting more than 10 minutes requires supervisory approval and oversight.	C	
662 Seclusion lasting more that 30 minutes requires clinical/administrative consultation, approval and oversight.	C	
663 Seclusion shall never be use for coercion, retaliation, humiliation, as a threat of punishment or a form of discipline, **in lieu of adequate staffing**, or for staff convenience.	N	Insufficient staffing level is offered as the explanation for above violations.
664 A Residential Treatment Program shall develop and implement a written policies and procedures that govern the circumstances in which seclusion is used. These policies and procedures shall contain and address the following: Circumstances under which seclusion may be used; Staff members authorized to approve the use of seclusion; Procedures for monitoring children/youth in seclusion; Time limitations on the use of seclusion; The immediate and continuous review of the decision to use seclusion; Documentation of the use of seclusion; Record keeping of incidents of seclusion; Debriefing with the child/youth; Debriefing with all witnesses; Debriefing staff; Notification of parent(s) and custodian; and Administrative review of all restraints and follow up actions taken.	N	Continues to be under revision in the context of the ISU
665 Incidents of seclusion shall be reported to the parent(s) and person legally responsible for the child/youth as soon as possible, and not later than within 24 hours.	C	
666 Incidents of seclusion which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than within 24 hours.	C	
DOCUMENTATION		
667 Each incident of restraint and seclusion shall be documented separately by staff members directly involved in the intervention as soon as possible, not later than 24 hours.	C	
668 This incident report written by the staff members shall include: Name, age, height, weight, gender and race of the child/youth; Date, beginning and ending time of occurrence; A description of what happened; including what activity the child/youth was engaged in prior to the escalation, the precipitating events; Description of de-escalation and less intrusive methods of intervention used and reasons for their use; Supervisory, clinical and/or administrative notification and approval; Staff involved, including full names, titles, relationship to the child/youth and if a restraint, date of most recent formal de-escalation and restraint training; Witnesses to the precipitating incident and subsequent restraint or seclusion; Preventative actions that may be taken in the future; Name of person making the report; Detailed description of any injury to the child/youth; Detailed description of any injury to staff members; Any action taken by the program as a result of any injury.	C	
669 Incident Reports shall be reviewed and signed by the supervisor/administrator within 8 hours. Documentation of the administrative review must include follow up actions which may include: Debriefing with child/youth; Debriefing with witnesses; Debriefing with staff; Medical needs; Identified need for additional training; or Personnel action (if warranted).	C	
RESTRAINT AND SECLUSION MONITORING		
670 A Residential Treatment Program will establish documentation and monitoring systems, enabling all incidents of restraint and seclusion to receive administrative review. The data and management systems will have the potential to monitor staff, individual, and critical programmatic involvement in incidents. The program shall track the following: Shift; Location; Day of the week; Time of day/night Incident antecedents; Length child/youth was held in restraint or seclusion; Type of restraint or seclusion; Age; Gender; Ethnicity; Number of incidents per child/youth; Staff members involved; Child/youth injuries requiring medical attention; and Staff injuries requiring medical attention.	C	
700 PHYSICAL ENVIRONMENT AND SAFETY		

GENERAL		
701 A Residential Treatment Program, including all structures and property shall be constructed, furnished, equipped, used and maintained so that the privacy, safety, health and physical comfort of all children/youth are ensured and in compliance with federal, state, local and municipal regulations.	C*	See Comment Section
702 A Residential Treatment Program shall pass and maintain documentation of an annual inspection of all buildings utilized by the program by an independent, qualified fire safety inspector.	C	
703 A Residential Treatment Program shall have a designated space to allow private discussions and counseling sessions between individual children/youth and their family members, visitors and staff.	C	
704 First Aid supplies shall be accessible in each living unit of a Residential Treatment Program.	C	
705 A Residential Treatment Program shall keep medication, cleaning supplies and other potentially harmful materials securely locked. Keys to such storage spaces shall be available only to authorized employees.	C	
706 A Residential Treatment Program shall ensure that there are sufficient and appropriate storage facilities.	C	
707 Each separate living unit within a Residential Treatment Program shall have 24-hour telephone service.	C	
708 A Residential Treatment Program shall not permit any firearm or chemical weapon on the property, including program and employee vehicles.	C	
709 A Residential Treatment Program shall ensure that children/youth are not exposed to second hand smoke in the facility, on the property or in program vehicles used to transport children/youth.	C	
710 Facility and staff vehicles shall be locked while on the property.	C	
711 A responsible adult will provide continuous and uninterrupted supervision when children/youth are swimming or otherwise engaged in water sports/activities.	C	
712 On-ground pools shall be enclosed and regularly tested to ensure that the pool is free of contamination.	C	
713 A Residential Treatment Program shall have written procedures for employees and children/youth to follow in case of emergency or disaster.	C	
714 A Residential Treatment Program shall conduct actual or simulated evacuation drills at least monthly and varied by shift. A record of such emergency drills shall be maintained including the date and time of the drill and whether evacuation was actual or simulated. All personnel in the building shall participate in emergency drills. The Residential Treatment Program shall make and document special provisions for the evacuation of any developmentally or physically disabled children/youth from the program.	C	
715 A Residential Treatment Program shall ensure that children/youth are properly secured and adequately supervised in any vehicle used by the program to transport children/youth.	C	
716 A Residential Treatment Program shall maintain, update and share with parent(s), custodians and the Licensing Authority the contact information of a specific individual to contact in the event of the emergency evacuation of children/youth.	C	
SLEEPING AREAS		
717 A Residential Treatment Program shall ensure that all sleeping areas used by children/youth are of sufficient size to allow for a bed and to afford space for dressing and quiet activities.	C	
718 No child/youth's bedroom shall be stripped of its contents and used for seclusion.	C	
719 A Residential Treatment Program shall ensure that no room without a window shall be used as a bedroom.	C	
720 A Residential Treatment Program shall not permit more than four children/youth to occupy a designated sleeping area or bedroom space.	C	
721 A Residential Treatment Program will assign roommates taking into account gender, age, developmental and treatment needs.	C	
722 Each child/youth residing in a Residential Treatment Program shall have his/her own bed.	C	
723 A Residential Treatment Program shall ensure that there is sufficient space between a mattress and another mattress (bunk bed) or ceiling for each occupant to sit up comfortably in bed.	C	
724 A Residential Treatment Program shall provide each child/youth with his/her own dresser or other adequate storage space in his/her bedroom unless there is a documented safety concern.	C	
725 The use of open flames shall not be allowed in sleeping areas of a Residential Treatment Program.	C	

TOILET, SHOWER AND BATHING FACILITIES		
726 A Residential Treatment Program shall have available to children/youth a minimum of one wash basin with hot and cold water, one flush toilet and one bath or shower with hot and cold water for every six children/youth.	C	
727 A Residential Treatment Program shall provide toilets and baths or showers which allow for individual privacy unless a child/youth requires assistance.	C	
728 A Residential Treatment Program shall have bathrooms with doors which can be opened from both sides.	C	
729 A Residential Treatment Program serving a co-ed population shall ensure private toileting, shower and bathing facilities.	C	
KITCHEN/DINING AREA		
730 A Residential Treatment Program shall have a sufficiently well-equipped kitchen to prepare meals for the children, youth and employees.	C	
731 A Residential Treatment Program shall be arranged and equipped so children, youth and employees can have their meals together.	C	
LIVING ROOM		
732 A Residential Treatment Program shall have a living room/common area where children/youth may gather for reading, study, relaxation, conversation and entertainment.	C	
SECLUSION ROOMS		
733 A Residential Treatment Program shall ensure all rooms used for seclusion meet all applicable state and local fire and safety codes.	C	
734 A Residential Treatment Program shall ensure all rooms used for seclusion are safe, clean, and well-maintained.	C	
735 A Residential Treatment Program shall ensure all rooms used for seclusion have adequate light, ventilation and maintain an appropriate room temperature.	C	
736 A Residential Treatment Program shall ensure all rooms used for seclusion are designed for continuous supervision.	C	
EMPLOYEE SPACE		
737 A Residential Treatment Program utilizing live-in employees shall provide adequate and separate living space for these employees.	C	
738 A Residential Treatment Program shall provide office spaced which is distinct from children/youth's living areas.	C	
ADDITIONAL REGULATIONS FOR SECURE FACILITIES		
901 Orientation and on-going training shall include; Security procedures; Trauma informed use of mechanical restraint; Trauma informed execution of strip search.	C	
902 During the admission process, a child/youth shall be offered the opportunity to call his/her parent(s).	C	
903 Admitting staff shall conduct a search of the child/youth and his/her possessions upon admission. Written policies and procedures regarding searches upon admission shall be consistent with the following provisions: All searches shall be of the least intrusive type necessary to satisfy the safety and security needs of the facility or the safety of the child/youth and not as a form of punishment. All searches shall only be conducted by same gender staff of the child/youth. A pat search is the standard method of searching children/youth upon admission.	C	
904 Strip searches upon admission are authorized (but not required) when there is reasonable suspicion that a child/youth has on his/her person contraband, weapons, or other items concealed which present a threat to the safety and security of the facility. Reasonable suspicion is determined on an individualized basis and shall be deemed present when: Current charges involve a crime of violence; or Current charges involve use of a weapon; or Current charges are drug related; or The child/youth's prior history includes arrest, charges or convictions of the above.	C	Variance granted to include "There is evidence of current self-harming or suicidal ideation."
905 Mechanical Restraints shall only be used by the program to bring a child/youth into the facility, when exiting the facility, and off the premises while in the custody of the facility.	N	Use of mechanical restraint occurring within facility
906 A Secure Residential Treatment Program shall ensure that children/youth have clean and appropriate clothing.	C	Dress Code

COMMENTS:

Woodside is found in violation or compliance with reservation to the following regulations:

100 REGULATORY OVERSIGHT

116 (C*) Alert licensing authority regarding program changes

During the previous licensing period, RLSI raised concern about the lack of timely communication from the facility about significant changes in programming. For example, RLSI was not notified that all youth deemed amenable to treatment had been placed on the Blue Unit where "incentivized" programming was being developed while youth deemed treatment resistant were housed on the Green Unit. The Green Unit, which had recently been "locked down," has continued to utilize significant seclusion (own room, seclusion room and ISU). The regulation implies that the licensing authority will have an opportunity to provide feedback and guidance prior to significant changes. This issue has been addressed and rectified at this time. The Woodside Clinical Director is now allowed to communicate directly with RLSI regarding program changes.

Corrective Action: *Woodside leadership agrees to alert and seek comment from RLSI to any significant programmatic or policy changes.*

125 (C*) Self Report of licensing violations

Until recently, RLSI has received inconsistent notification of use of mechanical restraint. When notified the necessary information was often mixed in with other reports of physical restraint and other responses to non-compliant behavior outside of required notification. RLSI repeatedly clarified expectations regarding appropriate notification. In March 2015 only 7 of 13 incidents of mechanical restraint were reported.

***Corrective Action*:** *Woodside Leadership has agreed to make notification to RLSI both verbally and in writing whenever a licensing violation occurs at Woodside. The licensing social worker's contact number will be added to the incident packet as a reminder to the supervisor on shift and to ensure the notification takes place. Violations of regulations trigger a response from RLSI which will result in a request for the incident reports documenting the intervention and possibly a follow up interview with the youth and/or staff. This was completed on 7/6/15.*

200 GENERAL PROVISIONS

201 (C*) Rights of Children and Youth
202 (C*) Rights of Families and Custodians
203 (N) Prohibitions and limitations of parental involvement

***Corrective Action*:** *See 500 section and 600 section*

400 PERSONELL

405 (C*) regular work schedule

During the site visits, many employees interviewed mention recent contact with union due to staffing levels and concerns over overtime expectations.

***Corrective Action**: Administration will assist staff in scheduling coverage so that the responsibility to find coverage to take time off does not rest on the employee.*

DCF has acquired 7 new permanent, classified Youth Counselor positions. This will allow clinicians and administrators to return to their normal duties. Woodside has upgraded three positions to supervisor level to enhance our ability to support staff on the line.

414 (C*) Provision of training

As mentioned above, staff training was abbreviated and limited during the Spring of 2015 in an attempt get new staff working as soon as possible.

***Corrective Action**: Stabilize staff resources and ensure proper onboarding. It is expected that current and new hires will be in compliance with training expectations and this will be reviewed at 6 month interim visit.*

423 (N) Procedures to ensure adequate communication and support

Direct Care staff report not being included in the treatment planning process and often not receiving the information they need to effectively deliver individual treatment plans on the floor. Youth Counselors report confusing individual behavioral plans with individual Plans of Care. Each individual gave examples of what they describe as "constant" program changes and changing directives/plans for youth. According to some, these directives are sometimes delivered by email not readily accessible to direct care staff and often without adequate explanation.

Woodside Director informs that In April 2015 Woodside discontinued the use of the Behavioral Support Plan. The Behavioral Support Plan took line staff's attention away from the residents' IPCs.

Corrective Action: *Woodside has acquired 7 new permanent, classified Youth Counselor positions. Woodside has upgraded three positions to supervisor level to enhance their ability to support staff on the line. This allows additional resources to a) address these concerns through communication at scheduled staff meetings and during individual supervision; and direct care staff will be included in quarterly treatment team meetings on a regular basis.*

500 TREATMENT AND CASE MANAGEMENT SERVICES

Conclusions are based on interviews and file review of a sample of Plans of Care. Interviews with residents, parent(s), social workers and many staff at Woodside indicate there is a need for improvement in collaboration, teaming, and inclusiveness among treatment team members both inside and outside the facility. Document review of Plans of Care supported this determination as evidenced by 1) lack of documentation of presence of key parties at treatment planning meetings, 2)

insufficiently individualized treatment plans, and 3) evidence that plans were not updated in a timely manner. Woodside's Preliminary Plan of Care does not meet requirements described in Regulation 522 and the subsequent Plans of Care are inconsistent in this regard. For example, sample reviews of Preliminary Plans of Care do not contain individualized plans for family contact, but rather reiterate Woodside's visitation policy. One parent reported being included in a treatment team meeting (of 5 explored youth.) This practice is changed from historical norms when this activity occurred regularly.

201 (C*) Rights of Children and Youth
202 (C*) Rights of Families and Custodians
203 (N) Prohibitions and limitations of parental involvement
522 (C*) Plan of Care content requirements

Corrective Action: *Clear documentation in Plan of Care of actions and decisions related to parental contact demonstrating accommodation of family needs (eg work schedules) and of any prohibitions and limitations. Program will review list of required Plan of Care content in 522 and incorporate.*

525 (N) Review and revision of Plan of Care at least every 90 days

Corrective Action: *The Woodside Director has agreed to resume quarterly treatment team meetings which will include the youth, natural supporting person, DCF DO Social Worker and representation from Woodside's internal multidisciplinary team to include the Clinical, Residential, Education and Medical staff providing individual services to the youth.*

600 RESIDENTIAL LIFE - Communication

604 (C*) family involvement and communication to foster Plan of Care

Corrective Action: *See 522 above*

614 (N) no barring contact with DCF social workers

Some division staff stated that they have been denied access or unsupervised access to youth under their supervision. Reasons given have been social worker safety, unstable or unsafe milieu, or lack of adequate staffing. Woodside administration disputes this claim.

Corrective Action: *Woodside administration has directed Woodside Operational Leadership that social workers have unfettered access to their clients at Woodside. Ideally, visits will be scheduled in advance to support stable program operations. The Preliminary Plan of Care will include a statement that social workers may see their clients at any time while at Woodside. The Woodside Director has initiated conversation with social workers through the Juvenile Justice Workgroup.*

615 (C*): documented in Plan of Care if contact with outside parties curtailed

Corrective Action: *Preliminary Plan of Care template has been adjusted to prompt clinicians to contact family within 24 hours to seek information and set expectations regarding visiting.*

600 RESIDENTIAL LIFE - Restraint

201 (C*) Rights of Children and Youth
651 (C*) Restraint as last resort

Restraint shall be used only to ensure that immediate safety of the child/youth or others when no less restrictive intervention has been, or is likely to be, effective in averting *danger*. Restraint shall be used only as a last resort. Interviews with staff, youth, and review of incident reports suggest a low threshold for initiating restraint. Restraint should not be a function of creating an orderly environment or addressing anticipated noncompliance or resistance.

Corrective Action: *Proposed adoption of PRTF sensitive rules should create clarity on proper threshold for restraint as response to emergency safety situations in which danger to youth or others is imminent. Restraint (and seclusion) have the potential to be a traumatizing or re-traumatizing experience for children/youth and are to be avoided if reasonably possible.*
Use of restraint as a last resort will be demonstrated in written incident reports, supported in policy, administrative procedure and staff training.

654 (C*) Restraint context (in lieu of adequate staffing)

During the Winter/Spring of 2015, Woodside experienced an increase in high risk/need residents requiring staff supports not available at Woodside. As a result staff was left to resort to interventions that in some cases were not best suited for the resident and resulted in high staff assault, stress and seclusion. As the resident needs exceeded staff resources that were available on the floor (1:1 supervision) resident were "rotated" in the interest of keeping residents and staff safe. Woodside acknowledges this violation and proposes the following corrective action plan.

Corrective Action: *DCF has acquired 7 new permanent, classified Youth Counselor positions to relieve situation of inadequate staffing. DCF has agreed to create new regulations based on psychiatric residential treatment program (PRTF) standards.*

600 RESIDENTIAL LIFE - Seclusion

658 (N) Use of seclusion with prior approval
201 (C*) Rights of Children and Youth
659 (N) Seclusion as last resort
660 (N) Supervision of youth in seclusion
663 (N) Seclusion contexts (in lieu of adequate staffing)
664 (N) Written policies and protocols

The above mentioned regulations all pertain to the use of seclusion.

The definition contained within these regulations states, "Seclusion: (however named) is the confinement of a child/youth in a segregated room, for the purpose of preventing harm to self or others, with the child/youth's freedom to leave physically restricted. Seclusion is not a punishment. Voluntary time-out is not considered seclusion, even though the voluntary time out may occur in response to verbal direction; the child/youth is considered in seclusion if freedom to leave the segregated room is denied."

According to program staff, "room time" is a frequently used consequence for a myriad of behaviors and may last for days, often accompanied by "rotations". This means a youth is restricted to their cell and is sometimes allowed to exit their cell for 30 minutes before re-entering their cell. Staff and youth describe this is an intervention routinely used. 30/30 rotation involves one youth out for 30 minutes and another in their room for 30 minutes and then alternate. When the entire Green Unit was "locked down" in 2015 one youth was allowed out at a time. This practice is seclusion.

Regulatory investigations during the Winter/Spring of 2015 resulted in Woodside being cited, more than once, for violating regulation 663 in that Woodside documented use of isolation in lieu of adequate staffing.

The program is lacking program description, policy and protocols regarding the Intensive Stabilization Unit (ISU).

Corrective Action: *Woodside will cease its practice of putting youth on "rotations" in their rooms. With additional staff, youth who require separation will receive supervision and programming safely outside the company of the other. Youth restricted to rooms will be considered in seclusion and program must adhere to applicable regulations.*

Policy, procedures, and program description regarding the use of the ISU will be created and finalized with approval from this regulator and other appropriate interested parties.

DCF has agreed to create new regulations based on psychiatric residential treatment program (PRTF) standards that will likewise address these same concerns.

700 PHYSICAL ENVIRONMENT AND SAFETY

701 (C*) physical facility safety

On February 27, 2015, Woodside Assistant Director, William Cathcart received confirmation of BGS receipt of work order (#242535) from BGS. The work order details: "Problem: (Blue Unit – Right Bathroom – There are 3 conduits running along the ceiling as you open the door. There is a gap between the ceiling and conduit, this creates a danger of a resident hanging themselves, Please tighten the conduit to the ceiling leaving no gaps and/or use pick proof caulk to close the gaps."

On March 17, 2015 a resident, assessed to be suicidal and appropriate for admission to in-patient psychiatric hospitalization, attempted suicide by hanging himself in this same bathroom at Woodside.

On June 10, 2015 upon inquiry, RLSI was notified by Woodside staff that this safety issue had yet to be rectified by BGS.

On July 9, 2015 the safety issue was rectified.

Corrective Action: *Situation ameliorated.*

900 ADDITIONAL REGULATIONS FOR SECURE FACILITIES

905 (N) mechanical restraints only used for transport
201 (C*) Rights of Children and Youth

Use of mechanical restraints in violation of this regulation within the facility has been routine. Current regulation only allows youth to be mechanically restrained when being transported to or from the institution.

Woodside Administration has requested the regulation be changed to allow mechanical restraint. Also, the Governing Authority (DCF Administration) is pursuing creation of new regulations in alignment with a psychiatric residential treatment facility (PRTF) model that may allow the future use of mechanical restraint. It has been recommended that Woodside pursue a variance to RTP regulations in the meantime. This variance request has not been received as of this date and the facility continues to be in violation.

Additionally, there was a significant increase in the use of mechanical restraints during the spring of 2015. Stated explanation for this is a challenging population and low staffing. In 2013 there were 3 occurrences, 2014 there were 13 and during the first six months of 2015, there have been 40 occurrences.

Corrective Action: *Woodside administration will seek a variance related to this regulation. The variance for use of mechanical restraints must conform to expectations and procedures in conformity with those in PRTF regulations.*

The Governing Authority will pursue adoption of PRTF conforming rules to govern the future regulation of Woodside.

DCF has acquired 7 new permanent, classified Youth Counselor positions to relieve situation of inadequate staffing.

LICENSING RECOMMENDATION:

We recommend that Woodside Juvenile Rehabilitation Center be granted a conditional license as a Residential Treatment Program for a period of one year, expiring July 31, 2016 with an interim visit in January 2016.

The conditions include the following summarized corrective actions.

Woodside will:

- Report and consult licensing authority regarding program changes.
- Hold Treatment Team Meetings quarterly.
- Initiate restraint as a last resort.
- Youth restricted to rooms will be considered in seclusion and program must adhere to applicable regulations
- Develop policy regarding purpose and procedures governing the ISU.
- Request a variance to regulation prohibiting use of mechanical restraints inside the facility.

The Governing Authority will:

- Pursue adoption of PRTF conforming rules to govern the future regulation of Woodside.

Brenda Dawson Crocket, MSW
Social Worker

Chris Ward, LICSW
Social Worker

Approved by:

James Forbes, LICSW, MPA, Date
Residential Licensing & Special Investigations Director

EXHIBIT C

VERMONT

State of Vermont
Department for Children and Families
Family Services Division
280 State Drive
Waterbury, VT 05671-2401

Agency of Human Services

July 26, 2016

Jay Simons, Director
Woodside Juvenile Rehabilitation Center
26 Woodside Drive
Colchester, Vermont 05446

Dear Mr. Simons,

Please find enclosed the license and licensing report reflecting the June 2016 site visits. Please note the license is effective July 31, 2016 and expires July 31, 2017.

Since repurposing Woodside as a Psychiatric Residential Treatment Facility, Woodside has been tasked with the substantial challenge of transforming a juvenile detention facility into a treatment-focused care institution that still retains the responsibility of secure and safe detention of adjudicated youth. During the previous review, the clear majority of those interviewed (program staff, contracted employees, residents, parents, and social workers) expressed opinions and experiences that indicate an imbalance between the therapeutic and detention functions of the program. (see prior report for detail). But even though the promulgation of new, PRTF-like regulations has not come to fruition, interviews conducted during this licensing visit indicate significant progress has been made during the course of the last year in addressing all areas of concern.

Woodside is found in compliance, but with reservations to Regulation 419, which states, "*A Residential Treatment Program shall conduct, at minimum, an annual performance evaluation based on performance expectations in the context of each employee's' job description and plan for on-going profession development.*"

All fulltime permanent employees are evaluated within 6 months of initial hire and annually thereafter. RLSI has been told that the State of Vermont, Department of Human Resources does not require performance evaluations of "temps." However, DCF Residential Treatment Program regulations do require an annual evaluation of all employees. Historically, Woodside "temps" have been employed as "temps" for years and this is the "pool" from which new permanent employees are drawn from.

Woodside is found in compliance, but with reservations to Regulation 648, which states, "*A Residential Treatment Program shall prohibit all cruel, severe, unusual or unnecessary practices including, but not limited to: Pain inducement to obtain compliance;* (excerpt from a list of prohibitions)

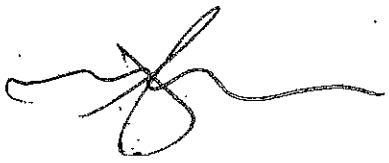
While participating in restraint training at Woodside, RLSI noted that staff were being trained in pain compliance techniques. Woodside immediately responded and is currently modifying the training curriculum to remove any pain compliance techniques.

Woodside is found in compliance, but with reservations to Regulation 658, which states, *"A Residential Treatment Program shall not use any form of seclusion without prior approval of the Licensing Authority."*

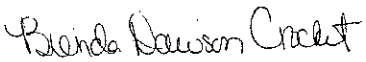
The policy defining and guiding the use of the Intensive Stabilization Unit continues to be under revision. However, aside from the above policy, Woodside has addressed prior concerns about the frequency and duration of seclusion.

If you have any questions, please feel free to contact RLSI.

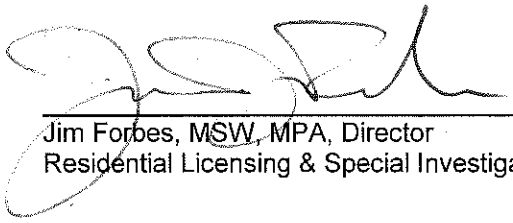
Sincerely,



Christopher Ward, LICSW, Social Worker
Residential Licensing & Special Investigations



Brenda Dawson Crocket, MSW, Senior Social Worker
Residential Licensing & Special Investigations



Jim Forbes, MSW, MPA, Director
Residential Licensing & Special Investigations

Enclosure

Cc: Ken Schatz, Commissioner, Department for Children & Families via email
Leslie Wisdom, General Counsel, Department for Children & Families via email
Karen Shea, Deputy Commissioner, Department for Children & Families, via e-mail
Melanie D'Amico, Child Placement Specialist, DCF via e-mail
Alicia Hanrahan, Education Programs Manager, Agency of Education, via e-mail
Pat Pallas-Gray, Independent Schools Consultant, Agency of Education, via email
Laurel Omland, Department of Mental Health via e-mail
Linda Cramer, Disability Rights Vermont, via e-mail
RLSI-electronic file

State of Vermont

AGENCY OF HUMAN SERVICES
DEPARTMENT FOR CHILDREN & FAMILIES

License to Operate a Residential Treatment Program

Granted to

Woodside Juvenile Rehabilitation Center
26 Woodside Drive
Colchester, Vermont 05446

in accordance with Title 33, Vermont Statutes Annotated, as amended, Section 2851.

TERMS OF THE LICENSE

MAXIMUM NUMBER OF CHILDREN: 30 youth, male & female, 10 – up to 18 years of age

CONDITIONS: Woodside will:

- Initiate restraint as a last resort.
- Develop policy regarding the purpose and procedures governing the use of the ISU.

This license is granted in consideration of the application thereof, and said application and all statements, information, answers, promises and agreements therein contained are hereby referred to and made a part hereof.

Commissioner, Ken Schatz

Effective: July 31, 2016

EXPIRES: July 31, 2017

UNLESS SOONER REVOKED OR SUSPENDED

RESIDENTIAL TREATMENT PROGRAM
Licensing Report

	Woodside Juvenile Rehabilitation Center	Original:	
Address:	26 Woodside Drive	First Relicense:	
	Colchester, Vermont 05446	Renewal:	X
Telephone:	(802) 655-4990		
		Licensed Capacity:	30
		Gender:	Male & Female
Date(s) of Site Visit:	6/8/16, 6/15/16, 6/20/16, 6/21/16	Age:	10 up to 18
Licensor(s):	Brenda Dawson, MSW and Chris Ward, LICSW		

Methodology

Review:	Review:	Interview:
X Application Documents	X Program Description	X Children/Youth
X Fire Safety Inspection documents	X Program Policies & Procedures	X Parents
n/a Minutes of Board Meetings	X Organizational Chart	X Direct Care Staff
X Communication logs	X Staff Roster/files/background Checks	X Supervisory Staff
X Medication logs	X Staff Schedules	X Clinicians
X Evacuation drill logs	X Staff Training Records/Supervision	X Administrators
X Secretary of State Website	X Client files	X Collateral agencies/departments
		X Inspect physical facility(ies)

PROGRAM SUMMARY: According to Woodside's program description "*Woodside Juvenile Rehabilitation Center is a secure residential treatment facility located in the Town of Essex in the State of Vermont. Operation of the facility is the responsibility of the Agency of Human Services (AHS), Department for Children and Families (DCF), Family Services Division (FSD).*

The goal of Woodside is to provide evidence-based practices using strength-based, goal-directed, and resident-led treatment in a safe and secure environment. It is the highest level of care in the state for youths adjudicated or pre-adjudicated delinquents, whose needs for supervision cannot be adequately addressed in the community.

Woodside incorporates a consistent treatment milieu essentially offering residents constant therapeutic services, staff accessibility, and the opportunity for social learning. Combined with this therapeutic milieu, evidenced-based therapy and assessment services are employed through individual and group delivery. To strengthen the opportunity for residents to be successful upon transition, Woodside is closely linked to the surrounding community through expert consultation, re-engagement programming and activities, treatment provider linkage, and volunteering.

The Green and Blue Units contain 12 and 14 (respectively) single occupancy resident rooms surrounding an open living day room. There are two bathrooms with showers available for resident use on each unit. The staff office walls are primarily safety glass to increase supervision.

The Intensive Stabilization Unit is comprised of three self-contained single occupancy rooms that have toilets and sinks within the room, and one padded safe room. These rooms are connected to a dayroom. The unit is equipped with shatterproof safety-glass windows, shatterproof lights and steel door for security purposes. All door locks can be electronically or manually controlled."

Information supporting this report and its conclusions was gathered by two Residential Licensing and Special Investigations social workers. On-site interviews and document reviews were conducted over the course of 4 days.

Additional comments are found at the conclusion of this report.

REGULATORY OVERSIGHT

	Compliance	Recommendations/Comments
101 A Residential Treatment Program shall not be operated without the formal prior approval of the Department for Children and Families, Residential Licensing Unit (hereafter "Licensing Authority").	C	Detention Unit opened in Colchester in 1986 and Treatment Unit in 1987.
102 A program, which was already operational before the need for a license was determined, may be considered to be in compliance if the program has applied for and is making satisfactory progress toward licensure.	C	The decision to require licensure of Woodside was made in 1996.
103 A Residential Treatment Program shall allow the Licensing Authority to inspect all aspects of a program's operation which may impact children/youth.	C	RLSI has found Woodside Administration and staff to be open and accommodating during licensing activities and investigations.
104 A Residential Treatment Program shall allow the Licensing Authority to interview any employee of the program and any child/youth in the care of the Residential Treatment Program.	C	
105 These regulations are not meant to supersede State or Federal mandates.	C	
PROCEDURES		
106 An applicant shall apply for a license on a form provided by the Licensing Authority and provide requested information.	C	
107 When a Residential Treatment Program has made timely and sufficient application for licensing renewal, the existing license does not expire until the application for renewal has been acted upon by the department.	C	
108 A license may be issued with conditions when regulations have not been met, provided that the non-compliance does not constitute an unsafe situation or a major programmatic weakness and the program acts immediately to address the identified non-compliance.	C	
VARIANCE		
112 A Residential Treatment Program shall comply with all applicable regulations unless a variance for a specific regulation(s) has been granted through a prior written agreement with the Licensing Authority.	C	
113 A variance for specific regulation(s) shall be granted only when the Residential Treatment Program has documented that the intent of these regulation(s) will be satisfactorily achieved in a manner other than that prescribed by the regulation(s).	C	Variance to Reg. 904 granted 2013, continues. Variance to Reg. 905 granted 2015.
114 When a Residential Treatment Program fails to comply with the variance agreement, the agreement shall be subject to immediate cancellation.	C	
RENEWAL		
115 Application for renewal of a Residential Treatment Program license shall be made in accordance with the policies and procedures of the licensing authority.	C	06/01/2015
CHANGES		
116 A Residential Treatment Program shall notify the Licensing Authority at least 60 days before any of the following: A substantial change in services provided or population served; A planned change in staffing pattern; A planned change in the Administration; A planned change of ownership and/or governance; A planned change of location: A planned change in the name of the Residential Treatment Program.	C	
117 A Residential Treatment Program shall notify the licensing authority as soon as the change is known, if any of the above mentioned changes occur without prior planning.	C	
REPORTING		
118 A Residential Treatment Program shall report any suspected or alleged incident of child abuse or neglect within 24 hours, to the Department for Children and Families, Centralized Intake Unit. (33 V.S.A., Chapter 49, §4913).	C	
119 A Residential Treatment Program will supervise and separate the accused individual(s) and the victim(s) whose behavior caused report to the Department for Children and Families unless or until otherwise instructed by the Special Investigation Unit and/or Residential Licensing Unit.	C	

120 A Residential Treatment Program shall report incidents of sexual activity between residents, as defined in these regulations, within 24 hours to the Department for Children and Families, Centralized Intake Unit; (800) 649-5285.	C	Allegations of sexual abuse by youth are investigated by RLSI
INVESTIGATIONS		
121 A Residential Treatment Program shall cooperate fully in investigations of any complaint or allegation associated with the program. This may include, but is not limited to the Department for Children and Families Special Investigations Unit, and the Licensing Authority.	C	Allegations of child abuse by staff at Woodside are conducted by the Agency of Human Services
NOTIFICATION		
122 A Residential Treatment Program shall immediately, or as soon as reasonable, report to the Licensing Authority incidents that could potentially affect the safety, physical or emotional welfare of children/youth within the program. Written report shall follow verbal report within 24 hours.	C	
123 Incidents of restraint which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than within 24 hours. (see regulation 657)	C	
124 Incidents of seclusion which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than within 24 hours. (see regulation 666).	C	
125 Residential Treatment Program shall report, verbally and in writing, within 24 hours to the Licensing Authority incidents where the program knowingly or negligently violates licensing regulations.	C	Woodside has addressed prior concerns and come into compliance.
200 GENERAL PROVISIONS		
THE RIGHTS OF CHILDREN/YOUTH AND FAMILIES		
201 A Residential Treatment Program shall ensure children/youth the following rights: to be served under humane conditions with respect for their dignity and privacy; to receive services that promotes their growth and development; to receive gender specific, culturally competent and linguistically appropriate service; to receive services in the least restrictive and most appropriate environment; to access written information about the providers policies and procedures that pertain to the care and supervision of children, including a description of behavior management practices; to be served with respect for confidentiality; to be involved, as appropriate to age, development and ability, in assessment and service planning; to be free from harm by caregivers or others, and from unnecessary or excessive use of restraint and seclusion/isolation; to file complaints and grievances without fear of retaliation.	C	Woodside has addressed prior concerns and have come into compliance with this regulation.
202 A Residential Treatment Program shall ensure families and custodians the following rights: to access written information about the providers policies and procedures that pertain to the care and supervision of children, including a description of behavior management practices; to receive services with respect for confidentiality; to be involved in assessment and service planning; to give and to withhold informed consent; to be notified immediately or as soon as reasonable of any runaway, attempted suicide, suicide, or medical emergency requiring the services of an Emergency Room or hospitalization, death or any other seminal event in the life of their child/youth; to be notified within 24 hours following the restraint or seclusion of their child/youth; to file complaints and grievances without fear of retaliation.	C	Woodside has addressed prior concerns and have come into compliance with this regulation.
203 A Residential Treatment Program shall document prohibitions and limitations regarding parental involvement in the child/youth's Plan of Care and review such prohibitions and limitations at least every 90 days.	C	Woodside has addressed prior concerns and is now in compliance.
300 THE GOVERNING AUTHORITY		
301 A Residential Treatment Program shall be incorporated. If incorporated outside the State of Vermont, it shall secure authorization from the Secretary of State to do business in Vermont.	C	
302 The Governing Authority is ultimately responsible for all aspects of the Residential Treatment Program.	C	Woodside is operated by the State of Vermont, Department for Children and Families. Ultimate authority within DCF resides with the Commissioner of DCF.
303 The Governing Authority shall make available to the Licensing Authority, upon written request, a list of directors and officers of the board.	C	
304 The Governing Authority shall: Review major operational decisions; Have provisions which preclude both the fact and appearance of conflict of interest; Specify the terms of appointment or election of members, officers, and chairperson(s) of committees; Specify the frequency of meetings and attendance requirements; Prohibit board members from being paid members of the staff.	C	
305 The Governing Authority of a Residential Treatment Program shall appoint a qualified administrator.	C	Jay Simons, Director
306 The Governing Authority is responsible for ensuring the writing of an annual evaluation of the Program Administrator, based on the job description which delineates the responsibilities and authority of the Program Administrator.	C	07/07/2016
307 The Governing Authority is responsible for assuring the Residential Treatment		

Program's continual compliance and conformity with the following: The program's stated goals and objectives; Relevant laws and/or regulations, whether federal, state, local or municipal, governing the operation of the Residential Treatment Program. This may include, but is not limited to Zoning; Department of Public Safety, Fire Prevention; Department of Health; Interstate and International Placement of Children; The Prison Rape Elimination Act of 2003.	C	While the promulgation of new PRTF regulations has not come to fruition, Woodside has made significant progress addressing prior concerns about "stated goals and objectives."
308 The Governing Authority shall ensure: Development and on-going review of program policies and procedures; Development and review of annual budgets to carry out the objectives of the Residential Treatment Program; Any fund raising, community activity, publicity or research involving children/youth is conducted in a manner which respects the dignity and rights of children, youth and their families and complies with all relevant state and federal laws regarding confidentiality.	C	
309 The Governing Authority shall require and review an annual report, written by the administrator of the program which evaluates the program in relation to the program description, with the goal of continuous quality improvement.	C	
310 The annual assessment shall identify indicators that measure the program's ability to deliver the services described in the program description. These indicators may consider (but are not restricted to) the following: The number and circumstances of planned discharges; The number and circumstances of unplanned discharges; Consumer feedback; Provision of adequate supervision as evidenced by all reports of child abuse, sexual contact between children/youth; Grievances heard, resolved and unresolved; Personnel actions taken; Staff turnover; and Employee satisfaction surveys.	C	Woodside has addressed prior concerns and come into compliance with this regulation.
400 PERSONNEL		
GENERAL		
401 A Residential Treatment Program shall not hire, or continue to employ, any person whose health, behavior, actions or judgment might endanger the physical or emotional well-being of the children/youth served.	C	
402 A Residential Treatment Program shall not hire, or continue to employ, any person substantiated for child abuse or neglect.	C	
403 There shall be a sufficient number of personnel qualified by education, training and experience with sufficient authority to adequately perform the following functions: Administrative; Financial; Supervisory; Clinical; Case Management; Direct child care; Housekeeping; Maintenance; Food service; Maintenance of records.	C	
404 A Residential Treatment Program shall have written job descriptions for all positions within the program, including lines of authority, which are accessible to all employees.	C	
405 A Residential Treatment Program shall ensure that direct child care employees have regularly scheduled hours of work.	C	Woodside has addressed prior concerns and come into compliance.
406 A Residential Treatment Program shall establish policies governing employee conduct. These policies shall be designed to promote: Good role modeling; Adequate supervision of children/youth; The development of healthy relationships between adults, children/youth.	C	See Code of Conduct
QUALIFICATIONS		
407 The credentials of the program administrator, directly responsible for the therapeutic milieu within the residential treatment program, regardless of job title will include at minimum: Master's degree in a relevant field and, four years' direct care, including supervisory experience in a residential treatment program or therapeutic setting for children and/or youth. Or, Bachelor's degree in a relevant field and, five years' direct care, including two years' supervisory experience in a residential treatment program or therapeutic setting for children and youth.	C	Jay Simons, B.A. in Business Management & Organizational Development & 20 years supervisory and administrative positions within VT Department of Corrections.
408 The credentials of those providing supervision of direct care staff, regardless of job title will include at minimum: Master's degree in a relevant field and, one-year experience providing direct care in residential treatment programs for children/youth. or, Bachelor's degree and, two years' experience providing direct care in residential treatment programs for children/youth. or, High School Diploma or GED and, four years' experience working with children/youth in residential treatment programs.	C	Operations and Clinical Supervisors meet or exceed this criteria
409 The credentials of those providing direct care for children/youth, regardless of job title will include at minimum: Bachelor's degree and, 21 years of age and, Experience working with children/youth. or, High School Diploma or GED and, 21 years of age and, Two years' experience interacting with children/youth. This may include, but is not restricted to camp counselor, coach, babysitting.	C	Direct care employees meet or exceed the criteria
410 Individuals providing clinical services for children/youth and families shall have experience working with children/youth and families shall meet current Vermont licensing and certification requirements and professional standards.	C	Per Secretary of State Website
HIRING		

411 A Residential Treatment Program shall have written personnel policies and procedures for the hiring, orientation, training, supervision, evaluation, recognition, discipline and termination of employees.	C	State of Vermont Human Resources
412 Residential Treatment Program shall conduct background checks, upon hire and every three years thereafter, on all employees, board member/trustees, volunteers, student interns, and others who may have unsupervised contact with children/youth in the program. Minimally, the background checks shall include the Vermont Criminal Information Center, Vermont Child Protection Registry and the Adult Abuse Registry.	C	
413 The results of background checks must be received and evaluated by the program administrator prior to the individual being hired and prior to having any unsupervised contact with children/youth. Documentation of completed background checks and administrative review must be maintained and available to licensing upon request.	C	
EMPLOYEE ORIENTATION AND TRAINING		
414 A Residential Treatment Program shall have written policies and procedures for the orientation of new staff to the program. This orientation must occur within the first 30 days of employment and include, but is not limited to: Program description and population served; A tour of the facility; Overall program treatment philosophy and approach; Program philosophy of behavior management; Child/youth grievance process; Basic information about behavior children/youth may exhibit; Identification of early warning signs that indicate child/youth may become disruptive or aggressive and how these observations are to be reported; Professionalism in dealing with children/youth, families, and others; Confidentiality; Program policies and procedure relating to interventions employed by staff to prevent, deescalate, safely manage child/youth acting out behaviors; Roles and expectation of various personnel in preventing and responding to crisis situations; Documentation requirements; Working as part of a team; Policies regarding zero-tolerance for sexual abuse; Procedures for reporting suspected incidents of child abuse and neglect; Policies and procedures regarding runaway children/youth Policies and procedures regarding the acquisition, storage, administration, documentation and disposal of medication; Emergency response procedures; Emergency evacuation procedures; Residential Treatment Program regulations.	C	Woodside has enhanced its training through collaboration with the UVM DCF Child Welfare Training Partnership to include new training modules in Fire Safety, Suicide Prevention, Mandated Reporter, Advanced Communications, Dangerous Behavior Control Techniques, Key Control, Radio Procedures, Transports, Cultural Competency, PREA, Report Writing, Individual Plan of Care, SMART Goal Development, Cognitive Behavioral Therapy, and Motivational Interviewing.
415 During orientation, each employee should be made aware of the plan for his or her particular on-going training and professional development. Plans should be developed between the employee and supervisor, and should be based on their roles and responsibilities in the program.	C	
416 Staff who may work with children/youth shall receive training in the prevention and use of restraint prior to participating in the use of restraint. Staff will be competent in (but not limited to) the following: Relationship building, group processes, restraint prevention, de-escalation methods, avoidance of power struggles, and threshold for use of restraint; The physiological effect of restraint, monitoring physical distress signs and obtaining medical assistance, and positional asphyxia; Legal issues and idiosyncratic conditions that may affect the way children/youth and staff may respond to restraint (e.g., cultural sensitivity, age, gender, developmental delays, history of trauma, symptoms related to substance abuse, health risks, etc.), and; Escape and evasion techniques, time limits, the process for obtaining approval for continued restraints, the procedure to address problematic restraints, documentation, debriefing with children/youth, follow-up with staff, and investigations of injuries and complaints.	C	Confidence Assessment and Protection Systems (CAPS) and Advanced Communication Techniques (ACT), Dangerous Behavior Control Techniques (DBCT)
417 A Residential Treatment Program shall ensure supervisors and those who provide direct care receive on-going training and develop competencies relevant to the population served including (but not limited to): Relationship Building; Listening and communication; Family Engagement; Understanding and analyzing problem behaviors; Trauma informed practices; Positive behavior support; Designing and implementing routines; Setting clear limits; Praising and reinforcing behavior; Early detections of conflict situations; Interventions to minimize potential conflicts; Designing and implementing activity programs; Teaching social and anger management skills; Managing transitions; Managing personal boundaries; Harassment; Conflict resolution; First Aid and emergency medical procedures; Administration of medication and the documentation thereof.	C	Agency of Human Services and Department for Children and Families Training is available to employees as well as "outside" conferences and training opportunities.
418 A Residential Treatment Program shall ensure annual training for every employee responsible for direct child care effective de-escalation techniques, appropriate use of restraint, seclusion and expectations regarding the documentation of the use of restraint and seclusion.	C	Tracked by Bill Cathcart
EVALUATION		
419 A Residential Treatment Program shall conduct, at minimum, an annual performance evaluation based on performance expectations in the context of each employee's' job description and plan for on-going profession development.	**C***	Permanent Staff receive an evaluation within 6 months of initial hire and annually thereafter.
420 The evaluation will identify areas of competence and document targets for growth	C	

and development to be reviewed at established intervals.		
421 The evaluation will be signed by the employee and his/her immediate supervisor. There must be an opportunity for the employee to express his/her agreement or disagreement with the evaluation in writing. The employee shall be given a copy of his/her evaluation.	C	However, Temp. Staff need to be evaluated in addition to permanent fulltime employees.
PERSONNEL FILES		
422 A Residential Treatment Program shall maintain a personnel file for each employee containing: The application for employment and/or resume; Documentation of reference checks; Employee's starting and termination dates; Applicable professional credentials/certifications; A signed job description, acknowledging receipt; Employee's plan for on-going training and professional development; Documentation of training; All annual performance evaluations; Commendations and disciplinary actions relating to the individual's job performance.	C	Well organized and maintained.
STAFF COMMUNICATIONS		
423 A Residential Treatment Program shall establish procedures to assure adequate communication and support among staff to provide safety, continuity and integration of services to the children/youth. This may include logs, shift notes, minutes of meetings, etc.	C	Prior concerns addressed by implementing quarterly meetings including all clinical and operations supervisors.
VOLUNTEER SERVICES AND STUDENT INTERNS		
424 A Residential Treatment Program may utilize volunteers and student interns to work directly with a particular child/youth or group of children/youth under the supervision of an employee of the program.	C	
425 Volunteers will not provide essential services which would otherwise be unavailable.	C	
426 A Residential Treatment Program shall ensure that the needs and learning experiences of volunteers and student interns do not interfere with the care of children/youth.	C	
427 Volunteers and interns are subject to the same background, character and reference checks as employees.	C	
428 Volunteers shall receive training relevant to the work they will be doing and issues of confidentiality.	C	
429 Student Interns shall receive training relevant to the work they will be doing, including (but not limited to) the training provided employees within the first 30 days of hire. See regulation 415	C	
500 TREATMENT AND CASE MANAGEMENT SERVICES		
PROGRAM DESCRIPTION		
501 A Residential Treatment Program shall have a written program description, accessible to prospective residents, parents, custodians, placing agencies and the general public upon request.	C	
502 The program description shall include: Description of the population served; Criteria for admission; Exclusionary criteria; Description of the milieu; Description of the treatment modalities; Description of the clinical services provided; Description of the educational services provided.	C	
CASE RECORDS		
503 A Residential Treatment Program shall have written policies and procedures for protection of the confidentiality of all children/youth's records.	C	
504 A Residential Treatment Program shall maintain record(s) for each child/youth. The content and format of these records shall be uniform within the program and minimally include: The name of the child/youth; Gender; Date of birth; Date of Admission; Legal custody and custodianship status; Informed consent signed by the parent(s) and custodian to provide emergency medical treatment and for the administration of medication; Contact information for the parent(s), caretakers; Documented acknowledgement from the child/youth, parent(s) and custodian that they have been informed of the program's policies and procedures regarding the use of restraint and seclusion; Informed consent signed by parent(s) and custodian regarding the policies and procedures guiding the use of restraint and seclusion that may occur while the child/youth is in the program; De-escalation intervention plan; Referral and Intake information; Treatment/clinical records; Education records; Cumulative medical records including date and results of last physical and dental examinations; Plan of Care, amendments and reviews; Incident Reports; Discharge Plan; Date of Discharge; and Contact information of the person or program to which the child/youth was discharged.	C	
505 When information is in the possession of another person or agency and unavailable to the program, the program shall document attempts to acquire that information.	C	

506 A Residential Treatment Program shall establish policies and procedures regarding the retention, storage and disposal of records.	C	Destroyed upon 18th birthday except treatment plans for which Medicaid has been billed, per DCF policy
REFERRAL/ADMISSION PROCESS		
507 Residential Treatment Program shall accept youth into care only when a current intake evaluation has been completed. The evaluation shall include information and assessments regarding the family, the child/youth's developmental, social, behavioral, psychological, and medical histories, allergies and any special needs.	C	
508 A Residential Treatment Program shall accept and serve only those children/youth whose needs can be met by the services provided by the program.	C	EXEMPT
509 A Residential Treatment Program shall have written referral and admission policies and procedures.	C	
510 A Residential Treatment Program shall ensure that the child/youth, his/her parent(s) and custodian are provided reasonable opportunity to participate in the admission process and decisions, and that due consideration is given to any questions/concerns.	C	
511 A Residential Treatment Program shall provide children, youth, families and custodians upon placement a clear and simple written statement that includes: The procedure used to report complaints or grievances, including timelines and accessible reporting formats; Assurance that the complaint may be submitted to someone other than the individual named in the complaint; Assurance that retaliation will not be tolerated; An opportunity for the child, youth, family member, custodian or staff member to present his or her version of events and to present witnesses; A process for informing the complainant of the results; A process for appeal; Contact information for the licensing authority; and Contact information for the State-designated protection and advocacy system.	C	Client Orientation Handbook
512 A Residential Treatment Program shall ensure that upon placement, each child/youth is asked if he/she has any physical complaints and is checked for obvious signs of illness, fever, rashes, bruises and injury. The results of this interview shall be documented and kept in the child/youth's record.	C	
513 Depending on the age, gender and needs of the child/youth an inventory and/or search of a child/youth's belongings as part of the admission process activity will be conducted by a same gender staff person as the child/youth being admitted and in the child/youth's presence.	C	Health Screening upon admission. Found in Intake Procedure
514 A Residential Treatment Program shall obtain the written informed consent of a child or youth, their parent(s) and custodian before the child or youth is photographed and/or recorded for research and/or program publicity purposes.	C	
515 A Residential Treatment Program shall assign a staff member to orient the child/youth and his/her parent(s) and custodian, to life at the program; including a verbal review of emergency evacuation procedures, the child/youth's rights and program expectations.	C	Client Orientation Handbook
516 A Residential Treatment Program shall make available to each child/youth, parent(s), and custodian, a simply written list of rules and expectations governing children/youth's behavior.	C	
517 The program will inform the child/youth, parent(s) and custodian of the policies and procedures regarding the use of restraint and seclusion. While this orientation will include the following content, the mode of delivery is dependent on the population served. Explanation of de-escalation techniques staff members may employ to defuse the situation in an attempt to avoid the use of restraint or seclusion; Description of situations and criteria for the use of restraint or seclusion; Who is authorized to approve and initiate the use of restraint or seclusion; A description of the restraint techniques authorized for use; A viewing of rooms used for seclusion; The protocol for the monitoring of the child/youth's health and well-being during the restraint, including time frames; The protocol for supervision and monitoring of the child/youth's health and well-being while secluded, including time frames; The decision-making process used by staff for the discontinuation of the use of restraint or seclusion; The internal grievance procedure to report inappropriate use restraint or seclusion; and Contact information for the Licensing Authority.	C	Client Orientation Handbook
518 A Residential Treatment Program will obtain written acknowledgement from the child/youth, parent(s) and custodian that they have been informed of the program's policies and procedures regarding the use of restraint and seclusion.	C	
519 A Residential Treatment Program that uses restraint or seclusion shall offer the child/youth, parent(s) and custodian the opportunity to provide information about the child/youth that may help prevent the use of restraint and seclusion.	C	
520 A Residential Treatment Program shall gather and assess the following information to develop an individualized de-escalation plan for each child/youth to avoid the use of restraint and seclusion. The child/youth's history of violence; The child/youth's history of suicidal ideation or attempts; Events that may trigger aggressive or suicidal behavior; Techniques to regain control, self regulate, self-sooth	C	

that have been successful in the past; Preexisting medical conditions or physical disabilities that place the child/youth at increased risk of harm, and History of trauma that places the child/youth at increased risk of psychological harm if he/she is restrained or secluded.		
PLAN OF CARE		
521 A Residential Treatment Program shall develop a Plan of Care based on the review of the referral information and input from the referral source, the child/youth, parent(s) and custodian within seven days.	C	
522 The Plan of Care shall include: Reason for Admission, Preliminary Goals and Objectives; Services/Interventions to be provided, by whom, and frequency; How progress will be measured; Family contact and level of involvement; Mental Health status; Physical Health status; Social Skills; Family relationships; Recreation/Activities/Interests; Education; Activities of daily living/Independent living skills; De-escalation Intervention Plan; Plan for discharge; Aftercare planning.	C	
523 Plans of Care shall be signed by the administrator of the program (or designee).	C	
524 A Residential Treatment Program shall demonstrate child/youth, parental and custodial participate in the development of the Plan of Care.	C	
525 A Residential Treatment Program shall review and revise the Plan of Care at least once every 90 days and shall evaluate the degree to which the goals have been achieved, identify successful interventions, progress toward discharge planning and recommendations.	C	Woodside has addressed prior concerns and come into compliance with this regulation.
526 A Residential Treatment Program shall ensure that the Plan of Care and subsequent revisions are explained to the child/youth, his/her parent(s) and custodian in language understandable to everyone.	C	
527 The current Plan of Care shall be available upon request at the time of discharge.	C	
600 RESIDENTIAL LIFE		
SUPERVISION		
601 A Residential Treatment Program shall provide adequate supervision appropriate to the treatment and developmental needs of children/youth.	C	
602 A Residential Treatment Program shall ensure that each child/youth has ready access to a responsible staff member throughout the night.	C	
603 A Residential Treatment Program shall provide adequate overnight supervision consistent with the needs of the children/youth.	C	
FAMILY INVOLVEMENT		
604 A Residential Treatment Program shall make every possible effort to facilitate opportunities for children/youth to communicate with parent(s), siblings, and custodian to foster permanent relationships with family, in accordance with the Plan of Care.	C	Woodside has addressed prior concerns and come into compliance.
605 Alternative visiting hours shall be provided for families who are unable to visit at the prescribed times, consistent with the Plan of Care.	C	
606 A Residential Treatment Program shall not use family contact as an incentive to elicit desired behavior; likewise family contact shall not be withheld as a consequence for misbehavior.	C	
607 A Residential Treatment Program shall have written procedures for overnight visits outside the program which includes; The child/youth's location; Length of stay; Plan for transportation; Plan for conveying medication; Discussion of medication regime; Recommendations for supervision; Name, address and contact information for person responsible for the child/youth while they are away from the program; Relationship to the person responsible for the child/youth; Plan for the unforeseen return of the child/youth, and Documentation of above activities.	C	
608 A Residential Treatment Program shall not place a child/youth in a foster home unless the Residential Treatment Program is also a licensed Child Placing Agency.	C	
EDUCATION		
609 A Residential Treatment Program shall ensure that every child/youth is provided an appropriate educational program in accordance with state law and approved by the Vermont Department of Education.	C	While not an "Approved Independent School" Woodside follows the Independent School Guide, Rule 4500, & Performance Based Standards
DAILY ROUTINE		
610 A Residential Treatment Program shall follow a written daily routine, including weekends and vacations.	C	
611 Daily routines shall not conflict with the implementation of a child/youth's Plan of Care.	C	
COMMUNICATION AND PRIVACY		
612 A Residential Treatment Program shall permit children/youth to send and receive mail, make telephone calls and e-mail, consistent with the Plan of Care.	C	

613 Program staff shall read a child/youth's mail and e-mail or listen in on telephone conversations only with the child/youth's full knowledge and understanding of the reasons for this action, consistent with the Plan of Care.	C	
614 A Residential Treatment Program shall not bar contact between a child/youth and their parent(s), custodian, attorney, *guardian ad litem*, clergy and State-designated protection and advocacy system.	C	Woodside has addressed prior concerns and come into compliance.
615 When the right of a child/youth to communicate in any manner with any person outside the program must be curtailed, or monitored a residential program shall: Document the decision, including who was involved in the decision making process, reasons for limitations of his/her right to communicate with the specified individual(s); Inform the child/youth of the decision making process; Review this decision minimally at each review of the Plan of Care.	C	Client Orientation Handbook
MONEY/FINES		
616 A Residential Treatment Program shall permit children/youth to access his/her own money consistent with his/her Plan of Care.	C	
617 Fines shall not be levied except in accordance with a written Program Description which includes a description of how revenues from fines are used for the benefit of the children/youth residing in the program.	C	
CHORES		
618 The Residential Treatment Program may assign chores that provide for the development of life skills and not used as punishment.	C	
619 Children/youth participation in chores shall not be a substitute for housekeeping and maintenance staff.	C	
RELIGION		
620 A Residential Treatment Program with religious affiliation(s) or expectations for participation shall include such information in the program description.	C	
621 A Residential Treatment Program shall make every effort to accommodate a child/youth's desire to attend and/or participate in religious activities and services in accordance with his/her own faith.	C	
PERSONAL BELONGINGS		
622 A Residential Treatment Program shall ensure that children/youth have his/her own adequate, clean, and appropriate clothing.	C	EXEMPT - See Regulation 906
623 A Residential Treatment Program shall allow children/youth to bring his/her personal belongings to the program e.g. comfort items, memorabilia.	C	
624 Limitations on the quantity of personal items shall be discussed during the referral/admission process.	C	
625 Provisions shall be made for the protection of children/youth's personal property.	C	
626 Any search of a child/youth's personal belongings for contraband deemed necessary for the safety of the child/youth or others within the program will be conducted in the presence of the child/youth, by same gender staff as the child/youth unless contraindicated and documented.	C	
PERSONAL CARE AND HYGIENE		
627 A Residential Treatment Program shall ensure children/youth receive guidance in healthy personal care and hygiene habits.	C	
FOOD SERVICES		
628 A Residential Treatment Program shall ensure that a child/youth are provided at least three nutritional meals, available daily at regular times.	C	
629 There shall be no more than 14 hours between the evening meal and breakfast, unless nutritional snacks are offered during the evening.	C	
630 No child/youth in a Residential Treatment Program shall be denied a meal for any reason, except by a documented doctor's order.	C	
631 No child/youth shall be required to eat anything they do not want to eat, nor there be consequences for food preferences.	C	
632 Special dietary needs shall be discussed during the referral/intake process and the Residential Treatment Program shall make healthy accommodations for children/youth with special dietary needs.	C	
MEDICAL CARE		
633 A Residential Treatment Program shall ensure a routine physical examination by a medical practitioner for each child/youth within 30 days of admission unless the child/youth received such an examination within 12 months prior to admission.	C	
634 A Residential Treatment Program shall have written procedures for staff members to follow in case of medical emergencies, including the administration of first aid.	C	
635 A Residential Treatment Program must ensure that children/youth receive timely, competent routine and emergency medical care when they are ill or injured and that		

they continue to receive necessary follow-up medical care with parent(s) and custodians' consent.	C	
636 A Residential Treatment Program shall maintain a cumulative record of medical care. This record shall include: The name of the resident; The reason for the visit; Name and contact information for the provider; Results of examination, tests and recommendations; Medication(s) prescribed; The time and date the medication is administered.	C	
DENTAL CARE		
637 A Residential Treatment Program shall make reasonable effort to ensure each child/youth has had a dental examination by a dentist within 30 days of the child/youth's admission unless the child/youth has been examined within 6 months prior to admission and the program.	C	
638 Residential Treatment Program shall make reasonable effort to ensure children/youth receive timely, competent routine and emergency dental care and that they continue to receive necessary follow-up dental care.	C	
ADMINISTRATION OF MEDICATION		
639 A Residential Treatment Program shall have written policies and procedures governing the use and administration of medication to children/youth.	C	Procedures 405a – 405e
640 Policies and procedures governing the use and administration of medication shall be disseminated to all staff responsible for prescribing and administering medication.	C	
641 These policies shall specify who can administer medication, under what circumstances and procedures for documenting the administration of medication.	C	
642 A Residential Treatment Program shall ascertain all medication a child/youth is taking when coming into care and obtain parental and custodial consent for the administration of medication and any changes in medication(s).	C	
643 Medication will be administered as prescribed by a licensed practitioner.	C	
644 Medication errors shall be documented on an incident report.	C	
PETS		
645 A Residential Treatment Program shall have written policies and procedures address the presence and supervision of pets in the program.	C	
646 A Residential Treatment Program will ensure that the presence of any pet does not have an adverse effect on any child/youth residing in the program, for example allergies or fear.	C	
647 A Residential Treatment Program will maintain a separate record on each pet that includes: Identifying information; Owner(s) contact information; Record of vaccinations; Record of registration; Statement of good health from a Veterinarian; Veterinarian's contact information and; Incidents involving the pet, for example if the pet is abused by a child/youth, or if the pet bites a child/youth or staff member.	C	
BEHAVIOR MANAGEMENT		
648 A Residential Treatment Program shall prohibit all cruel, severe, unusual or unnecessary practices including, but not limited to: Strip searches; Body cavity searches; Restraints that impede a child/youth's ability to breathe or communicate; Chemical restraint; Mechanical restraint; Pain inducement to obtain compliance; Hyperextension of joints; Peer restraints; Locked buildings, rooms, closets, boxes, recreation areas or other structures from which a child/youth cannot readily exit; Discipline or punishment which is intended to frighten or humiliate a child/youth; Requiring or forcing a child/youth to take an uncomfortable position, such as squatting or bending, or requiring or forcing the child/youth to repeat physical movements; Spanking, hitting, shaking, or otherwise engaging in aggressive physical contact (horseplay) with a child/youth; Physical exercises such as running laps or performing push-ups; Excessive denial of on-grounds program services or denial of any essential program services; Depriving a child/youth of meals, water, rest, or opportunity for toileting; Denial of shelter, clothing, or bedding; Withholding of personal interaction, emotional response or stimulation; Exclusion of the child/youth from entry to the residence; Any act defined as abuse or neglect by 33 V.S.A., Chapter 28, §4912.	**C***	Woodside is exempt from the following elements of this regulation: Strip Searches, Mechanical Restraints, and the use of locked buildings, rooms, recreation area. See 900 Series instead. RLSI notes that Woodside has been training staff to use pain compliance techniques and is currently modifying the training curriculum to remove all pain compliance techniques.
649 A Residential Treatment Program shall ensure that behavior management is not delegated to persons who are not known to the child/youth.	C	
PHYSICAL RESTRAINT		
650 A Residential Treatment Program shall not use any form of restraint without prior approval of the Licensing Authority.	C	
651 Restraint shall be used only to ensure that immediate safety of the child/youth or others when no less restrictive intervention has been, or is likely to be, effective in averting danger. Restraint shall be used only as a last resort.	C	Woodside has addressed prior concerns and come into compliance.
652 Any restraint lasting more than 10 minutes requires supervisory consultation, approval and oversight.	C	

653 Any restraint lasting more that 30 minutes requires clinical/administrative consultation, approval and oversight.	C	
654 Restraint shall never be used for coercion, retaliation, humiliation, as a threat of punishment or a form of discipline, in lieu of adequate staffing, for staff convenience, or for property damage not involving imminent danger.	C	Woodside has addressed prior concerns and come into compliance.
655 A Residential Treatment Program shall develop and implement written policies and procedure that govern the circumstances in which restraint is used. These policies and procedures shall contain and address the following: The threshold for initiating restraint; Forms of restraint that are permitted; Staff members authorized and qualified to order or apply restraint; Procedures for monitoring the child/youth placed in restraint for signs of discomfort and medical issues; Time limitations on the use of restraint; The immediate and continuous review of the decision to restrain; Documentation of the use of restraint; Record keeping of incidents of restraint; Debriefing with the child/youth; Debriefing with all witnesses; Debriefing staff; Notification of parent(s) and custodian; and Administrative review of all restraints.	C	FSD Policy 177
656 Incidents of restraint shall be reported to the parent(s) and the person legally responsible for the child/youth as soon as possible, and not later than 24 hours.	C	
657 Incidents of restraint which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than 24 hours.	C	
SECLUSION		
658 A Residential Treatment Program shall not use any form of seclusion without prior approval of the Licensing Authority.	C*	The policy defining and guiding the use of the Intensive Stabilization Unit continues to be under revision since the fall of 2014. Aside from the absence of finalized policy, Woodside has addressed most of the prior concerns and has come into compliance with these regulations.
659 Seclusion shall be used only to ensure that immediate safety of the child/youth or others when no less restrictive intervention has been, or is likely to be, effective in averting danger.	C	
660 Children/youth in seclusion will be provided constant, uninterrupted supervision by qualified staff, employed by the program and familiar to the child/youth.	C	
661 Seclusion lasting more than 10 minutes requires supervisory approval and oversight.	C	
662 Seclusion lasting more that 30 minutes requires clinical/administrative consultation, approval and oversight.	C	
663 Seclusion shall never be use for coercion, retaliation, humiliation, as a threat of punishment or a form of discipline, in lieu of adequate staffing, or for staff convenience.	C	
664 A Residential Treatment Program shall develop and implement a written policies and procedures that govern the circumstances in which seclusion is used. These policies and procedures shall contain and address the following: Circumstances under which seclusion may be used; Staff members authorized to approve the use of seclusion; Procedures for monitoring children/youth in seclusion; Time limitations on the use of seclusion; The immediate and continuous review of the decision to use seclusion; Documentation of the use of seclusion; Record keeping of incidents of seclusion; Debriefing with the child/youth; Debriefing with all witnesses; Debriefing staff; Notification of parent(s) and custodian; and Administrative review of all restraints and follow up actions taken.	C	
665 Incidents of seclusion shall be reported to the parent(s) and person legally responsible for the child/youth as soon as possible, and not later than within 24 hours.	C	
666 Incidents of seclusion which result in injury to a child/youth or staff member, requiring medical attention shall be reported in writing to the Licensing Authority as soon as possible, and not later than within 24 hours.	C	
DOCUMENTATION		
667 Each incident of restraint and seclusion shall be documented separately by staff members directly involved in the intervention as soon as possible, not later than 24 hours.	C	
668 This incident report written by the staff members shall include: Name, age, height, weight, gender and race of the child/youth; Date, beginning and ending time of occurrence; A description of what happened; including what activity the child/youth was engaged in prior to the escalation, the precipitating events; Description of de-escalation and less intrusive methods of intervention used and reasons for their use; Supervisory, clinical and/or administrative notification and approval; Staff involved, including full names, titles, relationship to the child/youth and if a restraint, date of most recent formal de-escalation and restraint training; Witnesses to the precipitating incident and subsequent restraint or seclusion; Preventative actions that may be taken in the future; Name of person making the report; Detailed description of any injury to the child/youth; Detailed description of any injury to staff members; Any action taken by the program as a result of any injury.	C	
669 Incident Reports shall be reviewed and signed by the supervisor/administrator within 8 hours. Documentation of the administrative review must include follow up actions which may include: Debriefing with child/youth; Debriefing with witnesses;	C	

Debriefing with staff; Medical needs; Identified need for additional training; or Personnel action (if warranted).		
RESTRAINT AND SECLUSION MONITORING		
670 A Residential Treatment Program will establish documentation and monitoring systems, enabling all incidents of restraint and seclusion to receive administrative review. The data and management systems will have the potential to monitor staff, individual, and critical programmatic involvement in incidents. The program shall track the following: Shift; Location; Day of the week; Time of day/night Incident antecedents; Length child/youth was held in restraint or seclusion; Type of restraint or seclusion; Age; Gender; Ethnicity; Number of incidents per child/youth; Staff members involved; Child/youth injuries requiring medical attention; and Staff injuries requiring medical attention.	C	
700 PHYSICAL ENVIRONMENT AND SAFETY		
GENERAL		
701 A Residential Treatment Program, including all structures and property shall be constructed, furnished, equipped, used and maintained so that the privacy, safety, health and physical comfort of all children/youth are ensured and in compliance with federal, state, local and municipal regulations.	C	Woodside has addressed prior concerns and come into compliance.
702 A Residential Treatment Program shall pass and maintain documentation of an annual inspection of all buildings utilized by the program by an independent, qualified fire safety inspector.	C	07/18/2016, VT Department of Public Safety, Division of Fire Safety
703 A Residential Treatment Program shall have a designated space to allow private discussions and counseling sessions between individual children/youth and their family members, visitors and staff.	C	
704 First Aid supplies shall be accessible in each living unit of a Residential Treatment Program.	C	
705 A Residential Treatment Program shall keep medication, cleaning supplies and other potentially harmful materials securely locked. Keys to such storage spaces shall be available only to authorized employees.	C	
706 A Residential Treatment Program shall ensure that there are sufficient and appropriate storage facilities.	C	
707 Each separate living unit within a Residential Treatment Program shall have 24-hour telephone service.	C	
708 A Residential Treatment Program shall not permit any firearm or chemical weapon on the property, including program and employee vehicles.	C	
709 A Residential Treatment Program shall ensure that children/youth are not exposed to second hand smoke in the facility, on the property or in program vehicles used to transport children/youth.	C	
710 Facility and staff vehicles shall be locked while on the property.	C	
711 A responsible adult will provide continuous and uninterrupted supervision when children/youth are swimming or otherwise engaged in water sports/activities.	C	
712 On-ground pools shall be enclosed and regularly tested to ensure that the pool is free of contamination.	C	
713 A Residential Treatment Program shall have written procedures for employees and children/youth to follow in case of emergency or disaster.	C	
714 A Residential Treatment Program shall conduct actual or simulated evacuation drills at least monthly and varied by shift. A record of such emergency drills shall be maintained including the date and time of the drill and whether evacuation was actual or simulated. All personnel in the building shall participate in emergency drills. The Residential Treatment Program shall make and document special provisions for the evacuation of any developmentally or physically disabled children/youth from the program.	C	
715 A Residential Treatment Program shall ensure that children/youth are properly secured and adequately supervised in any vehicle used by the program to transport children/youth.	C	
716 A Residential Treatment Program shall maintain, update and share with parent(s), custodians and the Licensing Authority the contact information of a specific individual to contact in the event of the emergency evacuation of children/youth.	C	
SLEEPING AREAS		
717 A Residential Treatment Program shall ensure that all sleeping areas used by children/youth are of sufficient size to allow for a bed and to afford space for dressing and quiet activities.	C	
718 No child/youth's bedroom shall be stripped of its contents and used for seclusion.	C	
719 A Residential Treatment Program shall ensure that no room without a window shall be used as a bedroom.	C	
720 A Residential Treatment Program shall not permit more than four children/youth	C	

to occupy a designated sleeping area or bedroom space.		
721 A Residential Treatment Program will assign roommates taking into account gender, age, developmental and treatment needs.	C	
722 Each child/youth residing in a Residential Treatment Program shall have his/her own bed.	C	
723 A Residential Treatment Program shall ensure that there is sufficient space between a mattress and another mattress (bunk bed) or ceiling for each occupant to sit up comfortably in bed.	C	
724 A Residential Treatment Program shall provide each child/youth with his/her own dresser or other adequate storage space in his/her bedroom unless there is a documented safety concern.	C	
725 The use of open flames shall not be allowed in sleeping areas of a Residential Treatment Program.	C	
TOILET, SHOWER AND BATHING FACILITIES		
726 A Residential Treatment Program shall have available to children/youth a minimum of one wash basin with hot and cold water, one flush toilet and one bath or shower with hot and cold water for every six children/youth.	C	
727 A Residential Treatment Program shall provide toilets and baths or showers which allow for individual privacy unless a child/youth requires assistance.	C	
728 A Residential Treatment Program shall have bathrooms with doors which can be opened from both sides.	C	
729 A Residential Treatment Program serving a co-ed population shall ensure private toileting, shower and bathing facilities.	C	
KITCHEN/DINING AREA		
730 A Residential Treatment Program shall have a sufficiently well-equipped kitchen to prepare meals for the children, youth and employees.	C	
731 A Residential Treatment Program shall be arranged and equipped so children, youth and employees can have their meals together.	C	
LIVING ROOM		
732 A Residential Treatment Program shall have a living room/common area where children/youth may gather for reading, study, relaxation, conversation and entertainment.	C	
SECLUSION ROOMS		
733 A Residential Treatment Program shall ensure all rooms used for seclusion meet all applicable state and local fire and safety codes.	C	
734 A Residential Treatment Program shall ensure all rooms used for seclusion are safe, clean, and well-maintained.	C	
735 A Residential Treatment Program shall ensure all rooms used for seclusion have adequate light, ventilation and maintain an appropriate room temperature.	C	
736 A Residential Treatment Program shall ensure all rooms used for seclusion are designed for continuous supervision.	C	
EMPLOYEE SPACE		
737 A Residential Treatment Program utilizing live-in employees shall provide adequate and separate living space for these employees.	C	
738 A Residential Treatment Program shall provide office spaced which is distinct from children/youth's living areas.	C	
ADDITIONAL REGULATIONS FOR SECURE FACILITIES		
901 Orientation and on-going training shall include; Security procedures; Trauma informed use of mechanical restraint; Trauma informed execution of strip search.	C	
902 During the admission process, a child/youth shall be offered the opportunity to call his/her parent(s).	C	
903 Admitting staff shall conduct a search of the child/youth and his/her possessions upon admission. Written policies and procedures regarding searches upon admission shall be consistent with the following provisions: All searches shall be of the least intrusive type necessary to satisfy the safety and security needs of the facility or the safety of the child/youth and not as a form of punishment. All searches shall only be conducted by same gender staff of the child/youth. A pat search is the standard method of searching children/youth upon admission.	C	
904 Strip searches upon admission are authorized (but not required) when there is reasonable suspicion that a child/youth has on his/her person contraband, weapons, or other items concealed which present a threat to the safety and security of the facility. Reasonable suspicion is determined on an individualized basis and shall be deemed present when: Current charges involve a crime of violence; or Current charges involve use of a weapon; or Current charges are drug related; or The child/youth's prior history includes arrest, charges or convictions of the above.	C	Variance granted to include "There is evidence of current self-harming or suicidal ideation."
905 Mechanical Restraints shall only be used by the program to bring a child/youth	C	Variance granted 12/15.

into the facility, when exiting the facility, and off the premises while in the custody of the facility.		
906 A Secure Residential Treatment Program shall ensure that children/youth have clean and appropriate clothing.	C	Dress Code

COMMENTS:

Since repurposing Woodside as a Psychiatric Residential Treatment Facility, Woodside has been tasked with the substantial challenge of transforming a juvenile detention facility into a treatment-focused care institution that still retains the responsibility of secure and safe detention of adjudicated youth. During the previous review, the clear majority of those interviewed (program staff, contracted employees, residents, parents, and social workers) expressed opinions and experiences that indicate an imbalance between the therapeutic and detention functions of the program. (see prior report for detail). But even though the promulgation of new, PRTF-like regulations has not come to fruition, interviews conducted during this licensing visit indicate significant progress has been made during the course of the last year in addressing all areas of concern.

Woodside is found in compliance, but with reservations to Regulation 419, which states, "*A Residential Treatment Program shall conduct, at minimum, an annual performance evaluation based on performance expectations in the context of each employee's' job description and plan for on-going profession development.*"

> All fulltime permanent employees are evaluated within 6 months of initial hire and annually thereafter. RLSI has been told that the State of Vermont, Department of Human Resources does not require performance evaluations of "temps." However, DCF Residential Treatment Program regulations do require an annual evaluation of all employees. Historically, Woodside "temps" have been employed as "temps" for years and this is the "pool" from which new permanent employees are drawn from.

Woodside is found in compliance, but with reservations to Regulation 648, which states, "*A Residential Treatment Program shall prohibit all cruel, severe, unusual or unnecessary practices including, but not limited to: Pain inducement to obtain compliance;* (excerpt from a list of prohibitions)

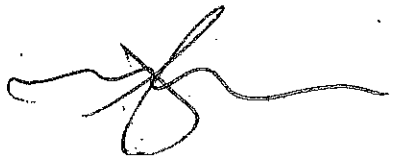
> While participating in restraint training at Woodside, RLSI noted that staff were being trained in pain compliance techniques. Woodside immediately responded and is currently modifying the training curriculum to remove any pain compliance techniques.

Woodside is found in compliance, but with reservations to Regulation 658, which states, *"A Residential Treatment Program shall not use any form of seclusion without prior approval of the Licensing Authority."*

> The policy defining and guiding the use of the Intensive Stabilization Unit continues to be under revision. However, aside from the above policy, Woodside has addressed prior concerns about the frequency and duration of seclusion.

LICENSING RECOMMENDATION:

We recommend that Woodside Juvenile Rehabilitation Center be granted a license, for 30 residents, male and female, age 10-years up to 18-years-old, as a Residential Treatment Program for one year.

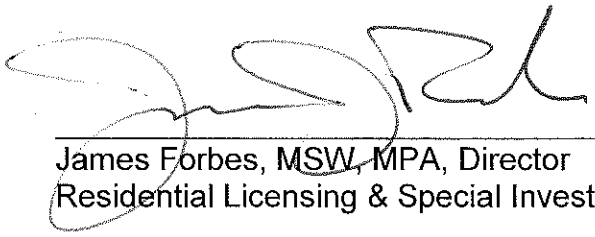


Chris Ward, LICSW, Social Worker
Residential Licensing & Special Investigations

Brenda Dawson Crocket

Brenda Dawson Crocket, MSW, Senior Social Worker
Residential Licensing & Special Investigations

Approved by:



James Forbes, MSW, MPA, Director Date
Residential Licensing & Special Investigations

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, Administrator of The Estate of G.W., R.H., T.W., T.F. D.H., B.C., and A.L. by next friend Norma Labounty, Plaintiffs,	)	
v.	)	Civil Action No. 5:21-CV-00283
KENNETH SCHATZ, KAREN SHEA, CINDY WALCOTT, BRENDA GOOLEY, JAY SIMONS, ARON STEWARD, MARCUS BUNNELL, JOHN DUBUC, WILLIAM CATHCART, BRYAN SCRUBB, KEVIN HATIN, NICHOLAS WEINER, DAVID MARTINEZ, CAROL RUGGLES, TIM PIETTE, DEVIN ROCHON, AMELIA HARRIMAN, EDWIN DALE, MELANIE D'AMICO, ERIN LONGCHAMP, CHRISTOPHER HAMLIN, and ANTHONY BRICE, all in their individual capacities, Defendants.	)	

CERTIFICATE OF SERVICE

I, Andrew Boxer, counsel of record for the Defendants Kenneth Schatz, Karen Shea, Cindy Walcott and Brenda Gooley certify that on August 11, 2022, I served *Defendants Schatz, Shea, Walcott and Gooleys' Amended Motion to Dismiss* with the Clerk of the Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF Parties:

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RESPECTFULLY SUBMITTED this 11th day of August, 2022.

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PARTIAL AND COMPLETE MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Defendant Aron Steward, Ph.D., moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to partially dismiss Plaintiffs' Amended Complaint, while Defendant Bryan Scrubb moves under the same provision to completely dismiss Plaintiffs' claims against him. For the reasons set forth below, as to Dr. Steward, Counts One, Two, and Five should be dismissed because they fail as a matter of law and, as to Mr. Scrubb, all counts should be dismissed for similar reasons.[1]

Background

In their Amended Complaint, Plaintiffs, all juveniles at the time, allege that Defendants, all employees or supervisors with the Department of Children and Families ("DCF"), violated

[1] Defendants' Dr. Steward and Mr. Scrubb also join those motions to dismiss filed by the other defendants in this lawsuit.

both their constitutional rights and their common law rights while they were being held at Woodside Juvenile Rehabilitation Center, Middlesex Adolescent Center, and the Natchez Trace Youth Academy in Tennessee. Generally, Plaintiffs' core allegation is that various Defendants violated Plaintiffs' rights by allegedly formulating, administering, and enforcing policies for physically restraining Plaintiffs and for placing Plaintiffs in solitary confinement.

Beyond this core complaint, Plaintiffs' specific allegations are complex, involving 22 Defendants, three facilities, and multiple alleged incidents over at least a three-year period. Given this complexity, rather than summarize all of Plaintiffs' allegations against all Defendants, this Motion to Dismiss focuses on those allegations brought against Mr. Scrubb and Dr. Steward.

For Mr. Scrubb, this is simple. In their original Complaint, Plaintiffs only named him in the case caption and described him in the "Parties" section of the Complaint as "a staff member at the woodside Juvenile Rehabilitation Center, Essex, Vermont." (Complaint ¶ 18.) In their Amended Complaint, Plaintiffs do not go much farther. (Amended Complaint ¶ 33.) Only T.W. and G.W. make claims against Mr. Scrubb and, as described in detail below, those general and unspecified claims are insufficient to allege his personal involvement. (*See* Amended Complaint ¶¶ 314–15, ¶¶ 335–40.) Accordingly, Plaintiffs' claims against him should be dismissed.

Unlike Mr. Scrubb, Plaintiffs do make some factual allegations against Dr. Steward. She "was the Clinical Director at the Woodside Juvenile Rehabilitation Center, Essex, Vermont." *(Id.* ¶ 14.) Although she was not responsible for formulating the policies relating to physical restraint and solitary confinement, (*see id.* ¶ 48), or indeed any policies meant to control or confine Plaintiffs, the Amended Complaint alleges that Dr. Steward knew of the policies and signed orders that approved of physically restraining and confining certain Plaintiffs. (*See id.* ¶¶ 96, 123–124, 253, 260, 265, 267–269, 338, 440, 467, 470.) Further discovery will show that Dr. Steward did not preapprove either the restraint or seclusion of Plaintiffs and, in fact, worked

diligently to ensure that all of the juveniles at Woodside received proper clinical care under the circumstances. However, even accepting those allegations as true at this stage of the proceedings, many of Plaintiffs' complaints against Dr. Steward should be dismissed as a matter of law. Those allegations are discussed in detail below.

Legal Analysis

This Court needs no reminder of the standard applicable to motions to dismiss.[2] Here, as a matter of law, that standard requires partial dismissal of the claims against Dr. Steward and complete dismissal of the claims against Mr. Scrubb for three reasons: first, the Eighth Amendment does not apply under these circumstances; second, Plaintiffs fail to plausibly allege a First Amendment violation; and third and finally, Plaintiffs do not allege that Defendant Scrubb was personally involved in any of the claimed constitutional violations.

I. Plaintiffs' Eighth Amendment Claims Should Be Dismissed, As The Eighth Amendment Applies Only To Convicted Prisoners.

Count One and Two in Plaintiffs' Amended Complaint are predicated upon alleged violations of the Eighth Amendment, (Amended Complaint ¶¶ 493–508), although Plaintiffs also refer to the Fourteenth Amendment in Count Two. Because Plaintiffs were not prison inmates at the time of the alleged violation of their federal rights, any claim arising from their confinement

[2] To survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a complaint must "provide the grounds upon which [its] claim rests." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). A plaintiff must also allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007*); see also* Fed.R.Civ.P. 8(a)(2) (pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In assessing the adequacy of the pleadings, a court must accept all factual assertions as true and draw all reasonable inferences in favor of the plaintiff. *See Wilson v. Merrill Lynch & Co., Inc.*, 671 F.3d 120, 128 (2d Cir. 2011); *ATSI Commc'ns*, 493 F.3d at 98. A complaint is properly dismissed, where, as a matter of law, "the allegations in [it], however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558. Conversely, this presumption of truth "is inapplicable to legal conclusions," and therefore the court need not credit "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678.

must be asserted and evaluated under the Due Process Clause of the Fourteenth Amendment, not the Eight Amendment. *See Lane v. Carpinello*, No. CIVA907-CV751 GLSDEP, 2009 WL 3074344, at *18 (N.D.N.Y. Sept. 24, 2009) ("Plaintiff's claims of failure to protect, excessive force, and medical indifference, all framed as arising under the Eighth Amendment, relate to allegedly unsafe conditions while he was involuntarily confined . . . , and must be analyzed within the framework of the Fourteenth Amendment."); *Dove v. City of New York*, No. 03-CV-5052 JFB LB, 2007 WL 805786, at *7 (E.D.N.Y. Mar. 15, 2007) ("[B]ecause plaintiff was not a convicted prisoner at the time of the alleged deprivation of his federal rights, any claim arising from his confinement must be asserted under the Due Process Clause of the Fourteenth Amendment, rather than the provisions of the Eighth Amendment."); *Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996) ("The rights of one who has not been convicted are protected by the Due Process Clause."). Accordingly, Plaintiffs' Eighth Amendment Claims should be dismissed.

II. Plaintiffs' First Amendment Claims Should Be Dismissed Because They Fail As A Matter Of Law.

In Amended Count Five, Plaintiffs claim that "Defendants Simons, Steward, and Bunnell violated R.H. and T.F.'s First Amendment Rights to Petition the Government for a Redress of Grievance." (Amended Complaint ¶ 276.) Although framed as the right to petition the government, Plaintiffs R.H. and T.F.'s claims implicate three distinct rights: the right to counsel, the right to access the courts, and the right to be free of retaliation for accessing the courts. As described below, each of their claims based on these rights should be dismissed.

A. Plaintiffs' Did Not Have A Constitutional Right To Counsel In Their State Court Cases.

First, to the extent R.H. and T.F. allege that they have a right to counsel, (Amended Complaint ¶ 528), such a right does not exist for the proceedings described in the Amended

Complaint because their alleged state court cases did not challenge their commitment in Woodside.

A juvenile's right to counsel does not fall under the First Amendment, but instead is founded in the Due Process Clause of the Fourteenth Amendment. *See, e.g., In re Gault*, 387 U.S. 1, 41 (1967) (requiring counsel in proceedings which may result in commitment to an institution in which the juvenile's freedom is curtailed). But that right is limited to those "proceedings by which a determination is made as to whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." (*Id.*) Put another way, a juvenile's right to counsel in certain proceedings depends on whether the juvenile will lose their liberty in those proceedings. *Turner v. Rogers*, 564 U.S. 431, 442–43 (2011) ("[T]he pre-eminent generalization that emerges from [the Supreme] Court's precedents on [the] right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.") Here, R.H. and T.F. brought protective orders apparently challenging the conditions of their confinement,[3] not their general liberty, and so they do not have a constitutional right to counsel based on this precedent.

More importantly, even if R.H. and T.F. have a right to counsel, such a claim would fail because the bald fact is that R.H. and T.F. did have counsel in the proceedings. (*See* Amended Complaint ¶ 528.) Accordingly, any claim based on their right to counsel should be dismissed.

[3] The Amended Complaint describes the claims made by R.H. in Vermont Superior Court, (Amended Complaint ¶¶ 74–86), but does not detail T.F.'s claims at all.

B. Plaintiffs Were Not Denied Access To The Courts.

R.H. and T.F.'s second argument related to their right to petition the government is that Dr. Steward (along with other defendants) unlawfully interfered with their right to counsel. This claim too should be dismissed because they have failed to adequately allege an injury.

"To state a valid § 1983 claim for denial of access to the courts . . . an inmate must allege that a defendant's deliberate and malicious interference actually impeded his access to the court or prejudiced an existing action." *Cancel v. Goord*, No. 00 CIV 2042 LMM, 2001 WL 303713, at *4 (S.D.N.Y. Mar. 29, 2001). That means "the plaintiff must show that a non-frivolous legal claim had been frustrated or was being impeded due to the actions of prison officials." *Id.* (internal quotation marks omitted).

As an initial matter, R.H.'s claim that Dr. Steward blocked his access both to his counsel and to his expert witness on one occasion on July 3, 2018 is not connected to any injury because he also notes that his case was filed just three days later on July 6, 2018. (Amended Complaint ¶¶ 285, 287); *see Shine v. Hofman*, 548 F. Supp. 2d 112, 118 (D. Vt. 2008) (granting motion to dismiss where plaintiff did not "allege that his difficulties in communicating with defense counsel . . . or his inability to contact witnesses caused him actual harm").

The only allegations that R.H. and T.F. advance that could plausibly establish prejudice to an existing action are their claims that Dr. Steward "pressured" both R.H. and T.F. to dismiss the court cases they had brought against Woodside. (Amended Complaint ¶¶ 296–98, 420–24.) While T.F. does not allege any specifics beyond "pressure," (*see* Amended Complaint ¶¶ 416, 422–424), R.H. also claims that Dr. Steward asked questions about a complaint that he had filed, (*id.* ¶ 289), praised R.H. for declining to meet with state investigators about an assault on another

Woodside resident,[4] (*id*. ¶¶ 290–92), and promised to reward R.H. if he dropped his case. (*Id*. ¶ 294.)

But the mere claim that they were pressured into dismissing a court case is not sufficient to survive a motion to dismiss. Instead, "the underlying cause of action, whether anticipated or lost, is an element that must be described in the complaint, just as much as allegations must describe the official acts frustrating the litigation." *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). Following this precedent, this court has dismissed a plaintiff's claim that his access to the courts was impeded when the complaint suggested "only in conclusory fashion that 'meritorious' claims have been prejudiced." *Bain v. Hofman*, No. 2:08 CV 110, 2009 WL 959978, at *5 (D. Vt. Apr. 3, 2009). Here, although R.H.'s claims are described in general, (Amended Complaint ¶¶ 74–86), nothing suggests R.H's claims were nonfrivolous or otherwise meritorious. *Id*. T.F.'s court case is not even described at all, let alone with sufficient particularity to judge whether it was meritorious. *See Cancel*, 2001 WL 303713, at *4 ("[I]n order to survive a motion to dismiss a plaintiff must allege . . . the defendant's actions resulted in actual injury to the plaintiff such as the dismissal of an otherwise meritorious legal claim.").

Moreover, just as with their claim that they were denied counsel, the fact that R.H. and T.F. had appointed counsel undercuts any claim that they were injured by Dr. Steward's supposed attempts to impede their access to the courts. *See McGee v. Gold*, No. 1:05-CV-231, 2006 WL 1394032, at *2 (D. Vt. May 17, 2006) (concluding that, because plaintiff had "appointed counsel," among other factors, the plaintiff "[could] not show the type of injury required for a denial of access to courts claim"); *Bourdon v. Loughren*, 386 F.3d 88, 99 (2d Cir. 2004) ("[T]he fact that [plaintiff] was represented by counsel—professional legal assistance

[4] It is not clear how Dr. Steward's alleged comments regarding R.H.'s information about another resident affected R.H.'s own access to the courts.

provided at the government's expense—and that [plaintiff] has not demonstrated that he was hindered from pursuing a particular legal claim, established constitutionally acceptable access to the courts.").

Accordingly, Plaintiffs' claims that Dr. Steward impeded their access to the courts should be dismissed.

C. Plaintiffs Do Not Plausibly Allege That Dr. Steward Retaliated.

Finally, Plaintiffs' retaliation claim also fails because they do not allege any retaliatory acts by Dr. Steward other than supposed verbal threats and promises.

To establish a prima facie case of First Amendment retaliation, Plaintiffs must demonstrate: "(1) that the speech or conduct at issue was protected, (2) that [Defendants] took adverse action against [Plaintiffs], and (3) that there was a causal connection between the protected speech and the adverse action." *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004) Notably, claims involving prisoners or other persons in custody should be approached "with skepticism and particular care, because virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act." *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003) (internal quotation marks omitted).

Here, R.H. and T.F.'s allegations do not satisfy the second element because, at most, Dr. Steward's alleged retaliatory acts were verbal threats unaccompanied by any threat of physical injury. Specifically, they claim that they were pressured to drop their court cases and that Dr. Steward promised to reward them if they did so. (Amended Complaint ¶¶ 294–98; 420–24.) Even if R.H. and T.F. specifically described this verbal pressure – which they do not – verbal warnings unaccompanied by physical threats are not sufficient to state a Section 1983 claim. *Whitehead v. Rozum*, No. CIV.A. 09-220J, 2010 WL 3885651, at *2 (W.D. Pa. Aug. 31, 2010)

(recommending that motion to dismiss be granted because "[p]laintiff makes several allegations that he was 'threatened' and 'pressured' to stop pursuing his appeal . . . Allegations of verbal threats, unaccompanied by any allegation of physical injury, do not state a Section 1983 claim."); *Ramirez v. Holmes*, 921 F. Supp. 204, 210 (S.D.N.Y. 1996) ("Allegations of threats or verbal harassment, without any injury or damage, do not state a claim under 42 U.S.C. § 1983."); *Jermosen v. Coughlin*, 878 F.Supp. 444, 449 (N.D.N.Y.1995) ("Although indefensible and unprofessional, verbal threats or abuse are not sufficient to state a constitutional violation cognizable under § 1983.").

Because Plaintiffs' fail to allege an adverse action, Plaintiffs' First Amendment claims based on Dr. Steward's alleged retaliation must be dismissed.

III. All Of Plaintiffs' Claims Against Defendant Bryan Scrub Should Be Dismissed For Lack of Personal Involvement.

Finally, all of the claims brough against Defendant Bryan Scrubb should be dismissed because Plaintiffs fail to allege Mr. Scrubb was personally involved in the constitutional violations.

In order to succeed on a Section 1983 claim for a constitutional violation, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *see also Raspardo v. Carlone*, 770 F.3d 97, 115 (2d Cir. 2014) ("If a defendant has not personally violated a plaintiff's constitutional rights, the plaintiff cannot succeed on a § 1983 action against the defendant.")

In their original Complaint, Plaintiffs made no claim at all against Mr. Scrubb, describing him only once in the body of the Complaint. Their claims in the Amended Complaint do not go much further. Plaintiffs first broadly allege that Mr. Scrubb – along with all of the other named

defendants – either directly participated in the alleged physical abuse and solitary confinement of Defendants, or failed to protect Plaintiffs. (Amended Complaint ¶ 33.) Becoming slightly more specific, Plaintiff T.W. claims that Mr. Scrubb, along with Defendants Cathcart, Hamlin, Bunnell, and Dubuc requested orders for restraint and/or seclusion and he also alleges that Mr. Scrubb, as well as twelve other defendants, carried out those orders on 10 dates ranging from February 11, 2018 to May 25, 2018. (*Id*. ¶¶ 314–15.) No attempt is made in the Amended Complaint to link Mr. Scrubb (or any of the other defendants) to specific incidents or, more importantly, to describe the incidents and whether any injury arose from the incidents. Likewise, Plaintiff G.W. asserts that Mr. Scrubb – along with 10 other defendants – either participated in, observed, or failed to intervene in the unnecessary restraint of G.W. on 31 occasions. (*Id*. ¶¶ 335–40.) As with T.W.'s claims, these 31 incidents are not linked to specific defendants, nor are they described with any sort of particularity.

These broad and unspecified allegations are not sufficient to allege Mr. Scrubb's personal involvement. The allegations do not describe the circumstances surrounding these incidents, nor do they describe Mr. Scrubb's specific involvement including whether he observed or participated in the incidents. Nor do they describe when precisely T.W. or G.W. were physically restrained or secluded. Nor, in fact, do they describe whether they were physically restrained or placed in seclusion by Mr. Scrubb as opposed to another defendant. The allegations in short, are not sufficient to plausibly state a claim against Mr. Scrubb and should be dismissed. *See Bridgewater v. Taylor*, 832 F. Supp. 2d 337 (S.D.N.Y. 2011) (dismissing prisoner's § 1983 claim for failure to protect where defendant did not participate in, and had no other connection to, initial altercation and she was not present at all when second alleged altercation occurred); *Canales v. Sheahan*, No. 12-CV-693(LJV)(HBS), 2017 WL 1164462, at *4 (W.D.N.Y. Mar. 28, 2017) ("Plaintiff's allegations fall short because the facts alleged indicate that [Defendant] was

not actually present during an assault or incident, nor that [Defendant] was aware of any specific assault or on notice that one might occur.");

Lane v. Carpinello, No. CIVA907-CV751 GLSDEP, 2009 WL 3074344, at *21 (N.D.N.Y. Sept. 24, 2009) (granting summary judgment where "[t]here [was] no evidence in the record that plaintiff was physically touched or in any way injured as a result of this incident").

IV. Conclusion.

For the reasons discussed above, Counts One, Two, and Five brought against Dr. Steward should be dismissed because they fail as a matter of law and, as to Mr. Scrubb, all counts should be dismissed for the same reason.

Dated at Burlington, Vermont this 15th day of August, 2022.

ARON STEWARD, Ph.D., and BRYAN SCRUBB

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, Admin. of the Estate of G.W., *et al.*, Plaintiffs	)	Case 5:21-cv-283-gwc
v.	)	**Defendants Christopher Hamlin and Anthony Brice's Motion to Dismiss the Amended Complaint**
KENNETH SCHATZ, *et al.*, Defendants	)	

Defendants Christopher Hamlin and Anthony Brice (collectively, Hamlin and Brice) move to dismiss the Amended Complaint (Doc. 65) against them. The Amended Complaint fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

FACTUAL BACKGROUND[1]

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept all "well-pleaded factual allegations" in the complaint as true and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff. *Lynch v. City of N.Y.*, 952 F.3d 67, 74–75 (2d Cir. 2020). Conclusory allegations, unsupported by factual allegations, are not entitled to the assumption of truth. *Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 72 (2d Cir. 2021) (*en banc*).

Plaintiffs are or were juveniles "detained" at facilities operated by the Vermont Department for Children and Families (DCF): Woodside Juvenile Rehabilitation Center (Woodside) and the Middlesex Adolescent Center.[2] (Am. Compl. (Doc. 65) pp. 1–2).

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[1] This action was started by Summons and Complaint dated December 13, 2021. All defendants filed motions to dismiss dated April 25, 2022. By agreement of the parties, Plaintiffs were permitted to file an Amended Complaint, which they did on June 28, 2022. Without waiver of any argument in Hamlin and Brice's motion to dismiss the original Complaint (which was never opposed), this motion seeks dismissal of the Amended Complaint.

[2] The Amended Complaint also refers to the Middlesex facility as the "Middlesex Adolescent Program" or "MAP." (Am. Compl. ¶ 474).

There are seven individual Plaintiffs and 22 individual defendants. (Am. Compl. p. 1). The only factual allegations in the Amended Complaint mentioning Defendant Hamlin or Defendant Brice are as follows:

General Allegations

- Hamlin and Brice were employed by DCF at all times relevant to the Amended Complaint. (Am. Compl. ¶¶ 28, 29).

- Defendants Schatz, Shea, Wolcott, Gooley, Simons, Steward, Bunnell, Dubuc, Cathcart, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, D'Amico, Hamlin, and Brice *either* directly participated in the physical abuse of G.W., R.H., T.W., B.C., T.F., A.L., and D.H. and the use of solitary confinement, *and/or* failed to fulfill their constitutional obligation to protect G.W., R.H., T.W., B.C., T.F., A.L., and D.H. from these abusive and reprehensible practices. (Am. Compl. ¶ 33) (emphasis added).

- Under the direction of Defendants Simons, Woodside staff members, including…Defendant Brice (and others) would apply rotational pressure to a juvenile's joints, including wrists, shoulders, and knees, and hyperextend shoulder and rotator cuff muscle groups. (Am. Compl. ¶ 49).

G.W.

- Plaintiff, Cathy Welch, was appointed administrator of the Estate of G.W. by the Orange County Probate Court on December 5, 2021. (Am. Compl. ¶ 1). G.W. was detained at Woodside in 2016 and 2019. (Am. Compl. ¶ 335).

- The Amended Complaint alleges Plaintiff G.W. was detained in an isolation cell where she was physically restrained at least 31 times. (Am. Compl. ¶ 337). According to incident reports, Defendants Hamlin and Brice (and others) either participated in or witnessed these alleged unlawful restraints. (Am. Compl. ¶ 339).

- A video from June 27, 2019, shows Defendant Hamlin, other defendants and non-defendant staff members "confronting"[3] G.W. who is standing naked by her cell door, covered in feces. (Am. Compl. ¶ 377).

T.W.

- Plaintiff T.W. was detained at Woodside in 2018. (Am. Compl. ¶ 311).

- While [Plaintiff] T.W. was detained at Woodside, [T.W.] was repeatedly and unlawfully placed in a seclusion cell in the so-called "North Unit," and repeatedly and unlawfully subjected to painful physical restraints. (Am. Compl. ¶ 312). According to incident reports of the isolation incidents, Defendants Simons and Steward issued these unlawful

[3] The Amended Complaint does not explain what "confronting" an individual entails.

orders, following *requests* from Defendant Hamlin (and others). Defendant Hamlin (and others) requested and/or received and carried out the orders to unlawfully place T.W. in a North Unit isolation cell or physically restrain her, or witnessed this unlawful conduct without fulfilling his constitutional obligation to intervene or take other steps to protect T.W. (Am. Compl. ¶ 314).

A.L.

- Plaintiff A.L. is a minor. (Am. Compl. ¶ 7).[4] In 2018, Plaintiff A.L. was in DCF custody and detained at Woodside. (Am. Compl. ¶ 463).

- On April 15, 2020, a video captured Defendant Brice shoving Plaintiff A.L. "with significant force using two hands on [A.L.'s] neck. [A.L.] appears to be pushed into the wall from the force of the shove to the neck." (Am. Compl. ¶ 475).[5]

- At one (unspecified) point in time, Defendant Steward approved of Defendant Hamlin's request to restrain A.L. (Am. Compl. ¶ 467).

- On June 29, 2020, Plaintiff A.L. "was . . . assaulted"[6] by Woodside/MAP staff, "led by Defendant Hamlin." (Am. Compl. ¶ 485).[7]

Based on these factual allegations, the Amended Complaint alleges Hamlin and Brice are liable to Plaintiffs under Count One (violations of the Eighth Amendment's ban on cruel and unusual punishment); Count Two (violations of the Eighth and Fourteenth Amendment's ban on the use of excessive force); Count Three (deprivation of Plaintiffs' rights to due process of law as

[4] A.L. will turn 18 on November 23, 2022. (Am Compl. ¶ 464). His claims are brought on his behalf by his mother, Norma Labounty, as next friend. (Am. Compl. ¶ 7).

[5] "Significant force" is conclusory and not entitled to the assumption of truth.

[6] "Assaulted" is a legal conclusion that is not entitled to an assumption of truth. *See Siegel v. HSBC N. Am. Holdings, Inc.*, 933 F.3d 217, 222 (2d Cir. 2019) (on motion to dismiss under Fed. R. Civ. P. 12(b)(6), court need not accept conclusory allegations or legal conclusions masquerading as factual conclusions); *Kent v. Katz*, 146 F. Supp. 2d 450, 462 (D. Vt. 2001), aff'd in part, 312 F.3d 568 (2d Cir. 2002) (under Vermont common law, "assault" refers to a civil tort).

[7] The Amended Complaint alleges that during the assault, A.L. "was knocked to the floor, A.L.'s arms were twisted and pulled behind his back, and A.L.'s legs were crossed while his feet were moved up against his buttocks." (Am. Compl. ¶ 486). The Amended Complaint does not allege that Defendant Hamlin did any of those things.

guaranteed by the Fourteenth Amendment); Count Seven (Assault and Battery) and Count Eight (Intentional Infliction of Emotional Distress).[8]

A. Pleading standards.

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the well-pleaded factual allegations, which the Court must accept as true for purposes of this motion, and reasonable inferences drawn therefrom must state a claim to relief that is plausible on its face. *See Francis*, 992 F.3d at 72 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

"A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Whiteside v. Hover-Davis, Inc.*, 995 F.3d 315, 323–24 (2d Cir. 2021) (quoting *Iqbal*, 556 U.S. at 678). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" is insufficient. *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

While a complaint need not be a model of clarity, at a minimum it must give "each defendant fair notice of what the plaintiff's claim is and the ground upon which it rests." *Wolfe v. Enochian BioSciences Denmark ApS*, 2022 WL 656747, at *13 (D. Vt. Mar. 3, 2022) (quoting *Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (summary order) (quotation marks and citations omitted); Fed. R. Civ. P. 8(a)(2).

A civil-rights complaint must plead each defendant's personal involvement in the alleged constitutional violation. Vicarious liability does not apply; an individual cannot be held liable for the constitutional violations of others. *Iqbal*, 556 U.S. at 676; *Tangreti v. Bachman*, 983 F.3d

[8] Hamlin and Brice are not mentioned in Counts Four, Five, Six and Nine of the Amended Complaint.

609, 612 (2d Cir. 2020); *Wiley v. Baker*, 2021 WL 2652869, at *5 (D. Vt. Jan. 28, 2021) (nonspecific allegations that rely on group pleading and fail to differentiate which defendant was involved in the alleged unlawful conduct do not state a claim), *report and recommendation adopted*, 2021 WL 2652868 (D. Vt. June 28, 2021).

B. Counts One, Two and Three do not meet the pleading standards.

The Amended Complaint sought to cure the original Complaint's defective and impermissible "group" or "shotgun" pleading[9] as to Hamlin and Brice by adding new factual allegations (Am. Compl. ¶¶ 49; 314; 315; 339; 340; 377; and 467), and listing, by name, individual defendants in respective counts. Specifically, the new factual allegations are that Hamlin and Brice participated in or witnessed the restraint of G.W., that Hamlin confronted G.W., requested that T.W. be put in a seclusion cell, and requested that A.L. be restrained. In conclusory fashion, the Amended Complaint adds that Brice (and six other defendants) would apply rotational pressure to *a* juvenile's[10] joints and hyperextend shoulder and rotator cuff muscle groups. (Am. Compl. ¶ 49).

Counts One, Two and Three of the Amended Complaint did not remedy the "group pleading" defect simply by naming defendants and adding new vague, conclusory allegations. In these counts, the Amended Complaint individually names 20 out of the 22[11] named defendants and provides a disjunctive list[12] of how the listed defendants *could have* violated the "Plaintiffs"

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[9] In the original Complaint, every count alleged that "Defendants" (all 22 of them) violated (all) "Plaintiffs'" rights or engaged in tortious conduct.

[10] No specific "juvenile" is identified. The Amended Complaint does not allege that the juvenile is a Plaintiff.

[11] Defendants Harriman and Longchamp are not mentioned in these allegations.

[12] Counts One, Two and Three allege that while "Plaintiffs were detained at Woodside and the Middlesex Adolescent Program, Defendants Schatz, Shea, Gooley, Wolcott, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice *either* unlawfully isolated Plaintiffs in seclusion cells in Woodside's North Unit, physically restrained

rights. The Amended Complaint only alleges action of Defendant Hamlin against G.W., T.W., and A.L., and Defendant Brice against G.W. and A.L. Defendants Hamlin and Brice are not liable to any other Plaintiff.

The Court must dismiss Counts One, Two and Three against Defendants Hamlin and Brice; those Counts are not based on allegations of their specific conduct. *See Wilson v. County of Ulster*, 2022 WL 813958, at *8 (N.D.N.Y. Mar. 17, 2022) (dismissing claims for assault and battery because complaint failed to allege personal involvement of each defendant but instead used impermissible group pleading). While Defendants Hamlin and Brice are "named" in these counts, the allegations still "lump[] all the defendants together in each claim and provide no factual basis to distinguish their conduct." *See Atuahene*, 10 F. App'x 33 (2d Cir. 2001). These Counts should be dismissed.

i. COUNTS FOUR, FIVE, SIX, AND NINE: These allegations are not against Defendant Hamlin or Defendant Brice; they must be dismissed.

Counts Four (Am. Compl. ¶¶ 518–523), Five (Am. Compl. ¶¶ 524–537), Six (Am. Compl. ¶¶ 538-539), and Nine (Am. Compl. ¶¶ 556-559) make no allegations against Defendants Hamlin or Brice. The Court should dismiss these Counts against Hamlin and Brice.

ii. DEFENDANTS' MENTAL STATES are impermissibly conclusory.

Plaintiffs' allegations of Defendants' mental states are impermissibly conclusory: "**wanton and willful**" conduct, (Am. Compl. ¶¶ 498, 507, 508, 516, 517, 542,553); "**malicious**," (Am. Compl. ¶ 502); "**reckless**," (Am. Compl. ¶¶ 502; 551, 559); "**callous**," (Am. Compl. ¶ 502);

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them in violation of Plaintiffs' constitutional rights and engaged in wanton and willful conduct that violated Plaintiffs' right[s]. . . as guaranteed by . . the United States Constitution in violation of 42 U.S.C. $1983, *or* failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect and correct problems that could cause injury to Plaintiffs." (Am. Compl. ¶¶ 498, 508, 517) (emphasis added).

"**deliberate[ly] indifferen[t]" or "indifferen[t]**" (Am. Compl. ¶¶ 165, 502, 507, 516, 542); and "**intentional.**" (Am. Compl. ¶ 547).

See Jang v. Trustees of St. Johnsbury Acad., 331 F. Supp. 3d 312, 351 (D. Vt. 2018) (conclusory allegations that defendants acted "willfully, wantonly, and recklessly" did not plausibly state claim of defamation) *aff'd*, 771 F. App'x 86, 87–88 (2d Cir. 2019) (summary order).

Since these attributions of Defendants' mental states appear in all counts against Defendants Hamlin and Brice, and since malice is necessary to impose punitive damages, all counts and all demands for punitive damages against Defendants Hamlin and Brice must be dismissed.

1. The Eighth Amendment does not apply to Plaintiffs. Even if it did, the Amended Complaint does not state a plausible Eighth Amendment claim against Defendant Hamlin or Defendant Brice.

In Count One, Plaintiffs allege that Defendants violated the Eighth Amendment's ban on cruel and unusual punishment, (Am. Compl. ¶¶ 493-498) and, in Count Two, its ban on excessive force. (Am. Compl. ¶¶ 499-508).

A. The Eighth Amendment does not apply to Plaintiffs. They were not convicted of crimes.

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." "Taken together, these Clauses place 'parallel limitations' on 'the power of those entrusted with the criminal-law function of government.'" *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (citation omitted) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)).

The Eighth Amendment protects "those convicted of crimes, and consequently the [Cruel and Unusual Punishment] Clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'" *Whitley v. Albers*,

475 U.S. 312, 318 (1986) (quoting *Ingraham*, 430 U.S. at 671 n.40). "The Eighth Amendment protects prisoners from cruel and unusual punishment by prison officials." *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015).

Applying those principles, the court in *Jackson v. Johnson* ruled that the Eighth Amendment did not apply to a teenager who was adjudicated a juvenile delinquent in a noncriminal proceeding and placed by the family court in the custody of a state official not for punishment, but "to provide guidance and rehabilitation." 118 F. Supp. 2d 278, 286–87 (N.D.N.Y. 2000), *aff'd in part, dismissed in part*, 13 F. App'x 51 (2d Cir. 2001) (summary order). The court reasoned that under New York law, adjudication as a juvenile delinquent "may [not] be denominated a conviction." 118 F.Supp.2d at 287. Since the Eighth Amendment applies only to those convicted of a crime, *see Whitley* and *Ingraham*, it did not apply to the juvenile whose claim was before the court. *Id.*

Similarly, juvenile proceedings in Vermont "are aimed primarily at protecting and rehabilitating youth in trouble. See 33 V.S.A. § 5101(a) (setting forth purposes underlying juvenile proceedings provisions). The legislative policy expressly seeks to rehabilitate juvenile offenders while removing 'the taint of criminality and the consequences of criminal behavior.' 33 V.S.A. § 5101(a)(2)." *In re D.K.*, 2012 VT 23, ¶ 19, 191 Vt. 328, 338–39, 47 A.3d 347, 355.

In Vermont, the family division of the superior court adjudicates juvenile delinquency proceedings. An order of the court in those proceedings is not deemed a conviction of crime and does not impose any civil disabilities or sanctions ordinarily resulting from a conviction. 33 V.S.A. § 5202(a)(1)(A), (B). At all relevant times prior to Woodside's closure, its mandate was to operate "as a residential treatment facility that provides in-patient psychiatric, mental health, and substance abuse services in a secure setting for adolescents who have been adjudicated or

charged with a delinquency or criminal act." 33 V.S.A. § 5801(a) (prior to repeal via 2021, No. 74, § E.327).

Plaintiffs were not at Woodside for punishment. The Eighth Amendment does not apply to them. Counts One and Two must be dismissed.

B. The Amended Complaint does not plausibly allege an Eighth Amendment claim.

Even if Plaintiffs were protected by the Eighth Amendment, akin to prisoners, their claims fail; the Amended Complaint does not allege sufficient facts to support the conclusory assertions that Defendants violated their rights under the Eighth Amendment.

To state an Eighth Amendment claim, a plaintiff must allege two elements, one subjective and one objective. First, the subjective element requires a prisoner to allege that the defendant "had the necessary level of culpability, shown by actions characterized by 'wantonness'" in light of the surrounding circumstances, which turns on whether the "force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Wright v. Goord*, 554 F.3d 255, 268 (2d Cir. 2009) (quotations omitted).

Second, the plaintiff must allege conduct that was objectively harmful enough or sufficiently serious to reach constitutional dimensions. *Crawford*, 796 F.3d at 256. In the prison context, although not "every malevolent touch by a prison guard gives rise to a federal cause of action," the Eighth Amendment proscribes conduct that is "repugnant to the conscience of mankind," *id.*, that is, conduct that is "incompatible with evolving standards of decency" or involves "the unnecessary and wanton infliction of pain." *Id.*

The Amended Complaint does not plausibly plead a plausible Eighth Amendment claim. On the subjective element, it alleges wantonness in conclusory terms, without supporting details; the

Amended Complaint does not address whether Defendants were engaged in "a good-faith effort to maintain or restore discipline." *See Wright*, 554 F.3d at 268.

On the objective element, Plaintiffs allege "no basis to conclude that the alleged use of force was "objectively 'harmful enough' or 'sufficiently serious'" to violate the Eighth Amendment. *See George v. County of Westchester*, 2021 WL 4392485, at *9 (S.D.N.Y. Sept. 24, 2021) (quoting *Crawford*, 796 F.3d at 256).

Without explanation, Plaintiffs allege that a video shows Defendant Brice using his hands on A.L.'s neck and that A.L. "appears to be pushed into the wall from the force of the shove to the neck." (Am. Compl. ¶ 475). This does not describe conduct "repugnant to the conscience of mankind," *see Crawford*, 796 F.3d at 256, nor is it "objectively 'harmful enough' or 'sufficiently serious'" to violate the Eighth Amendment.

In *George*, a prison official went into plaintiff's cell and shoved him against the wall, threatening that if plaintiff did not retract a grievance plaintiff had been pursuing the official would ensure that the prisoner's incarceration would last longer. 2021 WL 4392485, at *2. The court dismissed the Eighth Amendment claim, citing decisions from other courts in this circuit that have found that comparable forceful shoving or pushing of an inmate is insufficient to satisfy the objective prong of an excessive-force claim.

The Amended Complaint's allegation that that Defendants Hamlin and Brice "participated in" restraints of G.W also does not satisfy the elements of an Eighth-Amendment claim. There are no factual allegations of the "restraints" of G.W. that Defendants Hamlin and Brice "participated in," or how they "participated in" any such restraints.

Since the Amended Complaint does not plausibly allege the subjective or objective elements of an Eighth Amendment claim against Defendant Hamlin or Defendant Brice, Counts One and Two must be dismissed against them.

2. The excessive-force counts should be dismissed; the Eighth Amendment claims are redundant, and the Fourteenth Amendment claims do no plead objectively unreasonable force.

Count One is based on the Eighth Amendment's ban on "cruel and unusual punishment. Count Two alleges an Eighth Amendment "excessive force" claim; it cites the Fourteenth Amendment but Count One does not. Count Two directly cites a violation of excessive force under the Fourteenth Amendment, while it is alluded to in Count Three. All claims for excessive force should be dismissed.

A. Excessive Force Claims Under Eighth Amendment are redundant

The Eighth Amendment excessive-force counts are legally indistinguishable from the cruel-and-unusual counts. The phrase "excessive force" does not appear in the Eighth Amendment. "Excessive force" is a subset of "cruel and unusual punishment." *Crichlow v. Annucci*, 2022 WL 179917, at *17 (N.D.N.Y. Jan. 20, 2022) ("cruel and unusual punishment encompasses the use of excessive force . . .."). The cruel-and-unusual counts subsume the excessive-force counts; they are based on the same facts; they are redundant. They must be dismissed. *See* Fed. R. Civ. P. 12(f).

B. The Excessive Force Claims Under the Fourteenth Amendment do not plead objectively unreasonable force.

The right not to be subjected to excessive force, most commonly associated with the Fourth and Eighth Amendments, can also arise under the Fourteenth. *Edrei v. Maguire,* 892 F.3d 525, 533 (2d Cir. 2018). In a Fourteenth Amendment claim, "[a] pre-trial detainee must show that the

force purposefully or knowingly used again him was objectively unreasonable." *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015). Objective reasonableness turns on the "facts and circumstances" of each case. *Id.* (citations omitted).

The only specific allegation of force by Defendant Brice is that he "shoved" A.L. using "significant force" into a wall. (Am. Comp. ¶ 475). There are no allegations that A.L. suffered any injury from the alleged shove, or any other allegations to provide context to the interaction. Without greater detail, the court cannot conclude from the pleadings that the use of force by Defendant Brice was "objectively unreasonable," and therefore excessive. *See Lewis v. Huebner*, No. 17-CV-8101 (KMK), 2020 WL 1244254, at *5 (S.D.N.Y. Mar. 16, 2020) ("[C]laims for excessive force under the Fourteenth Amendment must involve force that is either 'more than *de minimis*' or "repugnant to the conscience of mankind.'") (quoting *United States v. Walsh,* 194 F.3d 37, 48 (2d Cir. 1999)).

Plaintiff A.L. pleads that Hamlin "led an assault" against him, but he does not state that Defendant Hamlin ever touched him. (Am. Compl. ¶¶ 485, 486). The Amended Complaint also alleges that Hamlin "requested" a restraint of A.L.—but it does not say that Hamlin personally restrained A.L. (Am. Compl. ¶ 467). There are no allegations that Hamlin used any force against A.L., G.W. or T.W., let alone unreasonable, excessive force.

The allegations that Defendants Brice and Hamlin "participated in, or witnessed" restraints of G.W. are conclusory and should be disregarded. (Am. Compl. ¶ 339).

The Amended Complaint does not state a plausible claim against Defendant Hamlin or Defendant Brice under the Fourteenth Amendment for use of excessive force.

3. Count Three does not state a plausible claim for violation of Plaintiffs' Fourteenth Amendment rights against Defendants Hamlin or Brice

The Amended Complaint does not allege specific facts that Hamlin or Brice used excessive force, isolated the Plaintiffs, or otherwise failed to intervene upon witnessing violations of Plaintiffs' constitutional rights.[13] This Count should be dismissed against Defendants Hamlin and Brice.

"Section 1983 provides a federal remedy for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'" *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 105 (1989) (quoting 42. U.S.C.§ 1983). The conduct at issue "must have been committed by a person acting under color of state law" and "must have deprived a person of rights, privileges or laws of the United States." *Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010) (quoting *Pitchell v. Callan,* 13 F.3d 545, 547 (2d Cir. 1994)).

The Amended Complaint alleges that Defendants violated *each* Plaintiff's due-process rights by either unlawfully isolating Plaintiffs, physically restraining Plaintiffs or failing to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe. (Am. Compl. ¶ 517). The excessive-force claim under the Fourteenth Amendment was pleaded in Count Two and is therefore redundant in Count Three.

A. The Fourteenth Amendment claims are impermissibly vague and conclusory.

The Fourteenth Amendment claims against Defendants Hamlin and Brice are impermissibly vague,[14] conclusory, and fail to put Defendants on notice of how they violated Plaintiffs' rights.

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[13] Count Three alleges that Hamlin and Brice violated Plaintiff's right to substantive and procedural due process. (Am. Compl. ¶ 517). The Amended Complaint does not allege how Hamlin and Brice were personally involved with any violation of procedural due process. Allegations of procedural due process should be dismissed against Hamlin and Brice.

[14] The count alleges that *all* Defendants (listed by name) violated *all* of the Plaintiff's due process rights by *either* unlawfully isolating Plaintiffs, physically restraining Plaintiffs in violation of their constitutional rights, and engaging in wanton and willful conduct that violated Plaintiff's right to

See Section B, above. Did Hamlin and Brice "confine[], restrain[], treat[], and punish[] Plaintiffs," "punish[], restrain[], and confin[e] Plaintiffs," or did they fail to fulfill their constitutional duty to ensure Plaintiffs were reasonably safe? (Am. Compl. ¶ 514; 515). Because Hamlin and Brice are "lumped" in with 18 other defendants in these allegations, they are not on notice of how they violated Plaintiffs' constitutional rights. *See* Fed. R. Civ. P. 8(a).

B. Defendants Hamlin and Brice did not unconstitutionally isolate Plaintiffs.

The Amended Complaint alleges that Defendant Hamlin requested that T.W. be placed in solitary confinement, and that those requests were approved by his superiors. (Am. Compl. ¶ 314). It makes no other factual allegations with respect to T.W.'s isolation or any other Plaintiffs' isolation or confinement. There are no allegations that Defendant Brice had any personal involvement in "isolating" or "confining" Plaintiffs. These allegations against Hamlin and Brice should be dismissed. *Pilj v. Doe*, No. 3:20-CV-771 (VAB), 2020 WL 6826739, at *3 (D. Conn. Nov. 20, 2020) (citing *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (stating that a pretrial detainee can state a substantive due process claim regarding the conditions of his confinement in two ways: he can show that the defendants were deliberately indifferent to the conditions of his confinement or he can show that the conditions are punitive.)

C. The allegations that Hamlin and Brice "failed to intervene" are conclusory.

The Amended Complaint alleges that Defendants Hamlin and Brice "failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonable safe and detect and correct problems that could cause injury to Plaintiff." (Am. Compl. § 517). While the Amended Complaint alleges

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substantive and procedural due process of law as guaranteed by the Fourteenth Amended of the United States Constitutional in violation or 42 U.S.C. 1983 *or* failing to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe and to detect or correct problems that could cause injury to Plaintiffs. (Am. Compl. ¶ 517.)

a slew of actions by other defendants, it fails to establish, even at the pleading stage, when or where Hamlin or Brice had an obligation to intervene.

While law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers, an officer can only be liable to intervene when "(1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's position would know the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene." *Jean-Laurent v. Wilkinson*, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008) (citing *O'Neill v. Krzeminski*, 839 F.2d 9, 11–12 (2d Cir. 1988).

The bare allegations of the Amended Complaint do not establish that Hamlin or Brice had an obligation to intervene. The Amended Complaint alleges Hamlin and Brice witnessed allegedly unlawful restraints of G.W.,[15] but does not specify *when* this happened or *what* they saw. The allegation that these restraints were "unlawful" is conclusory.

Similarly, with regard to T.W., Hamlin is alleged to have "witnessed" unlawful conduct, without specifying what the conduct is. The lack of factual detail does not establish that a reasonable person in Brice or Hamlin's position would know that the plaintiffs' constitutional rights were being violated. *See Jean-Laurent*, 540 F. Supp. 2d at 512.

The only allegation with some factual detail is that a video from June 27, 2019, shows Hamlin and others, "confronting G.W. who is standing naked by her cell door, covered in feces." (Am. Compl. ¶ 377). Even with this additional factual detail, it is not clear how G.W.'s

[15] The Amended Complaint alleges G.W. was placed in an isolation cell where she was restrained "at least" 31 times.

constitutional rights are being violated, and whether Defendant Hamlin had an opportunity to intervene.

Without more specificity, any allegation that Hamlin and Brice "witnessed" unlawful acts and failed to intervene are conclusory. This claim must be dismissed.

4. Defendants Hamlin and Brice are entitled to qualified immunity.

"[Q]ualified immunity shields federal and state officials from money damages unless the plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Francis v. Fiacco*, 942 F.3d 126, 139 (2d Cir. 2019). The Court may rule on either prong.

For a right to be clearly established, its "contours . . . must be sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). That is, "[then-]existing precedent must have placed the . . . constitutional question beyond debate," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), so that any reasonable official would have "'known for certain'" that the conduct was unlawful under then-existing precedent. *Liberian Cmty. Ass'n of Connecticut v. Lamont*, 970 F.3d 174, 186–87 (2d Cir. 2020) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). Otherwise, the official is immune from suit.

To determine whether a right is clearly established, the Court should look to Supreme Court and Second Circuit precedent existing at the time of the alleged violation. *Vasquez v. Maloney*, 990 F.3d 232, 238 (2d Cir. 2021). The clearly established right must be defined with specificity, not "at a high level of generality." *City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500, 503 (2019).

Because qualified immunity protects officials not merely from liability but from litigation, when possible, the issue should be resolved on a motion to dismiss, before the commencement of discovery, to avoid subjecting public officials to time-consuming and expensive discovery procedures. *Garcia v. Does*, 779 F.3d 84, 97 (2d Cir. 2015).

Qualified immunity bars Plaintiffs' Eighth Amendment claims. At the time of Defendants' alleged conduct, no Supreme Court or Second Circuit law clearly established that the Eighth Amendment would apply to Plaintiffs under these circumstances. That is still true. Defendants are entitled to qualified immunity from suit on Counts One and Two, which must be dismissed.

5. The Court should decline jurisdiction over the pendent state-law claims.

Counts Seven through Nine assert what Plaintiffs refer to as "pendent" state claims: assault and battery (Count Seven), intentional infliction of emotional distress (Count Eight), and grossly negligent and reckless supervision of persons in Defendants' custody and control (Count Nine). Count Nine was not plead against Hamlin or Brice.

Plaintiffs claim this Court has jurisdiction over the state-law claims under 28 U.S.C. § 1367,[16] which "codifies the court-developed pendent and ancillary jurisdiction doctrines under the label 'supplemental jurisdiction,'" *Artis v. D.C.*, 138 S. Ct. 594, 598 (2018). (Am. Compl. ¶ 36.) The Court should decline to exercise that jurisdiction.

"[D]istrict courts may decline to exercise supplemental jurisdiction over a [pendent] claim . . . if . . . (1) the claim raises a novel or complex issue of State law, [or] (3) the district court has dismissed all claims over which it has original jurisdiction . . .." § 1367(c)(3). In those

[16] Under § 1367(a), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

circumstances, a court should consider whether "judicial economy, convenience, fairness, and comity counsel against exercising supplemental jurisdiction." *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 86 (2d Cir. 2018).

Here, the state-law claims present novel issues of Vermont law. *See* 28 U.S.C. § 1367(c)(1). They would require the Court to apply 12 V.S.A. § 5602, which immunizes State employees from tort liability, except in the case of "gross negligence or willful misconduct."[17] *See* Part 5.B. below. And they would require the Court to apply Vermont tort law to a setting the Vermont Supreme Court has not addressed.

The relevant factors identified in *Catzin* weigh in favor of dismissal. Litigation about § 5602 and the cited tort laws in a Vermont court would be more efficient; it will obviate any need for this Court or the Court of Appeals to ask the Vermont Supreme Court to resolve Vermont-law questions.[18] Interests of comity weigh in favor of allowing Vermont courts to decide important issues of Vermont law governing the liability or immunity of State employees. *See Boyens v. Anderson*, 2021 WL 5580055, at *3 (D. Vt. Nov. 30, 2021) (citing comity as basis for declining to exercise discretion to decide Vermont common-law claims after dismissing federal claims).

Likewise, if the Court dismisses all the original-jurisdiction claims, *see* 28 U.S.C. § 1367(a), the Court should dismiss the state-law claims. *See* 28 U.S.C. § 1367(c)(3).

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[17] Section 5602 provides:

> (a) When the act or omission of an employee of the State acting within the scope of employment is believed to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the State of Vermont; and no such action may be maintained against the employee or the estate of the employee.
>
> (b) This section does not apply to gross negligence or willful misconduct.
>
> (c) As used in this chapter, "employee" means any person defined as a State employee by 3 V.S.A. § 1101.

[18] *See* L.R. 74 (D. Vt.); V.R.A.P. 14; and L.R. 27.2 (2d Cir.), governing certification.

6. Plaintiffs' state-law claims are barred by 12 V.S.A. § 5602.

Under Vermont law, a tort claim may not be asserted against a state employee unless the employee acted with "gross negligence or willful misconduct"; any action lies exclusively against the State. 12 V.S.A. § 5602(b). *See* footnote 17 (quoting § 5602).

Plaintiffs' allegations of gross negligence and willful misconduct are conclusory; they are not entitled to the assumption of truth and do not overcome Defendants' immunity under § 5602(a).

7. The Amended Complaint fails to state a state-law claim upon which relief can be granted.

In federal court, federal pleading standards prevail in all civil actions, including those based on state law. *See Tannerite Sports, LLC v. NBCUniversal News Grp.*, 864 F.3d 236, 247 (2d Cir. 2017). Thus, this Court must test Counts Seven and Eight against the *Twombly-Iqbal* standard. *See id.* Vague and conclusory allegations are not sufficient. *See Wiley*, 2021 WL 2652869, at *4.

A. Count Seven (Assault and Battery), fails to state a plausible claim.

In Count Seven ("Assault and Battery"), the Amended Complaint alleges, "While Plaintiffs were detained at Woodside and the Middlesex Adolescent Program between 2016 and 2020, Defendants, Simons, Steward, Bunnell, Cathcart, Martinez, Weiner Piette, Rochon, Hamlin, Ruggles, Hatin, and Bryce [sic] repeatedly placed [Plaintiffs] in isolation cells in the North Unit and physically assaulted them." (Am. Compl. ¶ 545).

As argued above, allegations about the placement of Plaintiffs in isolation cells do not apply to Defendant Brice. Further, there is no allegation that Defendant Hamlin ever placed any Plaintiff in an isolation cell. That part of Count Seven must be dismissed.

In Count Seven, Plaintiffs "repeat and incorporate" paragraphs 1 through 624 [sic]. (Am. Compl. ¶ 544). Including those incorporated paragraphs, Count Seven does not plausibly state a claim against Hamlin or Brice. The allegations are impermissibly vague and conclusory.

Under Vermont law, battery "is an intentional act that results in harmful contact with another." *Christman v. Davis*, 2005 VT 119, ¶ 6, 179 Vt. 99, 101, 889 A.2d 746, 749. "At common law, the civil tort of assault is defined as any gesture or threat of violence exhibiting an [intention] to assault, with the means of carrying that threat into effect . . . unless immediate contact is impossible." *MacLeod v. Town of Brattleboro*, 2012 WL 5949787, at *8 (D.Vt. Nov. 28, 2012) (internal quotation marks omitted).

Privilege is a defense to an intentional tort, *see Skaskiw v. Vermont Agency of Agric.*, 2014 VT 133, ¶ 12, 198 Vt. 187, 195, 112 A.3d 1277, 1285 (discussing privilege in defamation law), including assault and battery, *see Crowell v. Kirkpatrick*, 667 F.Supp.2d 391, 417 (D.Vt. 2009) (applying Vermont assault-and-battery law; asking whether police officer's conduct was "reasonably necessary and thereby privileged"), *aff'd*, 400 Fed.Appx. 592 (2d Cir. 2010) (summary order) (quotation marks omitted). When the complaint alleges an intentional tort under circumstances giving rise to a privilege, the complaint must include allegations that would overcome the privilege. *Skaskiw*, *supra*.

Count Seven alleges that Defendants "physically assaulted" Plaintiffs. (Am. Compl. ¶ 545). That allegation is a legal conclusion and not entitled to the assumption of truth. *See Kartiganer v. Juab Cty.*, 2012 WL 1906547, at *2 (D. Utah Apr. 6, 2012), *report and recommendation adopted*, 2012 WL 1906531 (D. Utah May 25, 2012). Therefore, Plaintiffs must allege facts sufficient to put each Defendant on notice of *their* specific harmful conduct. *Id. See also Durnell*

v. Foti, 2019 WL 5893263, at *2 (E.D. Pa. Nov. 12, 2019) (dismissing battery claim against physician for lack of specificity).

The Amended Complaint alleges that A.L. "was assaulted" by Woodside staff, "led" by Defendant Hamlin. (Am. Compl. ¶ 485). During the incident, A.L. "was [allegedly] knocked to the floor, [his] arms were twisted and pulled behind his back, and [his] legs were crossed while his feet were moved up against his buttocks." (Am. Compl. ¶ 486).

The Amended Complaint does not allege that Defendant Hamlin did any of those things. It does not specifically allege how—i.e., by what conduct—Defendant Hamlin "led" an "assault" as defined by the above-cited caselaw.

The Amended Complaint alleges that a video recorded Defendant Brice using his hands on Plaintiff A.L.'s neck shoving A.L. with "significant force" and that A.L. "appears to be" "pushed into the wall from the force of the shove to the neck." (Am. Compl. ¶ 475). These allegations lack the detail necessary to state a claim for assault and battery. For example, it does not establish that Brice's alleged conduct was not "reasonably necessary and thereby privileged." *See Crowell*, 667 F.Supp.2d at 417.

The context of these allegations against Defendants Hamlin and Brice, the administration of a treatment facility for juveniles in the custody of the DCF Commissioner, raises the issue of privilege. *See Chase v. Watson*, 75 Vt. 385, 388, 56 A. 10 (1903) (holding that selectmen with duty to remove obstructions from highway may use such force as is reasonably necessary for purpose of preventing plaintiff from interfering with removal). The Amended Complaint fails to allege facts overcoming the privilege. *See Skaskiw*, 2014 VT 133, ¶ 12, 198 Vt. at 195, 112 A.3d at 1285.

Since the allegations against Defendants Hamlin and Brice do not plausibly state a claim of assault and battery, Count Seven must be dismissed against them.

B. Count Eight, intentional infliction of emotional distress, fails to state a claim.

In Count Eight, Plaintiffs allege that Defendants are liable for intentional infliction of emotional distress (IIED): they allege that Defendants' conduct "was so outrageous and extreme as to go beyond all possible bounds of decency," (Am. Compl. ¶ 550), and that, "by placing Plaintiffs in isolation cells . . . and by physically assaulting them," Defendants' conduct caused Plaintiffs extreme emotional distress. (Am. Compl. ¶ 554).

Neither Defendant Hamlin nor Defendant Brice put any plaintiff in isolation. The Amended Complaint simply alleges that Hamlin "requested" that T.W. be placed in seclusion/isolation. (Am. Compl. ¶ 314). Any claim regarding isolation must be dismissed against Hamlin and Brice.

A plaintiff alleging IIED under Vermont law carries a "heavy burden." *Davis v. Am. Legion, Dep't of Vermont*, 2014 VT 134, ¶ 20, 198 Vt. 204, 212, 114 A.3d 99, 106. The plaintiff must show defendants engaged in "outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct." *Sheltra v. Smith*, 136 Vt. 472, 476, 392 A.2d 431, 433 (1978).

Plaintiff must show defendants' conduct was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable." *Dulude v. Fletcher Allen Health Care, Inc.*, 174 Vt. 74, 83, 807 A.2d 390, 397 (2002). Plaintiff must allege harm that was so severe that no reasonable person could be expected to endure it. *Grega v. Pettengill*, 123 F. Supp. 3d 517, 550 (D. Vt. 2015).

The Amended Complaint does not plausibly allege an IIED claim against Defendant Hamlin or Defendant Brice. It merely attempts to recite the elements of an IIED claim with naked assertions devoid of further factual enhancement, which is insufficient. *See Iqbal*, 556 U.S. at 678. The few specific allegations in the incorporated paragraphs about Defendants Hamlin and Brice do not state an IIED claim against either of them.

The allegations against Hamlin: that he (and others) "confronted" G.W. while she was in her cell, (Am. Compl. ¶ 377); that he "participated in or witnessed" physical restraints of G.W., (Am. Compl. ¶ 339); that he "requested" T.W. be placed in a seclusion cell, (Am. Compl. ¶ 314); that he "requested" the restraint of A.L., (Am. Compl. ¶ 467); and that he "led" Woodside staff in an incident with A.L., (Am. Compl. ¶ 485), all fail to meet the "heavy burden" for stating an IIED claim. The vague allegations do not plausibly allege conduct *by him* that meets the objective test for outrageousness or the other elements of an IIED claim under Vermont law.

Defendant Brice allegedly shoved A.L., (Am. Compl. ¶ 475), and "participated in or witnessed" physical restraints of G.W., (Am. Compl. ¶ 314). The alleged interactions are not so extreme or outrageous as to give rise to liability under Vermont law. *See Dulude*, 174 Vt. at 83, 807 A.2d at 397.

The Amended Complaint's conclusory allegation of "extreme" emotional distress, (Am. Compl. ¶ 554), does not allege a causal connection to the alleged conduct of either Defendants Hamlin or Brice. *See Sheltra*, 136 Vt. at 476, 392 A.2d at 433 (IIED claim requires showing of extreme emotional distress resulting from defendant's conduct).

These flaws require dismissal of Count Eight against Defendants Hamlin and Brice.

C. The Amended Complaint fails to state a claim for punitive damages.

Plaintiffs seek punitive damages, (Am. Compl. at ¶¶ 542, 547, 555), which require a showing of: (1) wrongful conduct that is outrageously reprehensible; and (2) malice. *Fly Fish Vt., Inc. v. Chapin Hill Estates, Inc.*, 2010 VT 33, ¶ 18, 187 Vt. 541, 996 A.2d 1167.

To make knowing and intentional conduct malicious, plaintiff must show bad motive. That is, there must be more than willful and knowing conduct. *State Agency of Nat. Res. v. Riendeau*, 157 Vt. 615, 625, 603 A.2d 360, 365 (1991).

Plaintiffs do not plausibly allege the elements of a punitive damages claim under the specified substantive standards or the applicable pleading standards set forth in *Twombly*, *Iqbal*, and their progeny. Their demand for punitive damages must be dismissed.

CONCLUSION

For the reasons stated above, the Court should grant this Motion to Dismiss.

WHEREFORE, Defendants, Christopher Hamlin and Anthony Brice, respectfully request that the court DISMISS the claims against them in this matter.

DATED: August 15, 2022

RYAN SMITH & CARBINE, LTD.

By: */s/ Francesca Bove*

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10596-001 1244244

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, ADMINISTRATOR OF THE
ESTATE OF G.W., R.H., T.W., T.F.,
D.H., B.C., and A.L., by next friend Norma Labounty

Plaintiffs, Civil Docket No. 5:21–cv-00283

v.

KENNETH SCHATZ, KAREN SHEA,
CINDY WOLCOTT, BRENDA GOOLEY,
JAY SIMONS, ARON STEWARD, MARCUS BUNNELL,
JOHN DUBUC, WILLIAM CATHCART,
BRYAN SCRUBB, KEVIN HATIN,
NICHOLAS WEINER, DAVID MARTINEZ,
CAROL RUGGLES, TIM PIETTE,
DEVIN ROCHON, AMELIA HARRIMAN,
EDWIN DALE, MELANIE D'AMICO,
ERIN LONGCHAMP, CHRISTOPHER HAMLIN,
and ANTHONY BRICE, all in their individual capacities.

Defendants

DEFENDANT WILLIAM CATHCART'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(6)

NOW COMES Defendant WILLIAM CATHCART, by and through counsel, WOODSTOCK LAW, PC, and pursuant to F.R.C.P. 12(b)(6) hereby moves the Court to dismiss all Counts against him, as further detailed below, for failure to state a claim upon which relief can be granted. In furtherance of this Motion to Dismiss, Defendant Cathcart submits the following Memorandum of Law.

INTRODUCTION

This matter stems from claims asserted by, and on behalf of, juveniles detained at the Woodside Juvenile Rehabilitation Center in Essex, Vermont, the Middlesex Adolescent

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Center and Natchez Trace Juvenile Academy between 2016 and 2020. Defendant William Cathcart is identified as a "staff member and assistant director" in paragraph 17 of The Factual Background section in the Amended Complaint. In a largely conclusory manner, the Amended Complaint outlines certain facts against Defendant Cathcart, but those facts are without specific "enhancement" necessary to allow the Court to infer any possibility of relief against him. Additionally, the Amended Complaint includes no allegations as it relates to Plaintiffs T.F., D.H., B.C., and A.L. and Defendant Cathcart. For the reasons set forth below, the assertions against Defendant Cathcart in the Amended Complaint do not rise to a right to relief above the speculative level, and must be dismissed. ***Bell Atl.Corp. v. Twombly***, 580 U.S. 544, 554 (2007).

MEMORANDUM OF LAW

Defendant Cathcart seeks dismissal of all Counts (One through Eight as Count Nine is not asserted as against Cathcart) outlined in the Amended Complaint (dated June 23, 2022) pursuant to F.R.C.P. 12(b)(6), for failure to state a claim upon which relief can be granted. Likewise, F.R.C.P. 8(a)(2), as a provision of general pleading practice, requires the pleader to provide fair notice to the opposing party to enable him to answer and prepare for trial. ***Salahuddin v. Cuomo,*** 861 F.2d 40, 42 (2d Cir. 1980). It is therefore incumbent upon the pleader to assert "a statement clear enough 'to give the Defendant fair notice of what the Plaintiff's claim is and the grounds on which it rests." *See*, V.R.C.P. 8 REPORTER'S NOTES (quoting ***Conley v. Gibson***, 355 U.S. 41 (1957)). As stated in ***Salahuddin***, the requirement the statement is short as "[u]necessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant

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material from a mass of verbiage." 861 F.2d at 42, citing 5 C. WRIGHT & A. MILLER, *Federal Practice and Procedure* § 1281 at 365 (1969). This Amended Complaint lacks any concise statement of factual allegations which give rise to any reasonable inferences against Defendant Cathcart and therefore give rise to a right to relief to any Plaintiff, pursuant to both F.R.C.P. 8(a)(2), and F.R.C.P. 12(b)(6).

As it relates to Defendant William Cathcart, Plaintiffs make no allegations specific to conduct which would give rise to an inference of liability by Defendant Cathcart as it relates to Plaintiffs T.F., D.H., B.C., and A.L. For this reason alone all claims against Defendant Cathcart by these Plaintiffs must be dismissed. Defendant Cathcart is without any concise statement of factual allegations, nor the grounds of the claims, against him by these Plaintiffs. Defendant Cathcart acknowledges the serious nature of the complaints asserted in Plaintiffs' Amended Complaint, as well as the historical perspective of the Disability Rights injunctive action which illustrated executive policy decisions by some of the administrators of Woodside. This matter stands on different footing as it is a claim for damages by Plaintiffs.

To survive a Motion to Dismiss, a Complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." ***Ashcroft v. Iqbal***, 556 U.S. 662, 678 (2009) (quoting ***Bell Atl. Corp v. Twombly***, 550 U.S. 544, 570 (2007)). To meet this standard, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id. See also* ***Chambers v. Time Warner, Inc.***, 282 F.3d 147, 152 (2d Cir. 2000). Plaintiffs must allege both facts and legal theories as against each named Defendant with specificity such the Defendant to have a "fair understanding of what the plaintiff is complaining about and to

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know whether there is a legal basis for recovery." ***Hauff v. State Univ. of New York,*** 425 F.Supp.3d 116, 126-127 (E.D.N.Y 2019).

The Court, in evaluating the efficiency of the Complaint, uses a "two pronged approach". ***Hayden v. Paterson***, 594 F.3d 150, 161 (2d Cir. 2010)(*quoting* ***Iqbal***, 556 U.S. at 679). First, legal conclusions are discounted by the Court, as are "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusary statements". ***Iqbal***, 556 U.S. at 678. Second, the Court considers whether the factual allegations, taken as true, plausibly give rise to an entitlement to relief. *Id*. This second step is fact-bound, context-specific and the Court is to "draw upon its own judicial experience and common sense." ***Iqbal***, 556 U.S. at 679.

The "facial plausibility" standard seeks more than a "sheer possibility that the Defendant has acted unlawfully". ***Ashcroft v. Iqbal***, 556 U.S. at 678 (2009). A Complaint which pleads facts "merely consistent with" a defendant's liability "stops short of the line between possibility and plausibility of entitlement to relief". *Id.* (additional citations omitted). As will be outlined further below, the claims against Defendant Cathcart must be dismissed for failure to state a claim for which relief can be granted, as the Amended Complaint stops short of the line between possibility and plausibility of entitlement to relief.

I. Plaintiffs T.F., B.C., D.H., and A.L. do not allege any facts against Defendant William Cathcart which would allow the Court to infer any misconduct which would give these named Plaintiffs a right to relief accordingly, their respective claims must be dismissed.

Plaintiffs' Amended Complaint does not lack specificity factually. In addition to the usual factual background section, Plaintiffs offer additional detail about the conditions at Woodside, conditions of confinement at Natchez Trace Juvenile Academy, as well as general

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commentary on the impacts of solitary confinement on juveniles and confinement in the North Unit. The Amended Complaint also contains specific allegations pertaining to each named Plaintiff. In those sections Plaintiffs outline their time at Woodside, including any allegations of physical restraint, seclusion or isolation which occurred during their residency giving rise to the stated legal claims. Plaintiffs reference documentation and named Defendants and their alleged actions or omissions. For example, when detailing T.F.'s claims, the Amended Complaint relays the investigation performed by DCF/RLSIU with detail of the alleged regulatory violations. ¶ 427. The alleged Defendants involved are specifically named, as is the actions involving them and the claimed injury resulting to T.F. ¶¶ 406-427. There are no specifically plead factual assertions relating to claims by T.F., B.C., and A.L., as alleged against Defendant Cathcart. Likewise, there is but one stated allegation against Defendant Cathcart as it relates to Plaintiff D.H.:

> 253. When asked about the decision to send D.H. into solitary confinement, Defendants Simons, Cathcart, and Steward gave contradictory explanations, neither of which were based on North Unit's policy that only those who demonstrated actual harm or imminent risk of [sic] harm to self or others could be placed in a North Unit isolation cell.

To be clear, the Amended Complaint asserts:

> 49. Under the direction of Defendants Simons, Woodside staff members, including Defendants Cathcart, Hatin, Piette, Bunnell, Dubuc, Brice, Weiner, Martinez, and Rochon, would apply rotational pressure to a juvenile's joints, including wrists, shoulders, and knees, and hyperextend shoulder and rotator cuff muscle groups.

Plaintiffs assert this technique, as introduced allegedly by Defendant Simons, would sometimes cause pain and "could lead to swelling" and a "possibility of limited range of motion." ¶ 51. At no point in the Amended Complaint does any Plaintiff assert this tactic

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was specifically used by Defendant Cathcart. T.F., B.C., D.H., and A.L., make no such allegation.

The Amended Complaint does not allege that Defendant Cathcart was responsible, at any time, for the supervision, management, evaluation or discipline of other personnel working at Woodside. Plaintiffs do not allege Defendant Cathcart had any ability or authority to adopt rules, policies, procedures or general practices governing the juveniles at Woodside.

The Court is without any factual content involving actions of Defendant Cathcart with these Plaintiffs. Given in each Factual Background section specific Defendants and actions are clearly named, where the Amended Complaint is silent as to Defendant Cathcart's actions or involvement the Court is unable to reasonably infer claims giving rise to relief. Moreover, Defendant Cathcart is without any fair notice of the claims against him which would enable him to answer and prepare for trial.

Nowhere in the Factual Background of T.F., B.C., D.H., and A.L, are actions or omissions of Defendant Cathcart described, which would detail specific personal involvement by Defendant Cathcart in his own individual actions which were in violation of constitutional protections. ***Iqbal***, 556 U.S. at 678. These Plaintiffs do not state any "statement of circumstances, occurrences, and events in support of the claim presented". See, C. WRIGHT & A. MILLER, *Federal Practice and Procedure* § 1202, at 94-95 (3d ed.2004). There is no statement of a plausible claim against Defendant Cathcart by these named Plaintiffs. Simply identifying Defendant William Cathcart as a "staff member and assistant director at Woodside Juvenile Rehabilitation Center in Essex" is not enough under the parameters of F.R.C.P. 8(a)(2) and 12(b)(6) to give rise to any reasonable inferences entitling Plaintiffs to relief. For these

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reasons, any and all claims asserted by T.F., B.C., D.H., and A.L. against Defendant Cathcart must be dismissed.

II. Plaintiffs fail to allege facts supportive of the claims set forth in Count One as the Eighth Amendment is not applicable as it relates to any assertions against Defendant Cathcart such that Count One must be dismissed.

This Count must be dismissed as it relates to Defendant Cathcart as the Eighth Amendment is inapplicable in this case as these juveniles were being held in noncriminal custody. Plaintiffs assert the Defendants were "vested with control over the custody and care of Plaintiffs", in this case juveniles. ¶ 496 . The only mention of any "adjudication" in the Amended Complaint is asserted in the claims by B.C. in paragraph 432, and 433 indicating B.C. was "imprisoned" and subjected to improper physical restraints and solitary confinement. There are no factual allegations against Defendant Cathcart as set forth in B.C.'s claims, and her claims are ripe for dismissal as outlined in Section I. For all other Plaintiffs there is no assertion of criminal custody, rather juvenile detention; accordingly, the Eighth Amendment claims do not give rise to any right of relief on the part of Plaintiffs as to Defendant Cathcart.

The Eighth Amendment "was designed to protect those convicted of crimes, and consequently the [Cruel and Unusual Punishment] clause applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.' " ***Whitley v. Albers***, 475 U.S. 312, 318 (1986)(*quoting* ***Ingraham v. Wright***, 430 US. 651, 671 n. 40 (1977). Generally, "juveniles", when they are held, are held in noncriminal custody; they are persons civilly committed without the full panoply of protections attendant upon a criminal trial." ***Pena v. New York State Div. For Youth***, 419 F.Supp. 203, 206 (S.D.N.Y. 1976). Similarly, placement in the custody of state services such

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as Woodside is not meant as punishment, but rather, to provide guidance and rehabilitation. *See* ***Kent v. United States***, 383 U.S. 541, 554 (1966); ***Pena***, 419 F.Supp. at 206.

Therefore, the Eighth Amendment ban on cruel and unusual punishment is inapplicable in this case. Plaintiffs' claims of violation pursuant to the Eighth Amendment are legally deficient on their face and must be dismissed.

III. Plaintiffs in Count Two allege no facts specific to Defendant Cathcart which would give rise to a reasonable inference he violated the Eighth Amendment and Fourteenth Amendment's ban on the use of excessive force, pursuant to 42 U.S.C. §1983 thus dismissal is required.

As noted above, Plaintiffs' claim of a violation of the Eighth Amendment is not supported as Plaintiffs were held in juvenile custody and the Eighth Amendment is inapplicable. ***Jackson v. Johnson***, 118 F.Supp.2d 278 (2000).

The due process clause of the Fourteenth Amendment includes an individual's freedom from unreasonable bodily restraint. ***Youngberg v. Romeo***, 457 U.S. 307, 316 (1982). This applies to excessive force claims brought under the Fourteenth Amendment. ***Hudson v. McMillan***, 503 U.S. 1(1992); ***United States v. Walsh***, 194 F.3d 37, 48 (2d Cir. 1999). It is well settled that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." ***Wright v. Smith***, 21 F.3d 496, 501 (2d Cir. 1994). The section 1983 plaintiff must "allege a tangible connection between the acts of the defendant and the injuries suffered. " ***Bass v. Jackson***, 790 F.2d 260, 263 (2d Cir. 1986)

The core inquiry by the Court in excessive force cases is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." ***Hudson***, 503 at 7. This inquiry includes a determination of several factors: "[T]he need for application of force, the relationship between that need and the amount of force used,

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the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.' " *Id*. (*quoting* ***Whitley v. Alberts***, 475 U.S. 312, 321 (1986)). The extent of injury is another factor to consider which "may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation, 'or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur.' " *Id*. (*quoting* ***Whitley***, 475 U.S. at 321, 106 S.Ct. 1078). Additional factors include any effort to temper or limit the amount of force; the severity of the security problem at issue; and whether the plaintiff was actively resisting. ***Kingsley v. Hendrickson***, 576 U.S. 389, 397 (2015). Excessive force claims must show objectively "conscience-shocking" action by the Defendant. ***Johnson v. Newburgh Enlarged School Dist.***, 239 F.3d 246, 252 (2d Cir. 2001). Where the assertions of the use of force by Defendants were "de minimis, necessary, appropriate, and benign," a claim of excessive force under the Fourteenth Amendment should not stand. *Id*. Specific actions pled as "unprovoked pushing, punching, and kicking", verbal abuse, violent pushing, and distinct physical injury are absent in this Amended Complaint, and not pled by Plaintiffs, nor are they alleged against Defendant Cathcart. *See* ***D. K. v. L.K. Teams***, 260 F.Supp.3d 334, 355-357 (S.D. New York 2017)(offering specific detail as to staff actions against residents which gave rise to claims of excessive force which shocked the conscience).

Plaintiffs specifically allege:

¶ 31. Because children detained at Woodside were in the custody of DCF, all of these defendants had a "special relationship" with G.W., R.H., T.W., B.C., T.F., A.L., and D.H.

¶ 32. Because of the defendants' "special relationship" with their wards held at Woodside, each of them had a constitutional duty enforceable through the Due

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Process Clause of the Fourteenth Amendment to the United States Constitution to protect G.W., R.H., T.W., B.C., T.F., A.L., and D.H. from harm, including physical abuse, excessive force, and solitary confinement in the North Unit.

¶ 33. Defendants Schatz, Shea, Wolcott, Gooley, Simons, Steward, Bunnell, Dubuc, Cathcart, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, D'Amico, Hamlin, and Brice, either directly participated in the physical abuse of G.W., R.H., T.W., B.C., T. F., A.L., and D.H., and the use of solitary confinement, and/or failed to fulfill their constitutional obligation to protect G.W., R.H., T.W., B.C., T. F., A.L., and D.H., from these abusive and reprehensible practices.

¶49. Under the direction of Defendants Simons, Woodside staff members, including Defendants Cathcart, Hatin, Piette, Bunnell, Dubuc, Brice, Weiner, Martinez, and Rochon, would apply rotational pressure to a juvenile's joints, including wrists, shoulders, and knees, and hyperextend shoulder and rotator cuff muscle groups.

Plaintiffs also assert Defendants, including Cathcart did not make "any serious effort to prevent" the alleged abuse, "thus violating their constitutional obligation to protect" Woodside residents. ¶¶ 393-394. Plaintiffs assert a "failure to fulfill their constitutional duty," to insure safety, and "detect and correct problems". ¶¶ 502, 505, 507-508. Plaintiffs G.W., R.H., T.W. and R.H., are the sole Plaintiffs who incorporated any factual assertions involving Defendant Cathcart. As will be demonstrated below, for each such Plaintiff there are insufficient facts pled as to the details of specific actions and personal involvement by Defendant Cathcart. Instead, there are merely conclusory allegations which do not offer the specificity to state a Fourteenth Amendment claim for excessive force, accordingly, dismissal pursuant to F.R.C.P 12(b)(6) is appropriate.

a. Claims asserted by D.H.

The majority of factual allegations involving D.H. relate to his transfer and residence at Natchez Trace Youth Academy. Plaintiffs make no assertion Defendant Cathcart was in

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any way involved in this Academy, and do not include him in Count Four pertaining specifically to this location. The sole allegation by Plaintiff D.H. involving Defendant Cathcart is that he and others "gave contradictory explanations" regarding why D.H. was placed in solitary confinement in the North Unit, resulting in a grievance filed with Woodside by D.H..¶ 253. The Amended Complaint indicates D.H. had purported engaged in "disruptive and annoying behavior", but that the decision to send D.H. to solitary confinement was "not in line with applicable policy". ¶¶ 251, 248. Neither the behaviors, nor the applicable policy are specifically defined in the Amended Complaint. Absent from the facts allege is any assertion of "force", much less "excessive force" personally by Defendant Cathcart. There is no assertion of physical injury alleged. There is nothing more than a bare assertion that Defendant Cathcart made a "contradictory explanation". Plaintiff D.H. does not provide any facts which would support an inference that Defendant Cathcart failed to "detect and correct" problems that could cause injury to this Plaintiff, such that Plaintiff's constitutional rights were violated. ¶ 508.

There is no factual content plead in the sections involving D.H., as it relates to Defendant Cathcart that offer anything more than a "sheer possibility" he acted unlawfully, therefore dismissal is appropriate. ***Ashcroft v. Iqbal***, 556 U.S. at 678 (2009).

b. Claims asserted by Plaintiff R.H.

Plaintiff R.H. asserts he was "restrained on the bed, and stripped of all of his belongings" in part, by Defendant Cathcart, on April 17, 2018. ¶ 271. The factual allegations detail other events occurring on other days involving Plaintiff R.H., without mention of Defendant Cathcart. See generally ¶¶ 266, 272-279, 299-303. There is no

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assertion in those paragraphs of any degree of personal involvement and personal contact by Defendant Cathcart beyond those alleged occurring on April 17, 2018. Plaintiff R.H. asserts through counsel a request was made to Defendant Cathcart to "pair" R.H. with different staff members, and the alleged refusal to do so amounted to a violation of a constitutional duty. Plaintiff R.H., does not allege the factual basis to support that Defendant Cathcart was responsible, authorized, or able to take such suggestion, much less act upon it. Plaintiff R. H. does not allege facts which amount to an obligation by Defendant Cathcart to "detect and correct" any problems.

As it relates to the claims of excessive force which violated the Fourteenth Amendment, the Court's inquiry is "whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." ***Hudson***, 503 at 7. There are no facts alleged which evidence "conscience-shocking" personal action(s) by Defendant Cathcart which if accepted as true which give rise to a legally viable claim of excessive force as it relates to Plaintiff R.H.

c. Claims asserted by Plaintiff T.W.

Plaintiff T.W. alleges Defendant Cathcart initiated requests and /or received requests to and from other Defendants to place T.W. in seclusion on certain dates in 2018. ¶¶ 313-314. As it relates to Defendant Cathcart specifically, it is alleged on May 26, 2018, Defendant Cathcart was one of three whom "restrained" and "escorted her to her room." ¶ 328. The Amended Complaint does not allege any of the particular facts and circumstances leading up to this specific allegation of restraint. Nor does not offer any facts outlining behaviors by Plaintiff T.W. which may have led Defendant Cathcart and others to believe it was necessary

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to restrain her for her own safety, or the safety of other residents or staff. There is no factual allegations detailing the "need for the application of force, the relationship between the need and the amount of force used, and the threat "reasonably perceived by the responsible officials". ***Hudson***, 503 at 7 (*quoting* ***Whitley v. Alberts***, 475 U.S. at 321). Moreover, there is no assertion of physical injury resulting from the alleged restraint and escorting event cited in the Amended Complaint. At best, Plaintiff T.W. makes conclusory complaints which lack specificity to trigger a Fourteenth Amendment claim for excessive force.

Assuming all of the allegations involving Plaintiff T.W. and Defendant Cathcart are true, there are no facts supportive of excessive force and/or "conscience-shocking" behavior which would allow the Court to reasonably infer a claim of relief beyond mere speculation.

d. Claims asserted by Plaintiff G.W.

Plaintiff G.W. asserts on or about June 4, 2019, Defendant Cathcart was one of several Defendants to enter her isolation cell and put a smock on her. ¶ 355. Defendant Cathcart is alleged to have watched while other Defendants placed G.W. face down on the bed platform, while holding a smock in his hands. ¶ 357. While the Amended Complaint asserts the Defendants "forcibly" removed her clothes, there is no specific discussion of the force used, nor is there any assertion of the extent of injury. ***Kingsley v. Hendrickson***, 576 U.S. at 397. There is no assertion of the events and circumstances giving rise to the "security" problem, nor whether these Defendants were protecting Plaintiff G.W. from harming herself. Plaintiff G.W. does acknowledge a female staff member found a screw in her bra upon search. ¶ 367.

On the same day, it is further alleged G.W. is "surrounded" by Defendants including Defendant Cathcart at the top of a stairway. ¶ 359. Defendant Cathcart is alleged to assist in

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carrying G.W. down the stairway and placing handcuffs on her. ¶¶ 362-363. She is then picked up "by her arms and legs" and carried down the hall while she is screaming "my neck " and "no". ¶ 364. She alleges Defendant Cathcart, with others, dragged her by her arms into the room, then uncuffed her. ¶¶ 365-366. Plaintiff G.W. asserts an event occurring on June 18, 2018 wherein Defendant Cathcart is involved in pressing a riot shield against her chest and face, and removing her blanket and smock, leaving her naked on the cell floor. ¶¶ 368-373.

Plaintiff G.W. asserts events occurring on June 27 and 28, 2019 wherein a video shows Defendant Cathcart and others "confronting" her by her cell door, covered in feces. ¶¶ 377, 380. Plaintiff G.W. offers no explanation about the facts and circumstances leading up to the confrontation. Defendant Cathcart is described as "grappling" with G.W. while she is naked, and putting hands on to "escort" her to her room. Id. The Amended Complaint is devoid of the facts and circumstances leading up to these events. Plaintiff makes no assertion these actions were "unprovoked", nor resulted in specific physical injury. ***D.K. v. L.K. Teams***, 260 F.Supp.3d 334, 355-357 (S.D. New York 2017).

There are other allegations involving the confinement of Plaintiff G.W. between 2016 and 2019 alleged in the Amended Complaint, however, none of these assert personal involvement by Defendant Cathcart. ¶¶ 335-354, 381-389.

Even assuming these facts as plead to be true, Plaintiffs do not allege facts which would reasonably allow this Court to infer Defendant Cathcart acted "maliciously or sadistically" with the design of causing harm to Plaintiffs. ***Johnson v. Glick***, 481 F.2d 1028, 1033 (2d Cir. 1973), *partially abrogated on other grounds by* ***Graham v. Connor***, 490 U.S.

386 (1989). The allegations against Defendant Cathcart could not possibly be construed as "power arbitrarily and oppressively exercised." ***Daniels v. Williams***, 474 U.S. 327, 331 (1986). There are no facts alleged which support Defendant Cathcart used force in a manner that was objectively unreasonable. Further, Plaintiff G.W. fails to allege any facts specific to her claim that Defendant Cathcart failed to intervene or otherwise did not "detect and correct" alleged problems. *See* ***Pettus v. Morgenthau***, 554 F.3d 293, 300 (2d Cir. 2009) (vague and conclusory allegations that a supervisor has failed to properly monitor the actions of subordinate employees do not suffice to establish the requisite personal involvement and support a finding of liability).

Accepting Plaintiffs' factual allegations as true, there is no plausible claim for relief beyond the mere possibility of misconduct by Defendant Cathcart as it relates to the claims for Constitutional violations of excessive force and "conscience-shocking" behavior, dismissal is appropriate.

IV. Plaintiffs allege no facts against Defendant Cathcart in Count Three which would allow the Court to reasonably infer a Constitutional violation of any Plaintiffs' life, liberty or property without due process, this Count must be dismissed.

An individual's Fourteenth Amendment substantive due process rights are implicated "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - *e.g.*, food, clothing, shelter, medical care, and reasonable safety." ***DeShaney v. Winnebago Cty. Dept. of Social Services***, 489 U.S. 189, 200 (1989). To maintain a procedural due process claim properly, a plaintiff must allege facts showing that governmental action deprived plaintiff of a property interest protected by the Fourteenth Amendment.

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LaFlamme v. Essex Junction Sch. Dist., 170 Vt. 475, 480 (2000). Due process is violated only when the conduct can be characterized as "arbitrary, or conscience shocking, in a constitutional sense." ***Edrei v. Maguire***, 892 F.3d 525, 536 (2d Cir. 2018). "[P]urposeful, knowing or (perhaps) reckless action that uses an objectively unreasonable degree of force *is* conscience shocking." ***Edrei***, 892 F.3d at 536. Section 1983 provides redress for a deprivation of federally protected rights by persons acting under color of state law. 42 U.S.C. § 1983. To prevail on a § 1983 claim, a plaintiff must establish (1) the violation of a right, privilege, or immunity secured by the Constitution or laws of the United States; and (2) by a person acting under the color of state law. ***West v. Atkins***, 487 U.S. 42, 48 (1988); ***Flagg Bros., Inc., v. Brooks***, 436 U.S. 149, 155–56 (1978). When sued in his individual capacity the defendant must be personally involved in the claimed violation. "To proximately cause a ... due process violation ... a defendant must be personally involved in the violation." ***Warren v. Pataki***, 823 F.3d 125, 136 (2d Cir. 2016) . Plaintiffs must plead and prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution." ***Iqbal***, 556 U.S. at 676.

Plaintiffs in this Count assert Defendants "confined, restrained, treated, and punished" them, and that such actions were "excessive, done with actual malice toward Plaintiffs, and with willful and wanton indifference to, and deliberate disregard for human life and the constitutional rights of Plaintiffs." ¶¶ 516-517. This Count is again presumed to arise from the allegation of confinement and physical or bodily restraint as a violation of Plaintiffs' liberty interests, in addition to the vague claim of failure of Defendants to intervene and "detect and correct". The residents of Woodside are confined by the State and their ability to

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act on their own behalf is limited. The Constitution requires Vermont meet the basic needs of safety, treatment and care. ***Langley v. Coughlin***, 715 F.Supp. 522, 539 (S.D.N.Y. 1989). These interests "are not absolute; indeed to some extent they are in conflict." ***Youngberg***, 457 U.S. at 319-320. Woodside qualifies as that "institution" in which "it is necessary for the State to restrain the movement of residents - for example, to protect them as well as others from violence." ***Youngberg***, 457 U.S. 320. Further, such detainees cannot be "punished" but any restrictions on liberty must be reasonably related to "legitimate government objectives and not tantamount to punishment." ***Youngberg***, 457 U.S. at 320 , *citing* ***Bell v. Wolfish***, 441 U.S. 520 (1979). ***Youngberg***, which dealt with an involuntarily committed adult, highlighted the necessary balance between the legitimate interests of the State and the individual's rights noting:

> The Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made. ***Youngberg***, 457 U.S. at 323 (citing [the lower court]).

The decisions by the professionals, here Defendant Cathcart, are presumed to be valid. Liability is imposed only:

> When the decision by the professional is 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.

Plaintiffs do not specifically allege actions by Defendant Cathcart which would indicate a substantive departure from accepted professional judgment, practice or standards. Plaintiffs do not allege Defendant Cathcart, by his own individual actions, violated the

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Constitution, nor their constitutionally protected interests. Plaintiffs' Amended Complaint is without any conduct that can be characterized as arbitrary or conscience shocking. ***Edrei***, *supra*.

Plaintiffs assert Defendant Simons introduced a use-of-force system to the staff at Woodside. ¶¶ 48-51. Plaintiffs complain the noted use-of-force system was "contrary to national standards and Vermont law". ¶ 51 . Plaintiffs do not specifically state Defendant Cathcart utilized, or was even personally involved, this use-of-force system on any Plaintiff resulting in injury or damage. As noted in Sections I and II, no claims are alleged by Plaintiffs T.F., D.H., B.C. and A.L. against Defendant Cathcart. Moreover, as detailed in Section II, those facts alleged by each Plaintiff relating to Defendant Cathcart assert nothing more than vague and conclusory statements regarding conduct by Defendant Cathcart. None of the conduct asserted shows a substantial departure in the professional judgment, practice and standards as to demonstrate that Defendant Cathcart actually did not base any decisions on such a judgment. ***Youngberg***, 457 U.S. at 323. Plaintiffs do not allege facts, nor factual content, which would allow the Court to infer professional judgment in the application of this use-of-force system was not exercised. Nor do Plaintiffs assert facts which would allow the Court to conclude Defendant Cathcart utilized such use-of-force system as "punishment". Similarly, Plaintiffs assert isolation and seclusion, in certain circumstances was "inappropriate". While the use of this system and isolation/seclusion may have been "contrary" to national standards, there are no facts alleged with which the Court can infer Defendant Cathcart acted in a manner that was a "substantial departure from accepted professional judgment, practice or standards" such that he did not base any alleged decision(s)

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on such a judgment. ***Youngberg***, 457 U.S. at 323.

The need to protect Plaintiffs, other juveniles, and staff, is a "legitimate government objective". In the absence of any pled facts which would allow the Court to infer actions taken amount to "punishment" or otherwise "arbitrary" or "conscience-shocking" behavior, Plaintiffs failed to plead deprivation of a "fundamental liberty interest" and further Plaintiffs fail to allege personal involvement in any action by Defendant Cathcart of such behavior, accordingly dismissal is appropriate pursuant to F.R.C.P. 12(b)(6).

V. As Plaintiffs make no factual allegations against Defendant Cathcart directly with regard to actions at the Natchez Trace Youth Academy Count Four must be dismissed.

This Count should be summarily dismissed as it relates to Defendant Cathcart. Neither paragraphs 168 through 185, nor the allegations set forth in Count Four, paragraphs 518 through 523, mention Defendant Cathcart nor actions made by Defendant Cathcart, nor do they pertain to any specifically named Plaintiff whom alleged wrongdoing by Defendant Cathcart - namely G.W., R.H., T.W., and D.H.. Accordingly, Count Four as it relates to Defendant Cathcart should be dismissed.

VI. Plaintiffs R.H. and T.F. allege no facts in Counts Five which give rise to a right of relief against Defendant Cathcart.

Plaintiffs assert a violation of the First Amendment's Right to Petition the Government for a Redress of Grievances by R.H. and T.F.. Nowhere in the Amended Complaint do these Plaintiffs allege facts which would give rise to a right of relief against Defendant Cathcart. See ¶¶ 255-310 and 396-428. The one exception is paragraph 271 wherein it is alleged Defendant Cathcart, with other Defendants, enters R.H.'s room, restrained him, and removed his belongings from the room. In the absence of specific facts

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from which the Court can conclude a reasonable inference of a violation of rights, there is no legal relief the Court can grant on this claim as it relates to Defendant Cathcart. Accordingly, dismissal of these claims is appropriate under F.R.C.P. 12(b)(6).

VII. Count Six must be dismissed as it relates to Defendant Cathcart as Plaintiffs have failed to allege any claim for supervisory liability against him.

Similar to the assertions in Count Four and Five, Plaintiffs make no allegation of violations by Defendant Cathcart in this Count, therefore dismissal is warranted.

VIII. Plaintiffs' state claim in Count Seven for assault and battery must be dismissed as there is no factual allegation to support Defendant Cathcart intentionally engaged in physical contact with any Plaintiff.

Plaintiffs assert in this Count assault and battery arising from allegations of placement in isolation in the North Unit and physical assault by Defendants. This Count does not name any specific Plaintiff or Defendant, nor does it specifically detail the "damage" resulting. The tort of assault and battery in Vermont requires a finding of intent. ***Wilson v. Smith***, 144 Vt. 358 (1984). A "battery" is an intentional wrongful physical contact with another person without consent.' " ***Girden v. Sandals Int'l***, 262 F.3d 195, 203 (2d Cir. 2001) (*quoting* ***United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp***., 994 F.2d 105, 108 (2d Cir. 1993). "In the civil context, the common meanings of 'assault' and 'battery' subsume all forms of tortious menacing and unwanted touching. ' " ***Girden***, 262 F.3d at 203. (*quoting* ***United Nat'l Ins. Co.***, 994 F.2d at 108).

Plaintiffs offer no facts which would give rise to a reasonable inference that Defendant Cathcart acted to intentionally cause physical contact without consent toward any Plaintiff. Even those instances alleged (described in Section II as it relates to the specific Plaintiffs' allegations) wherein Defendant Cathcart had any physical contact with selected Plaintiffs,

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there is no support for a claim that such contact was "tortious menacing" or "unwanted touching". These statements do not permit the Court to infer anything more than a "mere possibility of misconduct", nor do they allow the court to reasonably infer the intent needed to satisfy the tort of battery, thus on the face of the Complaint Plaintiffs have failed to show they are entitled to relief. ***Ashcroft v. Iqbal***, 556 U.S. at 679, citing F.R.C.P. 12(b)(6).

IX. Plaintiffs' allegations do not demonstrate intentional outrageous conduct on the part of Defendant Cathcart which would give rise to any reasonable inference of Intentional Infliction of Emotional Distress therefore dismissal is required.

In Count Eight, Plaintiffs allege Defendant Cathcart "intended to cause emotional distress to Plaintiffs or acted in reckless disregard of the "probably of causing emotional distress to Plaintiffs." The elements of an IIED claim are: "(1) conduct that is extreme and outrageous, (2) conduct that is intentional or reckless, and (3) conduct that causes severe emotional distress." ***Thayer v. Herdt***, 155 Vt. 448, 455 (1990). "An IIED claim can be sustained only where the plaintiff demonstrates 'outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct.' " ***Colby v. Umbrella, Inc***., 2008 VT 20, ¶ 10, 184 Vt. 1 (*quoting* ***Boulton v. CLD Consulting Eng'rs, Inc.***, 175 Vt. 413, 427 (2003)), ***Denton v. Chittenden Bank***, 163 Vt. 62, 66 (1994).

The burden on one asserting the claim to prove outrageous conduct is "a heavy one." ***Denton***, 163 Vt. at 66. The claimed actor's conduct must be outrageous, atrocious and utterly intolerable. *Id.* The conduct must be so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community. The standard for

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outrageousness is objective. Therefore, the alleged conduct must be assessed with an objective standard based on the alleged actions and words, not on what the complaining party personally believed motivated the alleged conduct. ***Cate v. City of Burlington***, 2013 VT 64, ¶ 28 *(emphasis added*). The Court determines, as a threshold matter, whether the trier of fact could reasonably find that the alleged conduct was extreme and outrageous. ***Denton***, *supra*.

The Vermont Supreme Court has refused to hold that an Intentional Infliction of Emotional Distress claim can arise from a series of less-than-outrageous acts. ***Fromson v. State***, 176 Vt. 395, 401 (2004); ***Dulude v. Fletcher Allen Health Care, Inc.***, 174 Vt. 74, 84 (2002). "A string of individually unactionable events cannot be taken together to establish a prima facie case of IIED." ***Fernot v. Crafts Inn***, 895 F.Supp. 668, 684 (D.Vt. 1995). The rationale for this rule, as described in ***Denton***, is that one cannot be on notice as to what in a series of offensive-but-not-outrageous actions crosses a line into the realm of outrage. A party cannot combine a series of events without showing a significant outrageous act. ***Fromson,*** *Id.*

In this case, Plaintiffs allege the "confinement, restraint, treatment and punishment" were so outrageous and extreme as to go beyond all possible bounds of decency. ¶ 550. Further, they allege the Defendants intended to cause or alternatively acted in reckless disregard of the probability of causing emotional distress by repeatedly placing Plaintiffs in insolation and restraining them was "outrageous" to the extent it caused Plaintiffs to suffer from extreme emotional distress. ¶¶ 551-552. Even assuming this conduct could be identified as "extreme and outrageous", which is denied, the Amended Complaint fails to offer facts of intentional or reckless behavior by Defendant Cathcart such that severe emotional distress resulted. Nor is there any fact asserted which offer any support to an

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assertion that Defendant Cathcart acted with "malice". ¶ 290.

The factual allegations do not give rise to an inference by a reasonable person that the conduct was, in fact, outrageous, nor intentional. There is nothing more than a general conclusory allegation, as it relates to Defendant Cathcart, of intentional infliction of emotional distress which is not sufficient to survive a Motion to Dismiss pursuant to F.R.C.P. 12(b)(6).

X. Plaintiffs' make no allegations against Defendant Cathcart in Count Nine.

In Count Nine Plaintiffs allege "grossly negligent and reckless supervision" and a breach of the duty of care owed to Plaintiffs. ¶ 559. Plaintiffs state a duty of care was owed "to ensure their custody was reasonably safe and to detect and correct problems that could cause injury to Plaintiffs." ¶ 558. Similar to the discussion in Counts Four, Five and Six, Plaintiffs do not assert any specific allegations against Defendant Cathcart and dismissal of this Count is appropriate.

CONCLUSION

To survive a 12(b)(6) Motion to Dismiss, the Amended Complaint must contain "enough facts to state a claim to relief that is plausible on its face." ***Twombly***, 550 U.S. at 570. Plaintiffs' Amended Complaint as it relates to Defendant Cathcart consists of nothing more than "threadbare recitals of a cause of action," "unadorned, the-Defendant-unlawfully-harmed-me-accusation[s]," or "naked assertion[s] devoid of 'further factual enhancement.' " ***Iqbal***, 556 U.S. at 678. Accordingly, it did not state a plausible claim for relief.

WHEREFORE, Defendant WILLIAM CATHCART respectfully requests this Honorable Court dismiss all claims asserted against him by Plaintiffs and for all such other relief as this Honorable Court deems just and appropriate under the circumstances.

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Dated at Woodstock, Vermont this 15th day of August 2022.

/s/ Bonnie J. Badgewick

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, ADMINISTRATOR OF THE
ESTATE OF G.W., R.H., T.W., T.F.,
D.H., B.C., and A.L., by next friend Norma Labounty

Plaintiffs, Civil Docket No. 5:21–cv-00283

v.

KENNETH SCHATZ, KAREN SHEA,
CINDY WOLCOTT, BRENDA GOOLEY,
JAY SIMONS, ARON STEWARD, MARCUS BUNNELL,
JOHN DUBUC, WILLIAM CATHCART,
BRYAN SCRUBB, KEVIN HATIN,
NICHOLAS WEINER, DAVID MARTINEZ,
CAROL RUGGLES, TIM PIETTE,
DEVIN ROCHON, AMELIA HARRIMAN,
EDWIN DALE, MELANIE D'AMICO,
ERIN LONGCHAMP, CHRISTOPHER HAMLIN,
and ANTHONY BRICE, all in their individual capacities.

Defendants.

CERTIFICATE OF SERVICE

NOW COMES Bonnie Badgewick, Esq., of the law firm of WOODSTOCK LAW, PC, attorneys for Defendant WILLIAM CATHCART, and hereby certify that on the 15th day of August, 2022, I served the attached **DEFENDANT WILLIAM CATHCART'S MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT PURSUANT TO F.R.C.P. 12(b)(6)** on the below identified counsel of record *via CM/ECF system and e-mail. The CM/ECF system will provide service of such filing(s) via Notice of Electronic Filing (NEF) to the following NEF parties:*

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Dated at Woodstock, Vermont this 15TH day of August, 2022.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, ADMINISTRATOR
OF THE ESTATE OF G.W., R.H., T.W.,
T.F., D.H., B.C., and A.L., by Next Friend, Norma Labounty,

Plaintiffs

v. **Docket No. 5:21-cv-00283**

KENNETH SCHATZ, KAREN SHEA,
CINDY WOLCOTT, BRENDA GOOLEY,
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DEVIN ROCHON, AMELIA HARRIMAN,
EDWIN DALE, MELANIE D'AMICO,
ERIN LONGCHAMP, CHRISTOPHER HAMLIN,
AND ANTHONY BRICE, all in their individual capacities,

Defendants

DEFENDANT JAY SIMONS' SUPPLEMENTAL MOTION TO DISMISS

In response to Plaintiffs' *Amended Complaint* Defendant Jay Simons again moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all counts because they fail to state claims for relief as a matter of law.

Argument

Defendant Jay Simons is the former Director of Woodside Juvenile Rehabilitation Center. Plaintiffs have withdrawn their various claims of conspiracy as stated in the original *Complaint*. (Complaint (Document 1) at Counts One, Two, Three and Eight, ¶221-235, 267-271). The

remaining/newly asserted counts of the *Amended Complaint* (Document 65) should be dismissed. Defendant Simons hereby incorporates by reference the arguments set forth in the motions to dismiss previously filed in response to the original *Complaint* and those filed by Defendants Schatz, Shea, Walcott, and Gooley (Document 68); Seward and Scrubb (Document 69); Hamlin and Brice (Document 70); Cathcart (Document 71) and others in response to the *Amended Complaint* as if set forth at length herein. In addition, Defendant Simons argues as follows:

I. G.W.'s claims, in full or at least with respect to claims for punitive damages, do not survive her death.

Plaintiffs' *Amended Complaint* (Document 65) at Page 2 states: "G.W. died of an accidental drug overdose in October 2021. Her claim is being pursued by her estate ("the Estate"), which was established for the sole purpose of pursuing justice in her memory." Plaintiffs, including the Estate, did not file their *Complaint* until December 13, 2021. Because the Estate filed subsequent to G.W.'s death, G.W. did not die during the "pendency of the action." Consistent with the plain language of the statute, G.W.'s claims cannot survive her death and the Estate cannot assert them. Vermont's "survival statue," 14 V.S.A. § 1452, allows for recovery of damages for a bodily hurt or injury in an action where "either party dies during the pendency of the action . . ." This action, however, was not pending before this court during G.W.'s lifetime; the Estate's claims must be dismissed.

Alternatively, should any of the claims Plaintiffs assert in their *Amended Complaint* survive, including those that arise under the Constitution, the Estate should be foreclosed from seeking and precluded from any award of punitive damages. Plaintiffs, including the Estate, seek entitlement to "exemplary damages" in counts "One" through "Six" of their Amended Complaint. With respect to punitive damages, this Court should confirm that the Estate's claims for punitive damages did not

survive G.W.'s death. *See U.S. Equal Emp. Opportunity Comm'n v. Coughlin, Inc.*, No. 2:21-CV-99-WKS, 2022 WL 1568529, at *6 (D. Vt. May 18, 2022). *Coughlin* involved allegations by numerous McDonald's employees who claimed they were subjected to a sexually hostile work environment and retaliation over complaints arising from this over a substantial period of time. Plaintiffs sought various remedies including punitive damages. Plaintiff-Intervenor Jennie Lumbra died during the pendency of the claim. This Court ruled on Defendant's motion, dismissing claims for punitive damages[1]:

> Ms. Lumbra's claims for punitive damages do not survive her death. In general, a claim will survive the death of an injured party if it is "remedial rather than punitive." *See United States v. Wolin*, 489 F. Supp. 3d 21, 27 (E.D.N.Y 2020) (internal quotation marks omitted). In *Estwick v. U.S. Air Shuttle*, the Court held that while a Title VII claim for compensatory damages survived a plaintiff's death, the claim for punitive damages did not. 950 F. Supp. 493, 498 (E.D.N.Y. 1996) ("The punitive damages are plainly penal and must be dismissed under either federal or state law."). Other cases have held that federal common law governs on this question and that under federal common law, punitive damages are considered penal rather than remedial. *See Smith v. Dep't of Human Servs, State of Okl.*, 876 F.2d 832, 834 (10th Cir. 1989) (citing *James v. Home Constr. Co.*, 621 F.2d 727, 729 (5th Cir. 1980); 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1952 at 526 (1986)) ("The question of the survival of an action grounded in federal law is governed by federal common law when, as here, there is no expression of contrary intent."). "The general rule under the federal common law is that an action for a penalty does not survive the death of the plaintiff." *See Smith*, 876 F.2d at 834-35 (citing *Schreiber v. Sharpless,* 110 U.S. 76, 80 (1884)).

Here, this Court should apply the same analysis and dismiss the Estate's claims for punitive damages.

[1]State claims were allowed, however, but only because of a State statute, VFEPA, that permitted such claims to survive.

II. Defendant Simons is not alleged to have any role in the allegations regarding Natchez Trace Youth Academy.

Finally, and again following review of the Amended Complaint, Defendant Simons is not alleged to have had any involvement and indeed had no involvement with Natchez Trace Youth Academy (Amended Complaint (Document 65), Count Four, ¶¶518-523). To the extent that this Court will not dismiss this count in its entirety based on the implicated defendants' arguments, it should be dismissed with respect to Defendant Simons.

Conclusion

All claims against Defendant Simons should be dismissed.

Dated at Montpelier, Vermont this 15th day of August, 2022.

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Andrew C. Boxer, Esq.
Andrew H. Maass, Esq./Francesca Bove, Esq.
Lisa M. Werner, Esq./Susan J. Flynn, Esq.
Bonnie J. Badgewick, Esq.
Michael J. Leddy, Esq./Joseph A. Farnham, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CATHY WELCH, ADMINISTRATOR OF THE ESTATE OF G.W., R.H., T.W., T.F., D.H., B.C., and A.L., by Next Friend, Norma Labounty,

Plaintiffs

v. **Docket No. 5:21-cv-00283**

KENNETH SCHATZ, et. al.

Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I electronically filed **Defendant Jay Simons' Supplemental Motion to Dismiss** with the Clerk of Court using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

Brooks G. McArthur, Esq. and David J. Williams, Esq., Lisa M. Werner, Esq. and Susan J. Flynn, Esq., Bonnie J. Badgewick, Esq., Andrew C. Boxer, Esq., Michael J. Leddy, Esq. and Joseph A. Farnham, Esq., Jon T. Anderson, Esq. and Robin Ober Cooley, Esq., Francesca Bove, Esq. and Andrew H. Maass, Esq., Ian P. Carleton, Esq., and Brooks G. McArthur, Esq. and David J. Williams, Esq.

Dated at Montpelier, Vermont this 15th day of August, 2022.

/s/ Wesley M. Lawrence
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, Administrator of the Estate of G.W., R.H., T.W., T.F., D.H., B.C., and A.L., by Next Friend Norma Labounty, Plaintiffs, v. KENNETH SCHATZ, KAREN SHEA, CINDY WOLCOTT, BRENDA GOOLEY, JAY SIMONS, KEVIN HATIN, ARON STEWARD, MARCUS BRUNNELL, JOHN DUBUC, WILLIAM CATHCART, BRYAN SCRUBB, NICHOLAS WEINER, DAVID MARTINEZ, CAROL RUGGLES, TIM PIETTE, DEVIN ROCHON, AMELIA HARRIMAN, MELANIE D'AMICO, EDWIN DALE, ERIN LONGCHAMP, CHRISTOPHER HAMLIN, and ANTHONY BRICE, all in their individual capacities, Defendants.	)	Civil Action No. 5:21-cv-00283

JOINT MOTION OF DEFENDANTS HARRIMAN, D'AMICO, DALE AND LONGCHAMP TO DISMISS AMENDED COMPLAINT

NOW COME DEFENDANTS Amelia Harriman, Melanie D'Amico, Edwin Dale, and Erin Longchamp by and through their attorneys, Clark, Werner and Flynn, P.C., and hereby move this Court to DISMISS all counts lodged against them in the Amended Complaint for failing to state actionable claims, pursuant to Federal Rule of Civil Procedure 12 (b)(6). Furthermore, in the event the Court dismisses all Plaintiffs' claims arising under federal law (e.g., Counts One through Nine), Defendants additionally move to DISMISS all Vermont state law claims for failure of supplemental jurisdiction pursuant to Federal Rules of Civil Procedure

12 (b)(1), 12 (b)(2) or 12 (b)(6), and 28 U.S.C. § 1367 (c)(3). Defendants' reasons for so moving are stated in the accompanying Memorandum Of Law In Support Of Joint Motion To Dismiss Of Defendants Harriman, D'Amico, Dale And Longchamp.[1]

DATED at Burlington, Vermont, this 15th day of August 2022.

By: _____

Susan J. Flynn, Esq.
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Attorneys for Defendant Harriman, D'Amico, Dale, and Longchamp
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DATED at Burlington, Vermont, this 15th day of August 2022.

By: _____

Lisa M. Werner, Esq.
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[1] The accompanying Memorandum of Law exceeds the 25-page limit for memoranda supporting dispositive motions provided in this District's Local Rule 7 (a)(4) by approximately 4 pages. However, the instant Memorandum combines the arguments of four separate defendants, who each would be entitled to 25 pages if they opted to file separate motions and memoranda. The undersigned counsel have conferred with counsel for Plaintiffs, who advised that Plaintiffs would not object to the filing of the accompanying Memorandum.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, Administrator of the Estate of G.W., R.H., T.W., T.F., D.H., B.C., and A.L., by Next Friend Norma Labounty, Plaintiffs, v. KENNETH SCHATZ, KAREN SHEA, CINDY WOLCOTT, BRENDA GOOLEY, JAY SIMONS, KEVIN HATIN, ARON STEWARD, MARCUS BRUNNELL, JOHN DUBUC, WILLIAM CATHCART, BRYAN SCRUBB, NICHOLAS WEINER, DAVID MARTINEZ, CAROL RUGGLES, TIM PIETTE, DEVIN ROCHON, AMELIA HARRIMAN, MELANIE D'AMICO, EDWIN DALE, ERIN LONGCHAMP, CHRISTOPHER HAMLIN, and ANTHONY BRICE, all in their individual capacities, Defendants.	Civil Action No. 5:21-cv-00283

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS HARRIMAN, D'AMICO, DALE AND LONGCHAMP'S JOINT MOTION TO DISMISS AMENDED COMPLAINT

INTRODUCTION

This Memorandum of Law is being filed by defendants Amelia Harriman, Melanie D'Amico, Edwin Dale, and Erin Longchamp, by and through their attorneys, Clark, Werner and Flynn, P.C.[1] Said defendants are hereinafter collectively designated the "Employee

[1] The accompanying Memorandum of Law exceeds the 25-page limit for memoranda supporting dispositive motions provided in this District's Local Rule 7 (a)(4) by approximately 4 pages. However, the instant Memorandum combines the arguments of four separate defendants, who each would be entitled to 25 pages if they opted to file separate motions and memoranda. The undersigned counsel have conferred with counsel for Plaintiffs, who advised that Plaintiffs would not object to the filing of the accompanying Memorandum.

Defendants," not just for reading clarity, but to remind the Parties and the Court that the only reason the Complaint identifies them as parties to this action is that they all were "employed by DCF at all times relevant to [the] Complaint. Amended Complaint, ¶¶ 24 – 27. For three of the Employee Defendants (Harriman, Dale and Longchamp) the Complaint contains no further factual information about their employment: no job description, no specified job-related duties, no specific duties as to any Plaintiff. The fourth, D'Amico, is alleged to have been DCF's Facilities Manager, but no further information is provided as to what that job description entailed. As will be seen, the Complaint raises numerous theories based on alleged breaches of duty. It is important to keep in mind that it never specifies why such duties apply to these specific defendants.

The Employee Defendants are a small part of a big case. One or more of said Defendants are named in only 30 out of the 492 paragraphs reciting the facts underlying Plaintiff's legal claims (not counting the four paragraphs mentioned earlier stating that they worked for DCF).[2] See, e.g., Amended Complaint, ¶¶ 33, 34, 52, 53, 70, 114, 171, 174 – 176; 179, 182, 184, 185, 238 – 245; 307, 309, 341, 342, 344, 345, 393, 447. Even this number is an exaggeration since the Complaint double-pleads several incidents or interactions. See, e.g., *id.*, ¶¶ 52 - 53 and 344 – 345. (October 2016 complaint to Edwin Dale by an Office of the Juvenile Defender ("OJD") attorney); ¶¶ 171, 241 (July 2017 OJD complaint to Erin Longchamp); ¶¶ 174 – 175; 243 – 245 (September 2017 OJD complaint to Melanie D'Amico).

[2] In their now moot motion to dismiss the original complaint in this matter, Employee Defendants noted that following their introduction as parties, one or more of them were mentioned in just 20 of the 220 factual allegations therein: approximately 9%. In the voluminous and considerably more factually detailed Amended Complaint, the percentage of allegations involving the Employee Defendants drops to approximately 6% (one or more of their names are referenced in 29 of the now 492 allegations).

Of more significance to this motion is the Employee Defendants' lack of significance with respect to the troubling acts and occurrence that are at the heart of this action. The Amended Complaint details incidents of physical, emotional and sexual violence, but does not allege that any of the Employee Defendants were personally involved in them. At most, it alleges that each of them possessed some information indicating things might be amiss but failed to act. Employee Defendants Edwin Dale and Melanie D'Amico appear in the first three Counts based upon information they supposedly knew about conditions at DCF's Woodside facility.[3] All four Employee Defendants are targeted by Count Four based upon information they supposedly knew about conditions at Natchez Trace Youth Academy ("Natchez Trace"), a Tennessee facility with which DCF contracted to house certain wards, including Plaintiffs D.H. and R.H. As will be shown, the Amended Complaint's allegations are not sufficient to sustain any of the Plaintiffs' causes of action against any of the Employee Defendants. Because the Natchez Trace allegations involve all of the Employee Defendants, we will begin with a general discussion of them before moving on to a more detailed review the allegations against each individual Defendant.

FACTS

NATCHEZ TRACE

The thrust of Count Four of the Amended Complaint is that Employee Defendants and others were deliberately indifferent to purported complaints about inhumane conditions at Natchez Trace and that such indifference "directly and negatively impacted [the] physical safety

[3] Amelia Harriman and Erin Longchamp are not subject to Counts I through III and none of the Employee Defendants are subject to Counts V through IX. Said counts should be dismissed as a matter of course.

and emotional well-being…" of Plaintiffs D.H. and R.H. Amended Complaint, ¶ 523. Later in this Memorandum, we will demonstrate that none of Employee Defendants manifested deliberate indifference as a matter of law. See pp. 16 - 24, *infra*. At present, Employee Defendants would like to highlight the Amended Complaint's failure to plead facts sufficient to establish *prima facie* causation.

In order for Plaintiffs to be harmed by Defendants' purported indifference to complaints, the complaints must necessarily come earlier in time than the alleged injuries to Plaintiffs. The Amended Complaint has not alleged the order of "complaint" and injury, and it cannot, because it contains NO allegations specifying the dates either Plaintiff was at Natchez Trace. Plaintiffs provide slightly more detail about the timing of some of the "complaints": we are told that Erin Longchamp received a complaint from the Office of the Juvenile Defender ("OJD") concerning D.H. in July 2017, Amended Complaint, ¶¶ 171, 241, and that Melanie D'Amico received a similar one in September 2017. *Id.*, ¶¶ 174, 243. These dates are meaningless with reference to liability to D.H. when there is no allegation that he was still living at Natchez Trace in July or September 2017. It is Employee Defendants' understanding, on information and belief, that he was no longer there, having transferred out in February 2017. Employee Defendants also understand, on information and belief, that R.H. was transferred out of Natchez Trace in August, 2017. The Amended Complaint also cites an undated complaint made to Edwin Dale by D.H., *id.*, ¶¶ 238 – 239, and an undated complaint from R.H. to Amelia Harriman. *Id.*, ¶ 309. Even if the Court cannot credit the transfer dates provided herein as decided fact for the purposes of a 12(b)(6) motion, the point is that without defined dates there can be no causation.

EDWIN DALE

i. Woodside

Edwin Dale is a social worker and has never been part of the management structure at DCF, Woodside or Natchez Trace Youth Academy. He is not alleged to possess authority over disciplinary actions involving facility residents, including solitary confinement. Neither is he alleged to possess authority to arrange placements at out-of-state facilities on DCF's behalf. The Amended Complaint contains NO specific factual allegations that Dale EVER directly participated in ANY physical abuse of ANY resident. Nor is there any actual evidence that he knew of specific physical abuse while it was occurring. Nevertheless, and somewhat bizarrely, the Amended Complaint includes him in a list of Defendants who allegedly directly participated in physical abuse and solitary confinement of Defendants or "fail[ed] to fulfill their constitutional obligation" to protect Defendants from such measures. Amended Complaint, ¶ 33.[4] See, also, *id.*, at ¶¶ 393 - 394 (DCF officials, including Dale, were aware that residents were "subjected to unspeakable abuse" at Woodside, "yet none of these defendants made any serious effort to prevent the continuing abuse of children…" at the facility).

When the overblown rhetoric of the above-referenced Paragraphs is discounted, the actual facts alleged against Edwin Dale with respect to the Woodside facility are the following:

- In October 2016, Dale was allegedly informed about problematic conditions at Woodside in an email from OJD. While the text of the email has not been provided, the allegations

[4] Paragraph 33, which also implicates Employee Defendant Melanie D'Amico, is an unsupported legal conclusion rather than a true factual assertion and is therefore not a legitimate allegation of either Employee Defendant's personal participation in physical abuse of Plaintiffs. *Ashcroft v. Iqbal,* 556 U.S. 662, 678-79 (2009) (legal conclusions not entitled to presumption of truth in context of motion to dismiss). Moreover, the allegation is virtually impossible to parse. Are Defendants being accused of participating in abuse or standing by? How can completely different theories of personal participation and failure to protect be portrayed as either/or? Is knowledge of solitary confinement the same as personal participation in physical abuse? Why? How? What duty did Defendants breach and what authority did they have to remedy any supposed breaches. Because of the conflation of separate legal theories, separate kinds of harm and fact and legal argument, Employee Defendants request that paragraph 34 of the Amended Complaint be stricken.

state that it included a general concern about isolation and specific worries about Plaintiff G.W.'s mental health. Dale forwarded the complaint to Jay Simons and Aron Steward, respectively the Director and Clinical Director of Woodside. Amended Complaint, ¶¶ 52 - 53 and 344 – 345.

- On November 17, 2016, Defendant Marcus Bunnell (Woodside Operations Supervisor, *id.*, ¶ 15) notified Dale that Plaintiff G.W. had been placed in solitary confinement and Dale did not intervene or take other steps to protect G.W. *Id.*, ¶ 341 – 342.

- At some point, probably late June 2019, Dale is alleged to have received emails from Defendants Bunnell, John Dubuc (Woodside Operations Supervisor, Amended Complaint, ¶ 16), and William Cathcart (Woodside staff member and Assistant Director, *id.*, ¶ 17), which "confirmed that they were involved" in incidents on June 24 and 26, 2019. *Id.*, ¶ 114.

To summarize, Dale received an October 2016 email complaint from OJD that he forwarded to Woodside supervisory staff, a November 2016 notification from a Woodside Operations Supervisor that D.W. had been placed in solitary confinement, and apparently after-the-fact 2019 emails from three supervisory staff, including the Woodside Assistant Director, supposedly acknowledging their participation in incidents involving Plaintiff G.W. in June 2019. These three events are the entirety of what Edwin Dale is alleged to have known about.

With respect to D.W., there is no basis to the assertion that Dale was aware she was "subjected to unspeakable abuse," *Id.*, ¶ 393. All he allegedly knew is that she had been subjected to solitary confinement and that her lawyer was concerned. The Amended Complaint goes into considerable detail about research showing deleterious effects of enforced solitude on juvenile psychosocial development. *Id.*, ¶¶ 186 – 235 Even assuming that these allegations are true, as we must at this stage of the litigation, there is no Appellate level authority in the 2nd Circuit holding that solitary confinement of juveniles violates any provision of the United States Constitution and no caselaw defining it as "unspeakable abuse."

Moreover, with respect to the 2019 situation involving G.W., as disturbing as the Amended Complaint's description of the underlying events is, the specific wording of the emails

referenced in Par. 114 is never provided; it is thus unknown precisely what "involvement" Dubuc, Bunnell and Cathcart supposedly "confirmed." *Id.*, ¶¶ 100 – 108, 114. What IS clear is that the alleged "confirmation" came after the fact from Woodside supervisory staff whose activities Dale had no authority to review or oversee.

ii. Natchez Trace

Dale is also called out on the carpet for allegedly knowing that Natchez Trace was a hellhole but continuing to send children there. See Amended Complaint, ¶ 34 (Dale and other listed Defendants "ignored repeated warnings about the unsafe conditions at the Natchez Trace Youth Academy and transferred R.H. and D.H. to that facility where they were subjected to unspeakable physical and mental abuse…"), ¶ 185 (DCF officials, including Dale, "apparently" did not take complaints about Natchez Trace seriously and kept sending children there);[5] ¶ 307 (Plaintiff R.H. placed at Natchez Trace "after credible complaints about the treatment of children held at that facility had been made" to Defendants including Dale).

The above-referenced paragraphs profoundly misrepresent Dale's actual knowledge of conditions faced by D.H. and R.H. at Natchez Trace. Far from being privy to "repeated warnings about the unsafe conditions" there, the only "warning" the Amended Complaint alleges Dale had was a statement by Plaintiff D.H. to Dale that that Natchez Trace "was a bad place, staff hit a kid's face off the wall and his nose started to bleed," which Dale purportedly ignored. *Id.*, ¶¶ 238 – 239.[6] While, as noted above, the Amended Complaint does not provide any information as to

[5] To be precise, Paragraph 185 actually alleges that Dale and other DCF "Officials," "apparently did not take *these complaints* seriously and instead continued to place children" at the Natchez Trace facility. Amended Complaint, ¶ 185 (emphasis added). "These complaints" refers to various criticisms that are listed at ¶¶ 171 – 184, which were allegedly fielded by Erin Longchamp, Melanie D'Amico, Kenneth Schatz, Cindy Wolcott and Brenda Gooley; *NOT by Edwin Dale.*

[6] The specific wording of Paragraph 240 is as follows: "D.H.'s *reports* of the inhumane conditions at the Natchez Trace facility were ignored by Defendant Dale." (emphasis added) However, the only report from D.H. to Dale alleged in the entire Complaint is the *one report* described in ¶ 238.

either the date D.H. conveyed this information to Dale, or the dates D.H. lived at Natchez Trace, it is irrefutable that the incident D.H. described occurred while he was living there and could not function as a warning Dale ignored at the time of D.H.'s transfer to the facility. Also, as stated previously, Dale lacked authority to transfer DCF detainees between institutions.

To the extent Plaintiffs claim that Dale is liable for injuries to Plaintiff R.H. while at Natchez Trace, D.H.'s "warning" is even further removed as a factual basis. It constitutes an observation by a bystander of an incident that occurred at an unknown time that was conveyed to Dale at an unknown time, that Plaintiffs appear to allege triggered a duty for Dale with respect to R.H., who was at Natchez Trace at unknown times. Importantly, the Amended Complaint fails to allege that Dale had any contact with or responsibility for R.H. while he resided at Natchez Trace.

Finally, nothing D.H. allegedly told Dale supports an argument that Dale failed to act upon knowledge that D.H. was abused while at Natchez Trace. D.H.'s alleged statement concerns an incident he observed that happened to someone else. Nowhere does the Amended Complaint assert that D.H. notified Dale about anything that happened to him. Nor does it contain any allegation that D.H. suffered abuses subsequent to the wrongdoing he allegedly observed -- as noted above, the date of the interaction with D.H. is not specified. The vagueness of the allegation makes it hypothetically possible that D.H. informed Dale of the alleged conditions at the very end of his time at Natchez Trace, possibly after the decision had been made to bring him back to Vermont, possibly the very day DCF collected him.

MELANIE D'AMICO

Melanie D'Amico is alleged to have been DCF's Residential Services Manager at the times relevant to the Amended Complaint. Like Edwin Dale, she is accused of ignoring evidence of horrific abuse at both Woodside and Natchez Trace, to Plaintiffs' detriment. See Amended Complaint, ¶¶ 33, 34, 185. Also like Dale, D'Amico's duties are not alleged with any specificity—the inclusion of her job title tells us nothing regarding the scope of her authority with respect to the circumstances of the matter.

Per the Amended Complaint, D'Amico allegedly witnessed one incident at Woodside and fielded a few broadly defined "complaints" regarding Natchez Trace, one of which was both off-topic and significantly after both D.H. and R.H. had left the facility.

The single Woodside incident allegedly occurred in August 2018, when we are told that D'Amico witnessed Plaintiff B.C. pant-less in her North Unit cell, and subsequently made it known to many people, including Defendants Simons (Jay Simons, Woodside Director, ¶ 12) and Shea (Karen Shea, Deputy Commissioner of DCF, ¶ 9), how horrible and inhumane she thought that was." Amended Complaint, ¶¶ 70, n. 2., and 447. Thus, by Plaintiffs' own account, D'Amico neither ignored the situation nor failed to take it seriously. Rather, she immediately complained up the DCF chain of command.[7]

With respect to Natchez Trace, there are three putative "warnings" D'Amico supposedly ignored or "apparently ignored." The first was an email from OJD in September 2017 about poor conditions at Natchez Trace, specifically in the context of Plaintiff D.H. *Id.*, ¶¶ 174, 243. The

[7] The Amended Complaint packages D'Amico's observation of B.C. together with allegations that three other Defendants allegedly forcibly removed B.C.'s clothing while restraining her two days prior, apparently to create the impression that the incident was ongoing. Amended Complaint, ¶¶ 439-447. However, there is no allegation that D'Amico was part of that incident or even knew about it at the time.

OJD email allegedly included a link to a 2015 letter from the West Virginia Department of Health and Human Resources to the CEO of Natchez Trace. *Id.*, ¶ 244. D'Amico reportedly responded by stating she was 'worried that these overgeneralization (sic) you are making are not helpful and undermine the good work the Natchez Trace program is and has done. Only positive experiences have been reported to me." *Id.*, ¶ 175. It is clear that the quotation was torn from a more extensive response which is not provided in the pleadings; nonetheless, as quoted, it doesn't support any wrongdoing. D'Amico is also alleged to have "ignored apparently" said OJD notice. *Id.*, ¶ 245. However, D'Amico's "apparent" failure to act is not supported by any factual allegations. As already noted, the Amended Complaint entirely fails to mention the date when D.H. left Natchez Trace, which is a critical piece of information needed to support Plaintiffs' claims. On information and belief, D.H. left Natchez Trace in February 2017, more than 5 months before the relevant email.[8]

The second "warning" appears to have arisen in the context of agency deliberations concerning a 2017 complaint raised by the mother of a Natchez Trace resident about the conditions faced by her child. The Complaint states that the mother, "in or about 2017," (*Id.*, ¶ 174) complained to D'Amico, DCF Commissioner Kenneth Schatz, and Deputy Commissioner Cindy Wolcott. *Id.*, ¶¶ 8, 10, 174. Details surrounding who made the complaint (mother of whom?), how the complaint was raised, and how it reached the level of review by the Commissioner are nonexistent, as are any explanations of what D'Amico's role in the process was. The allegations regarding this situation that *are* in the Complaint do not shed much light. Descriptions are hedged in limiting terms, e.g., ¶ 177 ("The mother *apparently* reported that a

[8] Even if the Court cannot credit Employee Defendants' information and belief assertion that D.H. left Natchez Trace in February 2017, the Amended Complaint itself establishes that he was living at Woodside in early December 2017, no more than two months after the OJD email. See, e.g., Amended Complaint, ¶¶ 246, 251.

staff member at that facility was 'choking kids out' and that her child had been subjected to physical abuse and suffered injuries at the hands of staff members")(emphasis added); ¶ 185 ("DCF officials, including Defendants Schatz (DCF Commissioner), Wolcott (DCF Deputy Commissioner) and D'Amico, *apparently* did not take these complaints seriously and instead continued to place children in its custody, including R.H., at Natchez Trace Juvenile Academy")(emphasis added). Somewhat ironically, in their attempt to paint D'Amico and DCF as uninterested in complaints about conditions at Natchez Trace, *Plaintiffs have affirmatively alleged that the mystery-mother's complaint was directly considered by the highest-level administrators for the Agency. Id.*

Finally, it is alleged that a meeting occurred June 12, 2018, meeting between an OJD attorney, Melanie D'Amico, and Brenda Gooley, DCF Director of Policy and Operations. Amended Complaint, ¶¶ 11, 179 – 184. The meeting is alleged to have been about out-of-state placement generally, with some discussion of Natchez Trace's parent company, Universal Health Services ("UHS"). *Id.*, ¶¶ 179 – 181. The OJD attorney allegedly informed D'Amico and Gooley that certain unidentified children had raised non-specified concerns regarding "quality of care" they received at an unidentified facility owned by UHS. *Id.*, ¶ 182. The OJD attorney also raised what appear to be generalized concerns that out-of-state facilities were blocking access to her clients, that the credibility of youth raising concerns was dismissed by DCF, and that DCF was biased in favor of facilities because of the need to place children in custody. *Id.*, ¶¶ 183 – 184. To sum up, this final "warning" did not involve Natchez Trace and occurred well after both Plaintiffs D.H. and R.H. were no longer there.

ERIN LONGCHAMP

Plaintiffs' practice of falsely pluralizing single events continues with respect to Erin Longchamp, who, like all the Employee Defendants, is accused of ignoring "repeated warnings about the unsafe conditions" at Natchez Trace and continuing to send children there, including R.H. Amended Complaint, ¶¶ 34, 185, 307. However, on Plaintiffs' own facts, Longchamp was the recipient of a single OJD complaint, in July of 2017, about an incident involving Plaintiff D.H. at Natchez Trace. *Id.*, ¶¶ 171, 241. Again, the Complaint neglects to mention the date when D.H. and R.H. left Natchez Trace. While DCF allegedly failed to follow through on this issue, the Complaint does not specifically allege that Longchamp, personally, did anything wrong: "*DCF did not respond* to the Juvenile Defender's report of the inhumane conditions at the Natchez Trace facility and the abuse of D.H." *Id.*, ¶ 242 (emphasis added). Neither does the Amended Complaint allege what Longchamp should have done or had authority to do in response to the single complaint.

AMELIA HARRIMAN

Amelia Harriman's role in this case is at most a cameo. The ONLY factual allegation bearing her name states that, "R.H.'s complaints to Defendant Amelia Harriman regarding this abuse[9] were ignored and never seriously investigated." Amended Complaint, ¶ 309. This allegation comes somewhat out of the blue, because the Complaint contains no allegation that R.H. complained to her, not even once. And, while paragraph 309 is preceded by a long list of issues faced by R.H. at during his eight years in DCF custody, the Amended Complaint fails to provide any specific details as to which of the alleged incidents, if any, R.H. told Harriman

[9] It seems the Complaint is referencing the prior paragraph, paragraph 308, which states that R.H. was abused at Natchez Trace, but this isn't entirely clear.

about. It also fails to mention whether R.H.'s "complaints" were made to Harriman before or after R.H. left the Natchez Trace facility. We are again asked to infer a causal connection between Harriman and the putative organizational response to the complaints.

Despite the insubstantiality of the single allegation, Harriman stands accused of not taking seriously a series of complaints she is never alleged to have been privy to and placing R.H. at Natchez Trace, a power she is never alleged to have. Amended Complaint, ¶ 185.[10] None of the Employee Defendants belong in this suit, but Harriman's presence is an extreme reach.

"MISSING" ALLEGATIONS

Having reviewed the scant affirmative allegations against the Employee Defendants, we move onto what has not been alleged. There are no allegations that any of the Employee Defendants personally participated in any of the incidents of physical abuse alleged in the Complaint, nor that are they were supervisors of DCF employees who allegedly were involved. At the very most, the Complaint contains allegations that the Employee Defendants failed to remedy allegedly tortious and/or unconstitutional acts or conditions after receiving notice that there might be concerns. As shown below, none of these allegations provide sufficient factual underpinning to support any of the legal theories Plaintiffs have raised.

[10] Paragraphs 170 – 184 describe alleged complaints concerning Natchez Trace that were fielded by Defendants Longchamp, D'Amico, Schatz, Wolcott, and Gooley, NOT Harriman.

ARGUMENT

I. STANDARD GOVERNING MOTIONS TO DISMISS

"The standard for reviewing a motion to dismiss pursuant to Rule 12(b)(6) is well-known." *Wyatt v. City of Barre/Barre City Fire Dep't,* 2012 WL 1435708, *2 (D. Vt. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "Factual allegations must be enough to raise a right of relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citations omitted) (rejecting former "no set of facts" standard from *Conley v. Gibson).*

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Amaker v. New York State Dep't of Correctional Services,* 435 Fed. Appx. 52, 54 (2d Cir. 2011) (internal quotation marks omitted). This "plausibility standard ... is guided by [t]wo working principles." *Harris v. Mills,* 572 F.3d 66, 72 (2d Cir. 2009) (internal quotation marks omitted). Citing *Twombly,* the U.S. Supreme Court explained:

> *First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice. . .* Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not show[n]-that the pleader is entitled to relief.

Iqbal, 556 U.S. at 678-79 (emphasis added, citations and internal quotation marks omitted). "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim

to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. Accordingly, a plaintiff is required to support its claims with sufficient factual allegations to show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted). When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint[s] must be dismissed." *Id.*

Only the first four of the Amended Complaint's nine Counts are lodged against any Employee Defendant. While said Counts are styled as separate causes of action, they are really theme and variation pleadings alleging violations of a single federal statute: 42 U.S.C. § 1983. As will be shown, none of the claims raised in any of the Counts reaches the universal requirement that any claim under Section 1983 against an individual defendant must be grounded in detailed factual allegations specifying the defendant's direct, personal participation in the purported Constitutional violations. Because Count Four implicates all four Employee Defendants and because the facts and analysis pertinent to Count Four are germane to Counts One through Three, we will start there.[11]

A. Plaintiffs Fail to Specifically Allege any Plausible Basis for Relief Under 42 U.S.C. ¶ 1983.

Counts One through Four, while implicating different pieces of the Bill of Rights, are all brought under the provisions of 42 U.S.C. ¶ 1983.

> "To state a claim under § 1983, a plaintiff must allege that (1) the challenged conduct was attributable at least in part to a person who was acting under color of state law; and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." *Snider v. Dylag*, 188 F.3d 51, 53 (2d Cir. 1999). A complaint under § 1983 "must contain specific allegations of fact which indicate

[11] Employee Defendants therefore request DISMISSAL of Counts Five through Nine as a matter of course. They also request DISMISSAL of Counts One through Three against Amelia Harriman and Erin Longchamp.

> a deprivation of constitutional rights; allegations which are nothing more than broad, simple, and conclusory statements are insufficient to state a claim under § 1983." *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987).

Ali v. Ramos, No. 16-cv-01994 (ALC), 2018 U.S. Dist. LEXIS 42489, at *5-6 (S.D.N.Y. Mar. 14, 2018). For liability to attach to a given defendant, plaintiffs must prove that the defendant was personally involved in the allegedly unconstitutional conduct. "It is well settled in this Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) (emphasis added, internal quotation marks omitted); *see also Gronowski v. Spencer*, 424 F.3d 285, 293 (2d Cir. 2005) ("Before § 1983 damages are awarded, a plaintiff must show by a preponderance of the evidence that the defendant was personally involved — that is, he directly participated — in the alleged constitutional deprivations.") "[D]irect participation as a basis of liability in this context requires intentional participation in the conduct constituting a violation of the victim's rights by one who knew of the facts rendering it illegal." *Provost v. City of Newburgh*, 262 F.3d 146, 155 (2d Cir. 2001) (emphasis added). The Complaint fails to allege that any of the Employee Defendants had the requisite level of personal involvement to be liable under any of the § 1983 based Counts.

1. Violation of 8th[12] and 14th Amendments By Deliberate Indifference to Abuse Perpetrated against Plaintiffs R.H. and D.H. (Count Four)

The distilled essence of Plaintiffs' rather verbose Count Four is that Defendants, including Employee Defendants, "ignored complaints about the inhumane conditions at the

[12] The applicability of the 8th Amendment to claims raised by juveniles in governmental custody has been questioned at the District Court level in this Circuit based on the argument that the purpose of juvenile custody is not punishment. Two New York Districts have held that the appropriate source of juvenile detainee Constitutional rights is the 14th Amendment rather than the 8th. and has been rejected by several New York Districts. *Jackson v. Johnson*, 118 F. Supp. 2d 278, 287 (N.D.N.Y. 2000) (8th Amendment inappropriate basis for excessive force claim by juveniles in custody); *G.B. v. Carrión*, 2012 U.S. Dist. LEXIS 200619 (S.D.N.Y. Jan. 19, 2012) (same). Since Count Four cites both Amendments, the point is moot. But see pp. 24 - 25, *infra*, regarding Count One.

Natchez Trace Youth Academy registered by Plaintiffs R.H. and D.H., demonstrating deliberate indifference to the repeated violations of R.H.'s and D.H.'s constitutional rights…" Amended Complaint, ¶ 523.

The Oxford English Dictionary defines "indifferent" as, "having no particular interest or sympathy; unconcerned." It is possible that the allegations against some of the Employee Defendants could support a finding that they were indifferent to the circumstances faced by some of the Plaintiffs. However, such ordinary, workaday indifference is a far, far cry from "deliberate indifference" as it is used in constitutional jurisprudence.[13]

In its proper context, Deliberate Indifference is an analytical framework courts use to establish whether a defendant had a sufficiently culpable state-of-mind to justify liability for claims raised under the 8th or 14th Amendment prohibitions on cruel or unusual punishment. See, *Morgan v. Dzurenda*, 956 F.3d 84 (2d Cir. 2020) (8th Amendment); *Caiozzo v. Koreman*, 581 F.3d 63, 72 (2d Cir. 2009) ("[c]laims for deliberate indifference . . . should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth

[13] If anything, the allegations against the Employee Defendants could be construed as stating a case sounding in Vermont common law negligence rather than Federal constitutional law. Indeed, that is what paragraph 522 of the Amended Complaint hints at, positing that Defendants owed Plaintiffs a duty of care to ensure that their custody was reasonably safe and to "detect and correct problems that would cause injury to Plaintiffs." Amended Complaint, ¶ 522. However, Plaintiffs have not explicitly pleaded a negligence claim against the Employee Defendants, because they cannot. The Vermont Tort Claims Act provides that actions for damages arising from the act or omission of Vermont State employees acting within the scope of their employment, such as the Employee Defendants, lie exclusively against the State of Vermont, not the individual employees. 12 V.S.A. § 5602.

It is unclear what a state law negligence allegation is doing in the middle of a constitutional Deliberate Indifference claim. It is even more confusing that Plaintiffs chose to insert virtually identical allegations into their 8th Amendment Cruel and Unusual Punishment claim (Count One, ¶ 497), 8th and 14th Amendment Excessive Force claim (Count Two, ¶ 502), and 14th Amendment Due Process claim (Count Three, ¶¶ 513 - 517). Since none of said paragraphs go to any of the actual elements under Section 1983 or the respective portions of the Bill of Rights, they serve only to confuse the issues and should be stricken. As catchy as a duty to "detect and correct" sounds, it appears nowhere in constitutional jurisprudence as an element of 42 U.S.C. ¶ 1983.

Amendment"). Thus, Deliberate Indifference should not really have its own Count, but be subsumed within Counts One through Three.[14]

The above notwithstanding, the 2nd Circuit requires Deliberate Indifference plaintiffs bringing claims under either the 8th or 14th Amendment to prove: "(1) that [the plaintiff] is incarcerated under conditions posing a substantial risk of serious harm,[15] and (2) that the prison official had a sufficiently culpable state of mind, which in prison-conditions cases is one of deliberate indifference to inmate health or safety. *Morgan v. Dzurenda*, *supra*, at 88 – 89 (internal quotation marks and citations omitted).

> Deliberate indifference requires more than negligence, but less than conduct undertaken for the very purpose of causing harm. *A prison official does not act in a deliberately indifferent manner unless that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.*

Id. (emphasis added, internal quotation marks and citations omitted). This definition of Deliberate Indifference has virtually nothing in common with the "detect and correct" standard raised by Plaintiffs. Amended Complaint, ¶ 522, see, also, *id.*, ¶¶ 497, 513 – 517. Significantly, the duty to "correct" constitutional infirmities, if there is one, is triggered by the officer's knowledge, obtained passively. There is no duty to actively investigate, or "detect." This is clear from the requirement that the officer must possess sufficient facts to infer that the subject faced a substantial risk of serious harm. Thus, even if the metaphorical pieces of the puzzle are sitting on the table, there is no liability unless the officer puts the pieces together but still fails to

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[14] In addition to the present Count, Plaintiffs have included deliberate indifference as an element of their Count Two, but not One or Three. Amended Complaint, ¶ 502.

[15] For the purposes of this motion, Employee Defendants will assume, without conceding, that the Complaint contains sufficient factual allegations to support the first *Morgan* element, i.e., that Plaintiffs were "incarcerated under conditions posing a substantial risk of serious harm." *Morgan v. Dzurenda*, 956 F.3d, at 88 – 89. Employee Defendants reserve the right to contest this issue in the future.

act. Indifferent lack of follow-through, even if negligent, does not constitute cruelty. Pigheaded refusal to act when one *knows of* significant risks to safety does. *Morgan v. Dzurenda, supra*, at 88 - 90 (prison guards not deliberately indifferent despite prisoner's oral expression of worry about being harmed by other prisoner if placed together for recreation time, where other prisoner harmed inmate at recreation time, because oral statements lacked detail and failed to notify guards inmate faced "a substantial risk of serious harm." However, plaintiff's detailed written transfer request which was known to supervisors, combined with and oral concerns voiced by inmate to supervisors, who responded by taunting inmate, precluded grant of summary judgment to supervisors). As shown below, there are no allegations against any Employee Defendant that meet the governing standard for Deliberate Indifference in the 2nd Circuit.

a. Amelia Harriman

As discussed earlier, Harriman purportedly received complaints from R.H. at some unknown time (perhaps after his release) regarding "abuse," and such complaints "were ignored and never seriously investigated." Amended Complaint, ¶ 309. There is no allegation that Harriman was the person who ignored or failed to seriously investigate the complaint, nor that it was her duty to do so. Plaintiffs do accuse her of "apparently not taking seriously" a series of complaints they never allege she even knew about. Amended Complaint, ¶ 185.

Even allowing broad inferences in Plaintiffs' favor, all the Amended Complaint can say about Amelia Harriman is that R.H. complained to her at some point that he was abused at Natchez Trace. Since this discussion occurred while R.H. was at Natchez Trace, it cannot be the basis of a claim that Harriman exhibited deliberate indifference in transferring him to Natchez

Trace.[16] It is also insufficient to trigger a duty to protect under the 8th and 14th Amendment Due Process clause.

For Harriman to be liable under a Deliberate Indifference theory, she would have to possess sufficient knowledge for her to infer that R.H. faced "a substantial risk for serious harm." *Morgan v. Dzurenda*, *supra*, at 88 – 89. Although the Amended Complaint is not clear as to what R.H. told Harriman or when, it is clear that Harriman did not infer that R.H. (or D.H., for that matter) was at substantial risk of harm. Because Plaintiffs have therefore failed to establish any of the Deliberate Indifference elements with respect to Amelia Harriman, she must be DISMISSED, with prejudice, from Count Four.

b. Erin Longchamp

As discussed in more detail above, Erin Longchamp's sole alleged participation in the circumstances of this matter was her receipt of a single complaint from OJD in July 2017 concerning purported abuse of Plaintiff D.H. at Natchez Trace, wherein D.H. was kicked in the testicles and threatened with physical harm. Amended Complaint, ¶¶ 171, 241. Like Harriman, Longchamp is accused of "apparently [not taking] these complaints seriously and instead [continuing] to place children, including R.H. in [Natchez Trace's] custody." *Id.*, ¶ 185.

As with all facts cited in support of Plaintiffs' deliberate indifference theory, the time is out of joint. Even if is assumed that Longchamp had authority to place R.H. at Natchez Trace, which the Amended Complaint does not allege and which, in reality, Longchamp did not have, Longchamp could only be liable if R.H. was not transferred to Natchez Trace until after July 2017. As stated numerous times previously, the Amended Complaint fails to allege ANYTHING regarding when R.H. was at Natchez Trace. On information and belief, R.H. left

[16] Which she had no authority to do.

Natchez Trace in August of 2017—no more than one month after the OJD's alleged complaint, and at about the time he would need to have arrived there for Longchamp to be liable.

Even if R.H. was placed at Natchez Trace after OJD contacted Longchamp about D.H., Plaintiffs still fail to state a claim under Count Four. The alleged OJD email amounts to a snapshot covering a single incident that had already occurred to someone other than R.H. There is no basis in the pleadings for Longchamp to infer that either D.H. or R.H. faced "a substantial risk for serious harm." *Morgan v. Dzurenda*, *supra*, at 88 – 89. It is clear that she did not so infer. Moreover, the Amended Complaint is silent as to what action she was obligated or even authorized to take even if she did reach such inference. Therefore, Plaintiffs have not stated a Deliberate Indifference claim against Longchamp under 42 U.S.C. § 1983 and Count Four must be DISMISSED against her, with prejudice. *Morgan v. Dzurenda*, *supra*; *Provost v. City of Newburgh*, *supra*; *Harris v. Mills, supra.*

c. Edwin Dale

As noted in the Facts section, Dale purportedly received a "report" from D.H. where D.H. notified him that Natchez Trace "was a bad place, staff hit a kid's face off the wall and his nose started to bleed." *Id.*, ¶ 122. No date is specified for said "report" although the timeframe is limited to times while D.H. was detained at Natchez Trace. *Id.*, ¶ 238. However, the allegations do not support that Dale knew of said alleged information at a point in time when D.H. was to remain at Natchez Trace: it is possible, based on the facts, that D.H. relayed the information to Dale on the date Dale came to Natchez Trace to retrieve him. Nor have Plaintiffs shown that D.H.'s complaint occurred before R.H. was transferred there.

As it does with Longchamp, the Amended Complaint just describes Dale's knowledge of a single alleged incident at Natchez Trace, which did not involve either D.H. or R.H. Having failed to allege that Dale knew of and disregarded an excessive risk *to either's safety*, Count Four

must be DISMISSED with prejudice against Dale. *Morgan v. Dzurenda, supra*; *Provost v. City of Newburgh, supra*; *Harris v. Mills, supra.*

d. Melanie D'Amico

In their § 1983 claim against Melanie D'Amico, Plaintiffs similarly fail to "nudge[] their claims across the line from conceivable to plausible." *Iqbal,* 556 U.S. at 678-79. D'Amico is alleged to have been a residential services director for DCF (Amended Complaint, ¶ 91) and she is accused of "apparently" ignoring reports about bad conditions at the Natchez Trace facility. *Id.*, ¶¶ 185, 245. These reports included the September 2017 email from OJD, *id.*, ¶¶ 174, 243, 244, the "mystery mother's" alleged report of abuse of her unidentified child at some point during 2017, *id.*, ¶ 176 – 178, and the June 18, 2018 meeting with an OJD attorney where concerns were aired about Natchez Trace's parent company but there is no allegation that Natchez Trace was discussed. *Id.*, ¶¶ 179 – 184.

As discussed above, the Amended Complaint fails to allege that either D.H. or R.H. were transferred to Natchez Trace after September 2017, so the OJD email cannot serve as a trigger for a deliberate indifference claim. Moreover, while a one and a half sentence snippet excised from an email D'Amico wrote to OJD in response to OJD's report on D.H. at Natchez Trace is presented, in which she characterizes OJD's complaints as overgeneralizations and states that "only positive experiences have been reported to me." *Id.*, ¶ 92. None of this reflects the actions she took or failed to take following receipt of the alleged complaints. It is not cruel or unusual punishment to express skepticism to claims allegedly raised by a juvenile and reported through his counsel. Nor is it evidence supporting a theory that D'Amico or DCF failed to take the concerns "seriously." The out of context excerpt shows that D'Amico took the report seriously enough to write a response containing her honest perspective.

The Amended Complaint similarly fails to allege that either D.H. or R.H. were transferred to Natchez after the discussion involving the mystery mother, D'Amico, DCF Commissioner Kenneth Schatz, and Deputy Commissioner Cindy Wolcott. *Id.*, ¶¶ 176 – 178. Although, it does demonstrate that D'Amico and DCF were taking the issue quite seriously by allegedly directly involving Director-level staff. *Id.* Finally, the Amended Complaint itself avers that both D.H. and R.H. had left Natchez Trace well before the June 18, 2018 meeting. See, e.g., *Id.*, ¶¶ 257 (R.H. detained at Woodside between March 2018 and December 2018), 246 – 254 (allegations relating to D.H. placement in Woodside North Unit in December 2017).[17]

As with the other Employee Defendants, the Complaint fails to allege details about the information known by D'Amico regarding risks faced by R.H. or D.H. at Natchez Trace. Conversely, the allegations regarding D'Amico's purported failure to take concerns "seriously" quite clearly establish that D'Amico *did not infer* that either R.H. or D.H. faced any excessive risks to health or safety there. *Morgan v. Dzurenda*, *supra*, at 88 – 89 (for Deliberate Indifference liability to attach, the defendant official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference).

Finally, the Complaint also does not really allege that D'Amico failed to act, merely that she did not act as Plaintiffs would have wished her to act, in retrospect. The previously noted lack of specificity anywhere in the Complaint regarding the dates when D.H. and R.H. resided at Natchez Trace further doom any theory based upon purported failure to act. The timing is important. If Defendants did not receive notice in time to change anything, there can be no claims.

[17] It is puzzling why Plaintiffs added allegations about said meeting to their Amended Complaint. They only confuse matters.

Because Plaintiffs' Count Four and its underlying facts fail to sufficiently allege claims based on Deliberate Indifference against D'Amico or any other Employee Defendant, Plaintiffs have not shown a violation of 42 U.S.C. § 1983 and have failed to state a case that can survive a Rule 12 (b)(6) motion. Count Four must be DISMISSED with prejudice as to D'Amico and all other Employee Defendants. *Morgan v. Dzurenda*, *supra*; *Provost v. City of Newburgh*, *supra*; *Harris v. Mills, supra.*

2. The Complaint Fails to Allege that Edwin Dale or Melanie D'Amico Violated the 8th Amendment's Prohibition on Cruel and Unusual Punishment (Count One).

In their Count One, Plaintiffs broadly accuse Edwin Dale [18] of 8th Amendment violations:

> Between 2017 and 2020, while Plaintiffs were detained at Woodside and the Middlesex Adolescent Program, Defendants Schatz, Shea, Gooley, Wolcott, Simons, Steward, Bunnell, Cathcart, Dubuc, Scrubb, Hatin, Weiner, Martinez, Ruggles, Piette, Rochon, Dale, Hamlin, and Brice either unlawfully isolated Plaintiffs in seclusion cells in Woodside's North Unit, physically restrained them in violation of Plaintiffs' constitutional rights and engaged in wanton and willful conduct that violated Plaintiffs' right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment to the United States Constitution in violation of 42 U.S.C. §1983, or failed to fulfill their constitutional duty to ensure that Plaintiffs were reasonably safe, and to detect and correct problems that could cause injury to Plaintiffs.

Complaint, ¶ 498.

Never mind the crazy-quilt allegation which substitutes generic tort language for elements of 8th Amendment claims, equates solitary confinement with physical restraint and "wanton and willful conduct" and equates direct participation in egregious behavior with failing to ensure reasonable safety. Indeed, never mind the distinct possibility that Count One cites the

[18] Note that D'Amico is not included in Paragraph 498. She is in ¶¶ 494 and 497. Thus, strictly speaking, Count Four merely alleges that D'Amico acted under color of state law and that she owed Plaintiffs a duty of care, but does not allege that she breached any such duty.

wrong Constitutional Amendment altogether. *Jackson v. Johnson*, 118 F. Supp. 2d 278, 287 (N.D.N.Y. 2000) (8th Amendment inappropriate basis for excessive force claim by juveniles in custody); *G.B. v. Carrión*, 2012 U.S. Dist. LEXIS 200619 (S.D.N.Y. Jan. 19, 2012) (same).

Even if the contents of the Count pass muster, the underlying facts alleged in support do not. Neither Dale nor D'Amico are alleged to have personally physically restrained any Plaintiff or moved any into a seclusion cell. Neither Dale nor D'Amico are alleged to have any authority over disciplinary actions, including solitary confinement, but both are alleged to have raised concerns with DCF and Woodside management, who did possess such authority, when they became aware of issues of concern. Amended Complaint, ¶¶ 52 – 53, 344 – 345 (Dale forwarded October 2016 OJD concerns about G.W.'s solitary confinement to Defendants Simons and Steward); ¶ 447 (D'Amico "made it known to many people, including Defendants Simons and Shea, how horrible and inhumane" she thought treatment of B.C. was after observing her without pants). Thus, even absent a real Constitutional duty to "detect and correct," and absent any indicia of Deliberate Indifference, the Amended Complaint's allegations document Dale and D'Amico taking corrective actions being anything but indifferent to Plaintiffs' plights. Count One must be DISMISSED with prejudice. *Twombly, supra*; *Provost v. City of Newburgh*, *supra*; *Harris v. Mills, supra*.

iii. The Complaint Fails to Allege that Edwin Dale or Melanie D'Amico Violated the 8th or 14th Amendment Ban on the Use of Excessive Force.[19]

Like the other Counts previously discussed, Count Two fails due to the Amended Complaint's lack of alleged facts showing Dale or D'Amico's personal participation in the use of

[19] The confusion as to who this Count implicates is even worse than in Count One. Count Two, in its entirety, runs from ¶ 499 to ¶ 508. Dale and D'Amico are mentioned in ¶¶ 500 and 502. Dale, but not D'Amico, is mentioned in ¶¶ 505 and 508.

force against Plaintiffs. Neither is alleged to have so much as lifted a finger against any Plaintiff. Its failure to protect/deliberate indifference allegations also fail for the same reasons already argued. Plaintiffs have neither shown facts indicating that Dale or D'Amico inferred that any Plaintiff was at excessive risk to safety sufficient to invoke a deliberate indifference theory, nor have they alleged that either was in a position to stop or mitigate an active incident of excessive force, which is the basis for a failure to intervene theory. Because the Complaint fails to allege that either Defendant had the personal involvement in purported 8th [20]or 14th Amendment violations to trigger liability under 42 U.S.C. § 1983, Count Two must therefore be DISMISSED with prejudice. *Morgan v. Dzurenda*, *supra*; *Provost v. City of Newburgh*, *supra*; *Harris v. Mills*, *supra*.

iv. The Complaint Fails to Allege that any of the Employee Defendants Violated the 14th Amendment Due Process Clause.

The Third Count of the Amended Complaint is largely a restatement of the First Count with a dash of Counts Two and Four thrown in for flavor. Paragraphs 514 – 517 are variations on previously alleged "cruel and unusual punishment allegations," touching on alleged unlawful restraint (¶¶ 514 – 515), isolation (¶ 517), and excessive, malicious, willfully and wantonly indifferent "aforementioned" acts, committed with deliberate disregard for human life and Plaintiffs' constitutional rights. *Id.*, ¶ 516. As with all the other Counts, Defendants are alleged to have both personally participated in violations and failed to adhere to the non-existent constitutional duty to "detect and correct" problems. *Id.*, ¶¶ 513 – 516. Therefore, Employee Defendants will rely on the arguments they employed when said issues appeared previously.

[20] As noted above, the 8th Amendment portion of Count Two may fail as a matter of law due to being the wrong Amendment. *Jackson v. Johnson*, *supra*; *G.B. v. Carrión*, *supra*.

Edwin Dale and Melanie D'Amico were not personally involved in any of the "aforementioned acts" as is required to establish liability under 42 U.S.C. 1983, nor were they Deliberately Indifferent. They had no authority over disciplinary action. They had no authority over solitary confinement, but Dale forwarded OJD's complaint regarding the negative effects of such confinement to supervisors who did have the authority, and D'Amico let her criticisms of the treatment of G.W. be widely known. Amended Complaint, ¶¶ 52 – 53, 344 – 345, 447. Neither Defendant was on-site when excessive force was allegedly used by other Defendants. The Amended Complaint establishes that both Defendants did what was within their power to raise issues and concerns with facility and agency management. They were not personally involved, nor were they deliberately indifferent. Thus, Count Three must be DISMISSED with prejudice. *Morgan v. Dzurenda*, *supra*; *Provost v. City of Newburgh*, *supra*; *Harris v. Mills, supra*.

C. The Employee Defendants are Protected by Qualified Immunity

Qualified Immunity is an affirmative defense available to officials who have been sued for alleged Constitutional violations. *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). Although affirmative defenses are generally first stated in the Answer to a Complaint, the qualified immunity defense "may be asserted in a motion to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure 'as long as the defense is based on facts appearing on the face of the complaint.'" *Id*.

> When assessing qualified immunity, a court first determines "whether the facts shown `make out a violation of a constitutional right.'" *Taravella v. Town of Wolcott*, 599 F.3d 129, 133 (2d Cir. 2010) (quoting *Pearson*, 555 U.S. at 223). Then, a court will grant qualified immunity if "one of two conditions is satisfied: (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." *Garcia*, 779 F.3d at 92(quoting *Russo v. City of Bridgeport*, 479 F.3d 196, 211 (2d Cir. 2007)). Whether "qualified immunity applies in a particular case 'generally turns on the objective legal reasonableness' of the challenged action,

> 'assessed in light of the legal rules that were clearly established at the time it was taken.'" *DiStiso v. Cook*, 691 F.3d 226, 240 (2d Cir. 2012) (quoting *Messerschmidt v. Millender*, 565 U.S. 535, 546, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012)). An act is "objectively reasonable" if 'officers of reasonable competence could disagree' on the legality of the defendant's actions." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

Ali v. Ramos, No. 16-cv-01994 (ALC), 2018 U.S. Dist. LEXIS 42489, at *16-19 (S.D.N.Y. Mar. 14, 2018). As argued above, Plaintiffs have failed to plead sufficiently specific allegations to survive dismissal as to any of their Constitutional claims. However, to the extent that this Court finds merit to any, they should still be dismissed pursuant to qualified immunity. Recall that Employee Defendants are not personally implicated in any of the disturbing events chronicled in the Complaint, but, rather, are accused of failing to act in the face of scant knowledge of wrongdoing. The Complaint fails to cite any clearly established legal rule requiring further action given the level of notice each Employee Defendant allegedly was privy to.[21] Nor does it specify anywhere exactly what actions said Defendants were obligated to but failed to take. Under the Complaint's allegations, officers of reasonable confidence could disagree whether Employee Defendants did anything wrong. Therefore, all are protected by the qualified immunity defense and all federal claims against them should be DISMISSED.

CONCLUSION

For the foregoing reasons, Defendants Edwin Dale, Melanie D'Amico, Erin Longchamp and Amelia Harriman request that all claims and allegations against them be DISMISSED with prejudice and that the Court grant such other relief as it deems just and proper.

[21] By way of example, Employee Defendants note that there is no Appellate authority in this Circuit holding that placing juveniles into solitary confinement is a Constitutional violation. Thus, even if this Court were to determine that such violation exists on the facts at hand, Employee Defendants would still be protected by qualified immunity.

DATED at Burlington, Vermont, this 15th day of August 2022.

By: _____

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

CATHY WELCH, Administrator of the Estate of G.W., R.H., T.W., T.F., D.H., B.C., and A.L., by Next Friend Norma Labounty, Plaintiffs, v. KENNETH SCHATZ, KAREN SHEA, CINDY WOLCOTT, BRENDA GOOLEY, JAY SIMONS, KEVIN HATIN, ARON STEWARD, MARCUS BRUNNELL, JOHN DUBUC, WILLIAM CATHCART, BRYAN SCRUBB, NICHOLAS WEINER, DAVID MARTINEZ, CAROL RUGGLES, TIM PIETTE, DEVIN ROCHON, AMELIA HARRIMAN, MELANIE D'AMICO, EDWIN DALE, ERIN LONGCHAMP, CHRISTOPHER HAMLIN, and ANTHONY BRICE, all in their individual capacities, Defendants.	Civil Action No. 5:21-cv-00283

CERTIFICATE OF SERVICE

I certify that I have today delivered *Joint Motion* and *Memorandum of Law in Support of Defendants Harriman, D'Amico, Dale and Longchamp's Joint Motion to Dismiss Amended Complaint* to all other parties to this case as follows:

___ By first class mail by depositing it in the U.S. mail;

___ By personal delivery to _____ or his/her counsel;

_x_ Other. Explain: _____sent via email _____

The names and addresses of the parties/lawyers to whom the mail was addressed or personal delivery was made are as follows:

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DATED at Burlington, Vermont, this 15 day of August 2022.

Signature: _____

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KATHY WELCH, ADMINISTRATOR OF THE ESTATE OF G.W., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Case No. 5:21-cv-283
KENNETH SCHATZ, *et al.*,	)	
Defendants.	)	

DEFENDANT MARCUS BUNNELL'S SUPPLEMENTAL MOTION TO DISMISS

NOW COMES Defendant Marcus Bunnell ("Bunnell"), by and through his attorneys, McNeil, Leddy & Sheahan, P.C., pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, hereby moving to dismiss all claims against him. Bunnell moves to dismiss in response to Plaintiffs' Amended Complaint (Doc. 65), hereby supplements and incorporates herein by reference his prior Motion to Dismiss (Doc. 54), and incorporates herein by reference the motions to dismiss by other defendants in this action. Bunnell moves to dismiss on the grounds that Plaintiffs have failed to state plausible federal and state law claims against him, he is entitled to qualified immunity, and this Court should not exercise supplemental jurisdiction over Plaintiffs' pendent state law claims.

INTRODUCTION

Plaintiffs' Amended Complaint alleges that Defendant Bunnell was "involved" in three incidents with G.W. from June 2019. (Doc. 65 ¶¶ 114, 339-340). Bunnell is also alleged to have been involved with another incident with G.W. on the stairway and in her room. (*Id.* ¶¶ 355-366). The Amended Complaint also alleges Bunnell was involved in a restraint of T.F. during which T.F. was dragged across the floor, Bunnell had a knee on T.F.'s back, and Bunnell

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punched T.F. in the face. (*Id.* ¶¶ 155-158, 402-404, 407-414). Plaintiffs allege Bunnell was involved in a "pressure campaign" against T.F. in an effort to persuade T.F. that Bunnell "punched her accidentally." (*Id.* ¶¶ 417-419, 424). It is also alleged that Bunnell twisted T.W.'s arms on May 25, 2018. (*Id.* ¶ 323).

Bunnell is not even mentioned in relation to any claims brought by four of the seven Plaintiffs: R.H., D.H., B.C., and A.L.

ARGUMENT

I. STANDARD GOVERNING MOTIONS TO DISMISS

"The standard for reviewing a motion to dismiss pursuant to Rule 12(b)(6) is well-known." *Wyatt v. City of Barre/Barre City Fire Dep't,* 2012 WL 1435708, *2 (D. Vt. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citations omitted).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Amaker v. New York State Dep't of Correctional Services,* 435 Fed. Appx. 52, 54 (2d Cir. 2011) (internal quotation marks omitted). This "plausibility standard . . . is guided by [t]wo working principles." *Harris v. Mills,* 572 F.3d 66, 72 (2d Cir. 2009) (internal quotation marks omitted). Citing *Twombly,* the U.S. Supreme Court explained:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion

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> to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief.

Iqbal, 556 U.S. at 678-79 (citations and internal quotation marks omitted). "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly,* 550 U.S. at 570. When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint[s] must be dismissed." *Id.*

II. ALL CLAIMS BY PLAINTIFFS R.H., D.H., B.C., AND A.L. AGAINST DEFENDANT BUNNELL MUST BE DISMISSED

Plaintiffs' Amended Complaint contains no allegations from R.H., D.H., B.C. or A.L. against Bunnell. The allegations related to each of these Plaintiffs make no reference to him. For this reason, these Plaintiffs cannot state a plausible claim and the claims of these four Plaintiffs must be dismissed as to Defendant Bunnell.

III. COUNTS FOUR, SIX, AND NINE ARE NOT DIRECTED AT DEFENDANT BUNNELL AND THUS SHOULD BE DISMISSED AS TO HIM

In their Amended Complaint, Plaintiffs specifically name the individuals against whom their causes of action are brought. While still vaguely plead, the Amended Complaint's Counts Four, Six, and Nine name specific Defendants but omit Defendant Bunnell. (*See* Doc. 65 ¶¶ 519, 539, & 557). Therefore, because these causes of action cannot reasonably be directed at Bunnell, they should be dismissed as to him.

IV. PLAINTIFFS' COUNTS ONE, TWO, AND THREE, WHICH MAY BE ANALYZED SIMILARLY, NONETHELESS DO NOT STATE A PLAUSBILE CONSTITUTIONAL CLAIM AGAINST DEFENDANT BUNNELL

Plaintiffs' Counts One, Two, and Three allege constitutional violations under the Eighth and Fourteenth Amendments. Because Plaintiffs in this case were juveniles in non-criminal

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custody at Woodside Juvenile Rehabilitation Center, these claims may be similarly analyzed under the Fourteenth Amendment and its due process requirements.

"The Eighth Amendment's prohibition on cruel and unusual punishment 'applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions…. [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.'" *G.B. ex rel. T.B. v. Carrion*, No. 09-CV-10582, 2012 WL 13071817, *16 n. 27 (S.D.N.Y. Jan. 1, 2012) (quoting *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 199 n.6 (1989)). "Therefore, the Eighth Amendment ban on cruel and unusual punishment is inapplicable in this case." *Jackson v. Johnson*, 118 F. Supp. 2d 278, 287 (N.D.N.Y. 2000). As alleged in the Amended Complaint and citing the recently repealed Vermont statute 33 V.S.A. § 5801, DCF's Woodside Juvenile Rehabilitation Center was a facility for "adolescents who have been adjudicated or charged with delinquency or criminal act." (Doc. 65, ¶ 38). Plaintiffs all allege they were detained at Woodside. (*Id.* ¶¶ 236, 255, 311, 335, 398, 433, and 463). Under Vermont law, an order of the Family Division of the Superior Court in a juvenile delinquency proceeding shall not be deemed a conviction of a crime or impose any civil disabilities sanctions ordinarily resulting from a conviction. 33 V.S.A. § 5202. Thus, all Plaintiffs were held at Woodside "in non-criminal custody as juveniles." *G.B. ex rel. T.B. v. Carrion*, No. 09-CV-10582, 2012 WL 13071817, *16 (S.D.N.Y. Jan. 1, 2012) (citing analogous New York statute). Therefore, the Eighth Amendment is inapplicable and Plaintiffs' claims regarding their detention at Woodside are properly analyzed under the Fourteenth Amendment's due process requirements. Because Plaintiffs allege claims under the Fourteenth Amendment

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(Count Two and Three), their Eighth Amendment claim in Count One is duplicative and should be dismissed.

Plaintiffs' Counts Two and Three do purport to invoke the rights set forth in the Fourteenth Amendment. However, Plaintiffs' allegations against Bunnell nonetheless do not plausibly state a constitutional claim against him.

"As to the appropriate standard for reviewing a non-criminal detainee's Fourteenth Amendment due process claim, the Supreme Court has held that such a detainee may establish a Fourteenth Amendment violation by showing that the government action at issue was: (1) intended to punish; (2) lacked legitimate purpose; or (3) objectively, was "not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *J.S.X. Through D.S.X. v. Foxhoven*, 361 F. Supp. 3d 822, 832-33 (S.D. Iowa 2019) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015)). Certain "restrictions on liberty" are permissible if they are "reasonably related to legitimate government objectives and not tantamount to punishment." *Id.* (internal quotations omitted).

Plaintiffs allege Bunnell was acting as an Operations Supervisor at Woodside. (*See* Doc. 65 ¶ 15). Bunnell is one of twenty Defendants alleged to have violated the Fourteenth Amendment rights of all "Plaintiffs." (*Id.* ¶¶ 499-517). Plaintiffs' Fourteenth Amendment claims lack specificity. The body of the Amended Complaint includes reference to two restraint incidents involving Bunnell, one of T.W. and another of T.F. But even taking the allegations as true, Plaintiffs do not allege that any of Bunnell's actions were intended to punish or lacked a legitimate purpose. Because Plaintiffs have not stated sufficient facts against Defendant Bunnell to meet their burden as to the first and second prongs above, their claims under Counts One, Two, and Three must be dismissed as against Defendant Bunnell.

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In the alternative, as discussed below, Defendant Bunnell is entitled to qualified immunity on Plaintiffs' claims under the Eighth and Fourteenth Amendments.

V. PLAINTIFFS FAIL TO STATE A FIRST AMENDMENT CLAIM AGAINST DEFENDANT BUNNELL

Plaintiffs fail to state sufficient facts against Defendant Bunnell that would invoke the First Amendment as alleged in Plaintiffs' Count Five. To sufficiently plead their First Amendment retaliation claim, Plaintiffs must show: "(1) [they had] a right protected by the First Amendment; (2) the [Defendants'] actions were motivated or substantially caused by [Plaintiffs'] exercise of that right; and (3) the [Defendants'] actions caused [them] some injury." *Dorsett v. County of Nassau,* 732 F.3d 157, 160 (2d Cir. 2013). Plaintiffs allege no facts to indicate that any action by Defendant Bunnell was "motivated or substantially caused" by any Plaintiff's exercise of a First Amendment right. Plaintiffs allege an "unlawful pressure campaign" and that "Defendants Steward and Bunnell unlawfully pressured T.F. as described above to dismiss her lawsuit." (Doc. 65 ¶¶ 535-536). However, the described actions of Bunnell were that he "tried to persuade T.F. that he did not intend to punch T.F and that it was an accident," and that he told T.F. "he would not deliberately hit her because T.F. was like a daughter to him." (*Id.* ¶¶ 417-419). Even taken as true, the allegations are that Bunnell tried to tell T.F. that he accidentally hit her and that he would never deliberately hit her. There is no factual basis for a First Amendment claim. Plaintiffs assert no factual, non-conclusory allegations that Bunnell's actions were "motivated or substantially caused" by T.F.'s exercise of a right protected by the First Amendment. Plaintiffs have also failed to plausibly allege any actual injury that T.F. sustained as a result of Bunnell explaining to her that he did not intend to hit her. Overall, Plaintiffs have failed to state a plausible First Amendment claim against Defendant Bunnell under Count Five.

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VI. PLAINTIFFS DO NOT STATE PLAUSIBLE STATE LAW CLAIMS AGAINST DEFENDANT BUNNELL

Plaintiffs' state law claims are insufficiently pled as against Defendant Bunnell. Plaintiffs first assert an assault and battery claim (Count Seven), alleging that a dozen Defendants, including Bunnell, "repeatedly placed [Plaintiffs] in isolation cells in the North Unit and physically assaulted them." (Doc. 65 ¶ 545). But the only allegations in the Amended Complaint pertaining to assault and battery are the claims that Bunnell twisted T.W.'s arm on May 24, 2018, and the restraint incident with T.F. on May 27, 2018. (*See id.* ¶¶ 323, 402-413). Even if the allegations related to these two incidents would state a claim for assault and battery against Bunnell, he is nonetheless entitled to qualified immunity as set forth below.

Plaintiffs' Count Eight purports to state a claim for intentional infliction of emotional harm (or distress). To state an IIED claim, Plaintiffs must show "outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct." *Fromson v. State*, 2004 VT 29, ¶ 14, 176 Vt. 395 (internal quotations omitted); *see also Crowell v. Kirkpatrick*, 667 F. Supp. 2d 391, 416 (D. Vt. 2009). Plaintiffs' burden is a heavy one and requires Plaintiffs to show conduct "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable." *Id.* The test for outrageousness is objective and the court makes the initial determination as to whether the alleged conduct satisfies the test. *Id.* at ¶¶ 14-15.

Bunnell's alleged actions are not sufficiently extreme and outrageous to constitute IIED. The Amended Complaint references two incidents, on June 24 & 27, 2018, where Bunnell is alleged to have twisted T.W.'s arm and on the next occasion to have restrained and punched T.F.

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Even if taken as true, these two acts cannot objectively be deemed extreme and outrageous. As alleged, Bunnell was restraining T.W. and T.F. in his capacity as an Operations Supervisor at Woodside. The alleged actions cannot objectively rise to the level of actionable outrageous conduct. Therefore, Count Eight against Bunnell must be dismissed.

Moreover, Defendant Bunnell would also be entitled to qualified immunity on this claim. Furthermore, if Plaintiffs' state law claims alone survive dismissal, then this Court should decline to exercise supplemental jurisdiction over those state law claims and dismiss the action.

VII. DEFENDANT BUNNELL IS ENTITLED TO QUALIFIED IMMUNITY

Even if Plaintiffs can plead a constitutional violation, which is not conceded, Defendant Bunnell is nonetheless entitled to qualified immunity if he did not violate clearly established law particularized to the facts of this case. *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 552 (2017). Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *McEvoy v. Spencer,* 124 F.3d 92, 97 (2d Cir. 1997). Qualified immunity protects government officials from lawsuits over errors made while reasonably performing their duties, whether resulting from "a mistake of law, a mistake of fact, or a mistake of mixed questions of law and fact." *Pearson v. Callahan,* 555 U.S. 223, 129 (2009).

Qualified immunity is essentially the same under federal and state law. *See Wilkinson v. Russell,* 182 F.3d 89, 97 (2d Cir. 1999) (Sotomayor, J.), *cert. denied,* 528 U.S. 1155 (2000); *Hubacz v. Protzman,* 2013 WL 1386287, *12 (D. Vt. 2013); *Stevens v. Stearns,* 2003 VT 74 ¶ 15, 175 Vt. 428, 434 (2003). "The only significant difference is that '[q]ualified immunity from a state law claim does not contain the "statutory or constitutional rights" limitation because a state law claim is not so limited.'" *Wilkinson,* 182 F.3d at 98 (quoting *Murray v. White,* 155 Vt. 621,

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630 n.4 (1991)). Under Vermont law, "lower-level government employees are immune from tort liability when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority." *Hudson v. Town of East Montpelier,* 161 Vt. 168, 171, 638 A.2d 561 (1993). To determine whether a state employee is acting in "good faith," Vermont law relies on the same federal objective standard: whether the defendant's conduct violated "clearly established rights ... of which a reasonable person would have known." *Stevens v. Stearns,* 175 Vt. 428, 434 (2003); *see also Murray v. White,* 155 Vt. 621, 630, 587 A.2d 975 (1991) ("Good faith exists where an official's acts did not violate clearly established rights of which the official reasonably should have known."). "Of course, when we consider state tort liability, the 'clearly established law' is not limited to federal constitutional and statutory rights, but may include Vermont statutes, regulations and common law." *Sabia v. Neville,* 165 Vt. 515, 521 (1996).

Plaintiffs cannot state that Defendant Bunnell violated a clearly established right, much less that he was plainly incompetent or knowingly violated the law. Thus, Defendant Bunnell is entitled to dismissal of the federal and state law claims on qualified immunity grounds.

CONCLUSION

WHEREFORE, for the reasons stated above, and the reasons for dismissal set forth in the other Defendants' motions, Defendant Marcus Bunnell respectfully requests that this Court dismiss with prejudice all of Plaintiffs' claims against him and dismiss him as a party to this litigation.

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DATED at Burlington, Vermont this 15th day of August 2022.

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KATHY WELCH, ADMINISTRATOR OF THE ESTATE OF G.W., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Case No. 5:21-cv-283
KENNETH SCHATZ, *et al.*,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I electronically filed *Defendant John Dubuc's Supplemental Motion to Dismiss, Defendant Kevin Hatin's Supplemental Motion to Dismiss* and *Defendant Marcus Bunnell's Supplemental Motion to Dismiss* with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record in the case.

DATED at Burlington, Vermont this 15th day of August 2022.

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UNITED STATES DISTRICT COURT
FOR THE
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KATHY WELCH, ADMINISTRATOR OF THE ESTATE OF G.W., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Case No. 5:21-cv-283
KENNETH SCHATZ, *et al.*,	)	
Defendants.	)	

DEFENDANT JOHN DUBUC'S SUPPLEMENTAL MOTION TO DISMISS

NOW COMES Defendant John Dubuc ("Dubuc"), by and through his attorneys, McNeil, Leddy & Sheahan, P.C., pursuant to Rule 12(b)(6) of the Federal Rule of Civil Procedure, hereby moving to dismiss all claims against him. Dubuc moves to dismiss in response to Plaintiffs' Amended Complaint (Doc. 65), hereby supplements and incorporates herein by reference his prior Motion to Dismiss (Doc. 55), and incorporates herein by reference the motions to dismiss by other defendants in this action. Dubuc moves to dismiss on the grounds that Plaintiffs have failed to state plausible federal and state law claims against him, he is entitled to qualified immunity, and this Court should not exercise supplemental jurisdiction over Plaintiffs' state law claims.

INTRODUCTION

As with their original Complaint, Plaintiffs' allegations against Dubuc in the Amended Complaint are limited. In amending their pleading, Plaintiffs seek to avoid the "group pleading" issue that plagued their original filing by now simply listing all individual defendants targeted by each cause of action. Of the nine causes of action presented, only Counts One, Two, Three, and

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Eight name and purport to be directed at Defendant Dubuc. Therefore, Counts Four, Five, Six, Seven, and Nine may be readily dismissed as to Dubuc.

Similarly, two of the Plaintiffs do not assert any allegations against Dubuc – T.F. and B.C. There are no factual allegations in the Amended Complaint connecting these Plaintiffs to Dubuc, and therefore all claims by T.F. and B.C. must be dismissed as to Dubuc.

As for the factual allegations that do reference Dubuc, Plaintiffs allege that on April 18, 2018, Dubuc was involved in restraining R.H. and cutting his shirt off his body. (Doc. 65 ¶¶ 77, 262, 272, 279, 301-303). Plaintiffs also allege that on May 26, 2018, Dubuc was involved in restraining T.W., and that during the incident Dubuc "pushed his fingers into T.W.'s left eye orbital socket, leaving a 50-cent size bruise on T.W.'s face." (*Id.* ¶¶ 328-331). The Amended Complaint names Dubuc as one of the employees present during an incident with G.W., where Dubuc entered her cell and stood "over her naked body" while two other men restrained G.W. (*Id.* ¶¶ 381-384). As for Plaintiffs D.H. and A.L., the only allegations related to Dubuc are that he "sent an email" about D.H. in the North Unit and that he "ordered A.L. into the North Unit." (*Id.* ¶¶ 251 & 471).

ARGUMENT

I. STANDARD GOVERNING MOTIONS TO DISMISS

"The standard for reviewing a motion to dismiss pursuant to Rule 12(b)(6) is well-known." *Wyatt v. City of Barre/Barre City Fire Dep't,* 2012 WL 1435708, *2 (D. Vt. 2012). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the

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speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Amaker v. New York State Dep't of Correctional Services*, 435 Fed. Appx. 52, 54 (2d Cir. 2011) (internal quotation marks omitted). This "plausibility standard . . . is guided by [t]wo working principles." *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (internal quotation marks omitted). Citing *Twombly*, the U.S. Supreme Court explained:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by merely conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief.

Iqbal, 556 U.S. at 678-79 (citations and internal quotation marks omitted). "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. When plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint[s] must be dismissed." *Id.*

II. ALL PURPORTED CLAIMS BY PLAINTIFFS T.F. AND B.C. AGAINST DEFENDANT DUBUC MUST BE DISMISSED

The Amended Complaint contains no factual allegations from T.F. nor B.C. against Defendant Dubuc. The omission of any reference to Dubuc in relation to these Plaintiffs is fatal to their claims against him. They cannot state a plausible claim for relief absent any allegation of his personal involvement. For this reason, T.F. and B.C.'s claims should be dismissed as to Defendant Dubuc.

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III. COUNTS FOUR, FIVE, SIX, SEVEN, AND NINE ARE NOT DIRECTED AT DEFENDANT DUBUC AND THUS SHOULD BE DISMISSED AS TO HIM

In their Amended Complaint, Plaintiffs list the names of the individuals against whom their causes of action are brought. In Counts Four, Five, Six, Seven, and Nine, Plaintiffs name specific Defendants but omit Defendant Dubuc. (*See* Doc. 65 ¶¶ 519, 525, 539, 545, & 557). Therefore, because theses causes of action are not directed at Dubuc, they should be dismissed as to him.

IV. PLAINTIFFS' COUNTS ONE, TWO, AND THREE, WHICH MAY BE ANALYZED SIMILARLY, NONETHELESS DO NOT STATE A PLAUSBILE CONSTITUTIONAL CLAIM AGAINST DEFENDANT DUBUC

Plaintiffs' Counts One, Two, and Three allege constitutional violations under the Eighth and Fourteenth Amendments. Because Plaintiffs in this case were juveniles in non-criminal custody at Woodside, these claims may be similarly analyzed under the Fourteenth Amendment and its due process requirements.

"The Eighth Amendment's prohibition on cruel and unusual punishment 'applies only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions…. [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.'" *G.B. ex rel. T.B. v. Carrion*, No. 09-CV-10582, 2012 WL 13071817, *16 n. 27 (S.D.N.Y. Jan. 1, 2012) (quoting *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 199 n.6 (1989)). "Therefore, the Eighth Amendment ban on cruel and unusual punishment is inapplicable in this case." *Jackson v. Johnson*, 118 F. Supp. 2d 278, 287 (N.D.N.Y. 2000). As alleged in the Amended Complaint and citing the recently repealed Vermont statute 33 V.S.A. § 5801, DCF's Woodside Juvenile Rehabilitation Center was a facility for "adolescents who have been adjudicated or charged with delinquency or criminal act." (Doc.

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65, ¶ 38). Plaintiffs all allege they were detained at Woodside Juvenile Detention Center. (*Id.* ¶¶ 236, 255, 311, 335, 398, 433, and 463). Under Vermont law, an order of the Family Division of the Superior Court in a juvenile delinquency proceeding shall not be deemed a conviction of a crime or impose any civil disabilities sanctions ordinarily resulting from a conviction. 33 V.S.A. § 5202. Thus, all Plaintiffs were held at Woodside "in non-criminal custody as juveniles." *G.B. ex rel. T.B. v. Carrion*, No. 09-CV-10582, 2012 WL 13071817, *16 (S.D.N.Y. Jan. 1, 2012) (citing analogous New York statute). Therefore, the Eighth Amendment is inapplicable and Plaintiffs' claims regarding their detention at Woodside are properly analyzed under the Fourteenth Amendment's due process requirements. Because Plaintiffs allege claims under the Fourteenth Amendment (Count Two and Three), their Eighth Amendment claim in Count One is duplicative and should be dismissed.

Plaintiffs' Counts Two and Three do purport to invoke the rights set forth in the Fourteenth Amendment. However, Plaintiffs' allegations against Dubuc are too vague and speculative as to plausibly state a constitutional claim against him.

"As to the appropriate standard for reviewing a non-criminal detainee's Fourteenth Amendment due process claim, the Supreme Court has held that such a detainee may establish a Fourteenth Amendment violation by showing that the government action at issue was: (1) intended to punish; (2) lacked legitimate purpose; or (3) objectively, was "not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *J.S.X. Through D.S.X. v. Foxhoven*, 361 F. Supp. 3d 822, 832-33 (S.D. Iowa 2019) (quoting *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015)). Certain "restrictions on liberty" are permissible if they are "reasonably related to legitimate government objectives and not tantamount to punishment." *Id.* (internal quotations omitted). Here, Plaintiffs

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G.W., D.H., and A.L., have failed to plausibly state any factual allegations of Dubuc's personal involvement in an alleged violation of constitutional rights. These Plaintiffs allege only that Dubuc was present for an incident involving G.W., that he sent an email about D.H. going to the North Unit, and that he ordered A.L. to the North Unit. (*See* Doc. 65 ¶¶ 381-382, 251, & 471). As for Plaintiffs R.H. and T.W., their allegations, while stating more personal involvement by Dubuc, still do not set forth a plausible claim that Dubuc's actions were not "reasonably related to legitimate government objectives and not tantamount to punishment." The factual allegations against Defendant Dubuc, that he cut off R.H. shirt from his body, and that he pushed his fingers into T.W.'s left orbital socket, still do not state that he "intended to punish" or "lacked legitimate purpose."[1] Because Plaintiffs have not stated sufficient facts against Defendant Dubuc to meet their burden as to the first and second prongs above, their claims under Counts One, Two, and Three must be dismissed as against Defendant Dubuc.

In the alternative, as discussed below, Defendant Dubuc is entitled to qualified immunity on Plaintiffs' claims under the Eighth and Fourteenth Amendments.

V. PLAINTIFFS DO NOT STATE A PLAUSIBLE STATE LAW CLAIM AGAINST DEFENDANT DUBUC

Plaintiffs' one state law claim in their Amended Complaint against Dubuc, Count Eight for Intentional Infliction of Emotional Harm, is insufficiently pled as against Defendant Dubuc. The conduct attributable to Dubuc in the Amended Complaint is not sufficiently outrageous so as to plausibly state an IIED claim.

To state a claim for intentional infliction of emotional harm (or distress), Plaintiffs must show "outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or

[1] Tellingly, Plaintiffs do not assert an Assault and Battery cause of action against Dubuc. (*See* Doc 65 ¶ 545).

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proximately caused by the outrageous conduct." *Fromson v. State*, 2004 VT 29, ¶ 14, 176 Vt. 395 (internal quotations omitted); *see also Crowell v. Kirkpatrick*, 667 F. Supp. 2d 391, 416 (D. Vt. 2009). Plaintiffs' burden is a heavy one and requires Plaintiffs to show conduct "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable." *Id.* The test for outrageousness is objective and the court makes the initial determination as to whether the alleged conduct satisfies the test. *Id.* at ¶¶ 14-15.

Even taking the allegations against Dubuc in the Amended Complaint as true, the alleged actions by Dubuc are not sufficiently extreme and outrageous to constitute IIED. G.W., D.H., and A.L. allege only that Dubuc was present for an incident with G.W., sent an email regarding D.H., and ordered A.L. to the North Unit. (*See* Doc. 65 ¶¶ 381-382, 251, & 471). These Plaintiffs cannot sustain an IIED claim against Dubuc. As for R.H. and T.W., even if taken as true that Dubuc was involved in restraining R.H. and cutting his shirt off his body, and that he was involved in restraining T.W. and pushed his fingers into T.W. left orbital socket, these actions taking place during two discrete events are nonetheless still not objectively outrageous under Vermont law to state an IIED claim. Because Plaintiffs have not satisfied the objective test for outrageous conduct on the part of Defendant Dubuc, this Count Eight against him must be dismissed. Defendant Dubuc would also be entitled to qualified immunity on this claim.

Furthermore, if Plaintiffs' state law claims alone survive dismissal, then this Court should decline to exercise supplemental jurisdiction over those state law claims and dismiss the action.

VI. DEFENDANT DUBUC IS ENTITLED TO QUALIFIED IMMUNITY

Even if Plaintiffs' pleading is considered sufficient, Dubuc is nonetheless entitled to qualified immunity if he did not violate clearly established law particularized to the facts of this

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case. *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 552 (2017). Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *McEvoy v. Spencer,* 124 F.3d 92, 97 (2d Cir. 1997). Qualified immunity protects government officials from lawsuits over errors made while reasonably performing their duties, whether resulting from "a mistake of law, a mistake of fact, or a mistake of mixed questions of law and fact." *Pearson v. Callahan,* 555 U.S. 223, 129 (2009).

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and statutory rights, but may include Vermont statutes, regulations and common law." *Sabia v. Neville*, 165 Vt. 515, 521 (1996).

Plaintiffs cannot state that Dubuc violated a clearly established right, nor that he was plainly incompetent or knowingly violated the law. Thus, Defendant Dubuc is entitled to dismissal of the claims asserted against him on qualified immunity grounds.

CONCLUSION

WHEREFORE, for the reasons stated above, and the reasons for dismissal set forth in the other Defendants' motions, Defendant John Dubuc respectfully requests that this Court dismiss with prejudice all of Plaintiffs' claims against him and dismiss him as a party to this litigation.

DATED at Burlington, Vermont this 15th day of August 2022.

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

KATHY WELCH, ADMINISTRATOR OF THE ESTATE OF G.W., *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Case No. 5:21-cv-283
KENNETH SCHATZ, *et al.*,	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I electronically filed *Defendant John Dubuc's Supplemental Motion to Dismiss, Defendant Kevin Hatin's Supplemental Motion to Dismiss* and *Defendant Marcus Bunnell's Supplemental Motion to Dismiss* with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record in the case.

DATED at Burlington, Vermont this 15th day of August 2022.

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GENERAL RELEASE

In accordance with a Settlement Term Sheet dated December 14, 2022, which is attached to this GENERAL RELEASE, B[redacted] C[redacted] ("Releasor"), for and in consideration of the sum of Four Hundred Twenty-Eight Thousand Five Hundred Seventy-One Dollars and Forty-Three Cents ($428,571.43), lawful money of the United States, paid by the STATE OF VERMONT and LEXINGTON INSURANCE COMPANY, the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge, and by these presents does for his/her children, heirs, executors, administrators, successors and assigns remise, release and forever discharge Ken Schatz, Karen Shea, Cindy Walcott, Brenda Gooley, Jay Simons, Aron Steward, Marcus Bunnell, John Dubuc, William Cathcart, Bryan Scrubb, Kevin Hatin, Nicholas Weiner, David Martinez, Carol Ruggles, Tim Piette, Devin Rochon, Amelia Harriman, Edwin Dale, Melanie D'Amico, Erin Longchamp, Christopher Hamlin, Anthony Brice, the STATE OF VERMONT, AIG CLAIMS, INC., and LEXINGTON INSURANCE COMPANY, "Releasees," and their current or former employees, officers, directors, agents, volunteers, contractors, adjusters, attorneys, representatives, members, heirs, executors, administrators, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, executions, claims and demands whatsoever, in law or in equity, including any claims for attorney's fees, costs and litigation expenses, as well as any and all liens, which Releasor ever had, now has, or which his/her children, heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against Releasees, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release and particularly including, but without in any manner limiting the foregoing, on account of all issues and claims for relief which were asserted or could have been asserted in a civil action instituted by the undersigned styled *Welch, et al. v. Schatz, et al.*, Civil Action No. 5:21-cv-00283 (D. Vt., Dec. 13, 2021).

Releasor agrees that there are no collateral or outside agreements of any kind between the parties, other than the attached Settlement Term Sheet dated December 14, 2022. It is also understood and agreed that the attached Settlement Term Sheet dated December 14, 2022 is the compromise, accord, and satisfaction of disputed claims, and that this Release and any consideration therefore is not to be construed as an admission of liability,

fault, illegality or wrongdoing on the part of Releasees, by whom liability, fault, illegality and wrongdoing are expressly denied. It is further agreed and understood that this payment and the attached Settlement Term Sheet dated December 14, 2022 are made and executed to terminate further controversy with respect to all claims and injuries that Releasor has asserted or that she/he or his/her representatives can, shall, or may assert, or could have asserted against Releasees arising from any matter, cause, or thing whatsoever up to the date of this Release. It is further agreed and understood that, as a further consideration and inducement for this payment and the attached Settlement Term Sheet dated December 14, 2022, this Release shall apply to all unknown and unanticipated injuries and damages to Releasor, as well as to any unknown and unanticipated claims of Releasor, arising from or related to any act or omission of Releasees occurring on or up to the date of this Release.

To ensure compliance with applicable federal regulations, the Releasor acknowledges that she/he and his/her attorneys have, to the extent required by law, reported this claim to the Centers for Medicare and Medicaid Services. The Releasor acknowledges that, if necessary, Medicaid will be reimbursed out of these settlement proceeds for any and all payments made in the past. Releasor further acknowledges, warrants, and agrees to satisfy all liens, reimbursement rights, subrogation interests or claims, including any automatic liens or obligations created by federal and/or state law, of medical assistance, Medicare, Medicaid, child support, income tax, and of any doctor, hospital, insurance carrier, non-profit hospital and medical service organization, state or governmental agency, attorney or any other person, or firm or corporation, which have been made or may be made in the future against the payments described in the attached Settlement Term Sheet dated December 14, 2022; and the Releasor further agrees to hold harmless, and to defend and indemnify Releasees and their counsel of record in *Welch, et al. v. Schatz, et al.*, No. 5:21-cv-00283 from and against any suits, claims, cross-claims, judgments, costs or expenses of any kind, including attorneys' fees, arising from the assertion of any such liens, reimbursement right, subrogation interest or claim.

Releasor acknowledges that she/he has had ample time to consult with his/her attorneys and others prior to signing this release, is

competent to sign this release, and does so voluntarily and without duress.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 14th day of February 2023.

B[redacted] C[redacted]

STATE OF VERMONT
COUNTY OF Chittenden, SS.

On this 14th day of ~~January, 2022,~~ February 2023 before me personally appeared B[redacted] C[redacted] known to be the person described in and who executed the foregoing release, and he/she acknowledged he/she has executed the same as his/her free act and deed

Before me,

Casandra L. Parah

Notary Public

My Commission Expires: 1/31/25

Casandra L. Parah
Notary Public - State of Vermont
Commission No. 0001818
Commission Expires: 1/31/25

GENERAL RELEASE

In accordance with a Settlement Term Sheet dated December 14, 2022, which is attached to this GENERAL RELEASE, Estate of G[redacted] W[redacted] ("Releasor"), for and in consideration of the sum of Four Hundred Twenty Eight Thousand, Five Hundred Seventy One Dollars and Forty Two Cents ($428,571.42), lawful money of the United States, paid by the STATE OF VERMONT and LEXINGTON INSURANCE COMPANY, the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge, and by these presents does for his/her children, heirs, executors, administrators, successors and assigns remise, release and forever discharge Ken Schatz, Karen Shea, Cindy Walcott, Brenda Gooley, Jay Simons, Aron Steward, Marcus Bunnell, John Dubuc, William Cathcart, Bryan Scrubb, Kevin Hatin, Nicholas Weiner, David Martinez, Carol Ruggles, Tim Piette, Devin Rochon, Amelia Harriman, Edwin Dale, Melanie D'Amico, Erin Longchamp, Christopher Hamlin, Anthony Brice, the STATE OF VERMONT, AIG CLAIMS, INC., and LEXINGTON INSURANCE COMPANY, "Releasees," and their current or former employees, officers, directors, agents, volunteers, contractors, adjusters, attorneys, representatives, members, heirs, executors, administrators, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, executions, claims and demands whatsoever, in law or in equity, including any claims for attorney's fees, costs and litigation expenses, as well as any and all liens, which Releasor ever had, now has, or which his/her children, heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against Releasees, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release and particularly including, but without in any manner limiting the foregoing, on account of all issues and claims for relief which were asserted or could have been asserted in a civil action instituted by the undersigned styled *Welch, et al. v. Schatz, et al.*, Civil Action No. 5:21-cv-00283 (D. Vt., Dec. 13, 2021).

Releasor agrees that there are no collateral or outside agreements of any kind between the parties, other than the attached Settlement Term Sheet dated December 14, 2022. It is also understood and agreed that the attached Settlement Term Sheet dated December 14, 2022 is the compromise, accord, and satisfaction of disputed claims, and that this Release and any consideration therefore is not to be construed as an admission of liability,

fault, illegality or wrongdoing on the part of Releasees, by whom liability, fault, illegality and wrongdoing are expressly denied. It is further agreed and understood that this payment and the attached Settlement Term Sheet dated December 14, 2022 are made and executed to terminate further controversy with respect to all claims and injuries that Releasor has asserted or that she/he or his/her representatives can, shall, or may assert, or could have asserted against Releasees arising from any matter, cause, or thing whatsoever up to the date of this Release. It is further agreed and understood that, as a further consideration and inducement for this payment and the attached Settlement Term Sheet dated December 14, 2022, this Release shall apply to all unknown and unanticipated injuries and damages to Releasor, as well as to any unknown and unanticipated claims of Releasor, arising from or related to any act or omission of Releasees occurring on or up to the date of this Release.

To ensure compliance with applicable federal regulations, the Releasor acknowledges that she/he and his/her attorneys have, to the extent required by law, reported this claim to the Centers for Medicare and Medicaid Services. The Releasor acknowledges that, if necessary, Medicaid will be reimbursed out of these settlement proceeds for any and all payments made in the past. Releasor further acknowledges, warrants, and agrees to satisfy all liens, reimbursement rights, subrogation interests or claims, including any automatic liens or obligations created by federal and/or state law, of medical assistance, Medicare, Medicaid, child support, income tax, and of any doctor, hospital, insurance carrier, non-profit hospital and medical service organization, state or governmental agency, attorney or any other person, or firm or corporation, which have been made or may be made in the future against the payments described in the attached Settlement Term Sheet dated December 14, 2022; and the Releasor further agrees to hold harmless, and to defend and indemnify Releasees, their counsel of record in *Welch, et al. v. Schatz, et al.*, No. 5:21-cv-00283 from and against any suits, claims, cross-claims, judgments, costs or expenses of any kind, including attorneys' fees, arising from the assertion of any such liens, reimbursement right, subrogation interest or claim.

Releasor acknowledges that she/he has had ample time to consult with his/her attorneys and others prior to signing this release, is

competent to sign this release, and does so voluntarily and without duress.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 11th day of February 2023.

Cathy Welch on behalf of the
Estate of G[redacted] W[redacted]

STATE OF VERMONT
COUNTY OF Chittenden, SS.

On this 11th day of ~~January~~ February 2023, before me personally appeared Cathy Welch known to be the person described in and who executed the foregoing release, and he/she acknowledged he/she has executed the same as his/her free act and deed

Before me,

Notary Public

My Commission Expires: 1/31/25

Casandra L. Parah
Notary Public - State of Vermont
Commission No. 0001818
Commission Expires: 1/31/25

GENERAL RELEASE

In accordance with a Settlement Term Sheet dated December 14, 2022, which is attached to this GENERAL RELEASE, T[redacted] F[redacted] ("Releasor"), for and in consideration of the sum of Four Hundred Twenty-Eight Thousand Five Hundred Seventy-One Dollars and Forty-Three Cents ($428,571.43), lawful money of the United States, paid by the STATE OF VERMONT and LEXINGTON INSURANCE COMPANY, the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge, and by these presents does for his/her children, heirs, executors, administrators, successors and assigns remise, release and forever discharge Ken Schatz, Karen Shea, Cindy Walcott, Brenda Gooley, Jay Simons, Aron Steward, Marcus Bunnell, John Dubuc, William Cathcart, Bryan Scrubb, Kevin Hatin, Nicholas Weiner, David Martinez, Carol Ruggles, Tim Piette, Devin Rochon, Amelia Harriman, Edwin Dale, Melanie D'Amico, Erin Longchamp, Christopher Hamlin, Anthony Brice, the STATE OF VERMONT, AIG CLAIMS, INC., and LEXINGTON INSURANCE COMPANY, "Releasees," and their current or former employees, officers, directors, agents, volunteers, contractors, adjusters, attorneys, representatives, members, heirs, executors, administrators, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, executions, claims and demands whatsoever, in law or in equity, including any claims for attorney's fees, costs and litigation expenses, as well as any and all liens, which Releasor ever had, now has, or which his/her children, heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against Releasees, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release and particularly including, but without in any manner limiting the foregoing, on account of all issues and claims for relief which were asserted or could have been asserted in a civil action instituted by the undersigned styled *Welch, et al. v. Schatz, et al.*, Civil Action No. 5:21-cv-00283 (D. Vt., Dec. 13, 2021).

Releasor agrees that there are no collateral or outside agreements of any kind between the parties, other than the attached Settlement Term Sheet dated December 14, 2022. It is also understood and agreed that the attached Settlement Term Sheet dated December 14, 2022 is the compromise, accord, and satisfaction of disputed claims, and that this Release and any consideration therefore is not to be construed as an admission of liability,

fault, illegality or wrongdoing on the part of Releasees, by whom liability, fault, illegality and wrongdoing are expressly denied. It is further agreed and understood that this payment and the attached Settlement Term Sheet dated December 14, 2022 are made and executed to terminate further controversy with respect to all claims and injuries that Releasor has asserted or that she/he or his/her representatives can, shall, or may assert, or could have asserted against Releasees arising from any matter, cause, or thing whatsoever up to the date of this Release. It is further agreed and understood that, as a further consideration and inducement for this payment and the attached Settlement Term Sheet dated December 14, 2022, this Release shall apply to all unknown and unanticipated injuries and damages to Releasor, as well as to any unknown and unanticipated claims of Releasor, arising from or related to any act or omission of Releasees occurring on or up to the date of this Release.

To ensure compliance with applicable federal regulations, the Releasor acknowledges that she/he and his/her attorneys have, to the extent required by law, reported this claim to the Centers for Medicare and Medicaid Services. The Releasor acknowledges that, if necessary, Medicaid will be reimbursed out of these settlement proceeds for any and all payments made in the past. Releasor further acknowledges, warrants, and agrees to satisfy all liens, reimbursement rights, subrogation interests or claims, including any automatic liens or obligations created by federal and/or state law, of medical assistance, Medicare, Medicaid, child support, income tax, and of any doctor, hospital, insurance carrier, non-profit hospital and medical service organization, state or governmental agency, attorney or any other person, or firm or corporation, which have been made or may be made in the future against the payments described in the attached Settlement Term Sheet dated December 14, 2022; and the Releasor further agrees to hold harmless, and to defend and indemnify Releasees, their counsel of record in *Welch, et al. v. Schatz, et al.*, No. 5:21-cv-00283 from and against any suits, claims, cross-claims, judgments, costs or expenses of any kind, including attorneys' fees, arising from the assertion of any such liens, reimbursement right, subrogation interest or claim.

Releasor acknowledges that she/he has had ample time to consult with his/her attorneys and others prior to signing this release, is

competent to sign this release, and does so voluntarily and without duress.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 15 day of February ~~2022.~~ 2023

T[redacted] F[redacted]

STATE OF VERMONT
COUNTY OF Chittenden, SS.

On this 15 day of ~~January,~~ February ~~2022~~ 23, before me personally appeared T[redacted] F[redacted] known to be the person described in and who executed the foregoing release, and he/she acknowledged he/she has executed the same as his/her free act and deed

Before me,

Casandra L. Parah
Notary Public

My Commission Expires: 1/31/25

Casandra L. Parah
Notary Public - State of Vermont
Commission No. 0001818
Commission Expires: 1/31/25

GENERAL RELEASE

In accordance with a Settlement Term Sheet dated December 14, 2022, which is attached to this GENERAL RELEASE, D[redacted] H[redacted] ("Releasor"), for and in consideration of the sum of Four Hundred Twenty-Eight Thousand Five Hundred Seventy-One Dollars and Forty-Three Cents ($428,571.43), lawful money of the United States, paid by the STATE OF VERMONT and LEXINGTON INSURANCE COMPANY, the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge, and by these presents does for his/her children, heirs, executors, administrators, successors and assigns remise, release and forever discharge Ken Schatz, Karen Shea, Cindy Walcott, Brenda Gooley, Jay Simons, Aron Steward, Marcus Bunnell, John Dubuc, William Cathcart, Bryan Scrubb, Kevin Hatin, Nicholas Weiner, David Martinez, Carol Ruggles, Tim Piette, Devin Rochon, Amelia Harriman, Edwin Dale, Melanie D'Amico, Erin Longchamp, Christopher Hamlin, Anthony Brice, the STATE OF VERMONT, AIG CLAIMS, INC., and LEXINGTON INSURANCE COMPANY, "Releasees," and their current or former employees, officers, directors, agents, volunteers, contractors, adjusters, attorneys, representatives, members, heirs, executors, administrators, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, executions, claims and demands whatsoever, in law or in equity, including any claims for attorney's fees, costs and litigation expenses, as well as any and all liens, which Releasor ever had, now has, or which his/her children, heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against Releasees, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release and particularly including, but without in any manner limiting the foregoing, on account of all issues and claims for relief which were asserted or could have been asserted in a civil action instituted by the undersigned styled *Welch, et al. v. Schatz, et al.*, Civil Action No. 5:21-cv-00283 (D. Vt., Dec. 13, 2021).

Releasor agrees that there are no collateral or outside agreements of any kind between the parties, other than the attached Settlement Term Sheet dated December 14, 2022. It is also understood and agreed that the attached Settlement Term Sheet dated December 14, 2022 is the compromise, accord, and satisfaction of disputed claims, and that this Release and any consideration therefore is not to be construed as an admission of liability,

fault, illegality or wrongdoing on the part of Releasees, by whom liability, fault, illegality and wrongdoing are expressly denied. It is further agreed and understood that this payment and the attached Settlement Term Sheet dated December 14, 2022 are made and executed to terminate further controversy with respect to all claims and injuries that Releasor has asserted or that she/he or his/her representatives can, shall, or may assert, or could have asserted against Releasees arising from any matter, cause, or thing whatsoever up to the date of this Release. It is further agreed and understood that, as a further consideration and inducement for this payment and the attached Settlement Term Sheet dated December 14, 2022, this Release shall apply to all unknown and unanticipated injuries and damages to Releasor, as well as to any unknown and unanticipated claims of Releasor, arising from or related to any act or omission of Releasees occurring on or up to the date of this Release.

To ensure compliance with applicable federal regulations, the Releasor acknowledges that she/he and his/her attorneys have, to the extent required by law, reported this claim to the Centers for Medicare and Medicaid Services. The Releasor acknowledges that, if necessary, Medicaid will be reimbursed out of these settlement proceeds for any and all payments made in the past. Releasor further acknowledges, warrants, and agrees to satisfy all liens, reimbursement rights, subrogation interests or claims, including any automatic liens or obligations created by federal and/or state law, of medical assistance, Medicare, Medicaid, child support, income tax, and of any doctor, hospital, insurance carrier, non-profit hospital and medical service organization, state or governmental agency, attorney or any other person, or firm or corporation, which have been made or may be made in the future against the payments described in the attached Settlement Term Sheet dated December 14, 2022; and the Releasor further agrees to hold harmless, and to defend and indemnify Releasees, their counsel of record in *Welch, et al. v. Schatz, et al.*, No. 5:21-cv-00283 from and against any suits, claims, cross-claims, judgments, costs or expenses of any kind, including attorneys' fees, arising from the assertion of any such liens, reimbursement right, subrogation interest or claim.

Releasor acknowledges that she/he has had ample time to consult with his/her attorneys and others prior to signing this release, is

competent to sign this release, and does so voluntarily and without duress.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13th day of February 2023.

[redacted]

D[redacted] H[redacted]

STATE OF VERMONT
COUNTY OF Chittenden, SS.

On this 13th day of January, 2022, before me personally appeared D[redacted] H[redacted] known to be the person described in and who executed the foregoing release, and he/she acknowledged he/she has executed the same as his/her free act and deed

Before me,

Casandra L. Parah

Notary Public

My Commission Expires: 1/31/25

Casandra L. Parah
Notary Public - State of Vermont
Commission No. 0001818
Commission Expires: 1/31/25

GENERAL RELEASE

In accordance with a Settlement Term Sheet dated December 14, 2022, which is attached to this GENERAL RELEASE, R[redacted] H[redacted] ("Releasor"), for and in consideration of the sum of Four Hundred Twenty-Eight Thousand Five Hundred Seventy-One Dollars and Forty-Three Cents ($428,571.43), lawful money of the United States, paid by the STATE OF VERMONT and LEXINGTON INSURANCE COMPANY, the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge, and by these presents does for his/her children, heirs, executors, administrators, successors and assigns remise, release and forever discharge Ken Schatz, Karen Shea, Cindy Walcott, Brenda Gooley, Jay Simons, Aron Steward, Marcus Bunnell, John Dubuc, William Cathcart, Bryan Scrubb, Kevin Hatin, Nicholas Weiner, David Martinez, Carol Ruggles, Tim Piette, Devin Rochon, Amelia Harriman, Edwin Dale, Melanie D'Amico, Erin Longchamp, Christopher Hamlin, Anthony Brice, the STATE OF VERMONT, AIG CLAIMS, INC., and LEXINGTON INSURANCE COMPANY, "Releasees," and their current or former employees, officers, directors, agents, volunteers, contractors, adjusters, attorneys, representatives, members, heirs, executors, administrators, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, executions, claims and demands whatsoever, in law or in equity, including any claims for attorney's fees, costs and litigation expenses, as well as any and all liens, which Releasor ever had, now has, or which his/her children, heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against Releasees, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release and particularly including, but without in any manner limiting the foregoing, on account of all issues and claims for relief which were asserted or could have been asserted in a civil action instituted by the undersigned styled *Welch, et al. v. Schatz, et al.*, Civil Action No. 5:21-cv-00283 (D. Vt., Dec. 13, 2021).

Releasor agrees that there are no collateral or outside agreements of any kind between the parties, other than the attached Settlement Term Sheet dated December 14, 2022. It is also understood and agreed that the attached Settlement Term Sheet dated December 14, 2022 is the compromise, accord, and satisfaction of disputed claims, and that this Release and any consideration therefore is not to be construed as an admission of liability,

fault, illegality or wrongdoing on the part of Releasees, by whom liability, fault, illegality and wrongdoing are expressly denied. It is further agreed and understood that this payment and the attached Settlement Term Sheet dated December 14, 2022 are made and executed to terminate further controversy with respect to all claims and injuries that Releasor has asserted or that she/he or his/her representatives can, shall, or may assert, or could have asserted against Releasees arising from any matter, cause, or thing whatsoever up to the date of this Release. It is further agreed and understood that, as a further consideration and inducement for this payment and the attached Settlement Term Sheet dated December 14, 2022, this Release shall apply to all unknown and unanticipated injuries and damages to Releasor, as well as to any unknown and unanticipated claims of Releasor, arising from or related to any act or omission of Releasees occurring on or up to the date of this Release.

To ensure compliance with applicable federal regulations, the Releasor acknowledges that she/he and his/her attorneys have, to the extent required by law, reported this claim to the Centers for Medicare and Medicaid Services. The Releasor acknowledges that, if necessary, Medicaid will be reimbursed out of these settlement proceeds for any and all payments made in the past. Releasor further acknowledges, warrants, and agrees to satisfy all liens, reimbursement rights, subrogation interests or claims, including any automatic liens or obligations created by federal and/or state law, of medical assistance, Medicare, Medicaid, child support, income tax, and of any doctor. hospital, insurance carrier, non-profit hospital and medical service organization, state or governmental agency, attorney or any other person, or firm or corporation, which have been made or may be made in the future against the payments described in the attached Settlement Term Sheet dated December 14, 2022; and the Releasor further agrees to hold harmless, and to defend and indemnify Releasees, their counsel of record in *Welch, et al. v. Schatz, et al.*, No. 5:21-cv-00283 from and against any suits, claims, cross-claims, judgments, costs or expenses of any kind, including attorneys' fees, arising from the assertion of any such liens, reimbursement right, subrogation interest or claim.

Releasor acknowledges that she/he has had ample time to consult with his/her attorneys and others prior to signing this release, is

competent to sign this release, and does so voluntarily and without duress.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13th day of February 2023.

R[redacted] H[redacted]

STATE OF VERMONT
COUNTY OF Chittenden, SS.

On this 13th day of ~~January~~ February, 2022, before me personally appeared R[redacted] H[redacted] known to be the person described in and who executed the foregoing release, and he/she acknowledged he/she has executed the same as his/her free act and deed

Before me,

Casandra L. Parah

Notary Public

My Commission Expires: 1/31/25

Casandra L. Parah
Notary Public - State of Vermont
Commission No. 0001818
Commission Expires: 1/31/25

GENERAL RELEASE

In accordance with a Settlement Term Sheet dated December 14, 2022, which is attached to this GENERAL RELEASE, A[redacted] L[redacted] ("Releasor"), for and in consideration of the sum of ONE MILLION NINE HUNDRED TEWENTY-EIGHT THOUSAND FIVE HUNDRED SEVENTY-ONE DOLLARS AND 34/100 ($1,928,571.43), lawful money of the United States, as further described in Section 2.0 below, paid by the STATE OF VERMONT and LEXINGTON INSURANCE COMPANY, the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge, and by these presents does for his/her children, heirs, executors, administrators, successors and assigns remise, release and forever discharge Ken Schatz, Karen Shea, Cindy Walcott, Brenda Gooley, Jay Simons, Aron Steward, Marcus Bunnell, John Dubuc, William Cathcart, Bryan Scrubb, Kevin Hatin, Nicholas Weiner, David Martinez, Carol Ruggles, Tim Piette, Devin Rochon, Amelia Harriman, Edwin Dale, Melanie D'Amico, Erin Longchamp, Christopher Hamlin, Anthony Brice, the STATE OF VERMONT, AIG CLAIMS, INC., and LEXINGTON INSURANCE COMPANY, "Releasees," and their current or former employees, officers, directors, agents, volunteers, contractors, adjusters, attorneys, representatives, members, heirs, executors, administrators, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, executions, claims and demands whatsoever, in law or in equity, including any claims for attorney's fees, costs and litigation expenses, as well as any and all liens, which Releasor ever had, now has, or which his/her children, heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against Releasees, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release and particularly including, but without in any manner limiting the foregoing, on account of all issues and claims for relief which were asserted or could have been asserted in a civil action instituted by the undersigned styled *Welch, et al. v. Schatz, et al.*, Civil Action No. 5:21-cv-00283 (D. Vt., Dec. 13, 2021).

Releasor agrees that there are no collateral or outside agreements of any kind between the parties, other than the attached Settlement Term Sheet dated December 14, 2022. It is also understood and agreed that the attached Settlement Term Sheet dated December 14, 2022 is the compromise, accord, and satisfaction of disputed claims, and that this Release and any

consideration therefore is not to be construed as an admission of liability, fault, illegality or wrongdoing on the part of Releasees, by whom liability, fault, illegality and wrongdoing are expressly denied. It is further agreed and understood that this payment and the attached Settlement Term Sheet dated December 14, 2022 are made and executed to terminate further controversy with respect to all claims and injuries that Releasor has asserted or that she/he or his/her representatives can, shall, or may assert, or could have asserted against Releasees arising from any matter, cause, or thing whatsoever up to the date of this Release. It is further agreed and understood that, as a further consideration and inducement for this payment and the attached Settlement Term Sheet dated December 14, 2022, this Release shall apply to all unknown and unanticipated injuries and damages to Releasor, as well as to any unknown and unanticipated claims of Releasor, arising from or related to any act or omission of Releasees occurring on or up to the date of this Release.

Agreement

The parties agree as follows:

1.0 **Release and Discharge**

1.1 In consideration of the payments set forth in Section 2, Releasor hereby completely releases and forever discharges Defendant and Insurer from any and all past, present or future claims, demands, obligations, actions, causes of action, wrongful death claims, rights, damages, costs, losses of services, expenses and compensation of any nature whatsoever, whether based on a tort, contract or other theory of recovery, which the Releasor now has, or which may hereafter accrue or otherwise be acquired, on account of, or may in any way grow out of, or which are the subject of the Complaint (and all related pleadings) including, without limitation, any and all known or unknown claims for bodily and personal injuries to Releasor, or any future wrongful death claim of Releasor's representatives or heirs, which have resulted or may result from the alleged acts or omissions of the Defendant.

1.2 This release and discharge shall also apply to Defendant's and Insurer's past, present and future officers, directors, stockholders, attorneys, agents, servants, representatives, employees, subsidiaries, affiliates, partners, predecessors and successors in interest, and assigns and all other persons, firms or corporations with whom any of the former have been, are now, or may hereafter be affiliated.

1.3 This release, on the part of the Releasor, shall be a fully binding and complete settlement among the Releasor, the Defendant and the Insurer, and their

heirs, assigns and successors.

1.4 The Releasor acknowledges and agrees that the release and discharge set forth above is a general release. Releasor expressly waives and assumes the risk of any and all claims for damages which exist as of this date, but of which the Releasor does not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect Releasor's decision to enter into this General Release. The Releasor further agrees that Releasor has accepted payment of the sums specified herein as a complete compromise of matters involving disputed issues of law and fact. Releasor assumes the risk that the facts or law may be other than Releasor believes. It is understood and agreed to by the parties that this settlement is a compromise of a doubtful and disputed claim, and the payments are not to be construed as an admission of liability on the part of the Defendant, by whom liability is expressly denied.

2.0 **Payments**

In consideration of the release set forth above, the Insurer on behalf of the Defendant agrees to pay to the individual(s) named below (the "Payee(s)") the sums outlined in this Section 2 below:

2.1 Payments due at the time of settlement as follows:

Cash up front: $ 103,571.43 payable to A[redacted] L[redacted] and his attorneys.

2.2 Periodic payments payable to **A[redacted] L[redacted]** ("Payee"), made or caused to be made by the Insurer at a cost of **$325,000.00** through the purchase of an annuity policy, according to the schedule as follows (the "Periodic Payments"):

$2,011.15 payable monthly, guaranteed for 20 years, beginning 4/15/2023, with the last guaranteed payment on 03/15/2043.

Periodic payments payable to **Paul D. Jarvis** ("Payee"), made or caused to be made by the Insurer at a cost of **$500,000.00** through the purchase of an annuity policy, according to the schedule as follows (the "Periodic Payments"):

$5,012.27 payable monthly, guaranteed for 10 years, beginning 4/15/2023, with the last guaranteed payment on 03/15/2033.

Periodic payments payable to **Brooks G. McArthur** ("Payee"), made or caused to be made by the Insurer at a cost of **$500,000.00** through the purchase of an annuity policy, according to the schedule as follows (the "Periodic Payments"):

$5,012.27 payable monthly, guaranteed for 10 years, beginning 4/15/2023, with the last guaranteed payment on 03/15/2033.

Periodic payments payable to **David J. Williams** ("Payee"), made or caused to be made by the Insurer at a cost of **$500,000.00** through the purchase of an annuity policy, according to the schedule as follows (the "Periodic Payments"):

$5,012.27 payable monthly, guaranteed for 10 years, beginning 4/15/2023, with the last guaranteed payment on 03/15/2033.

Each attorney and the law firms hereby waive and disclaim any and all ownership interest or liens that they may have in the settlement proceeds by reason of any applicable state statute, common law Decision or ruling. By his signature, the Releasor and each attorney and the law firms, acknowledge that the attorney fee benefit payments are being made at the direction of the Releasor and for the convenience of the Releasor.

The Releasor solely for his convenience directs the above payment streams to be paid to Paul D. Jarvis, Brooks G. McArthur and David J. Williams, respectively. Releasor consents to the above-mentioned portion of the settlement obligation assigned to the assignment company MetLife Assignment Company, Inc. The assignment company will purchase Metropolitan Tower Life Insurance Company annuities to fund this obligation in an assignment intended to meet Section 130 of the IRC.

All sums set forth herein constitute damages on account of personal physical injuries or physical sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.

3.0 Payee's Rights to Payments

Payees acknowledge that the Periodic Payments cannot be accelerated, deferred, increased or decreased by any Payee; nor shall such Payee have the power to sell, mortgage, encumber, or anticipate the Periodic Payments, or any part thereof, by assignment or otherwise.

4.0 Payees' Beneficiary

Any payments to be made after the death of any Payee pursuant to the terms of this General Release shall be made to such person or entity as shall be designated in writing by that Payee to the Insurer or the Insurer's Assignee. If no person or entity is so designated by that Payee, or if the person designated is not living at the time of that Payee's death, such payments shall be made to the estate of that Payee. No such designation, nor any revocations thereof, shall be effective unless it is in writing and delivered to the Insurer or the Insurer's Assignee. The designation must be in a form acceptable to the Insurer or the Insurer's Assignee before such payments are made.

5.0 Consent to Qualified Assignment

5.1 Releasor acknowledges and agrees that the Defendant and/or the Insurer will make "qualified assignments", within the meaning of Section 130(c) of the Internal Revenue Code of 1986, as amended, of the Defendant's and/or the Insurer's liability to make the Periodic Payments set forth in Section 2.2 to MetLife Assignment Company, Inc. ("Assignee"). The Assignee's obligation for payment of the Periodic Payments shall be no greater than that of Defendant and/or the Insurer (whether by judgment or agreement) immediately preceding the assignment of the Periodic Payments obligation.

5.2 Any such assignment, if made, shall be accepted by the Releasor without right of rejections and shall completely release and discharge the Defendant and the Insurer from the Periodic Payments obligation assigned to the Assignee. The Releasor recognizes that, in the event of such an assignment, the Assignee shall be the sole obligor with respect to the Periodic Payments obligation, and that all other releases with respect to the Periodic Payments obligation that pertain to the liability of the Defendant and the Insurer shall thereupon become final, irrevocable and absolute.

6.0 Right to Purchase an Annuity

The Defendant and/or the Insurer, itself or through its Assignee reserve the right to fund the liability to make the Periodic Payments through the purchase of annuity policies from Metropolitan Tower Life Insurance Company ("Annuity Issuer"). The Defendant, the Insurer or the Assignee shall be the sole owner of the annuity policies and shall have all rights of ownership. The Defendant, the Insurer or the Assignee may have the Annuity Issuer mail payments directly to the Payee(s). Payee(s) shall be responsible for maintaining current mailing addresses with the Annuity Issuer.

7.0 Discharge of Obligation

The obligation of the Defendant, the Insurer and/or Assignee to make each Periodic Payment shall be discharged upon the mailing of a valid check or electronic funds transfer in the amount of such payment on or before the due date to the designated address of the Payee(s) named in Section 2.2 of this General Release. If any Payee notifies the Assignee that any check or electronic funds transfer was not received, the Assignee shall direct the Annuity Issuer to initiate a stop payment action and, upon confirmation that such check was not previously negotiated or electronic funds transfer deposited, shall have the Annuity Issuer process a replacement payment.

To ensure compliance with applicable federal regulations, the Releasor acknowledges that she/he and his/her attorneys have, to the extent required by law, reported this claim to the Centers for Medicare and Medicaid Services. The Releasor acknowledges that, if necessary,

Medicaid will be reimbursed out of these settlement proceeds for any and all payments made in the past. Releasor further acknowledges, warrants, and agrees to satisfy all liens, reimbursement rights, subrogation interests or claims, including any automatic liens or obligations created by federal and/or state law, of medical assistance, Medicare, Medicaid, child support, income tax, and of any doctor, hospital, insurance carrier, non-profit hospital and medical service organization, state or governmental agency, attorney or any other person, or firm or corporation, which have been made or may be made in the future against the payments described in the attached Settlement Term Sheet dated December 14, 2022; and the Releasor further agrees to hold harmless, and to defend and indemnify Releasees, their counsel of record in *Welch, et al. v. Schatz, et al.*, No. 5:21-cv-00283 from and against any suits, claims, cross-claims, judgments, costs or expenses of any kind, including attorneys' fees, arising from the assertion of any such liens, reimbursement right, subrogation interest or claim.

Releasor acknowledges that she/he has had ample time to consult with his/her attorneys and others prior to signing this release, is competent to sign this release, and does so voluntarily and without duress.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13 day of February 2023.

[redacted]

STATE OF VERMONT
COUNTY OF Chittenden, SS.

On this 13th day of ~~January~~ February 2023, before me personally appeared [redacted] known to be the person described in and who executed the foregoing release, and he/she acknowledged he/she has executed the same as his/her free act and deed

Before me,

Casandra L. Parah
Notary Public

My Commission Expires: 1/31/25

Casandra L. Parah
Notary Public - State of Vermont
Commission No. 0001818
Commission Expires: 1/31/25

Insurer

LEXINGTON INSURANCE COMPANY

By: _____

Title: Authorized Representative

Date: _____

GENERAL RELEASE

In accordance with a Settlement Term Sheet dated December 14, 2022, which is attached to this GENERAL RELEASE, T[redacted] W[redacted] and her Legal Guardian L[redacted] W[redacted] ("Releasors"), for and in consideration of the sum of Four Hundred Twenty-Eight Thousand Five Hundred Seventy-One Dollars and Forty-Three Cents ($428,571.43), lawful money of the United States, paid by the STATE OF VERMONT and LEXINGTON INSURANCE COMPANY, the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge, and by these presents does for their children, heirs, executors, administrators, successors and assigns remise, release and forever discharge Ken Schatz, Karen Shea, Cindy Walcott, Brenda Gooley, Jay Simons, Aron Steward, Marcus Bunnell, John Dubuc, William Cathcart, Bryan Scrubb, Kevin Hatin, Nicholas Weiner, David Martinez, Carol Ruggles, Tim Piette, Devin Rochon, Amelia Harriman, Edwin Dale, Melanie D'Amico, Erin Longchamp, Christopher Hamlin, Anthony Brice, the STATE OF VERMONT, AIG CLAIMS, INC., and LEXINGTON INSURANCE COMPANY, "Releasees," and their current or former employees, officers, directors, agents, volunteers, contractors, adjusters, attorneys, representatives, members, heirs, executors, administrators, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, damages, judgments, executions, claims and demands whatsoever, in law or in equity, including any claims for attorney's fees, costs and litigation expenses, as well as any and all liens, which Releasors ever had, now have, or which their children, heirs, executors, administrators, successors and assigns hereafter can, shall, or may have against Releasees, upon, or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release and particularly including, but without in any manner limiting the foregoing, on account of all issues and claims for relief which were asserted or could have been asserted in a civil action instituted by the undersigned styled *Welch, et al. v. Schatz, et al.*, Civil Action No. 5:21-cv-00283 (D. Vt., Dec. 13, 2021).

Releasors agree that there are no collateral or outside agreements of any kind between the parties, other than the attached Settlement Term Sheet dated December 14, 2022. It is also understood and agreed that the attached Settlement Term Sheet dated December 14, 2022 is the compromise, accord, and satisfaction of disputed claims, and that this Release and any consideration therefore is not to be construed as an admission of liability,

fault, illegality or wrongdoing on the part of Releasees, by whom liability, fault, illegality and wrongdoing are expressly denied. It is further agreed and understood that this payment and the attached Settlement Term Sheet dated December 14, 2022 are made and executed to terminate further controversy with respect to all claims and injuries that Releasors have asserted or that their representatives can, shall, or may assert, or could have asserted against Releasees arising from any matter, cause, or thing whatsoever up to the date of this Release. It is further agreed and understood that, as a further consideration and inducement for this payment and the attached Settlement Term Sheet dated December 14, 2022, this Release shall apply to all unknown and unanticipated injuries and damages to Releasors, as well as to any unknown and unanticipated claims of Releasors, arising from or related to any act or omission of Releasees occurring on or up to the date of this Release.

To ensure compliance with applicable federal regulations, the Releasors acknowledge that they and their attorneys have, to the extent required by law, reported this claim to the Centers for Medicare and Medicaid Services. The Releasors acknowledge that, if necessary, Medicaid will be reimbursed out of these settlement proceeds for any and all payments made in the past. Releasors further acknowledge, warrant, and agree to satisfy all liens, reimbursement rights, subrogation interests or claims, including any automatic liens or obligations created by federal and/or state law, of medical assistance, Medicare, Medicaid, child support, income tax, and of any doctor, hospital, insurance carrier, non-profit hospital and medical service organization, state or governmental agency, attorney or any other person, or firm or corporation, which have been made or may be made in the future against the payments described in the attached Settlement Term Sheet dated December 14, 2022; and the Releasors further agree to hold harmless, and to defend and indemnify Releasees, and their counsel of record in *Welch, et al. v. Schatz, et al.*, No. 5:21-cv-00283 from and against any suits, claims, cross-claims, judgments, costs or expenses of any kind, including attorneys' fees, arising from the assertion of any such liens, reimbursement right, subrogation interest or claim.

Releasors acknowledge that they have had ample time to consult with their attorneys and others prior to signing this release, are competent to sign this release, and do so voluntarily and without duress.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 21st day of February 2023.

T[redacted] W[redacted]

L[redacted] W[redacted]
Legal Guardian for T[redacted] W[redacted]

STATE OF VERMONT
COUNTY OF Chittenden, SS.

On this 21st day of February, 2023, before me personally appeared T[redacted] W[redacted] and L[redacted] W[redacted] known to be the persons described in and who executed the foregoing release, and they acknowledged they have executed the same as their free act and deed

Before me,

Casandra L. Parah
Notary Public

My Commission Expires: 1/31/25

Casandra L. Parah
Notary Public - State of Vermont
Commission No. 0001818
Commission Expires: 1/31/25