No. 22-2791

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CELINA MONTOYA, ZACHARY BLAYE, and RONALD MOLINA,

Plaintiffs-Appellants,

v.

ROB JEFFREYS,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois

District Court No. 1:18-cv-1991

Hon. John Robert Blakey

BRIEF AND SHORT APPENDIX OF PLAINTIFFS-APPELLANTS CELINA MONTOYA, ZACHARY BLAYE AND RONALD MOLINA

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Appellate Court No: 22-2791

Short Caption: Montoya et. al. v. Jeffreys

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Attorney's Signature: /s/Adele D. Nicholas Date: 03/20/2023

Attorney's Printed Name: Adele D. Nicholas

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/Mark Weinberg Date: 03/20/2023

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JURISDICTIONAL STATEMENT

Plaintiffs originally filed this case in the United States District Court for the Northern District of Illinois. Plaintiffs' complaint is an action under 42 U.S.C. §1983 alleging violations of the Fourteenth Amendment of the United States Constitution. The district court had federal question jurisdiction under 28 U.S.C. §1331.

This is an appeal from a final judgment on the merits resolving all claims as to all parties. The Seventh Circuit has jurisdiction pursuant to 28 U.S.C. §1291.

The district court granted summary judgment to Defendant in part on September 30, 2021. ECF 222, A.37–A.80.[1] The district court held a bench trial on April 18, 2022 – April 21, 2022. ECF 249–252. After accepting post-trial briefing, the district court issued a written decision ruling for Plaintiffs in part and for Defendant in part on August 25, 2022. ECF 269, A.2–A36. The court entered judgment on September 9, 2022. ECF 273, A.1. Plaintiffs filed a notice of appeal on October 7, 2022. ECF 275. Defendant filed a notice of cross appeal on October 20, 2022. ECF 283.

ISSUE PRESENTED FOR REVIEW

Whether the Illinois Department of Corrections' policy giving treating therapists authority to decide whether parolees who have been convicted of sex offenses may have contact with their own minor children violates the due process clause of the Fourteenth Amendment.

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[1] References in this brief to "ECF" refer to district court docket entries; "A." refers to pages of the Short Appendix filed with this brief.

STATEMENT OF THE CASE

I. Relevant Background and Procedural History

Plaintiffs Ronald Molina, Zachary Blaye and Celina Montoya represent a class of parents who are on Mandatory Supervised Release ("MSR") under the supervision of the Illinois Department of Corrections ("IDOC") after having been convicted of sexual offenses.[2] ECF 165, Class Certification Order. They challenge the constitutionality of the IDOC's policies restricting parents from having contact with their minor children while on MSR. ECF 92, First Amended Complaint. Each of the named Plaintiffs worked hard to maintain loving bonds with their children while incarcerated, only to have those relationships severed when they were released to community supervision. *Id.*

Under Illinois law, the IDOC has substantial discretion to dictate whether a parent can have contact with his or her child. The Illinois Code of Corrections provides that persons required to register as sex offenders must "refrain from all contact, directly or indirectly, personally, by telephone, letter, or through a third party, with minor children without prior identification and approval of an agent of the [IDOC]" while on MSR. 730 ILCS 5/3-3-7 (b-1)(9). The Prisoner Review Board ("PRB") imposes a condition of supervised release that tracks the statutory

[2] The terms "parole" and "MSR" are often used interchangeably, but the two forms of post-incarceration community supervision are different in crucial respects. "Parole" is early release from prison on an unexpired sentence that is granted at the sole discretion of the Prisoner Review Board. MSR is a separate sentence of community supervision that commences only at the termination of the sentence of imprisonment. 730 ILCS 5/5-4.5-15. In 1978, Illinois abolished discretionary parole. MSR is, however, still often informally referred to as "parole" because the supervising officers are called "parole officers." However, MSR is not a form of early release.

language.[3] A.5 at ¶19. The condition leaves it to the IDOC to decide the standards, criteria and process for a releasee to obtain approval to have contact with a minor child. *Id.* at ¶20.

When Plaintiffs brought their initial complaint, the IDOC imposed a blanket ban on contact between a parent with a sex offense conviction and his or her minor child for a period of at least six months following release from prison. ECF 1. The policy applied to all parents with sex offense convictions. *Id.* There was no formal process for a parent to seek review of the prohibition. *Id.* On June 13, 2018, the district court entered a preliminary injunction against the policy, finding that Plaintiffs had a likelihood of success on their claim that the six-month, blanket ban on parent-child contact was unconstitutional. ECF 33. The district court certified the case as a class pursuant to Fed. R. Civ. P. 23(b)(2). ECF 165–166.

II. The IDOC's Current Written Policy

Following the entry of the preliminary injunction, the IDOC adopted a new written policy governing releasees' ability to seek contact with their minor children. The new written policy, set forth in the Department's Sex Offender Supervision Unit ("SOSU") Manual, provides as follows:

- A releasee "can request visitation with biological or legally adopted children by submitting a Request for Contact with Children Form";
- If a releasee requests contact, the releasee "shall be given the opportunity for an appointment with a sex offender therapist within 14 days of release";

[3] Under Illinois law, sentencing judges play no role in setting the conditions of MSR. 730 ILCS 5/5-8-1(d). Illinois law vests responsibility for setting the conditions of MSR with the PRB. *See* 730 ILCS 5/3-3-7(a).

- Within 21 days of the initial appointment, the therapist and the parole agent "will determine whether there is reasonable cause to believe that the parolee's child(ren) would be endangered by parent-child contact with the parolee";

- In making such a determination, the parole agent must "give considerable weight to the therapist's recommendation";

- If parent-child contact is restricted or prohibited, "The parole agent and therapist must give the reasons for the restriction or prohibition briefly in writing";

- "The restriction or prohibition will automatically be reviewed by the therapist and parole agent every 28 days, and if any restriction or prohibition continues, reasons will be provided briefly in writing"; and

- The releasee "may seek review of any restriction or prohibition from the Deputy Chief of Parole, and the Deputy Chief (or his/her designee, so long as the designee is not the parole agent directly supervising the parolee) will respond in writing within 21 days."

ECF 174-1, Policy.

III. The Implementation of the Policy

A. All Contact Is Presumptively Banned

The new policy still functions as a ban for months and years at a time. Upon release from prison, a parent who is on MSR under the supervision of the SOSU may not have any contact with his or her minor child. A.17. Parents are banned from residing with their own families if they have minor children at home. *Id.* Parents who maintained loving bonds with their children while incarcerated through letters, phone calls and visitation are completely cut off from their children when released from prison. ECF 309 at 101:3–25; *Id.* at 106:20–107:5. The IDOC bans all calls, letters, supervised visits, and even passing along a message of love and support through a third-party such as the child's custodial parent. ECF 308 at

26:9–24.

B. The IDOC Gives Treating Therapists Final Say over Child-Contact Decisions

For any contact between a parent on MSR and his or her minor child to be restored, the parent must obtain permission from the so-called "containment team," composed of the individual's parole agent, treating sex offender therapist, and parole commander. A.10 at ¶56–57. All persons with sex offense convictions are required to enroll in sex offender therapy as a condition of MSR. Some parolees see one of the four therapists employed directly by the IDOC. The majority see a private therapist (which IDOC calls "community therapists"). A.4 at ¶12. A releasee is responsible for paying for weekly sex offender therapy (typically $25 to $40 per week). ECF 172 at ¶46.

In practice, the IDOC gives therapists final say over whether parents may have contact with their minor children. Parole agents and therapists testified that parole agents defer to therapists with regard to whether a parents may have contact with their children and never over-ride or even question their judgment. *See, e.g.*, ECF 308, Agent Steven DeYoung, 29:22-24 ("Q. Have you ever approved child contact that was against the wishes of the therapist? A. No."); *Id.* at 32:7-11 ("Q. Can you imagine any situation where you would disagree with the sex offender treatment provider's determination? … A. I can't think of one."); *Id.*, Agent Joseph DeMauro, 148:24-149:2) ("Q. Has there ever been a situation where you overrode the therapist's decision about whether a parolee could have contact with their child? A. No."); ECF 313, Dr. Patricia Grosskopf, 596:15-20; 596:24-597:1 (the decision is

rendered by "more myself, probably, than the agent."); ECF 310, Dr. Gerald Blain, 251:19-252:5 (none of the agents who refer clients to Dr. Blain have questioned the policy and protocols that he uses for making parent-child contact determinations.)[4]

C. The IDOC Does Not Constrain Therapists' Discretion

The evidence established that the IDOC's policy of vesting the power with therapists to decide whether parents may have contact with their children leads to denials of parent-child contact for long periods of time in the absence of any reason to believe that the child would be endangered by contact with the parent. As shown below, this occurs in three ways. First, because the IDOC does not exercise authority over therapists' policies, schedules or availability, decisions about child contact are frequently delayed simply because parents cannot start therapy in a timely manner due to the unavailability of therapists or parolees' inability to afford therapy immediately upon release. Second, IDOC does not constrain therapists' discretion by setting time limits or criteria for their consideration of child-contact requests. Thus, therapists' policies, requirements and timeframes vary widely, leading to arbitrary denials of parent-child contact. Third, the IDOC's process conflates therapy with risk evaluation. The evidence at trial showed that therapy and risk evaluation have different functions, standards, goals, and methodologies, and entangling the two leads to delays in parent-child contact for reasons unrelated to the safety of the child.

[4] Indeed, Agent DeMauro expressed surprise at the suggestion that he even could disagree with a therapist. ECF 308, 138:22-141:3 ("The Court: I'm sorry. I'm not getting an answer to my question. Did you disagree with the therapist? A: Can I?")

1. The IDOC Does Not Ensure that Parents Can Start Therapy in a Timely Manner

The IDOC does not have any way of ensuring that a parent can see a therapist within 14 days after release, and it is often the case that parents are unable to see a therapist for months. This is because the IDOC doesn't control therapists' availability and schedules and can't force therapists to accept clients who can't afford to pay a weekly fee for therapy. ECF 308, DeMauro, 150:3-24 (due to financial considerations it is his general practice not to "give [a] referral to therapy until four to six weeks after the person is released."); ECF 312, Deputy Chief Dion Dixon, 434:24-435:7 (the department is not "able to control when these community therapists have appointments available."). Even for the four therapists employed directly by IDOC, demand for therapy outstrips the therapists' capacity to see patients, and as a result it "typically" takes around two months to even have an initial intake appointment. ECF 312, Dr. Grosskopf, 583:20-22. Because the IDOC forbids parole agents from allowing parents to see their children without the input of a therapist, the IDOC routinely delays decisions about parent-child contact until after a parent is able to start therapy. ECF 308, DeMauro at 163:15-164:12.

2. IDOC Gives Therapists Unchecked Discretion

After a parent enrolls in therapy, the IDOC does not ensure that child contact decisions are made in a fair, consistent, and timely manner. The IDOC gives therapists unchecked discretion—that is, it does not set any time limit for therapists to render a recommendation about whether parent-child contact should be allowed; nor does it dictate what criteria therapists use when deciding whether

to restrict parent-child contact. *See* ECF 312, Dixon, 460:7-16 (IDOC "can't set the policies that therapists use for making recommendations about parent-child contact."); ECF 311, IDOC's Manager of Sex Offender Services Sarah Brown-Foiles, 345:16-20 (therapists are permitted to develop their own criteria for whether to allow parent-child contact). IDOC permits therapists to deny child contact indefinitely without rendering any decision about whether the child would be endangered by contact with their parent by checking a box on a denial form that states "insufficient therapy sessions to make assessment." A.11 at ¶62; 312, Dixon, 489-91.

This hands-off approach by IDOC puts parents at the mercy of the treating therapist they are assigned to see. Therapists' policies vary widely with regard to how long they want someone to be enrolled in therapy before they will consider parent-child contact requests. For example, Dr. Eleanor Harris, a community therapist at a private therapy practice in Chicago, will not render a recommendation about child contact for "at least a year." ECF 255-2, Harris, 48:21–49:1. Dr. Michael Kleppin, a community therapist based in Springfield, requires a parolee to be engaged in therapy for a "minimum of six months" before making a recommendation. ECF 254-6. Dr. Patricia Grosskopf, one of IDOC's therapists, requires parolees to be engaged in therapy "on average three months" before allowing visitation with a child. ECF 313, Dr. Grosskopf, 591:19-592:16.

Moreover, because IDOC doesn't dictate (or even know) what criteria therapists are employing to decide whether parents may have contact with their children,

therapists routinely deny parents contact with their children for reasons that are unrelated to a determination of dangerousness. ECF 311, Brown-Foiles, 345:16-20; ECF 309, DeMauro, 173:18-174:1. For example, some therapists testified that they use their ability to curtail parents' relationships with their children to motivate parolees to comply with parole conditions or therapy policies such as the requirement to pay for polygraph examinations. Dr. Blain testified as follows:

> THE COURT: So, let's say you thought it was a very low risk, as low a risk as … you've seen. … Would you nonetheless decline to recommend child contact in order to provide a carrot for the parolee to make better progress on other aspects of the therapy?
> A: And if you throw in there the polygraph, the answer is yes.
> THE COURT: Meaning to provide a carrot for the parolee to take a polygraph?
> A: Yes.

ECF 310 at 283:14-284:1; *id.* at 235:2–236:18 ("a big part of my job is … to provide incentives, encouragement, and motivation" to "comply[] with all of the rules and conditions that they have, including things like getting approval for movement, following their curfew" and having contact with their children might be the "only incentive" available).

Some therapists testified that they withhold approval for parent-child contact until the parent can afford a polygraph examination.[5] IDOC allows therapists to condition approval for contact with children upon a parolee's ability to pay for one or more polygraph examinations. *See* ECF 312, Dixon, 497:12-24; *id.* at 462:4-8; ECF 309, DeMauro, 165:3-17. Testimony establishes that individuals released from

[5] Polygraph examinations typically cost between $250 and $350. DeMauro, at 164:18-24 ("between $275 and $350"); Brown-Foiles, 309:22-25 ("between $250 and $300").

prison often cannot afford to pay for a polygraph exam (ECF 312, Dixon, 497:3-10), and the IDOC makes no provision for those who cannot afford to pay for a polygraph. ECF 312, Dixon, 497:12-24; ECF 311, Brown-Foiles, 310:8-10. At trial, none of the witnesses articulated a correlation between not having the money to pay for a polygraph and risk of harm to a child. *Id.*, DeMauro, 165:9-12 ("Q. [D]oes a parolee's ability to pay $275 to $350 for a polygraph examination have any bearing whatsoever on whether they're a danger to their child? A. No.").

Crucially, therapists agreed that, in prohibiting parents from have contact with their minor children, they were not rendering an individualized determination of dangerousness (*i.e.*, that the parent posed a danger to his or her own minor children); rather, the therapists were taking a "wait and see" approach—withholding contact in order to undertake an investigation into the releasee and to gauge the releasee's progress in therapy over time. *See* ECF 310, Blain, 238:1-14 ("Q. [A]t any time during the first couple of sessions, are you forming a conclusion about whether the person poses a risk to their own child? A. Well, I'm not sure I can say it's that specific or that narrow. … [U]sually my view of the clients are I would say more broad and more general than that. Q. [Would] you say that particularly at the beginning you're gathering information about the person, rather than making a conclusion, right? A. Correct. That's true."); *see also*, ECF 312, Dixon, 488:21-491:6; ECF 254-7 (contact between class member Brandon Velna and his children was denied from September 2019 through February 2020 based on "insufficient therapy sessions to make assessment" without any finding of risk to the child).

Dr. Blain's testimony is representative of the testimony of other therapists. He testified that, prior to making any decision about parent-child contact, he requires that a person participate in therapy for at least "five, six, seven months." ECF 172 at ¶40. As explained by Dr. Blain, "I want to make sure I know everything about them." *Id*. Such information includes the following:

> A full knowledge of their sexual history. In particular, any offending issues. Their own abuse history. Their sexual fantasies …. Their sexual lifestyle. Are they compulsively masturbating? Are they addicted to porn? Are they being truthful … not just with me and the group, but also with their family and loved ones? Are they stable at work and home and in their relationships? Are they on board with working with the agents and with the therapists and with the program? Are they… resisting and working against us and … feeling entitled and trying to … appear to be cooperative but yet they're not? That takes time. It takes time and it takes opportunity. It takes more than just a couple sessions.

Id.

3. Evaluation of Risk and Therapy Are Two Different Functions, and Entangling the Two Leads to Long Delays

The third way in which the IDOC's deference to therapists arbitrarily denies parents contact with their children is that it entangles *evaluation*, a discrete process designed to render a valid assessment of risk in a relatively short time frame, with *therapy*, an inherently long-term process that has many purposes distinct from assessing risk. The testimony at trial showed that the goals and methodologies of therapy are incompatible with the need for a prompt and fair determination of whether a parent poses a risk to his or her child. Dr. Blain, who is a licensed sex offender evaluator and a sex offender therapist with extensive experience with both

therapy and evaluation, described the difference between the two functions as follows:

> Q. In the evaluation context, you make a recommendation about whether someone can contact the child based on the information that's available to you at that point, right?
> A. Yes.
> Q. In the therapy context, you're considering more things … Including their overall progress towards the ultimate goals of sex offender therapy?
> A. That's correct.
> Q. And including giving them incentives to keep progressing in therapy?
> A. [Y]eah, we want to give people hope. I think hope's a big part of treatment. …
> Q. So, in therapy, you would see someone being able to have contact with their child as a goal you want them to work towards, right?
> A. That's a good way of putting it, yes.
> Q. Whereas, in the evaluation context, you're just weighing in on whether, based on the information that's available, there's a risk to the child?
> A. Well, yeah. … I'm trying to give hope and incentive and treatment. That's not what I'm doing in evaluation. So, it's a big difference in terms of my – my role, my attitude, my perspective. …
> Q. So, [you] take a longer time to make a recommendation about child contact for someone in your therapy group [because] that's consistent with your overall goal … to see them making progress over a period of time?
> A. Yes.
> Q. Whereas, in the evaluation context, you are being asked by [a] government official, like a judge or a probation department, to just give a simple up or down about whether the person is risky to their child?
> A. Yes.

ECF 310, Blain, 260:23–263:3.

The other mental health professionals agreed with Dr. Blain that therapy focuses on long-term goals such as developing greater empathy, coping with stress, and improving one's attitude—goals distinct from the discrete purpose of assessing risk. *See* ECF 313, Grosskopf, 616:21–617:2 ("Q. Would you agree that sex offender therapy is something that takes place over a longer duration? A. Yes. Q. And sex

offender therapy isn't necessarily aimed at answering a particular question within a discrete period of time, right? A. Correct. It's not based on a referral question."); ECF 255-2, Harris, 20:20-21:11 ("Q. What are the goals of sex offender group therapy? A. [T]o help them to become more empathetic, … to sensitize them to … the needs of others to make them a little bit more for lack of a better word, humanistic, caring, loving."); ECF 255-1, Dr. Pete Eisenmenger, 25:15-26:9 (describing the goals of sex offender therapy as to "learn coping skills"; "develop empathy"; "understand what led to their offense."); ECF 311, Brown-Foiles, 364:15-20 ("Q. The goals of therapy are more long-term than the goals of an assessment, right? A. Yes, I would say. Q. So, it's over a period of time the therapist is trying to assist the client in progress towards long-term goals? A. Yes.").

Because the goals of therapy are long-term and wide ranging, this influences therapists' approach to requests for parent-child contact. As Dr. Blain testified, therapists are not rendering a decision about risk to a child; rather they see parent-child contact as a goal or reward that a parent should work towards in conjunction with meeting other long-term goals of therapy. ECF 310, Blain, 238:15- 239:12 ("Q. What is the threshold that you want a person in your therapy group to meet before you will recommend that they be allowed to have contact with their own child? A. Well, certainly that they are being compliant and they're following the rules and they're not showing any… negative, resistant, defiant attitude; that they are … showing stability emotionally and behaviorally and in their residence and relationships and work."); ECF 313, Grosskopf, 592:3-7 ("they have to be out with a

certain period of time and be able to demonstrate the transition and stability and the acclimation."); ECF 255-2, Harris, 118:10-21 (testifying that she wants "time to gauge their progress, the amount of information they've learned, the opportunity to assess their emotional stability, cognitive functioning, the whole bit.").

This evidence shows that therapists are not actually rendering an assessment of whether there is cause to believe a child would be endangered by contact with the parent. Such a determination is not the goal of sex offender therapy. As Dr. Eisenmenger, who is both a therapist and an evaluator put it, evaluating a client's risk to their own child and making a recommendation about parent-child contact is simply "not within the scope" of what a therapist is doing in treatment. ECF 255-1, 40:20–41:1.

D. The Review Process Is Deficient

A parent whose therapist denies a request for contact with his or her child is supposed to be able to "seek review of that decision from the Deputy Chief of Parole or his or her designee." ECF 174-1. In practice, many parents are unable to avail themselves of the review process because therapists and parole agents do not provide them the necessary paperwork, such as a written explanation of the reason for the denial. *See* ECF 309, DeMauro, 158:3-11; ECF 172 at ¶¶103, 150-154 (describing experiences of seven class members who were never provided a written explanation of the reason for the denial of their requests for contact with their children).

When a parent is provided the opportunity to appeal, most appeals are decided by Sarah Brown-Foiles. A.15 at ¶94. Brown-Foiles is intimately involved with the supervision and training of therapists who make the first-line decision about parent-child contact. In fact, she regularly weighs in on the initial decision to deny contact. *See* ECF 311, Brown-Foiles, 365:10-18 (she provides training to IDOC therapists and outside therapists); *id*. at 365:19-366:6 (she consults with outside therapists and IDOC therapists regarding requests for child contact); *id*. at 366:24–367:7 (she consults with the containment team when they have questions regarding a request for contact); ECF 313, Grosskopf, 598:1-599:5 (she regularly consults with Brown-Foiles "prior to rendering a decision" regarding child-contact).

In cases where Ms. Brown-Foiles has been involved in the initial decision to deny child contact, appeals are forwarded instead to Alyssa Williams, who is Brown-Foiles' supervisor (A.16 at ¶100); or Heather Wright, a therapist at Big Muddy River Correctional Center who reports to Brown-Foiles. ECF 174-7, Brown-Foiles, at 9:21–10:5 (testifying that she oversees the treatment providers at Big Muddy River Correctional Center).

IV. The Application of the Policy to Class Members[6]

A. Ronald Molina

Plaintiff Ronald Molina is the father of one son, who was 16 at the time of Ronald's release from prison. Ronald was released from IDOC onto MSR in 2018,

[6] Testimony from many other class members was made part of the record at summary judgment and trial. *See* ECF 172, Statement of Facts, at ¶¶69–154; ECF 309. For the sake of brevity, Plaintiffs highlight two examples.

when he was 33 years old. He was convicted of committing criminal sexual assault of a 15-year-old girl in 2007, when he was 22. ECF 172 at ¶82.

While Ronald was in prison, he maintained regular contact with his son through phone calls and visits. *Id.* at ¶84. Erika, his son's mother, supported Ronald's relationship with their son. She brought their son to visit Ronald in prison. *Id.* at ¶85. Ronald's mother also brought Ronald's son to visit Ronald in prison with Erika's approval. *Id.*

After Ronald's release from prison all contact with his son was cut off pursuant to IDOC policy. Ronald enrolled in therapy with Dr. Blain. He repeatedly asked Dr. Blain and his parole agent, Agent DeMauro, for permission to see his son. *Id.* at ¶90–99. Erika and Ronald also met with Dr. Blain. *Id.* at ¶100. Erika told Dr. Blain that she wanted Ronald to have contact with their son and filled out paperwork confirming that she would supervise contact between Ronald and their son. *Id.* For more than a year and half, until after Ronald's son turned 18, all contact (including phone calls) was prohibited, and Ronald was never given a written explanation for why he was prohibited from seeing his son. ECF 309, DeMauro, at 158:5–14. Because Ronald was never given a written denial, he was unable to appeal the decision, as his agent deemed the original request to still be "pending." *Id.*

Agent DeMauro testified that he personally had "no reason to believe" that Molina "posed a risk to his teenaged son," but he deferred to Dr. Blain on the matter. ECF 309, DeMauro, 165:19–166:23. For his part, Dr. Blain testified that he "didn't have a strong objection to [Ronald's] having phone calls [with his son] in

terms of the safety of the child," and he never made "a clear determination" about whether Ronald posed any risk to his son. *Id.* at 256:15–259:8. In explaining his decision to deny contact, Dr. Blain wrote a letter to Agent DeMauro stating that his "main concern and frustration was that [he] wanted [Ronald] to undergo a polygraph and … Ronald couldn't afford it." *Id.* at 258:8-259:8. At trial, Dr. Blain cited his desire for Ronald to work on "some attitude issues," to take a polygraph examination, and to demonstrate "full compliance, full disclosure, having a positive attitude," as reasons that parent-child contact was prohibited. *Id.*, 255:20-256:2; 258:20-259:8. Agent DeMauro's understanding was that the sole reason Ronald was denied contact with his son was that Ronald could not afford a polygraph examination and Dr. Blain would not consider the request until such time as Molina paid for a polygraph. ECF 309, DeMauro, 165:19-166:23; *see also* Blain, 255:20-256:2; 258:20-259:8.

B. Joel Mitchell

Joel Mitchell has been married to his wife Rachel since 2014. ECF 313, J. Mitchell, 508:13-22. They have two children, a seven-year-old daughter and a four-year-old son. *Id.* at 506:12-18. Joel was convicted in 2018 of two counts of aggravated criminal sexual abuse. The victims of his offense were his younger sisters. The offense occurred in 2008, when Joel was 19 and 20. *Id.* at 507:13-21. Although Joel had never been charged with a crime, he disclosed his offense to Rachel early in their relationship when they started dating in 2011. *Id.* at 508:23–509:18. Rachel and Joel had many conversations about it and prayed about it before

they decided to get married and have a family together. *Id*. at 509:11-18; R. Mitchell, 536:8–23. Beginning in 2015, Joel began voluntarily attending therapy to address his sexual offending behavior. *Id*. at 509:19–510:16. He was not charged with a crime until 2016. *Id*. at 507:22–25.

In January 2019, Joel was sentenced to serve three years in IDOC at 50 percent, plus two years of MSR. *Id*. at 508:1–10. After his conviction but before he started his term of incarceration, Joel was permitted to return home and reside with Rachel and their children (from January 18, 2019 to February 1, 2019). *Id*. at 512:24–513:21 The sentencing court and the local police department were both aware that he was residing at home with his children during this time. *Id*.

While Joel was in prison, he stayed closely in touch with his family. He talked to his wife and daughter on the phone daily. He sent drawings to his kids. Rachel sent him art that their daughter made for him. He had a family video visit with his wife and children once a week. *Id*. at 516:9–517:19.

Approximately six months before Joel's release from prison, Joel and Rachel began planning for his MSR. *Id*. at 518:12–521:15. Rachel wanted Joel to live with her and their two children while he was on MSR to reunite their family. She also needed Joel's help caring for their two young children and working to support them, as she had been the sole breadwinner and caretaker during Joel's imprisonment. *Id*., R. Mitchell, 541:5–10. Rachel and Joel submitted their home as Joel's "host site" several months before his scheduled release. *Id.* at 541:17–542:4. The IDOC rejected it solely because of the presence of their children in the home. *Id*. at 543:7–21.

Thinking that the rejection was a mistake, Rachel called the parole office and eventually spoke to Parole Officer Martha Dittmer to inform her that she wanted her husband to live at home while on MSR. Dittmer said he would not be allowed to live with her and there were "no exceptions" to that rule. *Id.* 544:14–21.

Rachel followed up with a certified letter to the IDOC. *Id.* at 546:9–547:17. In her letter, she asked the IDOC to reconsider its denial. Along with the letter, Rachel enclosed the following:

- A Sex Offender Evaluation conducted by a licensed sex offender evaluator Dr. Barry M. Leavitt. Dr. Leavitt concluded that Joel is "a relatively low risk for engaging in future acts of sexual offending" and recommended that he was a good candidate for probation rather than imprisonment. The report noted many "risk mitigating factors" including Joel's voluntary participation in therapy; his age at the time of his offense; his stable marriage; his "receptivity" to treatment; his "good work ethic"; his "supportive family unit" and his "strong and active church affiliation." ECF 254-7;

- A reference letter from Joel's treating therapist Dr. Scott Lownsdale. Dr. Lownsdale's letter stated that after seeing Joel "2-4 times per month" for a year, "I do not view this patient as a threat to his daughter. Furthermore, I do not view this patient as being at risk for acting out sexually towards children or adolescents, or being involved sexually with anyone but his wife." *Id.*; and

- Three letters from members of their church who know Joel well and have observed their family dynamic closely. *Id.*

Rachel followed up her letter with calls to Agent Dittmer and the parole commander, Matthew Lukow. ECF 313, R. Mitchell, 547:22–549:20. Both refused to review the materials. Commander Lukow bluntly said there is "no way in hell" Joel would be allowed to live with his kids. *Id.*

Because Joel could not live with his family, he submitted an alternative host site with a friend who allowed Joel to reside with him. ECF 313, J. Mitchell, 522:5-10.

When Joel was released, his supervising agent told him that he was not permitted to have any contact with his children—not even asking his "wife to tell [his] kids that [he] loved them" until after he had a therapist's approval. *Id.* at 521:16-21.

Joel enrolled in therapy the same week he was released from prison and immediately asked his therapist, Dr. Strauss, about the process for restoring his relationship with his children. *Id.* at 524:25-525:9 ("I asked [Dr. Strauss] how long the process could take, and she … didn't have a direct answer for me. She told me that, 'Well, it could take six months. It could take a year. … we need to do an initial assessment on you first, ….'"). When Joel followed up on his request for contact with his children, Dr. Strauss told Joel to stop asking about it. *Id.* at 525:25–526:15.

Joel was never given a written explanation for the prohibition on his having any contact with his children. He was thus unable to appeal. *Id.* 527:7–-528:1. Because of the total prohibition on contact with their children while on MSR, both Joel and Rachel described MSR as being worse than Joel's imprisonment where telephone calls, letters and face-to-face visits with one's children are allowed. *Id.* at 550:4-7; 533:17-18.

After approximately two months, the friend who had allowed Joel to parole to his home told Joel he had to leave because he was receiving harassment from his neighbors about having a person on the sex offender registry at his home. *Id.* at 528:8-24. Because the family could not afford another home, Joel was taken back to prison. *Id.* at 528:7–529:6. Upon reflection on the situation and conversations with his wife, Joel decided to spend the rest of his supervised release term in prison

because "it was too difficult to have two separate households … financially, but also just emotionally." *Id.* at 510:7-9.

Joel spent the remaining 11 months of his MSR period behind bars. He received no therapy while incarcerated. When he was released, he moved home and was not subject to any supervision. *See* ECF 255-1, Dr. Eisenmenger, 74:23–75:9; ECF 311, Brown-Foiles, 355:20-357:6; ECF 313, J. Mitchell, 530:11-531:8.[7]

V. The Court's Decision

After the bench trial, the district court found that IDOC's policy was constitutional in all but two respects. The court found that "IDOC unconstitutionally prohibits written contact between class members and their minor children upon their release from prison and placement on MSR; and in certain circumstances, IDOC unconstitutionally conditions parent-child contact on a class member's ability to afford a polygraph examination." A.2. The court declared those aspects of the policy unconstitutional. In all other respects, the court found that IDOC's policies did not violate due process. *Id.*

[7] Persons with determinate MSR terms may remain in prison for a statutorily mandated length of time rather than serve their MSR terms in a community setting. That practice is known as "maxing out." Some individuals who are eligible for MSR choose to "max out" their MSR terms in prison so they can continue written, telephone, and in-person contact with their minor children. A.6 at ¶24-27.

SUMMARY OF THE ARGUMENT

The district court erred in upholding the IDOC's policy regulating contact between parents on supervised release and their own children in three ways:

First, the policy gives treating therapists unconstrained discretion to keep parents from having contact with their children, and the evidence at trial demonstrated that this leads to parent-child contact being restricted for long periods of time for arbitrary reasons unrelated to child safety. Granting such power to treating therapists is inconsistent with the requirements of due process because therapists are not neutral and independent decisionmakers.

Second, regardless of who the decisionmaker is, the IDOC policy is substantively flawed in three ways: (1) the IDOC imposes no criteria and no deadline for therapists' determinations about whether parents may have contact with their own children; (2) irrebuttable presumptions in the context of parole restrictions are at odds with the requirement of particularized findings, accompanied by individualized explanations where conditions affect significant liberty interests; and (3) the presumptive ban on phone calls is irrational and overly broad.

Third, the district court erred in applying the deferential *Turner v. Safley* standard to its analysis of the constitutionality of the policy. Where a parolee's constitutional rights are at stake, a higher standard of scrutiny is necessary.

ARGUMENT

The Supreme Court has long held that parent-child relationships are a fundamental right worthy of the utmost protection under our constitution. *Lassiter v. Dep't of Soc. Svcs.*, 452 U.S. 18, 27 (1981). The IDOC's policy for deciding whether parents may have contact with their own children while on supervised release results in long interruptions in the parent-child relationship without a legitimate reason—that is, some specific and articulable risk of harm to the child. The district court erred in entering judgment for Defendant. The decision should be reversed and judgment should be entered in Plaintiffs' favor to properly safeguard parent-child relationships from arbitrary and undue government interference.

I. Standard of Review

After a bench trial, this court reviews the district court's legal conclusions *de novo* and factual findings for clear error. *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir. 2001) (citing Fed. R. Civ. P. 52(a)).

II. Granting Executive Branch Officials the Unchecked Authority to Make Decisions about Fundamental Rights Is Inconsistent with Due Process

As set forth in the Statement of the Case, treating therapists have been granted unchecked power to make determinations involving fundamental rights—namely, decisions about parent-child contact. IDOC has imposed no limitations on therapists' discretion to deny or grant child-contact, including no deadline by which such decisions need to be made. In addition, each therapist has been given the right to use their own criteria for making such determinations, and as a result there is no consistency among therapists' policies. Different therapists set different minimum

timeframes that they require a parent to be enrolled in therapy before they will make a decision (some will make a decision in three months, others six months, others a year or more); some therapists use the possibility of child contact as a "carrot" to incentivize parents to abide by other rules or policies; and others make parents wait until after they can pay for polygraphs. Given the absence of any criteria or formal deadlines, therapists have the power to interfere with parental rights indefinitely and to do so for reasons unrelated to determinations of dangerousness.

Granting sex offender treatment providers unchecked authority to make decisions about parent-child contact is a core structural problem with the IDOC policy. Such decisions belong in the hands of a judge or other neutral arbiter like the Prisoner Review Board, which, as explained, is the entity in Illinois responsible for setting the conditions of parole and MSR. *Supra* at 3, n. 3. As set forth below, the IDOC's current decision-making structure is inconsistent with Seventh Circuit case law and fundamental principles of due process.[8]

A. The Policy Violates Procedural Due Process Because It Does Not Provide for a Sufficiently Neutral and Impartial Decisionmaker

The core problem with the IDOC's policy of giving executive branch officials (or

[8] It should be noted that sex offender treatment providers do not just make determinations of individuals' fundamental rights in the context of parent-child contact decisions. Per IDOC policy, treatment providers also have the power to make determinations about releasees' internet use, including the power to completely deny a releasee's access to the internet. Such decision-making authority raises due process concerns similar to those at issue here and are currently being litigated in *Tucker v. Jeffreys*, 18-CV-3154 (N.D. Ill.) (Shah, J.).

their designees) the authority to make decisions about supervisees' fundamental rights is that it fails to provide for a sufficiently neutral and impartial decisionmaker. The determination of whether a particular procedure meets the minimum requirements of procedural due process is set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and requires consideration and balancing of three well-known factors.[9] Application of the test here reveals that the IDOC's policy of granting treatment providers the authority to make decisions about supervisees' fundamental rights violates due process requirements.

1. The Right at Stake Is Highly Important

The first *Mathews* factor—the private interest that will be affected by the official action—weighs heavily in favor of Plaintiffs because a parent's desire for and right to the companionship of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("the interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court.")

2. There Is a High Risk of Erroneous Deprivation Due to the Lack of a Neutral Decisionmaker

The second prong of the *Mathews* analysis considers the adequacy of the

[9] The three-prong test consists of the following: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

procedures used to guard against "erroneous deprivation" of protected interests, and the probable value of "additional or substitute procedural safeguards." *Mathews* at 335. Where, as here, a person in state custody is subject to a condition that interferes with constitutionally protected rights, the Supreme Court has emphasized the need for a sufficiently neutral decisionmaker as a necessary element of due process. *See, e.g., Washington v. Harper,* 494 U.S. 210, 233 (1990) (finding the Court's concerns about the "independence of the decisionmaker" were addressed by a process whereby "none of the hearing committee members may be involved in the inmate's current treatment or diagnosis.") Applying this principle in *Felce v. Fiedler*, 974 F.2d 1484, 1498-99 (7th Cir. 1992), this Court found that a decision to impose a parole condition requiring a parolee to take psychotropic medications violated due process because the decision was made by the parolee's parole officer in consultation with a treating psychiatrist. *Id*. at 1498, 1500 ("the defendants' current procedure— with its heavy emphasis upon the judgment of the individual parole agent—is constitutionally inadequate.").

Similarly, in *Bleeke v. Server*, 1:09-CV-228, 2010 U.S. Dist. LEXIS 27063 (N.D. Ind. Mar. 19, 2010), a case that is directly on point, the district court considered the constitutionality of Indiana's imposition of a no-child-contact condition on an individual on parole for a sex offense and found it to be lacking. *Id*. at *5. Applying the *Mathews* analysis, the *Bleeke* court found that a parole condition "totally limiting [the plaintiff's] contact with his own children may only be imposed after an appropriate hearing and a finding that [he] constitutes a threat to his children by

reason of his lack of sexual control." *Id.* at *7-8. Specifically, the court found that a supervising parole officer could not be tasked with deciding "whether conditions limiting or banning contact with his children should be imposed" (*id.* at *9) (*citing Morrissey v. Brewer,* 408 U.S. 471, 485 (1972)); and that "A person or panel of persons not personally involved in [the parolee's] supervision must preside at the hearing and render a decision on the imposition of conditions restricting [the parolee's] contact with his children." *Id.* at *17-19.

Here, there is a grave risk of erroneous deprivation of an individuals' parental rights because the decisionmakers are not neutral. This is so for two main reasons.

a. The Decision Is Rendered by Individuals Intimately Involved in the Parolee's Supervision and Treatment

As explained in *Washington v. Harper*, *Felce v. Fiedler*, and *Bleeke v. Server*, courts have held that due process considerations forbid individuals directly involved in a prisoner or parolee's treatment or supervision from rendering decisions about a person's fundamental rights. Here, the Department's policy is to allow treatment providers to make determinations about releasees' contact with their own children. Such decisions are therefore being rendered by individuals intimately involved in the supervision and treatment of the releasees. Additionally, even if it could be said that these decisions were rendered by the so-called "containment team" (*i.e.*, the parole agent, the parole agent's supervisor and treating therapists), these decisions would still be in conflict with the requirements of due process, since all of these individuals on the "containment team" are intimately involved in the supervision

and treatment of releasees, a fact which the district court recognized.[10]

In apparent acknowledgment of the lack of neutrality of the treatment providers and the other members of the "containment team," the IDOC insists that its decision-making process as a whole is valid because it allows releasees to appeal to an IDOC official not directly involved in their treatment. In particular, the IDOC allows releases to appeal to Alyssa Williams, the Acting Assistant Director of the IDOC, or Heather Wright, a therapist at Big Muddy River Correctional Center. But neither Ms. Williams nor Ms. Wright are meaningfully removed and detached. As explained, Ms. Williams is Sarah Brown-Foiles' "boss," and Ms. Wright reports to Brown-Foiles. As the district court recognized, supervisors have an interest in upholding their subordinates' decisions. A.79. Thus, there is still not a neutral person making the initial decision of whether a parent may have contact with his child or considering appeals from the first decision.[11]

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[10] At summary judgment, the district court noted that IDOC's procedures for prohibiting parents from having contact with their children do not involve an independent decisionmaker. A.78 ("[the members of the containment team] are all 'currently involved in [the parolee's] diagnoses or treatment,' and therefore do not qualify as independent decisionmakers.") (*quoting Felce*, 974 F.2d at 1499). The district court also recognized that "IDOC's appeal process does not provide for independent review of the containment team's decision," because the Deputy Chief of Parole is "similarly situated to the reviewing officials in *Felce*, who were held to be insufficiently independent because they 'formed a direct line of supervisors above [the parole agent] and thus had individual interests in supporting his decision.'" *Id*. (*citing Felce*, 974 F.2d at 1499) (explaining that supervisors have an interest in upholding their subordinates' decisions). Likewise, the district court recognized that, given her responsibility to provide training, policies and supervision to therapists, "Brown-Foiles has an individual interest akin to Dixon's in supporting the therapists' recommendations [and] does not qualify as an independent decisionmaker in the administrative appeals process." A.79.

[11] Moreover, as noted above, the appeals process is inadequate to meet the requirement of a neutral decisionmaker because many parents are never afforded an opportunity to appeal. Because therapists are outside of the IDOC's control, the IDOC doesn't have any way to

b. The Decision to Deny Contact with One's Child Is Rendered by Executive Branch Officials (or their Agents) Who Are Charged with Crime Prevention and Law Enforcement

Granting executive branch officials or their designated agents (here, treatment providers) the power to make decisions about parent-child contact creates grave risks of erroneous deprivation because executive branch officials charged with crime prevention and law enforcement will likely fail to strike the right balance between security concerns and constitutionally protected freedoms. Stated differently, it's all too predictable that the IDOC will adopt (and has adopted) a "better-safe-than-sorry" approach that sacrifices constitutional rights to notions of public safety and crime prevention. As Justice Souter wrote in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004):

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty … is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch.

Hamdi at 545. Simply stated, in contrast to a neutral and independent arbiter, such as a court of law or the PRB, the IDOC and its parole agents are not in a position to rein in their security and safety biases to properly balance constitutional rights

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ensure that therapists consistently provide parents a written explanation for restrictions on child contact. And in the absence of a written denial, parole agents won't process appeals. *See, e.g.*, Statement of the Case, IV(A) and (B); III(D) (class members never received written denials).

with safety and supervision concerns. *Cf.* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 Suffolk U. L. Rev. 441, 458 (1999) (arguing that judicial deference to authoritarian institutions can be dangerous because "first, the authoritarian nature of these institutions makes them places where serious abuses of power and violations of rights are likely to occur; and second, the political process is extremely unlikely to provide any protections in these arenas").

3. Alternative Procedures Would Not Compromise Government Interests

The final *Mathews* factor considers the "government's interest," including the "burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. Here, the infrastructure to satisfy due process already exists in the form of the Prisoner Review Board, a state-created neutral and independent body that is already legally tasked with dictating the parole conditions of individuals to be released onto MSR. 730 ILCS 5/3-3-1(a)(5). The PRB already conducts regular hearings at every IDOC facility for that very purpose. *See* Illinois Prisoner Review Board, Operations and Hearing Information (available at: https://idoc.illinois.gov/parole/prisonerreviewboard.html). It would be appropriate for the PRB to consider the need for restrictions on child contact at the same time that it determines the other MSR rules to which a person will be subject.

In conclusion, the application of the *Mathews* test shows that granting unchecked authority to treatment provides to make determinations of parent-child contact violates procedural due process.

B. Seventh Circuit Case Law Warns against Granting Undue Authority to Supervising Authorities to Make Determinations about Fundamental Rights

Granting therapists discretion to make decisions about individuals' fundamental rights conflicts with Seventh Circuit case law. In *U.S. v. Scott*, 316 F.3d 733 (7th Cir. 2003), a case involving an internet ban imposed on a releasee convicted of a sex offense, the Seventh Circuit warned against broad delegations of "standardless power[s]" to parole officers. In *Scott*, this Court explained that such broad delegation of powers leave the door open to the "unacknowledged reliance on illegitimate criteria of selection." *Id*. at 736 (internal citations omitted) (explaining that, in the context of parole, arbitrary conduct is endemic to granting parole officers the power to curtail constitutional rights on their own "whim.")

Elsewhere, this Court has made clear that what can be said about granting undue authority to parole officers can also be said about medical professionals like treatment providers. *See U.S. v. Wagner*, 872 F.3d 535, 543 (7th Cir. 2017) (finding it improper to delegate to a sex offender treatment provider the determination whether a ban on adult pornography should be imposed as a condition of parole, explaining that "we distinguish between permissible conditions that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and impermissible delegations that allow the officer to decide the nature or extent of the defendant's punishment." (quotations omitted)).

C. *Bleeke v. Server* Offers a Model for Making Procedurally Sound Decisions about Parent-Child Contact

If the IDOC seeks to impose restrictions on parent-child contact on a particular parolee, there is a lawful and proper way to do so. In particular, *Bleeke v. Server*, No. 1:09-CV-228, 2010 U.S. Dist. LEXIS 27063 (N.D. Ind. Mar. 19, 2010), offers a model by which such decisions should be made. In *Bleeke*, the plaintiff was on parole for a sex offense from the Indiana Department of Corrections. He sued to enjoin Indiana's parole board from restricting his ability to live with and have contact with his two minor children. After undertaking a thorough analysis of the *Mathews* factors, the court granted the plaintiff's motion for a preliminary injunction, concluding that due process required the parole board to observe the following procedures before restricting parent-child contact:

- The parolee must receive "advance written notice of the time and place of a hearing on the imposition of conditions limiting his contact with his children";
- "A person or panel of persons not personally involved in [the parolee's] supervision must preside at the hearing and render a decision on the imposition of conditions restricting his contact with his children";
- The parolee "must be permitted to appear in person and to be heard at the hearing";
- The parolee "must be permitted to call witnesses and present documentary evidence in opposition to the imposition of the disputed conditions";
- The parolee "must be afforded the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation";
- "Following the hearing, the decisionmaker must issue a written statement as to the evidence relied upon and the reasons for the determination whether or

> not there exists reasonable cause to believe that [the parolee] poses a risk to his children sufficient to ban or limit his contact with them..."

Id. at *6–7. To the extent that it seeks to prohibit a particular parolee from having contact with his or her own child, IDOC should follow similar procedures.[12]

D. A Basic Structural Flaw in the MSR System in Illinois Is the Root of the Problem

To be sure, for purposes of determining the constitutionality of the IDOC's policy granting total discretion to treating therapists to make child-contact determinations, it is probably irrelevant why the IDOC grants therapists so much power in the first place. But for purposes of clarity, it seems a proper question to ask. The answer is that a core structural problem with the administration of MSR in Illinois is at the root of the problem: state law affords the department unfettered discretion to make decisions about parolees' ability to engage in constitutionally-protected rights.

Illinois law vests responsibility for setting the "conditions" of MSR with the PRB, an entity distinct from the IDOC. 730 ILCS 5/3-3-7(a). Most of the conditions the PRB imposes are mandated by Illinois law and are dictated by the offense of which the parolee was convicted. 730 ILCS 5/3-3-7. The IDOC, in turn, is permitted to give parolees any "instructions" that are consistent with the conditions set by the PRB.

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[12] By way of comparison to Illinois' extreme prohibitions on child-parent contact, it is worth noting the procedures in place in California and Texas, which are more protective of the parent-child relationship. *See* Alexis Karteron, *Family Separation Conditions*, 122 Colum. L.R. 649, 666-67 (2022) (In both states, "the standard parole condition for people convicted of sex offenses that bars contact with minors expressly excludes the parolee's children." Texas only limits contact between a parolee convicted of a sex offense and their child in two circumstances: (1) when there is a court order requiring such limitations, or (2) when the parolee's child was the victim of the offense.)

730 ILCS 5/3-3-7 (a)(15) (parolees must "follow any specific instructions provided by the parole agent that are consistent with furthering conditions set and approved by the Prisoner Review Board or by law."). As a practical matter, the line between "conditions" and "instructions" is often blurred.

Here, the PRB gave each of the Plaintiffs an MSR "condition" mandated by Illinois law—*i.e.*, that they must "refrain from all contact, directly or indirectly, personally, by telephone, letter, or through a third party, with minor children without prior identification and approval of an agent of the Department of Corrections." 730 ILCS 5/3-3-7 (b-1)(9). In response, the IDOC formulated the policies at issue here, which resulted in a *de facto* ban on child contact for everyone on MSR for a sex offense. Ultimately, the IDOC has very broad discretion to make policies that, in effect, set the conditions of MSR under the guise of giving parolees "instructions." This leads to therapists' making decisions about constitutional rights in violation of Seventh Circuit precedent and due process principles.

The power to set conditions of parole, effectively speaking, allows parole officers to set the terms of an individuals' sentence, which is a power that is outside the bounds of the executive branch's proper authority. Notably, neither the federal system nor other state systems grant such powers to parole officers. *See, e.g.*, *J.I. v. N.J. State Parole Board*, 228 N.J. 204 (explaining that parole officers' decisions must be approved by the parole board, meaning there is a built-in neutral arbiter to put a check on the powers of parole officers).

III. The IDOC Policy Regarding Parent-Child Contact Violates Due Process Regardless of Who Makes the Final Decision

Putting aside the procedural due process problems associated with there being no neutral arbiter, other aspects of the IDOC policy violate due process and would whether the conditions were imposed by an individual treatment provider; a parole officer, a "containment team" or a judge.[13]

A. The Absence of any Criteria and/or Deadlines by which Determinations Involving Parent-Child Contact Are Made Violates Due Process

As explained in the Statement of Case, the IDOC imposes no criteria and no deadline for therapists' determinations about whether parents may have contact with their own children. The matter is left solely and exclusively up to the individual therapists' personal discretion. Therapists can interfere with that right indefinitely without making any determination of the parent's dangerousness. For example, Dr. Harris will not render a recommendation about child contact for "at least a year." The lack of criteria creates the very conditions this Court has warned against—namely, broad delegation of powers to unaccountable individuals that leaves the door open to the "unacknowledged reliance on illegitimate criteria of selection." *Scott,* 316 F.3d at 736. The absence of any criteria or deadlines creates an obvious risk of arbitrary and capricious decision-making, which is the opposite of a narrowly tailored condition. *See* §IV (discussing requirement of narrow tailoring).

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[13] Judges, too, are constrained in the conditions of parole they can properly impose. *See U.S. v. Shannon*, 743 F.3d 496, 501-502 (7th Cir. 2014) (sentencing judge "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing").

B. A 35-Day Ban Amounts to an Unconstitutional Presumption of Dangerousness

As the district court acknowledged, the IDOC's policy imposes a 35-day period during which there is an irrebuttable presumption against allowing a releasees to have any contact with his or her children. A.16 (describing the policy as imposing "presumptive 35-day ban.") As shown above, the presumptive ban often lasts much longer because therapists withhold a decision while conducting a lengthy investigation during months or years of therapy. As a general matter, irrebuttable presumptions in the context of parole restrictions are at odds with the requirement of particularized findings, accompanied by individualized explanations, especially where, as here, the condition affects a significant liberty interest.[14]

1. A Conviction, Standing Alone, Does Not Support a Presumption of Danger to a Child

The 35-day ban presumes that all persons who have been convicted of sex offenses are a danger to their children. This irrebuttable presumption is inappropriate because the mere commission of a sex offense falls far short of the demand for particularity in making a determination of dangerousness.

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[14] *See, e.g., U.S. v. Burns*, 775 F.3d 1221 (10th Cir. 2014) ("Because of the burden on Mr. Burns' constitutional right of familial association, the restriction is valid only if Mr. Burns presents a danger to S.B. … But the record is not sufficient for us to make this determination in the first instance. There is no evidence that Mr. Burns has abused or sexually molested children, and the record indicates that Mr. Burns has a positive relationship with four of his five children.") (citations omitted); *U.S. v. Quinn*, 698 F.3d 651, 652 (7th Cir. 2012) (vacating a sentence that included a term of supervised release that prohibited "unsupervised contact" between the defendant, who had been convicted of possessing child pornography, and his child, noting that "putting the parent-child relationship under governmental supervision for long periods ... requires strong justification.").

To be sure, two obvious grounds exist for making a determination that someone poses a risk to his or her own child: (1) the child was the victim and (2) the parent is diagnosed as a pedophile who is unable to control their sexual urges. Either of these conditions would constitute "definite and articulable evidence" that the child "has been abused or is in imminent danger of abuse." *Berman v. Young*, 291 F.3d 976, 984-85 (7th Cir. 2002). But neither of these possibilities justifies an automatic ban on parent-child contact for *all* persons who have been convicted of sex offenses, because both of these conditions are easily identified before the individual is released from prison.[15]

2. There Is an Established Methodology for Assessing Risk to a Child

Even assuming that there might exist other reasonable grounds to believe that a parent is dangerous to his own child, a presumptive ban is not justified. The evidence at trial established that an evaluation conducted by a licensed Sex Offender Evaluator is a customary, accepted and valid means of assessing whether a parent poses a risk to a particular child in a short timeframe.

- Dr. Blain, ECF 310, 207:8-18 ("Q. Do you conduct sex offender evaluations at the request of the Department of Children and Family Services? A. Occasionally, yes. Q. In that context, what is your understanding of what the evaluation is used for? A. It's primarily focused on … the risk of contact with children.");

[15] Whether a person's child was the victim is part of the criminal record and the pre-release evaluation (*see* ECF 172 at ¶59); and every person who is released from IDOC custody onto MSR has, pursuant to law, undergone an assessment to determine whether he or she has a mental condition such as pedophilia that meets the criteria for civil commitment as a sexually violent person. 725 ILCS 207/10. Illinois law requires all sex offenders who are released onto MSR to undergo an evaluation to determine whether they suffer from a "mental disorder … affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." 725 ILCS 207/5(b).

- Brown-Foiles, ECF 311, 315:5-16 ("Q. [Am I] correct in understanding that a sex offender evaluation can be aimed at answering a certain question or set of questions about the person being evaluated? A. Sure. Q. And a licensed sex offender evaluator can conduct the evaluation and render a recommendation or opinion as to those identified questions? A. Yes. Q. Could one of the identif[ied] questions be whether an individual who is being evaluated can have contact with a minor child? A. Of course, yes.");

- Dr. Grosskopf, ECF 313, 610:3-9 ("Q. Can a sex offender evaluation … answer a discrete question, such as whether a particular person poses a particular risk to a child? A. Yes."); *id.* at 612:13-17 ("Q. In your experience, a sex offender evaluation can generate accurate or reasonably accurate recommendations concerning specific questions that have been posed to you in connection with that? A. Yes.");

- Dr. Eisenmenger, ECF 255-1, 55:18-56:3 ("Q. Let's talk about the sex offender evaluations that are conducted pre-release within IDOC. Would you feel comfortable making a recommendation about whether someone should be allowed to have contact with their child based on the outcome of one of those evaluations? … A. Yes. And again, depending on the type of contact and everything else.").[16]

The district court discounted this testimony, crediting instead the IDOC's claim that an evaluation conducted post-release would yield a better or "more accurate" assessment of risk. A.7–A.9, ¶¶28–48.

But the fact that the IDOC believes post-release evaluations are better does not justify a presumptive ban that wholly does away with the requirement of individualized "definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse" to justify state interference in the parent-child relationship. *Berman*, 291 F.3d at 984-85 (citation omitted).

[16] It should be noted that the Department is legally mandated to conduct a sex offender evaluation on every person being released from IDOC who has been convicted of a sex offense prior to their release. *See* 730 ILCS 5/3-6-2(j); Dr. Eisenmenger, ECF 255-1, 14:13-16.

The state has not presented any evidence that every person convicted of a sex offense is a risk to their own child to justify its presumption of danger. Due process does not permit the government to impose a prohibition on child contact based solely on a generalized, non-specific fear.[17]

Moreover, the IDOC's "wait-and-see policy" is at odds with cases holding that parole conditions are to be determined before an individual is released from prison. *See U.S. v. Hogenkamp*, 979 F.3d 1167, 1168 (7th Cir. 2020) ("[a] prisoner is entitled to know, before he leaves prison, what terms and conditions govern his supervised release," adding, "People must be able to plan their lives."); *Scott*, 316 F.3d at 736 ("Terms should be established by judges *ex ante*, not by probation officers acting under broad delegations ... .").

C. The IDOC's 35-Day Categorical Ban on Phone Contact Violates Due Process

As set forth above, the IDOC's presumptive 35-day ban applies equally to phone, written, and in-person parent-child contact. The district court found that the presumptive ban on all written communication violated due process, but it upheld

[17] The IDOC's presumption that all releasees are a danger to their children reverses the ordinary presumption that the state must make an initial showing of harm to a child before interfering with parental rights. Such reversals have been rejected by the Supreme Court. *See e.g., Troxel*, 530 U.S. at 69 (finding unconstitutional a law authorizing a court to order visitation rights for any person when visitation might serve "the best interest of the child" and explaining, "In effect, the judge placed on … the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters" and that "[t]he decisional framework employed … directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child.")

the IDOC's ban on phone contact. A.3. The prohibition on phone contact is no less irrational than the prohibition on written communication for at least four reasons:

(1) the presumption imposes greater restrictions on parent-child contact after a person is released from prison than when they were in prison, where letters, phone calls and supervised visitation are permitted. *See, e.g.*, ECF 172 at ¶112 (Joel Mitchell exchanged letters, had regular phone calls and weekly video visits with his children while imprisoned); *Id*. at ¶70 (Zachary Blaye spoke to his son on the phone "four or five times a week" while in prison). It is backwards for the IDOC to think it necessary to keep parents who are out of prison from communicating with their children when they regularly communicated with them while in prison;[18]

(2) phone and written correspondence simply do not present the risk of sexual abuse presented by unsupervised face-to-face interactions. *Id.* at ¶67 (Dr. Blain, Dr. Grosskopf, and Dr. Harris all agree that phone contact presents less risk than in-person contact);

(3) phone and written correspondence can easily be monitored by a custodial parent and/or an agent of the IDOC to guard against any potential victimization; and

(4) for children who have regularly communicated with their parent via phone and by mail, the abrupt disruption of such communication can only have negative consequences for the child.

For all of these reasons, the district court erred in entering judgment for Defendant on Plaintiffs' due process claim.

IV. The District Court Erred in Applying the *Turner v. Safley* Standard

At bottom, this case presents an important but unsettled question of law: How stingy are the constitutional protections for persons under community supervision?

[18] "Backwards" because one of the main purposes of supervised release is to promote reintegration into society, and it simply does not promote reintegration to disrupt one's relationship with one's child without good cause. *See U.S. v. Johnson*, 529 U.S. 53, 59 (2000) ("Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.").

The district court held that its analysis of whether the IDOC's policy is consistent with the demands of substantive due process is governed by the deferential standard applicable to prison regulations set forth in *Turner v. Safley*, 482 U.S. 78 (1978). A.54. The district court rejected Plaintiffs' contention that a condition of MSR that restricts a fundamental right—such as the right of parents to the "care, custody and control of their children" (*Troxel*, 530 U.S. at 65)—must be narrowly tailored to serve a compelling government interest.

The court reasoned that "[g]iven that Plaintiffs remain 'in custody' while they are on MSR, it stands to reason that *Turner* governs the substantive scope of their constitutional rights." A.57.[19] The district court's application of this low standard of review led it to conclude that the policy was constitutional because it is "rationally related" to legitimate interests such as "rehabilitation," fostering "compliance and respect for rules," and "protection of … children." A.60–A.61.

The district court erred in applying a mere "reasonableness" standard to the IDOC's policy for two principal reasons. First, the logic supporting *Turner*'s deferential standard doesn't apply to the community supervision context. Jails and prisons have unique security needs, such as the prevention of escapes, maintenance of order, and keeping contraband out. Deference to prison officials is necessary in this context given institutional security needs that may not be well understood

[19] *Turner*'s four-factor test considers "(1) whether the [prison] regulation has a 'valid, rational connection' to a legitimate governmental interest; (2) whether alternative means are open to inmates to exercise the asserted right; (3) what impact an accommodation of the right would have on guards and inmates and prison resources; and (4) whether there are 'ready alternatives' to the regulation." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (*quoting Turner*, 482 U.S. at 89–91).

outside of prisons. *See, e.g.*, *Turner*, 482 U.S. at 89 (noting prison officials' need to "anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration"). But these same institutional security needs simply do not exist in the community supervision context. Thus, it isn't appropriate to give the same stingy protection to the constitutional rights of parolees as to imprisoned persons.

Second, the district court's decision is inconsistent with the decisions of this Court and many other courts that have consistently found that a more searching inquiry is necessary when a parole restriction abridges a parolees' fundamental rights—particularly the right to familial association. *See*, *e.g.*, *U.S. v. Myers*, 426 F.3d 117, 126 (2d Cir. 2005) (finding that where "a parole condition impacts a fundamental right," the government bears the burden of showing that the restriction is "narrowly tailored to serve a compelling government interest.") (citation omitted); *U.S. v. Loy*, 237 F.3d 251, 256 (3rd Cir. 2001) ("a condition that restricts fundamental rights must be narrowly tailored and directly related to deterring [the defendant] and protecting the public."); *see also* Karteron, 122 Colum. L.R. at 680–81 ("[F]ederal courts reviewing supervised release conditions have been more protective of the right to parent. … Because the right to parent one's children is recognized as a fundamental liberty interest, federal courts routinely recognize that the supervised release statute cabins their discretion to impose conditions infringing that right.") (collecting cases).[20]

[20] *U.S. v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012) (holding that when a court imposes conditions that infringe on the parent-child relationship, it must "undertake an

This Court also has been highly critical of conditions that deprive parolees of the ability to maintain relationships with their children, even when the parolees' convictions involve sex crimes against minors. For example, in *U.S. v. Baker*, 755 F.3d 515, 526 (7th Cir. 2014), this Court vacated a condition of supervised release that prohibited "unsupervised contact" between the defendant, who had been convicted of multiple sex offenses, and his own children because there was "no evidence that Baker has abused or attempted to abuse his own children, or that he is a danger to his own family." *See also*, *e.g., U.S. v. Poulin*, 745 F.3d 796, 802 (7th Cir.2014) (vacating a condition of supervised release that prohibited "unsupervised contact with minors, including [the defendant's] own son and family members" because the record lacked sufficient evidence to impose such a restriction); and *U.S. v. Goodwin*, 717 F.3d 511, 524 (7th Cir. 2013) (vacating a condition of supervised release prohibiting contact with minors without a chaperone "[b]ecause the district court has not provided any explanation of how this condition is reasonably related to [the defendant's] offense and background or to the goals of punishment, involving

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individualized review of that person and the relationship at issue"); *U.S. v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014) ("When a defendant has committed a sex offense against children … general restrictions on contact with children ordinarily do not involve a greater deprivation of liberty than reasonably necessary. But restrictions on a defendant's contact with his own children are subject to stricter scrutiny."); *U.S. v. Davis*, 452 F.3d 991, 994-96 (8th Cir. 2006) ("Because the condition at issue here would interfere with [the defendant's] constitutional liberty interest in raising his own child, the government may circumscribe that relationship only if it shows that the condition is no more restrictive than what is reasonably necessary."); *State v. Letourneau*, 997 P.2d 436, 446 (Wash. Ct. App. 2000) ("[t]here must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children to justify such State intervention."); *Simants v. State*, 329 P.3d 1033, 1039 (Ala. Ct. App. 2014) (applying a "heightened level of scrutiny" to a probation condition that barred a woman convicted of having a sexual relationship with a seventeen-year-old boy from residing with her own children).

no greater deprivation of liberty than is reasonably necessary to achieve these goals.")

Even where courts have applied the *Turner* framework to parole conditions, they have required some form of narrow tailoring where, as here, the right the parolee seeks to exercise is compatible with his status as a parolee. For example, in *Bleeke*, where the court considered the constitutionality of a parole condition that restricted a father's right to have contact with his children, the district court reasoned as follows:

> Although "freedom of association is among the rights least compatible with incarceration," *Overton,* 539 U.S. at 131, the same cannot be said of parole. A parolee's "condition is very different from that of confinement in a prison," precisely because of his interest in pursuing the "enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. The re-establishment of the familial relationship is one of the prime examples of substantive freedom that a parolee enjoys upon achieving his new status. *Id.* …[T]his is very much the *whole point* of parole. Without the ability to foster or even participate in this relationship, the "liberty" provided by parole may be considered a mostly hollow shell.

Bleeke v. Server, 1:09-CV-228, 2010 U.S. Dist. LEXIS 4058, at *25 (N.D. Ind. Jan. 19, 2010) (emphasis in original).

Admittedly, courts use different phrasing to describe the standard of review in the context of parole restrictions that interfere with fundamental rights, but all of them call for "some form of narrow tailoring to further a legitimate governmental interest." Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. Rev. L. & Soc. Change 663, 675 (2019); *see also id*. at 677 ("[J]udicial review of supervision condition will

involve asking the question: Is this condition narrowly tailored to support the government's interests? The hodgepodge of analytical standards in case law all coalesce around this basic question.")

What is clear is that restrictions on familial relationships between parents and their children must be individually tailored to the specific circumstances of the parent. The right at stake is too significant to curtail in a blanket fashion, even for those who have been convicted of sexual offenses. The district court erred in applying the *Turner* test without any requirement of narrow tailoring.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court reverse the district court's decision and remand with instructions to enter judgment for Plaintiffs.

Respectfully submitted,

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/s/ Mark G. Weinberg
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CERTIFICATE OF COMPLIANCE WITH
F.R.A.P 32(a)(7), F.R.A.P. 32(g) and C.R. 32(c)

I certify that the foregoing Plaintiff-Appellant's Brief conforms to the rules contained in F.R.A.P 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 12,904 words.

/s/ Adele D. Nicholas
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on March 20, 2023, I electronically filed the **Brief and Short Appendix for Plaintiff-Appellant** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adele D. Nicholas
Counsel for Plaintiffs-Appellants

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix

/s/ Adele D. Nicholas
Counsel for Plaintiffs-Appellants

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Celina Montoya, et al.,

Plaintiff(s),

v.

Jeffreys,

Defendant(s).

Case No. 18 C 1991
Judge Gary Feinerman

JUDGMENT IN A CIVIL CASE

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment is entered in favor of Plaintiffs Celina Montoya, et al., and against Defendant Rob Jeffreys, insofar as the court declares as follows: The Illinois Department of Corrections' ("IDOC") child-contact policy for parolees convicted of sex offenses violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution insofar as: (1) IDOC fails to offer such parolees a process by which they may submit to the containment team written communications addressed to their child(ren) for review and decision within seven calendar days; and (2) the policy allows IDOC to deny child contact based solely on the parolee's failure to take a polygraph examination where the parolee cannot afford such an examination. In the circumstances described in (2), IDOC may comply with the Due Process Clause by (a) providing financial assistance to the parolee such that the parolee reasonably can afford a polygraph examination offered by a privately employed polygraph examiner; (b) offering the parolee a polygraph examination by an IDOC employed polygraph examiner at a cost that the parolee reasonably can afford; or (c) granting the parolee's child contact request notwithstanding the absence of the polygraph examination. In all other respects, Plaintiffs' constitutional challenges to the IDOC's child-contact policy are rejected, and in those respects judgment is entered in favor of Defendant Rob Jeffreys and against Plaintiffs Celina Montoya, et al.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☒ tried by Judge Gary Feinerman without a jury and the above decision was reached.
☐ decided by Judge on a motion

Date: 9/9/2022

Thomas G. Bruton, Clerk of Court

/s/ Jackie Deanes , Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CELINA MONTOYA, ZACHARY BLAYE, and RONALD MOLINA, individually and on behalf of all others similarly situated,	)	18 C 1991
Plaintiffs,	)	Judge Gary Feinerman
vs.	)	
ROB JEFFREYS, in his official capacity as Director of the Illinois Department of Corrections,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Celina Montoya, Zachary Blaye, and Ronald Molina, who all were placed on mandatory supervised release ("MSR") following imprisonment for Illinois sex offense convictions, bring this suit under 42 U.S.C. § 1983 against Rob Jeffreys in his official capacity as Director of the Illinois Department of Corrections ("IDOC"), alleging that IDOC's implementation of an MSR condition prohibiting them from having contact with their minor children without prior approval violated their Fourteenth Amendment due process rights. Doc. 92. The court has entered a preliminary injunction, Doc. 33; certified a Civil Rule 23(b)(2) class as to certain claims, Doc. 165-166 (reported at 2020 WL 6581648 (N.D. Ill. Nov. 10, 2020)); and granted IDOC summary judgment as to some of the class claims. Docs. 221-222 (reported at 565 F. Supp. 3d 1045 (N.D. Ill. 2021)). The court then held a bench trial on the surviving class claims. Docs. 249-252.

Pursuant to Civil Rule 52(a), the court enters the following Findings of Fact and Conclusions of Law. The Findings of Fact rest on the court's evaluation of the exhibits and witness testimony; unless otherwise noted, if the court cites witness testimony to support a

factual finding, the court found that testimony credible. To the extent any Findings of Fact may be considered Conclusions of Law, they shall be deemed Conclusions of Law, and vice versa. After carefully considering the evidence and assessing the witnesses' credibility, the court finds that Plaintiffs have shown that: (1) IDOC unconstitutionally prohibits written contact between class members and their minor children upon their release from prison and placement on MSR; and (2) in certain circumstances, IDOC unconstitutionally conditions parent-child contact on a class member's ability to afford a polygraph examination. The court declares unconstitutional those two aspects of IDOC's policies. In all other respects, the court finds that Plaintiffs fail to show that IDOC's policies violate due process.

Findings of Fact

A. The Parties and Witnesses

1. Zachary Blaye is a class representative who, while on MSR, did not have permission to have any in-person contact with his minor son until January 2020. 565 F. Supp. 3d at 1058.

2. Ronald Molina is a class representative who, while on MSR, was prohibited from having contact with his son until his son turned eighteen years old. *Ibid.*; Tr. 157:19-158:14, 166:11-166:15 (DeMauro testimony).

3. Celina Montoya is a class member who has been permitted to live at her family home with her children since August 2019. 565 F. Supp. 3d at 1058.

4. Joel Mitchell is a former class member who completed his MSR term in August 2021. Tr. 506:22-504:25, 507:13-507:17 (J. Mitchell testimony).

5. Rachel Mitchell is Joel Mitchell's wife and the mother of their children. Tr. 535:21-535:25, 538:18-539:3 (R. Mitchell testimony).

6. Blaye and Molina represent a certified class comprising "all parents of minor children who are on MSR for a sex offense under IDOC supervision." 2020 WL 6581648, at *15-16.

7. Defendant Rob Jeffreys is IDOC's Director. Doc. 147 at ¶ 6.

8. Sarah Brown-Foiles is IDOC's Manager of Sex Offender Services, a position formerly called Coordinator of Sex Offender Services. Tr. 293:24-294:13 (Brown-Foiles testimony).

9. IDOC currently employs four sex offender therapists who see persons on MSR, and it has plans to hire five more. Tr. 307:22-307:25, 359:9-359:19 (Brown-Foiles testimony).

10. Brown-Foiles supervises the IDOC-employed sex offender therapists, including Dr. Patricia Grosskopf. Tr. 400:19-400:22, 598:23-598:24 (Brown-Foiles testimony; Grosskopf testimony).

11. Brown-Foiles also supervises clinicians working towards licensure as sex offender therapists in Aurora, Illinois. Tr. 401:1-401:22 (Brown-Foiles testimony).

12. Brown-Foiles coordinates training for sex offender therapists who are not employed by IDOC; those therapists are called "community therapists." Tr. 296:5-296:8, 341:7-341:22, 365:10-365:18, 376:24-377:23 (Brown-Foiles testimony).

13. Dr. Jerry Blain and Dr. Eleanor Harris are community therapists. Tr. 200:1-200:17 (Blain testimony; Brown-Foiles testimony); Harris Dep. (Doc. 255-2 at 3 (6:3-7:11)).

14. Dr. Peter Eisenmenger is a licensed sex offender therapist and sex offender evaluator employed by Wexford Health Sources. Eisenmenger Dep. (Doc. 255-1 at 4-5 (11:25-14:12).

15. Steven DeYoung is a parole commander employed by IDOC. He formerly was a parole agent with IDOC's Sex Offender Supervision Unit ("SOSU"). Tr. 20:13-21:5 (DeYoung testimony).

16. Joseph DeMauro is an IDOC parole agent assigned to the SOSU. Tr. 134:5-134:18 (DeMauro testimony).

B. Mandatory Supervised Release

17. Individuals convicted of certain offenses are subject a form of parole called mandatory supervised release ("MSR") following their release from prison. Joint Exh. 1 at 22. For simplicity, the court also refers to MSR as "parole" and persons released on MSR as "parolees."

18. The Illinois Prisoner Review Board imposes MSR conditions on parolees pursuant to 730 ILCS 5/3-3-7. Doc. 244 at p. 6, ¶ 1.

19. The Prisoner Review Board ordinarily imposes on parolees convicted of sex offenses an MSR condition requiring them to "refrain from all contact, directly or indirectly, personally, by telephone, letter, or through a third party, with minor children without prior identification and approval of an agent of the [IDOC]." Doc. 244 at p. 6, ¶ 2; *see* 730 ILCS 5/3-3-7(b-1)(9). For simplicity, the court refers to that requirement as the "no-contact condition."

20. IDOC enforces the no-contact condition and determines the standards, criteria, and process for a parolee to obtain approval to have contact with a minor child. Doc. 244 at pp. 6-7, ¶¶ 3, 15.

21. The SOSU supervises parolees convicted of sex offenses. Doc. 244 at p. 7, ¶ 14; Joint Exh. 1.

22. A small percentage of parolees convicted of sex offenses request contact with their minor children. Tr. 35:23-36:7, 250:22-251:11, 600:8-600:13, 627:24-628:3 (DeYoung testimony; Blain testimony; Grosskopf testimony).

23. IDOC provides such parolees with an information packet about the parent-child contact policy, including the process for submitting child-contact requests and appeals. Doc. 244 at p. 7, ¶ 16.; Joint Exh. 2.

24. Persons with determinate MSR terms may remain in prison for a statutorily mandated length of time rather than serve their MSR terms in a community setting. That practice is known as "maxing out." Doc. 244 at p. 6, ¶ 4.

25. Some individuals convicted of sex offenses who are eligible for MSR choose to "max out" their MSR terms. Tr. 356:11-356:21, 529:5-530:14 (Brown-Foiles testimony; J. Mitchell testimony).

26. Sex offenders who are in prison can have contact with their minor children. Phone calls are monitored and recorded; non-attorney written correspondence is reviewed; and in-person visitation is supervised IDOC correctional officers. Tr. 83:10-84:6 (DeYoung testimony).

27. "Maxing out" thus allows some individuals whose child-contact requests have been or would be denied while on MSR to resume or continue written, telephone, and/or in-person contact with their minor children. Tr. 102:21-103:3, 529:22-530:4 (Tyree testimony; J. Mitchell testimony).

C. Pre-Release Procedures

28. As relevant here, IDOC has two processes for assessing individuals convicted of sex offenses prior to their release on MSR: (a) pre-release evaluations; and (b) Sexually Violent

Persons Commitment Act ("SVPCA") screening. Tr. 318:12-322:4, 378:12-386:14 (Brown-Foiles testimony).

1. Pre-Release Evaluation

29. Illinois law requires that a person convicted of a sex offense "receive a sex offender evaluation" prior to release from prison. Doc. 244 at p. 30-31, ¶ 9; *see* 730 ILCS 5/3-6-2(j).

30. IDOC refers to those evaluations as "pre-release evaluations." Tr. 378:15-378:22 (Brown-Foiles testimony).

31. Pre-release evaluations occur six to twelve months before an individual's release from prison. Tr. 379:4 (Brown-Foiles testimony).

32. Pre-release evaluations necessarily lack information the evaluator could use to assess a parolee's stability in the community, relationship stability, employment, cooperation with supervision, and ability to adapt to stressors outside the prison environment. Tr. 392:16-392:19, 393:5-393:9, 575:19-575:23, 592:3-594:16 (Brown-Foiles testimony; Grosskopf testimony); Eisenmenger Dep. (Doc. 255-1 at 21-22 (81:11-82:5)).

33. As a result, risk assessments conducted while a parolee is in the community are more accurate than assessments conducted prior to release. Tr. 392:10-392:19 (Brown-Foiles testimony).

34. IDOC's pre-release evaluations currently do not include any actuarial risk assessments. Tr. 381:21-381:22 (Brown-Foiles testimony).

35. Actuarial risk assessments, such as the STATIC-99 and STABLE, are not validated for use with prisoners. Tr. 613:1-613:5 (Grosskopf testimony).

36. Despite the lack of validation, IDOC uses the STATIC and STABLE assessments with prisoners seeking to enroll in sex offender therapy while incarcerated. Tr. 332:22-332:25 (Brown-Foiles testimony).

37. Because the STABLE and STATIC actuarial risk assessments are not validated for use with incarcerated persons, they would not necessarily produce accurate results if used before a prisoner's release. Tr. 612:18-613:5, 633:12-633:21 (Grosskopf testimony).

38. In particular, the STABLE assessment is designed for use with non-incarcerated persons because it incorporates information from a person's life in the community that cannot be assessed while a person is incarcerated. Tr. 391:5-392:3 (Brown-Foiles testimony).

39. Accordingly, even if IDOC sometimes performs STABLE assessments for prisoners, it will repeat that assessment after a prisoner's release so that it can consider the risk factors that cannot be captured by an assessment performed in a prison. Tr. 391:15-391:18 (Brown-Foiles testimony).

40. Prisoners who receive sex offender therapy while incarcerated are reassessed after release because the assessed risk can change for reasons such as increased access to victims, access to addictive substances, and inability to reintegrate into community life. Tr. 373:23-374:19 (Brown-Foiles testimony).

41. The Abel assessment is a treatment tool that is not capable of rendering results that would inform child-contact decisions. Tr. 629:24-632:16 (Grosskopf testimony).

42. The Risk of Sexual Abuse to Children ("ROSAC") framework is not an actuarial risk assessment. Rather, it is designed to structure a treatment provider's professional judgment. Tr. 340:5-340:15, 580:22-581:12, 632:21-633:5 (Grosskopf testimony; Brown-Foiles testimony); Pl. Exh. 1 at 10.

43. ROSAC assessments are not designed to be used with prisoners because some factors relate to a parolee's circumstances in the community. Tr. 276:24-277:7, 633:6-633:8, 636:2-636:12 (Blain testimony; Grosskopf testimony).

44. Although it is not impossible to use ROSAC with prisoners, the framework may produce less accurate results because it has not been "normed" for incarcerated populations, which increases the margin of error. Tr. 343:3-343:5, 636:13-637:6 (Brown-Foiles testimony; Grosskopf testimony).

45. Pre-release evaluations are based on voluntarily self-reported information, which is not corroborated and can contain inaccuracies. Tr. 316:9-317:5, 318:25-319:9, 337:9-337:15, 379:23-381:2 (Brown-Foiles testimony).

46. Information about a prisoner gathered in the pre-release evaluation may change once the prisoner is released as a parolee into the community. Tr. 627:14-627:23 (Grosskopf testimony).

47. Given the limits of pre-release evaluations, the most accurate risk assessments are performed while a parolee is living in the community. Tr. 392:10-392:13, 627:6-627:19, 636:6-636:12 (Brown-Foiles testimony; Grosskopf testimony).

48. There is no evaluation or combination of pre-release evaluations that can be as accurate as post-release evaluations. Tr. 392:4-392:8 (Brown-Foiles testimony).

2. SVPCA Screening

49. The SVPCA, 725 ILCS 207/1 *et seq*., creates a procedure under which the Attorney General of Illinois or the relevant county's State's Attorney may petition for civil commitment of certain individuals convicted of sex offenses upon their release from prison. 565 F. Supp. 3d at 1053.

50. To facilitate this process, the SVPCA requires IDOC to conduct a "comprehensive evaluation of the person's mental condition." 725 ILCS 207/10(c)(2).

51. An evaluator conducting a first-level SVPCA screening will review the pre-release evaluation report and other documents in the prisoner's master file to determine whether the prisoner should be referred for a second, more comprehensive evaluation conducted by a sex offender evaluator, who is a Ph.D. psychologist. Tr. 320:14-321:2 (Brown-Foiles testimony).

52. A first-level SVPCA screening does not include an interview with the prisoner. Tr. 383:22-383:24 (Brown-Foiles testimony).

53. A second-level SVPCA screening includes an interview and actuarial risk assessments, including the STATIC assessment. Tr. 384:18-384:22 (Brown-Foiles testimony).

54. A second-level evaluation ordinarily takes three to four weeks to complete. Tr. 384:23-384:25 (Brown-Foiles testimony).

55. Because the threshold for civil commitment is high, a person could have an above-average recidivism risk and still not be referred for civil commitment through the SVPCA screening process. Tr. 386:4-386:14 (Brown-Foiles testimony).

D. Post-Release Evaluation

56. IDOC convenes "containment teams" to evaluate parolees' child-contact requests. Tr. 428:8-428:10 (Dixon testimony); Joint Exh. 1.

57. A parolee's containment team comprises the parolee's assigned parole agent, the parole agent's commander, and a sex offender therapist. Tr. 428:11-428:14 (Dixon testimony).

58. IDOC policy requires that a containment team make an initial determination on child contact within 21 days of a parolee's request for child contact. Tr. 442:14-442:18 (Dixon testimony; DeMauro testimony); Joint Exh. 1 at 9.

59. IDOC policy does not establish a different timeline for requests seeking contact only via written communications. Joint Exh. 1 at 9.

60. DeYoung testified that he would not have time to review written communications that parolees would like to send to their minor children. Tr. 57:11-57:20 (DeYoung testimony). As explained below, the court finds that testimony unpersuasive.

61. If the containment team restricts or denies parent-child contact, the team must provide the parolee with written reason(s) for the decision. Joint Exh. 1 at 10; Joint Exh. 2 at 4.

62. An IDOC form titled "Parolee/Releasee Determination of Request for Contact with Child(ren)" lists standard reasons for denial, including "Insufficient therapy sessions to make assessment" and "Therapist requested polygraph but results are not available." Joint Exh. 2 at 4.

63. If the containment team approves child contact, the containment team and parolee develop a "safety plan" setting forth requirements or guidelines for child contact. Joint Exh. 1 at 10; Joint Exh. 2 at 6-8; Tr. 568:9-568:14 (Grosskopf testimony).

64. The form safety plan has a "requirement[]" that "[t]he parolee has successfully completed and passed a sexual history OR maintenance polygraph." Joint Exh. 2 at 6.

65. IDOC policy, however, does not require a parolee to take a polygraph examination prior to parent-child contact, so the safety plan "requirement" applies only when a therapist requests a polygraphs. Tr. 452:17-453:3 (Dixon testimony).

66. In evaluating child-contact requests, the containment team may consider compliance and stability in the community, such as whether the parolee has stable housing, has a stable job, and attends school or other training. Tr. 469:6-469:20, 471:16-472:23, 575:19-575:23, 589:1-589:5 (Dixon testimony; Grosskopf testimony).

1. Polygraph Examinations

67. IDOC permits therapists to exercise their discretion in deciding whether to withhold a recommendation for parent-child contact until a parolee takes and passes a polygraph examination. Tr. 462:9-462:13, 486:22-487:2 (Dixon testimony).

68. Some, but not all, sex offender therapists require parolees to take one or more polygraph examinations prior to the therapist recommending parent-child contact. Tr. 453:4-453:9 (Dixon testimony).

69. Regardless of their financial situation, parolees must pay for their own polygraph examinations without any financial assistance from IDOC. Doc. 244 at p. 6, ¶ 8; Tr. 164:18-164:24, 241:10-241:22, 310:3-310:10, 497:12-497:15 (DeMauro testimony; Blain testimony; Brown-Foiles testimony; Dixon testimony).

70. Polygraph examinations typically cost parolees between $200 and $400. Doc. 244 at p. 6, ¶ 7; Tr. 242:5-242:7, 309:22-310:2 (Blain testimony; Brown-Foiles testimony).

71. Of the sex offender therapists who require a polygraph examination, some do not make exceptions for parolees who cannot afford to pay the fee. Tr. 241:23-242:4, 246:24-247:2 (Blain testimony).

72. Some private polygraph examiners, at their discretion, offer discounts or payment plans to parolees. Tr. 242:8-243:1 (Blain testimony).

73. IDOC offers no process or mechanism by which a parolee can take a polygraph examination if the parolee is unable to afford it. Tr. 310:8-310:10, 497:16-497:19 (Brown-Foiles testimony; Dixon testimony).

74. Ability to pay for a polygraph has no connection to the risk of harm presented by parolee-child contact. Tr. 165:9-165:12 (DeMauro testimony).

75. Still, Dr. Blain considers the ability to pay for a polygraph when assessing a parolee's risk profile. Tr. 269:1-269:9, 284:8-248:11 (Blain testimony).

76. In November 2019, Dr. Blain withheld his support for Molina's child-contact request because Molina had not taken a polygraph examination. Tr. 166:3-166:24, 254:7-257:14, 258:14-258:23 (DeMauro testimony; Blain testimony).

77. At that time, Molina could not afford to pay for a polygraph examination. Tr. 166:8-166:15 (DeMauro testimony).

78. Approximately half of parolees do not have the financial resources to pay for a therapist upon release, Tr. 46:22-47:4 (DeYoung testimony), which strongly suggests they also lack the funds to pay for a polygraph.

2. Duration of Therapy

79. Some providers, such as Dr. Grosskopf, do not set a lower bound for how long a parolee must be enrolled in therapy before parent-child contact will be approved. Tr. 582:19-583:14, 589:16-589:23 (Grosskopf testimony).

80. Other providers have a general timeline for how long a parolee must enroll in therapy, such as six months to a year, for them to make an informed recommendation regarding parent-child contact. Tr. 236:24-237:5 (Blain testimony).

81. Other providers set a lower bound for duration in therapy, but still exercise professional discretion to make individualized assessments. Harris Dep. (Doc. 255-2 at 13-14 (48:21-49:20; 50:14-50:21)).

82. IDOC policy does not cap the length of time, whether measured in weeks or number of therapy sessions, a provider can take to be able to make a child-contact recommendation. Tr. 350:11-350:25 (Brown-Foiles testimony).

83. A parolee who believes that a therapist has taken too long to make a parent-child contact recommendation can seek input from an IDOC-employed therapist, contact Brown-Foiles, or file a formal appeal. Tr. 394:22-395:7 (Brown-Foiles testimony).

84. A parole agent can also refer a parolee to another provider, such as Dr. Grosskopf, to expedite the decisional process. Tr. 47:7-48:12, 359:20-360:3 (DeYoung testimony; Brown-Foiles testimony).

85. Although Dr. Grosskopf's IDOC office in Chicago currently has a waiting list for new clients, she historically has made exceptions that allow her to see on an expedited basis parolees requesting child contact. Tr. 54:3-54:6, 585:8-586:6 (DeYoung testimony; Grosskopf testimony).

3. Compliance with Parole Conditions

86. Compliance with parole conditions is one factor the containment team uses to decide whether to approve parent-child contact requests. Tr. 471:13-473:23, 573:2-575:14 (Dixon testimony; Grosskopf testimony).

87. IDOC does not automatically deny parent-child contact requests if the parolee has a certain number of parole violations. Tr. 452:11-452:16 (Dixon testimony).

88. In evaluating this criterion, IDOC considers a parole violation's seriousness, and minor parole violations do not result in the denial of parent-child contact. Tr. 78:23-79:6, 451:10-451:19, 477:14 (DeYoung testimony; Dixon testimony).

89. "Minor" parole violations include, for example, returning home late, leaving early for work, and failing to check in as instructed. Tr. 451:19-451:25, 574:20-575:4 (Dixon testimony; Grosskopf testimony).

90. More serious parole violations include patterns of repeated violations, using alcohol and/or drugs, not being responsive to a parole agent, and sexual offenses (such as

possessing an unauthorized cell phone containing pornographic images). Tr. 79:8-79:13, 172:17-172:25, 452:2-452:10, 574:9-575:10 (DeYoung testimony; DeMauro testimony; Dixon testimony; Grosskopf testimony).

E. Administrative Appeals Process

91. If the containment team denies a child-contact request, the containment team reviews that decision every 28 days. Tr. 443:3-443:14 (Dixon testimony).

92. A parolee whose child-contact request is denied may also file an administrative appeal. Tr. 398:16-398:19 (Brown-Foiles testimony); Joint Exh. 1.

93. Appeals are decided by the Deputy Chief of Parole or a designee. Joint Exh. 1.

94. Brown-Foiles is the Deputy Chief of Parole's designee and ordinarily decides appeals. Doc. 244 at p. 7, ¶ 17; Tr. 399:1-399:2, 447:7-447:14, 448:6-448:23 (Brown-Foiles testimony; Dixon testimony).

95. In deciding appeals, Brown-Foiles reviews the parolee's records, risk evaluations, and treatment documents. She also sometimes speaks directly with the parolee. Tr. 400:12-400:18 (Brown-Foiles testimony).

96. As of April 29, 2022, no appeal from a child-contact decision has involved an IDOC-employed or community therapist supervised by Brown-Foiles. Tr. 402:1-402:13 (Brown-Foiles testimony).

97. If such an appeal were filed, Brown-Foiles would not decide the appeal. Tr. 403:1-403:3 (Brown-Foiles testimony).

98. Brown-Foiles would not participate in any appeal from an initial child-contact decision in which she participated or offered advice. Tr. 413:13-413:21 (Brown-Foiles testimony).

99. Instead, such appeals would be forwarded to Alyssa Williams or Heather Wright. Tr. 403:5-403:8, 413:22-414:1 (Brown-Foiles testimony).

100. Williams is the IDOC Chief of Programs and, in that capacity, supervises Brown-Foiles. Tr. 403:9-403:12, 414:5-414:6 (Brown-Foiles testimony).

101. Wright is the Clinical Director at Big Muddy River Correctional Center and, in that capacity, oversees sex offender treatment provided there. Tr. 403:19-404:2 (Brown-Foiles testimony).

102. Wright does not participate in, and does not supervise anyone who participates in, initial child-contact determinations. Tr. 404:3-404:9 (Brown-Foiles testimony).

103. IDOC policy requires appeals to be decided in writing within 21 days of submission. Joint Exh. 1.

Conclusions of Law

The court certified four questions to be tried as a class action: "(1) whether the IDOC policy's presumptive 35-day ban on parent-child contact violates procedural due process; (2) whether the presumptive 35-day ban violates substantive due process; (3) whether certain criteria IDOC uses to make parent-child contact determinations violate substantive due process; and (4) whether the lack of a neutral decisionmaker violates procedural due process." 2020 WL 6581648, at *16. As to the third question, Plaintiffs challenged five criteria: "(1) not having taken a polygraph[;] (2) insufficient duration of therapy; (3) denial of the parolee's guilt by the parolee or the child's custodial parent; (4) noncompliance with conditions of parole; and (5) unreliable attendance at therapy." 565 F. Supp. 3d at 1059. The court granted IDOC summary judgment as to two of those criteria: denial of guilt (as limited to a restriction on what the child's guardian or the chaperone of an in-person visit may do and say) and unreliable

attendance at therapy (as used to capture attendance, engagement, and participation). *Id*. at 1072-74. The remaining claims proceeded to trial. (The case remains a proper class action even if the two class representatives' claims became moot after the class was certified. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) ("[A] class action is not rendered moot when the named plaintiff's individual claim becomes moot *after* the class has been duly certified.").)

As the court held, the standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), governs Plaintiffs' substantive due process claims. 565 F. Supp. 3d at 1060-63. *Turner* arose in the prison context, but the Seventh Circuit has held that it applies with equal force in the parole context. *Id*. at 1062 (citing *Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992)). As relevant here:

> *Turner* holds that "federal courts must take cognizance of the valid constitutional claims of prison inmates," but that courts must "accord deference to the appropriate prison authorities." 482 U.S. at 84-85. To accommodate those competing concerns, *Turner* articulates "a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." *Id*. at 85 (internal quotation marks and alteration omitted). The four-factor test considers: "[1] whether the [prison] regulation has a 'valid, rational connection' to a legitimate governmental interest; [2] whether alternative means are open to inmates to exercise the asserted right; [3] what impact an accommodation of the right would have on guards and inmates and prison resources; and [4] whether there are 'ready alternatives' to the regulation." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (quoting *Turner*, 482 U.S. at 89-91). "*Turner* does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Id*. at 136.
>
> "The four factors are all important, but the first one can act as a threshold factor regardless which way it cuts." *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010); *see also Van den Bosch v. Raemisch*, 658 F.3d 778, 785 n.6 (7th Cir. 2011) ("Though each of the factors is relevant in assessing the reasonableness of a regulation, we have previously observed that the first factor serves as a threshold, and the district court need not explicitly articulate its consideration of each one.") (internal quotation marks omitted).

…

> Under *Turner*, "[t]he burden ... is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132; *see also Jackson v. Frank*, 509 F.3d 389, 391 (7th Cir. 2007) ("When challenging the reasonableness of the prison's regulation, the inmate bears the burden of persuasion."). Even so, "prison officials must still articulate their legitimate governmental interest in the regulation and provide some evidence supporting their concern." *Riker v. Lemmon*, 798 F.3d 546, 553 (7th Cir. 2015) (internal quotation marks omitted).

565 F. Supp. 3d at 1061 (alterations and second omission in original). By contrast, the familiar three-part balancing test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), governs Plaintiffs' procedural due process claims. 565 F. Supp. 3d at 1063 (explaining that, although *Turner* governs the scope of the affected private interest, it "does not displace *Mathews* as the overarching framework for the procedural due process analysis").

A. No-Contact Condition

Parolees subject to the no-contact condition are presumptively banned from contact with their minor children. Doc. 244 at p. 30, ¶ 7; 565 F. Supp. 3d at 1052-53. Plaintiffs challenge the presumptive ban as a violation of both substantive and procedural due process.

1. Substantive Due Process

As the court held, the no-contact condition burdens parolees' constitutional right to familial association. 565 F. Supp. 3d at 1064. Under *Turner*, the policy's constitutionality depends on "whether Plaintiffs can identify an 'obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost' to IDOC's 'valid penological goal[s].'" *Id*. at 1065 (alteration in original) (quoting *Overton*, 539 U.S. at 136). The same standard applies even where the policy adversely affects the rights of a custodial parent who is not on parole. *See Nigl v. Litscher*, 940 F.3d 329, 334 & n.2 (7th Cir. 2019) (noting that *Turner* applies when a lawsuit challenges prison regulations, "whether the rights of

prisoners or of nonprisoners are at stake") (quoting *Keeney v. Heath*, 57 F.3d 579, 581 (7th Cir. 1995)).

Plaintiffs propose that IDOC could "rely on a sex offender evaluation to consider whether a parent may have [in-person] contact with and/or reside in a home with his or her child prior to the parent's release from custody," arguing that the proposal is feasible because IDOC "already conducts a sex offender evaluation on every person being released from IDOC who has been convicted of a sex offense as required by law." Doc. 262 at 10. Based on the court's findings of fact, and insofar as in-person parent-child contact is concerned, Plaintiffs' proposed alternative is inadequate because it imposes more than a *de minimis* cost on IDOC's valid penological goals. Importantly, the pre-release evaluations that IDOC already conducts, though called "sex offender evaluations" under Illinois law, are different from the post-release "sex offender evaluations" conducted on parolees after their release. As Brown-Foiles and Dr. Grosskopf testified, the pre-release evaluations materially differ in that they lack actuarial risk assessments and do not render an accurate risk level.

IDOC could not reasonably adopt Plaintiffs' proposed alternative at no more than *de minimis* cost to its valid penological interests. The problem is not that pre-release assessments could not be administered, as IDOC already uses assessments in sex offender therapy programs offered in prisons and during the second-level SVPCA screening process. Rather, the severe burden on IDOC's penological interests arises from the inaccuracy of those pre-release assessments.

As Brown-Foiles explained, the "most accurate risk assessment" comes from using the "best information" about a parolee's transition to community life, which is necessarily unavailable in a pre-release context. As a result, Brown-Foiles persuasively concluded that there

is no assessment or combination of assessments that could provide an adequate substitute for post-release evaluation by a sex offender therapist. Similarly, Dr. Grosskopf explained that, given the differences between prison life and community life, an accurate assessment requires some post-release evidence regarding the parolee's transition to and stability in the community. In other words, even if IDOC could incorporate actuarial risk assessments into pre-release evaluations, those assessments still would lack the most probative information about the risk of harm to parolees' children from parent-child contact. That necessarily imposes a severe burden on IDOC's interest in ensuring child safety.

Resisting that conclusion, Plaintiffs suggest that if IDOC's pre-release evaluations are not true "sex offender evaluations," then they violate Illinois law requiring IDOC to conduct "sex offender evaluation[s]," 730 ILCS 5/3-6-2(j), before a parolee's release. Doc. 262 at 11. That argument is unpersuasive, as whether IDOC's pre-release evaluations conform to the state law meaning of "sex offender evaluation[s]" has no bearing on Plaintiffs' federal due process claims. *See Wozniak v. Adesida*, 932 F.3d 1008, 1011 (7th Cir. 2019) ("The meaning of the Due Process Clause is a matter of federal law, and a constitutional suit is not a way to enforce state law through the back door.").

Plaintiffs further argue that "IDOC's presumptive ban on parent-child contact upon release often has a profoundly destabilizing effect on" parolee parents and thereby "undermines the very interests it seeks to promote." Doc. 262 at 15. Some evidence supports Plaintiffs' view: the financial and emotional stresses of living apart from their children can undermine parolees' rehabilitation and reintegration into the community, and some parolees choose to "max out" their MSR term in prison so as to maintain contact with their children. But those facts do not render IDOC's policy arbitrary or irrational, as IDOC has a strong interest in assessing parolees'

stability and reintegration into the community before allowing child contact. Ultimately, the court owes deference to IDOC officials' judgments regarding the proper balance between its rehabilitative and safety goals. *See Overton*, 539 U.S. at 132 ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."); *Toston v. Thurmer*, 689 F.3d 828, 830-31 (7th Cir. 2012) (deferring to prison administrators' safety rationale even though their justification was "not ample"). Against that deferential backdrop, Plaintiffs have failed to satisfy their burden under *Turner* to disprove the validity of IDOC's policy.

Plaintiffs also suggest that the no-contact condition is overbroad insofar as IDOC could exempt remote contact—such as phone calls and letters—without any risk of harm. Doc. 262 at 7-8. Thus, according to Plaintiffs, remote contact is another ready alternative that would accommodate their parental rights without threatening IDOC's valid safety concerns. *Ibid*.

Allowing phone calls would require safeguards imposing a greater than *de minimis* burden on IDOC. Although a child could not be physically harmed by phone contact, other predatory behaviors are possible. If IDOC allowed phone contact, it would need to record or monitor the calls and, potentially, intervene instantaneously to protect child safety. That would, at a minimum, pose a substantial administrative burden. It is true, as Plaintiffs note, that IDOC allows parent-child calls from prison. But no record evidence suggests that IDOC could recreate at *de minimis* cost the existing infrastructure used to record or monitor prison phone calls. Under *Turner*, IDOC's policy survives insofar as it governs phone calls.

By contrast, IDOC's safety justification for banning written communication does not pass muster. Of course, as with phone calls, some written communications could contain harmful

content. But written communications need not be regulated and reviewed in real time: a parolee could submit a proposed written communication to a parole agent for prior review and approval. The amount of time it would take IDOC to review written communications like a letter or a birthday card would be *de minimis*. Reviewing such writings would require no more than a few moments. DeYoung's testimony that he does not have time as a parole agent or parole commander to review written communications is not persuasive and, even if it were, IDOC easily could provide an alternative process, such as review by the parolee's therapist.

Plaintiffs have therefore met their burden to show that IDOC's ban on parent-child contact is unconstitutional insofar as it fails to provide parolees an opportunity for written parent-child contact before other forms of contact are permitted. The policy is declared unconstitutional, as follows: IDOC must provide a parolee not otherwise approved for parent-child contact the opportunity to submit proposed written communications for approval. Within seven days of submission, IDOC shall approve or disapprove the communication. If the communication is disapproved, IDOC must briefly give the reasons for the disapproval in writing, and the parolee may seek administrative review through the existing appeal process. Disapproval shall be without prejudice to the parolee's submitting a revised version of the written communication that addresses IDOC's concerns.

Finally, the court notes that the denial of parent-child contact for reasons unrelated to child safety would raise grave constitutional concerns. *See Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 478 (7th Cir. 2011) ("The fundamental right to familial relations is an aspect of substantive due process. … This right is not absolute, but must be balanced against the state's interest in protecting children from abuse. To achieve the proper balance, caseworkers must have some definite and articulable evidence giving rise to a reasonable suspicion of past or

imminent danger of abuse before they may take a child into protective custody.") (internal quotation marks omitted). Consistent with that principle, IDOC policy does *not* permit containment team members to withhold child contact for non-safety-related reasons. Dr. Blain's testimony, which suggested he could withhold child-contact approval to incentivize parolees to comply with other aspects of their therapy, appears to be an aberrant misunderstanding of the policy, which IDOC repudiated at closing argument. Doc. 267. The court expects that IDOC, consistent with its representations regarding its policy's proper implementation, will ensure that containment team members understand the permissible bases for limiting or denying child contact. And, consistent with the policy, a parolee whose contact request has been denied for a potentially invalid reason can file an administrative appeal.

2. Procedural Due Process

Plaintiffs' procedural due process claim challenges both the lack of a pre-deprivation hearing and, if a post-deprivation hearing suffices, the promptness of such a hearing. 565 F. Supp. 3d at 1066. As noted, the three-factor *Mathews* balancing test governs the claim. *Id*. at 1063. That test considers: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

a. Pre-Deprivation Hearings

Weighing the *Mathews* factors, pre-deprivation hearings are not required. As the court held in its summary judgment opinion, the first factor—a parolee's liberty interest in familial association—weighs in Plaintiffs' favor. 565 F. Supp. 3d at 1067 ("No matter the outcome of a

post-deprivation hearing, parolees can never reclaim the time they have been separated from their children during the no-contact period following their release. The first *Mathews* factor therefore weighs in favor of pre-deprivation hearings."). Trial testimony that some parolees elect to "max out" their MSR in prison rather than give up contact with their children underscores the substantial weight of that liberty interest. The evidence adduced at trial, however, shows that the other two factors outweigh Plaintiffs' liberty interest.

"The second *Mathews* factor considers 'the risk of an erroneous deprivation of [the affected] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.'" *Ibid*. (quoting 424 U.S. at 335). Without pre-deprivation hearings, class members face a substantial risk of an erroneous deprivation because they are not allowed to pursue a pre-release process for receiving an individualized child-contact decision based on the risk of harm to the child. *Ibid*. But, as explained above, Plaintiffs' proposed alternative process would adversely affect the accuracy of IDOC's risk evaluation regarding child-contact requests. Pre-deprivation evaluations lack certain features, including actuarial assessments, that diminish their reliability. And even if it were feasible for IDOC to add actuarial assessments to its pre-release evaluations, such evaluations still would lack key inputs about parolees' adjustment to life in the community and ability to handle stress outside prison.

The third *Mathews* factor likewise weighs heavily in IDOC's favor. As the court held in its summary judgment opinion, IDOC has a legitimate interest in making "'an accurate and just decision'" as to whether parolee-child contact "pose[s] risks to the child's health and safety." 565 F. Supp. 3d at 1068 (quoting *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981)). As noted, the court credits Brown-Foiles's and Dr. Grosskopf's testimony that pre-release evaluations are inherently less accurate and reliable than post-release evaluations

because the former lack critical information about how a parolee will adjust to life in the community after release. Post-release evaluations thus serve IDOC's weighty interests in promoting child safety.

Plaintiffs argue that "testimony about the shortcomings of the pre-release evaluations conducted within IDOC was contradicted by Dr. Peter Eisenmenger." Doc. 262 at 11. Dr. Eisenmenger testified that, in certain circumstances, he would feel comfortable making child-contact recommendations based on pre-release evaluations. Doc. 255-1 at 14-15 (53:25-56:3). But he later agreed that, in evaluating the permissibility of visitation or living with a child, it would be "more appropriate" to conduct post-release evaluations, essentially for the reasons stated by Brown-Foiles and Dr. Grosskopf. *Id*. at 21-22 (81:13-82:11); *see also id*. at 12 (42:5-43:4) (testifying that, before making a recommendation about parolee-child contact, he would want "to know what [the parolee's] functioning is going to be in the community for a while because they can—there's treatment in the facility, which is under a—under a very controlled environment, but what happens in the community could be something completely different than what they're presenting in the facility itself. So someone could be saying all the right things and acting the right way in the facility, but then when they get out in the community, it could be a completely different type of situation," and that he would want to see how a parolee functioned in the community for "at least six months"). In any event, even if Dr. Eisenmenger's testimony conflicted with that of Brown-Foiles and Dr. Grosskopf, the court would credit Brown-Foiles and Dr. Grosskopf's opinions based on the depth of their experience, the clarity and cogency of their testimony, and their demeanor while testifying.

b. Prompt Post-Deprivation Hearings

IDOC's policy satisfies procedural due process by providing for sufficiently prompt post-deprivation hearings that yield an initial decision within twenty-one days of a parolee's

child-contact request. "Due process requires that post-deprivation determinations be 'sufficiently prompt.'" 565 F. Supp. 3d at 1068 (quoting *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 618 (7th Cir. 2002)). "The degree of promptness required is determined by balancing 'the importance of the private interest and the harm to the interest occasioned by the delay; the justification offered by the Government for the delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been erroneous.'" *Id*. at 1069 (quoting *FDIC v. Mallen*, 486 U.S. 230, 242 (1988)). Because "[t]hat balancing test merely 'rephrase[s]' the *Mathews* test for cases alleging an unconstitutional delay in providing post-deprivation process," *ibid*. (second alteration in original) (quoting *DeVito v. Chi. Park Dist.*, 972 F.2d 851, 855 (7th Cir. 1992), the court's due process evaluation of IDOC's post-deprivation hearings mirrors the *Mathews* analysis for pre-deprivation hearings.

IDOC has a compelling interest in making accurate determinations about the risk of harm posed by parolee-child contact. Again, the court credits trial testimony, particularly from Brown-Foiles and Dr. Grosskopf, that accurate and reliable decisions require an evidentiary basis from which decisionmakers can evaluate a parolee's transition to community life. Given the need for IDOC to collect post-release information in order to make a reasoned and accurate risk assessment regarding parent-child contact, IDOC has offered a compelling justification for a twenty-one-day delay in making an initial determination. That compelling justification would outweigh the other *Mathews* factors even if those factors weighed in Plaintiffs' favor. It follows that due process does not require more prompt post-deprivation hearings and initial decisions than those provided by IDOC policy.

B. Criteria Used to Evaluate Child Contact Requests

As noted, the remaining aspects of Plaintiffs' child contact criteria claim challenge, on substantive due process grounds, three criteria the containment teams use to evaluate requests for

parent-child contact: (1) the parolee's not having taken a polygraph; (2) insufficient duration of therapy; and (3) the parolee's noncompliance with conditions of parole. 565 F. Supp. 3d at 1069-74.

1. Polygraph Requirement

IDOC policy allows therapists to condition parent-child contact recommendations on a parolee's having taken and passed a polygraph examination. In denying IDOC's summary judgment motion as to this criterion, the court observed that, based on the undisputed record evidence, Plaintiffs "fail[ed] to raise a genuine dispute of material fact as to the validity, as a general matter, of IDOC's polygraph requirement." 565 F. Supp. 3d at 1071. The claim nonetheless proceeded to trial because a parolee who cannot afford to pay for a polygraph examination may be unable to receive approval for parent-child contact even if IDOC otherwise has no reason to deny the parolee's request. IDOC's summary judgment briefing failed to "articulate a legitimate governmental interest in denying parolees' contact with their children based on inability to pay for a polygraph." *Ibid*.

IDOC's post-trial submissions likewise fail to articulate or defend any state interest in conditioning parent-child contact in a parolee's ability to pay for a polygraph examination. Doc. 263 at 15-16; Doc. 267 (IDOC's closing argument). In fact, no trial evidence supports *any* rational connection between a parolee's ability to pay for a polygraph and a risk of harm from parent-child contact. *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a State could not condition an indigent parent's right to appeal a parental-rights termination on her ability to pay record preparation fees, in part because of the significance of parent-child relationships). (To the extent that Dr. Blain's testimony that he considers the ability to pay when assessing a parolee's risk profile could be construed to suggest that there is such a rational connection, the court finds that testimony wholly unpersuasive, as Dr. Blain did not articulate any basis for that suggestion.)

Thus, under the *Turner* standard, IDOC fails to "articulate [a] legitimate governmental interest in" denying child contact to an otherwise eligible parolee who cannot afford a polygraph and to "provide some evidence supporting [IDOC's] concern." *Riker*, 798 F.3d at 553 (internal quotation marks omitted); *see also Lashbrook v. Hyatte*, 758 F. App'x 539, 542 (7th Cir. 2019) ("At the outset we note that the application of the *Turner* factors may require defendants to produce evidence that justifies the[ir] policies.").

IDOC argues that Plaintiffs fail to show that the polygraph payment condition "is unconstitutional in all of its applications," making a facial challenge inappropriate. Doc. 263 at 15-16. True enough, "[u]nder the most exacting standard the [Supreme] Court has prescribed for facial challenges, a plaintiff must establish that a law is unconstitutional in all of its applications." *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015) (internal quotation marks omitted). "But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct." *Ibid*. Thus, "[t]he proper focus of constitutional inquiry is the group for whom the [policy] is a restriction, not the group for whom the [policy] is irrelevant." *Ibid*. (internal quotation marks omitted); *see also Fields v. Smith*, 653 F.3d 550, 557 (7th Cir. 2011) (same). The appropriate frame here, then, is not whether the polygraph payment condition is unconstitutional as to parolees whose therapists do not require a polygraph or parolees who can afford one, but whether parolees (like Molina) who cannot afford a polygraph may be denied parent-child contact based solely on their inability to pay.

Viewed under that frame, the policy is unconstitutional. When a sex offender therapist requires a polygraph that a parolee cannot afford, IDOC effectively conditions parent-child contact on the parolee's ability to pay. The court can declare unconstitutional that aspect of the

policy, even though IDOC's formal, written procedures do not explicitly address parolees' ability to pay. *Cf. Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 & n.2 (7th Cir. 2017) (affirming a preliminary injunction of an "unwritten" government policy), *abrogation on other grounds recognized in Ill. Repub. Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020). In fact, it is the policy's omission of any mechanism addressing ability to pay for a polygraphs that makes the criterion unconstitutional as to class members who cannot afford one.

Thus, the court declares the polygraph criterion unconstitutional to the extent it allows IDOC to deny a child-contact request based solely on the parolee's failure to take a polygraph examination if the parolee cannot afford an examination. In such circumstances, IDOC must (a) provide financial assistance to the parolee such that the parolee reasonably can afford a polygraph examination offered by a privately employed polygraph examiner; (b) offer the parolee a polygraph examination by an IDOC-employed polygraph examiner at a cost that the parolee reasonably can afford; or (c) grant the parolee's child-contact request notwithstanding the absence of the polygraph examination. To be clear, these obligations do *not* apply when IDOC articulates another valid, independently sufficient ground for denying a child-contact request. IDOC must provide financial assistance or waive the polygraph requirement only when a class member's child-contact request otherwise would be denied *solely* because the class member has not taken a polygraph examination *and* cannot afford to pay for an examination.

In its closing argument, IDOC suggested that any relief requiring it to pay for polygraph examinations would subject it to a significant resource burden. Doc. 267. The *de minimis* burden standard is not implicated, however, because IDOC does not defend any legitimate interest in prohibiting child contact under the circumstances described above. And even if IDOC

had some legitimate interest, the financial and administrative burden of the court's declaration is *de minimis* relative to the overall costs of IDOC's supervision of sex offender parolees, given that the court's ruling applies only to those parolees for whom paying for a polygraph is the sole obstacle to parent-child contact. Although the trial evidence did not directly establish how many parolees fall into that category, the evidence suggested only about half of parolees have financial issues, and only a small number of parolees ever request child contact. And IDOC will have other, legitimate reasons justifying child-contact denials for some persons in that already small population, making any financial burden *de minimis*. Thus, declaratory relief is appropriate. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.").

2. Insufficient Duration of Therapy

IDOC policy allows sex offender therapists to withhold recommendations for parent-child contact if a parolee has not enrolled in therapy for a sufficient duration. The summary judgment record did not disclose whether therapists' disparate practices regarding minimum time in therapy resulted in arbitrary denials of child-contact requests. 565 F. Supp. 3d at 1071-72. The trial evidence clarified that therapists exercise their professional judgment to make individualized assessments about the progress made by parolees in therapy, and that those assessments affect the required length of therapy. Even Dr. Harris, who appeared to have the most rigid duration requirement, clarified that if a parolee "has been [in contact with their] child while they were … incarcerated … I might think differently," Doc 255-2 at 13 (49:13-49:16), which suggests that she makes individualized assessments based on the available evidence. The court owes deference to therapists as medical professionals exercising their professional judgment. *See Washington v. Harper*, 494 U.S. 210, 230 n.12 (1990) (describing the deference

owed "to medical professionals … who possess, as courts do not, [certain] requisite knowledge and expertise").

As IDOC concedes, a therapist's exercise of discretion must "fall[] within acceptable professional standards." Doc. 263 at 17. The court understands that concession to mean that containment teams should not defer unquestioningly to a therapist's determination that further therapy is required, particularly if the therapist's practices appear to be an outlier among licensed sex offender therapists. And IDOC policy allows parolees to seek review of a therapist's determination by requesting an independent evaluation by an IDOC-employed therapist (such as Dr. Grosskopf), soliciting input from Brown-Foiles, or filing a formal appeal. Those processes sufficiently constrain individual therapists' discretion such that child-contact requests are not denied arbitrarily or irrationally. Accordingly, IDOC is entitled to judgment as to the duration of therapy criterion.

3. Noncompliance with Parole Conditions

As the court explained in its summary judgment opinion, "there is an indisputably logical relationship between a parolee's compliance with parole conditions and IDOC's interest in the parolee's rehabilitation." 565 F. Supp. 3d at 1073 (citing *Overton*, 539 U.S. at 133). Still, the summary judgment record did not establish "[t]he *strength* of the relationship" between the noncompliance criterion and IDOC's penological interest, as "there may be some relatively trivial parole violations that, even under the deferential *Turner* standard, would not warrant automatic denial of a request for parent-child contact." *Ibid*. As noted above, the court finds based on the trial evidence that IDOC does not deny parent-child contact based on trivial or minor parole violations, absent a pattern of noncompliance indicating the parolee will not abide by the parent-child contact conditions. IDOC is therefore entitled to judgment as to the noncompliance with parole conditions criterion.

C. Neutral Decisionmaker

Finally, Plaintiffs mount a procedural due process challenge to the alleged absence of a neutral decisionmaker when IDOC decides whether to grant parent-child contact requests. "The *Mathews* test governs whether due process requires a neutral decisionmaker." 565 F. Supp. 3d at 1074 (citing *Felce*, 974 F.2d at 1496). The court's summary judgment opinion applied *Mathews* in evaluating the constitutional validity of IDOC's administrative appeals process but withheld summary judgment because record evidence regarding the burdens of changing IDOC's procedures was "inconclusive at best." *Id*. at 1074-75. In their closing argument, Doc. 267, Plaintiffs further contend that procedural due process requires a neutral initial decisionmaker at the containment team level. The court addresses each argument in turn.

1. Administrative Appeals

As the court held in its summary judgment opinion, Plaintiffs have "a 'significant' liberty interest … in enjoying the companionship of their children," so "[t]he first *Mathews* factor weighs heavily in favor of Plaintiffs." 565 F. Supp. 3d at 1074. As to the second factor, "the lack of an independent decisionmaker creates a significant risk of an erroneous deprivation of Plaintiffs' interests," *ibid*., while "[i]ndependence … provides a significant added dimension of procedural protection to the liberty interest at stake," *Felce*, 974 F.2d at 1500. Drawing all inferences in Plaintiffs' favor at the summary judgment stage, the court observed that "IDOC's appeal process does not provide for independent review of the containment team's decision" because the two individuals empowered to decide appeals—the Deputy Chief of Parole and Brown-Foiles—had individual interests in supporting the decisions of their respective subordinates. 565 F. Supp. 3d at 1074-75. With the first two *Mathews* factors favoring Plaintiffs, the claim proceeded to trial to determine the relative weight of the third factor: "the

fiscal and administrative burdens" accompanying the addition or substitution of an independent decisionmaker. *Id*. at 1075.

The trial evidence showed that fiscal and administrative burdens of providing an independent appellate decisionmaker are minimal, as evidenced by Brown-Foiles's testimony that either Williams or Wright will decide appeals if Brown-Foiles has a conflict of interest (more on that in a moment). IDOC does not contend otherwise. Doc. 263 at 26-28. Thus, the third *Mathews* factor, to the extent it weighs at all in IDOC's favor, is clearly outweighed by the first two factors. Accordingly, the court concludes that procedural due process requires a neutral, independent decisionmaker in evaluating child-contact requests.

That said, IDOC's administrative appeal procedure does not violate due process because it in fact provides for a neutral decisionmaker. In most cases, Brown-Foiles acts as an independent appellate decisionmaker because she does not supervise the containment team members who made the initial decisions and does not participate in the containment team's decisional process. *See Felce*, 974 F.2d at 1499 ("Of course, a decisionmaker need not be external to an institution to be independent."). In those uncommon situations where Brown-Foiles cannot be independent—because the containment team members solicited her advice regarding a parolee's child-contact request, because she supervises the sex offender therapist on the containment team, or for any other reason—a different appellate decisionmaker will replace her.[*] (As noted, such a situation has not yet arisen, but Plaintiffs cast no doubt on

[*] In its summary judgment opinion, the court stated that Brown-Foiles could not be an independent appellate decisionmaker in those circumstances where she plays a supervisory role "to the structure of the treatment groups" or has "coordinate[d] trainings for [the] parole agents and therapists" who made the challenged child-contact decision. 565 F. Supp. 3d at 1075. On reflection, that statement was incorrect. Under the standard articulated in *Felce*, merely helping

Brown-Foiles's credible testimony describing the recusal process.) Brown-Foiles identified two individuals who could serve in her stead: Williams and Wright. Williams's neutrality is debatable given that she supervises Brown-Foiles. 565 F. Supp. 3d at 1074 ("[T]he reviewing officials in *Felce* … were held to be insufficiently independent because they formed a direct line of supervisors above the parole agent and thus had individual interests in supporting his decision.") (internal quotation marks and alteration omitted). But Plaintiffs do not dispute Wright's neutrality. Doc. 262 at 41-42. Accordingly, because IDOC's administrative appeal process allows Wright to step in for Brown-Foiles when Brown-Foiles has a conflict, the process provides for an independent, neutral appellate decisionmaker in all circumstances.

2. Initial Decisions

Given that IDOC's process provides for an independent, neutral appellate decisionmaker, procedural due process does not also require an "independent evaluator," as Plaintiffs propose. Doc. 267. Of course, Plaintiffs have the same liberty interest at stake, so the first *Mathews* factor again weighs in their favor. 565 F. Supp. 3d at 1074. But the second and third *Mathews* factors—the value of additional procedural safeguards and administrative burden—both weigh against Plaintiffs' position. Given that parolees can always appeal initial decisions to an independent, neutral decisionmaker, the probable value of additional safeguards at the initial decision level would be minimal. *Cf. Felce*, 974 F.2d at 1499-1500 (invalidating a procedure that, among other things, included "no provision for review by persons not currently involved in

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to structure treatment in general or coordinating a parole agent's or therapist's training does not give Brown-Foiles an impermissible stake in supporting an agent's or therapist's child-contact decision. *See Felce*, 974 F.2d at 1499 (holding that a person "involved in [the plaintiff's] diagnosis and treatment" could not be independent for purposes of a procedural due process analysis, and making clear that "a decisionmaker need not be external to an institution to be independent").

[the parolee's] diagnoses or treatment"). Moreover, no evidence suggests that IDOC has independent evaluators who could be added to or substituted for the containment without substantial administrative and financial burdens. The court therefore concludes that, on balance, the *Mathews* test does not require displacing the containment team or any member thereof in the initial decisionmaking process. *See Harper*, 494 U.S. at 235 (indicating that courts should "avoid unnecessary intrusion into either medical or correctional judgments") (internal quotation marks omitted).

Conclusion

On the class claims tried at the bench trial, the court will enter judgment in IDOC's favor with two exceptions. First, the court declares unconstitutional IDOC's child-contact policy for parolees convicted of sex offenses insofar as IDOC fails to offer parolees a process by which they may submit to the containment team written communications addressed to their child(ren) for review and decision within seven calendar days. Second, the court declares IDOC's policy unconstitutional insofar as it allows IDOC to deny parolee-child contact based solely on the parolee's failure to take a polygraph examination where the parolee cannot afford an examination. The court declares that, in such circumstances, IDOC must (a) provide financial assistance to the parolee such that the parolee reasonably can afford a polygraph examination offered by a privately employed polygraph examiner; (b) offer the parolee a polygraph examination by an IDOC-employed polygraph examiner at a cost that the parolee reasonably can afford; or (c) grant the parolee's child-contact request notwithstanding the absence of the polygraph examination.

No injunction is necessary at this juncture. "[I]nstitutional reform injunctions often raise sensitive federalism concerns," *Horne v. Flores*, 557 U.S. 433, 448 (2009), so a declaratory

judgment is preferable where, as here, the defendant state agency has been cooperative throughout the litigation. *See Badger Cath., Inc. v. Walsh*, 620 F.3d 775, 782 (7th Cir. 2010) ("If the entry of a regulatory injunction can be avoided by a simpler declaratory judgment, everyone comes out ahead.") (citing *Horne*, 557 U.S. at 447-50). If IDOC's posture changes absent a stay pending appeal or a reversal on appeal, "then more relief lies in store. For now, however, a declaratory judgment suffices." *Ibid*.

August 25, 2022

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CELINA MONTOYA, ZACHARY BLAYE, and RONALD MOLINA, individually and on behalf of all others similarly situated,	)	18 C 1991
Plaintiffs,	)	Judge Gary Feinerman
vs.	)	
ROB JEFFREYS, in his official capacity as Director of the Illinois Department of Corrections,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Celina Montoya, Zachary Blaye, and Ronald Molina, all serving mandatory supervised release ("MSR") terms following imprisonment for Illinois sex offense convictions, bring this certified class action under 42 U.S.C. § 1983 against Rob Jeffreys in his official capacity as Director of the Illinois Department of Corrections ("IDOC"), alleging that IDOC's implementation of an MSR condition prohibiting them from having contact with their minor children without prior approval violates their Fourteenth Amendment due process rights. Doc. 92. Earlier in the litigation, the court enjoined enforcement of IDOC's then-current parent-child contact policy, Doc. 33, and denied IDOC's motion to dismiss Plaintiffs' substantive due process claim, Docs. 63-64 (reported at 2019 WL 296556 (N.D. Ill. Jan. 23, 2019)). Plaintiffs then filed an amended complaint directed against IDOC's current policy. Doc. 92. The court denied IDOC's motion to dismiss the amended complaint, Docs. 138-139 (reported at 2020 WL 4464672 (N.D. Ill. Aug. 4, 2020)), and granted Plaintiffs' motion to certify a class under Civil Rule 23(b)(2) to seek injunctive relief against certain aspects of the current policy. Docs. 165-166 (reported at 2020 WL 6581648 (N.D. Ill. Nov. 10, 2020)).

Plaintiffs and IDOC now cross-move for summary judgment on all claims. Docs. 171, 192. Plaintiffs' motion is denied, and IDOC's motion is granted in part and denied in part.

Background

Because the parties cross-move for summary judgment, the court must consider the facts in the light most favorable to Plaintiffs when addressing IDOC's motion and in the light most favorable to IDOC when addressing Plaintiffs' motion. *See First State Bank of Monticello v. Ohio Cas. Ins. Co.*, 555 F.3d 564, 567 (7th Cir. 2009) ("[B]ecause the district court had cross-motions for summary judgment before it, we construe all facts and inferences therefrom in favor of the party against whom the motion under consideration is made.") (internal quotation marks omitted). To the extent a disputed fact relates to both sides' motions, the court will set forth the parties' respective positions. At this juncture, the court does not vouch for either side's version of the facts. *See Gates v. Bd. of Educ.*, 916 F.3d 631, 633 (7th Cir. 2019).

A. The No-Contact Condition

The class is defined as "all parents of minor children who are on [MSR] for a sex offense under the supervision of [IDOC]." Doc. 165. IDOC is responsible for monitoring persons on MSR—who for ease of reference will be called "parolees"—convicted of sex offenses. Doc. 205 at ¶ 1. IDOC supervises approximately 1,600 parolees who were convicted of sex offenses, most with victims under the age of 18. *Id*. at ¶ 2; Doc. 195-1 at ¶ 3.

Although IDOC manages the supervision of parolees, the MSR statute grants the Illinois Prisoner Review Board ("IPRB") the power to set MSR conditions: "The conditions of … [MSR] shall be such as [IPRB] deems necessary to assist the subject in leading a law-abiding life." 730 ILCS 5/3-3-7(a). The statute lists a series of conditions that IPRB *must* impose, such as not violating any criminal statute, *id*. at § 5/3-3-7(a)(1); reporting to an IDOC parole agent, *id*. at § 5/3-3-7(a)(3); and—for parolees "convicted of a sex offense"—completing sex offender

treatment, *id*. at § 5/3-3-7(a)(7.5). Another required condition is that a parolee must "follow any specific instructions provided by the parole agent that are consistent with further conditions set and approved by [IPRB] or by law." *Id*. at § 5/3-3-7(a)(15). IDOC has over forty parole agents and four parole commanders assigned to supervise sex offenders. Doc. 205 at ¶ 3.

The MSR statute further provides that "persons required to register as sex offenders … *may* be required by [IPRB] to comply with" several additional conditions. 730 ILCS 5/3-3-7(b-1) (emphasis added). One such condition is to "refrain from all contact, directly or indirectly, personally, by telephone, letter, or through a third party, with minor children without prior identification and approval of an agent of [IDOC]." *Id*. § 5/3-3-7(b-1)(9). Plaintiffs submit that IPRB imposes on all parolees with sex offense convictions a condition that tracks that statutory language. Doc. 171 at 11. IDOC states that "almost all sex offenders" must abide by the condition to not contact minor children without prior IDOC approval. Doc. 192-1 at 15. IDOC does not elaborate as to which offenders might be exempt from the requirement and does not contend that any such exceptions affect this case.

Due to this prohibition on contact with minor children, a parolee who committed a sex offense may not contact his or her *own* minor children upon release from prison. Doc. 193 at ¶¶ 13-14. The parties dispute whether this imposes a "presumptive ban" on child contact, Doc. 171 at 15; Doc. 192-1 at 6, but the debate is semantic. IDOC states that it "has adopted a process for approving a paroled sex offender's request for contact with his or her minor children," which necessarily implies that approval is required and therefore that a presumptive ban is in place. Doc. 192-1 at 16. Indeed, IDOC Deputy Chief of Parole Dion Dixon testified that "[i]mmediately" upon release, "the presumption is that [the parolee] may not have contact with his or her children." Doc. 174-2 at 3 (6:3-6), 9 (31:15-18). By way of qualification, Dixon

added that "some parolees have come out with court orders stating that they can have contact with their children." *Id*. at 9 (31:20-23). But Dixon could not identify any other circumstances in which immediate child contact would be allowed. *Id*. at 9 (32:8-15). So, while IDOC resists characterizing its parolee-child contact policy as establishing a "presumption," the evidence shows that, absent a court order, IDOC does not allow parolees with sex offense convictions to contact their children upon their release on MSR. The court will refer to this policy as the "no-contact condition."

B. Evaluations Conducted Before Release

IDOC's enabling statute provides that, before a person convicted of a sex offense is released from prison, he or she "shall be required to receive a sex offender evaluation." 730 ILCS 5/3-6-2(j). Sarah Brown-Foiles—IDOC's coordinator for sex offender services, Doc. 195-1 at ¶ 1—testified that IDOC conducts this evaluation about a year before the offender's scheduled release from prison. Doc. 174-7 at 23 (86:19-87:2). This "pre-release evaluation" is conducted by licensed sex offender evaluators. Doc. 193 at ¶ 59. The evaluation is a solely an "informative report" and "does not look to predict futur[e] risk" of re-offense. Doc. 174-7 at 24 (91:11-13). The evaluation does summarize the offender's background, educational attainment, medical needs, psychiatric and mental health history, and criminal history. *Id*. at 24 (92:21-93:15); Doc. 193 at ¶ 60. That information is derived from the prisoner's voluntary self-reporting, IDOC's internal records, and other sources such as case files and police reports. Doc. 174-7 at 24-25 (93:24-96:15). Pre-release evaluations are used to inform IDOC parole agents and treatment providers about "what type of client they're getting" upon an offender's release on MSR. Doc. 193 at ¶ 62.

Separately, the Sexually Violent Persons Commitment Act ("SVPCA"), 725 ILCS 207/1 *et seq*., creates a process by which the Attorney General of Illinois or the relevant county's

State's Attorney may petition for civil commitment of certain sex offenders upon their release from prison. To facilitate this process, the SVPCA requires IDOC to conduct a "comprehensive evaluation of the person's mental condition," which is different from the pre-release evaluation discussed above. *Id*. at § 207/10(c)(2). Persons convicted of a "sexually violent offense" as defined in the SVPCA, *id*. at § 207/5(e), must undergo this additional "SVP screening." Doc. 193 at ¶ 64. All sex offenders in IDOC custody except those convicted of criminal sexual abuse qualify for this SVP screening. *Ibid*. The SVP screening occurs approximately six months before release and is informed by the earlier pre-release evaluation. *Id*. at ¶¶ 62, 64. The SVP screening employs "actuarial-based risk assessment tools." *Id*. at ¶ 65.

IDOC does not use pre-release evaluations or SVP screenings to make any determinations about child contact before sex offenders with children are released on MSR. As noted, the no-contact condition initially prohibits contact absent a court order. Doc. 193 at ¶¶ 13-14. IDOC encourages parole agents to review the pre-release evaluation to "inform decisions regarding restrictions," but that review happens after an offender's release. *Id*. at ¶ 63.

The parties dispute whether IDOC could practicably use pre-release evaluations and SVP screenings to make decisions before an inmate's release about whether the inmate should be allowed to contact their children after release. Plaintiffs contend that a pre-release evaluation, because it examines the inmate's criminal record, would at least reveal whether the inmate's child was a victim of his or her crimes. Doc. 171 at 47. And pointing out that Blaye was granted contact with his children after only one meeting with a therapist, Doc. 193 at ¶ 67, Plaintiffs argue that a short evaluation period is sufficient to allow child contact for at least some offenders, Doc. 171 at 70. IDOC counters that two other therapists stated that they would not be

comfortable making a recommendation about child contact based on the pre-release evaluation. Doc. 205 at ¶¶ 42, 51-52. So the predictive value of the pre-release evaluation is disputed.

Plaintiffs also contend that the SVP screening's risk assessment resembles "specialized evaluations" used in child custody and parental rights proceedings that can quickly render decisions about child contact. Doc. 193 at ¶¶ 65-66. IDOC responds that those "specialized evaluations" are "very expensive." *Id*. at ¶ 66; Doc. 205 at ¶ 112. To support their respective views, both sides rely exclusively on Brown-Foiles's brief testimony that there are "specific risk evaluation[s] with a specific goal" that "do exist in the field," but that they are "very ex[p]ensive." Doc. 174-7 at 34 (130:4-6). The record contains little detail about what Brown-Foiles was referring to, how these specialized evaluations compare to the SVP screening, or the feasibility of implementing them to make child contact determinations.

C. Parent-Child Contact Policy After Release on MSR

IDOC implements the no-contact condition through a written policy for assessing parolees' requests for child contact. Doc. 205 at ¶ 7. The policy mirrors the preliminary injunction order issued earlier in this case. *Id*. at ¶ 6; Doc. 33.

Upon release, all parolees convicted of a sex offense receive an information packet that explains the policy and the process for requesting contact with their minor children. Doc. 205 at ¶ 8. The policy provides that a parolee "shall be given the opportunity for an appointment with a sex offender therapist within 14 days of release." Doc. 174-1 at 1 (emphasis deleted). IDOC directly employs only four sex offender therapists, so most of the therapists are third-party providers. Doc. 205 at ¶ 22. Practically speaking, this means that parolees do not necessarily obtain an appointment with a sex offender therapist within 14 days of release, Doc. 193 at ¶ 37, but IDOC at least provides a referral to sex offender treatment within 72 hours of release, Doc. 205 at ¶ 14.

The process for obtaining permission for child contact begins only when a parolee requests such contact. *Id*. at ¶ 7; Doc. 174-2 at 10 (36:3-19). The policy provides that "[i]f a parolee has requested contact with biological children, within 21 days of the initial [therapy] appointment, the therapist and the parolee's parole agent will determine whether there is reasonable cause to believe that the parolee's child(ren) would be endangered by parent-child contact." Doc. 174-1 at 1 (emphasis deleted). The policy thus assumes that the parolee requested contact *before* the initial therapy appointment. It is unclear what timeline IDOC follows when a parolee requests contact *after* the initial appointment.

For a parolee who immediately requests parent-child contact upon release, the policy allows IDOC at least 35 days in which to make a determination whether contact would endanger the minor child: at least 14 days to see a therapist, and at least 21 days after that initial appointment. IDOC asserts that its policy "sets no 35-day period where parent-child contact cannot be approved." Doc. 205 at ¶ 19. Plaintiffs do not dispute that assertion, because it is true that "the written policy does not categorically prohibit approval of contact" in the initial 35-day window. *Ibid*. IDOC can, if it chooses, move faster. But there can be no dispute, simply from reading the policy's text, that it *allows* a delay of up to 35 days.

The parolee's "containment team" decides whether a parolee may have contact with his or her minor children. *Id*. at ¶ 9. The containment team comprises the parolee's parole agent, parole commander, sex offender therapist, and any other therapists treating the parolee. *Ibid*. The containment team may also include supervising parole officers, polygraph examiners, and victim advocates. Doc. 193 at ¶ 4. If parent-child contact is restricted or denied, the parolee must be provided written reasons, and the restriction or prohibition must be reviewed every 28 days. Doc. 205 at ¶ 16; Doc. 174-1 at 1-2. IDOC has a "Parolee/Releasee Determination of

Request for Contact with Child(ren)" form for rendering such decisions. Doc. 174-1 at 3. The form is included in the information packet that parolees receive upon their release. Doc. 205 at ¶ 8.

A "safety plan" jointly developed by the containment team and the parolee must also be in place before parent-child contact occurs. Doc. 174-1 at 1; Doc. 174-2 at 29 (110:6-11). A form safety plan is included in the informational packet, but it applies only to in-person visits. Doc. 174-1 at 5-7; Doc. 174-2 at 29 (110:16-20); Doc. 193 at ¶ 10. A safety plan for contact over the phone or by mail does not follow the same form, but the containment team may implement such a plan. Doc. 174-2 at 29 (110:16-24).

A parolee may seek review of an adverse decision "from the Deputy Chief of Parole" (currently Dixon) "or his/her designee" (currently Brown-Foiles), who must "respond in writing within 21 days." Doc. 174-1 at 2. IDOC has a form for such appeals. *Id*. at 4. The form asks the parolee for a statement "in rebuttal to the denial of your request for contact," and has a space for the "Reviewer's Determination." *Ibid*. Appeals are heard only by Dixon or Brown-Foiles, and no further appeal is allowed. Doc. 193 at ¶ 44; Doc. 174-1 at 2.

D. Criteria Used to Evaluate Child Contact Requests

The containment team may consider a wide range of criteria in evaluating child contact requests, Doc. 205 at ¶ 12, but only a few are relevant for present purposes. One of the certified questions for class resolution is whether five criteria used by IDOC violate substantive due process: (1) a parolee's not having taken a polygraph, (2) insufficient duration of therapy; (3) denial of guilt; (4) a parolee's noncompliance with MSR conditions; and (5) a parolee's unreliable attendance at therapy. 2020 WL 6581648, at *12.

IDOC directs the containment team to consider those five factors. The form that IDOC uses to respond to child contact requests lists eleven specific reasons for a denial, plus a twelfth

labeled "[o]ther" with space for explanation. Doc. 174-1 at 3. The eleven specific reasons include "[t]herapist requested polygraph but results are not available," "[i]nsufficient therapy sessions to make an assessment," and "[s]afety plan incomplete or not completed." *Ibid*. The form safety plan requires the parolee's initialed agreement to several additional requirements, essentially incorporating them as conditions for child contact. *Id*. at 5. Those additional requirements include "engag[ing] in Sex Offender Counseling services and [being] compliant with these services," and "successfully complet[ing] and pass[ing] a sexual history OR maintenance polygraph." *Ibid*. The form safety plan requires an approved chaperone for in-person child visits, and states that the chaperone "shall not … enable the offender to deny or refute any details of his/her conviction." *Ibid*. Finally, the containment team may consider "whether the parolee is progressing in therapy" and "whether the parolee has been compliant with the terms of his or her parole." Doc. 205 at ¶ 12.

Plaintiffs assert that the polygraph and therapy criteria can cause indefinitely long delays in approving child contact. As for the polygraphs, IDOC imposes no limit on how long a containment team can withhold approval for child contact based on the lack of a polygraph exam. Doc. 193 at ¶¶ 31-32. Deputy Chief Dixon testified that parolees are responsible for paying for their own polygraph exams, which typically cost between $200 and $400. *Id*. at ¶ 46. IDOC has no policy or practice to accommodate parolees who cannot pay for an exam. *Id*. at ¶ 48. The requirement that a parolee reliably attend therapy for a sufficient period also can create indefinite delays in the approval of parent-child contact. IDOC imposes no limit on how long a therapist can take to make a recommendation on whether to allow child contact. *Id*. at ¶ 30. Dixon testified that parolees are responsible for paying for weekly therapy, *id*. at ¶ 46, though some evidence suggests that certain therapists will accommodate parolees unable to pay,

id. at ¶ 132; Doc. 205 at ¶ 75. But IDOC has no policy to accommodate such parolees. Doc. 193 at ¶ 48.

Several therapists testified about the utility of polygraphs and their importance to sex offender therapy. Licensed clinical sex offender therapist Dr. Eleanor Harris explained that "the polygraph provides good information, such as letting her know whether the person is telling the truth or has been truthful about his interaction with children or prior victims." Doc. 205 at ¶ 44; *see also id*. at ¶¶ 86-88. Clinical psychologist Dr. Gerald Blain testified that a parolee's passing at least one polygraph is an "absolute requirement before [he] would make a recommendation about contact with a child." Doc. 174-4 at 16 (58:8-12). He explained that the mandatory polygraph "gets [patients] to disclose and open up and talk about" their sexual and offense history. *Id*. at 19 (70:4-5). Licensed sex offender therapist Michael Kleppin likewise requires a polygraph to "establish[] a baseline of offending behavior for therapeutic purposes and to rule-out, to the best of ability, no interfamilial [*sic*] offending has occurred on biological minor children." Doc. 174-5 at 1. By contrast, IDOC sex offender therapist Dr. Patricia Grosskopf testified that she does not require a polygraph before approving parent-child contact. Doc. 174-6 at 27 (103:8-11). She added, however, that polygraph examinations can play a "treatment" role in sex offender therapy. *Id*. at 27 (104:10-105:11), 28 (108:21-109:9).

The time necessary to be able to make a recommendation about parent-child contact varies dramatically among therapists. Dr. Grosskopf testified that, of the seven individuals for whom she had made a recommendation this past year, the "average … is between two to three weeks, four weeks max" from the start of therapy to a recommendation, though "[t]he longest period of time might have been two months." *Id*. at 19 (73:13-22). Dr. Grosskopf recommended

that one of the Plaintiffs be permitted phone contact with his minor son after a single meeting. Doc. 193 at ¶ 67.

At the other end of the spectrum, Dr. Harris testified that she would need a parolee to participate in therapy for "[a]t least a year" before she would feel comfortable making a recommendation. Doc. 174-3 at 13 (48:21-49:1). Dr. Blain testified that, while there was "no set time" to make a recommendation, the parolee's cooperation and compliance with therapy would "probably" take "five, six, seven months." Doc. 174-4 at 9 (30:2-5). Dr. Kleppin indicated that a parolee must have "[b]een an active member within the therapeutic milieu … for a minimum of six months" to be in good standing. Doc. 174-5 at 1 (emphasis deleted); *see also id*. at 2 ("Once the above criteri[a] have been met, client contact with their biological children is no longer in violation of their therapeutic guidelines/rules … ."). No record evidence explains why these providers' minimum treatment times so widely vary.

E. "Cross-Offense" Evidentiary Dispute

IDOC asserts that it "restricts individuals who have never committed an offense against a minor from having contact with their children because there is a high risk of cross-offense, *i.e.*, that a sex offender may abuse both adults and children." Doc. 192-1 at 9 (citing Doc. 194 at ¶ 17). In support, IDOC cites the testimony of Deputy Chief Dixon and Dr. Grosskopf. Doc. 194 at ¶¶ 17, 70. Plaintiffs object to the admission of that testimony on the ground that Dixon and Dr. Grosskopf were not disclosed as experts on the subject of cross-offense risk. Doc. 204 at 11-13; Doc. 205 at ¶¶ 17, 18, 70. IDOC responds that Dixon and Dr. Grosskopf did not offer expert opinion and that, in any event, Plaintiffs solicited the testimony at their depositions. Doc. 217 at 8-9.

IDOC is correct insofar as Dixon and Dr. Grosskopf explained IDOC's interest in restricting parolees who have never committed an offense against a minor from contacting their

children. Doc. 192-1 at 9-10. Plaintiffs' counsel solicited testimony from Dixon, in her capacity as a Rule 30(b)(6) witness, as to why IDOC "restrict[s] individuals who have never committed an offense against a minor from having contact with their own children." Doc. 174-2 at 46 (178:20-23). Dixon answered by pointing to cross-offense risk. *Id*. at 46 (178:24-179:10). Dixon could testify to IDOC's understanding of the risk—*i.e.*, the reason why IDOC adopted this policy—because it falls within Rule 30(b)(6)'s authorization for a witness to testify to "matters known or reasonably available to the organization." *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 894-95 (7th Cir. 2004) (citation omitted). Plaintiffs' counsel asked Dr. Grosskopf to explain why she does not consider the victim's age when evaluating the risk of parent-child contact. Doc. 174-6 at 25 (95:16-96:13). In response, Dr. Grosskopf explained her understanding of the relevance (or lack thereof) of the victim's age to the probability of future offenses against children. *Ibid*. The court will therefore consider Dixon's and Dr. Grosskopf's testimony to the extent that IDOC relies on it to establish its interest in this aspect of its policy.

Insofar as IDOC seeks to establish the *actual* probability of cross-over offenses as support for its policy, Plaintiffs are correct that the testimony sets forth expert opinion because it is based on "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. "[L]ay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." Fed. R. Evid. 701 advisory committee's note to 2000 amendment (internal quotation marks omitted). Predicting or estimating the probability of cross-offenses clearly falls within the ambit of expert testimony, as it requires specialized knowledge in the field of statistics, criminology, psychology, or related disciplines. That Dixon and Dr. Grosskopf referenced studies as the basis for their understanding of the risk confirms this conclusion. Doc. 174-2 at 46 (178:24-179:2) ("Some

time ago … I read a study that was done, and there's a pretty high percentage of cross offense … ."); Doc. 174-6 at 25 (96:5) (referencing "crossover research" to establish the likelihood of cross-offenses).

IDOC did not disclose Dixon or Dr. Grosskopf as experts under Civil Rule 26(a)(2). It follows that IDOC may not use their expert opinions unless its failure to disclose "was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1); *see Salgado ex rel. Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998) ("[T]he sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless."). IDOC makes no effort to meet its burden, thereby forfeiting the point for purposes its effort on summary judgment to establish cross-offense risk as a factual matter.

F. Experiences of Individual Class Members

As the court's class certification opinion described, Plaintiffs are parents of minor children and are serving MSR terms following their convictions in Illinois state court of crimes that require registration as sex offenders. 2020 WL 6581648, at *2.

Montoya was convicted of criminal sexual assault of a 14-year-old boy in 2015. Doc. 174-22 at ¶¶ 2-3. Prior to her release on MSR, she sought a court order allowing contact with her minor children, which her sentencing judge granted. Doc. 193 at ¶ 15. Nonetheless, IDOC did not permit Montoya to live with her daughter until her parole agent approved a safety plan. Doc. 174-22 at ¶ 9. As noted in the court's class certification opinion, Montoya has lived at her family home with her children since August 2019. 2020 WL 6581648, at *5.

Molina was convicted of criminal sexual assault of a 15-year-old girl. Doc. 193 at ¶ 82. He began serving an MSR term on September 28, 2018. *Ibid*. Molina is the father of a son, G.S. *Id*. at ¶ 83. Molina was not permitted to have any contact with G.S. from the time he was released until G.S. turned 18 years old. *Ibid*.

Blaye was convicted of criminal sexual assault of a 21-year-old woman in 2008. *Id*. at ¶ 69. He began serving an MSR term on June 10, 2019. *Ibid*. From the time of his release until November 19, 2019, Blaye was not permitted to have any contact with his minor son, Z.M. *Id*. at ¶¶ 70, 76. Blaye did not receive permission to have in-person visits with Z.M. until January 27, 2020. *Id*. at ¶ 77. The parties dispute when Blaye first requested contact with his son, and consequently the reason why he was unable to have contact until five months after his release. *See id.* at ¶¶ 72, 75-77.

Absent class member Brandon Velna is the father of three children. *Id*. at ¶ 142. He began serving an MSR term on August 5, 2019. *Ibid*. Since his release, he has not been allowed to have any in-person contact with his children. *Id*. at ¶ 143. Velna has attended sex offender therapy since November 2019, and has taken and passed a polygraph examination. *Id*. at ¶ 144. Nonetheless, his therapist has not recommended that he be allowed to have contact with his children, *id*. at ¶ 145, and his request for contact was denied based on the lack of support from the therapist, *id*. at ¶ 147. Velna attempted to appeal the denial. *Id*. at ¶¶ 148-149. Given that he has not been permitted contact, *id*. at ¶ 143, it appears that the appeal was denied.

Discussion

I. Claims Before the Court

In moving for class certification, Plaintiffs identified several common questions that they believed could be resolved on a classwide basis. Doc. 134 at 7-16. The court agreed with Plaintiffs in part and certified four common questions to be tried as a class action: "(1) whether the IDOC child contact policy's presumptive 35-day ban on parent-child contact violates procedural due process; (2) whether the policy's presumptive 35-day ban violates substantive due process; (3) whether certain criteria IDOC uses to make parent-child contact determinations under its policy violate substantive due process; and (4) whether the lack of a neutral

decisionmaker violates procedural due process." Doc. 165. As to the third question, Plaintiffs named five allegedly unconstitutional criteria: (1) not having taken a polygraph, (2) insufficient duration of therapy; (3) denial of the parolee's guilt by the parolee or the child's custodial parent; (4) noncompliance with conditions of parole; and (5) unreliable attendance at therapy. Doc. 134 at 9. (As discussed below, IDOC policy makes clear that the third criterion operates only on the child's guardian and the chaperone supervising a parolee's contact with a child, not on the parolee or the child's custodial parent.) The court certified the question relating to the five criteria to "resolve, as a general matter, whether those criteria … are permissible under the governing due process standard." 2020 WL 6581648, at *12.

In moving for summary judgment, Plaintiffs address the four certified questions, arguing that the 35-day ban violates procedural due process, Doc. 171 at 61-65, and substantive due process, *id*. at 41-48; that the five criteria violate substantive due process, *id*. at 52-54; and that there is not a sufficiently neutral decisionmaker, *id*. at 68-69. But Plaintiffs' summary judgment motion also raises, for the first time in this case, three entirely new challenges to the IDOC policy: that the absence of any "formal criteria or standards" violates substantive due process, *id*. at 49-52; that IDOC's procedures afford insufficient notice and opportunity to be heard, thereby violating procedural due process, *id*. at 65-68; and that the policy discriminates based on wealth in violation of the Equal Protection Clause, *id*. at 72-76.

This opinion will not address those new challenges. True enough, as a general matter, "the fact that the complaint omits a legal theory cannot block a plaintiff from invoking that theory" on summary judgment, particularly when the court itself injects the theory into the case. *Koger v. Dart*, 950 F.3d 971, 974-75 (7th Cir. 2020). In a class action, however, "[a]n order that certifies a class action must define … the class claims, issues, or defenses." Fed. R. Civ.

P. 23(c)(1)(B). In accordance with Rule 23(c)(1)(B), the court specified four questions to be resolved through this class action. Doc. 165. Plaintiffs cannot obtain classwide relief based on any other claims or issues.

Comcast Corp. v. Behrend, 569 U.S. 27 (2013), is instructive on this point. The plaintiffs there proposed four theories of antitrust impact, but the district court certified only one—the "overbuilder theory"—for classwide treatment. *Id*. at 31. Before deciding whether the district court should have certified that question, the Court observed: "If [the plaintiffs] prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court." *Id*. at 35. That result followed from "straightforward application of class-certification principles," not any peculiarity of "substantive antitrust law." *Id*. at 34.

Similarly, the class here can obtain injunctive or declaratory relief based only on the questions that have been certified for classwide treatment. It is possible that Plaintiffs, in a non-representative capacity, could pursue individual claims based on theories of liability not covered by the class certification order. *See id*. at 31 n.3 ("The other theories of liability may well be available for the plaintiffs to pursue as individual actions."). But that possibility is not before the court, as Plaintiffs move for summary judgment as to the class. *E.g.*, Doc. 171 at 73 (contending that IDOC's policy "denies indigent or impoverished class members" equal protection). The court therefore limits its analysis to the certified questions.

IDOC also argues that the court cannot consider the newly asserted equal protection claim because Molina, the ostensible class representative for that claim, no longer has a minor child, rendering his claims moot. Doc. 192-1 at 12, 50. At the time of class certification, Molina had not been permitted contact with his 17-year-old son, but his son has since turned 18.

Doc. 193 at ¶ 83; Doc. 197 at 2. The parties agree that this fact renders moot any equal protection claim that Molina might try to bring. Doc. 192-1 at 12; Doc. 204 at 58. But there is no need to address IDOC's argument because, as noted, the court will not address the equal protection claim for a different reason.

The mootness of Molina's claim does not affect the court's jurisdiction to resolve the class claims. First, there are two other class representatives, Montoya and Blaye, who still have live claims despite having gained permission to contact their children. 2020 WL 6581648, at *5-8. Second, even if Montoya's or Blaye's claims have become moot, the class itself is a distinct entity that can carry on even if the class representative's individual claims become moot: "[W]hen a district court certifies a class, the class of unnamed persons described in the certification acquires a legal status separate from the interest asserted by the named plaintiff, with the result that a live controversy may continue to exist, even after the claim of the named plaintiff becomes moot." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 74 (2013) (internal quotation marks and alterations omitted); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1538 (2018) ("[W]hen the claim of the named plaintiff becomes moot after class certification, a 'live controversy may continue to exist' based on the ongoing interests of the remaining unnamed class members.") (quoting *Genesis*, 569 U.S. at 74); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (similar); *Doe v. Cook Cnty.*, 798 F.3d 558, 560 (7th Cir. 2015) (holding that because the suit had "been certified as a class action … the fact that the representative plaintiffs are no longer [detained] does not make the case moot"); *Payton v. Cnty. of Kane*, 308 F.3d 673, 681 (7th Cir. 2002) ("[W]here a class has been properly certified, even the mootness of the named plaintiff's individual claim does not render the class action moot.").

II. Application of the *Turner* Standard to Plaintiffs' Claims

IDOC argues that the standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), which arose in the prison context, governs Plaintiffs' substantive due process claims. Doc. 192-1 at 13. Plaintiffs contend that the *Turner* standard does not apply because they are on parole, not in prison, and because they allege the abridgement of a fundamental right. Doc. 171 at 39; Doc. 204 at 20-22. IDOC is correct.

Turner holds that "federal courts must take cognizance of the valid constitutional claims of prison inmates," but that courts must "accord deference to the appropriate prison authorities." 482 U.S. at 84-85. To accommodate those competing concerns, *Turner* articulates "a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." *Id*. at 85 (internal quotation marks and alteration omitted). The four-factor test considers: "[1] whether the [prison] regulation has a 'valid, rational connection' to a legitimate governmental interest; [2] whether alternative means are open to inmates to exercise the asserted right; [3] what impact an accommodation of the right would have on guards and inmates and prison resources; and [4] whether there are 'ready alternatives' to the regulation." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (quoting *Turner*, 482 U.S. at 89-91). "*Turner* does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal." *Id*. at 136.

"The four factors are all important, but the first one can act as a threshold factor regardless which way it cuts." *Singer v. Raemisch*, 593 F.3d 529, 534 (7th Cir. 2010); *see also Van den Bosch v. Raemisch*, 658 F.3d 778, 785 n.6 (7th Cir. 2011) ("Though each of the factors is relevant in assessing the reasonableness of a regulation, we have previously observed that the

first factor serves as a threshold, and the district court need not explicitly articulate its consideration of each one.") (internal quotation marks omitted). For example, in *Nigl v. Litscher*, 940 F.3d 329 (7th Cir. 2019), a prisoner challenged the prison's denial of his request to marry, and prison officials relied only on the first factor to defend the denial. *Id*. at 333-34 & n.3. The Seventh Circuit affirmed summary judgment for the officials, reasoning that the denial "was reasonably related to [the officials'] legitimate penological interests in preserving the security of the prison, inducing compliance with and promoting respect for the prison's rules governing inmate contacts, and rehabilitating [the plaintiff]." *Id*. at 334.

Under *Turner*, "[t]he burden … is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton*, 539 U.S. at 132; *see also Jackson v. Frank*, 509 F.3d 389, 391 (7th Cir. 2007) ("When challenging the reasonableness of the prison's regulation, the inmate bears the burden of persuasion."). Even so, "prison officials must still articulate their legitimate governmental interest in the regulation and provide some evidence supporting their concern." *Riker v. Lemmon*, 798 F.3d 546, 553 (7th Cir. 2015) (internal quotation marks omitted). On summary judgment, inferences as to disputed issues of material fact are drawn against the moving party, but "inferences as to disputed matters of professional judgment are governed by *Overton*, which mandates deference to the views of prison authorities." *Singer*, 593 F.3d at 534.

Turner's deferential standard applies even where a plaintiff alleges the deprivation of a fundamental right. *Turner* itself involved a fundamental right—the right to marry. *See* 482 U.S. at 96-99 (recognizing "a constitutionally protected marital relationship in the prison context," and striking down the prison's marriage regulation because it was "not reasonably related to legitimate penological objectives"). *Turner* also applies to prison regulations that restrict contact

with the prisoner's children, the fundamental right at issue here. *See Easterling v. Thurmer*, 880 F.3d 319, 323 (7th Cir. 2018) ("[P]rison officials may violate the Constitution by permanently or arbitrarily denying an inmate visits with family members in disregard of the factors described in *Turner* and *Overton*."); *Flynn v. Burns*, 289 F. Supp. 3d 948, 963 (E.D. Wis. 2018) (holding that a prison official was entitled to qualified immunity in a child contact case and that *Turner* "did not suggest that the test should be something different when a fundamental right is at stake").

The question remains whether *Turner* applies in the parole context. The Seventh Circuit in *Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992), held that it does. *Felce* was a procedural due process challenge to Wisconsin's forced administration of antipsychotic drugs to parolees. *Id*. at 1488. Although no substantive due process challenge was brought, *Felce* explained that the "first task" in the procedural due process analysis was "to determine 'the contours of the substantive right' [at issue] by defining 'the protected constitutional interest' and the 'conditions under which competing state interests might outweigh it.'" *Ibid*. (quoting *Washington v. Harper*, 494 U.S. 210, 220 (1990)). That analysis is required because procedural due process regulates deprivations of established substantive rights. *See Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972) ("The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."); *Khan v. Bland*, 630 F.3d 519, 529 (7th Cir. 2010) ("Because [the plaintiff] is not afforded a substantive right to participate in the program, he is not afforded procedural due process rights upon denial.").

In accord with these principles, *Felce* first asked whether the plaintiff could "claim a liberty interest in mandatory release parole without unwanted administration of antipsychotic drugs." 974 F.2d at 1488. To answer that question, the Seventh Circuit applied the *Turner* standard, recognizing that there was an established liberty interest "in being free from the

involuntary use of such drugs." *Id*. at 1494. In so holding, the Seventh Circuit pointed to the Supreme Court's ruling in *Washington v. Harper* that *Turner* restricted the scope of an inmate's right to refuse antipsychotic drugs, 494 U.S. at 223-24, and observed that "this basic analysis is just as applicable to parole as to prison situations." 974 F.2d at 1494. And the Seventh Circuit concluded that "the liberty interest against involuntary use of antipsychotic drugs guaranteed by the Due Process Clause for parolees *is essentially the same* as that recognized for those incarcerated in an institutional setting." *Id*. at 1495 (emphasis added). *Felce* therefore establishes that *Turner* governs the substantive rights of parolees, not just the substantive rights of prisoners.

This aspect of *Felce* accords with the principle, discussed in this court's opinion denying dismissal of Plaintiffs' substantive due process claim, 2019 WL 296556, at *3, that "the 'conditions' of parole *are* the confinement" for purposes of collateral challenges to criminal convictions. *Williams v. Wisconsin*, 336 F.3d 576, 579 (7th Cir. 2003); *see also Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (equating "incarceration" and "the restriction imposed by the terms of the parole" in evaluating the mootness of a parolee's collateral attack on his conviction); *Maleng v. Cook*, 490 U.S. 488, 491 (1989) ("[A] prisoner who ha[s] been placed on parole [is] still 'in custody' under his unexpired sentence."). The analogy between prison and parole is why Plaintiffs cannot challenge the fact that IDOC imposes the no-contact condition itself; rather, they may challenge only the manner in which IDOC implements that condition. 2019 WL 296556, at *4 (citing *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)). Given that Plaintiffs remain "in custody" while they are on MSR, it stands to reason that *Turner* governs the substantive scope of their constitutional rights.

Pressing the opposite view, Plaintiffs cite two out-of-circuit decisions—*United States v. Myers*, 426 F.3d 117 (2d Cir. 2005), and *United States v. Loy*, 237 F.3d 251 (3d Cir. 2001)—that subjected federal supervised release conditions implicating fundamental rights to strict scrutiny. Doc. 171 at 39. Neither case cited *Turner* or its progeny, and neither discussed why *Turner* would not apply in this context. *Myers* relied on *Washington v. Glucksberg*, 521 U.S. 702 (1997), for the proposition that supervised release conditions are subject to strict scrutiny, 426 F.3d at 126, but *Glucksberg* did not concern prison or parole, 521 U.S. at 705-06. *Myers* and *Loy* therefore are not persuasive. Plaintiffs also cite *People v. Morger*, 160 N.E.3d 53 (Ill. 2019), which invalidated under the First Amendment a probation condition for sex offenders. *Id*. at 69-70. Like *Myers* and *Loy*, *Morger* provides no support for its implicit holding that *Turner* does not affect the First Amendment analysis, and likewise is neither controlling nor persuasive in the face of *Felce*'s contrary authority.

Turner does *not* furnish the standard for determining whether a plaintiff received the process due under the Due Process Clause. Rather, as IDOC itself observes, Doc. 192-1 at 29, the familiar *Mathews v. Eldridge* factors govern that inquiry:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976). *Turner* remains relevant, however, because it governs the scope of "the private interest that will be affected," in this case a parolee's interest in enjoying contact with his or her minor children. *See Bleeke v. Server*, 2010 WL 299148, at *7 (N.D. Ind. Jan. 19, 2010) ("Although *Turner* is a *substantive* due process case, the *Felce* court nevertheless looked to it in determining the scope of the liberty interest in the context of a *procedural* due process

claim."). But *Turner* does not displace *Mathews* as the overarching framework for the procedural due process analysis. *See id*. at *9-13 (applying *Turner* to determine the scope of the substantive right at issue, but applying *Mathews* to determine whether the procedures offered satisfied due process).

The Supreme Court's decision in *Washington v. Harper* illustrates this two-step process. After noting that "identifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right," 494 U.S. at 220, the Court applied *Turner* to determine the scope of a prisoner's right to refuse antipsychotic medication, holding that *Turner* allows forced treatment "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest," *id*. at 222-27. Turning to the procedural component of the analysis, the Court weighed the *Mathews* factors to determine what "procedural protections" were required before administering such treatment. *Id*. at 229. The Court's procedural analysis did not cite or rely on *Turner*'s "rational connection" test, nor did it ask whether the plaintiff had identified a "ready alternative" to the existing procedures. *Id*. at 229-36. So *Turner* applies to this case, but only in ascertaining the scope of Plaintiffs' substantive rights, not the procedural protections to which they are entitled.

III. No-Contact Condition

A. Substantive Due Process

In addressing Plaintiffs' substantive due process challenge to the no-contact condition, the court must apply the *Turner* standard to determine the scope of the liberty interest they enjoy in having contact with their minor children upon their release on MSR. "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion); *accord id*. at 77 (Souter, J., concurring). This substantive due process

right includes a "right to familial relations" that protects against "forced separation" of parents and children. *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1018 & n.14 (7th Cir. 2000). Because parents enjoy this liberty interest, as a general rule a State "has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id*. at 1019.

As IDOC correctly notes, Doc. 192-1 at 14-15, *Troxel* and *Brokaw* do not involve parents who were in prison or on parole. But the mere fact that Plaintiffs are parolees does not extinguish their constitutional right to familial association. Like prisoners, parolees "retain a limited constitutional right to intimate association." *Easterling*, 880 F.3d at 322. That right derives from the liberty interest in "a parent's right to enjoy the companionship of his children." *United States v. Lee*, 950 F.3d 439, 448 (7th Cir. 2020); *accord id.* at 451 (St. Eve, J., concurring in part and dissenting in part) ("[P]arents have a liberty interest, protected by the Constitution, in having a reasonable opportunity to develop close relations with their children.") (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 484 (1990) (Kennedy, J., concurring in part and dissenting in part)). The no-contact condition burdens that liberty interest by presumptively denying sex offenders on MSR contact with their children for 35 days after their release from prison.

That burden does not necessarily render the no-contact condition unconstitutional. In the parole context, even fundamental rights may be limited by restrictions that are "reasonably related to legitimate penological interests." *Easterling*, 880 F.3d at 322 (quoting *Turner*, 482 U.S. at 89). IDOC maintains that the no-contact condition is rationally related to its interests in the "rehabilitation of sex offenders on parole," "increasing compliance and respect for rules governing relationships while on parole," and the "protection of the general public, especially children." Doc. 192-1 at 16-17; *see also* Doc. 205 at ¶ 5 (explaining IDOC's "two main

objectives: (1) assisting the offender to re-acclimate himself back into society and resume a normal life … and (2) community and public safety," including the safety of children). Plaintiffs do not contest the legitimacy of IDOC's asserted interests. Doc. 204 at 23 ("[R]ehabilitation and reintegration are the primary objectives on supervised release."). Under *Turner*, then, the principal question is whether Plaintiffs can identify an "obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost" to IDOC's "valid penological goal[s]." *Overton*, 539 U.S. at 136.

The alternative policy proposed by Plaintiffs is for IDOC to evaluate parolees' requests for contact with their children before their release on MSR using the pre-release evaluations and SVP screenings that IDOC already conducts on sex offenders shortly before their release. Doc. 171 at 45 (complaining that IDOC's policy "defers until after release the decision whether a releasee will be permitted to have contact with his minor child while on MSR"). In support, Plaintiffs argue that those evaluations collect and assess evidence about the risks to children that will be posed by sex offenders on their release. *Id*. at 47.

The record includes evidence suggesting that the pre-release evaluations and SVP screenings provide data about parolees that is at least potentially relevant to IDOC's penological interests in rehabilitation and community safety. Brown-Foiles's testimony highlighted the potential utility of those evaluations for sex offender parolees' treatment providers. Doc. 174-7 at 26 (100:9-13) (testifying that a pre-release evaluation is "a very valuable tool for a treatment provider"); *id*. at 30 (115:20-21, 116:1-16) (testifying that "[SVP screenings] could be informative for a future treatment provider," and adding that "[i]t's just much more in depth and contains a lot of information" compared to the pre-release screening). The record also includes evidence suggesting that those evaluations can help IDOC meet its community safety goals. The

"standard" IDOC uses for approving contact between parolees and their children is whether the parolee is "low risk, no risk" for posing danger to a child. Doc. 193 at ¶ 19. The SVP screening could help determine whether a parolee satisfies that standard because, as Brown-Foiles put it, the "criteria might look the same" or be "similar" to the criteria used by "somebody who is evaluating a risk of contact with children." Doc. 174-7 at 38 (147:19-148:9). The SVP screening also uses "actuarial-based assessment tools," Doc. 193 at ¶ 65, that apparently produce a "score from which [IDOC] could derive a risk level," Doc. 174-7 at 30 (114:11-12). (By contrast, the pre-release evaluation "does not have a risk component" in that "[i]t does not look to predict futur[e] risk." *Id*. at 24 (91:11-13); *accord id*. at 25 (96:16-18). But a "formal risk assessment" by a therapist is not required as part of the post-release evaluations, either. Doc. 193 at ¶ 20.) This evidence supports an inference that evaluations conducted before a parolee's release, based on the information already available to IDOC, are a possible alternative to the post-release evaluations conducted by the containment team.

That said, other record evidence suggests that there are meaningful differences between pre-release screenings of prisoners and post-release evaluations of parolees. For example, IDOC does not currently administer polygraphs as part of its pre-release evaluations, Doc. 205 at ¶ 114, which IDOC posits as one reason why "[s]olely relying upon [those evaluations] is insufficient," *id*. at ¶ 51. Whether IDOC could conduct the polygraphs prior to release is unclear. It appears possible that many, if not all, of the questions asked during a parolee's post-release polygraph exam could be asked in a pre-release polygraph. *Id*. at ¶ 81 ("The questions for the initial polygraph depend on the client's sexual history, but could include whether the client has ever viewed child pornography, whether the client has ever engaged anyone in non-consensual sexual contact, whether the client has had any sexual contact with other minors as an adult, whether the

client has engaged in any peeping or exposing behaviors, whether the client has ever used force in the instances of a rape or sexual assault charge, or whether the client has ever had sexual contact with anyone who might have been asleep or drunk."). But the record does not compel an inference or conclusion in either party's favor concerning the effectiveness of that alternative.

IDOC cites Dr. Blain's and Brown-Foiles's testimony that evaluations conducted while an offender remains incarcerated inherently cannot account for how that offender will react as a parolee to the conditions and stressors in the outside world. *Id*. at ¶¶ 52, 54, 109. That testimony supports the inference that there is some disadvantage to making initial determinations about parent-child contact before an offender is released on MSR. Still, the court cannot conclusively decide on the present record whether that disadvantage is *de minimis*. *See Turner*, 482 U.S. at 91 (holding that the existence of "an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests" is "evidence that the regulation does not satisfy the reasonable relationship standard").

Brown-Foiles testified that the pre-release evaluation conducted by IDOC "could be used to inform the decision about whether someone should have contact with his or her child, but it is not a single source of information." Doc. 205 at ¶ 110; *see also* Doc. 193 at ¶ 63. Similarly, Dr. Blain testified that, at least in some cases, it would be possible to make a recommendation about parent-child contact based on a pre-release evaluation. Doc. 174-4 at 23 (87:12-18); *id*. at 24 (90:21-91:13). And Dr. Blain agreed that an IDOC evaluator could conduct a valid risk assessment before an offender is released on MSR. *Id.* at 24 (90:4-6). He cautioned, however, that it may not be possible to assess all relevant factors before release. *Id.* at 23 (89:22-24); *id*. at 24 (91:7-11). The record therefore gives rise to a genuinely disputed issue of material fact: the utility of pre-release evaluations and SVP screenings, and whether using such evaluations can

advance IDOC's penological goals with no more than a *de minimis* cost. *See Beard v. Banks*, 548 U.S. 521, 535 (2006) (plurality opinion) ("*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective."). A trial is necessary to fully develop the record as to the disadvantages, if any, that Plaintiffs' proposed alternative policy would impose on IDOC's penological goals, and therefore as to whether the no-contact condition satisfies *Turner*.

The cross-motions for summary judgment are accordingly denied as to Plaintiffs' substantive due process challenge to the no-contact condition.

B. Procedural Due Process

Plaintiffs also claim that the no-contact condition violates procedural due process by denying them (1) a pre-deprivation hearing or, if pre-deprivation hearings are not required, (2) sufficiently prompt post-deprivation determinations. As noted, Plaintiffs have a liberty interest in familial association with their children. The pertinent question for procedural due process purposes is precisely when Plaintiffs are constitutionally entitled to an initial determination of whether they can be deprived of that interest.

1. Lack of Pre-Deprivation Hearings

Absent a court order, IDOC policy does not grant parolees a hearing before they are deprived, upon their release, of their liberty interest in familial association. Doc. 192-1 at 36. IDOC argues that a pre-deprivation hearing is not constitutionally required. *Ibid*.

Procedural due process does not always require pre-deprivation process: "[W]here a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake … postdeprivation remedies might satisfy due process." *Zinermon v. Burch*, 494 U.S. 113, 132 (1990). Weighing an asserted liberty interest against the burdens of a pre-deprivation hearing is "a special case of the general *Mathews v. Eldridge* analysis." *Id*. at 128. Applying *Mathews*, the

Seventh Circuit recognized in *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463 (7th Cir. 2011), the general rule that, absent exigent circumstances, pre-deprivation process is required before removing children from their parents' custody. *Id*. at 486 ("[G]overnment officials may remove a child from his home without a pre-deprivation hearing and court order if the official has probable cause to believe that the child is in imminent danger of abuse."). But that general rule does not necessarily apply in the parole context, as procedural due process analysis is "flexible" and must be tailored to the "particular situation." *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The parties do not identify any precedent deciding whether *Hernandez* applies in the parole context, so the court will undertake that analysis in the first instance.

The first *Mathews* factor is "the private interest that will be affected by the official action." 424 U.S. at 335. A parent's liberty interest in familial association with minor children "is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court." *Lee*, 950 F.3d at 448 (internal quotation marks and alteration omitted). That long pedigree reflects the undeniable importance of the liberty interest at stake. *See Brokaw*, 235 F.3d at 1019 ("[T]he forced separation of parent from child, even for a short time, represents a serious infringement upon both the parents' and child's rights.") (quoting *J.B. v. Washington Cnty.*, 127 F.3d 919, 925 (10th Cir. 1997)); *cf. Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (noting a parent's "commanding" interest in the accuracy of a decision terminating parental rights). Given the importance of that liberty interest, a post-deprivation hearing does not afford a "completely adequate remedy" for its deprivation. *Ellis v. Sheahan*, 412 F.3d 754, 758 (7th Cir. 2005). No matter the outcome of a post-deprivation hearing, parolees can never reclaim the time

they have been separated from their children during the no-contact period following their release. The first *Mathews* factor therefore weighs in favor of pre-deprivation hearings.

The second *Mathews* factor considers "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." 424 U.S. at 335. Because the no-contact policy (absent a court order) imposes a blanket ban on parent-child contact without regard to individual circumstances or characteristics, there is a significant risk of erroneous deprivation of a parolee's liberty interest. Pre-deprivation process affording at least some consideration of the parolee's circumstances and yielding some individualized assessment of risk would protect against the erroneous deprivation of that interest. But the record does not establish with the necessary clarity how accurately pre-deprivation assessments would predict parolees' individual risks to their children. As noted, some evidence indicates that evaluations already conducted before a parolee's release are likely to have *some* probative value in assessing risk, but other evidence indicates that they are an imperfect substitute for IDOC's post-release evaluations.

Additionally, it is possible that IDOC could implement "specialized evaluations" that, according to Brown-Foiles, could enable an evaluator to make a pre-release risk assessment and render a recommendation. Doc. 193 at ¶ 66. But because Brown-Foiles's testimony on that point was very brief, the record does not contain sufficient evidence for the court to determine the probable value of using such evaluations as a safeguard against erroneous deprivations. Thus, unresolved factual issues mean that the court cannot yet determine in which direction the second *Mathews* factor tilts.

The third *Mathews* factor, IDOC's interests, is equally indeterminate. IDOC undoubtedly has an interest ensuring that parolee-child contact does not pose risks to the child's health and

safety. That interest does not inherently weigh against additional process, for IDOC "shares the parent's interest in an accurate and just decision." *Lassiter*, 452 U.S. at 27. Still, IDOC's interests could be harmed by additional administrative burdens. *See id.* at 28 (recognizing that "the State's pecuniary interest" in avoiding the expense of additional procedural safeguards is "legitimate"). What the record does not establish with any degree of certainty is the magnitude of that burden.

The undisputed fact that additional process would impose *some* burden on IDOC's resources does not warrant summary judgment for IDOC because the court must weigh that burden against the countervailing factors, including the significant liberty interest at stake and the value of additional process. The record is not sufficiently developed at this juncture for the court to make that determination. Specifically, IDOC cites no record evidence regarding the costs of using the information obtained from evaluations conducted before an offender's release, whether in terms of staff time or other resources. And while Brown-Foiles testified that the "specialized evaluations" are "very expensive," Doc. 205 at ¶ 112, "very" is a relative term. Brown-Foiles's testimony therefore does not allow the court to compare the costs of "specialized evaluations" to the costs of procedures that due process requires for other government-enforced parent-child separations. *See Felce*, 974 F.2d at 1500 (comparing the burdens of providing additional process for involuntarily medicating a parolee to "those required when the state seeks to medicate an inmate against his will and … must pursue involuntary commitment").

In sum, disputed issues of fact preclude any holding at this juncture that the *Mathews* factors either require or do not require pre-deprivation process. The parties' cross-motions for summary judgment therefore are denied as to this aspect of Plaintiffs' procedural due process challenge to the no-contact condition.

2. Timeliness of Post-Deprivation Hearings

On the assumption that procedural due process does not require pre-deprivation determinations, a trial is likewise necessary to determine whether IDOC's policies are unconstitutional because of the delays in providing post-deprivation determinations. Due process requires that post-deprivation determinations be "sufficiently prompt." *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 618 (7th Cir. 2002); *see also Brokaw*, 235 F.3d at 1021 (holding that when pre-deprivation hearings are not required, post-deprivation review must be "prompt and fair"). The degree of promptness required is determined by balancing "the importance of the private interest and the harm to the interest occasioned by the delay; the justification offered by the Government for the delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been erroneous." *FDIC v. Mallen,* 486 U.S. 230, 242 (1988). That balancing test merely "rephrase[s]" the *Mathews* test for cases alleging an unconstitutional delay in providing post-deprivation process. *DeVito v. Chi. Park Dist.*, 972 F.2d 851, 855 (7th Cir. 1992).

The first *Mathews* factor weighs against the 35-day delay because, as discussed above, even a brief parent-child separation imposes a serious intrusion on a parolee's interest in familial association. *See Brokaw*, 235 F.3d at 1019. If due process permits IDOC to defer determinations until after a parolee's release, the parolee will have a significant interest in the post-release determination occurring as quickly as possible.

As to the second *Mathews* factor, IDOC offers two principal justifications for the delay in making initial parent-child contact determinations. First, it contends that therapists need flexibility to make an individualized assessment about a parolee's rehabilitation after release, which necessarily requires some delay between the release and an initial determination.

Doc. 192-1 at 38-39. Second, IDOC asserts that limitations on its resources—in particular, its staff—constrain the speed with which it can process parolees' requests for child contact and appeals from denials of those requests. *Id*. at 40. Those justifications are facially legitimate. But, again, the record at this juncture does not establish with the requisite level of certainty the strength of the relationship between these justifications and IDOC's underlying interests. The parties do not cite record evidence about how administratively burdensome it would be for IDOC to make initial determinations in less than 35 days after an offender's release on MSR given the information it already collects prior to release.

The third factor, the likelihood of an erroneous interim decision, favors Plaintiffs. Because the 35-day no-contact period effectively operates as a blanket ban, there is a high likelihood of making erroneous determinations. That is particularly true because there is no threshold, pre-deprivation step ensuing that deprivation is "not baseless." *Gilbert v. Homar*, 520 U.S. 924, 934 (1997) (explaining that, in the absence of a pre-deprivation hearing, a threshold step can "provide[] adequate assurance that the [deprivation] is not unjustified"). That said, the court cannot determine this factor's relative weight without evidentiary development about the probative value of pre-deprivation hearings.

Accordingly, the parties' cross-motions for summary judgment as to this aspect of Plaintiffs' procedural due process challenge to the no-contact conditions are also denied.

IV. Criteria Used to Evaluate Child Contact Requests

As noted, Plaintiffs challenge on substantive due process grounds five specific criteria that IDOC uses to determine whether and, to what extent, parolees can have contact with their children. Each challenged criterion is considered in turn.

A. Polygraph Requirement

The first criterion is whether the parolee has taken a polygraph examination. IDOC policy permits a containment team to deny a request for parent-child contact indefinitely until a parolee takes a polygraph exam. Doc. 193 at ¶ 32. The policy also gives therapists the discretion to object or withhold approval for contact until a parolee passes a polygraph. *Id*. at ¶ 31. Consistent with this policy, the Parolee/Releasee Determination of Request for Contact with Child(ren) form has a checkbox indicating that one standard reason for denying a parent-child contact request is that the parolee's "[t]herapist requested polygraph but results are not available." Doc. 174-1 at 3. And the safety plan requires parolees to initial a "requirement" that "[t]he parolee has successfully completed and passed a sexual history OR maintenance polygraph." *Id*. at 5. Despite the seemingly mandatory nature of this "requirement," Deputy Chief Dixon testified that a polygraph "could be something that's not applicable." Doc. 174-2 at 23 (87:5-8).

The record includes testimony from therapists indicating that they view polygraphs as valuable tools for their clinical practice. As noted, Dr. Harris and Dr. Blain testified that they believe polygraphs provide useful information about whether a parolee's offense history disclosures have been truthful and complete. Doc. 205 at ¶¶ 44, 86-87, 91-92, 96. IDOC cites that testimony in arguing that the use of polygraphs is reasonably related to a therapist's decision whether to recommend parent-child contact. Doc. 192-1 at 27. Plaintiffs respond that the therapists' testimony about the utility and reliability of polygraphs should be stricken as expert opinion because IDOC did not disclose Drs. Harris and Blain as experts under Civil Rule 26(a)(2). Doc. 205 at ¶¶ 86-87, 93-94.

Assuming that Drs. Harris and Blain conveyed expert opinion regarding polygraphs, IDOC's failure to make the proper disclosures is harmless. *See* Fed. R. Civ. P. 37(c)(1) ("If a

party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion … unless the failure was substantially justified or is harmless."). As IDOC observes, Doc. 217 at 8-9, Plaintiffs subpoenaed Drs. Harris and Blain for deposition and asked them questions about the use of polygraphs, and the testimony Plaintiffs now seek to strike was offered in response to those questions. Because Plaintiffs solicited the therapists' testimony and knew its substance, they can hardly complain or feign surprise that IDOC seeks to rely on that testimony. Any failure of disclosure was therefore harmless. *See Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 888 (7th Cir. 2004) (affirming the district court's harmlessness finding where the party seeking to exclude an expert's opinion participated in the expert's deposition and knew of the opposing party's intent to rely on that opinion).

Moreover, even setting aside the therapists' testimony, there remains undisputed evidence in the record to support IDOC's use of the polygraph criterion. Brown-Foiles testified that "[n]ot every treatment provider uses polygraphs, but … it is a part of best practice that polygraphs really do benefit the treatment provider and the client." Doc. 174-7 at 18 (66:20-23). Under the *Turner* standard, Brown-Foiles's testimony on this matter of professional judgment is sufficient to articulate the legitimate governmental interest in requiring polygraphs, as it "provide[s] some evidence supporting [IDOC's] concern." *Riker*, 798 F.3d at 553. Accordingly, the burden shifts to Plaintiffs to provide sufficient evidence disproving the validity of the requirement. *See Beard*, 548 U.S. at 530 ("Unless a prisoner can point to sufficient evidence regarding such issues of [professional] judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.").

In attempting to meet their burden, Plaintiffs cite only a district court decision, *United States v. Moultrie*, 552 F. Supp. 2d 598, 601-02 (N.D. Miss. 2008), holding that the results of certain polygraph examinations were insufficiently reliable to be admitted in a criminal trial under Evidence Rule 702. Doc. 205 at ¶¶ 86-87, 93-94. In reaching its conclusion, the district court relied heavily on a finding by the National Academy of Sciences that the accuracy of polygraphs "may be highly variable." *Moultrie*, 552 F. Supp. 2d at 601 (quoting Comm. to Review the Sci. Evid. on the Polygraph, Nat'l Rsch. Council, *The Polygraph and Lie Detection* 214 (2003)). Even accepting *Moultrie* as correct, the "circumstance" addressed there, "as written about in [a] court opinion[], cannot provide sufficient support" for Plaintiffs' position in this case. *Beard*, 548 U.S. at 534 (holding that a prisoner did not meet his burden in opposing summary judgment by citing court opinions generally suggesting that a less restrictive prison policy would promote rehabilitation). *Moultrie* did not address the relevant context here—the use of polygraph examinations as part of therapy for parolees convicted of sex offenses. *See ibid*. (noting that judicial opinions are particularly inapt when they "were not considering contexts" analogous to the context in question). Plaintiffs therefore fail to raise a genuine dispute of material fact as to the validity, as a general matter, of IDOC's polygraph requirement.

IDOC is not entitled to summary judgment, however, due to questions arising from Plaintiff's submission that the polygraph requirement violates substantive due process because some parolees "can't afford to take[] a polygraph examination." Doc. 171 at 53. A therapist may withhold support for parent-child contact because a parolee cannot afford a polygraph exam. Doc. 193 at ¶ 49. Yet IDOC does not articulate a legitimate governmental interest in denying parolees' contact with their children based on inability to pay for a polygraph. Deputy Chief Dixon testified that a therapist's decision on whether to withhold support for parent-child contact

due to a parolee's inability to pay was "up to the therapist." Doc. 174-2 at 42 (163:5-13). That explanation fails to establish a logical connection between a parolee's ability to pay for a polygraph and IDOC's penological interests. Accordingly, Plaintiffs' substantive due process challenge to the polygraph criterion will proceed to trial so that the parties may develop an evidentiary basis for determining whether IDOC's penological interests are rationally related to the requirement that parolees pay for their own polygraphs without regard to their financial resources.

B. Insufficient Duration of Therapy

The second contested criterion is insufficient duration of therapy. Under IDOC policy, a therapist can decline indefinitely to make a recommendation regarding parent-child contact. Doc. 193 at ¶ 30. Deputy Chief Dixon testified that if a therapist does not feel comfortable making a recommendation because of a parolee's insufficient time in therapy, "the therapist will also list reasons" for that discomfort. Doc. 174-2 at 28 (107:9-11).

Construing the record in the light most favorable to Plaintiffs, there is evidence in the record that this criterion is arbitrary and therefore not reasonably related to IDOC's interests. *See Turner*, 482 U.S. at 89-90 ("[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational."). Specifically, the record can support an inference that the required duration of therapy varies based on the therapist's proclivities and practices, not on the parolee's history and circumstances. Dr. Harris testified that she "'would need to sit with [the parolee] for *at least a year*' … if asked to make a recommendation about whether the person should have contact with their children." Doc. 205 at ¶ 41 (emphasis added). By contrast, Dr. Grosskopf testified that "the average time for her to recommend contact with a child is two to three weeks, *four weeks max*, and that depends on … availability … . The longest period of time to recommend contact

with a child might have been two months in those cases where she rendered recommendations in the last year." *Id*. at ¶ 69 (emphasis added). Drawing reasonable inferences in Plaintiffs' favor, a typical parolee seen by Dr. Grosskopf will have a decision in about a month, while the same parolee would have to wait at least a year if seen by Dr. Harris. There may be some justification for this disparity—for example, Dr. Harris may see parolees with different characteristics than those seen by Dr. Grosskopf—but no such justification is apparent on the record. Doc. 174-6 at 5 (17:10-11) (Dr. Grosskopf's testimony that parolees' referrals to therapists are based on "where they live"). Consequently, a reasonable factfinder could find that parolees with similar characteristics, including recidivism risk and progress in rehabilitation, will be treated far differently for no apparent reason. IDOC therefore is not entitled to summary judgment on the insufficient duration of therapy criterion.

Nor are Plaintiffs entitled to summary judgment on this criterion. IDOC provides parolees with referrals to therapy, Doc. 205 at ¶ 14, but parolees may select their own therapist, *id*. at ¶ 22. Drawing reasonable inferences in IDOC's favor, any variance in the length of time necessary to secure a positive recommendation is not attributable to IDOC, but instead reflects a difference of professional judgment among therapists that the parolees themselves choose. If that is correct, then the duration of therapy criterion is not arbitrary and therefore satisfies the *Turner* standard.

C. Denial of Guilt

The third challenged criterion arises from a condition in the form safety plan that "the guardian of the child and the approved supervisor [of an in-person visit] may not 'deny, refute, or enable the offender to deny or refute any details of his/her conviction.'" Doc. 193 at ¶ 12 (quoting Doc. 174-1 at 5). Deputy Chief Dixon testified that this condition is intended to ensure the impartiality of the chaperone supervising the parolee's contacts: "If the chaperone is an

enabler, then the chaperone could potentially allow something harmful to the minor to happen during the visit. If the chaperone believed that the offender did do it, then there's animosity there[,] which creates a bad environment for the visit." Doc. 174-2 at 29 (112:23-113:4). The record therefore shows that the denial of guilt criterion operates as a limitation on what the child's guardian or the chaperone of an in-person visit may do and say, not on whether the parolee may maintain his or her innocence in other settings.

Plaintiffs do not contest the legitimacy of IDOC's requirement that parolee-child visits be supervised. Doc. 171 at 71 ("Where necessary, contact can be … subject to close supervision."). And Plaintiffs adduce no evidence disputing the relationship between IDOC's justification for the denial of guilt criterion and its valid goals. IDOC therefore is entitled to summary judgment as to that criterion.

To be clear, this criterion does not categorically prevent parolees themselves from asserting their innocence in an appropriate setting. A parolee's denial of guilt is only "a factor of the entire situation, the entire case," for the containment team to consider, not a dispositive factor that automatically requires denial of a parolee's request for contact with their children. Doc. 174-2 at 30 (113:12-114:16). Plaintiffs do not challenge that aspect of IDOC's policy; instead, they focus only on the denial of guilt condition set forth in the safety plan. Doc. 171 at 45. The court therefore will not consider arguments that Plaintiffs might have advanced to challenge the containment team's consideration of a parolee's denial of guilt as a non-dispositive factor in deciding whether to allow parent-child contact.

D. Noncompliance with Parole Conditions

The fourth challenged criterion is whether the parolees have complied with their MSR conditions. Doc. 205 at ¶ 12. Although the parties' briefs do not discuss this criterion with any specificity, Docs. 172, 192-1, 204, 217, there is an indisputably logical relationship between a

parolee's compliance with parole conditions and IDOC's interest in the parolee's rehabilitation. *See Overton*, 539 U.S. at 133 (recognizing the "self-evident" connection between a regulation prohibiting prison visitation by former inmates and a state's interest in prison security).

The *strength* of the relationship between this criterion and IDOC's penological interest is not clear, however. Deputy Chief Dixon's testimony establishes only that the containment team "should" consider "the parolee's compliance with the conditions of their parole." Doc. 174-2 at 24 (92:20-23). That brief description does not allow the court to find as a matter of law that this criterion necessarily bears a reasonable relationship to the decision whether to allow parent-child contact. For example, there may be some relatively trivial parole violations that, even under the deferential *Turner* standard, would not warrant automatic denial of a request for parent-child contact. Given this gap in the record, "there is reason to believe the better course would be to proceed to a full trial" as to the parole non-compliance criterion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

E. Unreliable Attendance at Therapy

The fifth challenged criterion is "unreliable attendance at therapy." Doc. 166 at 26. In their briefs, Plaintiffs reframe this criterion as "[t]he parolee's 'participation in therapy' and 'engagement' in therapy." Doc. 171 at 53. This framing is consistent with Deputy Chief Dixon's explanation of how containment teams use that criterion. Doc. 174-2 at 24 (92:24-93:2).

There is an obvious logical connection between a parolee's consistency in attending and participating in therapy, on one hand, and IDOC's rehabilitation goals, on the other. Undisputed record evidence confirms that connection. Doc. 205 at ¶ 68 (Dr. Grosskopf's testimony that she considers "participation in therapy" as a relevant factor in deciding whether to recommend parent-child contact); Doc. 174-3 at 7 (22:8-12) (Dr. Harris's testimony that persons "progress through therapy" by "attend[ing] regularly" and being "consistent"); *id*. at 13 (48:13-20) (Dr.

Harris's testimony that attendance and participation at therapy "would give [her] the opportunity to learn about that client"); Doc. 174-4 at 8-9 (29:18-30:1) (Dr. Blain's testimony that a parolee would need to be "attending[,] … on time[,] … working on assignments[,] … [and] contributing to the group" to be in good standing in therapy). Plaintiffs adduce no evidence undermining the reasonable relationship between this criterion and IDOC's rehabilitation goals. IDOC is therefore entitled to summary judgment as to this criterion.

V. Neutral Decisionmaker

Finally, Plaintiffs claim that the lack of a neutral decisionmaker in IDOC's procedures for implementing its parent-child contact policy violates procedural due process. The *Mathews* test governs whether due process requires a neutral decisionmaker. *See Felce*, 974 F.2d at 1496. In *Felce*, the Seventh Circuit held that a grievance procedure used by the Wisconsin Department of Corrections to review decisions by parole agents to involuntarily medicate a parolee with psychotropic drugs violated procedural due process. *See id*. at 1500. The court held that Wisconsin's procedure—which included "heavy emphasis upon the judgment of the individual parole agent," *ibid*.—"was insufficiently neutral and independent to guard against an erroneous determination," *id*. at 1498, because it lacked any "provision for review by persons not currently involved in [the parolee's] diagnoses or treatment," *id*. at 1499. The IDOC procedures challenged by Plaintiffs share many of the same features as those invalidated in *Felce*.

First, as in *Felce*, there is a "significant" liberty interest at stake. *Id*. at 1497. As noted, Plaintiffs have a liberty interest in enjoying the companionship of their children. *See Lee*, 950 F.3d at 448; *Easterling*, 880 F.3d at 322. That liberty interest is at least as significant as the liberty interest in *Felce*. "[A] parent's desire for and right to the companionship … of his or her children is an important interest that undeniably warrants deference and, absent a powerful

countervailing interest, protection." *Lassiter*, 452 U.S. at 27 (internal quotation marks omitted). The first *Mathews* factor weighs heavily in favor of Plaintiffs.

Second, the lack of an independent decisionmaker creates a significant risk of an erroneous deprivation of Plaintiffs' interests and increases the probable value of additional or substitute procedural safeguards. IDOC's procedures do not require an independent decisionmaker. As noted, a parolee's "containment team … has the authority to decide whether a parolee should have contact with his or her minor child." Doc. 205 at ¶ 9. The team "consists of the parole agent, parole commander, sex offender therapist, any other therapist the offender might be seeing, and the parolee." *Ibid*. Those individuals are all "currently involved in [the parolee's] diagnoses or treatment," and therefore do not qualify as independent decisionmakers. *Felce*, 974 F.2d at 1499.

Moreover, IDOC's appeal process does not provide for independent review of the containment team's decision. Appeals are decided by either the Deputy Chief of Parole or the Deputy Chief's designee (currently Brown-Foiles in her capacity as the coordinator for sex offender services). Doc. 193 at ¶ 44. As the position's title suggests, the Deputy Chief of Parole "supervise[s] … parole officers." Doc. 174-2 at 3 (6:16-17). Deputy Chief Dixon is therefore similarly situated to the reviewing officials in *Felce*, who were held to be insufficiently independent because they "formed a direct line of supervisors above [the parole agent] and thus had individual interests in supporting his decision." 974 F.2d at 1499. The possibility of appeal to Deputy Chief Dixon therefore does not cure the lack of an independent decisionmaker.

IDOC contends that Brown-Foiles is independent because she "is not directly involved in the [parolee's] supervision or in the chain of command." Doc. 193 at ¶ 45. Brown-Foiles, however, testified that some therapists employed by IDOC report directly to her, and that she

"provide[s] oversight and some supervision" even for therapists who are not "technically" her direct reports. Doc. 174-7 at 4 (11:11-12:2). Brown-Foiles further testified that she "play[s] a supervision role to the therapists, to the structure of the treatment groups," *id*. at 7 (22:4-6), and that she "coordinate[s] trainings for parole agents and therapists," including "community therapists" not employed by IDOC, *id*. at 4 (10:9-10, 11:3-4). Given her various roles, Brown-Foiles has an individual interest akin to Dixon's in supporting the therapists' recommendations, as those recommendations are likely to be informed by her supervision or training. As a result, Brown-Foiles does not qualify as an independent decisionmaker in the administrative appeals process. *See Felce*, 974 F.2d at 1499 (explaining that supervisors have an interest in upholding their subordinates' decisions).

Perhaps recognizing this problem, IDOC contends that procedural due process "does not require an independent decisionmaker." Doc. 192-1 at 44. But governing precedent holds that the decisionmaker's independence is an important aspect of procedural due process. As the Seventh Circuit explained, although "a decisionmaker need not be external to an institution to be independent," some degree of independence "provides a significant added dimension of procedural protection to the liberty interest at stake." *Felce*, 974 F.2d at 1499-1500. The second *Mathews* factor therefore weighs against the personnel that IDOC has assigned to make and review parent-child contact decisions.

Third, it is beyond dispute that IDOC has a substantial interest in the protection of children and the rehabilitation of parolees. Still, *Felce* recognizes that the assertion of legitimate interests in protecting the public and rehabilitating parolees, without more, cannot overcome the countervailing factors that favor a neutral decisionmaker. *See id*. at 1500 (holding that, on balance, "the involvement of an independent decisionmaker would benefit significantly the

protection of the liberty interest at stake without a significant burden upon either the resources of the state or the substantial interests that the state has in protecting the public and rehabilitating its parolees"). To overcome those countervailing factors, IDOC must establish the "fiscal and administrative burdens" of additional or substitute procedures. *Ibid*. On the current record, evidence regarding those burdens is inconclusive at best. Doc. 192-1 at 43-46; Doc. 217 at 29.

Given the state of the summary judgment record, the court cannot determine whether IDOC's interests outweigh the factors favoring Plaintiffs. The parties' cross-motions for summary judgment are therefore denied as to Plaintiffs' procedural due process challenge to the personnel who make and review parent-child contact decisions. At trial, the parties may develop the evidentiary record regarding the fiscal or administrative burdens of adding or substituting a neutral decisionmaker at some point in the process.

Conclusion

Plaintiffs' summary judgment motion is denied. IDOC's summary judgment motion is granted as to the requirements (1) that chaperones and guardians do not deny or refute, or allow parolees to deny or refute, the details of their convictions and (2) that parolees regularly attend therapy. IDOC's motion is otherwise denied. This case will proceed to a bench trial on the surviving class claims.

September 30, 2021

United States District Judge