IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

K.C., on behalf of herself and all others similarly situated, *et al.*, Plaintiffs, v. C.K. Townsend, in her official capacity as Executive Commissioner of the Texas Youth Commission, *et al.*, Defendants.	Civil No. 6:09-CV-012-C

PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT AND TO JOIN PLAINTIFFS

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The sole remaining Plaintiff, H.C., who is due to be released from a Texas Youth Commission (TYC) facility, the Ron Jackson State Juvenile Correctional Complex at Brownwood, Texas ("TYC-Brownwood"), hereby moves the Court for leave to amend the complaint and to join Plaintiffs pursuant to Federal Rules of Civil Procedure 16(b)(4), 15(a)(2), and 20(a). The proposed Second Amended Complaint is attached here as Exhibit A in compliance with Local Rule 15.1(b). The Renewed Motion for Class Certification, which will be formally filed as soon as the instant motion is granted, is attached here as Exhibit B. Additional documents supporting the instant motion are contained in an Appendix, pursuant to Local Rule 7.1(i), filed concurrently. A proposed order is also filed with this motion.

I. INTRODUCTION

Plaintiff H.C. files the instant motion for leave to amend because unlawful conditions persist at TYC-Brownwood that may only be redressed through class-wide litigation. This Court has twice denied Plaintiff H.C.'s requests to certify the putative class and to serve as a class representative in this action, which was filed over a year ago. H.C.'s imminent release from TYC-Brownwood necessitates the joinder of additional Plaintiffs, whose exemplary disciplinary histories are likely to satisfy concerns that led the Court to deny certification previously. The substantive claims at issue in this lawsuit will not change whatsoever as a result of the proffered amendment, and Plaintiff does not request any other modification to the scheduling order in conjunction with this motion. Primarily, granting leave to amend will simply mean that this action may continue towards the goal of obtaining class-wide relief, as intended. To demonstrate the urgency of such relief, Plaintiff submits with this motion a number of recently executed declarations—from two experts retained by Plaintiff's counsel and by nine girls currently housed at TYC-Brownwood—that speak to the ongoing injury and risk of injury caused by the

imposition of solitary confinement and intrusive search procedures at the facility. *See* App. at 1-44.[1] Foremost among the harms identified in these declarations is the psychological and emotional injury inflicted on mentally ill girls or girls with traumatic histories of abuse when they are violently restrained or placed in solitary confinement—particularly when these actions occur in response to a mental health crisis or an impulse to self-injure. The practice of isolating and forcibly restraining such girls in the Security Unit continues without significant change at TYC-Brownwood, as the declarations attest. In light of such evidence, Plaintiff and the class she has sought to represent deserve to be able to pursue relief on a class-wide basis.[2]

The instant motion seeks leave to file Plaintiff's Second Amended Complaint to add plaintiffs who have now exhausted all available administrative remedies and are thus eligible to join this lawsuit. The amended pleadings also update some factual allegations to reflect intervening events; however, the substantive issues and claims raised in the lawsuit have not changed. Specifically, this lawsuit continues to allege that girls at TYC-Brownwood are subjected to a substantial risk of harm due to Defendants' policies and practices related to (1) the imposition of solitary confinement, including the use of force and pepper spray in restraining and referring girls to the Security Unit, and in controlling them within the Security Unit, and (2) the use of routine strip searches. *See* Ex. A.

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[1] In accordance with Plaintiff's obligations under the Agreed Protective Order, all identifying information has been redacted from the girls' declarations before filing. *See* Doc. 35 at ¶ 10. Plaintiff's counsel will provide Defendants' counsel with unredacted copies.

[2] On August 10, 2009, TYC child psychiatrist Joseph Penn commented on the incarceration of mentally ill youth in a front-page article in *The New York Times*: "We're seeing more and more mentally ill kids who couldn't find community programs that were intensive enough to treat them. Jails and juvenile facilities are the new asylum." *See* Solomon Moore, *Mentally Ill Offenders Stretch the Limits of Juvenile Justice*, N.Y. Times, Aug. 10, 2009, *available at* http://www.nytimes.com/2009/08/10/us/10juvenile.html?_r=1&hp.

Good cause exists for the proposed amendment, and joinder of the proposed Plaintiffs is proper. The amendment will not prejudice Defendants, who have yet to take any discovery from any Plaintiffs.[3] The discovery period is still open. Expert reports have not yet been served. Moreover, the files and records related to all girls at TYC-Brownwood, including the proposed Plaintiffs, are in TYC custody. Plaintiff moves for leave to amend as soon as possible considering the procedural hurdles that incarcerated girls are required to clear before they are eligible to pursue legal action based on the conditions of their confinement. And as explained more fully below, the interests of both justice and judicial economy will be served by permitting the amendment. Therefore, Plaintiff respectfully requests leave to file the proposed Second Amended Complaint.

II. PROCEDURAL HISTORY

This action, originally filed on June 12, 2008 in the Western District of Texas, alleges unlawful practices affecting a putative class of girls and young women held at TYC-Brownwood. The original Complaint named five girls, who were then in TYC custody, as Plaintiffs and putative class representatives. *See* Doc. 1 at 1. The challenged practices were (1) the imposition of solitary confinement, including the use of force in restraining girls being referred to isolation and already in isolation; and (2) the routine strip-searching of girls upon placement in solitary confinement. *Id.* at *passim*. A Motion for Class Certification was filed concurrently with the Complaint. *See* Doc. 2.

While Plaintiffs' counsel attempted to engage Defendants in settlement discussions on the issues raised in this lawsuit, two of the original named Plaintiffs were released from TYC

[3] Defendants served their first written discovery requests on August 12, 2009, which include interrogatories regarding H.C., who will likely be released from TYC custody before the responses are due.

custody, thereby disqualifying them to serve as representatives in a putative class action seeking class-wide injunctive relief. Therefore, on September 24, 2008, Plaintiffs filed their First Amended Complaint. *See* Docs. 17 & 19. The First Amended Complaint substituted two new named Plaintiffs, then in TYC custody, for two previous Plaintiffs, who had been released. *Id.* at 1. The First Amended Complaint also included some allegations based on developments that had occurred since the original Complaint was filed. *See, e.g.,* Doc. 19 at ¶¶ 10, 20, 32. The original and First Amended Complaints did not differ in any other material respect. *Compare* Doc. 1 *to* Doc. 19.

On or about September 30, 2008, Defendants' counsel, who had received courtesy copies of both complaints, agreed to waive the right to formal service of the First Amended Complaint. *See* Docs. 27-30. But on October 3, 2008, before Defendants returned the executed Waiver of Service papers that had been timely provided to them by Plaintiffs, the Court, which did not yet know that Defendants had agreed to waive service, denied Plaintiffs' Motion for Class Certification without prejudice because the Court believed that Defendants had not yet been served. *See* Doc. 26. Defendants' Waivers of Service were filed shortly thereafter on October 15, 2008. *See* Docs. 27-30.

Defendants answered Plaintiffs' allegations on December 2, 2008. *See* Doc. 31. A few days later, knowing that Plaintiffs were preparing to file a Renewed Motion for Class Certification (Doc. 36), Defendants filed a Motion to Transfer Venue from the Western District of Texas, Austin Division to the Northern District of Texas, San Angelo Division (Doc. 34). By the time Plaintiffs filed their Renewed Motion for Class Certification on December 9, 2008, two of the five Plaintiffs named in the First Amended Complaint had been released from TYC custody. *See* Doc. 36 at 2 n.1. The venue motion and class certification motion were briefed in

December. On January 20, 2009, this action was transferred to the Northern District of Texas, San Angelo Division. *See* Doc. 49.

On January 22, 2009, this Court entered an Initial Scheduling Order, establishing that "[a]ll motions to join other parties and amend the pleadings must be filed by 3:00 p.m. on April 15, 2009." Doc. 50. On February 4, 2009, the Court denied Plaintiffs' Renewed Motion for Class Certification. *See* Doc. 61. A few days later, on February 8, 2009, Plaintiffs filed their Third Motion for Class Certification (Doc. 66). Defendants requested and received additional time to file an opposition to Plaintiffs' motion. *See* Docs. 67 & 68. By the time Defendants filed their opposition to Plaintiffs' Renewed Motion for Class Certification, only one named Plaintiff, H.C., was still being held at TYC-Brownwood. Defendants' opposition relied principally on the contention that H.C. had a particularly troublesome disciplinary history; therefore, Defendants argued, there would be unique defenses that could be leveled against her, thereby making her an inadequate class representative. *See* Doc. 71.

Over the past six months, Plaintiffs' counsel have continued to meet with additional girls incarcerated at TYC-Brownwood who have been harmed by the unconstitutional policies and practices at issue in this lawsuit and who may wish to serve as named Plaintiffs. *See, e.g.*, Docs. 76-1 & 76-2; *see also* App. at 13-44. But before any girl can join this lawsuit, she must first exhaust the grievance process that applies at TYC-Brownwood pursuant to the Prison Litigation Reform Act (PLRA) and TYC policy. *See* 42 U.S.C. § 1997e(a) (2000); *see also* 37 Tex. Admin. Code § 93.31 (2008) (Youth Grievance System); 37 Tex. Admin. Code § 93.53 (2005) (Appeal to Executive Director). Even when moving with absolute efficiency, completing the process takes ***months***. *See id.*; *see also* Docs. 76-1 & 76-2.

As of this week, both of the proposed new Plaintiffs in the Second Amended Complaint have completed the exhaustion process and are eligible to join the lawsuit. With the instant motion, S.D. and B.P. seek to join as named Plaintiffs and putative class representatives when leave is granted to file the Second Amended Complaint.[4] *See* Ex. A.

III. LEGAL STANDARDS

A. Rule 16(b)(4): Modifications To A Scheduling Order

Federal Rule of Civil Procedure 16(b)(4) governs motions for leave to amend pleadings when such motions are filed after the deadline set by a scheduling order. *S & W Enters., L.L.C.* v. *South Trust Bank of Ala., NA.*, 315 F.3d 533, 536 (5th Cir. 2003). In such cases, the court determines whether there exists "good cause" to modify the scheduling order. *Id.*; *Am. Tourmaline Fields* v. *Int'l Paper Co.*, 3:96-CV-3363-D, 1998 WL 874825, at *1 (N.D. Tex., Dec. 7, 1998). In evaluating whether good cause exists, courts consider four factors: "(1) the explanation for the failure to [timely move for leave to amend]; (2) the importance of the [amendment]; (3) potential prejudice in allowing the [amendment]; and (4) the availability of a continuance to cure such prejudice." *S & W Enters.*, 315 F.3d at 536 (citing *Reliance Ins. Co. v. La. Land & Exploration Co.*, 110 F.3d 253, 257 (5th Cir. 1997) and *Geiserman v. Macdonald*, 893 F.2d 787, 791 (5th Cir. 1990)).

B. Rule 15(a)(2): Leave To Amend

If good cause is found, courts then look to the "more liberal standard" of Federal Rule of Civil Procedure 15. *S & W Enters.*, 315 F.3d at 536. Under Rule 15, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Because Rule 15 "evinces a bias

[4] Pursuant to the Agreed Protective Order (Doc. 35), "S.D." and "B.P." are pseudonyms. Plaintiff will inform Defendants of the identities of these girls, which all parties are required to keep confidential.

in favor of granting leave to amend," a district court's discretion "is not broad enough to permit denial," except where a "substantial reason" for denial exists, such as undue delay, bad faith, dilatory motive, repeated failures to cure deficiencies, or undue prejudice to the opposing party. *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 286 (5th Cir. 2002); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, &64 (5th Cir. 2003).

C. Rule 20(a): Permissive Joinder

Federal Rule of Civil Procedure 20(a), which governs permissive joinder, provides in pertinent part that "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action." Fed. R. Civ. P. 20(a). Thus, when deciding whether parties were properly joined under Rule 20(a), courts consider two factors: (1) whether the right to relief arises "out of the same transaction, occurrence, or series of transactions or occurrences," and (2) whether there is a question of law or fact common to the plaintiffs. *See id*. The goal of the commonality requirement under Rule 20(a) is to promote fairness and judicial economy. 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure §§ 1652-53 (2007). Therefore, joinder of parties is strongly encouraged. *See, e.g., Blum v. General Elec. Co*., 547 F. Supp.2d 717, 722 (W.D. Tex. 2008).

IV. ARGUMENT

A. Good Cause For Leave To Amend Exists Here.

Plaintiff H.C. seeks leave to amend the complaint principally to add new Plaintiffs because all Plaintiffs in the First Amended Complaint have been, or imminently will be, released

from TYC custody. *See* Ex. A at ¶¶ 8-18. Because girls routinely move into and out of TYC custody, new Plaintiffs must join as TYC releases or transfers current Plaintiffs from TYC-Brownwood. Indeed, substituting plaintiffs is a routine part of litigation involving the rights of incarcerated individuals because, when putative class-action plaintiffs are transferred or released, they lose standing to enjoin conditions or practices in the institution in which they were confined and their claims can become moot. *See, e.g., Stewart v. Winter*, 669 F.3d 328, 333-34 (5th Cir. 1982); *Nelsen v. King County*, 895 F.2d 1248, 1250-54 (9th Cir. 1990); *see generally O'Shea v. Littleton,* 414 U.S. 488 (1974); *Rizzo v. Goode*, 423 U.S. 362 (1976); *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983). Thus, amending to add plaintiffs should be freely allowed in the class-action context.[5] As discussed below, based on an evaluation of the four factors relevant under Fifth Circuit law, Plaintiff can show "good cause" to modify the scheduling order to permit the addition of new named Plaintiffs in this lawsuit.

[5] The Plaintiffs at issue here, by virtue of their circumstances, constitute a recognized exception to the mootness doctrine, as explained in *Gerstein v. Pugh*, 420 U.S. 103 (1975). In *Pugh*, a class action involving the constitutional rights of the criminally accused, the Supreme Court expressly found that an exception to the mootness doctrine applies in cases such as this one, where custody of a potential class representative "may be ended at any time" by various actions by the state and thus it is uncertain that any given individual would be in state custody long enough for the district judge to certify the class. *Id.* at 111 n.11. Mootness, the Supreme Court emphasized, is not an issue if "the constant existence of a class of persons suffering deprivation is certain" and a pool of clients are available to counsel "with a continuing live interest in the case." *Id.* The Supreme Court has also held that, in prison condition class actions, the "personal stake" requirement of the mootness doctrine can be met despite the lack of a "legally cognizable interest" in "the traditional sense." *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 403-04 (1980); *see also Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1041-43 (5th Cir. 1981) (discussing *Geraghty* and the requirement simply that "[t]he classes which the plaintiffs seek to represent contain at least some number of persons who [experienced the factual basis for the class allegations] during the periods at issue"). Moreover, the Fifth Circuit has even directed district courts to certify a class in similar cases to avoid mootness. *See, e.g., Johnson v. City of Opelousas*, 658 F.2d 1065, 1068-71 (5th Cir. 1981) (directing court to certify putative class of juveniles in face of maturing of the named plaintiffs); *cf. Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1050 (5th Cir. 1981) (finding that, where class certification motion was pending and defendant then acted so as to moot named plaintiff's claims, certification would relate back to the outset of the action to avoid mootness).

1. Plaintiff has not delayed in seeking leave to amend.

Plaintiff is seeking leave to amend as soon as practicable in light of the burden litigants bear who are minors subject to various requirements under the PLRA. Prison terms imposed on juveniles are more often measured in months than years. TYC reports that in 2008 the average length of a stay in their facilities was 16.9 months.[6] While TYC has not publicly reported the average length of a stay for girls at TYC-Brownwood, it is likely to be significantly shorter than the overall average, because the offenses girls commit are usually less serious than those of boys.[7] Girls' relatively short prison terms mean that, by the time girls have entered TYC custody, experienced the violations at issue in this lawsuit, conferred with attorneys, and decided to participate as plaintiffs, they are often already on the brink of their release dates. Moreover, minors cannot join an action without the consent and participation of their legal guardians. Therefore, the guardians must also confer with attorneys, be apprised of the case, and decide to participate—a process that can add weeks of additional, unavoidable delay.

These challenges are multiplied by the administrative exhaustion requirements of the PLRA. *See* 42 U.S.C. § 1997e(a). The PLRA requires prisoners, including juvenile prisoners, to exhaust all available administrative remedies before they may file suit. *Id.* The American Bar Association and others have criticized the PLRA's inclusion of juveniles among those subject to its exhaustion requirement, because juveniles are particularly vulnerable to abuse while imprisoned, but often have trouble understanding and complying with complicated grievance

[6] *See* Texas Youth Commission, "TYC Population Trends," http://www.tyc.state.tx.us/research/growth_charts.html, accessed Aug. 5, 2009.

[7] *See* Texas Youth Commission, "Reasons for Commitments to TYC in Fiscal Year 2008," http://www.tyc.state.tx.us/research/commit_gender.html, accessed Aug. 5, 2009.

procedures.[8] TYC's grievance policy involves three stages of written grievances, each of which is separated by waiting periods of fifteen to thirty working days. 37 Tex. Admin. Code § 93.31 (2008) (Youth Grievance System); 37 Tex. Admin. Code § 93.53 (2005) (Appeal to Executive Director). In addition to the administratively mandated waiting periods, additional delay is inevitable because girls who wish to participate in this action require the assistance of attorneys to navigate the grievance system, yet such assistance can only be arranged through TYC staff. Simply scheduling telephone calls and in-person visits is a time-consuming task, complicated by myriad variables: the difficulty girls have obtaining grievance forms, private rooms, and even writing instruments; TYC employees' own unfamiliarity with the grievance process; and the necessity of scheduling consultations around caseworker availability, educational activities, meals, and TYC security protocols. *See, e.g.*, App. at 45-48 [Letter from G. Sween to B. Garcia, June 3, 2009].[9]

Although Plaintiffs' counsel have had limited access to the girls at TYC-Brownwood, they have steadily and diligently assisted girls who wish to participate in the lawsuit with the grievance process, including those who are now eligible to join the lawsuit. *See* App. at 13-44. Potential plaintiffs confront a multitude of logistical challenges that are largely beyond their control. Meeting these challenges does not constitute "delay" as that factor is generally

[8] *See* American Bar Association, Criminal Justice Section, "ABA Policies Related to Juvenile Justice and Youth at Risk," ("Repeal the provisions extending the PLRA to juveniles confined in juvenile detention and correctional facilities"), http://www.abanet.org/crimjust/juvjust/policy.html, accessed Aug. 5, 2009; Anna Rapa, *One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263 (2006); Human Rights Watch, "No Equal Justice: The Prison Litigation Reform Act in the United States," 29-34 (2009).

[9] *See also* Letter from Wan J. Kim, Assistant US Attorney General, to Texas Governor Rick Perry, March 15, 2007, http://www.dallasnews.com/sharedcontent/dws/img/03-07/0316tycletter.pdf at 9 (describing the grievance system at another TYC facility as "dysfunctional"), accessed May 31, 2009.

understood in analyses under Rule 16. *See, e.g., Raytheon Co. v. Indigo Sys. Corp.*, 07-cv-109, 2008 WL 3852715 (E.D. Tex. Aug. 14, 2008) (finding plaintiff had sufficient excuse for delay, which was defendant's delay in producing important documents); *cf. S & W Enters.*, 315 F.3d at 536 (finding explanation for delay, which was mere "inadvertence" on the part of counsel, insufficient); *cf. Smith v. EMC Corp.*, 393 F.3d 590, 595-96 (5th Cir. 2004) (finding delay in seeking leave to amend until ***two months after the close of trial*** was excessive). Time necessarily spent to satisfy the demands of the PLRA does not constitute "delay." *Cf. Harris v. Hesman*, 198 F.3d 153, 157-58 (5th Cir. 1999) (holding that statute of limitations was tolled while prisoner subject to the PLRA exhausted administrative remedies). And even if Defendants could show that leave to amend was not pursued as promptly as possible, Fifth Circuit law clearly prohibits denying leave as a punitive measure: "Merely because a claim was not presented as promptly as possible . . . does not vest the district court with authority to punish the litigant." *Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982).

2. Amendment to include additional named Plaintiffs in this putative class action is exceedingly important.

Amending to join new named Plaintiffs is quite important. Although controlling precedent indicates that the release of the current Plaintiff will not moot this case, *see* note 5, *supra*, putative class representatives need to be added periodically to ensure that at least one current resident of TYC-Brownwood who desires to serve as a class representative, is named. *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975) (finding exception to the mootness doctrine applies in cases where custody of a potential class representative "may be ended at any time"); *see also Stewart v. Winter*, 669 F.3d 328, 333-34 (5th Cir. 1982) (emphasizing that named plaintiffs could be released within less than a year therefore "class certification ensures the presence of a continuing class of plaintiffs with a live dispute against prison authorities"). Each

Plaintiff—past, current, and potential—has sought and still seeks not monetary relief but injunctive relief to end unconstitutional practices that affect a large, particularly vulnerable, and transient population.

Unfortunately, recent fact-finding has confirmed that the violations described in Plaintiffs' original and amended complaints are ongoing. For instance, girls at TYC-Brownwood attest to experiencing the following:

- being subjected to the excessive use of force during restraint procedures or transfers to the Security Unit (*see* App. at 20-21 [Decl. of B.B.], ¶¶ 5, 6; App. at 35-36 [Decl. of F.F.], ¶¶ 5, 6; App. at 17 [Decl. of S.D.], ¶ 7; App. at 39 [Decl. of H.H.], ¶ 7; App. at 43 [Decl. of I.I.], ¶ 6]);

- being strip searched or forced to remove their underwear in the Security Unit without cause and while being observed by staff (*see* App. at 14 [Decl. of B.P.], ¶ 8; App. at 32 [Decl. of E.E.], ¶ 7; App. at 17 [Decl. of S.D.], ¶ 9; App. at 39 [Decl. of H.H.], ¶ 7);

- being referred to the Security Unit in the absence of any violent or assaultive behavior on the girl's part (*see* App. at 13-14 [Decl. of B.P.], ¶¶ 4, 6, 7; App. at 20-21 [Decl. of B.B.], ¶¶ 4, 5, 6, 8; App. at 24-25 [Decl. of C.C.], ¶¶ 6, 7; App. at 28-29 [Decl. of D.D.], ¶¶ 6, 7, 8; App. at 32 [Decl. of E.E.], ¶¶ 5, 7; App. at 35 [Decl. of F.F.], ¶ 4; App. at 17 [Decl. of S.D.], ¶¶ 6, 7; App. at 39 [Decl. of H.H.], ¶ 6; App. at 42-43 [Decl. of I.I.], ¶¶ 4-6);

- being referred to the Security Unit after expressing a need to talk to someone about emotional or mental health issues or acknowledging the impulse to self-injure (*see* App. at 13-14 [Decl. of B.P.], ¶¶ 4, 6, 7; App. at 20-21 [Decl. of B.B.], ¶¶ 4, 6; App. at 28-29 [Decl. of D.D.], ¶¶ 6, 8; App. at 17 [Decl. of S.D.], ¶ 6; App. at 42 [Decl. of I.I.], ¶ 4]);

- finding conditions in the Security Unit filthy, monotonous, dehumanizing, and detrimental to their mental health (*see* App. at 14 [Decl. of B.P.], ¶ 8; App. at 21 [Decl. of B.B.], ¶ 7; App. at 25 [Decl. of C.C.], ¶ 8; App. at 29 [Decl. of D.D.], ¶ 9; App. at 32 [Decl. of E.E.], ¶ 6; App. at 36 [Decl. of F.F.], ¶ 8; App. at 17 [Decl. of S.D.], ¶ 9; App. at 38-39 [Decl. of H.H.], ¶¶ 4, 8; App. at 42-43 [Decl. of I.I.], ¶¶ 5, 9].

Many of these incidents occurred within the last six months. Significantly, these are girls with a documented history of trauma and abuse. As one girl who has been placed in solitary confinement recently testifies: "My suicidal feelings have gotten worse since I have been at Brownwood. It makes me upset because we are here to get help but I don't receive any

counseling to discuss my problems; we are just given medication. I have asked if they can send me to [another TYC facility in] Corsicana because I don't feel safe here." App. at 36, ¶ 8.

In preparation for submitting their expert reports at the end of August, Plaintiff's psychiatric and juvenile security experts were permitted to tour the Security Unit at TYC-Brownwood and spoke with a number of girls at the facility on July 20-21, 2009. Both experts have provided declarations describing their observations and summarizing some key conclusions based on their expert visit and document review thus far. Their statements make clear that serious problems remain at TYC-Brownwood related to the punitive and inappropriate use of isolated confinement in the Security Unit, the excessive use of force in carrying out referrals to the Security Unit, the recent return of unwarranted strip search procedures in the Security Unit, and the bleak and degrading conditions of the Unit itself. For example, Stuart Grassian, Plaintiff's psychiatric expert, states:

> In my opinion, the Brownwood facility currently demonstrates grossly inadequate recognition of the potentially harmful effects of security housing. The facility does so with an almost total disregard of these youths' past psychiatric histories, including but not limited to severe trauma, including sexual trauma.
> …
> …The facility uses the term "security room" to refer to cells in the Security Unit. The term is somewhat cynical. The "room" is among the smallest and most barren solitary confinement cells that I have ever observed during my over 25 years of experience with maximum security prisons.

App. at 2, 4 [Decl. of S.Grassian], ¶¶ 7, 15. Similarly, Anne Nelsen, Plaintiff's juvenile security and institutions expert observed:

> Isolating a child who is depressed or may be suicidal or self-destructive is not considered an effective intervention. TYC Suicide Training information discusses high-risk behaviors. Isolation of a potentially suicidal youth can aggravate at least two of these factors ("feelings of alienation or isolation" and "feelings of loss and separation"). The suicide training materials do not discuss the importance of developing a positive, trusting relationship with a caring adult as a way to address suicidal thoughts, gestures and attempts. A healthy relationship with a trusted adult is considered a more beneficial approach in suicide prevention

> than confinement and isolation. None of the interviews or documents discussed such relationship development at Brownwood. Not only are girls dealt with in an unprofessional and counter-productive manner through placement in the security unit for SA, that practice contradicts TYC's own suicide training module.

App. at 11 [Decl. of A.Nelsen], ¶ 8.

In light of such evidence, the amendment proposed here—naming additional girls who wish to pursue the same allegations of constitutionally deficient practices currently affecting a large class of girls and young women at TYC-Brownwood—is both more basic and more important than in other cases where this Court has granted leave to amend. *See, e.g., T-Netix, Inc. v. Value-Added Communs., Inc*., No. 3:05-CV-0654-D, 2007 WL 2668010 (N.D. Tex., Sep. 6, 2007) (finding amendment to plead a defense sufficiently important because it could preclude an award of damages); *see also Raytheon Co.*, 2008 WL 3852715 (finding amendment to add a claim of fraudulent concealment sufficiently important because without it, plaintiff's argument for tolling the statute of limitations "would be plainly less effective"). In short, denying leave to add new Plaintiffs here would likely foreclose any opportunity to seek renewed class certification in this case, thus imperiling the effective prosecution of the claims of the vast majority of putative class members, who are simply unable to pursue individual litigation.

3. The proposed amendment will not prejudice Defendants.

The proposed amendment does not involve new substantive claims or require moving any deadlines in the Court's Modified Scheduling Order; Plaintiff still intends to serve expert disclosures by August 31, 2009 at 3:00 p.m and otherwise comply with the Court's deadlines. *See* Doc. 78. The proposed amendment only entails adding new named Plaintiffs and making minor updates to reflect the current state of affairs within TYC-Brownwood. *See* Ex. A at ¶¶ 8-18 (new plaintiff-specific allegations); ¶¶ 19-21 (updated identities of Defendants); ¶ 35 (updated underlying facts). For over a year, Defendants did not serve any written discovery requests or

take any depositions. In part this is because Defendants simply do not need much, if any, discovery from Plaintiffs since this lawsuit remains wholly focused on ***Defendants'*** policies and practices, of which Defendants are well aware. *See* Ex. A. In any event, the discovery period is still open. Expert reports have not yet been served. And ***all*** TYC records for every girl in TYC custody have been in TYC's custody from the outset of this litigation. Therefore, there is simply no basis for any assertion of prejudice associated with the relief that Plaintiff requests here.

The fact that Defendants might prefer not to litigate this matter or this motion is not cognizable "prejudice." Only a prejudicial delay is meaningful to the instant inquiry. *See Mayeaux*, 376 F.3d at 427 ("delay alone is an insufficient basis for denial of leave to amend: The delay must . . . prejudice the nonmoving party or impose unwarranted burdens on the court."). Similarly, the fact that Defendants may be overwhelmed by concerns raised by multiple constituencies, including the state's governing bodies, as a result of rampant reports of abuse and mismanagement at TYC is not a proper basis for opposing this Motion.[10] Admittedly, TYC's leadership has changed repeatedly since this lawsuit was filed. For instance, the agency's second consecutive conservator, Richard Nedelkoff, one of the original Defendants, left the agency shortly after this lawsuit was filed—just as the state legislature was poised to put the agency through a Sunset review.[11] Also, TYC-Brownwood's superintendent changed during this

[10] *See* Texas Youth Commission, "Report from the Conservator" at http://www.tyc.state.tx.us/about/ conservator_report.html, accessed on Aug. 8, 2009.

[11] *See* Associated Press, "Texas Youth Commission Leader Recommends Ends to Conservatorship" at http://www.dallasnews. com/sharedcontent/dws/dn/latestnews/stories/072108dntextyc.193efd8.html, accessed on Aug. 8, 2009. *See also* Texas Youth Commission, "Cherie Townsend Named TYC Executive Director" at http://www.tyc.state. tx.us/news/tyc_townsend_director.html, accessed Aug. 18, 2009.

lawsuit's pendency from Teresa Stroud to Thomas Adamski.[12] These changes have certainly affected Plaintiffs' ability to move this lawsuit forward as expeditiously as desired. Defendants have no cause to complain of any "delay" on Plaintiffs' part when Defendants' institutional circumstances have contributed significantly to that delay. *See Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1207 (10th Cir. 2006) (finding claim added to pre-trial order not "untimely" or "unduly delayed" especially since defendant's dilatoriness contributed to plaintiff's delay in bringing claim).

Finally, if Defendants were able to demonstrate that the proposed amendment would somehow subject them to legitimate prejudice, any such prejudice could be readily cured by slight modifications to the Court's scheduling order.

In short, good cause exists for granting the relief that Plaintiff H.C. seeks here. *See Davis v. Dallas County, Tex.*, 541 F. Supp.2d 844, 848-49 (N.D. Tex. 2008). In *Davis*, the Northern District of Texas found that there was "good cause to permit plaintiffs to amend their complaint after the deadline established by the scheduling order" even though these plaintiffs, who were inmates, had failed "to explain their reasons for not timely filing their motion for leave to amend" and even though the "supplemental allegations in the proposed second amended complaint [did] not refer to any facts that were unavailable to plaintiffs before the deadline for amending the pleadings." *Id.* While noting that the amendment involved ***new*** allegations against a particular defendant (which is not the case here), the Court emphasized the importance of the proposed amendment to the case: "If plaintiffs' alleged pleading defects are not cured, their claims against [defendant] will be dismissed." *Id.* Here, unlike in *Davis*, Defendants did not

[12] *See* "Brownwood's TYC Superintendent Resigns" at http://www.reporternews.com/news/2008/oct/01/ brownwoods-tyc-superintendent-resigns/, accessed Aug. 18, 2009.

allege in a motion to dismiss that Plaintiffs' claims are deficient as a matter of law. Additionally, unlike the *Davis* plaintiffs, Plaintiff H.C. has explained the reasons for the passage of time ***and*** established the importance of the amendment. Plaintiff H.C. has also shown that Defendants will not be prejudiced by the amendment. Thus, there is an even stronger basis here than in *Davis* for concluding that "good cause" exists to allow Plaintiff H.C. to amend the complaint after the deadline established in the scheduling order.

B. There Is No "Substantial Reason" to Deny Leave to Amend.

As explained above, "good cause" exists for allowing leave to amend after the deadline memorialized in the January, 22, 2009 Scheduling Order. Thus, absent a "substantial reason"—such as undue delay, bad faith, dilatory motive, repeated failures to cure, undue prejudice to non-movants, or futility—Rule 15 ***requires*** that leave be given. *Mayeaux*, 376 F.3d at 425; *see also* Fed. R. Civ. P. 15(a)(2) (mandating that "the court should freely give leave when justice so requires"); *Foman*, 371 U.S. at 182 (explaining the only factors that might warrant denying leave, which should be "freely given"). Plaintiff H.C. has not delayed, let alone unduly delayed, in seeking leave to amend; she has moved forward as soon as additional, interested, and qualified individuals who were still in TYC custody had satisfied the exhaustion requirements. *See Vision Advancement, LLC v. Johnson & Johnson Vision Care, Inc.*, 2:05-CV-455, 2007 WL 865699 (E.D. Tex. Mar. 19, 2007) (granting defendant's motion for leave to amend to add claim nearly one year after deadline with trial a few months away). Further, Plaintiff H.C. does not seek to amend in bad faith or out of any dilatory motive. Nor is Plaintiff seeking to cure any deficiency that they had previously failed to cure. Defendants, who have only recently served any plaintiff-specific discovery, will not be unduly prejudiced by the amendment. And finally, the proposed amendment would not be futile. *See, by contrast, Yee v. Baldwin-Price*, No. 08-11050, 2009 WL

1361527, at *4 (5th Cir. May 15, 2009) (denying leave to amend as futile because plaintiff had not exhausted his administrative remedies with respect to the proposed amendment) (citing *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 576 n. 8 (5th Cir. 2005)).

Justice warrants granting leave here where discovery is ongoing and virtually all relevant discovery has been in Defendants' possession, custody, and virtually exclusive control from the outset. *See Reasoner v. Housing Authority of City of Teague*, 286 Fed. Appx. 878, 880 (5th Cir. 2008) (affirming decision to grant leave to amend four days before trial, explaining that "[w]hether leave to amend should be granted is entrusted to the sound discretion of the district court[;]" noting that Rule 15(a) "requires the trial court to grant leave to amend 'freely,' and the language of this rule 'evinces a bias in favor of granting leave to amend[;]'" and reminding that "district court must have a 'substantial reason' to deny a request for leave to amend"); *see also Miller v. Wathen*, 294 Fed. Appx. 906, 908 (5th Cir. 2008) (finding district court abused its discretion when it denied prisoner leave to file his second amended complaint as to certain claims "even though he had already amended it once") (citations omitted).

C. Joining New Plaintiffs Is Warranted Here.

The central purpose of Plaintiff H.C.'s proposed amendment is to add two new Plaintiffs, S.D. and B.P., who have recently exhausted the available administrative remedies as per federal law and TYC policy such that they are now eligible to join this lawsuit. The new Plaintiffs readily satisfy the two joinder requirements.

First, the right to relief that the proposed new Plaintiffs seek arises "out of the same transaction, occurrence, or series of transactions or occurrences," *i.e.*, the challenged TYC policies and practices that have been the subject of this lawsuit all along. *See* Doc. 1, Doc. 19, & Ex. A. Both S.D. and B.P. are currently in TYC custody at TYC-Brownwood. *See* Ex. A at ¶¶

8-18; *see also* App. at 16 [Decl. of S.D.], ¶ 2; App. at 13 [Decl. of B.P.], ¶ 2. Both S.D. and B.P. have been referred and admitted to the Security Unit where they experienced solitary isolation in a degrading setting; both girls have been subjected to strip searches absent any legitimate cause; both girls have been placed in physical restraints without provocation; both girls have a history of trauma that is exacerbated by the challenged TYC policies and practices. *See* App. at 13-18. These "series of transactions" are the basis of ***all*** claims in the Second Amended Complaint and underlie the unitary request for injunctive relief on behalf of all girls who are now or will be incarcerated at TYC-Brownwood.[13]

Second, there is a question of law or fact common to current and proposed Plaintiffs here. This lawsuit seeks injunctive relief on a class-wide basis to eliminate unconstitutional policies and practices currently utilized at TYC-Brownwood. The proposed new Plaintiffs seek to be class representatives. As putative class representatives, they are jointly interested in establishing the same prerequisites of numerosity, practicality, typicality, and adequacy. *See* Fed. R. Civ. P. 23(a). Thus, the claims of the old and new Plaintiffs share common questions of both law and fact. Therefore, joinder here will promote the goals of fairness and judicial economy.

In short, Plaintiff H.C. can satisfy both prongs of the joinder requirement under Rule 20. *See Akhtar v. U.S. Department of Homeland Security*, 4:07-CV-421-A, 2007 WL 4445236 (N.D. Tex. Dec. 17, 2007) (concluding that joinder requirements were satisfied because (1) "plaintiffs'

[13] In *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926), the U.S. Supreme Court explained that "'[t]ransaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." *Id*. at 610; *see also Mosley v. General Motors Corp*., 497 F.2d 1330, 1333 (8th Cir. 1974) (using the Supreme Court's definition of transaction in *Moore* to analyze Rule 20's first prong). Accordingly, "all 'logically related' events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence." *Id*. "Absolute identity of all events is unnecessary." *Id*.

claims arise from the same transaction or occurrence in the sense that they collectively challenge the unreasonable delay in the processing of the name checks and background checks associated with their immigration applications" and (2) there was "a common issue of fact").

V. CONCLUSION

For the foregoing reasons, Plaintiff H.C. respectfully asks that the Court grant the Motion for Leave to Amend the Complaint and to Join Plaintiffs. Plaintiff is prepared to file the Second Amended Complaint, attached as Exhibit A, and renewed Motion for Class Certification, attached as Exhibit B, as soon as leave is given.

DATE: August 21, 2009

Respectfully submitted,

/s/ Gretchen S. Sween
Lenora M. Lapidus (admitted *pro hac vice*)
Emily J. Martin (admitted *pro hac vice*)
Mie Lewis (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
WOMEN'S RIGHTS PROJECT
125 Broad St., 18th Floor
New York, NY 10004
Telephone: (212) 519-7848
Fax: (212) 549-2580
jehrlich@aclu.org
llapidus@aclu.org
mlewis@aclu.org
emartin@aclu.org

Lisa Graybill
Texas State Bar No. 24054454
Gouri Bhat (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION OF TEXAS
P.O. Box 12905
Austin, TX 78711
Telephone: (512) 478-7300
Fax: (512) 478-7303
lgraybill@aclutx.org

Steven M. Watt (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
HUMAN RIGHTS PROGRAM
125 Broad St., 18th Floor
New York, NY 10004
Telephone: (212) 519-7870
Fax: (212) 549-2580
swatt@aclu.org

Elizabeth Alexander (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL PRISON PROJECT
915 15th St, 6th Fl.
Washington, D.C. 20005
Telephone: (202) 393-4930
Fax: (202) 393-4931
ealexander@npp-aclu.org

Deborah LaBelle (admitted *pro hac vice*)
221 N. Main St., Ste. 300
Ann Arbor, MI 48104
Telephone: (734) 996-5620
Fax: (734) 769-2196
deblabelle@aol.com

Steven R. Daniels
Texas State Bar. No. 24925317
Gretchen S. Sween
Texas State Bar No. 24041996
DECHERT LLP
301 West 6th Street, Suite 1850
Austin, TX 78701
Telephone: (512) 394-3000
Fax: (512) 394-3001
steven.daniels@dechert.com
gretchen.sween@dechert.com

Robert A. Cohen (admitted *pro hac vice*)
Erika B. Gellert (admitted *pro hac vice*)
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
Telephone: (212) 698-3500
Fax: (212) 698-3599
robert.cohen@dechert.com
erika.gellert@dechert.com

CERTIFICATE OF CONFERENCE

In accordance with Local Rule 7.1(b), the undersigned hereby certifies that this motion is opposed. In early August, Gouri Bhat attempt to confer by telephone with Defendants' counsel, Bruce Garcia, who informed her that he was not available to discuss the matter. On August 17, 2009, Ms. Bhat followed-up with Defendants' counsel Bruce Garcia by e-mail to apprise him of the relief that Plaintiff seeks through the instant motion and asked for an opportunity to confer. On August 18, 2009 counsel for Defendants responded that Defendants oppose this motion.

/s/ Gretchen S. Sween

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 21, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system that will send a notification of such filing to all counsel of record who have registered in accordance with the Local Rules. I further certify that a courtesy copy of the foregoing was sent to Bruce Garcia, Assistant Attorney General and the Attorney in Charge for Defendants, by first-class U.S. mail.

/s/ Gretchen S. Sween