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VIA EMAIL ONLY

February 11, 2019

Board of Supervisors
County of Los Angeles, California
c/o Executive Office of the Board
Kenneth Hahn Hall of Administration
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RE: Letter of Support for Board Motion 19-0940
Phasing Out the Use of Oleoresin Capsicum Spray (OC) in County Juvenile
Facilities
February 12, 2019 Board Meeting – Agenda Item # 10

Dear Members of the Board of Supervisors:

On behalf of the Prison Law Office, I am writing to express our support for Board Motion 19-0940, submitted by Supervisors Kuehl and Ridley-Thomas. This bill would direct Los Angeles County Probation staff to develop a plan for the phased elimination of the use of pepper spray in all County camps and juvenile halls before the end of calendar year 2019, and develop programs and training to better manage behavior in the facilities.

The Prison Law Office is a nonprofit public interest law firm that for more than four decades has been at the forefront of legal efforts to enforce the constitutional rights of incarcerated people in California and across the country. We represent incarcerated adults and children in impact litigation and individual advocacy efforts; educate the public and policy leaders about conditions in our nation's prisons, jails, and juvenile facilities; and provide technical assistance to attorneys throughout the country. Our office helped develop and sponsor the US-European Criminal Justice Innovation Program in partnership with the UC Criminal Justice & Health Consortium, which brings leaders of state prison systems on a facilitated tour of the Norwegian criminal justice system, where they learn from European justice reform leaders and directly experience innovative and humane approaches to sentencing, diversion, treatment, conditions of confinement, and community reentry.

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In light of the alarming findings by the Los Angeles Office of Inspector General (“OIG”) in its February 4, 2019 “Report Back on Ensuring Safety and Humane Treatment in the County’s Juvenile Justice Facilities,” the Board of Supervisors should ban the use of chemical agents in all County juvenile institutions. Los Angeles County is out of step with the statewide trend of many counties prohibiting the use of pepper spray and other chemical agents on youth, and indeed, with the overwhelming majority of states that ban the use of chemical agents on detained children. More than fifteen years ago, the U.S. Department of Justice determined the use of chemical agents by Probation likely violated the constitutional rights of incarcerated children, and entered into a subsequent agreement to limit the use of such agents. Unfortunately, as detailed by the OIG Report, since the County exited the settlement with DOJ, the use of pepper spray has again skyrocketed, and is used in wholly inappropriate situations. It is past time for the nation’s largest juvenile probation system – which holds itself out as a model to others – to come into step with the vast majority of juvenile justice systems in this country.

The Use of Chemical Agents on Children

Pepper spray, or oleoresin capsicum (OC) spray, is a type of chemical agent that contains capsaicinoids extracted from the resin of hot peppers. It “incapacitates subjects by inducing an almost immediate burning sensation of the skin and burning, tearing, and swelling of the eyes. When it is inhaled, the respiratory tract is inflamed, resulting in a swelling of the mucous membranes...and temporarily restricting breathing to short, shallow breaths.”¹ People with heart conditions or respiratory conditions such as asthma or chronic bronchitis are at heightened risk for respiratory arrest from exposure to OC spray. People with mental illness who take psychotropic medications likewise are at increased risk of serious harm or death from exposure to OC spray. Chemical agents cause severe gastrointestinal side effects if ingested or swallowed. Children “are uniquely susceptible to deployment of and exposure to riot-control agents such as tear gas and pepper spray,” according to Dr. Irwin Redlener, a professor of public health at Columbia University.² This is because children have higher respiratory rates than adults, and so as a result, a child will inhale significantly more air in a given time frame.

¹ “Pepper Spray in Juvenile Facilities,” Council of Juvenile Correctional Administrators, May 2011, available at http://cjca.net/wp-content/uploads/2018/02/CJCA.Issue_Brief_OC Spray.pdf

² Irwin Redlener, “Tear Gas Should Never Be Used on Children. Period.” WASHINGTON POST (Nov. 28, 2018), available at https://www.washingtonpost.com/pb/opinions/tear-gas-should-never-be-used-on-children-period/2018/11/28/91c1ca78-f32c-11e8-9240-e8028a62c722_story.html

In *United States v. Neill*, 166 F.3d 943, 949-50 (9th Cir. 1999), the Ninth Circuit held it was acceptable to enhance a defendant's criminal sentence for using OC spray in robberies because, "pepper spray is capable of inflicting death or serious bodily injury and therefore satisfies the requirements of a dangerous weapon," as it "cause[s] extreme pain and prolonged impairment of a bodily organ..." In a different case, the Ninth Circuit "rejected the contention that the use of pepper spray is a minimal intrusion, due to the immediacy and uncontrollable nature of the pain involved." *Nelson v. City of Davis*, 685 F.3d 867, 876 (9th Cir. 2012) (citations omitted).

While the use of pepper spray and other chemical agents is accepted and used by law enforcement and in adult correctional agencies as an alternative to more lethal forms of force or control, its use against children in juvenile facilities is overwhelmingly outlawed. A 2011 report by the Council of Juvenile Correctional Administrators ("CJCA") found that only a handful of states allow staff to use or carry chemical spray in secure juvenile facilities, "and in the states that allow its use in policy, most prohibit the use except as a last resort and with many conditions. . ."³ California is one of 14 states that permit the use of chemical agents in juvenile facilities, and one of only five states that allow juvenile detention and correctional staff to carry chemical spray canisters on their person. That said, in recent years many California counties, including Sacramento, Santa Clara, Santa Cruz, Marin, and San Francisco Counties, have prohibited staff from carrying or using OC spray in their juvenile facilities, and instead focus on non-punitive de-escalation techniques to manage difficult adolescent behaviors.⁴

Given the small number of states that permit juvenile facility staff to carry and use chemical agents against children, the case law regarding the constitutionality of its use on children is sparse. Courts have found that its indiscriminate use, or the failure to use it as a last resort, violates the constitutional rights of children. For example, in *Alexander S. v. Boyd*, the federal court for the District of South Carolina wrote,

The court finds that the use of CS gas upon juveniles is counterproductive. It causes more anger in the juveniles toward the adults who are supposed to be caring for them. The use of gas as a form of punishment teaches the victims to inflict pain as a method of controlling others and makes the juveniles more volatile, more aggressive, and less likely to respond properly to authority figures. Moreover, the

³ CJCA Report, note 1.

⁴ The use of chemical agents against children in detention facilities also violates international human rights law and standards. See United Nations Rules for the Protection of Juveniles Deprived of Their Liberty, Rules 63-65 (1990), available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx>.

inappropriate use of CS gas may cause long-term medical complications for the juveniles. For these reasons, the court concludes that the indiscriminate use of CS gas violates the juveniles' constitutional rights under the Due Process Clause. Based upon the testimony presented on this issue, the court finds that gas should be used only when a genuine risk of serious bodily harm to another exists and other less intrusive methods of restraint are not reasonably available.

876 F. Supp. 773, 786 (D.S.C. 1995), *as modified on denial of reh'g* (Feb. 17, 1995).

Similarly, more than four decades ago, a federal court found that the use of chemical agents in Texas Youth Council facilities "in situations not posing an imminent threat to human life or an imminent and substantial threat to property – but merely as a form of punishment – constitutes cruel and unusual punishment in violation of the eighth amendment." *Morales v. Turman*, 364 F. Supp. 166, 173-74 (E.D. Tex. 1973) (citation omitted).⁵

Los Angeles County Has Been On Notice for More Than 15 Years Regarding Its Failure to Properly Manage the Use of Pepper Spray on Children

In 2000, the U.S. Department of Justice ("DOJ") initiated an investigation into the conditions of the County's juvenile facilities, pursuant to its authority under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, and 42 U.S.C. § 14141. In 2003, the DOJ issued a findings letter that determined that the County's use of chemical agents, likely violated the constitutional rights of detained children and threatened to sue the Probation Department.⁶

The County and the DOJ entered into a settlement in 2008 that obligated the County to establish new policies regarding the use of pepper spray. Specifically, it required that

⁵ Subsequent to the *Morales* decision, the U.S. Supreme Court held that the appropriate legal standard for evaluating conditions of confinement in juvenile institutions is the Fourteenth Amendment's due process clause, and not the Eighth Amendment's cruel and unusual punishment standard. *Youngberg v. Romero*, 457 U.S. 307, 321-22 (1982); *Gary H. v. Hegstrom*, 831 F.3d 1430, 1432 (9th Cir. 1987) (same). Nevertheless, the analysis in *Morales* stands, as practices that violate the Eighth Amendment standard *a fortiori* violate the Fourteenth Amendment. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1069-70 (9th Cir. 2016) (recognizing distinction between the Eighth Amendment protections for persons with criminal convictions and the due process protections afforded to pretrial detainees).

⁶ U.S. Department of Justice, Letter from Ralph F. Boyd to Yvonne B. Burke, (April 9, 2003), at 20-23, available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/la_county_juvenile_findlet.pdf.

The County shall develop and implement policies, procedures, and practices to restrict use of oleoresin capsicum (OC) spray to appropriate circumstances, enable supervisors to maintain appropriate controls over spray use and storage, restrict the carrying of OC spray to only those individuals who need to carry and use it, prevent wherever possible the use of OC spray on populations for whom its use is contraindicated or contrary to doctors' instructions, and ensure that decontamination occurs properly.

MOA at ¶ 11, available at <https://www.clearinghouse.net/chDocs/public/JI-CA-0025-0002.pdf>.

In 2012, DOJ found the County to be in substantial compliance with the settlement. Unfortunately, after the County exited from DOJ oversight, the documented inappropriate use of pepper spray again increased. A December 6, 2016 report by the Los Angeles County Auditor-Controller found that in 22% of cases reviewed, pepper spray was used in a manner not permitted by policy. And as detailed in the OIG Report released last week, from 2015 to 2017, the use of OC spray skyrocketed, while there had been no changes to the written use of force policies:

- Central Juvenile Hall – 338% increase
- Los Padornos Juvenile Hall – 214% increase
- Barry J. Nidorf Juvenile Hall – 192% increase⁷

The OIG staff analyzed a sample of 21 uses of force to determine compliance with existing policies. The OIG determined that

OC spray appears to be a commonly used tool by some staff to obtain compliance; however, it is not always justified or used as the final and most significant force option consistent with Department policy. The twenty-one force incidents reviewed suggest a consistent use of OC spray as an initial or intermediary force option, rather than as one that follows a failure to de-escalate or the use of less significant force. Several of the incidents also involve the use of OC spray where there did not appear to be actual or potential threat of harm by youth. [...]

⁷ County of Los Angeles, Office of Inspector General, *Report Back on Ensuring Safety and Humane Treatment in the County's Juvenile Justice Facilities*, (hereinafter "OIG Report") at 3, available at https://oig.lacounty.gov/Portals/OIG/Reports/Probation_Report_1.pdf?ver=2019-02-05-081601-153.

Some incidents reviewed include uses of OC spray that likely violate Department policies, at times involving youth who appeared only passively noncompliant. In several incidents, the use-of-force reports filed by staff described youth behaviors as aggressive or threatening, even when available video footage showed that youth appeared to pose no threat to staff. Other incidents involved staff who used OC spray before any attempts to use other, less significant force techniques.

[...] In some incidents reviewed, OC spray was used on youth who, under the Department's SCM policy, should not have been subject to OC spray unless all other alternatives to gain compliance had first been exhausted. The OIG reviewed incidents in which youth with identified respiratory conditions and youth taking psychotropic medications were subjects of OC spray. In one incident reviewed, a youth with a mental health condition was engaging in self-harming behavior, and was OC sprayed in the groin and buttocks. Following the use of OC spray, the youth was left in a room, which apparently lacked running water, for approximately 20 minutes before being decontaminated.

OIG Report at 5-6.

The OIG Report also detailed that Probation staff fail to issue proper warnings before deploying pepper spray, *id.* at 7-8; that bystander children and staff are often inadvertently exposed to pepper spray, *id.* at 8; and that there were "improper decontamination practices that may increase the discomfort that follows OC spray" and multiple "failures to timely and effectively decontaminate youth after OC exposure." *Id.* at 8-9. The OIG Report also identified "insufficient use-of-force policies, training, reporting, and accountability practices" in the Probation Department. *Id.* at 12.

Conclusion

The juvenile justice system is built upon a goal of rehabilitation, and the use of chemical agents such as OC spray on children does nothing to support this goal. Los Angeles is out of step with many other California counties, and most of the United States, in allowing its continued use. The explosive increase in the use of OC spray by Probation staff once the monitoring eyes of DOJ were off of the Department is troubling, and shows a disregard for complying with changes that put in place while the County was subject to monitoring by the federal government.

The OIG Report shows Probation's inability or unwillingness to abide by its own policies that call for very limited use of OC spray only when there is a risk of serious physical harm to others and/or when all other de-escalation techniques have failed. Therefore, for all of the

foregoing reasons, the Prison Law Office strongly supports Motion 19-0940, and urge your vote in support of it.

Sincerely,

A handwritten signature in black ink, appearing to read "CKendrick", written in a cursive style.

Corene Kendrick, Staff Attorney

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