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Sorry, Kid, You Have No Rights Here: How can we protect unadjudicated youth in private residential treatment facilities from harmful and unnecessary strip searches?

Amanda Simmons

I. INTRODUCTION

The "Troubled Teen Industry" ("TTI") is a catch-all term loosely applied to privately-owned youth residential facilities throughout the United States and abroad.[1] These programs have operated for over fifty years and include a broad range of institutions, such as therapeutic boarding schools, wilderness therapy programs, faith-based academies, and residential treatment centers.[2]

These facilities are notoriously difficult to define as they do not operate as traditional schools, juvenile detention centers, group homes, or psychiatric facilities.[3] They are currently regulated through a confusing patchwork of federal, state, and local laws, with minimal oversight and inconsistent reporting requirements.[4] These inconsistent reporting standards make the full scope

[1]Cathy Krebs, Five Facts About the Troubled Teen Industry, AM.BAR.ASS'N 1, 2(Oct. 22, 2021), https://www.americanbar.org/groups/litsexigation/resources/newsletters/childrens-rights/five-facts-about-troubled-teen-industry/.

[2] AM. BAR. ASS'N, REPORT TO THE HOUSE OF DELEGATES: COMMISSION ON SEXUAL ORIENTATION AND GENDER IDENTITY SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE, 1, 2 (AUG. 2023). https://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/605-annual-2023.pdf

[3] Lenore Behar et al., *Protecting Youth Placed in Unlicensed, Unregulated Residential "Treatment" Facilities*, 45 FAM. CT. REV. 399, 401-02 (2007)

> "Although many states do oversee residential programs, in some states private residential treatment facilities for minors are not subject to regulation, or monitoring either as mental behar health facilities or educational facilities. Yet states regulate other private facilities, such as nursing homes, day care centers, hospitals, and restaurants. Depending on the state, failure to provide state oversight of residential programs for minors may occur because these programs (1) do not accept public funds; (2) are affiliated with religious organizations; or (3) describe themselves (inappropriately) as outdoor programs, boarding schools, or other types of nontreatment programs . . .If a residential program advertises that it addresses behavior problems and calls itself a "therapeutic boarding school," "emotional growth academy," "behavior modification facility," "wilderness program," "boot camp," or other similar terms, then it most likely should be considered a treatment program because it targets the social, emotional, and/or behavioral functioning of the children").

[4]U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104670, CHILD WELFARE: HHS SHOULD FACILITATE INFORMATION SHARING BETWEEN STATES TO HELP PREVENT AND ADDRESS MALTREATMENT IN RESIDENTIAL FACILITIES 19 , 24 (2022) ("State oversight of residential facilities is often fragmented and not sufficiently focused on maltreatment, according to representatives from three stakeholder groups and a protection and advocacy organization." and "In order to fill oversight gaps, a stakeholder representative said there should be one entity in each state that is solely responsible for responding to maltreatment in facilities, including investigating incidents and removing staff from facilities when incidents occur" and "Differing interpretations of what constitutes maltreatment by residential facility administrators, staff, and state agencies may result in facilities over- or under-reporting incidents. This, in turn, complicates states' data collection efforts, according to agency officials in three states, representatives of two protection and advocacy organizations, and four stakeholder group representatives.").

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of the industry difficult to quantify. However, existing research indicates that between 120,000 and 200,000 youth are placed in residential facilities each year by state child welfare agencies, juvenile justice systems, mental health providers, refugee resettlement agencies, school district special education programs, and parents.[5]

Politicians, policy makers, and children's rights advocates[6] have documented problems within the troubled teen industry for decades.[7] These longstanding problems have received recent media attention, with celebrity activist Paris Hilton lobbying for federal regulation to increase safety protections for children in residential facilities.[8] Hilton's media reach has helped illuminate ongoing academic research substantiating claims of serious maltreatment in residential treatment facilities, including sexual assault, physical and medical neglect, assault and battery, violation of civil rights, and death.[9]

Despite the increasing awareness of systemic problems in youth treatment facilities, meaningful change is proving challenging.[10] Of the many abuses described in substantiated reports by government agencies, policy makers, and news agencies, very little is mentioned about the use of

[5]Krebs, *supra* note 1, at 2. *See also*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-346, RESIDENTIAL FACILITIES: IMPROVED DATA AND ENHANCED OVERSIGHT WOULD HELP SAFEGUARD THE WELL-BEING OF YOUTH WITH BEHAVIORAL AND EMOTIONAL CHALLENGES 1, 2 (2008) [hereinafterGAO-08-346]*/* (explaining as far back as 2004, federal funding to states financed more than 200,000 youth in residential facilities); *See also*, Marinus H van Ijendoorn et al., *Institutionalisation and Deinstitutionalisation of Children 1: A Systemic and Integrative Review of Evidence Regarding Effects on Development*, 7 LANCET PSYCHIATRY 703, 706 (2020) (claiming that as many as 5 to 6 million children worldwide live in residential rather than home based settings).

[6] ELEMENTS OF EFFECTIVE PRACTICE FOR CHILDREN AND YOUTH SERVED BY THERAPEUTIC RESIDENTIAL CARE, CASEY FAM. PROGRAMS 1, 9 (2016), https://www.casey.org/media/Group-Care-Exec-summ-complete.pdf.

[7] STAFF OF SUBCOMM. ON CONST. RTS. OF THE S. COMM. ON THE JUDICIARY, 91ST CONG., INDIVIDUAL RIGHTS AND THE FEDERAL ROLE IN BEHAVIOR MODIFICATION 5, 387 (Comm. Print 1974);
see generally Abuse and Neglect of Children in Institutions, Hearings Before the Subcomm. Of Child and Human. Dev. of the Comm. on Labor and Human Resources, U.S. S. 96th Cong. , UNITED STATES SENATE (1979) [hereinafter Abuse and Neglect].

[8] Julia Reinstein, *Paris Hilton Testified That She Was "Abused On A Daily Basis" At A Treatment Facility For Teens,* BUZZFEED NEWS
(Feb. 9, 2021, 12:44 PM), https://www.buzzfeednews.com/article/juliareinstein/paris-hilton-abuse-testimony-utah; Stop Institutional Child Abuse Act, H.R. 2955, 118th Cong. (2023); *see also* Stop Institutional Child Abuse Act, S.1351, 118th Cong. (2023).

[9] GAO-08-346*supra* note 5, at 17; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-696T, RESIDENTIAL FACILITIES: STATE AND FEDERAL OVERSIGHT GAPS MAY INCREASE RISK TO YOUTH WELL-BEING 3 (2008) [hereinafter GAO-08-696T]; *Desperation without Dignity: Conditions of Children Placed in For Profit Residential Facilities,* NATIONAL DISABILITY RIGHTS NETWORK 4, 24 (2021) [hereinafter *Without Dignity*], https://www.ndrn.org/resource/desperation-without-dignity/,("A 2008 GAO noted that investigations of government and private facilities serving youth conducted under DOJ's Civil Rights Division (Division) have found a pattern or practice of civil rights violations in some residential facilities, including physical and sexual abuse, medical neglect, and inadequate education")*Without Dignity]*;.; *See* Krebs, *supra* note 1, at 2.

[10] *See* Yael Zakai Cannon, *There's No Place Like Home: Realizing the Vision of Community-Based Mental Health Treatment for Children*, 61 DEPAUL L. REV. 1049, 1056 (2012) (("Today's calls for reform in the field of children's mental health echo many of the concerns articulated in the 1960's: most children in need of mental health services are not getting them, and those that are serviced are often placed in excessively restrictive settings").

strip searches in youth residential facilities.[11] These invasive and traumatizing practices used against children and youth, however, are deeply troubling and widely decried by children's mental health experts and policy experts alike.[12] The courts that have handled child strip search cases have recognized that a strip search inflicts" more than a mere indignity" on the child, and some have correctly concluded that a strip search is a traumatic event.[13]

As a result of increasing concern over the widespread and largely unregulated use of strip searches on juveniles, the American Bar Association ("ABA") passed a resolution in 2020 urging all federal, state, local, territorial, and tribal governments to adopt policies and contractual provisions that prohibit conducting strip searches of children and youth, except in exceptional circumstances.[14] The ABA resolution applies broadly to professionals and agencies who come into contact with youth, including residential facilities for "troubled teens."[15] Despite these straightforward recommendations, implementing even common sense standards such as those proposed by the ABA may prove to be a challenging endeavor, given the complicated, confusing, and inconsistent legal regimes currently regulating these facilities.

This article will take an in-depth look at the current case law and regulatory framework governing juvenile strip searches, and will also analyze the challenges of applying the ABA recommendations to youth in private residential treatment facilities. To accomplish this, Part I of this article will discuss Fourth Amendment jurisprudence and the constitutional problems associated with such an invasive search of minors. Part II of this article will examine the

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[11] *Id.* at 1049 citing to the American Bar Association's Youth at Risk Initiative Report detailing basic human rights violations at RTC's including youth deaths, inhumane and degrading discipline, inappropriate and dangerous use of seclusion and restraint, medical and nutritional neglect and severe restrictions on communication and visits with parents, attorneys, and advocates; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-146T, Residential Treatment Programs: Concerns Regarding Abuse and Death in Certain Programs for Troubled Youth 1, 3 (2007) [hereinafter, *GAO-08-146T*]

> ("GAO found thousands of allegations of abuse, some of which involved death, at residential treatment programs across the country and in American-owned and American-operated facilities abroad between the years 1990 and 2007. During 2005 alone, 33 states reported 1,619 staff members involved in incidents of abuse in residential programs. GAO could not identify a more concrete number of allegations because it could not locate a single Web site, federal agency, or other entity that collects comprehensive nationwide data");

[12] See *Addressing Trauma; Eliminating Strip Searches,* JUVENILE LAW CENTER 1,2 (2017) [hereinafter *Addressing Trauma*].

[13] *See* Steven Shatz and Molly Donovan, *The Strip Search of Children and the Fourth Amendment,* 26 UNIV. S.F. L. REV. 1, 10-11 (1991); *see also* Flores v. Meese, 681 F. Supp. 665, 667 (Cal. 1988)

> ("That plaintiffs are children under the age of eighteen is also a factor we must consider. Children are especially susceptible to possible traumas from strip searches. As the Supreme Court has noted, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage (citing to Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). It follows that a nude search of a child is an invasion of constitutional rights of some magnitude.").

[14] *Report to the House of Delegates,* AMERICAN BAR ASSOCIATION 1, 1 (2020) [hereinafter ABA 2020].

[15] *Preventing Strip Searches of Children and Youth: A Guide for Advocates,* THE CHILDREN RIGHTS LITIGATION COMM. OF THE AMERICAN BAR ASSOCIATION'S SECTION OF LITIGATION AND THE NEW YORK CIVIL LIBERTIES UNION 1, 2 (2021) [hereinafter *Preventing Strip Searches*].

terminology, history, and current regulatory framework within residential treatment centers. Then, Part III will examine the difficulties of implementing the ABA recommendations within the current legal environment governing youth in private facilities by discussing constitutional protections, federal statutes, state approaches and case law, local licensing standards, and accreditation organizations. Finally, this article will review the severity and importance of implementing the ABA standards and discuss different organizations, accreditation boards, and licensing agencies whose voluntary adoption of the ABA's recommendation could provide a critical layer of safety, preventing vulnerable youth from such an unnecessary and dehumanizing experience.

II. FOURTH AMENDMENT JURISPRUDENCE AND THE PROBLEM OF STRIP-SEARCHING MINORS

A. Strip searches are both ineffective and extremely traumatizing for children and youth

"A strip search is a 'search that requires a person to remove or arrange some clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia.'"[16] Depending on state law, a strip search may be visual, physical, or a combination of both and may also involve a cavity search.[17]

The psychological harm of searches on juveniles cannot be overstated. In 1979, Supreme Court Justice Stevens characterized a body cavity search as perhaps "the greatest personal indignity" officials can visit upon an individual.[18] Other courts have echoed this sentiment[19] and acknowledged the unique vulnerability of children to the possible traumas from strip searches[20] and that adolescent vulnerability intensifies the patent intrusiveness of the exposure and can result in serious emotional damage.[21] Strip searches have been described as a "demeaning,

[16] 28 C.F.R. § 115.6 (2012); *See also* Shatz, *supra* note 13, at 1.
[17] *Addressing Trauma, supra* note 12, at 1.
[18] Bell v. Wolfish, 441 U.S. 520, 594 (1979); *see also* Shatz, *supra* note 13, at 1.
[19] N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 233 (2d Cir. 2004) (citing *Wolfish*, 441 U.S. at 558, stating that "[a] strip search with a body-cavity inspection is the practice that has instinctively given the Supreme Court 'the most pause.' The Seventh Circuit has described strip searches as "demeaning", "dehumanizing," and "terrifying." *See* Mary Beth G. v. City of Chi., 723 F.2d 1263, 1272 (7th Cir. 1983). The Tenth Circuit has also called them "terrifying." *See* Chapman v. Nichols, 989 F.2d 393, 396 (10th Cir. 1993). The Eighth Circuit has called them "humiliating." *See* Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982).)
[20] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (describing that "youth . . .is a . . .condition of life when a person may be most susceptible . . . to psychological damage."); *see Flores, supra note* 13, at 667. (stating that children are especially susceptible to possible traumas from strip searches).
[21] ABA 2020, *supra* note 12, at 4 (citing to Safford Unified School District No. 1 v. Redding, 557 U.S. 364, 374-75 (2009)).

dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, and repulsive"[22] and a "violation of any known principle of human decency."[23]

Detailed descriptions of how strip searches are conducted on juveniles emphasize just how degrading these experiences are for minors. One officer described a visual cavity search as follows:

> After they're standing in front of me with no clothing, first they check their head. They bend down and shake their head, go through their hair with their fingers, check their ears, back and inside of their ears, check their eyelids, on the bottom of their eyelids, check their nose, inside their mouth under the tongue, sideways and the tongue. Then we go down to their armpits and then lift their breasts up. Then they have to pull their naval so I could check and see there's nothing in there. After that they jump three times on each leg, squat down three times; and at the end of the third squat, they stay down and cough. And they turn around and do the same thing, jumping three times on each leg, and they squat three times. On the third squat, they stay down. They pull their buttocks apart and they cough again.[24]

Subjective descriptions of this profoundly invasive process are equally uncomfortable to read. One 12-year-old described the process by saying:

> We walked in there and she told me I had to take my clothes off . . . [S]he told me she had to do a strip search. I said, 'What is that?' She said 'you have to bend over, you have to spread your butt cheeks, and you have to cough . . . I was like 'I can't do it!' And she was just like 'well, you're going to have to do it some time.' So, then I turned around, and I coughed, and I coughed again."[25]

In addition to the profoundly invasive nature of strip searches and their detrimental impact on the developing minds of children, it is also a highly ineffective tool for discovering contraband.[26] In *Flores v. Meese,* a district court considered the reasonableness of strip searches on juveniles detained in Immigration and Naturalization Service ("INS") facilities, ultimately holding that the policy of routinely strip searching juveniles upon their admission to INS facilities and after all

[22] *Mary Beth G.*, 723 F.2d at 1272; s*ee also* Florence v. Bd. Chosen Freeholders, 566 U.S. 318, 345 (2012) (Breyer, J. dissenting) (stating, "Even when carried out in a respectful manner, and even absent any physical touching . . . such searches are inherently harmful, humiliating and degrading.").
[23] Doe v. Renfrow, 631 F.2d 91, 93 (7th Cir. 1980).
[24] See Deposition of Juana Solorio, at 34-35 in Basurto, No. Civ. S 86-1457 EJG quoted by Steven Shatz et al "The Strip Search of Children and the Fourth Amendment", Page 2.
[25] *Addressing Trauma*, *supra* note 12, at 2.
[26] ABA 2020, *supra* note 12, at 10.

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visits with persons other than their attorneys violated the Fourth Amendment.[27] Accordingly, the *Flores* court found that, without reasonable suspicion that a strip search would yield weapons or contraband, such a search would be unconstitutional.[28] In reaching this conclusion, the court rejected the defendant's claim that routine strip searches of juveniles are necessary to maintain security, stating that, "Confining our analysis to juvenile aliens, there are approximately twenty juveniles searched daily, or approximately 7,300 per year. In 1987, only four instances of juveniles found with weapons or contraband were reported, and, of these, only one involved an item recovered in a strip search."[29]

Other courts have found the strip search equally ineffective for discovering contraband, stating that "not one [search] yielded evidence of contraband", and there was not "any evidence whatsoever legitimating . . . the strip search policy."[30] When the ineffectiveness of the practice is combined with the enduring trauma and humiliation experienced by children subject to such searches, it becomes increasingly important to implement common-sense standards to protect youth from these practices.

With an understanding of the traumatizing and ineffective nature of the juvenile strip search, the next section will provide an overview of Fourth Amendment jurisprudence and how these principles are applied to juvenile strip searches in both schools and juvenile justice facilities.

B. Fourth Amendment Framework Governing Strip Searches.

The legal framework for strip searches is governed by the Fourth Amendment, which grants citizens a right to be free from unreasonable search and seizure.[31] This Constitutional protection

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[27] *Flores, supra* note 13, at 665.
[28] *Id.* at 669.
[29] *Id.* at 668; *see also* Shatz, *supra* note 13, at 21.
[30] *See* N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 242 (2d Cir. 2004) (Sotomayor, J., dissenting) (stating the following:

> "Thus, the detention centers' own documentation of contraband discoveries provides absolutely no evidence that suspicionless strip searches were necessary, or even helpful, in any case. Other evidence in the record confirms the weakness of the government's argument. One supervisor testified that of the one hundred strip searches she personally conducted, not one yielded evidence of contraband. A director of one of the facilities testified that out of 2,500 strip searches performed since that facility was built, only two strip searches revealed contraband that otherwise would not have been found.").

See also Mabry v. Lee Cnty, 849 F.3d 232, 238-39 (5th Cir. 2017) (stating, "[A]t oral argument, counsel for the County could not point to even one instance in which contraband was found via the strip and cavity search that could not have been found through use of the metal detecting wand and pat-down . . . Indeed, at no point in its brief does the County point to *any evidence whatsoever* legitimating any components of the Center's intake procedures, including the search policy.").
[31] U.S. CONST. amend. IV.

from "unreasonable"[32] searches is a fluid concept varying with the context and circumstances in which the search occurs.[33]

While the Fourth Amendment does not, strictly speaking, require a warrant nor probable cause to support a search, the Supreme Court imposes a presumptive warrant requirement for searches and generally requires probable cause.[34] In some circumstances, a warrant is not required, but at least "some quantum of individualized suspicion" must be shown."[35] The more intrusive the search, the more justification must be provided,[36] and when determining reasonableness, the courts will consider "whether the government's need for the particular search outweighs the invasion of the personal rights that the search entails.[37]

When balancing these interests and analyzing the invasion of personal rights, "it is axiomatic that a strip search entails perhaps the most severe intrusion upon personal rights,"[38] and thus a strip search policy must "instinctively give us the most pause."[39] Children are especially susceptible to the possible traumas from strip searches as "youth is more than a chronological fact. It is a time and condition of life when a person may be more susceptible to influence and psychological damage."[40] Thus, "the nude search of a child is an invasion of constitutional rights of some magnitude."[41]

When balancing the government's need for the particular search, some level of individualized suspicion is generally required; however, "in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."[42] These cases, commonly referred to as "special needs"

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[32] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (stating that "[t]he ultimate measure of the constitutionality of a government search or seizure is reasonableness."). *See also* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (echoing the previous statement that "[t]he ultimate touchstone of the 4th Amendment is reasonableness").

[33] *N.G ex rel. S.C.*, 382 F.3d at 230; *see also* Ornelas v. United States, 517 U.S. 690, 696 (1996) (describing that the reasonableness standards are "fluid concepts that take their substantive content from the particular contexts in which they are being assessed.").

[34] Katz v. United States, 389 US 347, 357 (1969).

[35] Skinner v. Ry. Labor Exec. Ass'n., 489 U.S. 602, 619 (1989).

[36] Terry v. Ohio, 392 U.S. 1, 18 (1968).

[37] Bell v. Wolfish, 441 U.S. 520, 559 (1979).

[38] *Flores, supra* note 13, at 667.

[39] *Bell*, 441 U.S. at 558.

[40] *Flores, supra* note 13, at 667.

> "That plaintiffs are children under the age of eighteen is also a factor we must consider. Children are especially susceptible to possible traumas from strip searches. As the Supreme Court has noted, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage (citing to Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)). It follows that a nude search of a child is an invasion of constitutional rights of some magnitude."

[41] *Id.* at 667. (quoting Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980)).

[42] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989).

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cases,[43] ask whether a government needs a specific purpose to conduct a search, "beyond the normal need for law enforcement, makes the warrant and probable cause requirement impracticable."[44]

C. Special Needs Doctrine and Public School Searches

The "special needs" doctrine relates to searches where the government has an exceptional need to conduct the search, and frequently arises in the context of public schools, where the Fourth Amendment reasonableness standard reflects an understanding that "a student's privacy interest is limited in a public school environment where the state is responsible for maintaining discipline, health, and safety."[45] Fourth Amendment challenges in the context of prisons and jails are not typically referred to as special needs cases, though the Supreme Court has upheld prison searches predicated on less than probable cause or even reasonable suspicion, without resorting to the special needs doctrine.[46] Both school searches and searches within the criminal justice context are discussed below.

The Supreme Court first clarified in that public school students have some constitutional rights in the public school setting in 1969 in *Tinker v. Des Moines*, stating that, "[s]tudents do not shed their constitutional rights . . . at the schoolhouse gates."[47] In 1985, the Court further clarified its position on constitutional protections for students in *New Jersey v. T.L.O.*[48] In *T.L.O.*, the Court created the special needs doctrine for school searches, allowing the state to dispense of the normal warrant and probable cause requirements if certain conditions are met.[49]

In *T.L.O.*, a fourteen-year-old girl's purse was searched after she was sent to the principal's office for smoking in the bathroom with a friend.[50] The Court held that while the Fourth

[43] Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001) (enabling the government's ability to conduct searches without warrant or probable cause when they are conducted in furtherance of a government's "special need" other than the investigation of criminal activity). *See also* Abbe Smith, *Annual Review of Criminal Procedure*, 46 GEO. L.J. 3, 158 (2017) (discussing the government's need for probable cause in searches).
[44] Mashburn v. Yamhill Cnty, 689 F. Supp. 2d 1233, 1237 (2010) (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 829 (2002)).
[45] Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 830 (2002).
[46] *Mashburn*, 698 F. Supp. 2d at 1237.
[47] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
[48] *See* Diana R. Donahoe, *Strip Searches of Students: Addressing the Undressing of Children in Schools and Redressing the Fourth Amendment Violations*, 75 MO. L. REV., 1123,1125 (2010) (statement of Diana R. Donahoe)("Since the Supreme Court's 1985 decision in New Jersey v. T.L.O., courts have analyzed school searches, including strip searches, using a reduced Fourth Amendment standard – reasonable suspicion – rather than probable cause, the higher standard more typically employed in situations involving a search . . .Therefore, the T.L.O. court diluted the Fourth Amendment probable cause requirement in the school environment and crafted a two-prong reasonableness test to apply in school search situations.").
[49] *See* Erin P. Davenport, *Stripped Bare: Students' Fourth Amendment Rights, School Searches, and the Reasonableness Standard*, 4 TENN. J.L. & POL'y 115, 117 (2010).
[50] New Jersey v. T.L.O., 469 U.S. 325, 343 (1984).

Amendment's prohibition on unreasonable searches and seizures applied to searches conducted by public school officials, the search of this particular student was reasonable under the circumstances.[51] The Court reasoned that the "special need for an immediate response to behavior that threatens either the safety of school children and teachers . . .justifies the Court in excepting school searches from the warrant and probable-cause requirement, and applying a standard determined by balancing the relevant interests."[52] The Court then articulated the reasonableness requirement for a special needs search in a public school, stating that "determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."[53]

The *T.L.O.* two-pronged test provided the standard for determining the reasonableness of a public-school search for nearly a quarter of a century. The Court further addressed the issue of the more invasive strip search in a public-school setting in *Safford Unified Sch. District #1 v. Redding*.[54] In *Redding*, a 13-year-old girl was forced to strip down to her bra and underwear when searched by school officials on suspicion that she had brought over-the-counter ibuprofen onto the school campus.[55] The *Redding* Court held that the scope of a school search must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[56] The Court explained that the intrusiveness of the search, which was "embarrassing, frightening and humiliating" for the student, outweighed the degree of suspicion about drug possession and thus violated her constitutional rights.[57] *Redding* thereby introduced a higher standard for strip searches than was previously required under *T.L.O.* for school search cases.[58]

D. Strip Searches in Juvenile Detention Facilities

While the special needs doctrine and the standards articulated in *Redding* dictate strip searches in public schools, the Supreme Court has yet to consider the constitutionality of this practice in juvenile detention centers.[59] Without guidance from the Supreme Court on the issue, lower courts have interpreted the standards inconsistently. Some have chosen to apply the standards

[51] New Jersey v. T.L.O., 469 U.S. 325, 343 (1984).
[52] *Id*. at 353; *See also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995).
[53] *T.L.O.*, 469 U.S. at 341.
[54] Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377 (2009).
[55] *Id*.
[56] *Id.* at 342.
[57] ABA 2020, *supra* note 12, at 8.
[58] Meg Gould, *Cruel and Unusual Trauma: How Eighth Amendment Principles Governing Conditions of Confinement Should Apply to Juvenile Strip Searches*, 52 COLUM. HUM. Rts L. REV. 1009, 1027 (2021).
[59] Am. Bar Ass'n. Report To The House Of Delegates. https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/111b-annual-2020-final.pdf

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used in adult detention centers,[60] while others use a constitutional standard for analyzing strip searches of children [in detention centers] that falls somewhere between the standards that govern searches of adult prison inmates and searches of school children.[61]

The Supreme Court first examined the constitutionality of strip searches in adult detention facilities in 1979 in *Bell v. Wolfish*.[62] At issue in *Bell* was a policy requiring all inmates to expose their body cavities for visual inspection as part of a strip search conducted after contact visits with a person from outside the institution.[63] The Supreme Court held that correctional officers could strip search inmates without probable cause, so long as the search was conducted reasonably.[64] The reasonableness of each search could be determined by balancing "the need for the particular search against the invasion of personal rights that the search entails."[65]

In 2012, the Supreme Court again examined the issue of strip searches in adult detention centers in *Florence v. Board of Chosen Freeholders of County of Burlington*, holding that an intake strip and cavity search of adults detained after arrest, even for minor offenses, did not violate the Constitution, even if there was no individualized suspicion prompting the search.[66] In reaching this conclusion, the Court reasoned that a regulation or policy impinging the constitutional rights of an inmate should be upheld if reasonably related to a legitimate penological interest and the courts should defer to the judgment of the prison officials when there is no indication that the officer's response was exaggerated or improper.[67]

Federal courts vary on whether to apply the *Florence* decision governing adult prisons to juveniles in detention.[68] For example, the Fifth Circuit applied *Florence* in holding constitutional a strip and body cavity search conducted without any reasonable suspicion upon a 12-year-old girl arrested for fighting at school.[69] The Third Circuit also applied *Florence* and rejected applying the *Redding* standard when it held that a strip and body cavity search upon admission to a juvenile facility without specific suspicion was lawful. In rejecting the *Redding* standard within juvenile detention centers, the court reasoned that despite the heightened privacy needs of children in the detention context, the juvenile prisoner and school children "stand in wholly different circumstances."[70]

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[60] Gould, *supra* note 58, at 1028.
[61] Mashburn v. Yamhill Cnty, 689 F. Supp. 2d 1233, 1238 (2010).
[62] Bell v. Wolfish, 441 U.S. 520 (1979).
[63] *Id.* at 558.
[64] *Id. at* 558-60.
[65] *Id*. at 559.
[66] *Florence*, 566 U.S. at 351.
[67] *Florence*, 566 U.S. at 326-28; *see also* ABA 2020, *supra* note 12, at 1.
[68] Gould, *supra* note 58, at 1028.
[69] Mabry v. Lee Cnty, 849 F.3d 232, 236-39 (5th Cir. 2017).
[70] J.B. *ex rel.* Benjamin v. Fassnacht, 801 F.3d 336, 344 (2015).

Some federal courts have never applied *Florence's* rule for adult strip searches to the juvenile context. The Second Circuit held that strip searches of those arrested for misdemeanors require reasonable suspicion of possession of contraband.[71] Other federal district courts in both Oregon and California have held the blanket use of strip searches in juvenile detention facilities unconstitutional.[72]

E. Other Circumstances where children and youth are subjected to strip searches

While strip searches performed in a custodial setting are the most common, children are also strip searched in a number of other settings, including immigration centers, child protective services, and residential facilities for troubled teens.[73] There is little case law about the issue of strip searches in youth immigration centers, though the *Flores* court held that a strip search on a child in that setting is constitutional only if there is a reasonable suspicion that the particular juvenile may have contraband in their possession.[74] The court reasoned that children detained in INS facilities had not been criminally charged for anything and that the juvenile detainees' privacy concerns thus outweighed the government's interest in conducting these searches.[75]

Courts have also considered strip searches within the context of the child welfare system, resulting in a circuit split at the federal level.[76] This circuit split will not be resolved any time soon as the Supreme Court recently denied certiorari to a case from the Tenth Circuit that highlighted the divided authority.[77] Some circuits, including the Fourth and Seventh Circuits, have held that such searches can proceed without a warrant if the "special needs" balancing test is met, while others require the agency to have either a court order or exigent circumstances to perform such a search.[78]

Strip searches are also regularly performed with little guidance or regulation upon unadjudicated youth in private residential treatment facilities. The practice of strip-searching juveniles was so concerning that the ABA passed a 2020 resolution seeking to address the issue.[79] The ABA's report identified the use of strip searches in all of the settings discussed above, including

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[71] N.G. *ex rel.* S.C. v. Connecticut, 382 F.3d 225, 232 (2d Cir. 2004).
[72] *See* Mashburn v. Yamhill Cnty, 689 F. Supp. 2d 1233, 1235 (2010) (holding unconstitutional a policy subjecting youth to as many as eight strip searches in over five days); *See also* Moyle v. Cnty. of Contra Costa, No. C-05-02324, 2007 U.S. Dist. LEXIS 89509 (N.D. Cal. Dec. 5, 2007); *See also* Gould, *supra* note 58, at 1029-30.
[73] Preventing Strip Searches, *supra* note 13, at 2.
[74] Flores?
[75] *Flores, supra* note 13, at 665. .
[76] ABA 2020, *supra* note 12 , at 11.
[77] Doe v. Woodard, 912 F.3d 1278 (10th Cir.), *cert. denied*, 139 S. Ct. 2616 (2019); *see also* ABA 2020, *supra* note 12, at 11; I.B. v. Woodard 139 S. Ct. 2616 (2019).
[78] Gould, *supra* note 58, at 1031.
[79] AM. BAR. ASS'N. PREVENTING STRIP SEARCHES OF CHILDREN AND YOUTH: A GUIDE FOR ADVOCATES (2021), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/strip-search-tool-kit-national-edition.pdf

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residential treatment facilities, and subsequently approved high-level policy guidelines for standardizing differing approaches utilized by different agencies and in different parts of the country.

However, implementing the ABA standards within private residential facilities will be incredibly challenging due to the complex and confusing legal framework for youth treatment facilities. The remainder of this section will detail the model recommendations promulgated by the ABA. Parts III and IV will focus on addressing the legal issues arising from searches within these settings.

F. The American Bar Association's Policy Resolution for Juvenile Strip Searches

As discussed above, there are inconsistencies in the judicial system for determining the constitutionality of juvenile strip searches–a practice that is both profoundly intrusive and traumatizing to children and an ineffective means of discovering contraband. In response to this confusion, the ABA passed Resolution 111B in 2020. The resolution states, in part:

> The American Bar Association urges all federal, state, local, territorial, and tribal governments to adopt policies and contractual provisions that prohibit conducting strip searches of children and youth, except in exceptional circumstances, where the searches are permitted only:
>
> (1) When the child or youth is in custody;
> (2) When there is reasonable suspicion that the child or youth possesses or has had immediate access to an implement that poses a threat of imminent bodily harm to themselves or others;
> (3) After all other less intrusive methods of discovering and removing the implement have been exhausted, including the use of alternative search techniques that can be performed while the child or youth is fully clothed and
> (4) After the child or youth has been given notice, in a manner that is consistent with the child's or youth's primary language and developmental stage, and takes into account accommodations for disability, that they will be searched and that they have the opportunity to reveal any implement they are carrying instead of being searched . . .
>
> This resolution applies to professionals and agencies who come into contact with children and youth including, but not limited to, schools and educational institutions and their personnel; child welfare agencies and facilities and their personnel, including foster parents, mental health treatment agencies and facilities, and their personnel; programs and facilities for children and youth with developmental disabilities, and their personnel;

> law enforcement; juvenile justice agencies and facilities, and their personnel; and criminal justice agencies and facilities, and their personnel.[80]

The ABA further clarified that these recommendations should apply to youth in residential facilities for troubled teens in a toolkit produced to accompany the resolution and report.[81] However, as will be discussed in Parts III and IV, applying these standards within the context of youth residential treatment facilities is a surprisingly complex process that requires coordination between federal, state and local agencies, as well as voluntary contractual adoption by insurance agencies and the accreditation organizations that shape public confidence in residential facilities.

III. AN OVERVIEW OF YOUTH RESIDENTIAL TREATMENT PROGRAMS

This section provides a background of youth residential treatment programs, underscoring the depths and systemic nature of the problem and how deeply integrated institutionalization is within our society. In particular, this section will discuss the history of the troubled teen industry, followed by a discussion of the scope of the issue and the urgent need for additional protections, particularly with a practice as destructive as strip searches.

A. Brief History of How the "Troubled Teen Industry" Originated

The United States has a long history of institutionalization for those who have been deemed "socially undesirable."[82] With origins in almshouses, workhouses, convict farms, correctional institutions, asylums and hospitals, modern day youth treatment programs have evolved from centuries of locking up the disabled or unfit and removing them from the daily interactions of community life by confining them to a cell.[83] In Colonial America, care for dependent persons, such as the severely mentally ill, fell predominantly on family members until local governments began to assume responsibility for care of the mentally ill under a system of "poor laws."[84]

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[80] ABA 2020, *supra* note 12, at 1, 13.
[81] AM. BAR. ASS'N. PREVENTING STRIP SEARCHES OF CHILDREN AND YOUTH: A GUIDE FOR ADVOCATES (2021), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/strip-search-tool-kit-national-edition.pdf
[82] Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 419 (2018). ("segregation and detention have always served to control those on the margins; the poor (in almshouses, workhouses, and ghettos), minorities (in convict farms and correctional institutions), and the disabled (in cages, asylums, and hospitals) . . . until we understand our long history of forcibly institutionalizing the mentally ill, the cognitively disabled and physically disabled, and the "socially undesirable," we will remain ill equipped to address the problems of mass incarceration.").
[83] *Id*. at 423.
[84] Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 61 (2011).

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Born in the United States in the early nineteenth century, asylums and penitentiaries had significantly different growth trajectories by the twentieth century.[85] This resulted in not only the emergence of "penitentiaries for the criminal" and "asylums for the insane," but also "almshouses for the poor, orphan asylums for homeless children, and reformatories for delinquents."[86] The growth of the asylum during a forty year period from 1880 to 1920 was substantial, with inmates institutionalized in this setting growing from 40,000 in 1880 to over 263,000 in 1923.[87] During this period, asylums incarcerated more individuals than all other institutional placements combined.[88] Orphanages were also demonstrating significant growth during this time period. By 1900, nearly 100,000 children in the United States were housed in more than 1,000 orphanages throughout the United States.[89] These numbers continued to grow throughout the first half of the twentieth century.[90] By 1955, mental institutions had a peak incarceration of 558,992 mentally ill patients.[91] By 1967, state-run facilities for the developmentally disabled had approximately 200,000 residents.[92]

Therapeutic communities grew in popularity during the 1950s with increased interest in the idea that environmental and social settings could assist in treating mental illness and developmental disabilities.[93] From this interest in therapeutic communities grew Synanon, a controversial anti-drug cult widely credited with starting the "tough love" teen industry.[94] These early programs purported to cure addictions and modify behaviors by housing children in highly restrictive environments and subjecting them to various forms of large group awareness training, attack therapy, and experimental psychology, all techniques pulled from tactics utilized by Synanon.[95] These harsh tactics coincided with rising rates of serious juvenile mental health issues.[96] For example, in one California state hospital, the proportion of residents under the age of 21 grew from 1.3 percent in 1954 to 9.2 percent by 1969.[97]

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[85] *Id.* at 60.
[86] *Id.*
[87] Appleman, *supra* note 79, at 435.
[88] *Id.*
[89] Juliana Morales Liu, *Orphanages by Another Name*, , 30 KAN. J.L. & PUB. POL'Y 83, 83 (2020).
[90] Appleman, *supra* note 79, at 451.
[91] *Id.*
[92] *Id.*
[93] *Id*.
[94] *See* Maia Szalavitz, *The Cult That Spawned the Tough-Love Teen Industry*, MOTHER JONES (Sept./Oct. 2007) https://www.motherjones.com/politics/2007/08/cult-spawned-tough-love-teen-industry/.
[95] *See* Medium Anonymous, *Running My Anger: The Legacy of CEDU*, MEDIUM (Jun. 25, 2018), https://medium.com/@1527176167818/legacy-of-the-cedu-cult-7e2dcb8f30e4.
[96] James W. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 845 (1974).
[97] *Id.* See footnote 23 citing to Cal. Assembly Select Comm. on Mentally Ill and Handicapped Children, Report on Services for the Handicapped and Mentally Disordered Children 146 (1970) explaining that in 1954 the proportion of the California state hospital population under the age of 21 was 1.3 percent, and by 1969, patients under 21 constituted 9.2 percent of the hospital population.[97]

Academics,[98] politicians,[99] reporters, policy makers,[100] lawyers, advocates,[101] and mental health professionals warned about rampant abuses within youth residential treatment facilities as far back as the 1960s.[102] By the 1970s, the tactics used within TTI programs began to garner the attention of the federal government. A 1974 Senate investigation described the method used at one TTI program, The Seed, as extremely coercive and "similar to the highly refined brainwashing techniques employed by the North Koreans."[103]

Researchers were also sounding alarms about the commitment of children, resulting in a 1979 congressional hearing addressing the abuse and neglect of children in institutions.[104] This investigation revealed that programs were using militaristic orientation methods that would "scare any adult."[105]

The 1980s and 1990s saw an increase in the number and popularity of private youth residential treatment programs. The use of private youth residential programs within the TTI umbrella allowed families to access inpatient residential care under the guise of differing names such as emotional growth boarding schools and therapeutic specialty schools.[106] These facilities lacked the stigma other intensive care programs carried and purported to offer similar or better educational outcomes than traditional private and public schools. These residential programs often utilized a "tough love" component, a popular parenting methodology during this time period, and were marketed heavily on daytime talk shows.

Until the early 2000s, most youth residential programs operated with little state or federal oversight.[107] An increase in media attention following several deaths in residential programs catalyzed the United States Government Accountability Office ("GAO") to investigate multiple

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[98] *Id*.
[99] Individual Rights, *supra* note 5, at 387; *see generally* Abuse and Neglect, *supra* note 7.
[100] JOINT COMM'N ON THE MENTAL HEALTH OF CHILD., CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 1970'S (1969) [hereinafter CRISIS IN CHILD MENTAL HEALTH] (The study upon which this report was based was authorized and funded by Congress in 1965).
[101] JANE KNITZER & LYNN OLSON, UNCLAIMED CHILDREN: THE FAILURE OF PUBLIC RESPONSIBILITY TO CHILDREN AND ADOLESCENTS IN NEED OF MENTAL HEALTH SERVICES (Child.'s Def. Fund ed.,1982) [hereinafter UNCLAIMED CHILDREN].
[102] Cannon, *supra* note 8, at 1056 (Today's calls for reform in the field of children's mental health echo many of the concerns articulated in the 1960's: most children in need of mental health services are not getting them, and those served are often placed in excessively restrictive settings. More community-based treatment options short of hospitalization and residential treatment are needed").
[103] Individual Rights, *supra* note 5, at 15.
[104] Abuse and Neglect, *supra* note 7.
[105] *Id.*
[106] Chelsea McLaughlin, For Years Dr. Phil has sent 'troubled teens' to a treatment ranch. They allege they were abused there, Mamamia, Mar. 21, 2021, https://www.mamamia.com.au/dr-phil-turn-about-ranch/.
[107] U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-713T, RESIDENTIAL PROGRAMS: SELECTED CASES OF DEATH, ABUSE, AND DECEPTIVE MARKETING *7* (2008) [hereinafter GAO-08-713T] ("There are no federal oversight laws—including reporting requirements—pertaining specifically to private residential programs, referral services, educational consultants, or transportation services, with one limited exception. The U.S. Department of Health and Human Services oversees psychiatric residential treatment facilities (PRTFs) receiving Medicaid funds").

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facilities in the early 2000's, resulting in several reports identifying deficiencies in oversight and staff training,[108] as well as the use of deceptive marketing[109] and increased substantiated accounts of systemic abuses within institutional settings.[110] These serious abuses within youth treatment programs prompted a 2023 American Bar Association policy resolution aimed at addressing the widespread problems. The accompanying report noted difficulties with consistent nomenclature and regulatory confusion resulting from inconsistent federal, state, and local standards.[111]

B. Scope of Issue

Currently, there is insufficient data to accurately assess the full scope of the issue. In 1969, the Joint Commission on the Mental Health of Children released the first comprehensive study of children's mental health needs.[112] Of particular concern were children with disorders so severe that inpatient care might be needed and that as many as 75,000 children were in these residential mental health care facilities.[113] The report then defines the terms "residential care" and "residential mental health facilities" to include mental health services offered to children in residential treatment centers, in private mental hospitals, in state and county mental hospitals with psychiatric services, and in psychiatric day-night units.[114] Thus, a precise definition of youth residential treatment programs has evaded researchers and policy makers since at least 1969, when experts first began to address policy issues around youth institutionalization.

The inability to accurately define youth treatment facilities is echoed in current policy efforts as well, with considerable confusion existing between different government agencies and legal regimes.[115] These challenges with nomenclature are more than just semantic and can lead to

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[108] GAO-08-713T, *supra* note 103, at 3 (finding that "[i]n the eight closed cases GAO examined, ineffective management and operating practices, in addition to untrained staff, contributed to the death and abuse of youth enrolled in selected programs. In the most egregious cases of death and abuse, the cases exposed problems with the entire operation of the program").

[109] *Deceptive Marketing in the "Troubled Teen" Business,* ALLIANCE FOR THE SAFE, THERAPEUTIC, & APPROPRIATE USE OF RESIDENTIAL TREATMENT http://astartforteens.org/assets/files/ASTART-Deceptive-Marketing-Oct-2011.pdf

[110] GAO-08-146T, *supra* note 11, at 3.

> "GAO found thousands of allegations of abuse, some of which involved death, at residential treatment programs across the country and in American-owned and American-operated facilities abroad between the years 1990 and 2007. During 2005 alone, 33 states reported 1,619 staff members involved in incidents of abuse in residential programs. GAO could not identify a more concrete number of allegations because it could not locate a single Web site, federal agency, or other entity that collects comprehensive nationwide data".

[111] AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES RESOLUTION 2 (2023), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/605-annual-2023.pdf [hereinafter RESOLUTION].

[112] CRISIS IN CHILD MENTAL HEALTH, *supra* note 97; *see also* Elyce H. Zenoff & Alan B. Zients, *If Civil Commitment is the Answer for Children, What are the Questions?*, 51 GEO. WASH. L. REV. 171, 171 (1983).

[113] CRISIS IN CHILD MENTAL HEALTH, *supra* note 97; *see also* Zenoff, *supra* note 108, at 179.

[114] CRISIS IN CHILD MENTAL HEALTH, *supra* note 97, at 268 tbl.10; *see also* Zenoff, *supra* note 108, at 179 n.47.

[115] RESOLUTION, *supra* note 107, at 2; *See also* U.S. DEP'T OF HEALTH AND HUM. SERVS., STATE REGULATION OF RESIDENTIAL FACILITIES FOR CHILDREN WITH MENTAL ILLNESS 1, 1 (2006) (explaining that the Health and Human

significant legislative loopholes that prevent effective regulation, enabling residential facility operators to bypass state licensing requirements by self-identifying[116] their business as a type exempt from state licensure.[117]

Despite these inconsistencies, current estimates indicate that between 120,000 and 200,000 children and youth are placed in institutions each year by child welfare and juvenile justice systems, mental health providers, refugee resettlement agencies, school district special educations programs and parents.[118] With so many different sources placing children in residential treatment and moving them across state lines into different jurisdictions, the current patchwork approach of inconsistent state regulation and overlapping federal oversight has resulted in substantial uncertainty about the choice of law, definitions of abuse and neglect, and accountability measures for individuals or entities that engage in abuse and neglect of children in residential facilities.[119] These inconsistencies have allowed rampant abuse to proliferate and facilities to flourish, with some estimates indicating that over $23 billion of public funds are used to place youth in residential programs.[120]

Despite the many abuses and concerns within this industry, very little is mentioned of the extremely common practice of strip searching unadjudicated youth in private residential facilities. The internet contains numerous anecdotal accounts of the practice, some of which were included in the ABA's research on the issue.[121]

Services Office reported that there were no uniform definitions of residential facilities, and for those facilities treating children with mental illnesses, states reported at least 71 different facility types); *see also* GAO-08-346 *supra* note 5, at 2. (explaining the confusion in finding that there were no uniform definitions for the types of residential facilities, and that the GAO attempted to work with states to identify definitions that would be commonly understood, including boarding schools and academies, training and reform schools, wilderness camps, ranches, and treatment centers)

> those that require youth–ages 12 through 17–to reside at the facility and that provide program services for youth with behavioral and emotional challenges" while also acknowledging that "[n]o federal law defines what constitutes a residential program, nor are there any standard, commonly recognized definitions for specific types of programs";

See also OFF. JUV. JUST. AND DELINQ. PREVENTION, *infra* note**.** (noting several distinct categories of residential treatment facilities); Krebs, *supra* note 1, at 2.

[116] *See* OFF. JUV. JUST. AND DELINQ. PREVENTION, *infra* note at 7 n.7.
[117] GAO-08-696T, *supra* note 7, at 8; *see also,* Without Dignity, *supra* note 9, at 54.
[118] RESOLUTION, *supra* note 107, at 3.
[119] *Id.* at 7.
[120] *Id.* at 4.
[121] *See generally* Preventing Strip Searches, *supra* note 13, at 2.

The authors' interest in this matter is unfortunately far more personal. Both authors attended youth treatment programs in the 1990's that were early pioneers of some of the harshest and most abusive practices within an industry that is widely lamented for unnecessary aversive practices. Nearly thirty years later, we are now examining how to protect as many youth as possible from this incredibly traumatic experience. The next section will examine why this is such a challenging task within the current regulatory framework impacting youth treatment facilities and explain why it is so difficult to apply the ABA model recommendations.

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IV. CAN THE ABA RECOMMENDATIONS BE APPLIED CONSISTENTLY TO PRIVATE YOUTH RESIDENTIAL TREATMENT CENTERS UNDER THE CURRENT GOVERNING LAW?

As discussed above, strip searches are extremely traumatic, incredibly invasive, humiliating, and unlikely to yield contraband. However, unadjudicated youth continue to be subjected to these practices in private residential treatment facilities. With these facilities operating in a state of regulatory confusion, as discussed below, it is difficult to determine where and how to begin effectively coordinating regulatory efforts to protect vulnerable youth. While a cohesive regulatory framework still does not exist for youth treatment programs, the ABA's recommendations, which recognize the futility of these practices, can and should be applied to as many levels of regulatory oversight as possible to immediately curb the use of these practices. The remainder of this section will address if and how the ABA recommendations can be effectively implemented through different federal and state-level regulation, as well as through voluntary contractual adoption implemented through accreditation organizations and industry associations.

A. Are youth residential treatment programs state actors for Fourth Amendment purposes?

Underscoring yet again how challenges with nomenclature hinder efforts at consistent regulatory approaches, youth residential treatment programs are usually considered "private entities" despite receiving public funding for placements.[122] As private entities, many constitutional protections provided to public school children simply do not apply in this setting.[123] The Fourth Amendment applies only to searches and seizures that are the product of government action[124] and is intended to safeguard the privacy and security of individuals against arbitrary invasions by government officials.[125]

Courts have repeatedly upheld this distinction in regard to youth residential facilities, even when students are placed in the program by government agencies. In *Howell v. Father Maloney's Boys Haven, Inc.*, the court addressed a student's claim that there was state action when she was sexually assaulted at a "private non-profit entity that provides therapeutic residential care, foster care, and independent living programs . . ."[126] The court rejected her claim of state action, stating

[122] Matthew Herr, *Outsourcing Our Children: The Failure to Treat Mental Illness In-State*, 36 N.C. CENT. L. REV. 66, 66-67 n.3 (2013) (explaining that there are 41 private residential treatment facilities in the state of North Carolina, and only one is considered a state facility, while the other 40 are private).
[123] *In re* Devon T., 85 Md. App. 674, 701 n.7 (1991) (citing the Supreme Court's suggestion in *New Jersey v. TLO* that the Fourth Amendment would not apply to employees of parochial or other private schools because such employees are not agents of the government).
[124] *See generally* Gerstein v. Pugh, 420 U.S. 103, 118-19 (1975).
[125] *See* Walter v. U.S., 447 U.S. 649, 656 (1980); *see also* Carpenter v. U.S., 138 S.Ct. 2206, 2213 (2018).
[126] *See* Howell v. Father Maloney's Boys' Haven, Inc., 424 F.Supp.3d 511, 517 (2020).

that "the primary, if not exclusive function [of the school] is the housing, education, and care of at-risk youth, which is a function not materially different from that provided by foster parents or a foster home. In that vein, 'the care of foster children is not a power which has been exclusively reserved to the state.'"[127]

In *S.G. v. Care Academy*, the court ruled on whether there was state action in a case involving a strip search at Care Academy, a "school for students with disciplinary and behavioral problems, with most of the students . . . having been placed at the Academy by court order in juvenile proceedings. Care Academy had a contract with the Kentucky Department of Juvenile Justice to serve . . .as an alternative to detention."[128] Despite Care Academy's contract with Kentucky's Department of Juvenile Justice (the "DJJ"), which necessarily subjected it to the DJJ's policies and procedures regarding strip searches, the court held that there was no state action in this case.[129] It reasoned that S.G. did not become a student as a result of any juvenile proceeding, having been referred to Care Academy by his principal in order to facilitate special educational needs.[130] The court rejected S.G.'s Fourth Amendment claims, stating that Care Academy was a private school and private schools are not held to the same standards and rules as public schools.[131]

The holding in this case underscores how challenging it can be to determine what rules and policies to apply, as the school in question was subject to the DJJ standards regarding juvenile strip searches yet still deemed a private school for Fourth Amendment purposes since the student in question was placed in the program for special educational needs. While there are a number of federal legal regimes explicitly structured to protect children in these situations, state public agencies often fail to comply with the federal duties and aims and operate without coordination or oversight across the different legal regimes.[132] Without Fourth Amendment protections, and because of this historical tendency to operate without interagency cooperation, there must be a

[127] *Id.* (citing Lintz v. Skipski, 807 F. Supp. 1299, 1306 (W.D. Mich. 1992)); *see also* Milburn by Milburn v. Anne Arundel Cnty. Dep't of Soc. Servs., 871 F.2d 474, 479 (4th Cir. 1989) ("The care of foster children is not traditionally the exclusive prerogative of the State"); Leshko v. Servis, 423 F.3d 337, 343 (3d Cir. 2005) ("No aspect of providing care to foster children . . . has ever been the exclusive province of the government."); Rayburn *ex rel.* Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001) (agreeing with the district court's finding that foster care is not traditionally an exclusive state prerogative); Brown v. Hatch, 984 F.Supp.2d 700, 708 (E.D. Mich. 2013) ("While removing a child from her home and placing her with other caregivers are arguably exclusive governmental functions, . . . the day-to-day provision of foster care is not. Several other courts agree.") (citing Leshko, 423 F.3d at 343; Rayburn, 241 F.3d at 1347; Lintz, 807 F.Supp. at 1306-07; Darby v. California, 1 F.App'x 688, 691 (9th Cir. 2001) (affirming district court's dismissal of § 1983 claim against foster parent and noting that plaintiffs did not offer sufficient evidence showing that foster mother was a state actor)).
[128] S.G. *ex rel.* S.B.J. v. Care Acad., Inc., No. 2010-CA-002205-MR, 2012 Ky. App. Unpub. LEXIS 85, 1, 1-2 (Ky. App. 2012).
[129] *Id.* at 6.
[130] *Id.* at 2.
[131] *Id.* at 6.
[132] Cannon, *supra* note 8, at 1052.

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focused effort to apply the ABA recommendations broadly across multiple federal regimes related to child welfare, special education, health care, juvenile justice, and disability rights.

B. Federal Oversight of Youth Residential Programs

There are currently numerous federal legal regimes intended to prevent children from costly and unnecessary placement in youth residential treatment centers. Through their statutes, regulations, case law, and policies, federal regimes related to child welfare, special education, health care, juvenile justice and disability rights share the common goal of protecting youth in residential facilities.[133]

(1) Child Welfare Legal Regime

Orphanages were a dominant part of the American child welfare landscape in the late nineteenth and early twentieth centuries. Though "orphanage" facilities have supposedly been abandoned, they have been rebranded as group homes, residential treatment facilities, residential treatment centers, and a host of other congregate care[134] centers that more closely resemble orphanages than American society is comfortable admitting.[135]

Federal preference for a child's placement in the least restrictive, most family-like setting, rather than congregate care, dates back to the Adoption Assistance and Child Welfare Act of 1980.[136]

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[133] Cannon, *supra* note 8, at 1053.

[134] Liu, *supra* note 86, at 84 ("For the purposes of this article, the term congregate care will refer to all child placements in communal settings, group homes, shelters, and residential facilities. While there is a significant variation between types of congregate care facilities, these institutions are united in being artificial environments designed for raising children in group settings").

[135] *Id*. at 83.

[136] Am. Bar Ass'n Ctr. on Child. and L., *The Family First Prevention Services Act of 2018: A Guide for the Legal Community*, AM. BAR. ASS'N 12, 13 (Dec. 2020), https://www.americanbar.org/content/dam/aba/administrative/child_law/family-first-legal-guide.pdf. *See also* Cannon, *supra* note 8, at 1064:

> "The Child Abuse Prevention and Treatment Act was enacted in 1974 to require states to establish child abuse reporting procedures and provides guidelines for agencies to work together in that process. 42 U.S.C. § 5106 (2006). The Adoption Assistance and Child Welfare Act of 1980 was established to protect children, while maintaining and reunifying families and requires reasonable efforts to prevent unnecessary removal of a child from his home. Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.). The Adoption and Safe Families Act amended the Adoption Assistance and Child Welfare Act of 1997, with a focus on promoting the adoption of children in foster care. Pub. L. No. 105-89, 111 Stat. 2116 (codified in scattered sections of 42 U.S.C.). The Child and Family Services Improvement Act of 2006 was passed with the intent to promote stable families. Pub. L. No. 109-288, 120 Stat. 1233 (codified in scattered sections of 42 U.S.C.). The Fostering Connections to Success and Increasing Adoptions Act of 2008 improved outcomes for children in foster care and improved incentives for adoption. Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 42 U.S.C.). These statutes incentivize states to provide mental health treatment, coordinate with other agencies, and place children in family-like settings close to their parents' homes through grants and through conditioning federal funding on compliance."

In the decades since the passage of this legislation, significant research has highlighted the detrimental nature of group and institutional settings.[137]

As awareness and research about the harms of congregate care continued to grow, legislators responded with comprehensive legislation intended to prevent the unnecessary removal of children from their homes into harmful group settings. In 2018, Congress passed the Federal Family First Prevention Services Act ("Family First Act")[138] [139]

Family First Act created the qualified residential treatment program ("QRTP"),[140] a setting intended to meet the therapeutic needs of children with serious emotional or behavioral disorders or disturbances.[141] QRTPs are private or public childcare institutions, and provider accreditation is a statutory requirement.[142] Family First Act outlines a number of assessment and treatment-related criteria that must be met before an agency can access federal reimbursement for the costs of a child's care in a QRTP, including a requirement that QRTPs are licensed and nationally accredited by one of three organizations: Commission on Accreditation of Rehabilitation Facilities (CARF), the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), or the Council on Accreditation (COA).[143]

However, there is nothing in the Family First Act that addresses juvenile strip searches in QRTPs. The ABA recommendations should be a requirement for certification as a QRTP through JCAHO, CARF or COA. Furthermore, the ABA recommendations should be codified in Family First Act Section 50741, which defines the standards for QRTPs.[144]

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[137] *See generally* Richard P. Barth, *Institutions vs. Foster Homes: The Empirical Base for a Century of Action*, JORDAN INST. FOR FAMS., SCH. SOC. WORK, UNIV. N.C. CHAPEL HILL (June 17, 2002), https://ahum.assembly.ca.gov/sites/ahum.assembly.ca.gov/files/hearings/062811-BarthInstitutionsvFosterHomes.pdf; *See also* Mary Dozier et al., *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 AM. J. OF ORTHOPSYCHIATRY 219, 219 (2014), https://www.apa.org/pubs/journals/features/ort-0000005.pdf (with the American Orthopsychiatric Association stating that group care should be only when it is the least detrimental alternative, when necessary therapeutic mental health services cannot be delivered in a less restrictive setting).
[138] *Family First Prevention Services Act*, 115 Pub. L. No. 123, 132 Stat. 64, 64 (passed as part of the *Bipartisan Budget Act of 2018* (Family First Act), Sec. 70711, codified at 42 U.S.C. § 671(e)).
[139] Am. Bar Ass'n Ctr. on Child. and L., *supra* note 136.
[140] *See* Family First Act, §§ 50741, 50742, 50745, 50746 (codified at 42 U.S.C. §§ 672(k), 675(a)(c), 671(a)(20)). *See also* Am. Bar Ass'n Ctr. on Child. and L., *supra* note 136, at n.52.
[141] Am. Bar Ass'n Ctr. on Child. and L., *supra* note 136.
[142] CASEY FAM. PROGRAMS, *How Are Some Child Protection Agencies Attending to Qualified Residential Treatment Program Requirements?* (Feb. 15, 2022), https://www.casey.org/implementing-qrtp-requirements/.
[143] CHILD.'S DEF. FUND, THE FAMILY FIRST PREVENTION SERVICES ACT: HISTORIC REFORMS TO THE CHILD WELFARE SYSTEM WILL IMPROVE OUTCOMES FOR VULNERABLE CHILDREN 1, 8 (2018), https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf.
[144] Frequently Asked Questions About: The Family First Prevention Services Act, Quality Residential Treatment Programs (QRTPs), and the Medicaid IMD Exclusion Rule, Family First Act, (Jan. 14, 2022), https://familyfirstact.org/resources/frequently-asked-questions-about-family-first-prevention-services-act-quality-residential

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(2) Special Education Legal Regime

In 1975, Congress enacted the Individuals with Disabilities Education Act ("IDEA").[145] IDEA has two important goals. The first goal is to support the academic needs of children with disabilities. The second goal seeks to comprehensively address their behavioral needs in preparation for adult life.[146] The cornerstone principle of the IDEA is that every child is entitled to a Free and Appropriate Public Education ("FAPE").[147] In order to ensure that a child receives a FAPE, each child with special needs is provided with an Individualized Educational Program ("IEP") that must comply with formal procedure and substantive requirements.[148]

Special education law specifically disfavors the placement of children in institutions and residential facilities and is structured to allow students to receive appropriate services in their communities and in the least restrictive environment.[149] IDEA recognizes, however, that some students might be better serviced in a residential facility.[150] If a child with disability has been in the public school system and is going to be placed in a private school, school officials must hold an IEP meeting.[151] However, once the child is placed in a private school, the private school is responsible for convening any further IEP meetings,[152] though the public agency or school must continue to maintain an active role in any changes regarding the child's IEP.[153]

IDEA does not provide any guidelines regarding how or whether strip searches are to be conducted on students placed in private residential schools. Though the same child would have the due process protections regarding strip searches in public school settings required under *TLO*, once placed in a private school setting, those protections are no longer applicable.[154]

Because due process protections offered to public school students do not apply in the context of residential treatment centers, it is imperative that IDEA include statutory protection against the arbitrary use of juvenile strip searches on special education students placed in private schools. Since both federal, state, and local education agencies are responsible for funding these placements, educational authorities at each of these levels should voluntarily adopt the ABA recommendations.

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[145] *See generally* S. REP. NO. 94-168 (1975) (codified as the *Individuals with Disabilities Education Act*, 20 U.S.C. §§ 1400-1450 (2012)) (originally enacted as the *Education for All Handicapped Children Act*).
[146] Cannon, *supra* note 8, at 1071.
[147] 20 U.S.C. § 1401(9); *see also* Sch. Comm. Burlington, Mass. v. Dep't of Educ. Mass., 471 U.S. 359, 367-68 (1985).
[148] 34 C.F.R. § 300.320.
[149] 20 U.S.C. § 1412(a)(5).
[150] Erin M. Heidrich, *Expanding Access to Residential Treatments for Mentally Ill Youth Through the Individuals with Disabilities Education Act*, 41 N. KY. L. REV. 295, 296 (2014). *See also* 20 U.S.C. §1401(29)(A).
[151] Florence Cnty. Sch. Dist. Four v. Carter *ex rel.* Carter, 510 U.S. 7, 10 (1993).
[152] Great Valley Sch. Dist. v. Douglas M., 807 A.2d 315, 321-22 (Pa. Commw. Ct. 2002).
[153] Renner v. Bd. of Educ., 185 F.3d 635, 646 (6th Cir. 1999).
[154] *See In re* Devon T., *supra* note 119, at 701 n.7.

(3) Juvenile Justice

Many youth enter residential treatment centers through the juvenile justice system,[155] though, as discussed above, the same facility might serve youth who have not been placed through the courts.[156] Congress originally enacted the Juvenile Justice and Delinquency Prevention Act ("JJDP") in 1974 in an effort to support local and state efforts to prevent delinquency and improve juvenile justice systems.[157] This legislation also established the Office of Juvenile Justice and Delinquency Prevention ("OJJDP")[158] within the Department of Justice tasked with protecting children, urging for youth contact with the justice system that is "rare, fair, and beneficial."[159] The JJDP explicitly seeks to avoid confinement in juvenile correction facilities and institutionalization in residential treatment facilities whenever possible.[160]

In 2003, the U.S. Congress unanimously passed the Prison Rape Elimination Act (" PREA"), a "zero tolerance" policy for prison rape.[161] PREA, which applies to all incarcerated individuals, including juveniles, seeks to minimize sexual violence in custodial settings.[162] These standards apply to publicly and privately run facilities at the federal, state, and local level.[163] The OJJDP works with states to ensure compliance with PREA and protect youth in juvenile facilities.[164] PREA provides some limited guidance on conducting strip searches, primarily in the form of limitations on the use of cross-gendered strip searches,[165] but the standards set forth by PREA fall far below the ABA recommendations and fail to acknowledge the severity of the harm and the futility of the practices.

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[155] OFF. OF JUV. JUST. AND DELINQ. PREVENTION, *Juvenile Residential Programs* 1, 1, https://www.ojjdp.gov/mpg/litreviews/Residential.pdf (2019). (Residential programs occur in out-of-home facilities where youth live under various types and levels of restrictive control and programming. The Survey of Youth in Residential Placement conducted by the U.S. Justice Department's Office of Juvenile Justice and Delinquency Prevention classifies residential programs into five general categories: detention, corrections, camp, community-based, and residential treatment. Currently, there is no standard definition of residential treatment programs, and specific types of residential programs may be known by a variety of names. This has presented a number of challenges, including problems in the oversight of these programs, such as the appropriate qualifications and training of management and staff personnel. The most recent survey reported more than 7,000 youths in custody, with 32 percent in a correctional placement, 26 percent in detention, 18 percent in a community-based placement, 14 percent in residential treatment, and 10 percent in a camp. Residential facilities vary in program components, such as goals, security features, the physical environment, facility size, length of stay, treatment services, and targeted population).

[156] *See* S.G. v. Care Acad., Inc., *supra* note 124, at 2.

[157] Juvenile Justice and Delinquency Prevention (JJDP) Act, Pub. L. No. 93-415, 42 U.S.C. § 5601 et seq. (1974); *see also* OFF. JUV. JUST. AND DELINQ. PREVENTION, *Authorizing Legislation*, https://ojjdp.ojp.gov/about/legislation (last visited Nov. 14, 2023).

[158] 34 U.S.C. § 11111.

[159] OFF. JUV. JUST. AND DELINQ. PREVENTION, *About OJJDP*, https://ojjdp.ojp.gov/about#:~:text=The%20Juvenile%20Justice%20and%20Delinquency,and%20improve%20juvenile%20justice%20systems (last visited Nov. 14, 2023).

[160] Cannon, *supra* note 8, at 1085.

[161] 34 U.S.C. §30302(1).

[162] Lisa Pasko, *Damaged Daughters: The History of Girls' Sexuality and the Juvenile Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1099, 1125 (2010).

[163] *Id.* at 1125.

[164] See OFF. JUV. JUST. AND DELINQ. PREVENTION, *supra* note

[165] 28 C.F.R. § 115.315(a).

The ABA has stated that the proposed standards should be applied to "juvenile justice facilities and their personnel, and criminal justice agencies and facilities, and their personnel."[166] OJJDP should supplement the current PREA standards for adult facilities with the ABA's recommendations for juveniles, acknowledging the legal principle that "children are constitutionally different from adults."[167] Facilities that provide services to recipients of OJJDP funds through state-level juvenile justice agencies should be required to contractually adhere to the ABA's recommendations. These standards should be applied to all residents of the facility, regardless of whether that resident was placed in the facility by a juvenile justice agency, to avoid confusion over which youth are protected by the facility's contractual requirements.

V. CONCLUSION

As discussed above, there is a great deal of consensus in the legal system regarding the harm and futility of strip searches on minors. Because due process rights will not apply in private facilities, those risks are magnified for children in youth treatment programs that do not operate as state actors for Fourth Amendment purposes. Inconsistency between state laws and confusion over the choice of law creates an even more difficult regulatory landscape for vulnerable children. However, there are clear steps that can be immediately taken to help mitigate this incredibly high risk at a federal level.

First, the ABA recommendations should be a requirement for certification as a QRTP through JCAHO, CARF, or COA. Furthermore, the ABA recommendations should be codified in the Family First Prevention Act Section 50741, which defines the standards for QRTPs. Second, because due process protections offered to public school students do not apply in the context of residential treatment centers, it is imperative that IDEA include statutory protection against the arbitrary use of juvenile strip searches on special education students placed in private schools. Since both federal, state, and local education agencies are responsible for funding these placements, educational authorities at each of these levels should voluntarily adopt the ABA recommendations. And finally, OJJDP should supplement their current PREA standard with the ABA's recommendations for juveniles, and also require all contracting entities to apply those standards to all youth within facilities that contract with OJJDP. While more will need to be done at state and local levels to ensure elimination of this abusive practice, these three finite steps will go a long way to ensuring that children are not unnecessarily traumatized by these humiliating, personal invasions.

[166] ABA 2020, *supra* note 12, at 13.
[167] Miller v. Ala., 567 U.S. 460, 470-72 (2012).