

SCHEDULED FOR ORAL ARGUMENT ON SEPTEMBER 4, 2008

No. 07-1156

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OMAR KHADR,  
*Petitioner,*

v.

ROBERT M. GATES,  
*Respondent.*

On Original Jurisdiction

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ON MOTION FOR JUDGMENT AS A MATTER OF LAW

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**Brief of Juvenile Law Center as *AMICUS CURIAE*  
In Support of Petitioner's Motion for Judgment as a Matter of Law  
Based on His Juvenile Status**

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Marsha L. Levick, Esq.\*

\*Counsel of Record

Mia V. Carpinello, Esq.

Neha Desai, Esq.

Sherry Orbach, Esq.

JUVENILE LAW CENTER

1315 Walnut Street, Suite 400

Philadelphia, PA 19107

(215) 625-0551

Counsel for Amicus Curiae

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### (A) Parties and Amici

All parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioner Omar Khadr. By order filed April 21, 2008, this Court granted JLC permission to participate as Amicus Curiae in the briefing of the instant case and to file its own Amicus Curiae brief not to exceed 7,000 words.

### (B) Rulings Under Review

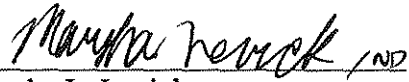
References to the rulings at issue appear in the Brief for Petitioner Omar Khadr.

### (C) Related Cases

This case was not previously before this Court or any other court. There are three related cases currently pending in the federal courts in the District of Columbia and the military commission system:

1. *Khadr v. United States*, No. 07-1405 (D.C. Cir. Feb. 27, 2008) (scheduling order): Petitioner filed a petition for review under the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 10-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a *et seq.*), asking this Court to determine the validity of the military commission judgment dismissing all charges against Petitioner for lack of jurisdiction, a decision that was subsequently reversed by the Court of Military Commission Review ("CMCR"). The Government's motion to dismiss that petition is currently pending; oral argument was held on April 15, 2008. *See* (D.C. Cir. Feb. 27, 2008) (scheduling order).
2. *O.K. v. Bush*, No. 1:04-CV-01136 (JDB) (D.D.C. filed July 2, 2004): Petitioner filed a petition for a writ of habeas corpus in the District Court for the District of Columbia challenging the legality of his detention. After the United States charged Petitioner with "war crimes," he filed a Supplemental Petition for Writ of Habeas Corpus, in which he challenged both the legality of his detention and the military commission's jurisdiction to try him for the purported "war crimes" set forth in his charge sheet.

3. *United States v. Khadr* (military commission): Petitioner has been charged with war crimes under the Military Commissions Act, and pre-trial discovery and motion practice before a military commission in Guantanamo Bay, Cuba is ongoing. A trial date has not yet been set.

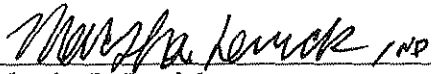


Marsha L. Levick  
Counsel for *Amicus Curiae* JUVENILE  
LAW CENTER  
1315 Walnut Street, Suite 400  
Philadelphia, PA 19107  
(215) 625-0551

Dated: June 16, 2008

D.C. CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Juvenile Law Center is a nonprofit corporation. It is not a publicly-held company and no publicly-held company has any ownership interest in it. The general nature and purpose of the organization is to advance the rights and well-being of children in jeopardy.

  
Marsha L. Levick  
Counsel for *Amicus Curiae*  
JUVENILE LAW CENTER  
1315 Walnut Street, Suite 400  
Philadelphia, PA 19107  
(215) 625-0551

Dated: June 16, 2008

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## GLOSSARY

A.B.A.:	American Bar Association
DOD:	Department of Defense of the United States Government
JLC:	Juvenile Law Center
N.M.H.A.:	National Mental Health Association
OJJDP:	Office of Juvenile Justice and Delinquency Prevention of the United States Government
RCA:	Recommended Course of Action for Reception and Detention of Individuals Under 18 years of Age
U.N.:	United Nations

**STATEMENT OF IDENTITY AND INTEREST  
OF AMICUS CURIAE**

Amicus Curiae Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, delinquent youth sent to residential treatment facilities or adult prisons, abused or neglected children placed in foster homes, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

JLC brings a unique perspective and a wealth of experience in advocating for the care, treatment, and rehabilitation of youth in the American juvenile justice system. JLC knows from first hand experience that youth need extra protection and special care, clearly necessitated by their status as youth, and that adolescent immaturity often manifests itself in numerous ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. It is precisely for these reasons that JLC believes that the status of childhood and adolescence separates youth from adults in categorical and distinct ways and that child soldiers cannot be held to the same standards of blameworthiness and culpability as their adult counterparts.

**CERTIFICATE AS TO RULE 29**

Pursuant to Fed. R. App. P. 29(b) and D.C. Cir. R. 29(b), JLC filed a Motion for Leave to Participate as Amicus Curiae. By order filed April 21, 2008, this Court granted JLC permission to participate as Amicus Curiae in the briefing of the instant case and to file its own Amicus Curiae brief not to exceed 7,000 words.

## SUMMARY OF ARGUMENT

This case calls upon the Court to determine whether Omar Ahmed Khadr was appropriately classified as an “enemy combatant” by the Combatant Status Review Tribunal. Khadr was only fifteen years old when he was taken prisoner by United States forces on July 27, 2002. Amicus Curiae Juvenile Law Center (“JLC”) supports Khadr’s argument before this Court that classifying a child soldier as an “enemy combatant” contravenes binding domestic and international law. As a consequence of the government’s erroneous determination that Khadr is an enemy combatant, he has been confined with adult prisoners throughout his detention at Guantanamo, and thus denied access to age-appropriate education, and physical and mental health services. Perhaps most significantly, he has been denied the opportunity to rehabilitate and reintegrate into society. Amicus Curiae will demonstrate how the government’s failure to provide basic educational, physical health and mental health services to Khadr is incompatible with federal and international law, national standards, and even the Department of Defense’s own policies regarding juvenile detainees.

## ARGUMENT

Khadr is believed to be the youngest person ever classified as an “enemy combatant.” Khadr’s age is central to the arguments of Amicus Curiae Juvenile Law Center (“JLC”). Despite the grave charges lodged against him, due to his age at capture Khadr remains a child soldier entitled to the protective policies, services and programs mandated by prevailing national and international law, and compelled by current research.<sup>1</sup> The government’s failure to extend and apply these laws and policies to Khadr only underscores the illegality of his classification as an enemy combatant.

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<sup>1</sup> Based on its obligations under the Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”), the U.S. is accountable for promoting the demobilization and rehabilitation of child soldiers within its jurisdiction. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000). The U.S. ratified the Optional Protocol in December of 2002. Pursuant to the Supremacy Clause of the U.S. Constitution, the Optional Protocol is now binding authority upon the United States. U.S. Const. Art. IV, cl. 2. Although the U.S. government has recognized the binding authority of the Optional Protocol, it has flagrantly violated its obligations to child soldier Omar Khadr by treating him as enemy combatant. Furthermore, the conditions of Khadr’s

For more than a century, the United States has maintained a separate justice system for children charged with crimes. See In re Gault, 387 U.S. 1, 14 (1967) (“The Juvenile Court movement began in this country at the end of the last century.”). Within 25 years of the passage of the first juvenile court act in Cook County, Illinois in 1899, every state in the country had passed similar legislation. See id. (“From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia, and Puerto Rico.”). In the decades that followed, an expansive body of domestic laws, policies and regulations, buttressed more recently by scholarly research on adolescent development, has carefully sketched out the rules governing the detention, prosecution, and treatment of children charged with crimes in this country. While each state has statutes and rules governing the treatment of youth charged with criminal behavior, federal law is also clear: children charged with crimes must be segregated from their adult peers pre-trial, and must be afforded opportunities for education as well as behavioral and physical health services in pre-trial detention. International law is in accord in requiring that children under 18, whether viewed as delinquents or child soldiers, must not suffer the punishments and prison conditions imposed on adults. Khadr, as a child soldier, is subject to these laws, which are summarized below.

A. **Federal Law Requires That Children Charged With Crimes Be Housed Separately From Adults.**

Since he was first taken into custody, Khadr has been detained as an adult and not segregated from adult detainees. Affidavit of Lt. Cmdr. William C. Kuebler dated March 31, 2008, para. 3 (“[N]otwithstanding his age at the time of capture, Mr. Khadr has, throughout the course of his detention by U.S. authorities, been detained as an adult. That is, Mr. Khadr has at no time been purposely segregated from adult detainees or afforded special treatment because of his status as a juvenile when

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detention have dramatically contravened norms and requirements of international law regarding the detention of juveniles more broadly.

initially charged.”) (attached to Khadr’s Brief at 45a). Indeed, the Camp Delta Standard Operating Procedures make no provision for specialized treatment or services for juvenile detainees held at Guantanamo. Joint Task Force - Guantanamo, U.S. Department of Defense, Camp Delta Standard Operating Procedures (Mar. 28, 2003), <http://www.wikileaks.org/leak/gitmo-sop.pdf>.

The failure to recognize Khadr’s juvenile status is contrary to prevailing American law. Federal law requires that children alleged delinquent in federal court be housed separately from adults while awaiting trial. In particular, the federal Juvenile Delinquency Act, 18 U.S.C.A. § 5035 (West, Westlaw through P.L. 110-198 approved Mar. 24, 2008), provides that the Attorney General “shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.” (Pursuant to D.C. Circuit Rule 28(a)(5), this statute and all other statutes cited to in the instant brief are set forth in the addendum entitled Statutes and Regulations.)

Another federal statute also encourages separate housing for juveniles. The Juvenile Justice and Delinquency Protection Act provides that in order to qualify for federal assistance for their juvenile justice programs, States must submit plans that, among other things, “provide that no juvenile will be detained or confined in any jail or lockup for adults.” 42 U.S.C.A. § 5633(a)(13) (West, Westlaw through P.L. 110-197 approved Mar. 14, 2008). Moreover, government standards also recommend that juveniles be detained separately from adults. See Office of Juvenile Justice and Delinquency Prevention, Standards for the Administration of Juvenile Justice: Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention 453 (1980) (Standard 4.26 “Detention Facilities,” recommending against confinement of juveniles with adults). See also Marty Beyer, Best Practices in Juvenile Accountability: Overview, Juvenile Accountability Incentive Block Grants Program Bulletin, Apr. 2003, at 3 (discussing the provision of grants for, inter alia, the building of temporary or permanent juvenile detention or correctional facilities).

The standards and recommendations of national legal organizations are in accord with federal law. American Bar Association (“A.B.A.”) policy specifically recommends that detained youth always

be housed separately from adults. A.B.A. Sec. Crim. Just., Policy 101D (Crim. Just., Litig.) (Midyear 2002), <http://www.abanet.org/crimjust/policy/cjpol.html#my02101d> (hereinafter A.B.A. Policy) ("if detained or incarcerated, youth should be housed in institutions or facilities separate from adult institutions or facilities at least until they reach the age of eighteen") (adopting the principle from Task Force on Youth in the Criminal Justice System, A.B.A. Sec. Crim. Just., Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners (2001)). Likewise, the National Juvenile Detention Association endorses the construction and operation of juvenile and adult facilities that ensure the total separation of juveniles and adults; eliminate accidental or incidental sight, sound, and physical contact between adults and juveniles; provide separate direct care and administrative staff; offer population specific training; and maintain separate programming. National Juvenile Detention Association, Position Statement: Collocation of Juvenile and Adult Facilities (Oct. 27, 1997), <http://www.njda.com/learn-guiding-ps1.html>. See also National Juvenile Detention Association, Resolution Opposing the Use of Adult Jails for the Detention of Juveniles (Oct. 14, 1981), <http://www.njda.com/learn-guiding-re6.html> (resolution opposing the use of adult jails for detention of juveniles).

National health organizations also support the laws and recommendations set forth above. Both the American Academy of Pediatrics and the National Commission on Correctional Health Care conclude that housing youth with adults increases their risk of physical harm, impacts the developmental process, and makes it unlikely that their developmental needs will be met in an adult correctional setting. See American Academy of Pediatrics, Health Care for Children and Adolescents in the Juvenile Correctional Care System 801 (Apr. 2001), <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;107/4/799> (describing increased risk of suicide for juveniles detained in adult jails or lockups); National Commission on Correctional Health Care, Position Statements: Health Services to Adolescents in Adult Correctional Facilities (May 1998), <http://www.ncchc.org/resources/statements/adolescents.html> ("incarcerating adolescents in adult correctional facilities ignores the fact that the growth and

developmental changes that occur in adolescence are substantially different from those that occur in adults”).

International law also requires that youth in detention facilities be separated from confined adults. For example, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“U.N. Rules for the Protection of Juveniles”) provides that “[i]n all detention facilities juveniles should be separated from adults, unless they are members of the same family.” U.N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, Annex, para. 29, U.N. Doc. A/45/49 (Dec. 14, 1990) (hereinafter U.N. Rules for the Protection of Juveniles). See also United Nations Standard Minimum Rules for the Administration of Juvenile Justice, G.A. Res. 40/33, Annex, para. 13.4, U.N. Doc. A/40/53 (Nov. 29, 1985) (hereinafter Beijing Rules) (juveniles “shall be detained in a separate institution or in a separate part of an institution also holding adults”); International Covenant on Civil and Political Rights art. 10(2)(b), opened for signature Dec. 19, 1966, 999 U.N.T.S. 85 (entered into force March 23, 1976) (“accused juvenile persons shall be separated from adults”). If confined youth come into contact with adults it should only be through a controlled program shown to benefit youth.<sup>2</sup> See U.N. Rules for the Protection of Juveniles, supra, at para. 29 (“Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned.”).

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<sup>2</sup> In fact, international law first takes the position that the detention of juveniles should be prevented to the greatest extent possible. Specifically, the U.N. Rules for the Protection of Juveniles states that “[d]etention before trial shall be avoided to the extent possible and limited to exceptional circumstances.” U.N. Rules for the Protection of Juveniles, supra, at para. 17. In flagrant violation of this principle, Khadr was detained for “more than three years before being charged by the first military commissions, and another two years before being prosecuted.” US: Move Khadr and Hamdan Cases to Federal Court – Military Commissions Are Fundamentally Flawed, Human Rights Watch News, June 1, 2007, <http://hrw.org/english/docs/2007/06/01/usdom16050.htm>. International law further urges the use of alternatives to secure detention whenever possible and as early as possible. See U.N. Rules for the Protection of Juveniles, supra, at para. 17 (“all efforts shall be made to apply alternative measures”); Beijing Rules, supra, at para. 13.2 (“Whenever possible, detention pending trial shall be replaced by alternative measures such as close supervision, intensive care or placement with a family or in an educational setting or home”); U.N. Standard Minimum Rules for Non-custodial Measures, G.A. Res. 45/110, Annex, para. 6.2, U.N. Doc. A/45/49 (Dec. 14, 1990) (“Alternatives to pre-trial detention shall be employed at as early a stage as possible.”).

Finally, and perhaps most telling, the U.S. Department of Defense (“DOD”) itself has taken steps to comply with the requirement that children be separated from adult prisoners by transferring other young prisoners to a separate facility in Guantanamo. In a news release dated January 29, 2004, the DOD announced that juveniles at Guantanamo had been moved to a separate detention facility modified to meet their special needs and with less restrictions, and that these juveniles received medical, behavioral, educational, intelligence and detention assessments to address their unique needs while detained at Guantanamo. Press Release, U.S. Dep’t of Def., Transfer of Juvenile Detainees Completed (No. 057-04, dated Jan. 29, 2004) (hereinafter DOD Press Release) (attached to Khadr’s Brief at 47a). The DOD Press Release specifically stated that every effort was made to place these juvenile detainees in an environment separate from the influences of adult detainees and that provided the emotional and physical care they needed. Id. The DOD’s failure to simultaneously remove Khadr to this new detention facility in 2004 is as inexplicable as it is unlawful. These juveniles were ultimately released to in their home countries and returned to an environment where they would have an opportunity to reintegrate into civil society, while Khadr remained detained with adult detainees at Guantanamo. Id.

Moreover, the DOD has issued a Recommended Course of Action for Reception and Detention of Individuals Under 18 years of Age (“RCA”) to “minimize psychological, emotional and physical harm” to “Pediatric Detainees” at Guantanamo. David Austin et al., Recommended Course of Action for Reception and Detention of Individuals under 18 Years of Age, 00766-008284 (Jan. 14, 2003) [http://www3.thestar.com/static/PDF/080522\\_under18.pdf](http://www3.thestar.com/static/PDF/080522_under18.pdf) [hereinafter RCA] In the RCA, the DOD acknowledges that “[p]eople less than 18 years of age are emotionally, psychologically, and physically dynamic and complex” and therefore “[i]f it is determined that they must be detained, then all aspects of their transport, in-processing, and detainment should be specific for this age group.” Id. Before articulating specific recommendations, the RCA states several “Assumptions” upon which the recommendations are based, including the assumption that the “[e]xposure of pediatric detainees to adult detainees will have a high likelihood of producing physical, emotional, and psychological damage to the pediatric detainee.” The RCA therefore urges that juvenile detainees be segregated from adult detainees



by sight and sound. Id. (“The housing location of pediatric detainees should be separated from the adult detainee population by both sight and sound.”) Thus, the principle that juvenile detainees ought to be housed separately from adult detainees is broadly accepted, as reflected in domestic and international law, national standards, and even in the DOD’s own policies and directives.

**B. It Is Well-Recognized By the United States Government, Prominent Organizations, and International Law That Juveniles Ought to Receive Developmentally Appropriate Services While Detained.**

The DOD has acknowledged its obligation to provide age-appropriate services for youth detained at Guantanamo. In its Press Release, the DOD stated that before being released from Guantanamo and returned to their home countries for reintegration, some juveniles were “housed in a separate detention facility [while at Guantanamo] modified to meet the special needs of juveniles.” DOD Press Release. Furthermore, the DOD Press Release indicates that:

While at Guantanamo, every effort was made to provide the juvenile detainees a secure environment free from the influences of the older detainees, as well as providing for their special physical and emotional care. While in detention, these juveniles were provided the opportunity to learn math, as well as reading and writing in their native language. Each took part in at least a portion of the opportunity to better themselves through education and participated in courses to improve their literacy and social skills. The juveniles also participated in daily physical exercise and sports games.

Id. This practice is consistent with the DOD’s RCA, which calls for the provision of developmentally appropriate services to juveniles, including educational, physical and mental health services. RCA, supra, at 00766-008284, 00766-008286, 00766-008288, 00766-008289. Nonetheless, in direct contravention of the RCA, Khadr was denied age-appropriate services at Guantanamo. By wrongfully classifying Khadr as an enemy combatant, the government has denied Khadr the benefits and protections he is entitled to under the DOD’s own policy and directives.

Moreover, the government’s failure to provide basic age-appropriate services to Khadr is inconsistent with principles set forth in federal law and national standards regarding the distinctive needs of juvenile detainees. Like juvenile offenders in the American juvenile justice system, detained child soldiers have unique needs as a result of their age. The physical and emotional trauma children experience in combat suggests that they may have even more acute and particularized needs. Thus,

federal law and national standards that guide the treatment and services provided to detained and incarcerated juveniles provide a useful analogy for detained child soldiers.

The United States Supreme Court recently reaffirmed the unique status of juvenile offenders in Roper v. Simmons, 543 U.S. 551 (2005). In overturning the juvenile death penalty, the Simmons Court held that adolescents cannot be counted among the worst offenders who are deserving of the death penalty because they are categorically different from adults. Id. at 568. Relying on developmental research, the Court explained that adolescents are less capable of considering consequences, are more impulsive, and are more susceptible to environmental influences than adults. Id. at 569-570. The Court further held that because adolescent immaturity is a passing phase for most individuals, adolescent offenders are more capable of reform than adults. “The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” Id. at 570 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993), and citing Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)) (internal quotations omitted).<sup>3</sup> This increased capacity for rehabilitation is at the heart of the juvenile justice system. While the criminal justice system focuses on punitive responses to crime, the juvenile justice system focuses on facilitating the opportunity for juveniles to reform. See Barry Feld, Cases and Materials on Juvenile Justice Administration 1-3 (2d ed. 2004).

Therefore, services such as education and health care are central to the functioning of the juvenile system.

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<sup>3</sup> Neurobiological research further supports the Simmons Court’s view that adolescent offenders are less culpable and more amenable to reform than adult offenders. Recent advances in the field of neurobiology, including improvements in the safety of Magnetic Resonance Imaging (MRI) brain scans, have enabled scientists to demonstrate that the frontal lobe—the area of the brain associated with reasoning, planning, judgment, and impulse control—begins to develop rapidly during the teen years and continues to develop into the early 20s. See Jeffrey Fagan, Adolescents, Maturity, and the Law: Why Science and Development Matter in Juvenile Justice, Am. Prospect, Aug. 14, 2005, at A5, A6-A7; Arthur Toga, Paul Thompson & Elizabeth Sowell, Mapping Brain Maturation, 29 Trends in Neuroscience 148-59 (2006). Because adolescent offenders have not yet developed a mature capacity to make independent, reasoned decisions, they cannot be held to the same standard as adult offenders. Furthermore, because their capacity for exercising judgment and self-control is still developing, adolescent offenders, with proper care and nurturing, are more likely than adults to improve their behavior over time.

The Juvenile Justice and Delinquency Prevention Act mandates that juveniles detained pre-trial in the federal system must be provided certain specified services. In particular, “[e]very juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.” 18 U.S.C.A. § 5035. In enacting 18 U.S.C.A. § 5035, Congress also recognized juveniles as a unique class of detainees for whom specific services must be guaranteed under the law.

As set forth more fully below, American organizations that work in the fields of health care and juvenile detention routinely recommend the provision of age-appropriate education, physical health, and mental health services to juveniles in detention. And, international standards are consistent with these national standards. For example, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice declare that detained juveniles shall receive, “care, protection and all necessary individual assistance- social, educational, vocational, psychological, medical and physical- that they may require in view of their age, sex and personality.” Beijing Rules, supra, at para. 13.5. The U.N. Rules for the Protection of Juveniles extensively discuss what treatment and programs juveniles should receive. See U.N. Rules for the Protection of Juveniles, supra, at paras. 12, 38-48. Of these various suggested services, education and health services are among the most basic and most critical.

### **1. Education**

Educational programs are essential for juvenile detainees. By building self-esteem and developing knowledge and problem-solving skills, education can be a catalyst for positive change at a critical juncture in a detained child’s life. See National Juvenile Detention Association, Desktop Guide to Good Juvenile Detention Practice 123 (1996). Indeed, the RCA directs that all juvenile detainees who are held longer than 72 hours at Guantanamo receive educational services, including instruction for at least four to six hours a day by teachers who are fluent in both English and the primary language of detainees, as well as education plans and modifications that are documented every three to six months. RCA, supra, at 00766-008289.

The U.S. government has also recognized the importance of educating juvenile detainees in the juvenile justice system. The Office of Juvenile Justice and Delinquency Prevention's<sup>4</sup> Standards for the Administration of Juvenile Justice explicitly state that "detained juveniles should be provided with educational...and other services appropriate to their needs." OJJDP, Standards, *supra*, at 459 (Standard 4.263 "Services"). In particular, a juvenile's education level should be determined immediately upon admission to a detention facility or as soon as possible thereafter. *See id.* Educational programs in detention facilities should aim to "assist detained juveniles to keep up with their studies to the greatest extent possible" and "[r]emedial educational services should be provided for those juveniles who require it." *Id.* Similarly, guidelines developed by the National Juvenile Detention Association, in partnership with OJJDP, maintain that second only to the child's court appearances, education should be the detention facility's top priority. National Juvenile Detention Association, Desktop Guide, *supra*, at 125. For Khadr, a child soldier for whom education and re-integration are particularly crucial, these federal standards are instructive.

The U.S. government's recognition of the importance of educating juvenile detainees has been echoed by various American legal and health organizations. The A.B.A., American Psychiatric Association, National Mental Health Association ("N.M.H.A."), and the American Correctional Association have all taken the position that educational programming must be provided to detained children. A.B.A. Policy, *supra*; American Psychiatric Association, Position Statement: Adjudication of Youths as Adults in the Criminal Justice System, November 2005; National Mental Health Association, Checking Up on Juvenile Justice Facilities 19 (1999); American Correctional Association, Standards for Juvenile Detention Facilities 103 (3d ed. 1991). The N.M.H.A. has even asserted that incarcerated children have a "right" to educational programming. *See* National Mental Health Association, *supra*, at 19.

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<sup>4</sup> According to the OJJDP website, the OJJDP was created in 1974 as part of the Juvenile Justice and Delinquency Prevention Act (JJDP) to "support local and state efforts to prevent delinquency and improve the juvenile justice system." Office of Juvenile Justice and Delinquency Prevention, <http://www.ojjdp.ncjrs.org/about/legislation.html> (last visited Mar. 31, 2008). *See also* 42 U.S.C.A. § 5602 (West, Westlaw through P.L. 110-198 (excluding P.L. 110-181) approved Mar. 24, 2008).

International law is consistent with our national policy. The U.N. Rules for the Protection of Juveniles state that, “[e]very juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society... Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs.” U.N. Rules for the Protection of Juveniles, supra, at para. 38. The UN Rules for the Protection of Juveniles further provide that juveniles beyond compulsory school age “who wish to continue their education should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes.” Id. at para. 39.

## **2. Physical Health**

The DOD has also acknowledged the importance of providing age-appropriate physical health care to juvenile detainees at Guantanamo. The RCA directs that medical care be provided consistent with guidelines for youth generally and detained youths specifically: “A treatment plan and appropriate medical screening should be performed as per guidelines in the Guidelines for Health Supervision III (American Academy of Pediatrics) and Standards for Health Services in Juvenile Detention and Confinement Facilities (NCCHC).” RCA, supra, at 00766-008286. Additionally, the RCA states that a pediatrician or a family physician with pediatric experience “should be available for routine medical care evaluations and continuing medical care as well as consultation for emergency medical interventions.” Id. The RCA also recommends that a “Developmental Pediatrician” be made available for detainees identified as “developmentally immature or having an adverse developmental progression.” Id.

National health and legal organizations, such as the A.B.A. and the American Psychiatric Association, have published standards and position statements on the health care of detained and/or incarcerated youth, premised on the view that these youth have special health care needs as a result of their age and the adverse conditions they experience both before and during their terms of confinement. These organizations maintain that confined youth should be provided with age-appropriate health care to address their unique medical needs. See OJJDP, Standards, supra, at 459; American Psychiatric Association, supra; A.B.A. Policy, supra; Milton J. Robinson, National Council of Juvenile and Family

Court Judges, Best Practices in Juvenile Corrections and Detention 33 (1995-2000); American Academy of Pediatrics, supra, at 802. See also National Juvenile Detention Association, Desktop Guide, supra, at 95, 165 (explaining that detained and incarcerated youth are a medically underserved population who are at high risk for various medical and emotional disorders). For example, the National Commission on Correctional Health Care recommends that youth incarcerated in adult facilities be treated by qualified medical professionals who have received specific training in adolescent health care. See, e.g., National Commission on Correctional Health Care, Position Statements, supra (asserting that health staff responsible for the treatment of adolescents in adult correctional facilities should receive “on-going training regarding the unique health and developmental and educational needs of youth”).

OJJDP and leading national organizations also recommend that youth receive comprehensive medical assessments upon entering detention, and provide guidelines for conducting such assessments. See, e.g., American Correctional Association, supra, at 84; National Commission on Correctional Health Care, Standards for Health Services in Juvenile Detention and Confinement Facilities 64-67 (2004); National Mental Health Association, supra, at 3-5; OJJDP, Standards, supra, at 459.

Whether classified as child soldiers or juvenile delinquents, children charged with crimes – even the most violent and serious crimes – have unique medical needs as a result of their age. International law echoes our domestic standards regarding medical care for detained children. For example, the U.N. Rules for the Protection of Juveniles provide that, “[a] confined child shall receive adequate preventive and remedial health care.” U.N. Rules for the Protection of Juveniles, supra, at 49.

### **3. Mental Health**

As a former child soldier, Khadr was seriously injured in war; lost his father to war; has been separated from the rest of his family; and has been brutally tortured, interrogated, and detained by the U.S. military for the past five years. Given his history, it is fair to assume that Khadr’s mental health has been severely compromised. It is crucial that mental health services be made available to child soldiers such as Khadr who have been exposed to extreme violence and possibly brainwashed by adults who have recruited them to fight.

The DOD itself acknowledges the need to provide age-appropriate mental health services to youth detained at Guantanamo. The RCA recognizes the significant psychiatric needs of juvenile detainees and therefore directs that a pediatric psychologist or psychiatrist be present for initial assessments, development of a plan for supportive services, and periodic review of a juvenile detainee's progress at Guantanamo. RCA, supra, at 00766-008288. Yet Khadr has received no specialized services at Guantanamo on account of his young age at the time he was initially charged. See Affidavit of Lt. Cmdr. William C. Kuebler dated March 31, 2008, para. 3 (“[N]otwithstanding his age at the time of capture...Mr. Khadr has at no time been...afforded special treatment because of his status as a juvenile when initially charged.”) (attached to Khadr's Brief at 45a).

With regard to youth detained in the juvenile justice system, federal law specifically mandates the provision of psychiatric and psychological care and treatment to federally detained juveniles. See 18 U.S.C.A. § 5035. In addition to this legal requirement, various standards promulgated by the U.S. government, national health organizations, national juvenile justice organizations, and national legal organizations recommend the provision of comprehensive mental health services to detained and incarcerated juveniles.<sup>5</sup>

A.B.A. policy provides that detained and incarcerated youth should be given access to programs that address their mental health needs. A.B.A. Policy, supra. The National Commission on Correctional Health Care has also promoted the standard of availability of mental health services for “all juveniles who require them” in juvenile detention and confinement settings. See National Commission on Correctional

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<sup>5</sup> In identifying the need for comprehensive and age-appropriate mental health services, several of these organizations, as well as OJJDP, point to the high incidence of mental health disorders among juveniles entering the American juvenile justice system. See American Academy of Pediatrics, supra, at 800 (reviewing a 1992 report of mental health needs of juveniles in the juvenile justice system and concluding that “[m]ental health problems, predominantly attention-deficit/hyperactivity disorder, conduct disorder, oppositional-defiant disorder, and depression, have been found to be common among incarcerated youth”); National Commission on Correctional Health Care, Position Statement, supra (highlighting that adolescents are at increased risk for depression, anxiety, self-mutilating behavior, suicide attempts, psychotic symptoms, and aggressive behavior toward others); National Juvenile Detention Association, Desktop Guide, supra, at 165-168 (recognizing the high incidence of mental disorders that precede detention and that result from detention).

Health Care, Standards, supra, at 105-106 (stating that “[f]acilities housing significant numbers of patients with mental health problems with longer lengths of stay are expected to offer more extensive mental health programming”).

National organizations also call for initial mental health screening and assessment upon entry into the juvenile justice system to ensure that youth with mental health needs are identified early on and receive appropriate treatment promptly. For example, the National Juvenile Detention Association, in partnership with OJJDP, acknowledges that “[i]t is a legal imperative that detention centers do psychological screenings and provide psychological care to protect...youth [entering detention] from harm or, more importantly, to identify symptoms that may be treated by the appropriate persons.” National Juvenile Detention Association, Desktop Guide, supra, at 57. Accordingly, the National Juvenile Detention Association calls for basic psychological screening of youth upon entry in detention centers that at a minimum addresses depression, potential suicidal behavior, and psychological history. See id. See also Milton J. Robinson, supra, at 32 (promoting the provision of a centralized assessment center to screen for such things as suicide risk and special treatment needs in juvenile detention and corrections). The National Juvenile Detention Association further advises detention centers to use a screening device that is developed by a mental health professional and that this professional train staff on the proper use of such a device. See National Juvenile Detention Association, Desktop Guide, supra, at 57.

The OJJDP recommends ongoing psychological services even beyond an initial screening – for example, a mental status examination if the youth is detained “for some period of time after the detention hearing,” and 24-hour access to psychological services. National Juvenile Detention Association, Desktop Guide, supra, 57 (“Although the law does not require the institution to provide ongoing counseling or therapy sessions, the best practice is to include a way for children to talk about their problems as part of the detention program” and “[i]f children are to be confined...for a long period of time, there should also be a professionally developed treatment plan and ongoing services.”). Published OJJDP standards specifically call for juvenile detainees to have access to mental health services. OJJDP,



Standards, supra, at 459 (“Each juvenile [in detention centers] should...be afforded reasonable access to psychiatric counseling and crisis intervention services in accordance with his/her needs.”).

National organizations also recommend that these mental health services be provided by qualified and trained mental health professionals to ensure that quality mental health care is provided. See American Correctional Association, supra, at 81; National Mental Health Association, supra, at 11 (“Only qualified mental health professionals should provide treatment to incarcerated young people. Treatment should be appropriate for age, gender, culture, and developmental status.”), at 21 (“All staff working in juvenile correctional facilities should be trained in suicide prevention, risk recognition, appropriate crisis response and referral.”); Milton J. Robinson, supra, at 32 (recommending as best practice the increase of “capabilities of staff to address mental health issues brought on by detention or incarceration”).

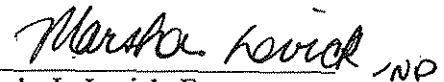
Finally, international law requires that mental health services be provided to detained juveniles. The U.N. Rules for the Protection of Juveniles state that a child with mental illness should be treated in a specialized institution and steps should be taken to ensure continuity of treatment at release. U.N. Rules for the Protection of Juveniles, supra, at 53. All of the above-cited standards, recommendations and requirements reflect the widespread understanding that age-appropriate educational services, physical health services, and mental health services – which take into account the unique developmental needs of youth – ought to be provided to juveniles detainees whether in the juvenile justice system or at Guantanamo.

## CONCLUSION

Omar Khadr is a child soldier. The government’s determination that he is an enemy combatant is wrong for the reasons set forth in Khadr’s Brief. As Amicus Curiae has shown, the consequences of this illegal determination are far-reaching, denying him not only the opportunity to be housed separately from the adult detainees at Guantanamo, but also access to age-appropriate programs, education, medical and mental health services and, most importantly, the opportunity to be re-integrated into society. For the

foregoing reasons, Amicus Curiae Juvenile Law Center respectfully urges this Court to grant Petitioner Omar Khadr's request for relief.

Respectfully submitted,

 *Marsha L. Levick* ND

Marsha L. Levick, Esq.  
Mia V. Carpinello, Esq.  
Neha Desai, Esq.  
Sherry Orbach, Esq.  
JUVENILE LAW CENTER  
1315 Walnut Street, Suite 400  
Philadelphia, PA 19107  
(215) 625-0551  
Fax (215) 625-2808  
*Counsel for Amicus Curiae*

## STATUTES AND REGULATIONS

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A juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges. Insofar as possible, alleged delinquents shall be kept separate from adjudicated delinquents. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

(a) Requirements

In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes applicable to a 3-year period. Such plan shall be amended annually to include new programs, projects, and activities. The State shall submit annual performance reports to the Administrator which shall describe progress in implementing programs contained in the original plan, and shall describe the status of compliance with State plan requirements. In accordance with regulations which the Administrator shall prescribe, such plan shall—

\* \* \*

(13) provide that no juvenile will be detained or confined in any jail or lockup for adults except--

(A) juveniles who are accused of nonstatus offenses and who are detained in such jail or lockup for a period not to exceed 6 hours--

(i) for processing or release;

(ii) while awaiting transfer to a juvenile facility; or

(iii) in which period such juveniles make a court appearance;

and only if such juveniles do not have contact with adult inmates and only if there is in effect in the State a policy that requires individuals who work with both such juveniles and adult inmates in collocated facilities have been trained and certified to work with juveniles;

(B) juveniles who are accused of nonstatus offenses, who are awaiting an initial court appearance that will occur within 48 hours after being taken into custody (excluding Saturdays, Sundays, and legal holidays), and who are detained in a jail or lockup--

(i) in which--

(I) such juveniles do not have contact with adult inmates; and

(II) there is in effect in the State a policy that requires individuals who work with both such juveniles and adults inmates in collocated facilities have been trained and certified to work with juveniles; and

(ii) that--

(I) is located outside a metropolitan statistical area (as defined by the Office of Management and Budget) and has no existing acceptable alternative placement available;

(II) is located where conditions of distance to be traveled or the lack of highway, road, or transportation do not allow for court appearances within 48 hours (excluding Saturdays, Sundays, and legal holidays) so that a brief (not to exceed an additional 48 hours) delay is excusable; or

(III) is located where conditions of safety exist (such as severe adverse, life-threatening weather conditions that do not allow for reasonably safe travel), in which case the time for an appearance may be delayed until 24 hours after the time that such conditions allow for reasonable safe travel;

42 U.S.C.A. § 5602 (West, Westlaw through P.L. 110-198 (excluding P.L. 110-181) approved Mar. 24, 2008)

The purposes of this subchapter and subchapter II of this chapter are--

- (1) to support State and local programs that prevent juvenile involvement in delinquent behavior;
- (2) to assist State and local governments in promoting public safety by encouraging accountability for acts of juvenile delinquency; and
- (3) to assist State and local governments in addressing juvenile crime through the provision of technical assistance, research, training, evaluation, and the dissemination of information on effective programs for combating juvenile delinquency.