

The Honorable William J. Janklow
Governor of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

Re: CRIPA Investigation of Custer Youth Correctional Center, Custer, South Dakota

Dear Governor Janklow:

We are writing to report the findings of our investigation of conditions at the Custer Youth Corrections Center. On December 29, 1999, we notified you of our intent to investigate certain South Dakota juvenile corrections facilities pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997, and the pattern or practice provision of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"). Those facilities were the State Training School, the Juvenile Prison, and the Girls Intensive Program ("the Plankinton facilities"), and the Patrick Henry Brady Boot Camp, the Custer Youth Correctional Center, the Living Centers, and the Quest Program (hereinafter referred to as "Custer" or "the facility").

On February 14, 2000, the State informed us that it would not permit us access to tour either the Plankinton or Custer facilities. At about the same time, private litigation was instituted concerning the Plankinton facilities. We awaited the outcome of that private litigation before taking further action. That litigation produced a settlement concerning conditions at the Plankinton facilities in December 2000. The State closed the Plankinton facilities in January 2002. On March 4, 2002, we renewed our request for access to the Custer facilities in order to confirm or deny the allegations we had received about the conditions. On March 18, 2002, the State denied our renewed request to tour the Custer facilities.

Nevertheless, we continued our investigation, interviewing former juvenile residents of Custer and also parents of former and then-current juvenile residents. On June 12, 2002, the State gave permission for us to tour the facility and also to procure documents for expert consultants to review. That permission was later expanded to allow our expert consultants in mental health care, medical care, and education to tour Custer, but you denied permission for an expert consultant in juvenile justice management to tour the facility, though you did provide documentary evidence for such an expert to review.

On June 17-18, August 13-14, and August 28-29, 2002, we conducted on-site inspections of the facility with expert consultants in mental health care, medical care, and education, and we have had an expert consultant in juvenile justice management review documents provided to us by the facility. While at Custer, we interviewed residents, and direct care, program, and administrative staff. Before, during, and after our visit, we reviewed documents including policies and procedures, incident reports, investigations, and mental health, medical, and education records. At the end of each visit, our expert consultants provided detailed exit interviews about their preliminary findings. At the State's request, we provided technical assistance in order for the State to begin to address our expert's preliminary findings.

We would like to thank the staff at Custer and State officials for the cooperation we received since June 2002. We also appreciated the candor and openness of the facility's staff and administration. Moreover, State and facility staff and administration reacted positively and constructively to the observations and recommendations for improvement made by our consultants during the site visits.

Consistent with the statutory requirements of CRIPA, we write to advise you of the results of the investigation. On the whole, we found Custer to be a well-run facility with staff that appear to care for

the welfare of the residents and an administration that seems committed to providing the best atmosphere and programs possible. Both the staff and administration have been very responsive to suggestions from our experts on how to implement not only a program that complies with statutory and constitutional requirements, but also one that utilizes best-practices for juvenile justice facilities. We find no systemic constitutional or statutory violations in the areas of overall juvenile justice management, excessive force, or provision of medical care.

Nevertheless, as described more fully below, we conclude that certain conditions at Custer violate the constitutional and statutory rights of residents at the facility. The facility fails to provide required education services. Also, youth confined at Custer suffer harm or the risk of harm from some deficiencies in mental health care.

I. BACKGROUND

A. FACILITY DESCRIPTION

Custer houses juveniles ages 13-18, and usually holds approximately 175 boys, served in four separate settings, and 48 girls, served in two separate programs. For the boys, the Intake Center (capacity 52) is designed to conduct a battery of assessments related to the youth's medical, mental health, and educational needs, and provides an orientation to the Boot Camp program. The average length of stay in the Intake Center is approximately 20 days, although the range is between 15 and 45 days. The Boot Camp program is a structured, military-type program in which youth participate for between four and six months. During our visits, the Boot Camp housed 90 boys. The actual capacity of the boot camp is 120 youth, but the facility is staffed to operate only three of the four possible 30-bed platoons. The Living Center A program (capacity 36) serves youth with a substance abuse diagnosis, and provides job skills and vocational training during the youths' six to eight month period of detention. The Living Center B program (capacity 36) serves youth who have completed a DOC program, but who remain committed to the DOC and cannot, for any number of reasons, return home. This program is considered a step-down from the Boot Camp or Living Center A program. Some of these youth attend school or work in the community, but reside in the dormitory at night. In general, boys who are determined to be high-risk or high-need are diverted to alternative settings and are not placed in programs at Custer.

Custer operates two separate programs for girls, located on a campus that is approximately 15 miles from the boys' campus. The Excel program (capacity 24) is a licensed group home that serves lower-level offenders in a program focused on wellness and family issues. The typical length of stay is between four and six months. The Quest program (capacity 24) is a residential substance abuse treatment (RSAT) facility, which integrates substance abuse treatment and treatment for girls recovering from a history of sexual abuse or victimization. The typical length of stay is between six and eight months.

B. LEGAL BACKGROUND

Both CRIPA and Section 14141 give the Department of Justice the authority to seek a remedy for a pattern or practice of conduct that violates the constitutional or federal statutory rights of children in juvenile justice institutions. 42 U.S.C. § 1997; 42 U.S.C. § 14141. Adjudicated juveniles have a right to adequate education instruction not only by state law but also by the United States Constitution. See *Alexander S. v. Boyd*, 876 F. Supp. 773, 798 (D.S.C. 1995); *Donnell C. v. Illinois State Bd. of Ed.*, 829 F. Supp. 1016 (N.D. Ill. 1993). They also possess federal statutory rights to education under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, et seq. Moreover, the Equal

Protection Clause can bar discrimination based on gender in the provision of education services, see *United States v. Virginia*, 518 U.S. 515 (1996).

The Constitution also requires that confined juveniles receive adequate mental health treatment, including mental health treatment and suicide prevention measures. *Hott v. Hennepin County*, 260 F.3d 901, 905 (8th Cir. 2001) (citing *Williams v. Kelso*, 201 F.3d 1060, 1065 (8th Cir. 2000)); *Young v. City of Augusta*, 59 F.3d 1160, 1169 (11th Cir. 1995); *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

II. FINDINGS

A. EDUCATION

Custer violates the constitutional and statutory rights of its residents by failing to provide adequate education services. These education deficiencies include the failure to provide sufficient instructional time for youth in the Intake Center. Moreover, youth held in isolation cells do not receive adequate instruction. The vocational programming for girls must be commensurate with that available for the boys; it presently is not. Finally, the facility does not have sufficient certified teachers on staff in certain areas of mandatory instruction.

I. Insufficient classroom instruction for residents of the Intake Center.

The school programs for girls and for boys in the Boot Camp and Living Center provide for at least 330 minutes of instruction per day, which is consistent with State law. However, the boys' Intake Center's school schedule includes only three hours of education (180 minutes) provided each weekday afternoon. While it is understood that a battery of assessments needs to be completed for youth upon admission, to the extent possible, these efforts should not compromise the youth's opportunity to participate in school. Further, a significant number of youth are held on the unit beyond the time required to complete the assessments. In addition, youth who are "recycled" through the Boot Camp program in response to their non-compliance with rules of the Boot Camp program then return to the Intake Center to await the deployment of a new platoon. Given the recency of their original admission, they are not required to complete a new battery of assessments. For these youth, it is particularly important that a complete range of educational services are offered so that their efforts and progress made in the Boot Camp school program can continue.

II. Youth in isolation do not receive adequate educational services.

Youth who are in disciplinary isolation do not consistently receive education services. The mechanism for communicating the presence of youth in disciplinary isolation to the education staff is not dependable. A review of disciplinary isolation logs for June-August 2002 revealed that there were a significant number of youth in isolation for significant periods of time. The education staff reported that they were not made aware of these youths' placement in isolation, and therefore had not provided educational services to them. Further, there is currently no procedure for documenting the provision of education services to these youth.

III. Vocational programming is not available to girls at Custer.

Given their physical separation from the boys' campus and the attached vocational facilities, girls housed at Excel and Quest do not have access to vocational programs. Girls are entitled to the same range and quality of educational and vocational programming as boys. Given their age, length of stay,

and the likelihood that they will enter the world of employment shortly after release, a range of vocational options for girls will also serve the rehabilitative goals of the facility.

IV. The Learning Center classroom is staffed by an instructor/aide, not a certified teacher.

The education program for boys at Custer features a Learning Center classroom, which is used to serve regular and special education students in an environment affording greater structure and individual attention than the regular classroom. Currently, this classroom is led by a teacher's aide, whose services are supplemented by an additional teacher's aide and the special education teacher. Given that students are assigned specifically to this class, and may be so assigned for a large portion of the school day, it needs to be staffed (i.e., led) by a certified teacher. Please note that the assistance of aides and the special education teacher are certainly valuable resources that should be continued.

V. Some special education students are not receiving adequate services

The philosophy for special education service provision at Custer is "full inclusion," meaning that to the extent possible, special education students are served in the regular education classrooms with their peers who do not have disabilities, using appropriate instructional supports. This philosophy is clearly in line with federal statutes calling for services in the least restrictive environment. A review of files indicated that most of the special education students at Custer have learning disabilities, and generally do not have emotional or behavior disorders or far below-average IQ's. Further, most special education students appear to progress through the regular curriculum and earn credits at the same rate as their non-disabled peers. Thus, the efforts toward full-inclusion are appropriate for most of the population served.

However, this model is not providing adequate special education services for some students. A significant number of special education students have been referred to the Learning Center classroom because they needed additional support. Because these students appear to be struggling in the regular classroom setting, it may be appropriate to change their special education placement to a classroom featuring co-teaching or team-teaching. If so, Custer should consider staffing the Living Center at a level that would provide opportunities for at least a few periods a day to be team taught by a regular education teacher and a special education teacher.

B. MENTAL HEALTH

The psychiatric treatment at Custer is provided by one of two psychiatrists. One psychiatrist comes twice a month for one day each time. One of these days is to the girls' site; one is to the boys' site. A second psychiatrist, a child and adolescent psychiatrist based in Sioux Falls, consults to the boys' campus two days per month utilizing a telemedicine hook-up. He does not come on-site. One of the two mental health professionals ("MHP") sit in with the youth when they see a psychiatrist and provide background information. The formulary for the psychiatrists is unrestricted; they can prescribe whatever medications they feel are clinically indicated. Having an unrestricted formulary is an excellent option.

The assessments of the first psychiatrist, who performs on-site visits, appear generally comprehensive, and his documentation is extensive. The medications he prescribes appear generally reasonable. Interviewed youth appeared to like him, and found him responsive to their needs. Although not trained as a child and adolescent psychiatrist, he has had considerable experience treating both children and adolescents, and by virtue of his experience, appears qualified to provide care to adolescents. Youth on medication appeared to be followed at least every 90 days, but more frequently in some cases when the clinical needs required it.

The second psychiatrist, who performs the telemedicine consultations, began providing services in the beginning of July 2002. Administrators indicated that they had attempted to contract with local psychiatrists for on-site service, but were unsuccessful, so turned to telemedicine techniques. This psychiatrist's care was more difficult to assess. Overall, the medications written appeared to be reasonable. However, there were no notes from him in any of the charts. Administrators were aware of this deficiency. Youth who were interviewed expressed mixed views about the telemedicine techniques of sitting in front of a camera and seeing him on the screen. While some youth found this a novel approach and enjoyed seeing themselves on TV, others found the experience quite unnatural, complained they could not hear him and that he could not hear them (reflecting essentially technical difficulties), and the youth did not feel they had communicated very effectively with this psychiatrist.

Many youth are admitted to Custer who are already taking psychotropic medications. The facility continues their prescribed regimen without having the youth and these medications reviewed by a psychiatrist or physician from the facility. For most youth, there is a significant lag time between when they arrive at the facility and when they first see a psychiatrist. One of the counselors estimated the average wait to be 45 days. Review of records and appointment dates for selected youth revealed a wide range of wait times. Some youth who were identified as having urgent needs were seen more rapidly, while others had been in the facility for over 80 days and had not yet seen a psychiatrist despite receiving psychotropic medications. This is problematic from at least two perspectives. First, given that the intake phase lasts about 30 days, most youth are classified without benefit of psychiatric or other mental health input. This is reflected also on the form which documents the classifications from various perspectives (school, medical, etc.) on which, for many youth, the mental health classification status was left blank. Second, maintaining youth on psychotropic medication in an institution without a review of efficacy or appropriateness by any physician for more than 21 days or any review of side effects by a psychiatrist constitutes substandard care. A number of personnel interviewed voiced the hope that the addition of the second psychiatrist with his telemedicine evaluations will shorten the waiting time for an initial psychiatric evaluation. However, at the time of our visit, impermissible delays remained.

The documentation of one youth who was transferred out of Custer suggested that mental health services for such youth may fall through the cracks. This youth was admitted to the intake unit and noted to be on psychotropic medication. After several weeks, before being seen by a psychiatrist, he was deemed not to be suitable to remain at Custer due to his behavior, and was placed in the isolation cells in the bootcamp building to await transfer. It is not clear whether his medication regime was appropriate, or whether another medication regime might have controlled his behavior so that he would have been found suitable to remain at Custer. It is our understanding from the staff that once placed in the isolation cell, he was deemed "transferred," and so was removed or not placed on the schedule to see a psychiatrist. He awaited transfer for about six days. He was transferred out shortly before our visit, and so could not be interviewed.

This youth's case illustrates two deficiencies. First, a placement decision was made for a youth with known psychiatric problems without any psychiatric assessment. Second, youth awaiting transfer are placed in isolation, and mental health services that otherwise might be provided are markedly reduced. The facility admitted to us that youth awaiting transfer are removed from programmatic support, e.g., psychiatric services and educational services. While a youth is housed at the facility, it is the facility's responsibility to provide adequate mental health care and education to that youth.

Finally, the suicide procedures were reviewed and appeared reasonable. Putting a youth on suicide watch was less frequent than is seen at many institutions, presumably because of the nature of the population (certain types of offenders are diverted from and not placed at Custer). Because of the infrequency, relatively few youth who had been on suicide watch were available for interview, and of those who were, the events took place several months previously. From this limited data, however, the

procedures appeared to be implemented appropriately.

III. REMEDIAL MEASURES

In order to rectify the identified deficiencies and protect the constitutional and statutory rights of the youth confined at Custer, the facility should implement, at a minimum, the following measures:

A. EDUCATION

1. Restructure the school program for the Intake Center so that all youth are routinely provided the opportunity for at least 330 minutes of instruction per day.
2. Notify education staff regarding the placement of youth in disciplinary isolation. Once notified, education staff need to provide access to educational services for these youth.
3. Develop a range of vocational program options for girls.
4. Assign a teacher to be the leader of the Learning Center classroom. Provide models of special education service delivery to accommodate the needs of all qualified youth.

B. MENTAL HEALTH CARE

1. In addition to the current mental health screening procedure administered at the time of a youth's admission to Custer, within three weeks of a youth's admission and prior to that youth's classification provide an interview and medication review by a physician with expertise in the medication for youth with identified psychiatric problems and for those who are admitted on psychotropic medication. While for some medications (such as stimulants for treating attention disorders), some pediatricians have sufficient expertise to assess medication appropriateness, for most other psychotropic medications, psychiatric expertise is generally required.
2. Implement a procedure such that the notes of any mental health evaluations conducted via a telephonic hook-up are available on the chart within 10 days of contact with patients.
3. Correct the technical problems (poor sound transmission, etc.) of the telemedicine apparatus.
4. Ensure that youth awaiting transfer continue to receive needed mental health services.

###

In making the foregoing findings, and identifying appropriate remedies, we recognize that the facility appears to have made progress in remedying many of the allegations we initially received. This progress can be attributed to the efforts of State and facility officials to address proactively problems they identified. These efforts evidence a commitment to improving the facility.

We will be sending our consultants' evaluations of the facility under separate cover. Although the experts' evaluations and work do not necessarily reflect the official conclusions of the Department of Justice, their observations, analysis, and recommendations provide further elaboration of the issues discussed in this letter and offer practical assistance in addressing them.

Pursuant to CRIPA, the Attorney General may institute a lawsuit to correct deficiencies of the kind

identified in this letter forty-nine days after appropriate officials have been notified of them. 42 U.S.C. (Section 1997b(a)(1)). We would prefer, however, to resolve this matter by working cooperatively with you. We have every confidence that we will be able to do so in this case. Civil Rights Division lawyers will be contacting your attorney to discuss these remedial measures.

Sincerely,

Ralph F. Boyd, Jr.
Assistant Attorney General

cc: Mark Barnett, Esq.
Attorney General
State of South Dakota

Brett Wilbur, Esq.
Counsel for Governor Janklow

Jeff Bloomberg
Secretary
South Dakota Department of Corrections

Doug Herrmann
Director
Juvenile Services
South Dakota Department of Corrections

Mark Snyder
Superintendent
Custer Youth Corrections Center