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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BLAISE CHIVERS-KING, *et al.*,

Plaintiffs,

v.

WYOMING DEPARTMENT OF FAMILY SERVICES, WYOMING BOYS' SCHOOL, *et al.*,

Defendants.

Case No. 24-CV-00039-SWS

REPLY TO RESPONSE TO DEFENDANTS' SUMMARY JUDGMENT MOTION

REPLY TO PLAINTIFFS' ADDITIONAL MATERIAL FACTS (AMF)

1. Object to ECF 225-44 as hearsay and immaterial because it was prepared when no Plaintiffs resided at WBS and does not address any incidents underlying their claims.

2. Object to conflating a diagnosis with a "disability" as defined under the ADA and Rehabilitation Act (RA). Deny the cited evidence shows Plaintiffs had disabilities within the meaning of those Acts.

3. Deny the cited material shows Plaintiffs had disabilities under the ADA or RA.

4. Deny. ECF 225-7 does not support ¶ 4's assertions. Object to ECF 225-41 as hearsay.

5-6. Object to ECF 225-44. *Reply to AMF* ¶ 1.

7. Deny there are no safeguards in place to ensure accuracy of incident reports. ECF 174-11 at § B.2. Deny Plaintiffs' mischaracterization of the cited testimony.

8. Object as the cited testimony lacks foundation and personal knowledge to show "WBS staff

frequently falsify records" or incident reports. Neither witness can competently testify about reports they did not prepare, review, or witness being prepared, or otherwise have no personal knowledge of. Urbin's knowledge is limited to his employment (fall 2022 to fall 2024) and cannot support a general claim about records created outside that period. His testimony is particularly irrelevant to Plaintiffs whose placements predated his employment (all except D.H.). If Urbin or McIntosh contend that any report was falsified, WBS was unaware of any such conduct that would have occurred contrary to WBS policies, training, and procedures. ECF 225-5 at 18:2-5; Ex. 1 *Affidavit of D. Weber* at ¶ 3.

9-10. Object and deny. *Reply to AMF* ¶ 8.

11. Object and deny. *Reply to AMF* ¶ 8; Ex. 2 *Affidavit of T. Shaffer* at ¶ 2.

12. Object and deny. *Reply to AMF* ¶ 8. Deny cited testimony ascribes alleged conduct to a Defendant.

13. Object and deny. The cited materials speak for themselves and do not evidence falsification of the incident report at issue. The cited materials provide no basis to conclude that other incident reports were falsified or that any broader practice of falsification existed.

14. Admit there is no universal definition of solitary confinement. Object to ECF 225-10 as hearsay and immaterial; WBS does not engage in practices that ¶ 14 describes as "solitary confinement." Ex. 1 at ¶ 4. Object to the repeated use of the terms "solitary confinement," "solitary," and "isolation" throughout Plaintiffs' AMF and brief as argumentative and conclusory. Whether any placement, status, or restriction constituted "solitary confinement" depends on the specific conditions, duration, and circumstances. Deny WBS employed practices that constituted solitary confinement and object to using those terms in lieu of evidence regarding the actual conditions experienced by any Plaintiff. This objection and denial applies to every use of the terms "solitary confinement," "solitary," and "isolation" throughout Plaintiffs' Response.

15. Object to ECF 225-10 and 225-39 as hearsay. Object as immaterial; WBS does not engage in the practices Plaintiffs describe as "solitary confinement." Ex. 1 at ¶ 4.

16. Admit WBS is aware isolation can have an impact on mental health. Deny the cited testimony establishes that any Plaintiff experienced isolation that impacted their mental health.

17. Admit that WBS does not use the words "solitary confinement." *Reply to AMF* ¶ 14. Deny mischaracterization of testimony in ECF 225-4.

18. Object to characterization of any room as a "solitary confinement" room. Deny the cited testimony shows WBS maintained rooms dedicated to or used for "solitary confinement." Object to conflating detention status with "solitary confinement," and deny that detention status always occurs in "exactly the same room." ECF 150 at ¶ 20. Deny that ECF 225-15 supports ¶ 18's assertions.

19. Object to ECF 225-10 as hearsay. Deny Plaintiffs were subjected to conditions amounting to "solitary confinement." *Reply to AMF* ¶ 14.

20. Deny WBS has "solitary confinement rooms." Deny the cited materials show staff used magnets punitively. Deny magnets were used "every time a student" was in a detention room. Object as Urbin and McIntosh lack personal knowledge of all placements in a detention room and cannot generalize their limited observations to every detention room use. Ex. 1 at ¶ 5; *Reply to AMF* ¶ 18.

21. Deny students assigned to a detention room had "no outside stimuli" and were rarely provided with books or educational material. Ex. 1 at ¶ 4; ECF 150 at ¶¶ 20, 96, 163, 168, 185-86, 190-193, 195, 196-98, 201, 203-05, 208. Object to those assertions as lacking foundation, personal knowledge, and evidentiary support for a system-wide practice.

22. Deny that WBS uses detention or any other status to punish. ECF 150 at ¶¶ 13-24. Deny mischaracterization of testimony cited in ECF 225-4.

23. Deny suggestion Plaintiffs were denied participation in activities for punitive reasons. Ex. 1 at ¶ 4; ECF 150 at ¶¶ 20, 96, 163, 168, 185-86, 190-193, 195, 196-98, 201, 203-05, 208.

24. Object to ECF 225-10 as hearsay. Deny suggestion that any limitation of any services was punitive and Plaintiffs were not provided educational or mental health services. Ex. 1 at ¶ 4; ECF 225-4 at

98:18-24; ECF 150 at ¶¶ 20, 96, 163, 168, 185-86, 190-193, 195, 196-98, 201, 203-05, 208.

25. Deny suggestion that limitations on interactions with peers or family phone calls are punitive.

26. Object to and deny the asserted linkage between the cited testimony as lacking foundation. Turner's testimony does not reference, describe, or relate to the alleged use of a towel under a door. If Plaintiffs combine these separate statements to imply a causal or responsive relationship, the inference is unsupported by the record and mischaracterizes the cited testimony.

27. Deny suggestion that all Plaintiffs were denied all exercise when on detention status for punitive reasons or otherwise. Ex. 1 at ¶ 4; ECF 150 at ¶ 20.

28. Deny. Ex. 1 at ¶¶ 4-5; ECF 150 ¶¶ 20, 96, 163, 168, 185-86, 190-193, 195, 196-98, 201, 203-05, 208. Object to ECF 225-44 as hearsay. Deny characterization of Coronado testimony.

29. Object to Urbin testimony as immaterial; he does not identify any Defendant who gave such an instruction about a Plaintiff. Deny suggestion that any limitation on staff communication with Willis or Karn was punitive. Ex. 3, *Turner Depo.* at 203:18-204:11, 205:21-206:4. Deny characterization of McIntosh testimony; as testified, Turner's instructions allowed RMO staff to talk to Karn.

30. Deny that the cited materials evidence any Defendants' participation in placing children on "solitary confinement" or determining the duration of such.

31. Deny characterization of "minor infractions" and deny cited materials support such.

32. Object to and deny characterization of cited testimony.

33. Object to ECF 225-39 as hearsay. Deny suggestion materials show a Plaintiff was placed in a detention room to punish for expressing suicidality; safety was the prime consideration. ECF 150 ¶20.

34. Deny mischaracterization of testimony. ECF 225-4 at 65:22-66:7.

35. Deny the cited evidence shows that placing a student on detention status for predetermined amounts of time is punitive. Deny characterization of Weber's testimony. ECF 225-6 at 179:1-15 (testifying that the duration of detention status should be based on the student's individual

circumstances, rather than a uniform, across-the-board period).

36. Deny characterization of detention room expectations as "strict and arbitrary" and deny that the cited evidence supports that characterization. Object to ECF 225-10 as hearsay.

37. Objection. ECF 225-12 does not support ¶ 37's assertions. Deny the cited material supports that the duration of any Plaintiff's status was extended for failing to sit in a corner or as punishment.

38. Deny the characterization of testimony and deny that it supports ¶ 38's assertion.

39. Deny Karn was in solitary confinement and that the cited evidence shows Elsa approved Karn's detention status or OCS-3 on each occasion. Deny Elsa approved detention status starting 9/30/20. ECF 150 ¶ 19-20; Ex. 4, *Elsa Depo.* 184:13-31, 186:1-5.

40. Deny Karn was in solitary confinement and that the cited evidence shows Adams approved Karn's detention status on each occasion except 8/16-8/18/20 and 6/7-6/9/21. *Reply to AMF* ¶¶ 39, 52.

41. Deny Karn was in solitary confinement and that the cited evidence shows Weber approved Karn's detention or OCS-3 on each occasion except 9/29-10/15/20, 2/2-2/18/21, and 6/7-6/9/21. *Id.*

42. Deny Karn was in solitary confinement and that the cited material shows Karn was "routinely" placed on detention status for pre-determined periods. Gilmore made those decisions. Ex. 1, at ¶ 8, Ex. 4 at 184:7-21, 186:1-5; *Reply to AMF* ¶¶ 39, 52.

43. Deny Karn was in solitary confinement and that his referenced acts were minor disobedience or infractions; in context, the actions were "unsafe[.]" Deny the characterization of cited testimony. ECF 225-13 at 182:23-183:1, 183:16-18, 195:11-25, 199:1-12; *Reply to AMF* ¶ 39.

44. Deny Karn was in solitary confinement and that the cited evidence supports ¶ 44's assertions.

45. Deny Karn was in solitary confinement and that the cited evidence shows they kept or extended Karn's detention due to the referenced conduct. Karn's conduct included assaulting staff and damaging property. ECFs 180-9 at 2-3; 181-16 at 4, 7-8; 225-60 at 1; 225-64 at 1-2; *Reply to AMF* ¶ 39.

46. Deny Karn was in isolation and that the cited evidence shows they kept Karn on detention status

despite positive behavior. Karn's days of positive behavior were either preceded or followed by days of negative behavior, including assaultive behaviors. Gilmore decided the length of Karn's detention status in Oct. 2020. ECFs 181-16 at 2-9; 181-17 at 2; 181-19 at 3; 225-67 at 197:8-12; Ex. 4, at 184:13-31, 186:1-5; *Reply to AMF* ¶¶ 39, 45.

47. Deny Karn was in solitary confinement and that the cited evidence shows the described conduct was the reason for an indefinite detention status period. ECF 225-68. p. 2; *Reply to AMF* ¶ 39.

48. Deny Karn was in solitary and that the cited evidence shows they placed Karn in detention status on Dorm 2 for 27 days. Karn spent 19 days engaging in unsafe behaviors like assaulting staff, damaging property, making threats; expressed thoughts of "assaulting staff and killing kids"; disclosed a plan to "overtake" staff and "break out of the facility." ECFs 150 ¶ 52k; 181-16 at 2-9; 225-3 at 3.

49. Deny the cited evidence shows Karn was prohibited from walking around the room, had minimal staff interaction, rarely received reading material, and did not participate in exercise. Karn received these things when he acted in a safe and appropriate manner. ECFs 175-3 at 85-86, 175-8 at 2, 180-9 at 4, 225-51 at 8-10, 225-58 at 2-3, 225-66 at 4-5. Deny Karn was placed in solitary confinement.

50. Deny Karn did not receive writing materials in detention status. Karn received writing material when he acted appropriately with it. ECFs 175-3 at 97-98, 175-7 at 2, 176-1 at 9.

51. Deny the cited evidence shows Karn experienced extreme mental health distress or that Weber and Adams had awareness.

52. Deny the cited exhibits show Mike Nelson approved placing Chivers-King on detention status. Plaintiffs conflate signatures on incident reports with approval of detention status. ECF 174-11 ¶ 12 (identifying persons required to "review, initial, and date" incident reports without stating such constitutes "approval" of actions taken).

53. Deny. Weber's signature on an incident report does not evidence approval of Chivers-King's detention status. *Reply to AMF* ¶ *52*.

54. Deny the cited evidence supports ¶ 54's assertion regarding "pre-determined time" on detention status. ECF 225-34, p.4 states that Chivers-King would be dismissed from detention status "upon successful completion of two consecutive days." ECFs 183-12; 184-6, p. 2.

55. Deny the cited incident report reviewed by Weber constitutes approval or authorization. *Reply to AMF* ¶ 52. Deny Weber authorized detention status for "minor infractions." ECF 184-9 (describing defiant and unpredictable behaviors disrupting the productivity of other students.); ECF 225-72 (explaining SMP was developed due to Blaise's refusal to meet behavioral expectations including "laying down, yelling, disrupting the dorm, hitting the windows and walls, looking out his window and communicating with peers.").

56. Deny the cited exhibits support ¶ 56's assertions. ECF 184-6 (disruptive behaviors including punching door and window); ECF 184-10 (disruptive behaviors including pushing on windows, punching wall, pounding on door, ripping up clothing, banging on window and door, hitting lights in room). Deny Weber's undated initials on Special Management Logs (ECFs 225-72, 225-97) evidence approval or authorization. Object that ¶ 56's characterizations do not account for Chivers-King's WBS behavioral history, which is relevant to staff's assessment of risk. Ex. 5, *Adams Depo.* at 90:6-91:6.

57. Deny the cited exhibits support ¶ 57's assertions and that Chivers-King was kept in solitary for 12 days. ECF 187-11 (describing 3 days of tearing up clothing, trying to destroy property, and that Chivers-King "walked around the inner circle" wearing restraints, played a card game outside the detention room, and "partially attended school for the day"); ECF 187-14 (describing disruptive and unsafe behaviors including tearing up clothing, and punching ceiling and lights, and that on days 6-11, Chivers-King spent the majority of his days outside the detention room doing chores, watching a movie, watching tv and "standing at the staff desk."). Logbook entries show Chivers-King spent considerable time outside the detention room while on detention status. ECF 187-17 at 112 (215PM to 325PM, cleaning on dorm, laundry while talking to staff and 545 PM to 620PM, out of detention

room for snack and talking with staff); 115 (330 PM to 345PM out for shower and walking around dorm; 615 pm to 655 PM given snack, medications and out to walk around); 116 (950 AM to 1125AM out of room cleaning on dorm; 1230 PM to 506PM watching movies in living area); 121 (820AM out of room cleaning; 1000 AM starts movie "Flash"); 123 (945AM cleaning complete and begins movie "Flash"; 1045 AM served lunch; 740PM in detention room).

58. Objection. ECF 225-35 does not support ¶ 58's assertions.

59. Deny. Object to ECF 225-39 as hearsay.

60. Deny characterization of cited exhibits. ECF 225-76 says Nelson and Blaise cleaned the wall together. Object to ECF 225-77; Plaintiffs do not establish the photographs relate to the incident.

61. Deny that on Dorm 4, Tolar was on OCS "nearly the entire time." Deny the cited Tolar testimony (ECF 225-38) addresses Tolar being on OCS, a status that may require a student to wear tan—not orange—clothing. ECFs 174-10 at 4; 189-2; Ex. 1 at ¶ 6.

62. Deny Tolar experienced "isolation in solitary confinement" on OCS. On OCS, he attended school; progressed in school with teacher support; and was completing his final course before graduation when he was discharged earlier than expected. He attended one-on-one counseling sessions, group therapy sessions, and medication management appointments with CPCC mental health providers. During periods when Tolar was on OCS, he was also in quarantine isolation by order of the Department of Public Health (not Elsa) due to testing positive for COVID-19; he also left the WBS campus for a medical home leave. ECFs 174-5 ¶¶ 6, 12-16, 21-26; 183-7 ¶ 10; 189-17, 189-20, 189-21 at 114:21-118:8; 191-7, 191-8; 225-79 at 2-3; Ex. 4 at 49. Object to McIntosh testimony (ECF 225-7) as lacking personal knowledge; he did not testify about Tolar's Dorm 4 OCS.

63. Deny that Elsa determined whether and how a student on OCS would attend CPCC-led mental health counseling and groups. ECF 225-79 at 2; Ex. 4, at 49-52.

64. Deny. The cited materials do not show Tolar was in "solitary confinement" on OCS or Schwalbe

"approved OCS." During Tolar's orientation period from 6/25/20 to 6/29/20, he did not constantly remain in his room. The statement in a 9/16/20 weekly update email that Tolar "need[s] to stay in Pod B" did not mean he constantly stayed in Pod B, as demonstrated by the statement in the same email that he "will be the last in line when lining up" and CHS teacher logs showing he attended school in that timeframe. Tolar was assigned to a Pod B dorm room because it had a camera and a mattress on the floor based on medical orders after a seizure. *Reply to AMF* ¶ 62; ECFs 189-1 at 145:17-22; 146:5-16; 189-2; 189-6; 189-9 ("monitored bed"); 191-8 at 6-9; 189-10 at 168:20-169:2.

65. Deny. Weber's signature on a progress meeting report does not show he "approved" two OCS incidents. Weber did not attend the progress meeting. ECF 225-80 at 1-2, 6.

66. Deny. Specialized clothing means wearing orange clothing for heightened observation but does not involve "solitary confinement." After Tolar was warned about being argumentative and defiant, he was placed in specialized clothing for "arguing with staff, not meeting his basic expectations, refusing to[] process his actions, and being passive aggressive." When Tolar wore specialized clothing from 9/12/20 to 9/22/20, he continued attending school; attended appointments with mental health providers; and was not constantly in his dorm room. *Reply to AMF* ¶¶ 62, 64; ECFs 174-2 ¶ 17; 225-81; Ex. 6, CPCC001113–115; Ex. 7, CPCC001116.

67. Deny. Tolar testified "a good couple of times," Schwalbe sent him to his room for a period that Tolar could not quantify, if even two hours. *Reply to AMF* ¶¶ 62, 64, 66; ECF 189-1 at 166:7-167:25.

68. Deny. On Dorm 1, Tolar was assigned to a camera room for his safety but was in the dorm community and stayed in his room the same as other students, such as sleeping. Tolar participated in program and therapy groups. ECFs 183-13 ¶ 16; 190-23; 191-9; 191-10; Ex. 8 DEFS 023797; Ex. 9, *McIntosh Depo.* 56:20-57:24, 58:4-8, 248:23-249:2, 249:24-250:18.

69. Deny that ECF 225-11 supports ¶ 69's assertions. Object to cited testimony because Willis has no personal knowledge of Turner and Elsa's intent and deny that the cited testimony supports that Turner

or Elsa "triggered" Willis for the purpose of placing him in "solitary confinement." Deny Willis spent 75% of his time at WBS "in solitary." ECF 192-26 which Plaintiffs do not deny the accuracy of, shows Willis did not spend any time in "solitary" and that he spent far less than 75% of his time on any specialized status. ECF 192-26; ECF 227 at fn.1 (admitting ¶ 27) and ECF 229 at ¶ 180 (denying only that incidents involved unsafe behavior). Indeed, Plaintiffs do not deny any of the "chronological facts" reflected in the Exhibits Defendants submitted, which show Willis did not spend 75% of his time on any status that could reasonably be characterized as solitary confinement. ECF 229 at fn. 3.

70. Deny the cited evidence supports that Turner approved Willis' placement in "solitary confinement" on each of the cited occasions. The cited testimony states she approved placement in the detention room "sometimes." Plaintiffs conflate signing an incident report with approval of detention status, which the evidence does not support. ECF 174-11 at ¶ B. 12 (identifying those required to "review, initial, and date" reports, not stating such constitutes "approval" of actions taken).

71-72. Deny that the cited evidence supports that Weber or Elsa approved Willis' placement in "solitary confinement" on each of the cited occasions. *Reply to AMF* ¶ 70.

73. Deny that the cited evidence reflects Weber, Turner, and Elsa approved Willis' placement on detention status "routinely."

74. Deny incomplete characterizations of cited material. The material speaks for itself and identifies events preceding Willis' placement on detention status. Object to the extent Plaintiffs' characterizations do not account for Willis' behavioral history at WBS, which is relevant to staff's assessment of the risk. **Ex.** 5, at 90:6-91:6 (explaining staff consider student's behavioral history in assessing safety risks). Deny the cited materials support that Turner and Weber "authorized" Willis' placement in "solitary" on each of the cited occasions. *Reply to AMF* ¶ 70.

75. Deny incomplete characterizations of the cited material. ECF 195-16 is the incident report discussed in the cited testimony. Elsa testified she did not remember the underlying incident

independent from the report. ECF 225-67 at 135:17-18. The report speaks for itself and identifies the events preceding Willis' placement on detention status. Object to the extent Plaintiffs' characterizations do not account for Willis' behavioral history at WBS.

76. Deny characterizations of cited material. Deny the cited material reflects Weber's participation in assigning Willis negative days or extending his placement on detention status.

77. Deny the cited materials show that all safety concerns had dissipated. Ex. 10, *D. Olson* at 92:3-93:9, 104:7-108:25 (student's ability to demonstrate commitment to safe behavior over length of time is relevant to determining whether he continues to present a safety risk). Deny the cited materials show Weber's participation in keeping Willis on detention status. Object to cited McIntosh testimony because he lacks personal knowledge to testify to what Turner "liked." Object to and deny assertion that Turner's cited testimony evidences that she "liked" to leave Willis on detention status.

78. Deny cited materials show that Turner and Shaffer came up with a plan to "talk less to Haiden," as ECF 225-83 does not attribute that statement to either of them. Deny suggestion that any plan or instruction to talk less to Willis was intended to punish or mistreat him. **Ex. 3** at 203:18-204:11, 205:21-206:4 (explaining intent to limit engagement with unhealthy, unproductive topics that Willis discussed, such as criminal activity).

79. Deny mischaracterization of cited testimony.

80. Deny that Willis was "isolated from everything." ECF 150 ¶¶ 185-86, 190, 192, 193, 195-98, 201, 203-205, 208 (identifying services provided to Willis while on detention status).

81. Deny. Logbook entries show many instances of Willis being provided with bedding in the evening and/or bedding being removed in the morning while on detention. ECF 193-9 at 128 (7:57pm), 129 (6:00am); ECF 193-13 at 31 (7:38pm); ECF 194-4 at 20 (7:28pm), 22 (6:00am), 103 (6:00am), 108 (5:57am), 113 (6:00am), 115 (7:39pm); ECF 194-13 at 54 (7:50pm), 56 (5:59am), 59 (8:11pm), 61 (5:59am), 63 (6:02am), 67 (6:03am), 72 (8:13am), 103 (8:30pm), 104 (6:09am), 114 (6:02am), 132

(7:52pm), 136 (7:52pm), 138 (6:05am), 147 (8:14am), 149 (6:05am), 150 (8:10pm), 151 (6:06am), 152 (8:12pm); ECF 189-3 at 38 (6:05am), 41 (6:05am); 87 (7:25pm), 89 (highlighted note after 6:00am); 92 (6:18am), 97 (6:06am), 103 (7:55am); ECF 180-1 at 18 (7:05pm).

82-83. Deny the cited testimony shows Willis was only allowed to communicate by raising his hand. Deny staff never had meaningful conversations with Willis or that he was never allowed to see a therapist on detention status. ECFs 193-9 at 131 (processing 3:33-3:40pm); 193-11 (nursing); 193-13 at 30 (out of room talking to Weber 3:51-4:15pm); 193-14 (nursing); 194-4 at 19 (processing 2:21pm), 23 (9:54-9:57am), 105 (3:11pm), 110 (1:33-1:51pm), 111 (7:35pm); 114 (2:12-2:25pm); 115 (3:52-4:02pm), 125 (7:39-7:57pm), 133 (3:08pm-3:19pm), ECF 194-13 at 45 (3:33pm), 62 (2pm), 105 (9:24am), 135 (12-12:03pm) 139 (processing), 141 (7:42pm), 143 (9:25-10:06am); 195-3 (nursing), 195-5 (nursing); 195-7 (psych. visit) 189-3 at 38 (Elsa/Schwalbe processing); 150 ¶ 14. ECF 225-11 does not support the remaining assertions. Willis lacks personal knowledge of Turner or Elsa's intent.

84. Deny characterization. He received appropriate medical care following events. ECF 150 ¶ 200.

85. Deny the cited exhibits support Plaintiffs' assertions. D.H. testified he did not remember how long he was on detention status. ECF 225-40 at 121:17-22. ECFs 191-24 and 191-25 do not contain any information about detention status or that D.H. was isolated. ECF 192-8, an incident report concerning D.H.'s runaway threat, states Adams placed D.H. on detention status. ECFs 174-19 and 174-24 say nothing about isolation. The cited Urbin testimony (ECF 225-5) does not state D.H. was kept in the detention room when not on detention status. Weber and Del's review of incident reports does not equate to authorization. *Reply to AMF* ¶ 52. ECF 192-9 where Del signed the incident report on 7/25/24, and Weber on 7/30/24, which dates are, respectively, 10 and 15 days after D.H. was discharged from WBS. ECF 191-13.

86. Deny the cited exhibits support ¶ 86's assertions. Weber and Del's review of incident reports does not equate to authorization. *Reply to AMF* ¶ 52. Both incident reports note D.H. was placed on TCR

and say nothing of detention or isolation.

87. Deny the cited exhibits support ¶ 87's assertions. Weber and Del's review of incident reports does not equate to authorization. *Reply to AMF* ¶ 52. Urbin did not state D.H. was placed in solitary confinement for acting out or not following directions. Instead, Urbin said "Anything from acting out to trying to pry a window out with a screwdriver. Not following directions" was behavior that got D.H. sent to the detention room. ECF 225-5 at 121:9-17.

88. Deny. ECF 225-17 does not support ¶ 88's assertions.

89. Deny the cited exhibits support ¶ 89's assertions. Urbin's testimony (ECF 225-5) is limited to his observations made on his Sunday shifts, and there is no evidence he ever observed D.H. in the detention room except on a Sunday. D.H. testified he ate meals in the detention room only when on detention status. ECF 225-40, p.5.

90. Deny that Cranford experienced "isolation in solitary confinement" on OCS. Cranford testified that on OCS, he still did group work and "as far as day-to-day living, it stayed pretty much the same." When on OCS, he had no restrictions at school; attended classes; and progressed, starting in 10th grade and graduating in December 2020. He attended one-on-one counseling (averaging over 3 each month), group therapy (averaging over 2 each week), and medication management appointments with CPCC providers. ECFs 174-5 ¶¶ 7-15, 17-20; 183-7 ¶ 7; 195-22 at 156:1-14, 156:21-157:5, 197:14-199:4; 195-24, 196-9; Ex. 4 at 49. Object to referenced McIntosh testimony (ECF 225-7) as lacking personal knowledge because he did not testify about Cranford's Dorm 4 OCS.

91. Deny. Schwalbe calling RMO to report Cranford was off OCS does not support the assertion that Schwalbe made the decision. ECF 225-87.

92. Deny. Ex. 11*, Elsa Aff.* ¶ 3.

93. Deny. Cranford was never on detention status or "in solitary confinement" at WBS and he was not prohibited from attending school and therapy sessions. *Reply to AMF* ¶¶ 90, 92.

94. Object to McIntosh testimony because he lacks personal knowledge of any use-of-force incidents he was not personally involved in. Deny testimony supports that staff provoked or escalated students.

95. Deny mischaracterization of testimony.

96. Deny suggestion residents placed in restraint chair had no opportunity to move their limbs during the duration of the placement. ECFs 182-4; 182-7 (showing exercise breaks).

98. Deny the cited evidence supports Karn was in the chair up to 8 hours; Karn had a mask on for multiple hours during 8 restraint chair uses; and Weber authorized the chair on: 12/22/20, 2/4/21, 6/19/21, or 6/26/21. When Weber authorized the chair, he did so at Gilmore's direction. Deny the cited evidence supports Shaffer was involved in placing Karn in the chair on 2/4/21; 6/19/21; 6/20/21; 6/25/21; 6/26/21; 6/27/21. Admit Mark Nelson was involved in placing Karn in the chair on 6/20/21, but deny the cited evidence supports his involvement on any other date. Admit Schwalbe was involved in placing Karn in the chair on 6/26/21, but deny the cited evidence supports his involvement on any other date. Schwalbe was not involved in the chair use on 6/19/21. ECF 174-2 at ¶ 5; Ex. 13, *Schwalbe Aff.* at ¶ 3.

99, 99a, 99e. Deny. Weber had legitimate safety justifications and only authorized use of the chair at Gilmore's direction. Deny Weber authorized the chair in AMF 99a, 99e events. ECF 174-2 at ¶ 5.

99b. Deny Karn was placed in the chair for trying to damage the camera. Staff attempted to place Karn in soft restraints so maintenance could fix the cameras. He was placed in the chair after struggling against restraints and attempting to assault staff, after threatening staff earlier. ECF 182-4 at 1-2.

99c. Deny Karn was placed in the chair for the referenced conduct. Maintenance repaired damage Karn caused in the room during the hour Karn spent in the chair. ECF 181-7 at 2-3.

99d. Deny the cited evidence shows no safety justification existed, or that Mark Nelson placed the spit mask on Karn's head. Karn attempted to damage the room, creating a safety risk. Deny the cited evidence supports that Karn complied with all instructions; Karn initially refused. Object to the cited

video and deposition evidence as misleading, as this does not take into account Karn's behavior prior to staff entering the room or Karn's history of assaulting staff. ECFs 182-12 at 2-3, 182-10; Ex. 12, *Weber 30(b)(6) Dep.* at 47:17-25, 48:1-8.

99f. Deny Weber pre-approved the restraint chair just until Karn committed "to not damage the detention room." The cited evidence states approval and pre-approval of the chair was "a result of Charles assaulting several staff in several different incidents" and Karn must make "a credible commitment to be safe to himself, staff, and to not damage the detention room." Gilmore, not Weber, pre-approved the chair in June 2021. ECF 225-88 at 2; Ex. 1, at ¶ 9.

100. Deny the cited evidence supports that Shaffer "taunted" Karn and spoke the quoted language.

101. Deny Karn was kept in the restraint chair longer than necessary. The cited testimony misquotes the video and, for two quotes, misidentifies the speaker. Ex. 2, at ¶ 8 .

101a. Deny. The cited evidence does not support that Weber approved the restraint chair on this date. Gilmore, not Weber approved the chair and Karn's release from it. ECF 182-4 at 5.

101b. Deny the cited evidence supports the referenced conduct. Karn attempted to escape the chair in the first hour. ECF 182-4 at 5-8.

101c. Deny the cited evidence shows Schwalbe kept Karn in the chair. Schwalbe was not involved in the decision to place Karn in the chair, the physical placing of Karn in the chair, the decision to remove Karn from the chair, or the physical removal. ECF 182-12 at 2-5, Ex. 13, Schwalbe Aff. at ¶ 3.

101d. Deny Mark Nelson had the authority to keep Karn in the chair. Deny Weber "authorized" the chair; he did so at Gilmore's direction. Deny Karn was kept in the chair despite the referenced behavior; he stayed in the chair while maintenance attempted to repair the room. Earlier, Karn made threats to hurt staff and injured a staff member the day before. ECFs 174-2 at ¶ 5; 181-6 at 2-3, 5; 182-10 at 2; Ex. 14, *Mark Nelson Dep.* 52:6-14.

101e. Admit Weber authorized the chair, but at Gilmore's direction. Deny the cited evidence supports

he was only noncooperative during two checks. He tried to tip the chair over, made threats, and was unwilling to commit to being safe. ECFs 174-2 at ¶ 5; 182-16 at 2-3.

101f. Deny Weber "authorized" the chair; he did so at Gilmore's direction. Deny suggestion that Karn was safe; he did not commit to be safe until about 7:00pm. ECFs 174-2 at ¶ 5; 181-10 at 4.

101g. Deny Weber "authorized" the chair; he did so at Gilmore's direction. Deny the cited evidence supports the absence of a legitimate safety justification. Maintenance was called to repair the room and Karn had a history of hurting staff even while in restraints. ECFs 174-2 at ¶ 5; 182-18 at 2-3.

102. Deny. ECF 150 ¶ 49c.

103. Deny the cited evidence shows Shaffer broke Karn's left wrist. Karn complained about right wrist pain after a restraint; Dr. Thurston diagnosed his right wrist as a soft tissue sprain. Deny the cited evidence shows Shaffer tackled Karn during the restraint or bragged about breaking his wrist. Object to Urbin testimony as lacking foundation; he didn't know at the time who the statement referred to, and only decided on Karn "after reading through this suit[.]" ECFs 150 ¶ 54; 225-5 at 47:4-7.

104. Deny. ECF 197-1; Ex. 2, ¶¶ *5-7*.

105. Deny Karn was tackled. Karn turned to face staff while sitting on the ground and resisted when staff attempted to turn him around, leading to staff physically managing him into prone position. Admit Karn was handcuffed and sitting at the time but deny the remainder of referenced conduct. Shaffer testified Karn had to be turned around for safety, and that he could have "carried out an assaultive move in that position by kicking." ECFs 197-10; 230-1 at 194:5-7, 194:20-21.

106. Object to characterization of video. The video shows Chivers-King trying to damage the lights in his room and threatening to assault Mike Nelson by raising his fist and taking an aggressive stance. Force was used only after he resisted and headbutted Nelson. ECF 184-14.

107. Object to characterization of the video. Deny the cited exhibit supports assertion that Del approved of the force. ECF 225-5 does not support assertions.

108. Deny characterization of the event; deny that it is consistent with the video; deny that the cited exhibits support ¶ 108's assertions. Deny mischaracterization of the cited incident report, ECF 186-4, stating Shaffer, and non-party WBS staff members Yeoman and Bennett decided to enter the room with the riot shield after Chivers-King began tying fabric from his shirt around his neck.

109. Deny mischaracterization of cited exhibit. Chivers-King does not identify Shaffer in his testimony at 156:12-17. ECF 225-35. Deny that the cited exhibit supports contention that Shaffer threw Blaise to the ground or restrained his arms behind his head in a manner that caused excruciating pain.

110. Object to Plaintiffs' characterization. The cited video speaks for itself.

111. Deny. The cited report does not support Plaintiffs' assertions. ECF 150 ¶ 182.

112. Deny. Ex. 2, at ¶ 9

113. Deny mischaracterization of testimony or that Mark's testimony establishes knowledge of all staff.

114. Deny the cited exhibit supports ¶ 114's assertions, which are inconsistent with and contradict the only relevant video evidence. Ex. 15, *Haun Affidavit* ¶¶ 4-5 and ECF 192-11.

115. Deny. ECF 195-22 at 307:2-13, 308:18-309:1, 309:2-9; Ex. 2 ¶ 3; Ex. 16, *Mark Aff.* ¶ 3; Ex. 13 ¶2.

116. Deny in part. Tolar wears an ankle-foot orthotic (AFO) with supports around his leg to keep it in place and stable; he wears it to help him walk "so I don't break any bones because my bones are on my right side more fragile;" he did not a break bone while at WBS. ECFs 189-1 at 127:5-11; 189-11; 189-19; 225-38 at 22:10-13.

118. Deny. Tolar testified an unidentified staff member took his brace "[s]ix months in" during his time at WBS—around December 2020, just before he was transferred to Dorm 1. He thought Elsa was involved but cannot explain how. Multiple medical request forms and other medical documentation show he used his brace on Dorm 4 except two brief periods when the brace broke and was being repaired. Tolar himself took his brace off at night to sleep, as he has done since childhood and consistent with WBS medical orders, and admits in AMF 116. Object to the referenced

McIntosh testimony (ECF 225-7) as lacking personal knowledge about Tolar on Dorm 4; he testified to reading about an "allegation" made by Tolar's mother. ECFs 174-8 ¶ 40; 189-1 at 127:12-128:24; 190-8; 190-9; 190-10; 190-13; 190-14; 190-16; 190-18; 190-19; 190-20; 190-21; 190-22; 191-5; 225-7 at 190:2-20; 225-78 at 22:10-13; Ex. 9, at 58:4-8, 248:23-249:14; Ex. 17, DEFS 041683.

119. Deny. *Reply to AMF* ¶ 118; ECFs 225-79 at 2; 189-11; 190-13; 190-18; 190-19; 190-20; 190-24.

120. Object to the referenced paragraph in an MDT report reflecting Debra Dever's (Tolar's mother) comments (ECF 225-78) as inadmissible hearsay. Object to the Dever comments and the referenced Tolar testimony (ECF 225-38) as improper lay opinion testimony that does not establish any causal relationship to events at WBS.

121. Deny. McGinty was not present for a suicide attempt matching the description. The event matching the description occurred 6/19/21, where Karn engaged in the cited behaviors but did not lose consciousness. Compare ECF 174-23 at 97:3-25, 98:1-12 with ECF 197-13. McGinty did not work 6/19/21 and could not have intervened. ECFs 183-5 at ¶ 7; 183-6.

122. Deny as mischaracterizing McGinty's testimony. McGinty testified he "would intervene" if a resident was hanging himself "so they don't die." ECF 225-91 at 56:17-57:1.

123. Deny any Plaintiffs were subject to a "disciplinary process," as WBS statuses are not imposed as part of any disciplinary process. ECF 150 ¶¶ 13-24.

124. Deny that ECF 225-12 supports that dorm directors were aware of whether a student had a psychiatric evaluation. Admit staff have access to residents' critical information cards, which may contain information about a resident's diagnoses if WBS has such information. Deny the cited testimony establishes knowledge of any dorm director other than Del.

125. Object to conflating diagnosis with "disability" as defined by the ADA and RA and deny the cited evidence establishes Plaintiffs had disabilities or that WBS was aware of disabilities.

126. Deny mischaracterization of the testimony. Deny cited paragraphs establish that WBS intended

to punish Plaintiffs. Rather, the paramount goal was safety. ECF 150 ¶ 215.

127. Objection. ECF 225-36 and ECF 225-12 do not support ¶ 127's assertions. Deny the testimony shows Defendants failed to consider Plaintiffs' disabilities in interactions with Plaintiffs.

128. Deny that the cited testimony establishes that WBS never provided any accommodations.

129. Object to Wachtel report as hearsay and deny the cited exhibit contains the quoted language; it is also not in ECF 225-41 (Wachtel's report). Deny opinion. ECF 116-4 (providing contrary opinion).

130. Object to ECF 225-39 as hearsay. Deny mischaracterization of Adams and Elsa testimony. Deny the cited testimony shows WBS did not comply with any Plaintiff's IEP.

131-132. Object to ECF 225-39 as hearsay. Object to conflating diagnosis with "disability" as defined by the ADA and RA and deny that Plaintiffs have submitted any evidence establishing Plaintiffs had disabilities within the meaning of those Acts. Object because during the portions of the cited testimony, Plaintiffs' solicited testimony calling for legal conclusions regarding the application of the ADA and RA, which lay fact witnesses are not qualified to give and therefore do not constitute competent evidence.

133. Object to ECF 225-44 as hearsay. Deny that the cited testimony establishes that WBS was on notice of the need for more training on mental health.

134. Object to the cited evidence as hearsay.

135. Deny that Karn was placed in solitary confinement. Object to the cited evidence as hearsay.

136. Deny. Karn received schoolwork when on detention status on Dorm 4 during his first placement, so long as he acted appropriately with it. ECFs 175-3 at 97-98, 175-7 at 2, 176-1 at 9.

137. Admit Karn did not attend school due to being on detention status during the referenced dates. Deny detention status is solitary confinement.

138. Deny that Karn was denied programs and activities. Karn received education and mental health services. ECFs 174-5 at ¶¶ 8, 28; 174-8 at ¶¶ 12, 32; 175-3 at 97; 183-7 at ¶ 8.

139. Object to ECF 225-39 as hearsay. Deny the cited testimony supports assertions.

140. Deny solitary. Admit students on detention status do not attend class in the school building.

141. Deny. Ex. 18, *Schwalbe Depo.* 147:24-148:9.

142. Deny. ECFs 174-8 ¶¶ 8-11; *Reply to AMF* ¶¶ 64, 118, 119.

143. Deny. ECFs 183-13 ¶¶ 10-12; 190-23; 191-3; 191-4.

144. Deny. Tolar was provided disability-related accommodations relating to his education. *Reply to AMF* ¶ 62. Object to ECF 225-39 as hearsay.

145. Deny in part. WBS knew Tolar wore a brace on his right foot [redacted] Deny that the second substantive sentence was known by WBS. ECFs 189-1 at 143; 225-47.

147. Objection. ECF 225-11 does not support ¶ 147's assertions. Deny suggestion Willis received an insufficient amount of schoolwork while on detention status, in light of the actual amount of time he spent on detention status and the safety considerations at the time.

148. Objection. ECF 225-11 does not support ¶ 148's assertions. Object to ECF 225-39 as hearsay.

150. Deny that the cited exhibits support Plaintiffs' assertions.

151. Objection. ECF 225-40 does not support ¶ 151's assertions. ECF 225-5, is the deposition of Les Urbin and does not mention D.H.'s school attendance.

152. Deny solitary. Deny Krezmien conclusion and object to ECF 225-39 as hearsay.

153. Object to ECF 225-39 as hearsay. Admit WBS never spoke with Cranford about having a disability because he never requested an accommodation; otherwise deny. Deny that he missed extensive school or required special education; he did not have obvious mental health disabilities. *Reply to AMF* ¶ 90; ECFs 195-22 at 155:10-13, 160:15-161:13, 222:12-223:8; 174-2 ¶ 32; 174-8 at ¶ 12.

154. Deny. *Reply to AMF* ¶ 90, 92, 153.

155. Deny. WBS policies use the term "resident" for current and former residents, and the policy's procedures apply to current and former residents. ECF 174-20; Ex. 1, at ¶ 11; Ex. 19, DEFS 00387-

388 ¶ 6, Ex. 20, DEFS 000553-554 ¶ 4.

156. Objection. A plaintiff's subjective awareness about a grievance policy is immaterial. *Gonzales-Liranza v. Naranjo*, 76 F. App'x 270, 273 (10th Cir. 2003). Admit with the qualification that WBS policy does not prohibit a grievance if a resident is transferred. ECF 174-20.

157. Deny that bleeding scabs on D.H.'s head due to improper hair products; healing bruises by his shoulder blades; [redacted] were causally associated with D.H.'s claims or a defendant. [redacted] ECFs 192-16; 225-94 at 3; Ex. 21, DEFS005328-5335 at 4-7; Ex. 22, CPCC000854-868 at 5-6, 15; Ex. 23, *D.H. Depo.* 56:24-57:4.

DISCUSSION

I. Karn and D.H. failed to exhaust available administrative remedies.

By showing Karn and D.H. failed to exhaust available administrative remedies, Defendants met their burden. *Estrada v. Smart*, 107 F.4th 1254, 1260 (10th Cir. 2024). The burden then shifted to Plaintiffs to show exhaustion or to establish unavailability. *Id.* at 1261. Plaintiffs failed to establish unavailability or that applying the WBS grievance policy to their claims is unreasonable.

Plaintiffs contend they exhausted administrative remedies, arguing WBS admitted the grievance procedure is exhausted if a resident complains to WDFS. ECF 224 at 49-50. Yet WBS did not testify that residents physically located at WBS could circumvent the grievance procedure that way. Instead, Plaintiffs' counsel asked the WBS designee: "What procedures are in place to ensure that *residents who are transferred from Wyoming Boys' School* can continue to pursue grievances related to events that arose at Wyoming Boys' School?" ECF 225-4 at 207:2-208:7 (emphasis added). The answer[1]—

[1] WBS answered: "The boys – the students at the Boys' School, as long as they remain under the custody of DFS after they are released from the Boys' School, would have direct access to a caseworker that would be able to forward any concerns to the Boys' School. But once they're released from the custody of DFS, they would have to call the Wyoming Boys' School to report something." ECF 225-4 at 207:11-18.

and ensuing questions and answers—followed up on the initial question and answer about *residents transferred from WBS*, not residents living at WBS. [redacted]

Plaintiffs contend that a parental complaint or communication to WBS qualifies as a grievance because the policy does not specify a particular form or procedure. ECF 224 at 50. Yet the policy contains a process to resolve a grievance that a parent submits "on behalf of the resident." Upon receipt of the grievance form filled out by the parent, the Director and resident will attempt to resolve the grievance informally; with the other procedures in the policy available to exhaust. ECF 174-20. "[W]hen an administrative process is susceptible of multiple reasonable interpretations, Congress has determined that the inmate should err on the side of exhaustion." *Estrada*, 107 F.4th at 1270 (citation omitted). Plaintiffs must show that it would be unreasonable to apply the WBS grievance policy to their claims. *Id.* at 1254 (citation omitted). Plaintiffs failed to make that showing. Under the policy, by simply communicating with WBS, Lucas and Belcourt did not submit grievances on behalf of their sons. ECFs 174-20, 174-19 ¶¶ 10, 13.

Arguing unavailability, Plaintiffs contend the WBS policy only applies to "residents" and suggest that term means "current" residents. Yet the term "resident" is not so restricted. WBS policies use the term "resident" for current and former residents. *Reply to AMF* ¶ 155. Even Plaintiffs' counsel used the term "resident" to describe a person who had been transferred and no longer lived at the

[2] On 6/29/2021, Karn reported alleged abuse or neglect to his DFS caseworker. On 6/30/2021 and 7/14/2021, different DFS representatives conducted interviews with Karn as part of the investigation. ECFs. 225-3, 225-19.

WBS facility. ECF 225-4 at 207:2-208:7. Moreover, the grievance policy contains no language prohibiting a former or transferred student from submitting a grievance and following the procedures set forth in the policy, which contains no time constraints. ECF 174-20. Although Plaintiffs had a practical means of access—contacting the facility to request a grievance form—they present no evidence that they made such an attempt. Plaintiffs cannot establish unavailability. *See Sims v. Kansas Dep't of Corrs.*, No. 18-01259-EFM-KGG, 2020 WL 707989, at *5 (D. Kan. Feb. 12, 2020) (finding that after interstate transfer, inmate failed to exhaust remedies with transferring facility, where inmate did not claim that he requested a grievance form or that the request was refused). This is not a case where a discrete event occurred immediately before Plaintiffs transferred away from WBS and they had no practical opportunity to file a grievance. Plaintiffs had ample opportunity to file grievances when they lived at WBS. During Karn's placements at WBS spanning nearly 3 years, he failed to file a single grievance. In the nearly 4 months D.H. was at WBS, he filed only one.

While Plaintiffs assert that WBS discourages grievances (ECF 226 ¶ 32), to establish unavailability based on threats or intimidation, Plaintiffs "must produce specific facts that show there is a genuine issue of fact as to whether (1) "the threat[, machination,] or intimidation actually did deter [them] from lodging a grievance" and (2) "the threat[, machination,] or intimidation would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance." *May v. Segovia*, 929 F.3d 1223, 1235 (10th Cir. 2019). Plaintiffs present no evidence that Karn or D.H. declined to file grievances for that reason.

II. D.H. failed to make the requisite physical injury showing for all claims.

D.H. failed to create a genuine issue of material fact as to the PLRA's physical injury requirement, so he is not entitled to compensatory damages. First, as recognized by 7 other circuits (with no split) and district courts within the 10th Circuit, a plaintiff must show more than a de-minimis physical injury to recover for a mental or emotional injury. *Johnson v. Reyna*, 57 F.4th 769, 777 (10th

Cir. 2023) (citing cases). Interpreting § 1997e(e) to impose the more-than-de-minimis requirement is consistent with the PLRA's purpose to curtail frivolous and abusive prisoner litigation, and allowing de minimis injuries would produce an absurd result. *See Mitchell v. Horn*, 318 F.3d 523, 535-36 (3d Cir. 2003); *Oliver v. Keller*, 289 F.3d 623, 627-29 (9th Cir. 2002). Chest soreness for 3 days, head scabs, and healing bruises are typical de minimis physical injuries. *See*, *e.g.*, *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (sore, bruised ear for 3 days insufficient); *Pierre v. Padgett*, 808 F. App'x 838, 843 (11th Cir. 2020) (scrapes, scratches, minor bruising or swelling insufficient), overruled on other grounds by *Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021).

Second, the physical injury requirement is claim-specific. *Murray v. Edwards Cnty. Sheriff's Dep't*, 248 F. App'x 993, 997 (10th Cir. 2007); *Wallin v. Dycus*, No. 03-cv-00174-CMA-MJW, 2009 WL 798839, at *13 (D. Colo. Feb. 25, 2009); *Turner v. Schultz*, 130 F. Supp. 2d 1216, 1223-24 (D. Colo. 2001). D.H. presents no evidence to associate head scabs, healing bruises, [redacted] with any pleaded claim, and presents no causal connection to the alleged conduct underlying his claims. [redacted] *Reply to AMF ¶ 157.*

Third, courts recognize that physical manifestations of mental conditions fail to establish a "prior showing of a physical injury," as required by § 1997e(e). *See Hughes v. Colo. Dep't of Corrs.*, 594 F. Supp. 2d 1226, 1238-39 (D. Colo. 2009) (finding alleged physical injuries that are "derivative manifestations of mental or emotional injuries" insufficient); *Ellis v. Retting*, No. 23-CV-03425-PA-CYC, 2025 WL 251148, at *3 (D. Colo. Jan. 21, 2025); *Silverman v. Prisoner Trans. Servs. of Am., LLC*, No. CIV-15-1093-F, 2016 WL 3355334, at *3 (W.D. Okla. Apr. 26, 2016), report and recommendation adopted sub nom., 2016 WL 3352199 (W.D. Okla. June 15, 2016). [redacted] *Reply to AMF ¶ 157.*

III. Defendants did not waive qualified immunity.

Plaintiffs assert Defendants waived the qualified immunity defense to claims 1-4 "because

their legal arguments are perfunctory." ECF 227 at 53. That assertion fails for several reasons.

First, Tenth Circuit precedent holds the clearly established law prong of qualified immunity is not waived even if not briefed in detail. *Hunt v. Montano*, 39 F.4th 1270, 1284-85 (10th Cir. 2022) ("Even if the [defendants] failed to argue the clearly established prong in detail, [] the [plaintiffs] still bore the burden to demonstrate that it was met."). This principle rests on the unique burden-shifting framework of qualified immunity. *Id.*; *accord Cox v. Glanz*, 800 F.3d 1231, 1244-1246 (10th Cir. 2015) (rejecting argument that appellee forfeited qualified immunity by failing to argue the clearly established law prong in light of unique qualified immunity briefing burdens); *Arnold v. Weld Cty. Sch. Dist. Re-5J*, 677 F. Supp. 3d 1218, 1237 fn. 12 (D. Colo. 2023). Here, Defendants invoked the defense in their motion for summary judgment, submitting approximately 250 record-supported facts and providing substantial citation to governing constitutional standards for each § 1983 claim. They also expressly addressed the clearly established law prong. Under *Hunt*, this invocation triggered Plaintiffs' burden to demonstrate both prongs, and Defendants cannot be found to have waived qualified immunity.

In any event, Plaintiffs' response confirms they had full notice of the qualified immunity defense and suffered no prejudice. In response to Defendants' assertion of qualified immunity, Plaintiffs extensively briefed the issue (ECF 227 pp. 54-69) and conceded no fewer than 15 claims. ECF 227 at fn. 20, 23, 26. Tenth Circuit authority makes clear that where a plaintiff fully responds to a qualified immunity argument on the merits, a claim of waiver is untenable. *See Ahmad v. Furlong*, 435 F.3d 1196, 1198-99, 1202-04 (10th Cir. 2006) (holding that although movant's brief only asserted qualified immunity "in general terms," the defense was adequately raised in light of non-movants response addressing qualified immunity); *Fogarty v. Gallegos*, 523 F.3d 1147, 1159 fn.11 (10th Cir. 2008) (rejecting suggestion defendants waived qualified immunity in light of extensive response thereto).

Finally, in contrast to Plaintiffs' cited cases, Defendants did not raise qualified immunity in a cursory manner. Rather, Defendants provided substantial citation to the governing constitutional

standards for each § 1983 claim. *Compare* ECF 149 at 5-72 *with* **Ex.** 24**,** Tillmon Motion at p. 9 (providing only general qualified immunity test) *and* **Ex.** 25, Niceta Motion at 18-19 (similar) *and* **Ex.** 26, Brighter Day Motion at 28-30 (similar). Defendants plainly placed Plaintiffs on notice that they sought summary judgment on qualified-immunity grounds and identified the factual and legal bases therefore. Plaintiffs' response confirms as much. Thus, there is no basis for waiver.

IV. First Claim for Relief: Isolation Resulting in Deprivation of Basic Human Needs

Plaintiffs contend *Milonas v. Williams* clearly established a bright-line constitutional rule prohibiting juvenile isolation for more than 24 hours or for any purpose other than containing a physically violent youth. 691 F.2d 931 (10th Cir. 1982). That reading overstates *Milonas*, which did not announce a categorical rule that *any* confinement exceeding 24 hours automatically violates the Fourteenth Amendment. Rather, *Milonas* focused on the *punitive* use of isolation. *Id.* at 942-43. Further, *Milonas* affirmed a multi- faceted permanent injunction after trial. It did not analyze individual qualified immunity or announce a damages rule. Likewise, *Blackmon v. Sutton* addressed punitive restrictions imposed without a legitimate interest. 734 F.3d 1237, 1241 (10th Cir. 2013).[3] Plus, *Blackmon*'s application turned on evidence that a restraint chair was allegedly used with no legitimate purpose. Plaintiffs cannot convert that fact-specific restraint-chair decision into a categorical prohibition on all instances of juvenile separation. The evidence shows any separation decisions were non-punitive and based on legitimate safety, security, and operational concerns, areas in which courts afford substantial deference to correctional officials. *Littlefield v. Deland*, 641 F.2d 729, 731 (10th Cir. 1981). Thus, neither *Milonas* nor *Blackmon* placed beyond debate that Defendants' conduct—undertaken for legitimate safety and security purposes rather than punishment—violated the Fourteenth Amendment.[4]

[3] This is true of all Plaintiffs cited cases.

[4] Nor does *Grissom v. Roberts*, 902 F.3d 1162 (10th Cir. 2018), where the majority held even after nearly two decades of confinement, the plaintiff had not identified clearly established law showing a Constitutional violation. Plaintiffs quote a concurrence about the harms of confinement, but a concurrence cannot clearly establish the law.

Plaintiffs out-of-circuit and district court cases do not clearly establish law, *Avant v. Doke*, 104 F.4th 203, 211 (10th Cir. 2024), especially when they do not stand for the proposition asserted. Take, for example, *Santana v. Callazo*, 793 F.2d 41 (1st Cir. 1986), which did not impose a categorical 24-hour rule, instead, vacating and remanding because the court needed more information about how, when, and why an institution used isolation. *Santana*'s core teaching is that juvenile separation must be evaluated under the particular conditions and institutional reasons at issue—not by abstract labels.[5]

V. Second Claim for Relief: Unlawful Use of Restraints and Excessive Force

A. Evidence does not support Willis' restraint chair claim against Elsa, Haun, or Weber.

Tenth Circuit precedent acknowledges that use of a restraint chair may be reasonable to prevent suicide or self-harm. *Blackmon*, 734 F.3d at 1242. Here, the undisputed evidence shows Willis was placed in a restraint chair on a single occasion on April 23, 2019, to prevent him from engaging in further self-harm. ECF 150 ¶ 182. Plaintiffs do not dispute this legitimate justification for the chair, instead contending Elsa, Haun, and Weber left him in the chair for too long. ECF 227 at 65. However, it is undisputed Weber did not even work at WBS at the time. ECF 150 ¶ 2. And Plaintiffs do not provide any evidence to counter that neither Elsa nor Haun participated in placing Willis in the chair or in determining the amount of time he would remain in there. ECF 227 at 15 (response to ¶182 stating affidavits are self-serving without supporting evidence or argument).

B. Plaintiffs have failed to meet their burden on other excessive force claims.

Clearly established law must be "particularized to the facts of the case," not stated at a high level of generality. *McCoy v. Meyers*, 887 F.3d 1034 (10th Cir. 2018). This is especially true in use of force cases where "the result depends very much on the facts of each case, and thus [] officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (internal quotation marks omitted). Although Plaintiffs cite

[5] Also, none of Plaintiffs' cited cases address circumstances comparable to OCS status. ECF 150 ¶ 19. Thus, any "isolation" claims premised on OCS status fail.

several excessive-force decisions, they do not identify any case that placed the unlawfulness of the specific conduct alleged here beyond debate. Cases involving materially different circumstances—such as street arrests of compliant misdemeanants—do not clearly establish the law in the distinct context of a juvenile detention facility, where staff must maintain order, protect detainees and employees, and make split-second decisions during volatile incidents.

That deficiency is compounded by Plaintiffs' reliance on sweeping legal generalizations to cover numerous factually distinct uses of force. Where Plaintiffs challenge multiple uses of force involving different plaintiffs, circumstances, staff members, and safety concerns, they cannot discharge their burden through broad legal propositions that paper over these distinctions. Rather, they must show clearly established law rendered each use of force unconstitutional under the specific facts of that encounter. *See Halley v. Huckaby*, 902 F.3d 1136, 1144 (10th Cir. 2018) ("The question is not whether a broad general proposition was clearly established, but whether the violative nature of the particular conduct was clearly established.") (internal quotation marks omitted).

VI. Third Claim for Relief: Deliberate Indifference to Medical Needs

A. Karn has failed to meet his burden on his deliberate indifference claims.

Karn concedes "his claim related to not receiving medical care for his broken wrist." ECF 227 at fn. 26. The only Defendant he identifies as being involved in any remaining deliberate indifference claims is McGinty. Accordingly, his claims against Shaffer, Schwalbe, and Weber should be dismissed.

So too, should the claim against McGinty. Even assuming McGinty did not physically intervene immediately, the record shows, at most, a brief delay of three minutes during which he continuously monitored Karn. Karn identifies no clearly established law holding such conduct constitutes deliberate indifference. *Crane* merely recognized the principle—derived from *Cox v. Glanz*, 800 F.3d 1231 (10th Cir. 2015)—that jail officials may violate the Constitution by failing to protect a detainee from suicide when they know of and disregard a substantial risk of suicide. *Crane v. Utah Dep't of Corr.* 15 F.4th 1296 (10th Cir. 2021). But both *Crane* and *Cox* involved completed suicides

resulting in death. So too did *Lieberenz v. Wilson*, No. 23-3085, 2024 WL 2952150 (10th Cir. June 12, 2024) (unpublished). Those decisions do not clearly establish that a brief delay in intervention during an unconsummated suicide attempt violates clearly established law. Indeed, the Tenth Circuit has repeatedly recognized that delay alone is insufficient to establish a constitutional violation absent resulting substantial harm. *Requena v. Roberts*, 893 F.3d 1195, 1213–14 (10th Cir. 2018). Because Plaintiff identifies no precedent placing the constitutional question "beyond debate" under these materially different circumstances, McGinty is entitled to qualified immunity.

B. Tolar has failed to meet his burden on his deliberate indifference claims.

Tolar does not make any argument concerning seizures or the denial of Botox injections. Thus, his deliberate indifference claims should be dismissed to the extent premised on those allegations.

Regarding his leg brace, the undisputed evidence does not support a deliberate indifference claim against Elsa, Schwalbe, or Weber. It is undisputed Tolar was at WBS for about 7 months, from 6/22/20 to 2/6/21, and that he transferred from Dorm 4 to Dorm 1 on 12/11/20. ECF 150 ¶¶ 101, 105. He testified an unidentified staff member took his brace on Dorm 4, about 6 months into his stay at WBS after he returned from medical home leave on 12/3/2020. Thus, accepting his own testimony, the maximum amount of time he could have been without his brace on Dorm 4 (where Elsa and Schwalbe worked) was 8 days.[6] ECFs 150 ¶¶128, 121; 174-8 ¶ 5; 175-9 ¶ 3. In any event, Tolar did not ascribe the removal of the brace to Schwalbe or Weber at all. The only evidence concerning Schwalbe or Weber is that they knew of Tolar's brace being removed from his room after he took it off voluntarily at night (consistent with his longstanding practice and medical orders). *Reply to AMF* ¶ 118. Plaintiffs cite no authority clearly establishing a constitutional violation in these circumstances. As to Elsa, Tolar testified only that he believed she was somehow involved in his brace being taken, but he could not identify any specific act or omission by her. Such speculation is

[6] In fact, ECF 190-22 (cited in ECF 150 ¶ 142) shows Tolar still had his brace 12/9/2020. Plaintiffs do not dispute ECF 190-22. ECF 227 fn.1.

insufficient to establish the personal involvement required for liability under 42 U.S.C. § 1983. *Stewart v. Beach*, 701 F.3d 1322, 1328 (10th Cir. 2012). Because the record contains no evidence that Elsa, Schwalbe, or Weber personally participated in any unconstitutional deprivation relating to Tolar's leg brace, Plaintiffs' deliberate indifference claim fails as a matter of law.

VII. Fourth Claim for Relief: Due Process

Plaintiffs have failed to prove Weber or Del violated their right to "meaningful and periodic reviews of their solitary confinement and meaningful notice of what they must do to earn release." Nor have they identified any clearly established law putting Weber and Del on notice that their conduct violated such a right. Because Plaintiffs bear the burden of overcoming qualified immunity, Plaintiffs' due process claims fail as a matter of law. ECF 150 at 65-72 (asserting qualified immunity on all §1983 claims). Thus, summary judgment should be entered in favor of Weber and Del.

VIII. ADA and Rehabilitation Act

Plaintiffs assert the causation standard of their ADA and RA claims is satisfied because "[w]hen Plaintiffs' disabilities caused them to engage in benign behaviors that posed no safety risk [], WBS repeatedly responded [] by placing [them] in solitary confinement and extending their stay in solitary." ECF 226 at 71. Yet, they do not identify a single incident in which any Plaintiff was held in "solitary" by reason of a disability, nor do they point to any evidence showing that any Plaintiff's alleged disability caused the behavior that purportedly resulted in such placement. Instead, the cited materials refer to generalized claims about WBS practices without drawing any causal connection between any Plaintiff's disability, the behavior resulting therefrom, and WBS' response thereto. ECF 226 at 71-72 (citing AMF 31, 33, and 37). Absent such evidence, Plaintiffs have failed to raise a genuine dispute of material fact on causation. *See J.V. ex rel. C.V. v. Albuquerque Pub. Sch.*, 813 F.3d 1289, 1296 (10th Cir. 2016) (affirming summary judgment because Plaintiffs "failed to cite any evidence showing his conduct indeed was a manifestation of his disability"); *Adler v. Wal Mart Stores*, 144 F.3d 664, 671

(10th Cir. 1998) (requiring nonmovant to "set forth specific facts" to withstand summary judgment).

DATED this 26th day of June, 2026.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 26th day of June, 2026, a true and correct copy of the foregoing was served as indicated below:

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