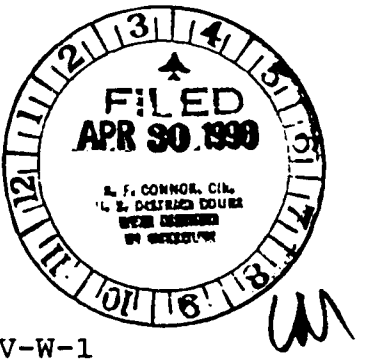

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

A.J., et al.,

Plaintiffs,

v.

LAWRENCE J. MYERS, et al.,

Defendants.

Case No. 89-1077-CV-W-1

ORDER

In this civil rights action, plaintiffs seek declaratory judgment, injunctive and other equitable relief and damages. Plaintiffs complain about the conditions and operations of the Jackson County (Missouri) Juvenile Justice Center ("center"). Five motions are pending:

1. Plaintiffs filed a motion on November 15, 1989, seeking an order determining that this matter should be maintained as a class action. In a motion to dismiss, filed on December 6, 1989, three defendants alternatively moved to deny class certification. Plaintiffs filed on January 16, 1990, a response to defendants' motion. The motion requesting class certification will be granted.

2. Plaintiffs filed a motion on November 15, 1989, seeking a preliminary injunction. Defendants' December 6, 1989, motion to dismiss alternatively moved to deny injunction relief. Plaintiffs responded on January 16, 1990. The motion will be denied.

3. The motion to dismiss was filed December 6, 1989, by defendants Lawrence G. Myers, David A. Jackson, and Forestal Lawton. Plaintiffs' response on January 16, 1990, included reply suggestions supporting their motions for class certification and injunction. Defendants filed reply suggestions on February 5, 1990, in support of their motion to dismiss. The motion to dismiss will be denied.

4. Defendants filed a motion on February 5, 1990, for a protective order to stay further discovery. Plaintiffs filed

their opposition on February 20, 1990. The motion will be denied.

5. Plaintiffs filed on February 14, 1990, a request to enter the center for inspection and other purposes. No opposition was filed within the allotted time. The motion will be granted.

I. Statement of the Case

Plaintiff A.J., a 16-year-old minor, filed this action November 15, 1989, by his mother and next friend, L.B., on behalf of himself and others similarly situated. Pseudonyms are used to protect the juvenile plaintiff's identity. He was detained at the center for 15 days, and was released about an hour after this lawsuit was filed. The defendants are Lawrence G. Myers, center administrator; David A. Jackson, assistant administrator; Forestal Lawton, juvenile officer, and unidentified administrative persons designated only as various John Does. They are sued in their official and individual capacities.

Pursuant to 42 U.S.C. §§ 1983 and 1988, plaintiffs complain that plaintiff A.J. and others similarly situated have been deprived of due process of law. Specifically, they allege overcrowding at the center, use of floor mattresses on which to sleep, and injurious health and safety conditions. They allege the conditions constitute punishment during pretrial detention, in violation of the Fourteenth Amendment.

II. Facts

The center is a three-story facility at 625 East 26th Street, Kansas City, Missouri. It is owned and operated by Jackson County as the official detention site for children under Jackson County

juvenile court jurisdiction. In the autumn of 1988, the center experienced an unexpected population increase. Administrative officials took numerous steps to accommodate the larger population.

A year later, on October 30, 1989, plaintiff A.J. was charged with carrying a concealed weapon. Throughout the 15-day detention his sleeping area was a one-person room which he shared with either one or two other persons while occupying a mattress on the floor.

III. The Motions

A. Class Action

1. Arguments

Plaintiffs seek class certification pursuant to Rule 23(b)(2), Fed.R.Civ.P. The class would include all present and future detainees of the center who have been detained between November 15, 1984, and November 15, 1989. Plaintiffs claim to have met the four class characteristics. Rule 23(a) requires numerosity, commonality, typicality, and fair and adequate representation. Additionally, plaintiffs assert that a class action under Rule 23(a) should be maintained because the action falls within one of the categories in Rule 23(b). That is, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole." Rule 23(b)(2), Fed.R.Civ.P.

Defendants argue that a class cannot be certified because the named plaintiff, A.J., was released from detention before certification occurred. His release made the certification issue moot, they contend. They cite Sosna v. Iowa, 419 U.S. 393, 402

n.11, (1975), in which the Supreme Court indicated there may be circumstances in which the issues will become moot before the district court reasonably could rule on a certification motion. Noting that named plaintiff A.J. has been released, defendants challenge the adequacy of that party to represent the class of persons who have been detained.

2. Discussion

a. Mootness

In class action suits, the plaintiff presents two separate issues for judicial resolution -- the individual claim on its merits and the claim that the plaintiff is entitled to represent a class of similarly situated persons. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980). Once a class is certified, of course, mootness regarding an individual party will not affect the continuing claim of the class because it has acquired a legal status separate from that of the plaintiff. Sosna v. Iowa, supra, 419 U.S. at 399-400. On the other hand, if certification is denied, the plaintiffs' individual claim for damages would not become moot.

Even though the named plaintiff A.J. here was released from the center before class certification reasonably could be considered, neither his claim nor the putative class's claim has become moot. In Gerstein v. Pugh, 420 U.S. 103 (1975), the Supreme Court held that release of named plaintiffs from a pretrial detention center before consideration of class certification did not make the class action moot. The Supreme Court said, at 111

n.11:

> At oral argument counsel informed us that the named respondents have been convicted. Their pretrial detention therefore has ended. This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class. See Sosna v[.] Iowa, 419 U.S. 393, 42 L[.] Ed[.] 2d, 532 S[.] Ct[.] 553 (1975). Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under the allegedly unconstitutional procedures. The claim, in short, is one that is distinctly "capable of repetition, yet evading review."
>
> * * *

As noted by defendants, persons seldom are kept at the center longer than three months. Therefore, an individual plaintiff would be unlikely to have his constitutional claim decided before leaving the center. Furthermore, a constitutional deprivation, if any, is capable of repetition with each new detainee. In fact, it easily could be repeated with the named plaintiff, A.J., who is currently on probation. The facts here easily put this case within the narrow class of cases described by the Supreme Court in Gerstein. The release of A.J. is not sufficient to make his claims or the class's claims moot.

b. Rule 23(a) Qualifications

(1) Numerosity

The number of persons in the proposed class would be large by any estimate and make joinder of parties difficult if not prohibitive. The fluid nature of the class -- with juvenile detainees arriving and leaving with irregularity -- also makes this

group of plaintiffs particularly suitable for class certification. Defendants have set forth no reasons why the numerosity requirement is not satisfied.

(2) Commonality

The same source of alleged harm against the named plaintiffs also applies to all putative class members, and arises from the same alleged constitutional deprivations. Each class member will have been detained in the center, where he will have been exposed to the same alleged constitutional deprivations as all other class members. Even though some persons will have been detained for longer periods than others, the distinction is only one of degree rather than substance. The crux of the complaint is that the detained juveniles are subjected to punishment before the charges against them are litigated. Variations in the amount of pretrial punishment, if any, are not sufficiently relevant to defeat certification.

(3) Typicality

Likewise, the named plaintiffs' grievances are typical of those of the other potential class members. The factual proof and legal theories to be applied by the named plaintiffs is precisely the same as would be used by the potential class members. Similarly, a judgment in favor of the named plaintiffs would benefit the proposed class. A judgment in favor of defendants would, and should, be binding upon all members of the proposed class as well as the named plaintiffs.

(4) Representation Adequacy

There is no reason to believe that the named plaintiffs and the potential class members would have a conflict of interest. The named plaintiffs appear to be ready, willing and able to represent the other class members fairly, adequately and vigorously. As discussed above, the release of the named plaintiff A.J. has no effect on his ability to represent the class.

c. Rule 23(b)(2)

Under Rule 23(b)(2) the proposed class first must satisfy the requirements of Rule 23(a) which, as discussed above, have been met in this instance. Second, the opposing party must have acted or refused to act on grounds generally applicable to a class, thereby making final relief appropriate. Defendants make no separate argument regarding Rule 23(b)(2) class certification requirements. As discussed above, the alleged actions or inactions attributed to the defendants are the same with regard to all plaintiffs and potential class members. The most appropriate remedy, if any, under the circumstances would be injunctive and declaratory relief. This is, in part, what the named plaintiffs seek. It also is what would benefit all members of the proposed class.

3. Conclusion

The requirements of Rule 23(a) have been met. The appropriateness of injunctive relief, if any, demonstrates that a class should be certified under Rule 23(b)(2). The motion to certify a class will be granted. Plaintiffs request that the class consist of all present and future detainees of the Jackson County,

Missouri, Juvenile Justice Center, and all persons who were detained at the center between November 15, 1984 and November 15, 1989, who have been, or will be subjected to overcrowding, use of floor mattresses, and/or other conditions of confinement injurious to their health and safety.

That description, however, begs a question: To be eligible for class membership, must a person first prove the injury which he would hope to prove if admitted to the class? Rather than conditioning membership upon proof of the claim which the class seeks to prove, a simpler description must apply. The class will consist of persons who have been or will have been detained at the center at some time since November 15, 1984.

It should be noted that this class will be permitted to seek only equitable relief, e.g., declaratory and injunctive relief. In the complaint, at page 9, plaintiffs pray for the court to:

* * *

> B. Issue an order certifying this action to proceed as a class action pursuant to Rule 23(a) and [(]b[)](2) of the Federal Rules of Civil Procedure;
>
> C. Award damages against defendants to plaintiff A.J. and members of the class in amounts which the jury and Court deem proper;
>
> D. Issue preliminary and permanent injunctions . . . .

* * *

By requesting damages as well as class certification under Rule 23(b)(2), plaintiffs apparently are seeking alternative types of relief. This conclusion is compelled by examining various

provisions of Rule 23, and the manner in which plaintiff has proceeded so far in this case. For instance, the text of Rule 23(b)(2) shows it is intended to apply to equitable relief:

> **(b) Class Actions Maintainable.** An action may be maintained as a class action of the prerequisites of subdivision (a) are satisfied , and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole; . . .

The Advisory Committee Notes for the 1966 amendment to the rule further support the intent to use Rule 23(b)(2) for equitable relief:

> * * *
>
> The subdivision [Rule 23(b)(2)] does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.
>
> * * *

This interpretation is even more apparent when one considers that Rule 23 provides for notice to class members only if the class is maintained under Rule 23(b)(3). See Rule 23(c)(2) and (3). If damages were awarded to a class pursuant to Rule 23(b)(2), for which no notice is required, disbursement of the award among the class members would be a practical impossibility for lack of precise identification of the individual members. The difficulty here is particularly obvious where, as here, the class includes people whose qualification for the class will occur only in the

future, i.e., juveniles whose detention begins in the future.

If for some reason plaintiffs believe their prayers for relief should not be viewed as alternative requests, they certainly have the option to apply for leave to amend their complaint. Now that plaintiffs have had the benefit of some discovery, their amended complaint, if any, could include more specific allegations than the original complaint. A more precise complaint, of course, could facilitate a speedier disposition of this lawsuit.

B. Preliminary Injunction

1. Argument

In the motion for preliminary injunction, plaintiffs seek an "order enjoining the defendants from continuing their course of unlawful behavior." The unlawful behavior described by plaintiffs consists of deprivation of Fourteenth Amendment due-process rights by imposing punishment on juvenile detainees. Specifically, they allege punishment by way of overcrowding, use of floor mattresses, and confinement conditions injurious to health and safety.

2. Applicable Law

Injunctive relief is an equitable remedy issued as fundamental fairness requires to prevent irremediable harm to the movant, that is, "to prevent the judicial process from being rendered futile by the defendant's action or refusal to act." See Wright and Miller, 11 Federal Practice and Procedure, § 2947 at 423-425 (1973) and 141-142 (1990). See also, Rule 65(b), Fed.R.Civ.P. Accordingly, the primary function of a preliminary injunction is "to preserve the status quo until, upon final hearing, a court may grant full,

effective relief." Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589, 593 (8th Cir. 1984).

Whether preliminary injunctive relief should be granted is determined in the Eighth Circuit by a four-factor test which was applied in Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109 (8th Cir. 1981)(en banc). The factors are (1) the threat of irreparable harm to the movant, (2) the balance between this harm and injury to other parties, (3) the probability that the movant will succeed on the merits, and (4) the public interest involved.

Of these factors, the threat of "irreparable harm" is paramount in determining whether a preliminary injunction will issue. See Rathmann Group v. Tanenbaum, 889 F.2d 787, 790 (8th Cir. 1989); Nordin v. Nutri-System, Inc., No. 89-5243 slip op. (8th Cir. 1990). Absence of irreparable injury is, alone, sufficient to deny such relief. Dataphase, supra, 640 F.2d at 114. Of course, a plaintiff's failure to satisfy the other factors also can defeat an injunction request.

In Elrod v. Burns, 427 U.S. 347 (1976), the Supreme Court found that deprivation of a constitutionally protected right, even for a minimal amount of time, is an irreparable injury. The Supreme Court noted that the danger of allowing this ongoing infringement while awaiting the determination of the merits of the case was sufficiently great to uphold an injunction. Elrod, supra, at 373. In Lareau v. Manson, 651 F.2d 96, 104-105 (2nd Cir. 1981), the court described conditions under which overcrowding of pretrial detainees would constitute punishment and, thus, an

unconstitutional deprivation of due-process rights. The court applied a standard set forth in Bell v. Wolfish, 441 U.S. 520, 538 (1979) for determining when confinement conditions for pretrial detainees exceeded constitutional boundaries.

3. Discussion

As the movants, of course, plaintiffs have the burden to establish specific and substantial evidence supporting the request for injunction. Although the plaintiffs and the class may have viable claims, they have not carried their burden sufficiently to obtain an injunction.

First, the irreparable harm has not been demonstrated. If plaintiffs have been deprived of constitutional rights, of course that would be irreparable harm. However, upon A.J.'s release, the continuing deprivation (if any) would have ceased because he no longer was subjected to the center's conditions. Absent a threat of continuing deprivation, the named plaintiffs' claim does not lend itself to injunctive relief. Certainly the class may be exposed to a continuing threat of rights deprivation, but no substantial evidence of that has been established yet. The best, and virtually only, showing of evidence of conditions concerns the conditions to which the named plaintiffs were exposed.

The defendants suggest that the conditions have been improved, permitting the possibility that the named plaintiffs' experience was isolated. That perception may seem naive. However, the class (by way of the named plaintiffs) assumed the duty to show a continuing threat of irreparable harm, and substantial evidence of

that has not been established yet.

The second factor is the balance between this harm and injury to others. Deprivation of a child's constitutional rights necessarily defies quantification. Equally difficult to quantify is other persons' justifiable expectation that they will be protected from unruly juveniles who are believed to have committed crimes. Plaintiffs do not challenge the means by which juveniles are put into detention. Without contrary evidence, the reasons for detaining juveniles can be presumed to be proper. If the alternative to depriving children of constitutional rights is to refrain from detaining them, then the balance does not weigh in favor of the plaintiffs.

If the alternative to depriving children of constitutional rights is to change the detention conditions, then plaintiffs still have not carried their burden. The injury to the operators of the center would arise from the court's sudden and unplanned interruption of the center's operations. Such an interruption would be the means by which conditions would be changed to eradicate the alleged constitutional deprivations. Even if an adequate and viable approach to changing conditions can be developed, such a plan has not yet been proposed. Without a workable alternative to the present conditions, the operators cannot be directed at whim simply to cease depriving persons of constitutional rights.

The third factor is the probability that the movant will succeed on the merits. As will be discussed below, plaintiffs'

claim cannot be said, as a matter of law, to be deficient. Nevertheless, having a claim meritorious enough to pursue is a far cry from having a claim that probably will succeed on the merits. Plaintiffs have not produced sufficiently persuasive evidence to demonstrate a likelihood of success on the merits.

Finally, the public interest is to be considered. The existence of detention centers is due, in part, to the need to separate allegedly dangerous youths from the public pending a decision on what to do with them. The surest way to avoid constitutional deprivations due to the center's conditions would be simply to release the detained children. Obviously that cannot happen. The alternative must be less drastic. Here lies the most troubling aspect of plaintiffs' request for injunction.

The request seeks a highly laudable intermediate remedy, i.e., immediate cessation of behavior which deprives children of their rights. In the real world, however, a preliminary injunction cannot work unless some plan can be devised with reasonable assurance of success. Plaintiffs have offered no clue about how an injunction would achieve the relief which is sought. The court is loathe to impose an injunction upon a well-established juvenile center operation without a clearly defined mission and a precise plan for accomplishing it. To do anything less would undercut the public interest which compelled establishment of the juvenile center.

4. Conclusion

Plaintiffs have not shown by sufficient evidence that a

continuing threat of irreparable harm exists for either the plaintiffs or the class. Nor has a sufficient showing been made that the harm to plaintiffs and the class outweighs the potential injury to others. The probability that movant would prevail on the merits has not been demonstrated. Finally, there has been no demonstration of how a preliminary injunction would obtain the requested relief (even if the need for it had been shown) and still be consistent with the public interest.

C. Dismissal

1. Arguments

Defendants essentially make four arguments. First, they argue that plaintiffs have no justiciable claim as required by Article III of the Constitution. They contend that improvements and remedial measures at the center occurred before the lawsuit was filed, so no claim remains to be litigated. Second, defendants challenge the specificity of the allegations, saying the allegations are vague, unsupported and fail to show a causal connection to defendants' acts or omissions. Third, defendants argue that they are not the proper parties because plaintiffs cannot prove constitutional violations directly resulting from the defendants' administrative policies. Finally, defendants contend that overcrowding which results in using floor mattresses is not a constitutional deprivation.

Plaintiffs begin by noting correctly that the motion to dismiss must be examined as a motion for summary judgment. Defendants submitted evidence (an affidavit) in support of the

motion, rather than attacking only the face of the complaint. Thus, defendants are challenging plaintiffs' ability to prove their claim, rather than the sufficiency of the complaint itself. See Rule 12(b), Fed.R.Civ.P.

Plaintiffs first respond that defendants' corrective actions do not dispose of the claims. Plaintiffs urge that there is a reasonable expectation that the wrongs would be repeated, and there is no assurance that these measures have eradicated the problems completely and finally. Second, plaintiffs argue that the pleadings sufficiently notify defendants that their actions or omissions have resulted in overcrowding and other injuries which are deprivations of constitutional rights. Third, plaintiffs assert that the defendants are the proper "persons" within the scope of 42 U.S.C. § 1983. Finally, plaintiffs argue that overcrowding and an increased risk of health and safety at a pretrial juvenile detention facility is a deprivation of constitutional rights.

2. Discussion

a. Standard for Summary Judgment

A movant is entitled to summary judgment pursuant to Rule 56(c), if the pleadings and other materials show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The movant bears the burden of proof. See, Aetna Life Insurance Co. v. Great National Corp., 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the

light most favorable to the nonmoving party, according that party the benefit of every factual inference and resolving all doubts as to the facts or existence of any material fact against the moving party. United States v. Conservation Chemical Co., 619 F.Supp. 162, 179-180 (W.D.Mo. 1985); Pierce v. Marsh, 859 F.2d 601, 603 (8th Cir. 1988).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), the Supreme Court discussed the twin requirements of Rule 56(c), i.e., (1) no genuine issue of (2) material fact:

> * * * As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of this suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

When ruling on a motion for summary judgment, the court is not to "weigh the evidence and determine the truth of the matters, but to determine whether there is a genuine issue for trial." Id. at 249. Where, as here, the party moving for summary judgment does not bear the burden of proof at trial, that party must show "that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). This burden is met when the moving party identifies those portions of the record demonstrating an absence of a genuine issue of fact. Id. at 423.

In the instant case, the movants have not carried their burden. The affidavit and pleadings do not dispel the likelihood that deprivations of constitutional rights have occurred, are

occurring, and/or will continue to occur. Plaintiffs have alleged specific conditions which they claim entitle them to relief. Defendants have not shown that plaintiffs will be unable to prove such conditions. The affidavit does not show that those conditions do not or never have existed. Furthermore, the defendants' affidavit and pleadings are directed only at the matter of overcrowding, and do not address the allegations of health and safety problems (such as fire code violations). As mentioned above, courts have found that overcrowding at a pretrial detention facility can be, under some circumstances, a deprivation of constitutional rights. Defendants have made an insufficient showing to support a finding that plaintiffs failed to state a claim or that they could prove a cognizable claim.

b. Justiciable Case or Controversy

Defendants contend that the remedial actions they took to relieve overcrowding have rendered the plaintiffs' claim moot. This argument must fail for two reasons. First, it does not address the alleged deprivation of rights which already would have occurred. Past wrongs, if any, are not eliminated merely by preventing their recurrence in the future. If plaintiffs have a cognizable claim arising from past conduct by defendants, they are not divested of such a claim merely because the defendants manifest an intent to refrain from such conduct henceforth.

Second, the claim concerning the center conditions generally would not be moot unless (1) there is no reasonable expectation that the wrong will recur and (2) the interim relief has completely

and irrevocably eradicated the effects of the alleged violation. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). In satisfying these requirements, the defendant carries a heavy burden. United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). The defendants' own description of the circumstances at the center reveal that they have not carried that burden.

Defendants note that they have no control over whether juveniles are sent to them for detention, and that an unexpected influx of juveniles had created an overcrowding problem. Defendants described their efforts to resolve that problem. However, there is no reasonable assurance that they will be able to avoid the same problem if another unexpected influx of juveniles arrives. (Also, for any reason or no reason the defendants easily could reverse or discontinue what they have done.) Furthermore, even if their laudable efforts would prevent recurrence, they cannot be said to eradicate the effects of the past violations, if any.

c. Notice Pleading

Defendants argue that the factual allegations in the complaint are insufficiently specific. This argument is without merit. The plain language of the complaint reveals to any reader the nature and substance of the complaint, and the factual allegations to support it. The complaint alleges deprivation of constitutional rights by denial of due process in punishing pretrial detainees. The alleged punishment consists of exposure to overcrowded and unsafe conditions. The alleged overcrowding is illustrated by the

allegations that floor mattresses are used, and rooms are filled beyond their capacity (specifically, three persons are put in rooms designed for one or two persons). The unsafe conditions are supported by allegations that the facility does not meet fire code requirements.

Certainly more specific information will be needed for the defendants to assemble a defense. However, that is a purpose of discovery. In the meantime, the defendants have been sufficiently apprised of the facts alleged to support the claims in the complaint. Rule 8(a), Fed.R.Civ.P., does not require what defendants would demand of a complaint.

d. Proper Parties

Defendants assert that the incorrect parties were named by plaintiffs. Defendants contend that they merely execute policy decisions, rather than formulating policies, and thus are not "persons" within the ambit of 42 U.S.C. § 1983. Defendants' motion presented almost no discussion of the frequently complicated business of ascertaining which persons may be held liable under Section 1983. Such analysis need not be presented here, either, under the circumstances. Suffice it to say that the defendants have been sued in both their official and individual capacities. Officials of local government are "persons" under Section 1983. Monell v. Department of Social Services, 436 U.S. 658, 690 (1978). These officials of local government claim they have taken sufficient actions to correct overcrowding problems. That representation completely undercuts their contention that they are

not the proper parties to sue. If they are able to take actions to prevent deprivations of constitutional rights, then they obviously were able to cause or permit such deprivations, if any. As such, they would be the proper parties from whom to obtain relief.

e. Overcrowding

Defendants argue that overcrowding is not per se a constitutional violation. They rely upon cases where convicted adults were in prison. In those situations, the standard of review is "wanton and unnecessary infliction of pain" as guided by the Eighth Amendment prohibition against cruel and unusual punishment. Cody v. Hillard, 830 F.2d 912 (8th Cir. 1987)(en banc), cert. denied, ____ U.S. ____, 108 S.Ct. 1078 (1988). In adult prison facilities for convicted inmates, overcrowding would not be a constitutional violation because, without more, it does not constitute wanton and unnecessary infliction of pain. See also Rhodes v. Chapman, 452 U.S. 337 (1981).

A critical distinction between those cases and this case is that this involves persons who have not been convicted of crimes. In Lareau v. Manson, supra, 651 F.2d at 104-105, the court discussed at length the circumstances under which overcrowding could be a deprivation of Fourteenth Amendment due process for detained persons who have not been convicted. The court applied the standard set forth in Bell v. Wolfish, supra, 441 U.S. at 538. The Lareau court also discussed the different standard applicable to overcrowding of sentenced prisoners, i.e., the Eighth Amendment

guarantee against cruel and unusual punishment. The majority of the court found, in the peculiar overcrowding circumstances in that case, a deprivation of constitutional rights had occurred.

Another distinction which may be significant is that this case concerns children, rather than adults. In criminal law and in the penal system, the standard historically has been far different for adults than for children. Conditions which are constitutionally acceptable for adults may well be too harsh to be constitutionally acceptable for children. Thus, overcrowding conditions which pass constitutional muster for adults may be unconstitutional for children.

All of this is not to say that the conditions at the center necessarily are unconstitutional. The merits of the case remain to be litigated. The particular conditions need to be identified and proved precisely as unconstitutional deprivations before plaintiffs can prevail. In the meantime, plaintiffs have not failed to state a claim, and defendants have not shown they are entitled to judgment as a matter of law.

D. Protective Order

Defendants premise their motion for a protective order on their belief that plaintiffs do not have, or are unable to prove, a cognizable claim. First, defendants have not met the requirements of Rule 26(c), Fed.R.Civ.P., for a protective order. Second, Local Rule 15(d) specifically provides that the filing of a motion will not, by itself, stay discovery. Third, the dispositive motion upon which defendants rely for seeking a

protective order is being denied here, so there is no remaining basis for the protection (even if such basis could be sufficient). The protective order must be denied.

It is

ORDERED that plaintiffs' motion, filed November 15, 1989, requesting an order certifying a class is granted. It is further

ORDERED that a class hereby is certified but only for seeking equitable relief and not damages, and the class shall consist of all persons who have been or will have been detained at the Jackson County, Missouri, Juvenile Justice Center at some time since November 15, 1984. It is further

ORDERED that plaintiffs' motion, filed November 15, 1989, for preliminary injunction is denied. It is further

ORDERED that defendants' motion, filed December 6, 1989, to dismiss (considered as a motion for summary judgment) is denied. It is further

ORDERED that defendants' motion, filed February 5, 1990, for protective order is denied.

DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATED: April 30th, 1990
Kansas City, Missouri