IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPELLATE DOCKET NO. 03-3075

A.M., by and through his next friend and mother, J.M.K.,
APPELLANT

v.

LUZERNE COUNTY JUVENILE DETENTION CENTER, a department of Luzerne County, Pennsylvania; SANDRA M. BRULO, individually and in her official capacity as chief administrator of the Luzerne County Juvenile Detention Center; LOUIS P. KWARCINSKI, individually and in his official capacity as deputy chief probation officer in charge of the Luzerne County Juvenile Detention Center; JEROME PRAWDZIK, in his individual capacity; CHRISTOPHER TRAVER, in his individual capacity; CHRISTOPHER PARKER, in his individual capacity; MICHAEL CONSIDINE, in his individual capacity; MARK PUFFENBERGER, M.D., in his official and individual capacity; ELAINE YOZVIAK, R.N., in her individual capacity,
APPELLEES

Appeal from the Order of the United States District Court
For the Middle District of Pennsylvania
Entered June 30, 2003 in Civil Action No. 3:01-CV-1276

REPLY BRIEF FOR APPELLANT

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In their response to plaintiff-appellant's brief [hereinafter "plaintiff" or "A.M."], defendants-appellees [hereinafter "defendants"] do little to address the central flaws in the district court's analysis. By reciting -- and relying exclusively on -- the district court's summary of the record, defendants merely compound the lower court's failure to properly characterize plaintiff's claims, properly credit plaintiff's evidence and, consequently, correctly analyze those claims under the appropriate legal standard. Ignoring undisputed evidence of the emotional and psychological damage suffered by plaintiff, captured almost daily in the incident reports maintained by defendants and reflected in the reports of plaintiff's expert witnesses, Dr. Annie Steinberg and Paul DeMuro, defendants decline to respond to a substantial portion of plaintiff's evidence. Accordingly, defendants also gloss over the many material facts which remain in dispute at the

[1]Defendant Puffenberger is represented separately from the other defendants and submitted his own brief in this appeal. Plaintiff herein replies to the briefs filed by all defendants. Citations to "Defendants' Br." refer to the brief filed on behalf of defendants Luzerne County Juvenile Detention Center, Brulo, Kwarcinski, Prawdzik, Traver, Parker, Considine, and Yozviak. Citations to "Defendant Puffenberger's Br." refer to the brief submitted on behalf of defendant Puffenberger.

heart of plaintiff's claims. Given this court's charge to conduct plenary review of defendants' motions for summary judgment on appeal, and its obligation to review the evidence in the light most favorable to the plaintiff, defendants' clouding of the record through distortion or deletion cannot succeed.

Defendants refer to the limited recitation of the evidence in the district court's opinion, Defendants' Br. at 18, calling it a "lengthy analysis of the record," *Id.* at 20, in asserting that plaintiff did not suffer constitutional harms while in the custody of defendant Luzerne County Juvenile Detention Center [hereinafter "the detention center"]. Defendants gravely misconstrue the *documentation* of incidents between A.M. and other residents, as well as of contact with detention center staff, as evidence that A.M. received proper care and supervision while in their custody. In his main brief, plaintiff presents a thorough analysis of the information contained in these documents and the action or lack of actions taken by the detention center in response to that information. See Plaintiff's Br. at 26. What is revealed is a woefully inadequate response by the detention center, despite abundant information that A.M. was being abused on an ongoing basis. Id. at 26, 29-30. And the detention center's failures to protect A.M. can be directly attributed to its constitutionally

inadequate policies and practices in key areas, including deficient hiring, staffing, and training practices; inadequate staff supervision; a lack of policies to ensure youth safety, and a lack of policy to address the mental health needs of youth in their custody. Id. at 23-39.

Moreover, while plaintiff did suffer physical injuries at the hands of other residents, his claims center on the emotional and mental distress that he suffered as a result of his almost daily victimization while at the detention center. That plaintiff had a long history of mental health disorders when he entered the detention center does not diminish his injuries; the uncontroverted expert psychiatric testimony submitted below confirmed that his condition was exacerbated and that he experienced a deterioration as a result of the abuse at the detention center.

The law on summary judgment is clear- where there are genuine issues of material fact in dispute, summary judgment is not an appropriate remedy. *See, e.g.*, Fed. R. Civ. P. 56 (c). Accordingly this court must, through its plenary review power, allow the plaintiff the opportunity to present his substantiated claims of abuse and resulting harms to a jury. *Pennsylvania Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3d Cir. 1995).

I. Defendants Inaccurately Portray the Factual Record Below, Discounting the Many Critical Facts that Remain in Dispute

Defendants make reference to "voluminous reports documenting ... the actions that the various child care workers and supervisory staff took in an effort to ensure [A.M.]'s safety," Defendants' Br. at 8, to argue that "the existence of this documentation, undisputed in the record, demonstrates in categorical fashion that the Juvenile Detention Center staff closely supervised A.M. during the period he was in custody and exercised its best judgment" to ensure his safety and well-being. Defendants' Br. at 13.

Defendants' argument is inherently flawed. It does not reflect how these documents' are themselves evidence of defendants' own missteps and inactions and how such failures caused the harm suffered by A.M. These documents show, for example, that supervisory staff gave conflicting instructions to child care workers as to A.M.'s placement in the facility. *See and compare* 7/28/99 Brulo memorandum to Kwarcinski and Prawdzik (143a) (directing that A.M. should spend the majority of his day in the girls' quarters), *with* 7/28/99 boys' unit log entry (125a) (directing that, as per Kwarcinski's instructions, A.M.

was to be kept on the boys' side at all times).[2] Incident reports and log entries after 7/28/99 also demonstrate that child care workers failed to properly segregate A.M. as Brulo instructed of that date and, instead, placed A.M. with other boys who had previously assaulted and threatened him. *See, e.g.*, incident report dated 8/1/99 by Traver, (141a) (detailing incident where J.D. hit A.M. in the head with a paddle); incident report dated 8/1/99 by Considine, (195a) (confirming violence toward A.M. by J.D. and the resulting injury); incident report by Tigue dated 8/1/99, (139a) (describing A.M.'s request for ice after he had been hit with a ping pong paddle by another youth, including that A.M. complained that he was getting beat up by other youth); incident report dated 8/2/99 by Considine, (140a) (recalling incident on basketball court where A.M. was bleeding from the chest); incident report dated 8/3/99 by Tucker, (510a) (Describing incident on basketball court where A.M.'s chest was bleeding); incident report dated 8/4/99 by Traver, (129a) (detailing altercation between S.S. and A.M. where S.S. hit A.M., placed him in a "headlock," and then later

[2]The log entry reads that "M.A." was to be segregated. But the morning report listing the names of all youth in the center on 7/28/99, filed under seal at (1012a), shows that there was no youth named M.A. in the facility; *see also* boys' unit log entry dated 7/26/99 (146a) (also stating that as per Kwarcinski, A.M. was to be segregated from the population).

punched him); incident report dated 8/5/99 by Johnson, (128a) (recording incident where S.S. hit A.M. in the eye with a towel and then hit him with his hand); incident report dated 8/9/99 by Hutchins, (126a) (stating that A.M. was transferred from girls quarters to boy's quarters when he was "getting on her (another staff member's) nerves, and was then transferred back to the girl's quarters several hours later); incident report dated 8/9/99 by DeMettro, (132a) (explaining that A.M. was passing notes between quarters out of fear of physical violence at the hands of S.S.); incident report dated 8/16/99 by Traver, (481a) (recounting disagreement where A.M. was taunting another resident and his taunting led to a physical attack by that resident before staff intervened to separate the youth). Moreover, these reports show that child care staff would personally witness disagreements at their inception, watch them escalate, and fail to intervene to prevent the physical assault on A.M., in contrast to defendants' argument that these reports documented their efforts to intervene. *See, e.g.*, (130a) (8/3/99 incident report) and (129a) (8/4/99 incident report).[4]

[4]In fact, staff members at Northwestern Academy, the facility to which A.M. was transferred on 8/19/99 for his court-ordered disposition, stated that T.M., a youth who had been in detention with A.M. and was similarly transferred to Northwestern, confirmed that detention center staff would allow A.M. to get beat up because they were sick of him and he

What is so disturbing - and what defendants and the district court failed to recognize - is that despite the fact that all this information was written down in incident reports and unit logs, the supervisors did not take corrective actions. As described in detail in plaintiff's main brief, *see* Br. at 30-31, this lapse is attributable to the fact that there was no procedure in place - written or otherwise -- for review and follow up of incident reports and log entries by child care staff.

Defendants further point to a "Daily Assessment Resident Development Record" maintained on A.M. as evidence that A.M. was appropriately supervised by child care workers throughout his five-week detention. Defendants' Br. at 8 (citing 486a-492a). Defendants state that, among other things, this Daily Assessment was to reflect whether a youth was "encountering any difficulties while at the facility". Defendants' Br. at 8. But a careful review of this Daily Assessment shows that A.M. never received a grade other than satisfactory[5] in all the reporting categories, including "manages difficulty and conflict well,"

"deserved it." (471a-475a) (Kahn dep.); (161a) (DeAngelo incident report)

[5]The document key indicates that there are three possible notations that can be made: S for "Satisfactory"; D for "Difficult"; or X indicating that no report was available for that shift.

even on days on which A.M. had multiple incident reports. *See citations with parentheticals cited supra.* Comparison of the Daily Assessment Record to the voluminous documentation of A.M.'s actual difficulties demonstrates that the Daily Assessment Record was meaningless as a source of information as to A.M.'s well-being while in detention and yet another example of Defendants' failed practices.

Plaintiff presents evidence in his main brief of inadequate monitoring of youth by child care workers, as well as the supervisors' failure to ensure adequate monitoring. *See* Plaintiff's Br. at 6-12. Defendants argue that the problems with staff supervision of youth were documented and addressed by the administrators, pointing to two reprimand letters. Defendants' Br. at 31 (citing 182a and 138a). This flimsy response is further belied by an analysis of the letters which shows that except for suspending these workers for a few days, no other corrective actions were taken to ensure that these problems did not recur. *See* 182a (reprimand of Tigue) and 138a (reprimand of Wesneski). The letters do not indicate, for example, that these staff members were required to attend any specialized trainings, or to review certain protocols in the

detention center operations manual.[6] Defendants further state that the district court pointed to specific areas of the record demonstrating that staff were adequately trained to intervene in conflicts between youth, Defendants' brief at 20, without providing a page citation to the lower court's opinion. In fact, a close reading of the lower court's opinion shows that it contains no such analysis, providing a bare assertion that training was adequate. Similarly, in a particularly bold misrepresentation of the record, defendants incorrectly state that Brulo and Kwarcinski testified at length and with specificity about the training program, brief at p. 8. As detailed in plaintiff's main brief at 27, while these defendants were questioned closely and at length by plaintiff's counsel about their purported training program, they provided very little information as to its content and never produced any documentation at all of their training curricula despite plaintiff's discovery requests.

With respect to plaintiff's claim that defendants' failed to adequately address his mental health disorders while in detention, defendants cite to testimony by Brulo about notes she

[6]Nor could the supervisors refer the child care workers to an operations manual to review procedures with respect to the monitoring of youth in detention, because there is a genuine issue as to whether one actually existed. *See* Plaintiff's Br. at 29-33.

purportedly wrote in 1999 that detention center staff contacted A.M.'s treating psychiatrist in the community. Defendants' Br. at 8. But as explained in plaintiff's brief at 10, these notes are not credible evidence as they are dated July 2001, the same month and year that A.M. filed the instant complaint. Defendants offer no explanation for this discrepancy in their response.

Additionally, defendants state that nurse Yozviak properly documented A.M.'s mental health history upon admission. While this is true, it confirms, rather than excuses, defendants' failings. This "documentation," a rudimentary list of hospitalizations noted only on the physical intake form, was never followed-up with any meaningful action. There is simply no evidence that Nurse Yosviak informed child care workers of A.M.'s special needs, no record of any conversations with the administrators/ supervisors about how to protect young A.M., and no documentation indicating that Yosviak contacted his treating psychiatrist in the community, despite evidence in the record that all of these activities were among her duties. *See* 239a, 334a, 407a (deposition testimony of Brulo, Prawdzik, and Yosviak)(explaining that Yosviak was required to inform child care workers and administrative staff of the special medical needs of children in the facility's care); 387a (deposition testimony of Dr. Puffenberger) (Providing that it was Yosviak's

responsibility to contact treating psychiatrists). Dr. Puffenberger likewise distorts the record. In arguing that his only contractual obligation was to do admission physicals and that he had no responsibilities with regard to A.M.'s mental health treatment while in detention, defendant Puffenberger's brief fails to cite to the ample evidence presented below that his duties were much more extensive than he represents. *See* Plaintiff's Br. at 36.[7]

Finally, with regard to the evidence of the mental and emotional harm that plaintiff suffered, defendants do not acknowledge the reports by the staff at Northwestern Academy as to plaintiff's condition when he arrived from detention, *see* Plaintiff's Br. at 12-13,[8] nor the extensive report by

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[7]It also should be noted that Defendant Puffenberger improperly references his own expert report in asserting that he did not breach the standard of care, Defendant Puffenberger's Br. at 8, as that report was not part of the record when the district court ruled on the summary judgment motion.

[8]With regard to plaintiff's contention that he experienced a 15 pound weight loss during his five-week detention, defendants cite to two documents that record his weight at 96 pounds upon his admission to Northwestern Academy. Defendants' Br. at 8 (citing to 482a (health assessment form) and 483a (physical evaluation form)). But other documents submitted to the court below indicate that his weight was 78 pounds when he arrived at Northwestern. Plaintiff's Br. at 12 (citing to 158a (Northwestern intake sheet) and 169a (Northwestern Intake Summary)). Therefore, plaintiff's weight loss was a material fact in dispute when the court below ruled on the motion for summary judgment.

plaintiff's psychiatric expert. *See id.* Defendants' choice to ignore this evidence does not alter the record below; it simply points to their failure to address it.

II. Defendants Misapply the Legal Standards for Assessing their Conduct

With respect to assessing the official capacity claims against the detention center and its administrators, defendants state that plaintiff does not take issue with the standard used by the district court but instead with the court's application of the standard to the facts. Defendants' Br. at 22. This is not a completely accurate representation of plaintiff's position. Plaintiff agrees that the appropriate standard to apply in assessing the official capacity claims against defendants is whether their actions and omissions constituted deliberate indifference such that it shocks the conscience. Plaintiff's Brief at 13. But, as set forth in detail in his main brief, plaintiff vehemently disagrees with the standard the lower court employed with respect to plaintiff's burden at the summary judgment stage to prove that defendants' policies and practices caused plaintiff's injuries. *Id.* at 27 fn 24, 31-32. The causation standard seemingly adopted is not only unsupported by the law, but also completely abrogates the role of the jury

by disallowing reasonable inferences of causation to be drawn from the presented record.

Defendants further confuse the tests for assessing claims against individuals acting in an official capacity, as contrasted to when supervisors may be held liable in their individual capacities. *See* Defendants' Brief at p. 34. Defendants cite *Sample v. Diecks*, 885 F.2d 1099 (3d Cir. 1989, as setting forth the standard for assessing a supervisor's liability in a § 1983 action. Defendants' Brief at p. 34. But it must be noted that there are two distinct theories of "supervisory liability." Under the first theory of liability, supervisory defendants who have policymaking responsibility can be held liable in their individual capacities if with deliberate indifference they fostered a custom or policy that directly caused a deprivation of plaintiff's rights. *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989); *Sample*, 885 F.2d at 1116-18; *Tazioly v. City of Philadelphia*, 1998 WL 633747 at *15 (E.D.P.A. 1998) (citing *Stoneking*, 882 F.2d at 725); *Owens v. City of Philadelphia*, 6 F. Supp. 2d 373, 393 (E.D. Pa. 1998) (citing *Stoneking, supra*). As detailed in plaintiff's main brief, defendants Brulo and Kwarcinski had a policymaking role at the detention center and indeed developed, or alternatively fostered a custom of, inadequate policy and

procedures with respect to ensuring youth safety and health care, and training with regard to both. Thus, they may be held liable in their official capacities with respect to their policy-making roles. Plaintiffs' Br. at 22 fn 19.[9]

Supervisory officials also can be held liable when they take ineffectual or no action with respect to the situation at hand, or fail to adequately supervise subordinates to ensure that the latter are carrying out their instructions in dealing with that situation. *See Baker v. Monroe Township*, 50 F.3d 1186, 1190-91 (3d Cir. 1995) (holding that a supervisor can be held personally liable under § 1983 if he either: (1) directly participated in violating plaintiff's rights; (2) directed others to violate them; or (3) as the person in charge had knowledge of and acquiesced in his subordinates' violations) (citations omitted). As detailed in plaintiff's main brief, the record demonstrates that defendants Brulo, Kwarcinski, and Prawdzik, in their roles as supervisors, consistently failed to take action with respect to plaintiff's safety and mental health

[9]It also should be noted that in *Sample*, although the Court uses the term "supervisor liability," there were no allegations that the defendant commissioner of corrections made actual decisions with regard to plaintiff's particular situation and, thus, the test set forth for "supervisor liability" referred to the defendant's failings with regard to policy and practice. *Sample*, 885 F.2d at 1113.

needs and, when they did take action, it was ineffectual in that the supervisory defendants did not ensure that their orders were being carried out by subordinate staff. Plaintiff's Br. at 29-31. Thus, they may also be held liable in their individual capacities.[10]

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[10]In their motion for summary judgment before the district court, defendants further argued that they were entitled to qualified immunity. The district court opinion granting defendants' motions for summary judgment did not address the issue of qualified immunity, and there is no mention of this defense in defendants' brief in this appeal. For this Court's reference, plaintiff submits the following argument as to why defendants are not entitled to qualified immunity.

Government actors performing discretionary functions are entitled to qualified immunity only when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity only shields officials in their individual capacities and is inapplicable to official capacity claims. *W.B. v. Matula*, 67 F.3d 484, 499 (3d Cir. 1995) (citing *Brandon v. Holt*, 469 U.S. 464, 472-72 (1985)).

When reviewing an individual defendant's claim of qualified immunity, the court must engage in a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001); *Wilson*, 526 U.S. at 609. *See also Hamilton v. Leavy*, 2003 WL 559392 at *8 (3d Cir. 2003); *Curley v. Klem*, 298 F.3d 271, 277(3d Cir. 2002); *Wilson v. Russo*, 212 F.3d 781, 786 (3d Cir. 2000) First, the court must determine if the facts alleged, taken in the light most favorable to the party asserting the injury, show that the government actor's conduct violated a constitutional right. *Saucier*, 533 U.S. at 201. *See also Curley*, 298 F.3d at 279-80 (same).

If a violation could be made out on this favorable view of the plaintiff's submission, the second step is to ask whether the right was clearly established. *Saucier*, 533 U.S. at 201. With respect to this second step, the relevant inquiry is whether it would be clear to a reasonable government actor that his/her conduct was unlawful in the particular situation s/he

confronted. *Id.* at 202 (citing *Wilson*, 526 U.S. at 615); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (holding that the qualified immunity determination turns on the "objective legal reasonableness" of the action in light of then-existing legal rules (citing *Harlow*, 457 U.S. at 819)). In other words, was the state of the law at the time such that officials had "fair warning" that their conduct was unconstitutional? *Hope v. Pelzer*, 122 S. Ct. 2508, 2516 (2002). That Defendants subjectively believed they properly handled the incidents in question is irrelevant to determining whether their conduct was objectively reasonable. Instead, the reasonableness of Defendants' conduct must be measured against the baseline of professional standards. *Shaw v. Stackhouse*, 920 F.2d 1135, 1145 (3d Cir. 1990); *Wendy H. v. City of Philadelphia*, 849 F. Supp. 367, 372-73 (1994).

Additionally, an official is not entitled to qualified immunity simply because the specific action in question has not previously been held unlawful. *Hope*, 122 S. Ct. at 2515 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535, n. 12 (1985); *Wilson* at 614-15 (citing *Anderson*, 483 U.S. at 640). "Although earlier cases involving `fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Hope*, 122 S. Ct. at 2516. *See also Matula*, 67 F.3d at 499 ("The 'clearly established' standard does not require `precise factual correspondence between relevant precedents and the conduct at issue`") (citation omitted); *Good v. Dauphin County Social Services*, 891 F.2d 1087, 1092 (3d Cir. 1989) (same); *Burns v. County of Cambria*, 971 F.2d 1015, 1024 (3d Cir. 1992) (same) (citation omitted). Instead, the standard is whether the unlawfulness was apparent in light of existing law. *Hope*, 122 S. Ct. at 2515 (citing *Anderson*, 483 U.S. at 640). And in determining whether the actor's conduct was objectively reasonable, the court must consider the specific facts of the case. *Saucier*, 533 U.S. at 202.

Taken in the light most favorable to Plaintiff, the evidence presented in the plaintiff's main brief makes out a violation of plaintiff's clearly established constitutional rights. Moreover, the case law cited in plaintiff's main brief - particularly *Youngberg*, *Estelle* and the pre-trial detainee cases - as well as the Title 55 Pa. Code Chapter 3760 regulations in effect at the time, *see* Plaintiffs' Br. at 19, 37, and (179a), show that defendants were on notice that plaintiff had a constitutional right to be free from harm and receive adequate health care while in their custody. Thus, the

issue of immunity turns on the reasonableness of Defendants' actions. The evidence cited in plaintiff's main brief, in particular the report of his corrections expert, at 110a, shows that it would be clear to a reasonable professional that Plaintiff would be subjected to continued assaults if the administrators and child care workers did not develop and implement a coherent safety plan (that included appropriate treatment for plaintiff's mental health disorders to minimize his provocative behavior). That defendants had ample notice that plaintiff was repeatedly subject to attacks by other detainees but did not take adequate steps to prevent future assaults demonstrates deliberate indifference to plaintiff's rights, and precludes qualified immunity. *See, e.g., Atkinson v. Taylor*, 316 F.3d 257, 268 (3d Cir. 2003) (noting the relevance of prior knowledge to a finding of deliberate indifference). *See also Robey v. Chester County*, 946 F.Supp. 333, 336-37 (E.D. Pa. 1996) (same).

Alternatively, the court should deny summary judgment on defendants' claim to qualified immunity at this time because there are disputed facts material to determining the objective reasonableness of Defendants' actions. The United States Supreme Court has repeatedly stressed the importance of deciding immunity questions at the earliest possible stages of litigation, because qualified immunity is not a mere defense from liability but an entitlement not to stand trial. *Saucier*, 533 U.S. at 2156; *Anderson*, 483 U.S. at 646 n.6; *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818.

However, the Third Circuit has recognized the tension between this imperative and "the reality that factual disputes often need to be resolved before determining whether the defendant's conduct violated a clearly established constitutional right." *Curley*, 298 F.3d at 278. *Accord Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir. 1996). While it is for the court to decide whether a state actor's conduct violated a clearly established law, "the existence of disputed, historical facts material to the objective reasonableness of [a state actor's] conduct will give rise to a jury issue." *Curley*, 298 F.3d at 278 (citing *Sharrar v. Felsing*, 128 F.3d 810, 828 (3d Cir. 1997)). *Accord Mera v. Lohman*, 2002 WL 511561 at *5 (M.D. Pa. 2002) (denying Defendants' motion for summary judgment upon finding that there were genuine issues of material fact as to whether Plaintiff's constitutional rights were violated). "The standard for granting or denying a motion for summary judgment does not change in the qualified immunity context." *Curley*, 298 F.3d at 282 (citing *Karnes v. Skrutski*, 62 F.3d

Additionally, defendants point to this Court's holding in *Beers-Capitol v. Whetzel*, 256 F.3d 120 (2001), in asserting that the claims against defendants in their individual capacities must be assessed against Eighth Amendment, rather than Fourteenth Amendment, jurisprudence. Defendants' Br. at 34 n. 15. The Supreme Court of the United States has not decided the issue of whether the Eighth Amendment applies to youth confined in juvenile justice institutions. *Ingraham v. Wright*, 430 U.S. 651, 669 n. 37 (1977). Some circuits have specifically held that the Fourteenth Amendment's more protective substantive due process standard applies to juvenile justice facilities. *See, e.g., Gary H. v. Hegstrom*, 831 F.2d 1430, 1431-32 (9th Cir. 1987) (holding that the Fourteenth Amendment, not the Eighth Amendment, applies to youth in juvenile correctional facilities); *H.C. v. Hewett*, 786 F.2d 1080, 1084-85 (11th Cir. 1986) (same); *Alexander v. Boyd*, 876 F.Supp. 773, 795-96 (D. S.C. 1995) (same), *rev'd on other grounds*, 113 F.3d 1373 (4th Cir. 1997). Other circuits have applied the Eighth Amendment. *See Nelson v. Heyne*, 491 F.2d 352, 355 (7th Cir. 1974).

Two Third Circuit cases have analyzed cases in juvenile correctional facilities using the Eighth Amendment standard. *See*

485, 494 (3d Cir. 1995)). In such a situation, the Third Circuit advises that a court can rule on the objective reasonableness of the actor's conduct after a jury has resolved the disputed facts. *Id.* at 279.

Beers-Capitol, 256 F.3d at 120; *Nami v. Fauver*, 82 F.3d 63 (3d Cir. 1996). But it is important to note that in these two cases the specific question of the appropriate standard was not squarely before the court. Thus, the Third Circuit has not yet decided this issue. Moreover, the defendant facility in *Beers-Capitol* was a Youth Development Center (YDC) at which only youth who have received a final disposition from a juvenile court may be committed and not a temporary detention center as is Defendant detention center in the instant case. At all relevant times, defendant detention center was authorized under law to house youth who were awaiting trial or, like Plaintiff, were awaiting final disposition, *see* 55 Pa. Code 3760.1, at 196a, and was not authorized to punish youth.

Finally, defendants misrepresent Plaintiff's argument with respect to the district court's application of *Fuentes v. Wagner*, 206 F.3d 335 (3d Cir. 2000), in assessing the individual liability of the child care workers. Defendants' Brief at 38. Plaintiff's argument why the "malicious and sadistic" standard for liability articulated in *Fuentes* is not applicable here, is not that the prisoner in *Fuentes* was an adult and A.M. is a juvenile. The lower court inappropriately relied on *Fuentes* because, in that case, the Court applied the "malicious and sadistic" standard to assess the use of force by prison

officials in a single instance of prisoner unrest. *Fuentes*, 206 F.3d at 346-48. Such deference has been accorded prison officials' use of force against an inmate in an isolated instance because of the need to act quickly in the heat of the moment to prevent the situation from escalating and threatening the safety of others. *Hudson v. McMillan*, 503 U.S. 1, 5 (1992). If A.M. had alleged that defendant child care workers themselves had harmed him on a single occasion, it may have been appropriate to apply the "malicious and sadistic" standard to determine their culpability.

However, these are the not the facts of the instant case. As described in detail in the main brief, Plaintiff's Br. at 3-7, the evidence below showed that A.M. was assaulted by other youth on a number of occasions over a five-week period, many times in the presence of child care workers. While it may be appropriate to use a standard as deferential as the "malicious and sadistic" test to assess the actions of the child care workers and their immediate supervisor the first time A.M. was beat up, or even the second, it is legally and factually absurd to suggest that this deference should extend to what became almost daily altercations between plaintiff and other residents. Indeed, the simultaneous documenting of these attacks by child care workers in incident reports and unit logs, *Plaintiff's Br.*

at 6 supra, make clear the staff had ample opportunity over the course of time to see the pattern emerging, consult amongst themselves and with their supervisors, and develop a safety plan for A.M.. As such, the acts and omissions of the detention staff over an extended period of time are more appropriately judged by the deliberate indifference standard applied in conditions of confinement cases, when state actors are not required to make a split-second decision in a single instance. *See Schieber v. City of Philadelphia*, 320 F.3d 409, 418-19 (3d Cir. 2003) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 851-53 (1998)) and 422-23 (citing *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999) and *Ziccardi v. Philadelphia*, .3d 57, 66 (3d Cir. 2002) (en banc)).

And, in fact, a number of federal courts have held in the Eighth Amendment context that the failure of prison officials to protect an inmate from an attack by another inmate should be judged by a deliberate indifference standard. *See citations in Plaintiff's Br. at 41.* Plaintiff is not aware of a decision of this Court that directly speaks to the standard by which to judge the culpability of detention center staff who fail to intervene when a youth is being repeatedly assaulted by other youth over an extended time period. However, this Court's holding in *Smith v. Mensinger*, 293 F.3d 641, 650 (3d Cir. 2002)

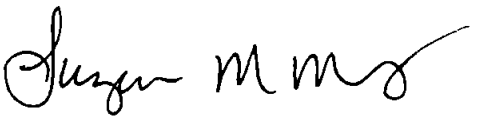
- an Eighth Amendment case that examined both the liability of an officer who beat an inmate, as well as the liability of the officer who failed to intervene in the beating - is instructive. In *Mensinger*, this Court applied the "malicious and sadistic" standard to determine the culpability of the officer who administered the beating. *Id.* at 649-650. By contrast, this Court held that a second officer who witnessed but failed to intervene in the beating administered by the first officer is culpable if that second officer had a "reasonable opportunity" to intervene but refused to do so. *Id.* at 650-651. *Mensinger* further supports Plaintiff's contention that the lower court erred when it ruled that because the child care workers and their immediate supervisors did not act "maliciously and sadistically to cause harm" they had not violated A.M.'s substantive due process rights.

In sum, the district court's grant of summary judgment to defendants must be reversed because it is contrary to the fundamental tenets of Rule 56: summary judgment cannot be granted when material factual issues are in dispute, and unless defendants are entitled to relief as a matter of law. As Plaintiff amply demonstrates in his main brief and this reply brief, both of these prongs have been breached by the district court.

CONCLUSION

For the reasons set forth above and in his previously-submitted main brief, plaintiff respectfully requests that this Court reverse the district court's grant of summary judgment to defendants on plaintiff's federal law claims, and remand this case to the district court for further proceedings.

Respectfully submitted,



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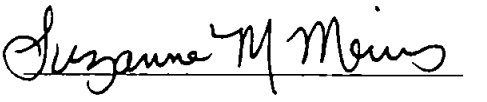
Dated: December 31, 2003

CERTIFICATE OF COMPLIANCE

I, Suzanne M. Meiners, certify that the foregoing brief for the Appellant meets the type-volume limitations of Fed. R. App. P. 32(a)(7). The number of words in the brief is 3,756, including text and footnotes.



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CERTIFICATE OF SERVICE

I, Suzanne M. Meiners, hereby certify that I am, this 31st day of December, 2003, serving this Reply Brief of Appellant upon the persons indicated below and in the manners indicated below:

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