UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Troy D. and O'Neill S.,	:	
	:	Hon. Joseph E. Irenas, U.S.D.J.
Plaintiffs	:	
	:	Civil Action No.
v.	:	1:10-cv-02902-JEI-AMD
	:	
Mickens, et al.,	:	
	:	
Defendants	:	
_____	:	

PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS
AND IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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INTRODUCTION

More than a century ago, the juvenile justice system was established to rehabilitate and protect youth charged with delinquent conduct, while also holding them accountable for their behavior. It is well-settled in case law and statute that the emotional, psychological, and physical vulnerability of youth requires that they be assured proper care, guidance, protection and the opportunity for social reintegration. New Jersey's Juvenile Code specifically promises that the State will "provide for the care, protection and wholesome mental and physical development of juveniles coming within the provisions of this act." N.J.S.A. 2A:4A-21(a).

Plaintiffs Troy and O'Neill were denied these promises. Just fifteen and sixteen years old at the time of their commitment to Defendant Juvenile Justice Commission, their stories depict a juvenile justice system so untethered from its principles that youth in its care suffered grave physical, social and emotional deprivations that breached not only prevailing law but universal notions of human dignity. Defendants confined Troy to a seven-foot-by-seven-foot isolation cell for an incredible 178 days of the 225 days he was committed to the custody of JJC Defendants.[1] He was permitted out of his cell only for showers. The lights in his cell glared 24 hours a day. He was denied education, recreation, proper nutrition and personal possessions. He was allowed no interaction with his peers, or even the touch of a hand. He was refused needed psychiatric counseling even when he pleaded for it. One health care defendant candidly admitted: "of course

[1] Defendants Ackles, Anema, Arbuckle, Buxton, Chell, Farr, Gaeta, Greene, Hendrix, Howard, Lawson, Mickens, Mitten, Morichetti, O'Neill, Pinto, Plousis, Roberts, Saville, Session, Smith, Stellman, Thomas, Wert and "John or Jane Doe #1-16" are referred to collectively as "JJC Defendants" herein. Defendants Carew, Clack, Drew-Lockhart, Fleming, Lally, Randolph and Zupkus are referred to collectively as "Mental Health Defendants" herein. All defendants are collectively referred to as "Defendants." Subgroupings of Defendants, often according to job title or function, are defined in Plaintiffs' Amended Complaint.

I know it's wrong, but my hands are tied by corrections." Worse, his cries for help were often met with physical force or restraints.

O'Neill was repeatedly isolated under similar conditions for a total of over 50 days in 15 months, usually as "prehearing restriction" for minor infractions – including possession of a pen or for cursing, or when he was the victim of physical assaults by other youth. Time and again, facility administrators found little or no justification for his isolation once the hearing was actually held. Yet for each period of isolation, O'Neill likewise was deprived of meaningful access to education, personal possessions and proper clothing, nutrition and medical care, physical recreation, exercise, or peer interaction.

The facts of both boys' isolation are well documented and hardly in dispute. It is also well-settled that isolation harms children. Research confirms that deprivations such as those imposed on Troy and O'Neill only worsen emotional and mental health, block educational progress, and increase the risk of self-harm and suicide. These findings are embedded in national and international standards, which uniformly proscribe the isolation of youth. Indeed, the law would even proscribe such treatment of adults. The United States Supreme Court has held that it violated "concepts of human dignity" and the constitutional rights of inmates with mental health needs to hold them in administrative segregation where they "languished for months or even years without access to necessary care." *Brown v. Plata*, ___ U.S. ___, No. 09-1233, 2011 WL 1936074 at *9 (Sup. Ct. May 23, 2011).

Defendants move to dismiss Plaintiffs' claims, brazenly suggesting that neither Troy nor O'Neill have sufficiently alleged violations of their procedural and substantive due process rights under the Fourteenth Amendment, the New Jersey Civil Rights Act, and other state laws. Defendants further suggest that New Jersey regulations even authorized this inhumane treatment.

Defendants' motions cannot be taken seriously; to the extent they purport to hide behind state regulations, the regulations themselves are constitutionally flawed.

Nor can Defendants validly argue that they are legally shielded from liability. First, Plaintiffs' claims are not barred by the administrative exhaustion requirement of the Prison Litigation Reform Act. The PLRA does not even apply to Troy because he was not a "prisoner" at the time he filed his Complaint. Moreover, corrections officers and mental health staff themselves prevented the boys from exhausting administrative remedies, intimidating Troy and O'Neill, suggesting that any formal grievance would lead to further punishment, and somehow expecting them to file written grievances on the proper forms when they were held in isolation with no pencil, paper, or access to advice. Even in the face of these obstacles, both boys informally sought relief from their intolerable conditions repeatedly, but without success. Defendants' argument that their conduct is immune from liability is also unavailing. Defendants cite to no provision of the New Jersey Tort Claims Act that grants immunity for their negligent acts. Further, Defendants do not dispute that Plaintiffs gave timely notice of their tort claims. That Plaintiffs filed the notice form after they filed this lawsuit does not bar their tort claims under New Jersey law.

Plaintiffs' Amended Complaint sufficiently alleges facts that, if proven, would more than justify the relief they seek. Defendants have not come close to showing that Plaintiffs' claims should be dismissed at this early stage of the lawsuit. Whether through distortion or outright ignorance of the facts and prevailing law, Defendants utterly fail to carry their burden. Defendants' motions should be denied.

STATEMENT OF FACTS

Plaintiff Troy D.

On February 18, 2009, at the age of fifteen, Troy was adjudicated delinquent and committed to the custody of the JJC. Am. Compl. ¶ 75. Troy's juvenile justice system involvement followed a dozen years in the custody of the Division of Youth and Family Services (DYFS), New Jersey's child welfare system. Am. Compl. ¶ 17. Although Troy thrives when given proper supports, Am. Compl. ¶ 21, when deprived of adequate treatment, his mental health deteriorates and he engages in self-harm. *See* Am. Compl. ¶ 113. When Troy arrived at JJC's Juvenile Reception and Assessment Center, JJC and its mental health staff were on notice that Troy was at risk for self-harm and other behavioral health problems. Am. Compl. ¶¶ 18, 19, 80. Despite this, Defendants assigned Troy to the Juvenile Medium Security Facility ("JMSF"). Am. Compl. ¶ 77.

At JMSF, Defendants secluded Troy in isolation, either on "close watch" or "constant watch," for at least 178 days out of 225, Am. Comp. ¶ 82, holding Troy in conditions akin to being locked in a closet. Am. Compl. ¶ 86. Defendants confined Troy to a seven-foot-by-seven-foot cement cell containing only a concrete bed slab, a toilet, a sink, and at times a mattress pad. Am. Compl. ¶ 87. There was one window in the cell, but it was frosted so Troy could not see out. Am. Compl. ¶ 87. The light burned 24 hours a day. Am. Compl. ¶ 87. Troy was allowed out of the cell for hygiene purposes only; his movement was so restricted that he was not permitted to engage in any type of recreation or exercise or even take meals outside his cell. Am. Compl. ¶ 86. He was denied any personal possessions or educational materials, including books and writing implements. Am. Compl. ¶ 86. Although Troy was eligible for special education and had an Individualized Education Plan ("I.E.P."), he received no education whatsoever for the entire

period of his isolation. Am. Compl. ¶ 86. For at least 120 days, Troy was ordered to remove his clothes and wear a Ferguson gown (a bulky, heavy, sleeveless smock). Am. Compl. ¶ 88.

Throughout Troy's commitment to the JJC, individuals charged by Defendants to evaluate Troy recommended individual therapy and other mental health treatment for him. Am. Compl. ¶ 94. Nonetheless, Defendants prevented Troy from receiving treatment. Am. Compl. ¶ 95. For example, although Troy was scheduled to receive court-ordered sex-offense-specific therapy twice a week, he received only six brief sessions in the 225 days he was in custody; the sex-offense therapist was repeatedly prevented from providing treatment due to Troy's isolation or lock-down status. Am. Compl. ¶ 96. Troy received nine other therapy sessions, averaging only 22 minutes each. Am. Compl. ¶ 97. Although Mental Health Defendants assessed Troy's status each day for classification purposes, Am. Compl. ¶ 98, they did not provide any therapeutic counseling, even when Troy directly asked for help. Am. Compl. ¶ 100. Weeks went by without Troy receiving any real therapy even though Mental Health Defendants were well aware of his needs. *See, e.g.* Am. Compl. ¶¶ 80, 105, 107, 113, 147, 154. Instead, Mental Health Defendants continuously recommended that Troy remain in isolation. Am. Compl. ¶¶ 93, 114.

Troy received no procedural due process throughout his 178 days of isolation. He was afforded no notice of why he was continuously isolated, no opportunity to be heard and, until the eleventh hour, no assistance of counsel or any other advocate. Am. Compl. ¶¶ 90, 115. Furthermore, although Troy managed to appeal some disciplinary charges, JJC Defs. Br. 5, the JJC handbooks did not describe how to formally contest a prolonged close or constant watch status. *See* Defs. Ex. F.

As Troy endured day after day alone in a cell without so much as a book to read, he decompensated and demonstrated grave mental health problems. Am. Compl. ¶ 117. He

frequently reported auditory and visual hallucinations to Defendants. Am. Compl. ¶ 104. He repeatedly engaged in self-harm, including cutting, described thoughts of suicide, and on some occasions attempted to take his own life. Am. Compl. ¶ 104. Defendants often observed Troy crying, in a "catatonic state," or engaging in other disturbed behavior, Am. Compl. ¶ 106, but refused to end his isolation, provide treatment, or take other steps to improve his situation. Am. Compl. ¶ 113. When Troy requested crisis counseling, for example, Defendant Carew told him the request "would only justify keeping him on constant watch longer." Am. Compl. ¶ 100. In response to Troy's implicit and explicit cries for help, Defendants extended his isolation or used force against him. Am. Compl. ¶ 113.

Defendants were well aware of the harsh conditions of Troy's confinement and his deteriorating mental health. *See, e.g.* Am. Compl. ¶¶ 80, 105, 107, 113, 147, 154. They also knew it was wrong to subject Troy to prolonged isolation. *See, e.g.* Am. Compl. ¶ 105. Indeed, when asked if she was aware that isolation exacerbates suicidal ideation, Defendant Zupkus stated "of course I know it's wrong, but my hands are tied by corrections." Am. Compl. ¶ 105.

Attorneys from the Rutgers-Camden Children's Justice Clinic ("Rutgers Clinic") eventually became aware of Troy's situation and openly questioned his conditions of confinement. Am. Compl. ¶ 90. In October 2009, the Rutgers Clinic filed a motion for recall and post-dispositional relief for Troy. Am. Compl. ¶ 116. On October 7, 2009, Troy was moved from JMSF to a psychiatric hospital. Am. Compl. ¶ 117. On October 15, 2009, the Superior Court of New Jersey vacated its order committing Troy to JJC custody. Am. Compl. ¶ 118. No longer in custody or sentenced to any facility, Troy next moved to a residential treatment center, the Carrier Clinic, where he resided when he filed the original Complaint in this case. Am. Compl. ¶ 119.

Plaintiff O'Neill S.

On February 27, 2009, at the age of sixteen, O'Neill was adjudicated delinquent and committed to the custody of the JJC. Am. Compl. ¶ 121. Although O'Neill was initially placed in a non-secure home, he fled the campus in fear of assaults from other residents. Am. Compl. ¶¶ 121-123. After being apprehended, he was placed at JMSF, and later at the New Jersey Training School ("NJTS"). Am. Compl. ¶¶ 124-125. Between June 2009 and October 2010, Defendants repeatedly placed O'Neill in isolation for a total of approximately 50 days. Am. Compl. ¶ 126. The majority of these periods of isolation were "pre-hearing room restriction" prompted by disciplinary charges Defendants imposed on O'Neill for minor behavioral infractions, including cursing and for fights in which he was actually the victim. Am. Compl. ¶¶ 127-146, 148-149, 153-154, 160-163, 165-166. "Pre-hearing room restriction" is a JJC practice whereby a youth charged with a disciplinary infraction is held in isolation for a period of time before the JJC affords him an opportunity to be heard, a chance to consult with counsel or even a counsel substitute such as an interested adult, or any other significant procedural due process protections. Am. Compl. ¶ 128. While in JJC custody, Administrator Defendants and JMSF and NJTS Correctional Officer Defendants placed O'Neill in pre-hearing isolation at least fifteen times. Am. Compl. ¶¶ 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 148, 152, 160, 162, 165. O'Neill routinely remained in pre-hearing isolation for multiple days, with the length of time ranging from less than one day to five days. Am. Compl. ¶¶ 127-146, 148-149, 150, 153-154, 160-163, 165-166. In several instances, the time O'Neill spent in pre-hearing isolation exceeded the total sanction ultimately recommended for his disciplinary violation. Am. Compl. ¶¶ 127-132, 148-149, 152-153, 160-161.

O'Neill also spent seven days in isolation after his jaw was broken when another youth assaulted him and JMSF medical personnel recommended that he be placed on "medical restrictive status." Am. Compl. ¶¶ 150-151. Instead of housing O'Neill in an infirmary, medical unit or other less restrictive environment, Defendants placed O'Neill in a small locked isolation cell. Am. Compl. ¶¶ 150-151. Although O'Neill was repeatedly assaulted by other residents, Defendants did not take steps to protect him from harm, but rather imposed disciplinary charges and held him in isolation. Am. Compl. ¶ 173.

The conditions of O'Neill's isolation mirrored Troy's. Am. Compl. ¶ 170. He was confined in a seven-foot-by-seven-foot cement cell and unable to leave for any reason other than to shower. Am. Compl. ¶ 170. He was required to eat every meal in the isolation cell and denied opportunities to engage in exercise or recreation outside of the cell. Am. Compl. ¶ 170. He was denied all personal possessions, including educational materials, with the exception of a book he requested a few times while in isolation at JMSF. Am. Compl. ¶ 170. Although O'Neill was eligible for special education and had an I.E.P., he received no education while in isolation. Am. Compl. ¶¶ 26, 170. Additionally, he was denied the programming and activities to which the general population at JMSF or NJTS had access, including career services, library time, and vocational training. Am. Compl. ¶ 170. While in isolation, O'Neill received nothing more than occasional and routine status checks by mental health clinicians; he received no therapy. Am. Compl. ¶ 171.

O'Neill was able to appeal the disciplinary charges against him on six occasions. JJC Defs. Br. 6 (citing Defs. Ex. E). At all other times, O'Neill was not able to file a formal grievance because there were no avenues available to him or his attempts to grieve were impeded by JJC staff. Am. Compl. ¶ 175. Specifically, O'Neill was threatened that appealing his sanction

would only result in his isolation being extended. Am. Compl. ¶ 175. Moreover, since the relevant JJC handbooks do not specify that the prescribed appeals or grievance methods are the only means by which juveniles may voice their complaints, s*ee generally* Defs. Ex. F., O'Neill attempted to make his complaints known through the methods available to him. *See* Am. Compl. ¶ 175. In vain, he asked the guards for services such as counseling. Am. Compl. ¶ 154.

On March 5, 2010, the Rutgers Clinic intervened on O'Neill's behalf by sending a letter to Defendant Thomas complaining that JMSF employees were using isolation excessively and inappropriately against O'Neill. Although the JJC's highest officer, Defendant Lawson, responded that she would look into the matter, the JJC has not changed its isolation policies or practices. Am. Compl. ¶ 147. In a subsequent response by Defendant Mickens on August 2, 2010, Mickens admitted that there was no record that mental health personnel visited O'Neill while he was in isolation. Am. Compl. ¶ 154. On May 4, 2010, the Rutgers Clinic also filed a motion asking the court to conduct a recall hearing and re-evaluate O'Neill's conditions of confinement. Am. Compl. ¶ 176. The judge found it had no jurisdiction to consider allegations against the JJC. Am. Compl. ¶ 176.

Prior to the involvement of the Rutgers Clinic, O'Neill had no access to any post-dispositional advocate. Am. Compl. ¶ 178. Even after the Rutgers Clinic became involved, O'Neill, like all New Jersey youth, was not permitted to have an attorney present at his parole hearings. Am. Compl. ¶ 179. Only after intervention by the Rutgers Clinic did O'Neill's conditions of confinement improve. Am. Compl. ¶ 151.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court must "'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (internal citation omitted). The notice pleading standard of Federal Rule of Civil Procedure 8(a)(2) does not require "detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). It requires only that a plaintiff plead sufficient facts to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

A court may not dismiss a complaint merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 556). The pleading standard requires only that the complaint "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 570).

Rule 12(d) directs that if a 12(b)(6) motion presents matters outside the pleadings, and the court chooses in its discretion to consider the extraneous materials, the motion must be converted to one for summary judgment under Rule 56.[2] The court must then provide notice and

[2] However, documents integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss into one for summary judgment. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, (3d Cir. 1997). In deciding motions to dismiss, a court may consider the allegations in the complaint, exhibits attached to the complaint, matters of public record, and other documents that form the basis of a claim. *Lum v. Bank of Am.*, 361 F.3d 217, 221 n.3 (3d Cir. 2004).

an opportunity to oppose the motion. *See Hancock Indus. v. Schaeffer,* 811 F.2d 225, 229 (3d Cir.1987).[3]

II. DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE PLRA MUST FAIL.

A. Troy Sufficiently Alleges That He Was Not A "Prisoner" At The Time Of Filing.

Because Troy was not a "prisoner" under the Prison Litigation Reform Act ("PLRA") when he filed suit, the PRLA's exhaustion requirement does not apply to him and he is free to seek relief in federal court.

The PLRA's exhaustion requirement only applies to "prisoners," *see* 42 U.S.C. § 1997e(a). "Prisoners" are defined as any persons "incarcerated or detained in any facility who [are] accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." § 1997e(h). Courts must consider only whether the plaintiff was a prisoner at the time the complaint was filed. *Cobb v. Weyandt,* No. 09-2763, 2009 U.S. App. LEXIS 28667, at *3 (3d Cir. Dec. 30, 2009) (citing *Abdul-Akbar v. McKelvie,* 239 F.3d 307, 314 (3d Cir. 2001) (en banc)); JJC Defs. Br. 12.

Troy pleads facts that, viewed in the light most favorable to him, establish that he was not a "prisoner" at the time of filing. JJC Defendants mistakenly claim that Troy was in the custody of the Carrier Clinic pursuant to a delinquency adjudication. JJC Defs. Br. 13. Troy explicitly alleges that the Superior Court of New Jersey vacated the order committing Troy to JJC custody

[3] Summary judgment is proper only if, when viewed in the light most favorable to the Plaintiffs, there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 580 (3d Cir. 2003). A factual dispute is material if it bears on an essential element of the Plaintiffs' claims, and is genuine if a reasonable jury could find in favor of the Plaintiffs. *See Natale*, 318 F.3d at 580. The court must resolve all factual doubts and draw all reasonable inferences in favor of the Plaintiff as nonmoving party. *Hugh v. Butler Cnty. Family YMCA*, 418 F.3d 265, 267 (3d Cir. 2005).

prior to his stay at Carrier, thus removing him from JJC custody. Compl. ¶¶ 109, 111. Despite their bald assertion otherwise, Defendants present no evidence to the contrary.

B. Plaintiffs Sufficiently Allege That Administrative Remedies Were Not Available To Them.

The PLRA only requires prisoners to exhaust the administrative remedies that are "available." § 1997e(a); *See also Camp v. Brennan*, 219 F.3d 279, 281 (3d Cir. 2002). Remedies are not "available" to prisoners under the PLRA when prison officials somehow prevent the inmate from making use of the grievance system. *See, e.g. Brown v. Croak*, 312 F.3d 109, 112-13 (3d Cir. 2002) (finding remedies unavailable because prison officials told plaintiff he had to wait until resolution of a pre-grievance investigation before filing a grievance, and then never informed plaintiff that the proceeding had been completed). In particular, threats by prison officials can make administrative remedies unavailable to inmates. *See e.g. Hemphill v. N.Y.*, 380 F.3d 680, 683-684 (2d Cir. 2004) (remand to the district court to determine whether remedies were "available" where the plaintiff alleged that after guards assaulted him, they told him "if [you] want to write this up you do it from SHU [Special Housing Unit].").

Troy and O'Neill sufficiently allege that Defendants' threats and other egregious conduct rendered any administrative grievance procedures unavailable. Defendants consistently denied Plaintiffs' repeated requests to be released from isolation, and to receive counseling and other services. Am. Compl. ¶ 3. Defendants intimidated Plaintiffs, locked them in concrete cells, took away their pens and books (including Handbooks that purportedly explained JJC grievance procedures), and often would not allow them to talk to anyone including their attorneys or counselors. Am. Compl. ¶¶ 1, 3, 87, 100, 113, 115, 150, 154, 170, 175, 178. As in *Hemphill*, Defendants threatened Plaintiffs that complaining would only make things worse for them. *See, e.g.* 380 F.3d at 383; Am. Compl. ¶ 3. While such intimidating tactics are substantial obstacles

for adult prisoners, they are insurmountable for juveniles like Troy and O'Neill. Unbelievably, Defendants now have the audacity to argue that Plaintiffs cannot voice their grievances to the only forum still available to them – this Court – because they failed to strictly follow the JJC facilities' grievance procedures. Defendants' arguments fail because the alleged facts demonstrate that administrative remedies were not sufficiently available to Plaintiffs.

C. Plaintiffs Sufficiently Allege That They Substantially Complied With JJC Administrative Grievance Procedures Prior To Filing Suit.

Even if this Court finds that the PLRA applies to Plaintiffs and that remedies were "available," it should conclude that the PLRA does not bar Plaintiffs' claims.[4] Plaintiffs persistently expressed their complaints through various channels both within and outside formal JJC grievance procedures; this court should deem their actions sufficient, especially in light of their status as juveniles.

The Third Circuit has found that "compliance with the administrative remedy scheme will be satisfactory if it is substantial." *Spruill v. Gillis*, 372 F.3d 218, 232 (3d Cir. 2004). Additionally, under the PLRA, administrative remedies may sometimes be exhausted through informal means.[5] *See, e.g. Ortiz v. McBride*, 323 F.3d 191, 194 (2d Cir. 2003); *Lewis v. Gagne*, 281 F. Supp. 2d 429, 435 (N.D.N.Y. 2003). The JJC Handbooks cited by Defendants, JJC Defs. Br. 13-14 (citing Defs. Ex. F), do not specify that the prescribed grievance procedures are the only mechanism for juveniles in JJC custody to register their complaints. *See* Defs. Ex. F. As noted above, Plaintiffs

[4] If this Court finds Plaintiffs exhausted some, but not all claims, the Court should permit the exhausted claims to go forward. *Jones v. Bock*, 549 U.S. 199, 201 (2007).

[5] The United States Supreme Court recently emphasized the importance of flexibility in a different aspect of the PLRA in *Brown v. Plata*, "[t]he PLRA should not be interpreted to place undue restrictions on the authority of federal courts to fashion practical remedies when confronted with complex and intractable constitutional violations." ___ U.S. ___, No. 09-1233, 2011 WL 1936074 at *20 (May 23, 2011).

were in any case stripped of all possessions including books and other materials while in isolation. Am. Compl. ¶¶ 1, 86, 170. Further, JJC Defendants would require Plaintiffs to follow a grievance procedure set forth elsewhere, in N.J.A.C. 13:95-8.5(a), to request a change in status or classification (which includes assignment to housing, education, treatment, work and other programs). JJC Defs. Br. 14; N.J.A.C. 13:95-8.5(a). The regulation cited by Defendants is not even in the JJC Handbooks, however, nor do the Handbooks reference or explain this procedure for challenging their status or classification. See Defs. Ex. F; N.J.A.C. 13:95-8.5(a). It is simply unrealistic to expect Plaintiffs or other juveniles to comply with a grievance procedure of which they were completely unaware.

Troy and O'Neill used a variety of means to complain about their treatment and conditions of confinement. Defendants themselves represent that in some instances both Troy and O'Neill appealed their disciplinary sanctions. JJC Defs. Br. 5-6 (citing Defs. Exs. B, E). Additionally, Troy continually requested that he be released from isolation and provided counseling and other services. Am. Compl. ¶¶ 3, 100, 101. O'Neill also repeatedly sought help. Am. Compl. ¶¶ 3, 154. Additionally, O'Neill's counsel complained by letter to Defendant Thomas, Superintendent of JMSF, regarding O'Neill's isolation--a letter answered by Defendant Lawson--and later transmitted a letter to Defendant Mickens, Operations Director, on O'Neill's behalf. Am. Compl. ¶ 154. Although Plaintiffs did not always follow a formal grievance process, they used all available methods to grieve their conditions of confinement. Furthermore, because Defendants Lawson, Thomas and Mickens were in the highest positions in the JJC and JMSF, respectively, O'Neill's complaint was considered by the final JJC authority and the Court should find Defendants' waived their exhaustion defense. *Camp*, 219 F.3d at 281.

Finally, plaintiffs' juvenile status dictates a more forgiving standard with respect to the PLRA's exhaustion requirement. Holding juveniles to the same strict degree of compliance as adult prisoners ignores the obvious developmental differences between these two populations. Not only has the Supreme Court recognized that juveniles merit greater protection than adults because psychological and neurological development lags during adolescence, *see* Part III(A) below, but juveniles may also have trouble complying with complicated multi-level institutional grievance policies due to their lower literacy levels.[6] This is particularly true for juveniles like Troy and O'Neill, whose diminished capabilities associated with their juvenile status are further compromised by their educational disabilities.

Thus, under the PLRA, Plaintiffs' "status as a juvenile inmate" has been found to be "an integral element to its exhaustion analysis," *J.P. v. Taft*, 439 F. Supp. 2d 793, 825-826 (S.D. Ohio 2006), and their young age and lack of experience entitle them to greater protection by and from the state than adult prisoners, including "special attention and assistance" from the facility. *Id.* When Troy and O'Neill gave Defendants fair notice of their complaints, they sufficiently complied with the PLRA exhaustion requirement even without satisfying the institution's formal grievance policies. *See id.* at 826-27; s*ee also Lewis*, 281 F. Supp. 2d at 431-435 (finding that juvenile exhausted under PRLA, even though he did not complete facility's three-tier appellate grievance process, when he filled out one grievance form and complained to several employees, and juvenile's mother notified officials both inside and outside the facility).

For all these reasons, this Court should deny Defendants' motions to dismiss the Fourth, Fifth, Ninth, Tenth, Eleventh and Twelfth Counts of Plaintiffs' Amended Complaint.

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[6] Human Rights Watch, No Equal Justice: The Prison Litigation Reform Act in the United States, 29-34 (2009), *available at* http://www.hrw.org/en/reports/2009/06/15/no-equal-justice.

III. DEFENDANTS' INHUMANE TREATMENT AND EXCESSIVE ISOLATION OF PLAINTIFFS ARE ACTIONABLE UNDER § 1983.

A. Plaintiffs State Claims Under The Fourteenth Amendment For Violations Of Their Substantive Due Process Rights.

Defendants fail entirely to respond to Plaintiffs' Fourteenth Amendment claims and incorrectly apply an Eighth Amendment analysis to argue for dismissal of Plaintiffs' suit. However, claims regarding juvenile conditions are properly considered under the Fourteenth Amendment's Due Process clause.

Under § 1983, the court must first "identify the exact contours of the underlying right said to have been violated" in order to determine whether Plaintiffs have properly alleged a deprivation. *See Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 581 (3d Cir. 2003). Troy and O'Neill both had a liberty interest in their personal security and well-being, *A.M. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 579 (3d Cir. 2004) (citing *Youngberg v. Romeo*, 457 U.S. 307, 315-19 (1982)), as well as the right to reasonably safe conditions of confinement. *Youngberg*, 457 U.S. at 324. They properly allege claims against JJC Defendants for excessive and arbitrary isolation in intolerable conditions of confinement, and for Defendants' profound failure to protect Troy and O'Neill from harm. Troy additionally alleges that Defendants violated his right to adequate medical treatment, including therapeutic mental health care.[7]

[7] Without any argument or explanation, Mental Health Defendants claim that the Eleventh Amendment insulates them and co-defendants from this suit. MH Defs. Br. 19. This assertion is entirely without merit. Plaintiffs seek prospective declaratory and injunctive relief against state officers Veleria Lawson and James Plousis, in their official capacities, to prevent an ongoing violation of federal law. Am. Compl. ¶¶ 266-269, 300-302, 307-313, Prayer for Relief (F)-(G). The Supreme Court has long held that seeking such relief against state officers in their official capacity to prevent an ongoing violation of federal law does not offend sovereign immunity. *Ex Parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Pa. Fed'n. of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323-24 (3d Cir. 2002). Plaintiffs sued all other Defendants in their individual capacities only. Am. Compl. ¶¶ 256-265, 270-299, 314-317, Prayer for Relief (A)-(C), (H). It is well established that state officials can be sued in their

Finally, Plaintiffs present a facial challenge to the New Jersey regulation, N.J.A.C. 13:101-6.17(e), which permits JJC to hold a youth in isolation indefinitely.

1. This Court should apply an objective Fourteenth Amendment deliberate indifference standard to Plaintiffs' claims.

a. Plaintiffs' claims are governed by the Fourteenth Amendment.

Plaintiffs plead that Defendants violated their rights to substantive due process under the Fourteenth Amendment – the appropriate standard for juvenile conditions cases. Defendants entirely fail to respond to this claim, and instead incorrectly argue that the Eighth Amendment applies to juvenile cases. The Eighth Amendment applies in *adult* prison conditions cases, where the challenged conditions or conduct are deemed constitutional unless prison officials were subjectively deliberately indifferent to the prisoner's needs. *Farmer v. Brennan*, 511 U.S. 825, 827 (1994). By contrast, a less deferential Fourteenth Amendment standard applies in situations in which punishment is not the primary goal. *See, e.g. Youngberg*, 457 U.S. at 314-25. For example, individuals confined for treatment purposes, such as those involuntarily confined to mental health facilities, "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Id.* at 322. Similarly, for adults in pre-trial detention not yet convicted of a crime, challenged conditions are unconstitutional under the Fourteenth Amendment if they amount to punishment. *Bell v. Wolfish*, 441 U.S. 520 (1979). And in *A.M.*, 372 F.3d 572, the Third Circuit applied the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment in analyzing a thirteen year-old boy's claims that a juvenile facility failed to provide adequate physical and mental health

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individual capacities without violating the Eleventh Amendment, even when the conduct at issue is a part of the individuals' official duties. *Hafer v. Melo*, 502 U.S. 21, 26, 30-31 (1991).

treatment and to protect him from harm from other residents, specifically noting that *A.M.* was a juvenile detainee and not a convicted prisoner. 372 F.3d at 575-76, 584.

Other courts have similarly applied the Fourteenth Amendment in juvenile conditions cases. *E.g., A.J. by L.B. v. Kierst*, 56 F.3d 849 (8th Cir. 1995); *Gary H. v. Hegstrom*, 831 F. 2d 1430, 1431-1432 (9th Cir. 1987); *H.C. v. Jarrard.*, 786 F.2d 1080, 1084-85 (11th Cir. 1986); *Alexander v. Boyd*, 876 F. Supp. 773, 795-96 (D.S.C. 1995). These cases underscore the legally relevant distinctions between the adult correctional system and the juvenile justice system. S*ee, e.g. Alexander*, 876 F. Supp. at 779 n.8 (Due Process Clause, not Eighth Amendment, applies because "the facilities at issue are training schools for juveniles who have not been convicted of a crime, but rather have been adjudicated to be juvenile delinquents"); *A.J.*, 56 F.3d at 854 (applying the Fourteenth Amendment in part because the juvenile system is "rehabilitative, not penal, in nature.").

While the United States Supreme Court has not directly addressed the appropriate Constitutional standard to apply in juvenile conditions cases, *Ingraham v. Wright,* 430 U.S. 651, 669 n. 37 (1977), support for application of the Fourteenth Amendment readily emerges from the Court's other juvenile jurisprudence, including its most recent decisions, *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida,* __U.S.__, 130 S.Ct. 2011 (2010). Both *Roper*, which abolished the juvenile death penalty, and *Graham,* which abolished life without parole sentences for juveniles convicted of nonhomicide cases, relied on an emerging body of research about the distinct psychological and neurological attributes of youth to conclude that juveniles must be treated differently than adults under the Constitution. In *Roper,* the Court emphasized three distinct characteristics of juveniles: "[a] lack of maturity and underdeveloped sense of responsibility," a vulnerability or susceptibility to outside pressures, and a transitory, less fixed,

personality trait. 543 U.S. at 569-70. As a result, juveniles could not be subjected to the harshest penalty. The Court concluded that, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570. In *Graham,* the Court reiterated that the unique characteristics of juveniles required a distinct and protective treatment under the Constitution. 130 S.Ct. 2011. The Court noted that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id*. at 2026.[8]

Because of its rehabilitative nature, challenges to various aspects of the juvenile justice system warrant a different Constitutional analysis than challenges by adult inmates. Thus, in *In re Gault,* the Court applied the Fourteenth, rather than the Sixth Amendment to hold that juveniles have a right to counsel. 387 U.S. 1, 36 (1967) (observing that juveniles have more need than adults for "the guiding hand of counsel.") In *McKeiver v. Pennsylvania,* the Court underscored that the Fourteenth rather than the Sixth Amendment governed the functioning of juvenile court. 403 U.S. 528, 543 (1976) (holding that juveniles are not entitled to trial by jury). Failing to distinguish between juvenile and adult court, the Supreme Court explained, "chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." *Id.* at 550. In *Schall v. Martin,* the Supreme Court applied the Fourteenth Amendment to a challenge to juvenile pre-trial detention

[8] In *Roper* and *Graham,* unlike here, the controlling law was the Eighth Amendment because Defendants were tried as adults, and not subject to the juvenile system. Even then, the Court readily adopted a less rigorous application of Eighth Amendment case law to juveniles because of their developmental status.

practices, emphasizing the importance of the State's "parens patriae interest in preserving and promoting the welfare of the child." 467 U.S. 253, 263 (1984). [9]

The New Jersey juvenile system's focus on rehabilitation and competency development likewise supports application of the Fourteenth Amendment Due Process analysis here. The New Jersey Code of Juvenile Justice obligates the State "to provide for the care, protection, and wholesome mental and physical development" of adjudicated youths, N.J.S.A. 2a:4a-21(a),[10] and

[9] In fact, Defendants' brief is internally inconsistent. They require Plaintiffs to satisfy an adult Eighth Amendment standard to prove a violation of the conditions of confinement, but then call for a separate juvenile standard as a justification for imposing additional isolation. *See* JJC Defs. Br. 19, 29-30. JJC Defendants also rely on other cases applying the Fourteenth Amendment. *See* JJC Defs. Br. 31, 37. This creates for youth the "worst of both worlds: … he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Kent v. U.S.*, 383 U.S. 541, 556 (1996).

[10] The relevant statutory language reads in its entirety: N.J.S.A. 2A:4A-21. This act shall be construed so as to effectuate the following purposes:

a. To preserve the unity of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of juveniles coming within the provisions of this act;

b. Consistent with the protection of the public interest, to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public;

c. To separate juveniles from the family environment only when necessary for their health, safety or welfare or in the interests of public safety;

d. To secure for each child coming under the jurisdiction of the court such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the State; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents;

e. To insure that children under the jurisdiction of the court are wards of the State, subject to the discipline and entitled to the protection of the State, which may intervene to safeguard them from neglect or injury and to enforce the legal obligations due to them and from them; and

f. Consistent with the protection of the public interest, to insure that any services and sanctions for juveniles provide balanced attention to the protection of the community, the imposition of accountability for offenses committed, fostering interaction and dialogue between the offender,

the New Jersey Supreme Court has noted that "rehabilitation traditionally has been regarded as the overarching objective of statutory schemes addressing juvenile delinquency….and… remains a primary goal of the Juvenile Code." *State ex rel. J.L.A.*, 136 N.J. 370, 377-78 (1994). Although punishment has been recognized as an additional goal of the system, it has not replaced rehabilitation. *State ex rel. J.D.H.*, 171 N.J. 475, 483 (2002) ("Rehabilitation of juvenile offenders is a critical goal of our juvenile justice system").

Defendants cite only *Betts v. New Castle Youth Development Center*, 621 F.3d 249 (3d Cir. 2010) to support their misguided contention that Plaintiffs' claims should be analyzed under the Eighth Amendment. JJC Defs. Br. 28-30. *Betts* is inapplicable. In *Betts*, the plaintiff asserted that the same conduct violated both the Eighth and Fourteenth Amendments. *Id.* at 260. When faced with the distinct question of how to analyze the Eighth and Fourteenth Amendment claims together, the *Betts* court concluded that the Eighth Amendment applied because it provided the "more specific provision" of the two. *Id.* The *Betts* analysis is wholly dependent on a claimant raising both issues.[11] Here, Plaintiffs assert only that their Fourteenth Amendment Substantive Due Process Rights were violated – so the *Betts* reasoning regarding the more specific provision does not come into play.[12] Moreover, in *Betts*, the court never considered

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victim and community and the development of competencies to enable children to become responsible and productive members of the community.

[11] Should this Court find that the Eighth Amendment is the proper standard, Plaintiffs request leave to amend the Complaint to substitute Eighth Amendment claims and brief the manner in which the Eighth Amendment applies differently to juveniles than adults.

[12] Two other Third Circuit cases have addressed juvenile conditions. *See Beers-Capitol v. Whetzel*, 256 F.3d 120 (3d Cir. 2001); *Nami v. Fauver*, 82 F.3d 63 (3d Cir. 1996). In *Beers-Capitol*, the Third Circuit was careful to note that plaintiffs did not press their original Fourteenth Amendment claims on appeal. 256 F.3d at 130 n. 5. In *Nami*, the court never contemplated whether the Fourteenth Amendment would be a more appropriate standard. *See generally* 82 F.3d 63.

whether juveniles are entitled to a distinctive treatment under the Constitution. Rather, the court simply referenced the plaintiff's claim that he was deprived of a liberty interest.[13] *Betts*, 621 F.3d at 259-60.

b. In juvenile cases under the Fourteenth Amendment, deliberate indifference is an objective standard.

Government action violates substantive due process when it is so egregious that it "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Conduct amounting to "deliberate indifference" is sufficient to "shock the conscience" where the persons responsible for a juvenile during his detention had time to deliberate concerning his welfare. *See A.M.*, 372 F.3d at 579 (holding "the custodial setting of a juvenile detention center presents a situation where 'forethought about [a resident's] welfare is not only feasible but obligatory.'"(citing *Lewis*, 523 U.S. at 851)). The Third Circuit has acknowledged that the deliberate indifference standard might be different under the Fourteenth Amendment than the Eighth,[14] requiring "an official's failure to act in light of a risk of which the official *should have known*, as opposed to failure to act in light of an actually known risk." *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 427-28 (3d Cir. 2006) (emphasis added). This objective deliberate

[13] Furthermore, *Betts* involved a single tragic accident that occurred when a plaintiff was injured during a football game in which he voluntarily participated while housed at a juvenile correctional facility. *See Betts v. New Castle Youth Dev. Ctr.*, 621 F.3d 249, 252-53 (3d Cir. 2010). While *Betts* happened to be confined in a juvenile correctional facility at the time of his death, his claim can hardly be equated with other juvenile challenges to their ongoing conditions of confinement in juvenile facilities under the Fourteenth Amendment.

[14] In the Eighth Amendment context, "deliberate indifference" is a subjective test, essentially equivalent to the criminal law concept of recklessness. *Kaucher v. County of Bucks*, 455 F.3d 418, 427 (3d Cir. 2006) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) ("[A]cting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk."). An objective standard would place the concept closer to negligence. *Id.* (citing *Farmer*, 511 U.S. at 836).

indifference test is also breached when "a person consciously disregard[s] a 'substantial risk of serious harm.'" *Id*. (*citing Zicardi v. City of Philadelphia*, 288 F.3d 57, 66 (3d Cir. 2002). Several other Circuits have adopted this test, finding defendants deliberately indifferent under the Fourteenth Amendment when they disregard an obvious risk of harm. *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir.2006); *Board v. Farnham*, 394 F.3d 469, 478 (7th Cir. 2005); *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1281 (10th Cir. 2003).

Troy and O'Neill are juveniles adjudicated delinquent, not adult prisoners. This Court should therefore apply an objective Fourteenth Amendment deliberate indifference standard to their claims.

2. Plaintiffs sufficiently allege that defendants violated their substantive Due Process rights by ordering excessive isolation under intolerable conditions.

Defendants completely fail to address Plaintiffs' claims that Defendants held them in excessive isolation in disregard of the well-recognized risk of harm. Am. Compl. ¶¶ 232-247. Instead, they falsely characterize Plaintiffs' Complaint as asserting a constitutional violation based merely on the physical characteristics of Plaintiffs' cells, Plaintiffs' physical discomfort or inadequate nutrition, JJC Defs. Br. 30-34; *JJC Defendants do not even mention O'Neill's conditions of confinement claims in their motion.* JJC Defs. Br. 30-33. The Court should treat Defendants' failure to respond to Plaintiffs' substantive due process claims for excessive isolation as a waiver. Even if this Court reaches Defendants' motions as to these claims, the motion must be denied because Plaintiffs state a claim, and plead sufficient facts supporting their claim that Defendants violated their substantive due process rights through excessive and arbitrary isolation.

Excessive isolation or solitary confinement of juveniles violates their Constitutional rights. *See Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (citing *Youngberg* and

finding use of isolation rooms violates juveniles' Due Process of Fourteenth Amendment); *Pena v. N.Y. Div. for Youth*, 419 F.Supp. 203, 210-11 (S.D.N.Y. 1976) (finding boys' placement in isolation for punitive reasons violates due process where there was no treatment and infrequent assessment for release); *Inmates v. Affleck*, 346 F. Supp. 1354, 1372 (D.R.I. 1972) (noting that "[t]his court is convinced that solitary confinement [for juveniles] may be psychologically damaging, anti-rehabilitative, and at times, inhumane" such that they violate Due Process). Experts overwhelmingly condemn isolation as harmful to youth, and the practice is particularly damaging to youth with mental health needs. Am. Compl. ¶¶ 232-247. Isolating a juvenile detainee for months on end in response to his suicide attempts contravenes standards of practice as it will exacerbate the juvenile's underlying conditions. *See Affleck*, 346 F. Supp. at 1367, 1369.

Moreover, any arguments that Troy and O'Neill were held in extended isolation for safety reasons or to promote institutional order must fail because that position is "such a substantial departure from accepted professional judgment, practice or standards."[15] *See Youngberg*, 457 U.S. at 323. Deference to facility officials and administrators is not appropriate when "the officials have exaggerated their response to [the safety and security] considerations." *Bell*, 441 U.S. at 540 n.23; *accord Small v. Owens*, No. 06-1363, 2006 U.S. Dist. LEXIS 60876 at *16 (D.N.J. Aug. 10, 2006) (grossly exaggerated responses to genuine security considerations do not qualify as legitimate non-punitive government objectives). The amount of deference accorded facility administrators is diminished in cases involving juveniles. *See, e.g., Santana v. Collazo*, 714 F.2d 1172, 1179 (1st Cir. 1983) (declining to defer to prison administrators' claimed rationale of institutional order and safety in the context of juvenile conditions claims and

[15]As noted above, Defendants never actually make these arguments because they completely fail to address Plaintiffs' isolation claims. However, they reference these rationales in other sections of their brief relating to other constitutional claims. *See* JJC Defs. Br. 35; MH Defs. Br. 16-17.

finding that juveniles' claims require "closer scrutiny of conditions of confinement than that accorded adult criminals"). Defendants repeatedly isolated Troy and O'Neill for extended periods, depriving them of therapeutic services, education, recreation and exercise, interaction with peers, adequate clothing and bedding, or even access to their own possessions. Moreover, Plaintiffs - juveniles without the capacity to voice their plight and advocate for themselves - were not even permitted access to legal counsel to advocate on their behalf. Am. Compl. ¶¶ 115, 178. Plaintiffs plead sufficient facts to show that Defendants' isolation orders were such a "substantial departure from accepted professional judgment" that the decision cannot reasonably be justified. *Youngberg*, 457 U.S. at 321-23; *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1155 (D. Haw. 2006).

With respect to Troy, Defendants knew or should have known the harm they would inflict on Troy by isolating him, particularly given Troy's fragile mental health and his desperate need for therapeutic services. Defendants, responsible for Troy's mental health care, *documented* Troy's serious mental health needs, lack of treatment services, self-harming behaviors and overall deterioration while in isolation and yet, inexplicably, responded by repeatedly *extending* his isolation in response and barred his participation in any treatment services or education. Am. Compl. ¶¶ 63, 79, 80, 92, 95-97, 102, 108, 113-114. Under no constitutional analysis can Defendants' isolation of Troy for 178 days be considered protective or therapeutic; it is instead glaring evidence of Defendants' deliberate indifference to Troy's well-being.

Defendants also were deliberately indifferent to the substantial risk of serious harm that repeated isolation caused O'Neill. Am. Compl. ¶¶ 126, 173. Defendants had knowledge of, witnessed, and participated in ordering O'Neill to be placed in isolation on approximately sixteen different occasions, resulting in over 50 days of confinement in a seven-foot-by-seven-foot cell

and subject to the same deprivations and inhumane conditions as Troy. Am. Compl. ¶¶ 147, 151, 154, 158, 167-173. O'Neill was frequently isolated following incidents where he was the victim of assault by other residents and deprived of needed medical care. Am. Compl. ¶¶ 137, 141, 143, 145, 150-151. O'Neill was on other occasions ordered into isolation for minor infractions such as cursing. Am. Compl. ¶ 152. These periods of isolation surpassed any legitimate government objective. Am. Compl. ¶¶ 126, 174.

Thus, this Court must deny Defendants' motions to dismiss Plaintiffs' claims of excessive isolation found at Counts One and Seven of the Amended Complaint.

3. Plaintiffs sufficiently allege that Defendants failed to protect Plaintiffs from harm.

JJC Defendants address Troy's failure to protect claim but offer no argument against O'Neill's failure to protect claim, JJC Defs. Br. 34-35, and Mental Health Defendants fail to raise any opposition to Troy's failure to protect claim. MH Defs. Br. 15-18. Accordingly, the Court should treat the absence of any argument against these claims as a waiver. If the Court reaches Defendants' motions as to these claims, the motion must be denied because Plaintiffs state a claim and plead sufficient facts supporting claims that Defendants unconstitutionally failed to protect them from harm.

The Third Circuit has held that a publicly run juvenile detention center has a duty to protect the youth confined in its care from harm – whether self-inflicted or inflicted by others – and to provide for treatment of mental and physical illnesses, injuries, and disabilities. *A.M.*, 372 F.3d at 585 n.3. A juvenile detainee's failure to protect claim is properly analyzed using the deliberate indifference standard because "the persons responsible for [Plaintiffs] during [their] detention . . . had time to deliberate concerning [their] welfare." *A.M.*, 372 F.3d at 579. Defendants' failure to protect Plaintiffs from a "pervasive risk of harm" caused by more than a

"single incident or isolated incidents," *Small*, 2006 U.S. Dist. LEXIS 60876 at *37 (citing *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir. 1985)), amounts to deliberate indifference.

Defendants [16] were deliberately indifferent to the substantial risk of serious harm to Troy by failing to address his significant need for mental health services. Am. Compl. ¶¶ 256-261. Defendants knew about Troy's fragile mental state, his history and pattern of suicidal ideations and suicide attempts, and his continued self-mutilation and overall deterioration during his unremitting course of isolation. Am. Compl. ¶¶ 80, 91-93, 114. Defendants had a duty to protect Troy from harming himself, Am. Compl. ¶¶ 182, 187, yet continued to isolate Troy and deprive him of essential therapeutic services. JJC Defendants' argument that officials who actually knew of a substantial risk but responded reasonably may thereby escape liability is without merit. JJC Defs. Br. 34-35. Isolating Troy for six months was not a reasonable action. To the contrary, Defendants' abusive actions unquestionably *created* "an objectively intolerable risk of serious injury." *See Farmer*, 511 U.S. at 846 n. 9. Am. Compl. ¶¶ 81-82.

On multiple occasions, Troy self-mutilated, experienced and expressed suicidal thoughts and hallucinations, and engaged in destructive, disturbing behavior such as banging his head against the wall, eating or cutting himself with caulk, and playing with his own waste. Am. Compl. ¶¶ 101-104, 106. Troy was sent to the emergency room after one attempt to kill himself, Am. Compl. ¶ 104, and was hospitalized for 21 partial or whole days while in JJC custody. Am. Compl. ¶ 83. This conduct should have, and did, alert Defendants to Troy's urgent need for sustained therapeutic interventions, but the well-pleaded facts show that Defendants failed to take the obvious actions needed to protect Troy – removing him from isolation and providing medically necessary therapeutic treatment. Am. Compl. ¶¶ 80, 114.

[16] As described above, Mental Health Defendants do not move to dismiss Troy's failure to protect claim. The Court should therefore decline to dismiss on this point.

Worse, JJC Defendants frequently resorted to force in response to Troy's pleas for help. Am. Compl. ¶¶ 112-113. On one of several occasions set forth in detail in the Amended Complaint, twelve officers were involved in an incident in which Troy's face was slammed into the ground and he was kicked and punched by staff members as he was "wrestled" into handcuffs and leg irons. Am. Compl. ¶ 112(a). On another occasion, Troy stated he wanted to kill himself while banging his head against the isolation cell wall and wrapping his detention shorts around his neck. Defendants responded only by placing Troy in a restraint chair. Am. Compl. ¶ 112(e).

Defendants failed to protect O'Neill from assaults by other residents on multiple occasions. Am. Compl. ¶¶ 283-287. On November 6, 2009, two residents entered O'Neill's cell and repeatedly punched him in the head while holding his legs, causing O'Neill to suffer scratches, abrasions, and bruising on his face and neck. Am. Compl. ¶ 137. O'Neill was assaulted by other youth twice in December 2009, Am. Compl. ¶¶ 141, 143, and again in January 2010. Am. Compl. ¶ 145. On April 5, 2010, O'Neill suffered a broken jaw when another resident repeatedly punched him in the head with closed fists. Am. Compl. ¶ 148. JJC Defendants' "solution" to these assaults was to order O'Neill repeatedly into isolation. Defendants cannot "remedy one harm with an indefensible and unconstitutional solution." [17] *See R.G.*, 415 F.Supp. 2d at 1156 (finding use of isolation to "protect" LGBT juvenile wards violates Due Process). "Judicial experience and common sense" support a plausible conclusion that Defendants were subjectively aware of and deliberately indifferent to the substantial risk of serious harm to O'Neill. Imposing isolation cannot be rationalized as a "reasonable measure to guarantee [O'Neill's] safety." *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009);

[17] Significantly, Defendants do not dispute the national and international standards cited in Plaintiffs' Complaint condemning the use of isolation, Am. Compl. ¶¶ 232-247, nor can they.

Jeffes, 777 F.2d at 145-46. When juvenile facility staff have an "opportunity" to "consult amongst each other concerning the appropriate response to a pattern and develop a plan to protect [the plaintiff] from assaults by other residents," but fail to do so, they are liable for failure to protect. *A.M.*, 372 F.3d at 587.

For all these reasons, Defendants' motions to dismiss Plaintiffs' failure to protect claims contained in Counts One and Seven of the Amended Complaint should be denied.

4. Troy sufficiently alleges that Defendants failed to provide him adequate medical treatment.

Defendants violated Troy's substantive due process rights under the Fourteenth Amendment by failing to provide adequate medical treatment, including mental health treatment. Am. Compl. ¶¶ 256-261.

For a claim of inadequate medical care, the Third Circuit requires a plaintiff to "show (i) a serious medical need[18], and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need."[19] *Natale*, 318 F.3d at 582 (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Neither JJC Defendants nor Mental Health Defendants challenge Troy's claim that he

[18] A "serious medical need," as defined by the Third Circuit, is (1) "one that has been diagnosed by a physician as requiring treatment;" (2) "one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention;" or (3) one for which "the denial of treatment would result in unnecessary and wanton infliction of loss or pain" or "a life-long handicap or permanent loss." *Atkinson v. Taylor*, 316 F.3d 257, 272-73 (3d Cir. 2003); *see also Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987), cert denied, 486 U.S. 1006 (1988).

[19] Mental Health Defendants cite to adult prisoner cases for the proposition that "[l]ack of prison medical care violates the Eighth Amendment only when the confinement facility doctors **intentionally** ignore the prisoners' or legally confined individuals' conditions and cause them to suffer severe pain." MH Defs. Br. 16. But as argued in Part III(A)(i) *supra*, the Eighth Amendment is not the proper standard for Plaintiffs' claims. Moreover, as described throughout this Brief, Mental Health Defendants were fully aware of Troy's mental health needs. They ignored or even rebuffed his explicit cries for help and his obvious mental decompensation.

had a serious medical need.[20] Indeed, the Third Circuit has recognized suicidal ideations, suicide attempts and self mutilation or other evidence of a "particular vulnerability to suicide" as a "serious medical need."[21] *Diaz-Ferrante v. Rendell*, No. 95-5430, 1996 WL 451366, at *3 (E.D. Pa. Aug. 6, 1996) (citing *Colbern v. Upper Darby Twp.*, 838 F.2d 663, 668-69 (3d Cir. 1988), *cert denied* 489 U.S. 1065 (1989)).

With respect to the second prong, liability may be imposed when the official's decision 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." See *Youngberg*, 457 U.S. at 323.[22] The U.S. Supreme Court recently considered the care required of mentally ill adults in California's prisons in *Brown v. Plata*, 2011 WL 1936074, No. 09-1233 (Sup. Ct. May 23, 2011). In holding that the prison violated the constitutional rights of inmates with mental health needs, the Court criticized conditions strikingly similar to Troy's: prisoners "with serious mental illness do not receive minimal adequate care. . . [and] suicidal

[20] Defendants' admissions that Troy has a "host of medical and mental health complications" and "suffers from a serious mental illness" JJC Defs. Br. 3; MH Defs. Br. 3, 17, and description of his auditory hallucinations, self-cutting, attempts to kill himself and eating blankets and caulking, JJC Defs. Br. 4; MH Defs. Br. 3, aptly illustrate a "serious medical need."

[21] Defendants do not deny that a person held in detention is entitled to psychiatric care for a serious mental or emotional illness. *See Inmates of the Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979). Indeed, courts recognize that failure to provide necessary psychiatric treatment to inmates with serious mental or emotional disturbances will result in infliction of pain and suffering just as real as would result from failure to treat serious physical ailments. *See id.*

[22] "Professional" decision maker is defined by the Supreme Court as "a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas of psychology. . . or the care and training of the retarded." *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982). The Court recognized that day-to-day decisions regarding care may necessarily be made by staff without medical training but requires that those staff are "subject to the supervision of qualified persons." *Id.*

inmates may be held for prolonged periods in telephone-booth sized cages" or "held for months in administrative segregation where they endure harsh and isolated conditions and receive only limited mental health services." 2011 WL 1936074 at *8 (internal quotes and citations omitted). The Court admonished, "[a] prison that deprives prisoners of . . . adequate medical care is incompatible with the concept of human dignity and has no place in civilized society. . . . Courts . . . must not shrink from their obligation to enforce the constitutional rights of all persons, including prisoners. Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." 2011 WL 1936074 at *11. The Court was rightfully offended by such despicable treatment of adults, and it is not difficult to imagine that they would respond even more strongly to conditions of isolation for mentally ill youth. *See infra* Part III(A).

Defendants claim that Troy fails to show they were deliberately indifferent to his serious medical need. The well-pleaded facts demand the opposite conclusion and support a denial of Defendants' motions to dismiss.

Mental Health Defendants rely on their "meticulous documentation" and "255 signed Mental Health Progress Notes" as evidence that they fulfilled their duty to provide treatment to Troy and acted in his best interest. MH Defs. Br. 16-17. They claim that medical staff monitored Troy daily, JJC Defs. Br. 36, and had "extensive" contacts with Troy. MH Defs. Br. 17. A mountain of paperwork, however, does not insulate Defendants from a finding of liability for failing to provide meaningful mental health services to a very unstable young man entrusted to their care. Nor do numerous contacts constitute proof of adequate treatment. *See Durmer v. O'Carrol*, 991 F.2d 64, 68 n.9 (1993) (doctor's repeated referrals with no actual treatment plan could be viewed as an intentional delaying tactic). To the contrary, that Defendants repeatedly

checked on Troy's deteriorating status *without* providing needed treatment constitutes deliberate indifference.

The most frequent contacts Troy experienced with mental health providers were from special observation status ("SOS") rounds, during which a clinician would briefly assess Troy's classification status. Am. Compl. ¶ 98. There was nothing therapeutic about these encounters. Mental health providers assessed Troy's status through the closed door of his cell, merely repeating a number of *pro forma* questions, i.e., had Troy cut himself and was he sleeping well. Am. Compl. ¶¶ 98-99. The Mental Health Defendants conducting rounds repeatedly denied Troy's requests for counseling and instead told Troy that reporting urges to cut himself "would only justify keeping him on constant watch longer." Am. Compl. ¶ 100.

Troy did not even receive his court-mandated sex-offense treatment; the therapist was prevented from providing treatment to Troy due to Troy's isolation or lock-down status. In his 178 days of isolation, Troy was provided with only six sex-offense sessions, Am. Compl. ¶ 96, and nine other purported individual therapy sessions. Am. Compl. ¶ 97. Many of these were not true therapy sessions but only brief meetings. *Id.*

Mental Health Defendants baldly assert that the minimal "medication, confinement and other treatment" provided Troy "significantly benefited" him, even if Troy "lacked legitimate insight into his illness." MH Defs. Br. 17. It is preposterous for Mental Health Defendants to suggest that a half a year of isolation was appropriate treatment for Troy's serious mental health needs. This is not a case of mere disagreement over treatment – while there may be several acceptable ways to treat a juvenile who is suicidal, hallucinating, and self-mutilating, none of them include isolation for 178 days. *See Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) (providing while courts may decline to "second guess the propriety or

adequacy of a particular course of treatment…, implicit in this deference to prison medical authorities is the assumption that such an informed judgment has, in fact, been made").

JJC Defendants claim that they themselves cannot be held responsible for Troy's lack of adequate treatment because Troy was under a doctor's care. JJC Defs. Br. 36. In fact, JJC Defendants are not absolved of responsibility for Troy's mental well-being. The Third Circuit recognizes a variety of circumstances in which non-medical prison officials' may be found to be deliberately indifferent to serious medical need, all of which apply here:

> (i) prison authorities deny reasonable requests for medical treatment, and such denial exposes the inmate to undue suffering or the threat of tangible residual injury…
> (iii) short of absolute denial, necessary medical treatment is delayed for non-medical reasons…[or]
> (vi) prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to physician capable of evaluating the need for such treatment.

Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346-47 (3d Cir. 1987); *see also Pierce*, 612 F.2d at 763 (When "inmates with serious mental ills are effectively prevented from being diagnosed and treated by qualified professionals, the system does not meet the constitutional requirements of *Estelle v. Gamble* and thus violates the Due Process clause.").

JJC Defendants are liable under the Fourteenth Amendment for imposing isolation that prevented Troy from receiving needed medical attention. *See H.C. v. Jarrard*, 786 F.2d 1080, 1087 (11th Cir. 1986) (holding a detention center supervisor liable for the placement of an injured juvenile in isolation for three days as the isolation delayed the juvenile's medical treatment for punitive, non-medical reasons); *see also Natale*, 318 F.3d at 582-83 (finding sufficient evidence of deliberate indifference where medical treatment was delayed for nonmedical reasons due to a policy of not seeing doctor for 72 hours). When "prison authorities

prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment, the constitutional standard of *Estelle v. Gamble* has been violated." *Pierce*, 612 F.2d at 762. Even Mental Health Defendants assert that JJC Defendants limited their access to Troy. MH Defs. Br. 16-17.

Troy sufficiently pleads facts to support claims against JJC Defendants that their "delay[] for non-medical reasons" and "den[ial of] reasonable medical treatment," established Defendants' deliberate indifference to Troy's serious medical needs. *See Lanzaro*, 834 F.2d at 346-47. JJC Defendants ordered Troy's isolation, and consequently he received "almost none of the mental health treatment recommended for him." Am. Compl. ¶¶ 82, 84-85, 95. JJC Defendants prohibited Troy from leaving his cell or participating in therapeutic counseling and other mental health services. Am. Compl. ¶¶ 92, 95. On multiple occasions, as is noted in JJC records, Troy expressly requested to be released from isolation and provided with counseling. Am. Compl. ¶¶ 107, 113. JJC Defendants' repeated delay or outright denial of necessary medical treatment "expose[d Troy] to undue suffering and the threat of tangible residual injury" such that a clear "deliberate indifference is manifest." *Lanzaro*, 834 F.2d at 346-47; *see also Natale*, 318 F.3d at 582 (allowing claim to proceed where officials ignored inmate's urgent need for insulin and required him to wait for scheduled doctor visit 3 days later).

JJC Defendants' rely on *Farmer v. Brennan*, 511 U.S. at 830, for the proposition that "if a defendant [1] did not know of the underlying facts indicating a substantial danger or [2] they knew of the underlying facts, but believed that the risk was either nonexistent or insubstantial, he did not act with deliberate indifference." JJC Defs. Br. 36. However, in *Farmer*, the Supreme Court acknowledged that where "an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness" and if prison officials

actually knew of the substantial risk, they must act reasonably to avoid liability. *See Farmer*, 511 U.S. at 844, 846 n.9. Here, Defendants knew of Troy's fragile mental health, of his isolation, and of the risks of isolation to mental health.[23] They cannot now claim "lack of awareness" or ignorance of these "substantial risks" nor can they plausibly claim that ordering Troy to be confined in such extensive isolation was "acting reasonably" on their knowledge of the risks.

Troy has pleaded sufficient facts which, along with every reasonable inference due the nonmoving party at a motion to dismiss, support a plausible claim that Defendants were deliberately indifferent to his serious medical need. Thus, this Court should deny Defendants' motion to dismiss Count One of the Amended Complaint.

5. Troy sufficiently alleges that N.J.A.C. 13:101-6.17(e) impermissibly violates Substantive Due Process on its face.

N.J.A.C. 13:101-6.17(e) is unconstitutional on its face. A facial challenge will be upheld either when "no set of circumstances exists under which [the regulation] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or when the regulation lacks any "plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997). N.J.A.C. 13:101-6.17(e) permits indefinite isolation of youth for safety purposes and creates a high risk that youth will be subjected to unconstitutional restraints that amount to punishment and that are excessive in light of a legitimate government purpose. Because youth confined in juvenile facilities are entitled to rehabilitative treatment, and because the practice of placing youth in extended and inhumane isolation is a substantial departure from accepted professional judgment with regard to juvenile rehabilitation, a substantial portion of the applications of N.J.A.C. 13:101-6.17(e) are likely to be

[23] Evidencing the liability of both JJC and Mental Health Defendants, Defendant Zupkus, a JJC psychologist, admitted to attorney Simkins when asked if she was aware that isolation exacerbates suicidal ideation, "[o]f course I know it's wrong, but my hands are tied by corrections." Am. Compl. ¶ 105.

held unconstitutional. Plaintiffs therefore make a plausible claim that the regulation is unconstitutional on its face, and Defendants' motion to dismiss Count Three must be denied.

6. Defendants are not entitled to qualified immunity because Plaintiffs sufficiently allege that Defendants violated their clearly established Constitutional rights.

In the event that this Court applies the Fourteenth Amendment standard, rather than the Eighth Amendment, to Plaintiffs' conditions of confinement and failure to protect and treat claims, JJC Defendants incorrectly claim qualified immunity. *See* JJC Defs. Br. 29 at n.6. Defendants are not entitled to qualified immunity. Courts may only dismiss for qualified immunity on a 12(b)(6) motion in the very limited situation "when the immunity is established on the face of the complaint." *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001) (citations and internal quotation marks omitted).

Taken in the light most favorable to Plaintiffs, the evidence presented in Plaintiffs' Amended Complaint makes out a violation of their clearly established constitutional rights. *See Pearson v. Callahan*, 129 S.Ct. 808, 815-16 (2009). The cases discussed at length in Part III(A) of this Brief confirm that Defendants were on notice that plaintiff had a constitutional right to adequate conditions of confinement, treatment, and protection from harm. Moreover, regardless of the standard this Court applies, Plaintiffs sufficiently alleged that any reasonable person in Defendants' position would have known that they were acting in violation of Plaintiffs' clearly established constitutional rights. Indeed, even under the Eighth Amendment, Defendants' conduct would be held unconstitutional. *See, e.g., Brown v. Plata*, No. 09-1233, 2011 WL 1936074 at *9 (holding excessive isolation and the deprivation of mental health services to

violate the Eighth Amendment).[24] Nothing in Plaintiffs' pleadings supports Defendants' claims of qualified immunity. This Court should therefore not dismiss on this ground.[25]

B. Plaintiffs Sufficiently State Claims Under The Fourteenth Amendment That Defendants Violated Plaintiffs' Procedural Due Process Rights.

The Fourteenth Amendment prohibits state deprivation of life, liberty, or property without due process of law. Courts apply a two-stage analysis to determine if state actors violated an individual's due process rights. The Court must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property;" if protected interests are implicated, the Court must then decide what procedures constitute "due process of law." *Ingraham*, 430 U.S. at 671 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

Plaintiffs allege that Defendants unjustly deprived them of liberty interests long protected by the Due Process Clause – freedom from bodily restraint and punishment. *Id*. at 673. "It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." *Id*. at 674. In addition, discipline of a prisoner for violating facility rules unconstitutionally infringes upon that prisoner's protected liberty interests when the

[24] A number of district and circuit courts have also found excessive isolation of juveniles to be unconstitutional under the Eighth Amendment standard. *E.g. Morales v. Turman*, 364 F. Supp. 166, 172, 175 (E.D.Tex. 1973), *overruled on other grounds by Morales v. Turman*, 535 F.2d 864 (5th Cir. 1976); *Nelson v. Heyne*, 355 F. Supp. 451, 456-57 (N.D. Ind. 1973); *Lollis v. N.Y. State Dep't of Soc. Servs.*, 322 F. Supp. 473, 480-82 (S.D.N.Y. 1970).

[25] Qualified immunity turns on whether the facts alleged, taken in the light most favorable to the party asserting the injury, demonstrate that the government actor's conduct violated a constitutional right. *Pearson v. Callahan*, 129 S.Ct. 808, 815-16 (2009). Qualified immunity only applies to Plaintiffs' claims for money damages not to Plaintiffs' claims for injunctive relief. *Burns v. Pa. Dep't of Corr.*, No. 09-2872, 2011 U.S. App. LEXIS 7999 (3d Cir. 2011). Also, it applies only individual capacity claims, and therefore cannot bar Plaintiffs Third, Eleventh or Twelfth Counts. *W.B. v. Matula*, 67 F.3d 484, 499 (3d Cir. 1995) (abrogated on other grounds by *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (3d Cir. 2007)).

restraint imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

As discussed in detail below, the Amended Complaint alleges that Defendants repeatedly inflicted "atypical and significant hardship" on Plaintiffs that deviated substantially from the ordinary events of life in a juvenile correctional facility without sufficient – and often without almost any – process.

Finally, Plaintiffs adequately raise a claim that certain regulations allowing for the almost-unfettered use of room restriction are facially invalid because they create a high risk of constitutional violations and therefore lack any "plainly legitimate sweep." *See United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010).

For all these reasons, the Court must deny Defendants' motion to dismiss Plaintiffs' procedural due process claims as alleged in Counts Four, Five, Nine and Ten of the Amended Complaint.

1. Plaintiffs sufficiently allege that Defendants imposed "atypical and significant hardship" and violated Plaintiffs rights to be free from bodily restraint and punishment without Due Process of law.

Defendants implausibly argue that their isolation of Troy for 178 days – confining him in a cell on "close watch" or "constant watch" for his own protection and the protection of others given his mental health disorders, without possessions, education, programming, meaningful counseling, or opportunities to interact with peers – did not entitle Troy to any due process protections. JJC Defs. Br. 17-20; MH Defs. Br. 19-20. Defendants rely on *Meachum v. Fano*, 427 U.S. 215 (1976), and argue that Troy had no right to procedural due process when transferred to a more restrictive placement. JJC Defs. Br. 20; MH Defs. Br. 19. *Meachum*, however, involved a transfer from one prison to another, not the imposition of mental health treatment. Troy's placement in prolonged isolation is governed by *Vitek v. Jones*, where the U.S.

Supreme Court held that appropriate procedural safeguards must be put in place before the mentally ill could be transferred from a prison to a state mental hospital:

> The interest of the State in segregating and treating mentally ill patients is strong. The interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, however; and… the risk of error in making the determinations [that an inmate is mentally ill and must therefore be subjected to involuntary psychiatric treatment] is substantial enough to warrant appropriate procedural safeguards against error.

Vitek v. Jones, 445 U.S. 480, 495 (1980). In *Vitek*, the Court explicitly distinguished *Meachum*, observing that in cases regarding transfers from one prison to the next, there is no protected liberty interest. In contrast, once a person is transferred to a more restrictive form of custody for mental health purposes:

> The fact of greater limitations on freedom of action…, the fact that a transfer… has some stigmatizing consequences, and the fact that additional mandatory behavioral modification systems are used… combine to make the transfer a major change in the conditions of confinement amounting to a grievous loss to the inmate…. A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and subject him to involuntary psychiatric treatment without affording him additional due process protections.

445 U.S. at 492-94 (internal quotations omitted). Thus, the due process clause applies. *Id.* Further, "the medical nature of the inquiry…does not justify dispensing with due process requirements. It is precisely the subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Id.* at 495 (citing *Addington v. Texas*, 441 U.S. 418, 430 (1979)).

Given the known harmful effects of isolation on youth, particularly suicidal youth like Troy, Troy's liberty interest in remaining free from extended isolation was even more

pronounced. *See* Am. Compl. ¶¶ 232-247. Yet Troy was placed in isolation on "close watch" or "constant watch" for at least 178 days, subject to the inhumane conditions described at Part III(A)(2)-(4) of this Brief. Like the inmate in *Vitek*, Troy was also subjected to additional mandatory behavioral modification systems, which governed how long he would remain on close or constant watch. *Id.* at ¶ 101; JJC Defs. Br. 17-18. Thus, before Troy suffered this "grievous loss," Defendants were constitutionally required to afford him additional due process protections. *See Vitek*, 445 U.S. at 492-94.

Yet Defendants provided Troy with no due process whatsoever. The process due to prisoners involuntarily transferred to restrictive placements due to mental illness includes the right to notice and a hearing, *id.* at 496, and "qualified and independent" representation by a person who is "free to act solely in the inmate's best interest." *Id.* at 500 (Powell, J., concurring) (Powell's concurrence controlling on this issue). Despite Troy's repeated requests for release into the general juvenile population, Am. Compl. ¶¶ 101, 107, Defendants failed to provide Troy with a hearing or other meaningful opportunity to be heard. Instead, when Defendants met to review the necessity of Troy's continued isolation, they did so without Troy or an advocate to speak on Troy's behalf. Am. Compl. ¶¶ 91-93, 114-115. JJC procedures, which allow residents to request changes in assignment or status by completing a form and submitting it to a social worker, *see* JJC Defs. Br. 20, do not sufficiently protect Troy's liberty interests. Rather than affording due process protections as a matter of right, they require a vulnerable youth with mental health problems to initiate the process. *Cf. Vitek*, 445 U.S. at 496-97 (noting that an inmate with mental health problems will be "more likely to be unable to understand or exercise his rights"). Moreover, Troy, who made repeated oral requests for such changes, was not permitted to have pen and paper in order to file a formal request. Am. Compl. ¶¶ 86, 101, 107.

Defendants' so-called procedures and actions fall well short of the due process required by the Fourteenth Amendment to the United States Constitution and Article 1, Paragraph 1 of the New Jersey Constitution. Defendants' motions to dismiss Counts Four and Five must therefore be denied.

O'Neill was also deprived of a protected liberty interest without due process of law. A youth's liberty interests while residing in a juvenile correctional facility are properly defined in relation to the ordinary incidents of life in a juvenile institution. *See Santana*, 714 F.2d at 1177; *Knop v. Jonson*, 977 F.2d 996, 999 (6th Cir. 1992). Juvenile dispositions serve a different purpose than criminal sentences. In New Jersey, juvenile court dispositions must "provide for [the youth's] care, protection, and wholesome mental and physical development…[through a] program of supervision, care, and rehabilitation," and "secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents." N.J.S.A. 2A:4A-21(a),(b),(d) & 2A:4A-24(a). The JJC's mandate is to promote public safety, accountability and rehabilitation of juvenile offenders, N.J.A.C. 13:90-1.1(a), and to provide them with treatment and rehabilitation to meet their needs. N.J.A.C. 13:101-3.1(a)(11).

The ordinary incidents of life in a New Jersey juvenile facility are therefore quite different from those in an adult prison, and are defined by what a youth may reasonably and lawfully expect to encounter as a result of his adjudication. *See Griffin v. Vaughn*, 112 F.3d 703, 706 (3d Cir. 1997) ("[T]he baseline for determining what is 'atypical and significant'– the 'ordinary incidents of prison life' – is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction in accordance with due process of law."). Where state actors in a juvenile facility impose discipline on a youth that is wholly incompatible with the facility's rehabilitative purpose, that disciplinary action violates the youth's protected

liberty interest as it fails to secure for him the "care and discipline as nearly as possible equivalent to that which should have been given by his parents" *see* N.J.S.A. 2A:4A-21(d), and thus imposes an atypical and significant hardship.

Under normal circumstances, the conditions of O'Neill's confinement were typically rehabilitative and therapeutic. O'Neill had freedom of movement; attended school; received mental health counseling; learned job skills; participated in activities and recreation with other youth; received mail, phone calls, and visits from his family; retained personal possessions; and ate meals with other residents. Am. Compl. ¶ 172. When O'Neill was in isolation, the conditions he endured were starkly at odds with the purposes of his commitment. He was not permitted to leave the isolation cell except for a shower. Am. Compl. ¶ 170. He was denied access to education, including special education services detailed in his IEP; denied all personal possessions, including educational materials; denied any opportunity for exercise or recreation outside of the isolation cell; and denied access to programming, visitation, and activities to which the general population of the New Jersey juvenile facilities had access, including career services, library time, and vocational training. *Id.* Defendants' repeated placement of O'Neill in isolation on PHRR imposed an atypical and significant hardship on O'Neill in relation to the ordinary incidents of life in a juvenile facility. *See Griffin*, 112 F.3d at 706. It therefore deprived him of a protected liberty interest and entitled him to due process of law.

At a minimum, due process requires "that deprivation of…liberty…be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950) (emphasis added). Three distinct factors drive the analysis of what process is due: first, the private interest affected by the official action; second, the risk of erroneous deprivation of such interest through

the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S 319, 335 (1976). At its fundamental core, due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Defendants repeatedly placed O'Neill on PHRR without due process. By definition, PHRR involves placement in isolation for up to 5 days without a timely opportunity to be heard. *See* N.J.A.C. 13:101-8.1. The procedures therefore failed to provide O'Neill with a fundamental requirement of Due Process, the opportunity to be heard "at a meaningful time." *See Armstrong*, 380 U.S. at 552. Hearing officers repeatedly found – after-the-fact and when O'Neill finally did have an opportunity to be heard – that O'Neill spent more time in isolation than was justified. Am. Compl. ¶¶ 128, 130, 132, 149, 153, 161. Defendants made no attempts to impose any less restrictive alternative prior to placing O'Neill in isolation on PHRR. Am. Compl. ¶ 174.

Defendants placed O'Neill in isolation on PHRR on approximately fifteen different occasions, for a total of about 50 days. Am. Compl. ¶ 126. Defendants did not limit the use of PHRR to safety issues. Instead they confined O'Neill in isolation on PHRR for days at a time for rule violations as minor as possession of a pen, horseplay in the shower, and cursing. Am. Compl. ¶¶ 131, 152, 165. Moreover, Defendants placed O'Neill in isolation on PHRR on multiple occasions for being the *victim* of severe assaults by other youth. Am. Compl. ¶¶ 137-138, 141, 143, 145, 162. All three factors in the *Mathews v. Eldridge* analysis weigh in favor of providing due process protections at a more meaningful time for youth like O'Neill who are placed in PHRR. First, considering the harmful effects of isolation on children, O'Neill's

interest in remaining free from such a restraint is strong. Second, the facts demonstrate the high risk that Defendants will erroneously deprive a youth of this protected liberty interest through the current procedures. Finally, although Defendants' interest in maintaining safety in the facility is strong, it may be achieved while providing a hearing at a more meaningful time, with minimal burden to the State.

JJC Defendants rely on *Schall v. Martin*, 467 U.S. 253 (1984), a pre-trial detention case, to argue that holding a youth in isolation for up to 5 days before giving him a meaningful opportunity to defend himself is constitutionally sufficient process. JJC Defs. Br. 25-26. However, the process afforded to pretrial detainees in *Schall*, unlike the PHRR process, provides youth with a meaningful opportunity to be heard at a meaningful time. The process at issue in *Schall* was an initial appearance in front of a judge to determine whether their detention would be continued. 467 U.S. at 257 n.5. Plaintiffs in *Schall* had argued that the hearing was insufficient because it was not based on probable cause. At the relevant appearance, the accused juvenile was accompanied by counsel and a parent, all of whom could speak on the juvenile's behalf. *Id.* at 275-76. When the judge ordered their continued detention, the youth in *Schall* were entitled to a formal, adversarial probable-cause hearing within three days of the initial appearance. *Id.* at 277. Had Plaintiff O'Neill been afforded similar due process protections each time he was placed in isolation on PHRR, such procedures would have adequately protected his constitutional rights and reduced the risk of erroneous deprivation of his liberty.

But Defendants did not provide O'Neill with anything approaching the process found constitutional in *Schall.* Instead, Defendants repeatedly placed O'Neill in a much more restrictive form of custody without an initial appearance before a neutral decision-maker. He was not able to speak in his own defense until the disciplinary hearing, which usually occurred

after 3-5 days of living in a punitive isolation cell. Defendants incorrectly suggest that *Schall* holds that juveniles may be temporarily detained without a hearing. The Court in *Schall* explicitly noted that Plaintiffs had not challenged the 72 hour provision of the process – the Court therefore considered only the constitutionality of the standard applied in the detention hearing. *Id.* Moreover, the statute at issue in *Schall* was more protective than the statute here – it required that whenever possible the juvenile be released to his parents or appear *immediately* before the judge. 467 U.S. at 257 n.5. Only if neither option was possible could the juvenile be detained pending a court hearing to be held within 72 hours. *Id.*[26]

For these reasons, Defendants' motions to dismiss O'Neill's procedural due process claims in Counts Nine and Ten of the Amended Complaint must be denied.

C. O'Neill Sufficiently Alleges That N.J.A.C. 13:101-6.6(c) And 13:101-8.1(a) Impermissibly Violate Procedural Due Process On Their Face.

Defendant Lawson's motion to dismiss O'Neill's facial challenges to N.J.A.C. 13:101-6.6(c) and 13:101-8.1(a) should be denied. JJC Defs. Br. 26-27. As Plaintiffs described in Part III(A)(5) supra, juvenile regulations that create a high probability of constitutional violations are unconstitutional on their face because they lack a "plainly legitimate sweep." *Glucksberg*, 521 U.S. at 740 n. 7 (Stevens, J., concurring); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008). Youth remain in isolation under the PHRR regulations for three to five days without any process. N.J.A.C. 13:101-6.6(c). The Amended Complaint's allegations show that there is a high probability that the hearing officer will find, after the fact, that a youth was held in isolation longer than was justified for the behavioral infraction. Similarly, there is a

[26] Moreover, pretrial detention is not the same thing as PHRR. PHRR subjects a youth to decisions made not by neutral decision-makers, but by staff members he or she will engage with repeatedly. As evidenced by O'Neill's story, this can result in not just a single incident, but a pattern of inappropriate isolation.

high likelihood that JJC staff will place youth in isolation under the existing PHRR regulations for being the victim of an assault, for minor behavioral infractions, or for unsubstantiated reasons that are later found to be specious. Am. Compl. ¶¶ 131, 137-138, 141, 143, 145, 152, 162, 165. Because a substantial number of the applications of the Regulations are unconstitutional when judged in relationship to their plainly legitimate sweep, Plaintiff O'Neill has presented a plausible claim that the regulations are facially invalid. Thus, Defendant Lawson's motion to dismiss the facial challenge to this regulation in Count Twelve of the Amended Complaint must be denied.

D. O'Neill Sufficiently Alleges That He Was Denied The Right To Counsel At His Parole Hearings.

Defendants erroneously contend that it is "well-settled that there is no right to counsel at a parole release hearing." JJC Defs. Br. 27 (relying on *Beckworth v. State Parole Bd*., 62 N.J. 348, 361-62 (1973). However, *Beckworth* is plainly inapposite as it involved an *adult* parole hearing subject to a Sixth Amendment analysis. The right to counsel in juvenile proceedings is governed by the Fourteenth, not the Sixth, Amendment. *In re Gault*, 387 U.S. 1 (1967). Since its ruling in *Gault*, the Supreme Court has consistently recognized three characteristics of children that heighten their need for counsel. First, children have more difficulty than adults understanding, let alone navigating, legal proceedings without a lawyer. *Id.* at 39-40; s*ee also Powell v. Alabama*, 287 U.S. 45 (1932) (recognizing that defendants were "young, ignorant, [and] illiterate," which contributed to the devastating impact of their denial of effective assistance of counsel). Second, children's susceptibility to coercion heightens the risk of unfairness in legal proceedings. *See Gault*, 387 U.S. at 39 (recognizing that counsel for juveniles is necessary "wherever coercive action is a possibility"). Third, the rehabilitative goal of the juvenile justice

system, including vesting children with a belief in the fairness of the system, is enhanced when children have counsel. *Id.* at 26.

Applying this reasoning to the case at hand demonstrates why O'Neill has a plausible claim that he has been denied access to counsel. First, in accordance with the parole Handbook, the juvenile is not only denied the appointment of counsel, but also forbidden from having privately-obtained counsel or even a parent present. Specifically, the Handbook states, "no one is permitted in the room during any…review hearings except State Parole Board Staff" and the juvenile "cannot have an attorney present." The Parole Book: A Handbook on Parole Procedures for Juvenile Residents B2. Although a parole hearing may be less formal and legalistic than an adjudicatory hearing, juveniles lack the capacity to understand the proceedings and to fully represent the relevant facts as would adults with a full knowledge of the legal system. These hardships are even more acute for juveniles like Troy and O'Neill who also suffer from learning disabilities. Second, a parole review hearing is inherently coercive, with parole officers exerting significant influence over decisions regarding the child's liberty, as the proceedings will determine where, with whom and under what conditions the child will live. Finally, as in any other proceeding, a juvenile's sense of fairness will be enhanced if he has a lawyer to advocate for him in this adversarial setting.

Moreover, even under the adult Sixth Amendment standard, O'Neill states a plausible claim. The Sixth Amendment guarantees a criminal defendant the right to an attorney in all "'critical' stages of [criminal] proceedings." *United States v. Wade*, 388 U.S. 218, 225 (1967). A critical stage is one in which the defendant's rights could be sacrificed or lost and the presence of counsel is necessary to protect the defendant's interests. *Id.* at 225-27. These critical stages include many pretrial and post-trial proceedings, such as interrogation (*Messiah v. United States*,

377 U.S. 201 (1964); *Escobedo v. Illinois*, 378 U.S. 478 (1964)), line-ups (*Wade*, 388 U.S. 218), show-ups (*Moore v. Illinois*, 434 U.S. 220 (1977)), preliminary hearings (*Coleman v. Alabama*, 399 U.S. 1 (1970)), arraignments (*Hamilton v. Alabama*, 368 U.S. 52 (1961)), plea negotiations (*McMann v. Richardson*, 397 U.S. 759 (1970)), sentencing proceedings (*Townsend v. Burke*, 334 U.S. 736 (1948) (reaffirmed by *Mempa v. Rhay*, 389 U.S. 128 (1967)), and the first appeal of right (*Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

In the most closely analogous situation to the instant case, the United States Supreme Court has upheld the right to counsel in probation revocation hearings, *Mempa*, 389 U.S. 128, and parole revocation hearings, *Morrissey*, 408 U.S. 471. Whether particular procedural protections are due in parole revocations depends on whether the individual will be "condemned to suffer grievous loss" in such proceedings and not on whether the governmental benefit is characterized as a "right" versus a "privilege. *Id.* at 481. The Court further explained that the "question is not merely the weight of the individual's interest, but whether the nature of the interest is one within contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Id*.

Juvenile review hearings held by the Juvenile Panel of the State Parole Board are significantly different from adult parole hearings – and do "condemn" participants to "suffer grievous loss." Like its adult counterpart, the Juvenile Panel "decides if and when" a juvenile will be released on parole, as well as the "conditions (rules) [he] must obey while on parole or post-incarceration supervision." The Parole Book: A Handbook on Parole Procedures for Juvenile Residents A2. However, unlike the adult parole board, the Juvenile Panel determines the youth's initial sentence upon arrival at the Juvenile Reception and Assessment Center or Valentine Complex, and also establishes a "tentative release date" or "time goal" at an initial

review hearing. *Id.* at B1.[27] Thus, an initial review hearing is effectively a sentencing hearing, which the Supreme Court has already determined is a critical stage requiring appointed counsel. Similarly, since the sentence is not fixed, but subject to re-evaluation, the subsequent review hearings engage the Panel in repeated sentencing determinations. Accordingly, Count Twelve of the First Amended Complaint sufficiently pled a claim for which relief should be granted and should not be dismissed.

IV. PLAINTIFFS SUFFICIENTLY ALLEGE CAUSES OF ACTION UNDER THE NEW JERSEY CIVIL RIGHTS ACT.

A. Plaintiffs' Constitutional Violations Are Plausible On Their Face.

JJC Defendants argue that Troy and O'Neill's claims under the New Jersey Civil Rights Act should be dismissed because their constitutional rights have not been violated. JJC Defs. Br. 38-39. The New Jersey Civil Rights Act was modeled after 42 U.S.C. § 1983, creating a private state law cause of action for violation of an individual's federal and state constitutional rights. *Owens v. Feigin*, 194 N.J. 607, 611 (2008) (*per curiam*); *Ferraioli v. City of Hackensack Police Dep't*, No. 09-2663, 2010 U.S. Dist. LEXIS 8527 at *40 (Feb. 2, 2010). Where federal constitutional claims are sufficiently pleaded under § 1983 to survive a motion to dismiss, such claims are also sufficiently pled under the New Jersey Civil Rights Act. *See Ferraioli*, 2010 U.S. Dist. LEXIS at *40-41. Moreover, the due process protections encompassed in Article 1, paragraph 1 of the New Jersey Constitution are "analogous *or superior to*" those afforded under the U.S. Constitution, *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 76-80 (1978) (emphasis added), and thus may afford Plaintiffs more robust protections than the U.S.

[27] Specifically, the Handbook states that "no one is permitted in the room during any…review hearings except State Parole Board Staff" and the juvenile "cannot have an attorney present." *Id.* at B2.

Constitution. *See also Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985) (courts interpreting the New Jersey due process clause are not bound by federal due process analysis that may limit Plaintiffs' recovery). As described throughout this brief, Plaintiffs state claims for relief for violations of their rights under the United States and New Jersey Constitutions that are plausible on their face. JJC Defendants' motion to dismiss Counts Two and Eight must therefore be denied.

B. The New Jersey Civil Rights Act Applies To Individuals Acting Under Color Of State Law, Including Mental Health Defendants.

Mental Health Defendants argue, without merit, that the New Jersey Civil Rights Act does not apply to individuals and therefore cannot be enforced against them. MH Defs. Br. 19-20. When a plaintiff names an official in his individual capacity, the plaintiff seeks "to impose personal liability upon a government officer for actions he takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). The New Jersey Civil Rights Act explicitly states that "[a]ny person who has been deprived of any substantive due process… rights… secured by the Constitution or laws of the United States, or… the Constitution or laws of this State… *by a person acting under color of law*, may bring a civil action for damages and for injunctive or other appropriate relief." N.J.S.A. 10:6-2(c). Mental health treatment providers rendering services to juvenile residents under contract with the State act under color of law. *See West v. Atkins*, 487 U.S. 42, 57 (1988) (a private physician contracted to provide medical services to prison inmates acted under color of law for § 1983 purposes when he refused to schedule a necessary surgery). That treatment providers allegedly act in accordance with their professional discretion and judgment does not change the fact that they are acting under color of law. *Id.* at 52. Troy alleges that Mental Health Defendants, acting under color of law, violated his substantive due process rights under the United States and New Jersey Constitutions. By

suing Mental Health Defendants in their individual capacities, Troy seeks to impose personal liability for actions they took under color of law. Such claims are clearly permitted under the New Jersey Civil Rights Act, and thus the motion to dismiss Count Two must be denied.

V. DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' TORT CLAIMS WITH PREJUDICE MUST FAIL BECAUSE PLAINTIFFS FILED TIMELY NOTICE.

Defendants argue that Plaintiffs' tort claims must be dismissed with prejudice because Plaintiffs provided notice of tort claims *after* filing suit. JJC Defs. Br. 39-40. Defendants conflate two separate requirements of the New Jersey Tort Claims Act, only one of which requires dismissal with prejudice. The Act requires first, that the notice be provided in the proper sequence, six months before filing suit; and second, that the notice be timely, within 90 days of accrual of the claim. N.J.S.A. 59:8-8. The Act expressly bars recovery only for noncompliance with the second requirement, timeliness. Specifically, the Act states, "[t]he claimant shall be forever barred from recovering against a public entity or public employee if: (a) He failed to file his claim with the public entity within 90 days of accrual of his claim…" *Id.* Plaintiffs do not dispute that their notice of tort claims was issued out of sequence. However, Plaintiffs did file *timely* notice within 90 days of Plaintiffs reaching the age of majority.

As to the sequencing issue, an appropriate remedy would be for this Court to suspend proceedings on the relevant issues until the six month period has passed. Because Plaintiffs filed notice on December 29, 2010, the six month period expires on June 29, 2011. The alternative, to allow Plaintiffs to re-file the complaint on that date, would be permissible, but disfavored as it is inefficient for the Court and all parties. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765 n.13 (1979) (concluding that where a plaintiff's complaint under the federal Age Discrimination in Employment Act failed to comply with the 60-day notice requirement, suspension of

proceedings is preferable to dismissal with leave to refile as requiring a second filing after termination of state proceedings would serve no purpose and only create an additional procedural technicality; "suspension pending deferral is the preferred practice in the federal courts"). Therefore, Plaintiffs' tort claims under Counts Six and Thirteen of the complaint are not barred, and should not be dismissed with prejudice. Instead, because six months will have passed by June 29, 2011, Plaintiffs should be permitted to proceed on their tort claims on or after that date without refiling.[28] Moreover, Defendants are not immune from suit on these claims.[29]

VI. PLAINTIFFS' SUFFICIENTLY ALLEGE CLAIMS FOR PUNITIVE DAMAGES AGAINST MENTAL HEALTH AND JJC DEFENDANTS.

In response to plaintiffs' claims for punitive damages, Defendants wrongly contend that the record "is devoid of any facts or evidence indicating that [Defendants] acted with an 'evil motive' or 'callous indifference'" and, instead, Defendants "made legitimate decisions in response to plaintiffs' own conduct." JJC Defs. Br. 41. Defendants purportedly rely on *Smith v. Wade*, 461 U.S. 30 (1983), but then incorrectly apply it to this case. JJC Defs. Br. 40. A proper application of *Wade* demonstrates that Plaintiffs sufficiently plead that Defendants' actions showed reckless indifference towards the rights of Plaintiffs Troy and O'Neill.

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[28] If this Court finds that Plaintiffs' tort claims cannot proceed as filed, Plaintiffs ask for leave to re-file the negligence claims without prejudice.

[29] Mental Health Defendants argue that Troy's tort claims must be dismissed because they "are insulated by the Tort Claims Act." MH Defs. Br. 19. Mental Health Defendants fail, however, to specify *any* provision of the New Jersey Tort Claims Act that provides immunity for their negligent actions. This Court should therefore reject their claims regarding immunity. If Defendants impermissibly raise any arguments with respect to any specific provisions in the New Jersey Torts Claims Act in their reply, Plaintiffs respectfully request leave of this court to file a sur-reply so that Plaintiffs may respond to the newly-raised arguments.

The Third Circuit does not require that defendant's conduct be "egregious" in order to award punitive damages in a civil rights action. *See Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 534-535 (1999); *Whittaker v. Fayette County*, 65 Fed. Appx. 387, 393 (3d Cir. 2003) (non-precedential opinion). Rather, "[a] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Wade*, 461 U.S. at 54.

A. Troy Sufficiently Alleges That Defendants Were Recklessly Indifferent To His Physical And Mental Health Needs.

The alleged facts sufficiently demonstrate Defendants' reckless indifference. As described in Parts III(A)(2)-(4) of the brief, Troy suffered excessive and prolonged isolation in the face of severely deteriorating mental health problems. Despite repeated recommendations for mental health treatment, and Troy's own cries for help, Defendants provided almost no treatment at all. Instead, JJC staff repeatedly resorted to force, including restraints, often resulting in injury to Troy. Am. Compl. ¶ 112. This conduct is "of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Wade*, 461 U.S. at 54. If these allegations are proven, the law readily allows the jury to award Troy punitive damages to punish Defendants for their misconduct and warn others against similar behavior. Therefore Plaintiff Troy sufficiently states a claim upon which relief can be granted and his claim for punitive damages should not be dismissed.

B. O'Neill Sufficiently Alleges That Defendants Were Recklessly Indifferent To His Need For Safety.

Defendants cite *Wade* in support of their motion. *Wade* actually reinforces Plaintiff O'Neill's punitive damages claim. *See* JJC Defs. Br. 40 (citing *Wade*, 461 U.S. 30). In *Wade*, the Supreme Court affirmed an award of punitive damages against corrections personnel for allowing the petitioner to be harassed and assaulted by other inmates when they should have recognized the risk he faced. *Wade*, 461 U.S. at 32. O'Neill's situation is similar. On at least six documented occasions, O'Neill was violently assaulted by other residents. Am. Compl. ¶¶ 137, 141, 143, 145, 148, 150, 162. O'Neill sustained several injuries at the hands of other inmates, including a broken jaw, scratches, abrasions, and bruising to the face and neck. *See* Am. Compl. ¶¶ 137, 150. When receiving treatment for his broken jaw, medical personnel recommended that he be protected on "medical restricted status." Am. Compl. ¶ 150. Despite this medical advice and instead of housing him in an infirmary, hospital unit, or other less restrictive environment, he was placed in a locked isolation cell. Am. Compl. ¶ 150. Following one of the first documented assaults, O'Neill asked to be placed in protective custody. Am. Compl. ¶ 137. Despite visible injuries, his request was denied and he was placed in isolation for three days. Am. Compl. ¶ 137. Defendants did not address the underlying threats or ensure that he would be safe upon his return to general population. Instead of taking steps to protect O'Neill from future harm, Defendants repeatedly and unjustifiably punished him for complaining. Their behavior demonstrates precisely the type of "reckless or callous disregard of…the rights or safety of others" and "flagrant or remarkably bad failure to protect" that existed in *Wade*. *Wade*, 461 U.S. at 51.

Plaintiff O'Neill also sufficiently states a claim upon which relief can be granted and his claim for punitive damages should not be dismissed.

VII. THIS COURT SHOULD DENY DEFENDANTS' MOTIONS IN THE ALTERNATIVE FOR SUMMARY JUDGMENT.

A. Defendants Failed To Satisfy The Local Rule Requiring A Motion For Summary Judgment To Be Accompanied By A Statement Of Material Facts Not In Dispute.

Local Civil Rule 56.1(a) of the United States District Court for the District of New Jersey requires any party moving for summary judgment to provide a statement setting forth "material facts as to which there does not exist a genuine issue, in separately numbered paragraphs citing to the affidavits and other documents submitted in support of the motion." Failing to observe this Rule is fatal to the motion. USDC DNJ L.Civ.R. 56.1(a) ("[a] motion for summary judgment unaccompanied by a statement of material facts not in dispute shall be dismissed").

JJC Defendants have failed to provide the requisite Statement of Material Facts Not in Dispute, and this Court should therefore dismiss their motion outright. *Bowers v. NCAA*, 9 F. Supp. 2d 460, 476 (D.N.J. 1998) (failing to file the Statement of Material Facts Not in Dispute is alone sufficient cause to dismiss). Although this Court has excused this oversight in special circumstances, this case warrants no such exception, as Defendants have not even substantially complied with the Rule. *See Williams v. Atl. City Dep't of Police*, No. 08-4900, 2010 WL 2265215, at *2 (D.N.J. June 2, 2010) (excusing noncompliance because facts at issue were laid out point-by-point in affidavit and incident report accompanying motion). Here, JJC Defendants provide no detail in any form regarding a single material fact not in dispute. The only affidavit JJC Defendants put forth in support of their motion in the alternative for summary judgment is a statement by JJC Executive Assistant Yvonne Lemane, who merely asserts that the Exhibits are true and accurate copies. Lemane Cert. 1-3. Citing generally to voluminous exhibits does not satisfy the Rule's requirement that any facts not in dispute be specified in separately numbered

paragraphs.[30] Indeed, JJC Defendants' Statement of Facts includes facts it acknowledges Plaintiffs dispute, in particular whether Troy was held in "isolation." JJC Defs. Br. 3. JJC Defendants are not, therefore, even in substantial compliance with the Rule 56.1(a). *Cf. McCleary v. City of Wildwood*, No. 09-2876, 2011 U.S. Dist. LEXIS 2342, at *1-2 (Jan. 10, 2011).

Mental Health Defendants have also failed to file the required statement of undisputed material facts. Although Attorney Lunga's affidavit sets forth some facts relevant to Plaintiff Troy D., the affidavit is peppered with argumentative language that impedes Troy from determining which statements are indeed facts Mental Health Defendants claim are material and undisputed. *See* Lunga Aff. in Support of Motion to Dismiss or Summary Judgment 12 ("Troy D. was provided with extensive and exhaustive medical treatment…"). Mental Health Defendants' statement of facts also weaves argument in with factual statements, once again precluding Troy's ability to ascertain which "facts" Mental Health Defendants claim are undisputed. *See, e.g.* MH Defs. Br. 11-12.

Furthermore, Defendants' failure to comply with Rule 56.1 or to otherwise clarify which facts are undisputed makes it impossible for Plaintiffs to fulfill their obligation under the Rule to provide a responsive statement of material facts in dispute. Plaintiffs have not received sufficient notice of the facts that JJC and Mental Health Defendants consider undisputed and therefore do not have a fair opportunity to respond. This underscores why this Court should dismiss Defendants' motions for summary judgment.

[30] Additionally, JJC Defendants' Statement of Facts in their brief does not set forth the facts in separately numbered paragraphs. JJC Defs. Br. 1-9.

Finally, to the extent that Defendants do claim any issues of material fact to be in dispute, these issues are not in dispute but rather must be resolved in Plaintiffs' favor, as discussed at length in Parts I-VI above.

B. Summary Judgment Is Premature Because There Has Been No Discovery; FRCP 56(d) Provides For Dismissal Or At Least Continuance Of Defendants' Motion For Summary Judgment.

Should this Court choose to proceed to consider Defendants' motion for summary judgment despite Defendants' failure to comply with Rule 56.1(a), this Court should nevertheless either deny Defendants' motions as premature or at a minimum defer its resolution until Plaintiffs have had a fair opportunity to obtain discovery that will directly bear on the genuine issues of material fact in this case. Federal Rule 56(d) gives the Court such discretion – which is routinely exercised – particularly when the non-moving party has not had an opportunity to make full discovery. F.R.C.P. 56(d); *Celotex Corp v. Catrett.*, 477 U.S. 317, 326 (1986); *Doe v. Abington Friends Sch.*, 480 F.3d 252, 257 (3d Cir. 2007); *St. Surin v. V.I. Daily News, Inc.*, 21 F.3d 1309, 1313-14 (3d Cir. 1994); *Dowling v. City of Philadelphia*, 855 F.2d 136, 139 (3d Cir. 1988) ("The court is obliged to give a party opposing summary judgment an adequate opportunity to obtain discovery"); *see also Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962) (summary judgment procedures should be used very sparingly where the proof is in the hands of the alleged wrongdoers).

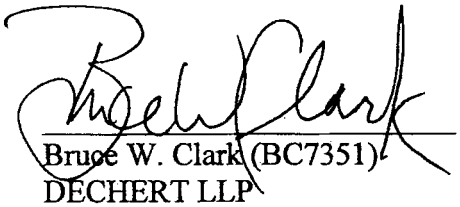
The details of some of the discovery Plaintiffs seek, and how that discovery will likely preclude summary judgment, are set forth in Plaintiffs' Declaration that has been submitted herewith.

Accordingly, Plaintiffs respectfully ask that Defendants' motions for summary judgment be denied (or, alternatively, deferred) until Plaintiffs have had a sufficient opportunity to conduct discovery in support of their claims.

CONCLUSION

WHEREFORE, for the foregoing reasons, and for any other reasons that may appear to this Honorable Court, Plaintiffs respectfully request that Defendants' Motions to Dismiss, and Motions in the alternative for Summary Judgment, be denied.

Respectfully submitted,



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