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

JEFFERY HARGETT, *et al.*,	)	
	)	
Plaintiffs	)	NO. 02 C 1456
v.	)	
	)	Judge Harry D. Leinenweber
LINDA BAKER, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants, LINDA BAKER, MARY BASS, TIMOTHY BUDZ, RAYMOND WOOD and TRAVIS HINZE, through their undersigned attorneys, submit the following as their Memorandum of Law in Support of their Fed.R.Civ.P. 12(b)(6) Motion to Dismiss:

I. INTRODUCTION

Plaintiffs, JEFFERY HARGETT, KIM OVERLIN, JIMMIE SMITH and LOREN WALKER, have been civilly committed to the custody of the Illinois Department of Human Services ("DHS") pursuant to the Illinois Sexually Violent Persons Commitment Act, 725 ILCS 207/1 *et seq.*, ("the SVP Commitment Act"). *See* Plaintiffs' Compl., ¶¶ 3-6 (attached as Exhibit A). Plaintiffs claim that they have "never received adequate treatment or treatment that might yield a realistic chance for [their] release." *Id.* Plaintiffs have sued Defendants LINDA BAKER, MARY BASS, TIMOTHY BUDZ, RAYMOND WOOD and TRAVIS HINZE in their official capacities. Plaintiffs assert that Defendants' adoption and administration of the treatment program "is a substantial departure from accepted professional judgment, practice or standards and demonstrates that the Defendants did not base their decisions on such professional judgment." *Id.* at ¶ 25. Plaintiffs claim that the treatment program fails to comport with their rights afforded by the Due Process Clause of the Fourteenth Amendment.

Defendants move to dismiss this action in its entirety on the basis that Plaintiffs have failed to plead the existence of any constitutional violation and/or how the Defendants violated the "professional judgment" standard under the circumstances.

II. THE SEXUALLY VIOLENT PERSONS COMMITMENT ACT

The SVP Commitment Act sets forth a process through which a person who is "sexually violent" may be civilly committed. A "sexually violent person" ("SVP") is defined as an individual who has either been convicted, adjudicated delinquent or found not guilty by reason of insanity of an underlying "sexually violent offense" and is found to be dangerous because he or she suffers from a mental disorder that makes it substantially probable that he will engage in future acts of sexual violence. 725 ILCS 207/5 (f); 207/15(b).

If a person is civilly committed under the Act, § 40(a) provides that "[t]he court shall order the person to be committed to the custody of the Department [of Human Services] for control, care and treatment until such time as the person is no longer a sexually violent person." The Act requires the Department of Corrections to provide DHS with a "secure facility" to house those individuals who are not appropriate for treatment through conditional release. § 207/50 (b); 59 ILADC 299.200.

Section 299.300 of the Illinois Administrative Code sets forth the standards for a "secure residential facility." Currently, DHS operates that facility in Joliet, Illinois which is commonly referred to as the Joliet Treatment and Detention Facility (the "Joliet TDF"). The security measures and "resident behavior management system" which are applied to the SVP residents at that facility are outlined at §§ 299.350 and 299.600-830 of Code. Sections 299.310 and 299.330(d) of the Illinois Administrative Code outlines the "treatment" that is to be afforded to SVPs who have consented to treatment. The Joliet TDF is not subject to the provisions of the Mental Health and Developmental Disabilities Code. *See* 725 ILCS § 207(50)(b).

The Illinois SVP Act is similar to the statute that was upheld against a constitutional attack in Kansas v. Hendricks, 521 U.S. 346 (1997). Hendricks rejected an ex post facto and double jeopardy challenge to the State of Kansas' SVP statute. The Illinois Supreme Court has also rejected ex post facto and double jeopardy challenges to the constitutionality of the Illinois Act. *In Re Detention of Samuelson*, 727 N.E.2d 228 (2000). Moreover, in *Seling v. Young*, 531 U.S. 250 (2001) the Supreme Court rejected an "as applied" habeas challenge in which the petitioner sought release from the State of Washington's SVP program.

III. PLAINTIFFS' ALLEGATIONS[1]

Plaintiffs divide their claims into two broad categories of allegations – inadequate treatment and overly restrictive conditions of confinement. As for the treatment claims, Plaintiffs claim that they "are being denied meaningful mental health care treatment that gives them a realistic opportunity for their conditions to improve." Compl., ¶ 24. Specifically, Plaintiffs assert the following treatment related deficiencies: (1) inadequate staff training; (2) failing to provide "a coherent and meaningful individualized treatment program for each detainee with understandable goals and a road map showing steps necessary for improvement and release"; (3) failing "[t]o make adequate provisions for the participation of detainees' family members in rehabilitation efforts"; (4) failing "[t]o draft and implement fair and reasonable grievance procedures and behavior management plans"; (5) failing "[t]o afford reasonable opportunities to all residents for education, religious, vocational and recreational activities;" (6) failing "[t]o cease requiring, as a precondition to participation in all but the most basic treatment offered by DHS . . . that the Plaintiffs . . . to admit to a laundry list of real and imagined crimes

[1] The allegations in this case are similar to those raised in the Consolidated Third Amended Complaint filed in Harrold TineyBey, et al., v. Howard Peters, III, et al., Case No. 99 C 2861 (hereafter referred to as the "Consolidated Case"), which was filed on September 20, 2000.

for which they were not convicted, and thereby place themselves in jeopardy of future criminal prosecution" in violation of the Constitution. Compl, ¶ 24(a)-(g). Plaintiffs assert that these failures, collectively, constitute "a substantial departure from accepted professional judgment, practice and standards." *Id.* at ¶ 25.

Plaintiffs attack the following conditions of their confinement: (1) routine strip searches following visits; (2) maximum security shackling; (3) intrusive cell searches; (4) restricted freedom of movement; (5) inability to purchase types of over-the-counter grooming and pharmacy items; and (6) excessive surveillance through the use of an in-room intercom system. *Id.* at, ¶ 27. As discussed below, neither category of claims, individually or collectively, violate the constitutional standards that apply to civilly detained individuals.

IV. APPLICABLE LEGAL PRINCIPLES

A. The "Professional Judgment" Standard

As civil detainees, Plaintiffs' claims are reviewed under the Due Process Clause of the Fourteenth Amendment through the application of the "professional judgment" standard. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982). This standard provides officials with a "presumption of correctness" in the decisions that they make in the fields of mental health and security, *Id.* at 321, 324, and is virtually identical to the Eighth Amendment's "deliberate indifference" standard. *Collignon v. Milwaukee County*, 163 F.3d 982, 987-89 (7th Cir. 1998).

In *Youngberg,* the mother of a mentally ill man, brought suit against several officials, claiming that the officials had failed to provide her son "with appropriate 'treatment or programs for his mental retardation.'" *Youngberg*, 457 U.S. at 310-11. The Supreme Court began its analysis by stating that "a State necessarily has considerable discretion in determining the nature and scope of its responsibilities." *Id.* at 317. It then observed that involuntarily committed persons enjoy a right to "adequate" conditions of confinement ("food, shelter, clothing and

medical treatment" *Id.* at 324) as well as "minimally adequate" care, treatment and training which is reasonably necessary to protect their interests. *Id.* at 319. *Youngberg* held that a constitutional violation would only exist if a defendant violated his "professional judgment." In the Court's words, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg,* 457 U.S. at 323.[2] In setting this threshold, the Court highlighted the substantial discretion afforded state officials in this context:

> we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operation of these institutions should be minimized. *Id.* at 322.

Significantly, under the professional judgment standard civil detainees are not provided with a "deep well" of constitutional protections. Rather, states are only required to provide detainees with "minimally adequate" treatment and care. *Youngberg*, 457 U.S. at 319, 322; *also*, *Collignon*, 163 F.3d at 987 (when the state involuntary commits a person, "it assumes an obligation to provide some *minimum* level of well-being and safety.") (emphasis added).

To determine whether professional judgment has been exercised, *Youngberg* explained:

> decisions made by the appropriate professional are entitled to a presumption of correctness. Such presumption is necessary to enable institutions of this type.....to continue to function.

Youngberg, 457 U.S. at 324; *see also, Parham v. J.R.*, 422 U.S. 584, 608, N.16 (1979); *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981); *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

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[2] The Supreme Court defined a professional decision maker as "a person competent, whether by education, training or experience, to make the particular decision at issue." *Youngberg,* 457 U.S. at 323. There is no dispute that the individual Defendants are "professionals" who meet that standard. Rather, Plaintiffs accuse the individual Defendants of violating their professional judgment. Compl., ¶ 25.

Finding that institutional decisions should be reviewed with deference, *Youngberg* instructed courts to refrain from second-guess these decisions:

> the Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.

Id. at 321; *see also, Hendricks*, 521 U.S. at 369 N.4 ("States enjoy wide latitude in developing treatment regimens . . . [b]y this measure, Kansas has doubtless satisfied its obligation to provide available treatment.").

The Seventh Circuit has explained that a violation of the professional judgment standard can exist only where the professional's subjective response to a situation "was so inadequate that it demonstrated an absence of professional judgment, that is that no *minimally* competent professional would have so responded under those circumstances." *Collignon*, 163 F.3d at 989 (emphasis supplied). Put another way, a mere disagreement over how to structure or what to include in a professionally acceptable treatment plan will not constitute a violation of the profcssional judgment standard. *Id.*; *Steele v. Choi*, 82 F.3d 175, 179 (7th Cir. 1996).

As noted above, *Collignon* observed that "there is minimal difference between the Eighth Amendment's deliberate indifference standard and substantive due process' "professional judgment standard." *Id.* at 988.[3] Under the "deliberate indifference standard," an official can be held liable only when he or she knows that the inmate faces a "substantial risk of serious harm" and disregards that risk by failing to take reasonable measures to prevent it. *Farmer v. Brennan,* 511 U.S. 825, 837 (1994). The following sections explain that Defendants have exercised their professional judgment and that they have not acted with deliberate indifference to their rights.

[3] *See also, Mayoral v. Shehan*, 245 F. 934, 938 (7th Cir. 2001) (citing *Weiss v. Cooley*, 230 F.3d 1027 (7th Cir. 2000)) (holding that there is "little practical difference between" a Fourteenth Amendment due process claim and a Eighth Amendment "deliberate indifference" analysis.).

B. The Rational Basis Test Applies to "Sexually Violent Persons"

Plaintiffs' claims should be reviewed under the "rational basis" standard because Plaintiffs are not members of a suspect class. *Thielman v. Leen*, 282 F.3d 478, 485 (7th Cir. 2002); *see also, Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985); *Stanley v. Litscher*, 213 F.3d 340, 342 (7th Cir. 2000). Under this standard, "[a] court will not disturb the law as long as it is rationally related to a legitimate government interest." *Thielman*, 282 F.3d at 485 (affirming use of security measures against SVPs in Wisconsin); *Stanley*, 213 F.3d at 342 ("A state rationally could conclude that psychopaths do not benefit from intra-prison programs, that they spoil the programs for less aggressive inmates, or both.").

C. This Court Should Defer to the Legislative Intent of the SVP Act

To the extent that Plaintiffs assert that the SVP Act is punitive in its intent or operation, that contention is rebuffed by the Act itself which provides that any commitment obtained thereunder is civil in nature. In concluding that the Kansas statute was civil on its face, the *Hendricks* held that its analysis was "a question of statutory construction" in which it would "defer" to the legislature's stated intent absent a showing of the "'clearest proof' that 'the statutory scheme [is] so punitive in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Hendricks*, 521 U.S. at 361. *Hendricks* called the later approach a "heavy burden." *Id.* In holding that the Kansas statute was non-punitive in nature, the Court reviewed both the statute on its face and the conditions which Mr. Hendricks claimed rendered his confinement punitive in nature. *Id.* at 362-63. This approach was reiterated in *Seling v. Young*, 531 U.S. at 262 and in *Hudson v. United States*, 522 U.S. 93, 100 (1997). *Seling* held that 28 U.S.C. § 2254 did not provide the means for the detainee's release even if the particular nature of the his

confinement amounted to punishment. Rather, the Court suggested that the proper method of attack might be through a state court lawsuit or a § 1983 action. *Id.* at 263.[4]

Because Plaintiffs appear to be bringing a "facial" and "as applied" attack to the SVP Act and its statutory based procedures (*see* Compl, ¶¶ 14-15, 26-29), this Court has the power to dismiss Plaintiffs' claims in their entirety on a motion to dismiss. *Thielman*, 282 F.3d at 486 (affirming motion to dismiss that attacked provisions of the State of Wisconsin's SVP Act); *see also*, *Hendricks*, 521 at 361-63, *Seling*, 531 U.S. at 261; *Hudson*, 522 U.S. at 100.

D. Plaintiffs Are Not Comparable to DOC Prisoners

Plaintiffs argue that their constitutional rights have been violated because they have been denied certain privileges that were allegedly available to them when they were in DOC custody. *See* Compl., ¶ 27. This argument is without merit. It is well settled that "prisoners" and "non-prisoners" are not similarly situated for purposes of a constitutional analysis. *Barichello v. McDonald*, 98 F.3d 948, 952-53 (7th Cir. 1996) ("We have found no case, however, holding that the state is powerless to distinguish between criminal and civil patients in matters of

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[4] Justice Scalia in his concurring opinion in *Seling* went one step further in suggesting that Mr. Young's first stop should be in state court rather than a § 1983 action:

> [w]hen, as here, a state statute is at issue, the remedy for implementation that does not comport with the civil nature of the statute is resort to the traditional state proceedings that challenge unlawful executive actions; if those proceedings fail, and the state courts authoritatively interpret the statute as permitting impositions that are indeed punitive, then and only then can federal courts pronounce a statute that on its face is civil to be criminal. Such an approach protects federal courts from becoming enmeshed in the sort of intrusive inquiry into local conditions at state institutions that are best left to the State's own judiciary, at least in the first instance. And it avoids federal invalidation of state statutes on the basis of executive implementations that the state courts themselves, given the opportunity, would find to be ultra vires. Only this approach, it seems to me, is in accord with our sound and traditional reluctance to be the initial interpreter of state law. *Id.* at 269 (citations omitted).

Justice Scalia's well reasoned concurrence comports with prior precedent which requires courts to defer to the decisions of state actors and resist substituting their own judgment. *See, e.g., Youngberg,* 457 U.S. at 321, 324; *Parham*, 422 U.S. at 608 N.16; *Rhodes*, 452 U.S. at 352; *Bell*, 441 U.S. at 539 (1979); *see also, Hendricks*, 521 U.S. at 369 N.4.

treatment."); *People v. McDougle*, 303 Ill.App.3d 509 (2d Dist. 1999) (holding that individuals civilly committed to DOC under the Sexually Dangerous Persons Act were not similarly situated and could not be constitutionally compared to individuals who had been committed under the SVP Act); *People v. McVeay*, 302 Ill.App.3d 960, 967 (2d Dist. 1999) (same).[5]

Plaintiffs' argument also misses the mark in that when they were housed in DOC custody, they were living at different facilities with differing levels of security. Plaintiffs were housed with individuals who committed various types of crimes ranging from theft and burglary to drug dealing. Now, however, they are committed only with other "sexually violent" individuals, which provides a significantly different dynamic for those officials who are operating the "secure facility" at which the Plaintiffs reside. To accept Plaintiffs' argument would ignore the fact that the DHS, in exercising its professional judgment, can set forth restrictive security measures which take into account the "sexually violent nature" of the individuals it houses. *Thielman v. Leen*, 282 F.3d 478 (7th Cir. 2002). As explained below, considering the wide ranging security threats posed by detainees (some are clearly more violent than others) DHS's security decisions should be afforded substantial deference. *Id.* at 482-84.

Plaintiffs' argument also ignores the fact that the Seventh Circuit has essentially negated any difference between the constitutional standards it applies to convicted prisoners and pre-trial detainees. *Mayoral*, 245 F.3d at 938; *Collignon*, 163 F.3d at 988. Consequently, it is beyond question that DHS, in the exercise of its professional judgment, is not required to build a separate facility that replicates the level of security which each resident was accustomed to while in DOC.

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[5] *See also, Rapier v. Harris*, 172 F.3d 999, 1004 (7th Cir. 1999) (pre-trial detainees are not similarly situated to convicted prisoners); *Hrbek v. Farrier*, 787 F.2d 414, 417 (8th Cir. 1996) (holding that prisoners and non-prisoners are not similarly situated groups for comparison purposes); *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998) (same); *French v. Owens*, 777 F.2d 1250, 1256 (7th Cir. 1995).

V. LEGAL ARGUMENT

A. Plaintiffs Have Not Been Subjected to Unconstitutional Conditions

Paragraph twenty-seven of the Plaintiffs' Complaint alleges that the conditions at the Joliet TDF violate the Fourteenth Amendment because "[t]hese conditions are unrelated to the security or treatment needs of the SVP population and are purely punitive in nature." Compl, ¶ 27. Their complaints can be summarized as follows:

(1) strip searches following visits;
(2) maximum security shackling;
(3) intrusive cell searches;
(4) restricted freedom of movement;
(5) inability to buy particular over-the-counter grooming/pharmacy items; and
(6) surveillance through the use of an in-room intercom system.

As discussed below, none of these complaints rise to the level of a constitutional. As an initial matter, Plaintiffs' complaints regarding security measures employed by the Joliet TDF ignore the security risks posed by "sexually violent persons". Plaintiffs would have this court second-guess the security measures that exist at the Joliet TDF despite the fact that the Supreme Court has repeatedly rejected the approach now urged by the Plaintiffs. *Youngberg,* 457 U.S. at 324; *Bell*, 441 U.S. at 547 (1979) ("the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); *Seibert v. Alt*, 2002 WL 370019, *2 (7th Cir. 2002) (upholding State of Wisconsin's decision to confiscate an SVP's word processor and disks in response to institution wide security search for gang-related material). Consequently, in light of the deference afforded to facility officials under *Youngberg* and *Bell* on the issue of institutional security, the Plaintiffs'

claims in paragraph 27 should be summarily rejected because they neither individually nor collectively render their confinement punitive and all reflect legitimate security measures which the defendants may lawfully employ.

Second guessing aside, in order to state a claim under the Fourteenth Amendment, Plaintiffs must establish that they have a "liberty interest" in the purported constitutional rights that have been allegedly violated and that the deprivation allegedly suffered "imposes an atypical and significant hardship" in a constitutional sense. *Thielman v. Leen*, 282 F.3d 478, 482 (7th Cir. 2002) (citing *Sandin v. Conner*, 515 U.S. 472 (1995)). In *Thielman*, the Seventh Circuit upheld the district court's determination that several provisions of the State of Wisconsin's Sexually Violent Persons Act did not violate a detainee's rights to due process where the plaintiff had alleged that the defendants had subjected him to overly restrictive security measures - characterized by the court as "'full and double-locked restraints, chain-type-belt waist restraints with attached handcuffs, security Blackbox, and leg restraints'" - during transport without an individualized determination that the security measures were necessary.

In affirming the district court's dismissal of this claim, the Seventh Circuit in *Thielman* analyzed the "predicate question" – "whether *Thielman* has a liberty interest in not being subjected to WRC's restraint policy." Accepting for the sake of argument that Wisconsin law provided the plaintiff with "a state-created right to the least restrictive conditions of confinement during transport," the Seventh Circuit held that the Wisconsin statutes did "not provide [him with] a liberty interest cognizable under the Fourteenth Amendment." *Thielman*, 282 F.3d. at 482. Applying the rationale of *Sandin v. Conner*, the Seventh Circuit found that civil detainees could only have a protectable liberty interest under state law where the method of restraint "'. . .

imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* at 484 (quoting *Sandin*, 515 U.S. at 484).

Acknowledging that *Sandin* disavowed the practice of involving courts in the "day-to-day" management of prisons in favor of allowing officials to operate them with "appropriate deference and flexibility," the Seventh Circuit concluded that the same deference should be provided to those officials running Wisconsin's SVP program. *Thielman*, 282 F.3d. at 483. In recognizing that "*Sandin* teaches that any person already confined may not nickel and dime his way into a federal claim by citing small, incremental deprivations of physical freedom," *Thielman* held that "*Sandin's* reasoning applies with equal to force to persons confined under" the Wisconsin SVP Act. *Id.* at 484. According to *Thielman*, "facilities dealing with those who have been involuntarily committed for sexual disorders are 'volatile' environments whose day-to-day operations cannot be managed from on high." *Id.* at 483. Applying *Sandin*, the Seventh Circuit concluded that the methods of restraint ("a waist belt and leg chains") *did not* impose an "atypical and significant hardship in relation to the ordinary incidents of [plaintiff's] confinement." *Id.* at 484.

1. Security Restraints and Strip Searches are Constitutional

Thielman rejected a nearly identical challenge that the use of the physical restraints failed to afford the plaintiff what he termed "the least restrictive conditions of confinement." *Id.* at 484-85. Applying the "rational basis test," *Thielman* agreed with Wisconsin's argument that the "dangerousness" of sexually violent persons warranted the use of those restraints. *Id.* at 485. Finding that detainees under the Wisconsin SVP Act "have a previous conviction . . . to evidence their dangerousness" and a chance of "indefinite commitment, heightening their desire to escape," *Thielman* held that the methods of restraint were rationally related to a legitimate

governmental interest. *Id.* In so finding, the Seventh Circuit accepted the affidavit of the security director of the Wisconsin SVP program which described that at least six cases of battery had been referred out for prosecution and that one patient had escaped and abducted a trial. *Id.*[6]

Against these standards, Title 59, § 299.350 of the Illinois Administrative Code sets forth the security measures employed by the SVP Program:

> d) Movement of Residents
>
> Handcuffs, security belts and/or leg irons may be used to restrain any resident when:
>
> 1) A person confined pending a review of an incident under Section 299.660 or in secure management status (Sections 299.650 and 299.690) is moved within the facility,
> 2) A resident is transported outside the facility, or
> 3) Determined by the Program Director to be necessary for security.

Since the Administrative Code provides for the use of the complained of security measures, under *Thielman's* analyses, in order to comport with the Constitution, the State of Illinois is simply required to establish that there exists a "rational basis" to support the use of these measures. Clearly, there is no reason to suggest that persons detained under the Illinois SVP Act are less violent than those detained under the Wisconsin SVP Act in *Thielman*. In fact, since the inception of the Illinois SVP Act on January 1, 1998, there have been not less than fifteen reported incidents of assaults by residents on DHS staff. *See* Motion to Dismiss, Exhibit A, Affidavit of Security Director Robert Glotz, ¶¶ 1-3, 8. Fourteen of these assaults were reported to the Illinois State Police for prosecution and seven were prosecuted. *Id.* at ¶¶ 9-10. In addition, in October of 2000, two SVPs escaped from a DHS transportation vehicle en route to Cook County Circuit Court after they overpowered DHS staff. *See* Exhibit A, Affidavit of Glotz, ¶ 4-7. Here, the complained of security measures are no different that what was alleged in

[6] Significantly, the Seventh Circuit accepted the affidavit in the context of a 12(b)(6) motion.

Thielman. Accordingly, this Court should dismiss Plaintiffs' claim in paragraph 27(b) which challenges the methods of security under the SVP Program.

To the extent that *Thielman* was not called upon to discuss whether strip searches of sexually violent persons before and after visits would violate the Constitution, this court need only turn to the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979) to find that this argument has no merit. In *Bell*, the Court sustained against a similar constitutional challenge, the practice of conducting routine body cavity searches following contact visits. *Bell*, 441 U.S. at 558-60. In reaching that conclusion, the *Bell* court held that governmental officials should be provided "wide-ranging deference" and that the constitutional rights of the detainees held in their custody may be limited or restricted in order to maintain the "essential goals" of institutional security and the preservation of internal order and discipline. *Id.* at 547. Underlying the Court's opinion was its finding that "[t]here is no basis for concluding that pretrial detainees pose any lesser risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to security and order." *Bell*, 441 U.S. at 546.

As recognized in *Thielman*, sexually violent persons by their very nature pose severe security risks. In light of this fact, the application of strip searches before and after visits is rationally related to legitimate security concerns. In fact, *Block v. Rutherford*, 468 U.S. 576, 587-89 (1984) went so far as to uphold a blanket prohibition of contact visits for pretrial detainees as well as irregularly scheduled shakedown searches of individual cells for security reasons. In *Block*, the Supreme Court recognized that the "purpose of the cavity searches in Wolfish was to discover and deter smuggling of weapons and contraband" which is a recognized risk associated with contact visits. *Block*, 468 U.S. at 587-88. As these cases teach, this Court should afford Defendants the benefit of the doubt with regard to their efforts to provide for

institutional security, internal order and discipline at the Joliet TDF and dismiss Plaintiffs' claims in paragraphs 27(a) and (b).

2. Room Searches are Constitutional

Plaintiffs' claim in paragraph 27(c) that they "[a]re subjected to intrusive cell searches, often with little or no justification," should also be dismissed that they do not have a constitutional right of privacy. *Bell*, 441 U.S. at 557 ("even the most zealous advocate of prisoners' rights would not suggest that a warrant is required . . . Detainees' drawers, beds and personal items may be searched."); *Hudson v. Palmer*, 468 U.S. 517, 526-30 (1984) (holding that prisoners lack expectation of privacy in their belongings). Again, Title 59 of the Illinois Administrative Code sets forth that "[a]ll residents and their clothing, property, housing and work assignments are subject to search at any time." *See* 59 ILADC 299.350(f)(2).

In both *Bell* and *Block*, the Supreme Court upheld the practice of conducting unannounced searches of living areas as a legitimate security measure. Here, DHS has a legitimate right to search for sexually explicit material which is off limits to SVPs. Plaintiffs do not suggest that those searches are being conducted to punish the residents, rather they object to their frequency. As noted above, Plaintiffs' comparisons to their prior DOC custody is of no moment. Accordingly, paragraph 27(c) should be dismissed.

3. Plaintiffs Do Not Have Unrestricted Freedom of Movement

To the extent that Plaintiffs argue in paragraph 27(d) that they "[h]ave their freedom of movement restricted in a variety of arbitrary ways; for example, they are not allowed to go to the commissary by themselves," this claim should be dismissed because persons in custody do not have a constitutional right to unfettered movement within a facility. *Antonelli v. Sheahan*, 81 F.3d 1422, 1430) (7th Cir. 1996) (holding that there is no constitutionality based liberty interest

in movement outside of a cell guaranteed by the Due Process Clause); *see also, Maust v. Headley*, 959 F.2nd 644, 647-48 (7th Cir. 1992) (criminal defendant found unfit to stand trial did not have a protected liberty interest in being confined under the "least restrictive environment"). In fact, Title 59 of the Administrative Code provides that the Program Director of the TDF "may confine residents temporarily in all or part of the facility when determined necessary in order to maintain security of the facility or the safety of residents, employees or other persons." *See* 59 ILADC 299.350(e)(1). Bearing this point in mind, institutional lockdowns are not *per se* violations of the Constitution. *Caldwell v. Miller*, 790 F.2d 589, 604-05 (7th Cir. 1986) (regardless of severity or duration of the lockdowns, due process rights are not violated because the difference in pre and post lock down conditions is one of degree and not of kind).

4. DHS Commissary Policies Do Not Violate the Constitution

Plaintiffs' claim in paragraph 27(e) that they are unable to purchase certain personal items from the Joliet TDF commissary should also be dismissed. It is well settled that persons do not have a constitutional right to unrestricted "commissary privileges." *Robinson v. Illinois State Correctional Center*, 890 F. Supp. 715, 718 (N.D. Ill. 1995) (rejecting similar claim brought by prisoner on due process, equal protection and Eighth Amendment grounds). Rather, "the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible with as little restraint as possible during confinement does not convert the conclusions or restrictions of detention into" unlawful "punishment" *Bell*, 441 U.S. at 437.

Plaintiffs' alleged inability to purchase razors, staplers, nail clippers (or other similar items that can be used as weapons) from outside vendors is readily justified on the basis of maintaining institutional security and safety. Accordingly, to the extent that Plaintiffs are required to purchase the enumerated personal items from the Joliet TDF commissary does not

violate the constitution. contrary to Plaintiffs' allegations in paragraph 27(f), they do not have a constitutional right against having an intercom system installed in their cells. As discussed in *Bell*, 441 U.S. at 556-57, detainees do not have a right of privacy. Even if they did, Plaintiffs have failed to identify a single instance in which their were monitored or that they have suffered damages from such monitoring (such as overhearing any privileged conversations). The intercom system is a legitimate security tool which has no punitive purpose.

5. Room Monitoring is Constitutional

Contrary to Plaintiffs' allegations in paragraph 27(f), they do not have a constitutional right against having an intercom system installed in their rooms. As discussed in *Bell*, 441 U.S. at 556-57, detainees do not have a right of privacy. Even if they did, Plaintiffs have failed to identify a single instance in which their were monitored or that they have suffered damages from such monitoring (such as overhearing any privileged conversations). The intercom is a legitimate tool which has no punitive purpose. Here, DHS has a legitimate basis for installing the intercom system. Rather than relying on SVPs to yell out requests through the door of the rooms, the intercom allows SVPs to contact staff to open their door or to summon help in an emergency.

B. <u>The SVP Treatment Program Does Not Violate "Professional Judgment"</u>

As noted above, the Supreme Court has declared that "*decisions made by the appropriate professional are entitled to a presumption of correctness.* Such presumption is necessary to enable institutions of this type…to continue to function." *Youngberg,* 457 U.S. at 324. Ignoring this principle, Plaintiffs have drafted a proverbial laundry list of alleged deficiencies which they claim support their contention that DHS officials have neglected to exercise any professional judgment in the adoption and administration of the SVP Program. Compl., ¶¶ 24-25. Claiming that "no more than a handful of detainees have been permitted to successfully complete the Defendants' treatment program to the point where the Defendants recommended their discharge

to the courts," Plaintiffs allege that the program violates the Constitution because *they* have not yet been released. *Id.* at ¶ 26.

By pointing to the successful completion of the treatment program by other SVPs (which was pointed out to this Court earlier this year in the State's objection to the discovery extension that was sought in the case of *Tiney-Bey v. Peters*, Case No. 99 C 2861), Plaintiffs have pled themselves out-of-court. Even if Plaintiffs had ignored this fact, as discussed below, their requested relief goes beyond what is required by the Constitution. Specifically, the relief they request ignores the limited role that courts have in overseeing the day-to-day operations of a state facility. *Youngberg,* 457 U.S. at 321, 324; *Bell*, 441 U.S. at 547; *Thielman,* 282 F.3d. at 483; *see also, Hendricks*, 521 U.S. at 369 N.4

Plaintiffs' allegations also ignore *In re Detention of Hayes*, 747 N.E.2d 444, (2nd Dist. 2001) which specifically overturned a trial court's attempt to dictate that manner in which the petitioner was to obtain of treatment. Contrary to Plaintiffs' attempts to second guess their treatment, the Second District in *Hayes* held that "nothing in the Act suggest that the trial court may appoint an expert on a continuing basis to oversee the implementation of a treatment plan." 747 N.E.2d at 459. Deferring to the State's treatment program, the reviewing court in *Hayes* held that "the Act specifically authorizes the Department to operate a secure facility and provide by rule for the nature of the facility and the level of care to be provided to the facility. 725 ILCS 207/50(b) (West 1998)." Pointing out this fact, the *Hayes* court held that "[a] trial court order appointing a special individual to oversee treatment at the facility directly conflicts with the authority granted the Department by this section. Therefore, the trial court's order . . . exceeds the trial court's statutory authority." *Id.* (citations omitted). In so holding, the *Hayes* court pointed out that a trial court's appointment of an expert to "oversee" the implementation of

treatment would cause the resources of DHS to "be consumed by the administrative burden of multifarious reporting requirements."[7]

As noted in *Hayes*, the Act sets forth a detailed treatment program, which by its very nature, establishes that professional judgment *was applied* in creating the program. Title 59, Section 299.310 of the Illinois Administrative Code sets forth the following treatment:

> a) A resident shall be provided with adequate and humane care and treatment services *pursuant to an individual services plan*, which shall be formulated and periodically reviewed by the treatment team with the participation of the resident to the extent feasible and, where appropriate, such resident's guardian. *A qualified professional shall be responsible for overseeing the implementation of such plan.*
>
> b) Residents shall attend scheduled individual and group therapy sessions, objective sexual assessment appointments, and other programming as set forth in the individualized services plans. A resident may be excused from attendance requirements by the Program Director for illness, pursuant to the Resident Behavior Management System or for other good cause. (emphasis supplied).

While SVPs must consent to be treated and are free to refuse to be treated, "[i]f the resident refuses to consent to or enter recommended treatment, demonstrates disinterest or a lack of progress attributable to poor motivation within treatment, the team may reassign the resident to another management status." *See* 59 ILAC 299.310. Section 299.330 of the Code also provides for a highly detailed regimen for the administration of psychotropic medicine which includes Treatment Review Committee Hearing procedures, clinical review procedures, emergency procedures as well as procedures related to minors.

One disappointing aspect of this case is that class counsel abandoned discovery into propriety of the treatment program in the case of *Harrold Tiney-Bey, et al., v. Howard Peters,*

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[7] *Hayes* is also noteworthy to the extent that it recognized that Dr. Carl Wahlstrom, a psychiatrist, testified at the trial court level and "opined that that the treatment respondent would receive at the then Sheridan treatment facility would be adequate to treat his mental condition." *Hayes*, 747 N.E.2d at 449.

III, et al., Case No. 99 C 2861 (the "Consolidated Case") when it chose to file this action after Defendants raised Article III standing arguments and objected to numerous discovery extensions sought by the Plaintiffs. Declining to amend the Consolidated Case to add the present Plaintiffs, counsel filed an entirely new action. In doing so, however, counsel left in his wake detailed written discovery answers which set forth the treatment program provided to the SVP residents. Pleadings and discovery materials in other cases on this court's docket are matters that this Court may accept through judicial notice on a 12(b)6 motion. *Opoka v. INS*, 94 F.3d 392, 394 (7th Cir. 1996)(collecting cases); *Doherty v. City of Chicago*, 75 F.3d 318, 324 (7th Cir. 1996); *Henson v. CSC Credit Srvs.*, 29 F.3d 280, 284 (7th Cir. 1994).

In response to Plaintiffs' interrogatory number 17 which asked "What are the policies and procedures relating to the treatment program," defendants provided a detailed answer which identified the individualized nature of the five step treatment program which is set up to treat SVPs through the core therapies of cognitive restructuring, relapse prevention and journaling which can range from 15 to 33 hours per week of individualized therapy. That interrogatory answer was provided to this court in opposition to the Consolidated Plaintiffs' request for an extension of discovery and is attached to Defendants' Motion to Dismiss as Group Exhibit B.

In response to this interrogatory answer and the production of hundreds of documents, including Defendant Budz's detailed "Focus Report" which detailed the methodology of the treatment program (*see* Group Exhibit B), Plaintiffs neglected to depose any treatment providers. Defendants in the Consolidated Case also provided the resumes of the treatment professionals involved in the SVP program which detail the fact that they have collectively devoted over four dozen years to providing treatment to sexually violent persons.[8] In response to Plaintiffs' request

[8] For example, Defendant Dr. Raymond Wood is the Clinical Director of the SVP Treatment Program. Dr. Wood received his doctorate in psychology in 1991 and has worked in the treatment of sexually

to extend discovery, Defendants tendered the evaluation report of its consulting expert, Dr. William L. Marshall.[9] *See* Group Exhibit B (attached to Def.s' Motion to Dismiss). Rather than respond to this Court's December 13, 2001 order which had instructed Plaintiffs to submit a non-binding response to Dr. Marshall's report by January 31, 2002 (*see* transcript of 12/12/01 hearing, p. 23 (lines 17-25) & p. 26 (lines 14-17 attached as Exhibit C to Def.s' Motion to Dismiss)), Plaintiffs moved to reconsider the December 13, 2001, ruling and obtained leave of Court to conduct expert discovery without restriction before March 6, 2002. Ignoring this deadline, Plaintiffs' counsel proceeded to file this present action.

Defendants, by attaching these materials, are attempting to demonstrate that given the broad deference and presumption of correctness provided to professionals in these circumstances, that DHS has in fact exercised its professional judgment in developing the SVP treatment program. In light of this fact, disposal of Plaintiffs' claims on a motion to dismiss is supported by *Thielman*.

Moreover, because a professional's judgment in this context is presumptively valid, and because the State has a treatment program in place, Plaintiffs must do more than broadly allege that "[t]he aforesaid failure to provide constitutionally adequate treatment is a substantial departure from accepted professional judgment, practice or standards and demonstrates that the

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violent sex offenders since 1994. *See* Group Exhibit B, p. 1. From 1994 to 1998 he rose through the ranks of the State of Wisconsin's Sexually Violent Persons Program to eventually head the program. *Id.* Prior to working in Wisconsin's program, Dr. Wood began treating incarcerated persons in 1985. *Id.* at p. 2. Dr. Wood was the lead coordinator of the 2001 National Sexually Violent Persons Conference and Summit held in Chicago in May of 2001, has co-authored five publications related to the treatment of sex offenders and has participated in over a dozen presentations related to this topic. *Id.* at pp. 2-4. Dr. Wood has also participated in nearly four dozen conferences related to the treatment of sex offenders. *Id.* at pp. 4-7.

[9] Dr. Marshall is a nationally acclaimed expert on sexually violent persons. According to his resume, he "has been instrumental in establishing several prison and community treatment programs for sexual offenders in Canada and in six other countries. Bill is an active clinician and researcher who has over 190 publications, including 40 book chapters and 5 books, with most of this work dealing with sexual offenders. He is on, or has been on, the editorial board of 14 international scientific journals, and he is the recipient of the Lifetime Achievement Award of the Association for the Treatment of Sexual Offenders." *See* Group Exhibit B.

Defendants did not base their decisions on such professional judgment." Compl., ¶ 25. To hold otherwise would run afoul of the Court's holding in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350-51 (1987) (explaining that state officials do not "have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.").

Finally, this Court should dismiss Plaintiffs' treatment related claims because, none of the complained of "failures" of the program independently or collectively violate the constitution.

1. Plaintiffs Do Not Have a Constitutional Right to Education or Vocational Services

Contrary to Plaintiffs' contention, they do not have a constitutional right to educational or vocational services. *Zimmerman v. Tribble*, 226 F.3d 568, 571 (7th Cir. 2000); *Garza v. Miller*, 688 F.2d 480, 486 (7th Cir. 1982); *Higgason v. Farley*, 83 F.3d 807, 809 (7th Cir. 1996); *Madyun v. Thompson*, 657 F.2d 868, 874 (7th Cir. 1981) (citing cases). For this reason alone, Plaintiffs' claim that they are entitled to education and vocational services should be dismissed.

Plaintiffs' claim should also me dismissed to the extent that they lack Article III standing. To establish standing, a plaintiff must "show that he 'has sustained or is immediately in danger of sustaining some direct injury' as a result of the challenged official conduct, and the injury or threat of injury must be both 'real and immediate,' not 'conjectural or hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (citations omitted); *Allen v. Wright*, 468 U.S. 737, 751 (1984) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and *likely to be redressed* by the requested relief." (emphasis supplied)). Here, Plaintiffs have alleged no facts which establish that they have been or will be injured by the alleged lack of education and vocational training currently available at the Joliet TDF nor have they suggested how these services will aid in their rehabilitation.

Plaintiffs' claims are also premature. Vocational training under the SVP Act is triggered at the point in time where an SVP reaches the point of conditional release. *See* 59 ILADC 299.400 Section 299.400 specifically provides for vocational training at the point of conditional release. Here, DHS has recently contracted with Liberty Healthcare to provide these services to SVPs who graduate to conditional release. (*See* Def.s' Motion to Dismiss, Exhibit D, p. 13). In addition, this contract requires Liberty's employees to have at least five years of therapy experience in sex offender treatment. *Id.* at p. 16. The fact that DHS has chosen to focus its program on sex offender treatment and does not provide vocational training until that treatment has been successful is an imminently reasonable approach. Otherwise, residents may be distracted from the foremost goal of the program – their successful treatment as sex offenders and ultimately the release from their civil commitment. Adding vocational training will take time away from the core therapies of the treatment program and could result in a longer stay the Joliet TDF. The alleged failure to offer vocational training at an earlier stage in the program does not suggest that professional judgment was not exercised; rather it reflects the exercise of considered judgment on the issue.

In view of the fact that Plaintiffs lack any constitutional right to education or vocational training, they cannot establish that the treatment program's alleged failure to provide these services violates the professional judgment standard.

2. Plaintiffs Have Failed to Allege an Abridgement of Their First Amendment Right to Practice Religion

Individuals who are in custody have a right to practice their religion, *Cruz v. Beto*, 405 U.S. 319 (1972); *Turner v. Safley*, 482 U.S. 78 (1987). However, the right to exercise one's religious beliefs "does not depend upon his ability to pursue each and every aspect of the practice of his religion." *Canedy v. Boardman*, 91 F.3d 30, 33 (7th Cir. 1996). Rather, a detention

facility is simply required to provide "reasonable opportunities" for religious practice, and nothing more. *Cruz*, 405 U.S. at 322; *Alston v. DeBruyn*, 13 F.3d 1036, 1040-41 (7th Cir. 1994). Restrictions on a detainee's right to practice his or her religious beliefs will be upheld as long as they are "reasonably related to legitimate penological interests" such as institutional security and economic concerns. *Turner*, 482 U.S. at 89; *Alston*, 13 F.3d at 1039. DHS has recognized this constitutional right by establishing that "Residents shall be provided reasonable opportunities to pursue their religious beliefs and practices subject to the Program's concerns regarding security, safety, rehabilitation, institutional order, space, and resources." *See* 59 ILADC 299.300(d)

Plaintiffs lack standing because they have totally failed to allege that they themselves have been deprived the right to practice their religion of choice. Moreover, they have failed to plead any facts or conclusions which suggest how the treatment program is rendered deficient by virtue of the alleged lack of a religious component.[10] In light of these pleading deficiencies and legal principles, Plaintiffs cannot establish that the treatment program's provisions for religious needs violate the professional judgment standard.

3. Plaintiffs Do Not Have a Constitutional Right to Have Their Families Participate in Treatment

Plaintiffs suggest the that the treatment program violates the professional judgment standard because the program allegedly does not "make adequate provisions for the participation of detainees' family members in rehabilitation efforts." Compl., ¶ 24(c). Plaintiffs also fault the program for failing to permit family visits "with reasonable frequency" and from failing to

[10] In fact, adding a religious component to their sex offender treatment program would put the State at risk of a claim that they were violating the Establishment Clause of the First Amendment. *See, e.g., Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (religious component to a prison's narcotics rehabilitation program violated the First Amendment); *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (striking down nondenominational religious invocation and benediction as part of a public school graduation ceremony). The fact that prayers or religious services are "technically voluntary" has not prevented courts from finding violations of the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (striking down Alabama statute prescribing a moment of silence followed by voluntary prayer in schools).

provide "prompt telephone access to detainees in cases of family emergency." *Id.* None of these omissions violate the Constitution much less the professional judgment standard.

Addressing the last complaint first, none of the Plaintiffs have alleged that they have been harmed in any manner, much less allege that their treatment has been compromised because they were unable to have telephone contact with their family during a so-called "family emergency." It should go without saying that they lack standing to assert such a claim for anyone else. As for the allegedly deficient visitor policy, again, it is unclear how the treatment program is to blame for this deficiency or how the visitor policy renders the treatment program substandard. In any event, none of the Plaintiffs have standing to assert because they have failed to allege that they have been deprived of any visits or that any denial of visitation has harmed their treatment.

Plaintiffs' remaining claim regarding the alleged lack of family participation also fails to establish a constitutional violation or a violation of the professional judgment standard. First, there is no clear right to have family members participate in treatment. In any event, none of the Plaintiffs assert that they have made and/or been denied a request to have their family participate in their treatment. Even if they made such a request, Plaintiffs have not alleged how family participation would positively impact their treatment. *Allen*, 468 U.S. at 751. Clearly, DHS has a rational basis for exercising its judgment to not include family members in treatment sessions.

4. The SVP Act Contains Comprehensive Grievance and Behavior Management Procedures

Contrary to Plaintiffs' allegations in paragraph 24(d) of their Compliant, the SVP Program contains a comprehensive set of behavioral management procedures as set forth in Title 59 of the Illinois Administrative Code. Specifically, § 299.650 details the temporary assignment of SVPs on secure management status, § 299.660 details the Behavioral Review Committee's review of incident reports and § 299.670 details the consequences of rule violations. *See also,* §

299.690 (placement in Secure Management Status); § 299.700 (conditions of confinement in Secure Management Status); §§ 299.800 through 299.850 (detailing grievance procedures); § 299.630 and Appendix A to Title 59 sub-section 299 (describing and defining rule violations).

Plaintiffs have failed to set forth how they have been injured as a result of the established grievance procedures and behavioral management plans, let alone specify, what, if any provision(s) violate the Constitution or the professional judgment standard. While notice pleading is allowed under the federal rules, defendants should not be forced to guess at what is the plaintiffs' liability theory. Plaintiffs fail to allege how the behavioral management program renders the treatment program inadequate and therefore this claim should be dismissed.

5. The Treatment Program Does Not Violate the 5th Amendment

Plaintiffs contend that the treatment program violates the Fifth Amendment's protection against self incrimination because it requires SVP's to admit to real and imagined crimes. Compl, ¶ 24(f). There is no merit to this claim. Similar claims have been rejected in *In re Detention of Anders*, 710 N.E.2d 475, 478-79 (2nd Dist. 1999) and *In re Detention of Tiney-Bey*, 707 N.D.2d 751, 755-56 (4th Dist. 1999). Both courts held that SVPs did not have a right to maintain silence during psychological evaluations. Rather, the right to silence was statutorily limited to SVP trial proceedings. Similarly, the Supreme Court in *Allen v. Illinois*, 478 U.S. 364, 374 (1986), rejected a similar challenge to the Illinois Sexually Violent Persons Act (725 ILCS 205/0.01, *et seq.*), holding that the civil nature of the statute did not trigger the Fifth Amendment.

6. Plaintiffs Have Failed to Allege a Breach of Confidentiality

There is no merit to Plaintiffs' suggestion in paragraph 24(g) that the treatment program violates the professional judgment standard on the basis that the program fails "[t]o institute a procedure to guarantee appropriate therapist/patient confidentiality." *See* Pl.s' Compl, ¶ 24(g). As discussed in *In re Detention of Anders*, 710 N.E.2d 475, 480 (2nd Dist. 1999), the physician-

patient privilege does not apply to the SVP Act due to the fact that a commitment proceeding places a detainee's "mental condition" "at issue." This claim should also be dismissed because there are not facts alleged to suggest that any of the named Plaintiffs have suffered from any purported right to confidentiality. Again, none of the Plaintiffs have standing to raise this claim.

7. Plaintiffs Are Not Entitled to a Treatment "Roadmap" Provide them with an Individualized Treatment Program

Turning to Plaintiffs' more esoteric contentions, they do not have a constitutional right which entitles them to "a road map showing steps necessary for improvement and release." Compl., ¶ 24(b). Aside from the fact that this claim is totally inappropriate for class-wide relief (for example, Plaintiff Kim Overlin's detailed Master Treatment Plan (which has been provided in discovery to Plaintiffs) is markedly different from that of Plaintiff Loren Walker (*see* Motion to Dismiss, Group Exhibit E)), Plaintiffs' request runs smack against the professional judgment standard. Plaintiffs are provided with an individualized service plan under 59 ILAC 299.310. Those plans form the basis of the treatment which will ultimately lead to an individual's release from his commitment. To the extent Plaintiffs desire something more – a roadmap to release – their claim is simply not actionable in light of the inherent difficulties in treating mental illness. All that is required is an individualized plan which meets the professional judgment standard – which is precisely what the Plaintiffs are provided under 59 ILAC 299.310.

Treating a mental illness is not like administering to custodial conditions. Rather, each individual's sexual history, his personality traits, background experiences, substance abusive, anti-social tendencies, etc. require an individualized plan, not some roadmap for all residents of the program. As recognized by *Hendricks*, "not only do 'psychiatrists disagree widely and frequently on what constitutes mental illness' . . . but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement."

Hendricks, 521 U.S. 359. Similarly, *Seling*, 531.S. at 255-56, noted that the Mr. Young's expert opined that "there is not any mental disorder that makes a person likely to reoffend" while Washington's expert came to the opposite conclusion and when he opined that Mr. Young suffered from a personality disorder which made him likely to reoffend. Lastly, Plaintiffs do not have standing for the relief they request because they have not described how they have been injured by not having a "roadmap" for release, *Lyons*, 461 U.S. at 101-102, and because they have failed to point to any alternative methodology. *Allen*, 468 U.S. at 751.

While Plaintiffs fault DHS with failing to provide them with "a coherent and *meaningful* individualized treatment program," Compl., ¶ 24(b), they do not appear to dispute have been provided with an individualized treatment plan as mandated by § 299.310 of the Illinois Administrative Code. As noted above, Plaintiffs Overlin and Walker have different treatment plans. Again, Plaintiffs are improperly seeking to micro-manage the SVP treatment program. Moreover, Plaintiffs' individualized request is contrary to class relief to the extent that each treatment plan will necessarily respond to individualized concerns. Lastly, they lack standing to raise this claim because they have failed to point to an injury caused by DHS much less offer an alternative treatment plan. *Lyons*, 461 U.S. at 101-102; *Allen*, 468 U.S. at 751.

8. Plaintiffs Have Failed to Allege a Failure-to-Train Claim

As a final matter, Plaintiffs have failed to set forth the elements of a failure to train claim against DHS. *See* Pl.s' Compl., ¶ 24(a). First, assuming that a failure to train claim can be brought in the absence of a violation of the professional judgment standard, as a fundamental matter, a failure-to-train claim must be based upon a constitutional injury. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) ("considerably more proof than [a] single incident will be necessary ... to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the unconstitutional deprivation."); *Canton v. Harris*, 489

U.S. 378, 390-91 (1988). Accordingly, simply alleging that a defendant was inadequately trained is not enough. Second, it is not enough to simply "point to something that the [entity] 'could have done' to prevent" the injury from occurring. *Canton*, 489 U.S. at 392. Put another way, allegations that "more or better training" fail to state a claim. *Palmquist v. Selvik,* 111 F.3d 1332, 1345 (7th Cir. 1997); *Erwin v. County of Manitowoc*, 872 F.2d 1292, 1298 (7th Cir. 1989).

Plaintiffs have failed to allege any injury other than the fact that they remain in DHS custody and none of their contentions established a constitutional violation. Therefore, Plaintiffs cannot make out a failure to train claim. *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997); *Contreras v. City of Chicago*, 119 F.3d 1286, 1294 (7th Cir. 1997). In view of the foregoing, this Court should dismiss Plaintiffs' failure-to-train claim.

C. The Department of Human Services is the Only Proper Defendant

Plaintiffs have sued Defendants in his or her official capacities. As *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) teaches, these official capacity claims are in reality a single claim against the Illilnois Department of Human Services. *See also, Smith v. Metropolitan Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1021 N.3 (7th Cir. 1997) (dismissing redundant official capacity claims against individual defendants; *Contrerras v. City of Chicago,* 920 F.Supp. 1370, 1376 N.1 (N.D. Ill. 1996) (same). To the extent that any claims remain in the face of this motion, this Court should order that the Complaint be amended to name DHS as the proper defendant.

VI. CONCLUSION

As this Court can imagine, the successful treatment of sexually violent individuals is not any easy task. The Illinois SVP Program is not a life sentence. Rather, SVPs who are not in treatment may petition for release via periodic evaluations and court ordered evaluations "for the purpose of determining whether the person has made sufficient progress to be conditionally released or discharged." *See* 725 ILCS 207/55; 207/60; 207/65; 207/70. Moreover, since the

inception of the SVP Program only several years ago, six (6) SVPs have been conditionally released to the community and two (2) release proceedings are currently pending. For privacy purposes (as mandated by the Illinois Mental Health and Disabilities Confidentiality Act, 740 ILCS 110, *et seq.*), these individuals will be listed by a DHS identification number.

DHS ID No.	Committing County	Admittance Date	Release Date
18	Saline	04/19/98	07/29/99
23	Perry	04/27/98	02/04/99
41	Lake	08/18/98	03/14/00
57	Winnebago	12/17/98	03/22/00
91	Marion	07/15/99	08/19/01
48	Cook	09/18/98	10/17/01
5	Winnebago	01/26/98	Pending
11	Kane	04/01/98	Pending

Ignoring the facts, Plaintiffs' lawsuit improperly seeks to mandate the manner in which treatment should be provided to all of the SVP residents on a class-wide basis. As aptly stated by the Supreme Court, "[i]t is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

WHEREFORE, for the reasons set forth above, Defendants, respectfully request that this Honorable Court dismiss Plaintiffs' Complaint in its entirety.

Respectfully submitted,

By:_____
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Exhibit A

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

JEFFERY HARGETT; KIM A. OVERLIN; JIMMIE SMITH; LOREN K. WALKER; on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

LINDA R. BAKER, Secretary of the Illinois Department of Human Services, MARY BASS, Head Facility Administrator for the Illinois Department of Human Services, TIMOTHY BUDZ, Facility Director of the Sexually Violent Persons Unit at the Joliet Correctional Center, RAYMOND WOODS, Clinical Director, and TRAVIS HINZE, Associate Clinical Director,

Defendants.

No. 02C 1456

JUDGE KENNELLY

MAGISTRATE JUDGE GERALDINE SOAT BROWN

CLASS ACTION COMPLAINT

Plaintiffs, JEFFERY HARGETT, KIM A. OVERLIN, JIMMIE SMITH and LOREN K. WALKER, on behalf of themselves and all others similarly situated, by their undersigned counsel, state as follows for their Class Action Complaint:

INTRODUCTION

1. This complaint asserts a civil rights action pursuant to Title 42 of the United States Code, § 1983 for declaratory and injunctive relief to redress violations of the United States Constitution in connection with the complete and utter failure of the Defendants or those acting under their control or direction to provide adequate and meaningful mental health treatment to the named Plaintiffs and all others similarly situated that have been involuntarily detained by the Illinois

Department of Human Services ("DHS") pursuant to the Sexually Violent Persons Commitment Act, 725 ILCS 207/1 et al. (the "SVP Act"). The avowed purposed of the SVP Act is to provide mental health treatment and care to individuals in the custody of DHS in the least restrictive manner consistent with the person's needs and in accordance with the court's commitment order. The treatment and care provided by the Defendants to the Plaintiffs and all others similarly situated is punitive and Constitutionally inadequate.

JURISDICTION

2. The Court has jurisdiction over this action under Title 28 of the United States Code, § 1331 and § 1343.

PARTIES

3. Plaintiff Jeffery Hargett was involuntarily civilly committed pursuant to the Act in or about March, 2000 by the Circuit Court of Iroquois County, Illinois. Mr. Hargett has consented to participate in any and all mental health treatment programs provided by DHS. Mr. Hargett has never refused treatment or to participate in any test administered by the Defendants. Nevertheless, due to the systemic deficiencies in the SVP program described below, Mr. Hargett has never received adequate treatment or treatment that might yield a realistic chance for his release.

4. Plaintiff Kim A. Overlin ("Overlin") was involuntarily civilly committed pursuant to the Act in or about June, 1998 by the Circuit Court of Macon County, Illinois. Mr. Overlin has consented to participate in any and all mental health treatment programs provided by DHS. Mr. Overlin has never refused treatment or to participate in any test administered by the Defendants. Nevertheless, due to the systemic deficiencies in the SVP program described below, Mr. Overlin has never

received adequate treatment or treatment that would lead to a realistic chance for his release.

5. Plaintiff Jimmie Smith ("Smith") was involuntarily civilly committed pursuant to the Act in or about October, 2000 by the Circuit Court of Macoupin County, Illinois. Mr. Smith has consented to participate in any and all mental health treatment programs provided by DHS. Mr. Smith has never refused treatment or to participate in any test administered by the Defendants. Nevertheless, due to the systematic deficiencies in the SVP program described below, Mr. Smith has been denied adequate treatment or treatment that would lead to a realistic chance for his release.

6. Plaintiff Loren K. Walker ("Walker") was involuntarily civilly committed pursuant to the Act in or about September, 1998 by the Circuit Court of Madison County, Illinois. Mr. Walker has consented to participate in any and all mental health treatment programs provided by DHS. Mr. Walker has never refused treatment or to participate in any test administered by the Defendants. Nonetheless, due to the systemic deficiencies in the SVP program described below, Mr. Walker has been denied adequate treatment or treatment that would lead to a realistic chance for his release.

7. Defendant Linda R. Baker ("Baker"), is the Secretary of the Illinois Department of Human Services ("DHS") and the chief administrative officer of the DHS. Defendant Baker is sued herein in her official capacity. At all relevant times, she was acting under the color of state law.

8. Defendant Mary Bass ("Bass") is the Head Facility Administrator of DHS. She is sued herein in her official capacity. At all relevant times, she was acting under the color of state law.

9. Defendant Timothy Budz ("Budz") is the Facility Director of the DHS Sexually Violent Persons Unit at Joliet. He is sued herein in his official capacity. At all relevant times, he was acting under the color of state law.

10. Defendant Raymond Woods ("Woods") is the Clinical Director of the DHS Sexually Violent Persons Unit at Joliet. He is sued herein in his official capacity. At all relevant times, he was acting under the color of state law.

11. Defendant Travis Hinze ("Hinze") is the Associate Clinical Director of the DHS Sexually Violent Persons Unit at Joliet. He is sued herein in his official capacity. At all relevant times, he was acting under the color of state law.

12. Baker, Bass, Budz, Woods and Hinze (the "Defendants"), pursuant to authority vested in them by the State of Illinois (the "State"), are the individuals primarily responsible for the care, custody, treatment and control of the Plaintiffs and all others similarly situated. The Defendants knowingly and with deliberate indifference established and maintained the treatment policies, procedures and regime that are challenged in this action.

BACKGROUND

13. The SVP Act provides for the civil commitment into the custody of DHS of persons that: (a) have been convicted, or acquitted by reason of insanity, of certain sexual offenses; and (b) have been found to have a mental disorder that creates a substantial possibility that they will engage in future acts of sexual violence. Persons may be detained by DHS pursuant to the SVP Act prior to a civil commitment proceeding if there is probable cause to believe that conditions (a) and (b) above are met.

14. Although the SVP Act's stated purpose is not to punish, but instead is to provide for the segregation and treatment of persons with a dangerous

mental disorder. Plaintiffs in fact have not received adequate treatment and have been confined in punitive conditions that are not rationally related to the purposes of the SVP Act.

15. This action challenges under the Due Process Clause of the Fourteenth Amendment the punitive conditions and the inadequate treatment received by the Plaintiffs and all others similarly situated. Specifically, this action challenges the decision of the Defendants to warehouse and put out of sight the Plaintiffs and all others similarly situated in an attempt to hold them indefinitely and to punish, rather than treat their perceived mental disabilities.

CLASS ALLEGATIONS

16. This case is brought on behalf of a class that consists of all persons who have been, are or will be committed under the SVP Act and placed in the custody of DHS.

17. The class is so numerous that joinder of all members is impracticable. The population in the custody of DHS exceeds 150 individuals and is constantly growing larger as new persons are detained and civilly committed under the SVP Act.

18. There are questions of law and fact common to the members of the class, and these questions predominate over those affecting only individual class members. The predominate common question is whether the mental health treatment and care provided by the Defendants or those acting under their control or direction comports with the requirements of the Due Process Clause of the United States Constitution.

19. Plaintiffs' claims are typical of the claims of the class members. All are based on the same factual and legal theories in that they have all suffered as a result of the unconstitutional practices alleged in this Complaint.

20. Plaintiffs will fairly and adequately represent the members of the class. They have no interests antagonistic to the class, and they are represented by counsel who are competent and experienced in civil rights litigation.

21. A class action is superior for the fair and efficient adjudication of this matter, in that the Defendants, by creating and maintaining the practices alleged in this complaint, have acted on grounds generally applicable to the class, and, as a result, declaratory and injunctive relief with respect to the entire class is appropriate.

DUE PROCESS VIOLATIONS

22. Defendants, in their official capacities, are collectively responsible for the policies and procedures controlling the manner and method of Plaintiffs' confinement and manner and method of their mental health treatment.

23. The Fourteenth Amendment Due Process Clause requires states to provide civilly committed persons with access to mental health treatment that is at least minimally adequate and gives them a realistic opportunity for their conditions to improve so that they can be released. Further, because the Plaintiffs and others similarly situated are not prisoners, they are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.

24. The Plaintiffs and all others similarly situated are being denied meaningful mental health care treatment that gives them a realistic opportunity for their conditions materially to improve because, among other things, the Defendants have failed:

(a) To properly train staff regarding the treatment of sexual deviance;

(b) To provide a coherent and meaningful individualized treatment program for each detainee with understandable goals and a road map showing steps necessary for improvement and release;

(c) To make adequate provisions for the participation of detainees' family members in rehabilitation efforts, including permitting family visits with reasonable frequency and allowing prompt telephone access to detainees in cases of family emergency;

(d) To draft and implement fair and reasonable grievance procedures and behavior management plans;

(e) To afford reasonable opportunities to all residents for educational, religious, vocational and recreational activities;

(f) To cease requiring, as a precondition to participation in all but the most basic treatment offered by DHS, and therefore, as a predicate to release, that the Plaintiffs and all other similarly situated detainees to admit to a laundry list of real and imagined crimes for which they were not convicted, and thereby place themselves in jeopardy of future criminal prosecution for other crimes in violation of the Plaintiffs' Fifth right against self-incrimination applied to the states by the Fourteenth Amendment; and

(g) To institute a procedure to guarantee appropriate therapist/patient confidentiality.

25. The aforesaid failure to provide constitutionally adequate treatment is a substantial departure from accepted professional judgment, practice or standards and demonstrates that the Defendants did not base their decisions on such professional judgment.

26. Instead of providing treatment and conditions that are rationally related to the purposes of Plaintiffs' confinement, Defendants are using the SVP program as a means of warehousing and punishing those in the SVP program. Since this program was initiated over four years ago, no more than a handful of detainees have been permitted to successfully complete the Defendants' treatment program to

the point where the Defendants recommended their discharge to the courts. Defendants erect one arbitrary barrier after another to prevent Plaintiffs from progressing to the point where the SVP program will recommend their release, including requiring participants in the program to confess to crimes which they did not commit.

27. The Plaintiffs and all others similarly situated are being held in conditions that are more restrictive than the conditions under which the Plaintiffs were confined when they were incarcerated as criminals prior to their civil commitment under the Act. These conditions are unrelated to the security or treatment needs of the SVP population and are purely punitive in nature. Further, the Plaintiffs and all others similarly situated are arbitrarily confined in conditions that are more restrictive than the conditions under which most convicted felons are confined by the Illinois Department of Corrections in that, among other things, the Plaintiffs:

(a) Are routinely stripped searched before and after every visit, including visits with attorneys;

(b) Are routinely shackled with restraints normally used for the transportation of prisoners housed in "super-max" facilities;

(c) Are subjected to intrusive cell searches, often with little or no justification, with greater frequency than those of prisoners;

(d) Have their freedom of movement restricted in a variety of arbitrary ways; for example, they are not allowed to go to the commissary by themselves;

(e) Are not allowed to purchase their own razor, stapler, nail clippers, aspirins or other similar over-the-counter medication, vitamins or eye drops; and

(f) Are constantly surveilled by DHS as a result of the installation of intercom systems in the Plaintiffs' cells.

CLAIM FOR RELIEF

28. The aforesaid conditions are not rationally connected to furthering the constitutionally legitimate purpose of the Act, which is to provide for the segregation and treatment of the Plaintiffs because of their alleged mental disorder, and are excessive in relation to that purpose, in violation of the Due Process Clause of the Fourteenth Amendment.

29. As a direct and proximate result of the conduct of the Defendants, the Plaintiffs have suffered and continue to suffer distress, humiliation, pain and a loss of liberty. The Defendants' practices and policies described above violate Plaintiffs' rights to reasonable mental health care and constitute punishment in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs have been and continue to be irreparably harmed by these injuries and they have no adequate remedy at law for the Defendants' unlawful conduct.

WHEREFORE, JEFFERY HARGETT, KIM A. OVERLIN, JIMMIE SMITH and LOREN K. WALKER, on behalf of themselves and all others similarly situated, respectfully request that this Court:

(1) Issue a Declaratory Judgment that the conduct, conditions and mental health treatment described in this complaint violates the Fourteenth Amendment to the United States Constitution;

(2) Issue a Permanent Injunction against the Defendants, their officers, agents, servants, employees and attorneys, and upon all those persons in active concert or participation with them who receive actual notice of the Injunction by personal service or otherwise requiring them to submit and implement a plan correcting the constitutional deficiencies alleged in this complaint;

(3) Award Plaintiffs their costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988;

(4) Expressly reserve the right of all class members to bring subsequent lawsuits for damages; and

(5) Enter such other and further relief as this Court deems just and equitable.

DATED: February 27, 2002

JEFFERY HARGETT, KIM A. OVERLIN, JIMMIE SMITH and LOREN K. WALKER, on behalf of themselves and all others similarly situated

By: _____
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