**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

| | | |
|---|---|---|
| **HARVE PORTER,** e***t al.,*** | ) | |
| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | Eighth Circuit File No. |
| | ) | |
| **KURT KNICKREHM,** e***t al.,*** | ) | 05-2978 |
| | ) | 05-2979 |
| Defendants, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| **FAMILIES AND FRIENDS OF CARE FACILITY** | ) | |
| **RESIDENTS AND ELLEN SUE GIBSON** | ) | |
| | ) | |
| Defendant Intervenors. | ) | |

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**

**FOR THE EASTERN DISTRICT OF ARKANSAS**
**WESTERN DIVISION**

---

**THE HONORABLE SUSAN WEBBER WRIGHT**
**UNITED STATES DISTRICT JUDGE**

---

# BRIEF OF APPELLANTS/CROSS-APPELLEES HARVE PORTER; DISABILITY RIGHTS CENTER, INC.

---

**Dana McClain, Appellants attorney**
**Disability Rights Center, Inc.**
**1100 N. University, Ste 201**
**Little Rock, AR 72207**
**501-296-1775**

## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARUGUMENT

On October 14, 2003, Plaintiffs Harve Porter and Robert Norman, two adults with mental retardation, and Disability Rights Center, Inc., filed their complaint against two employees of the Arkansas Department of Human Services ("ADHS") and the members of the Board of Developmental Disabilities Services ("Board") in their official capacities. The complaint alleged that Defendants had involuntarily confined Mrssrs. Porter and Norman in a human development center ("HDC") in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Plaintiffs sought a declaration that certain provisions of the Arkansas Mental Retardation Act and policies of the Arkansas Division of Developmental Disabilities Services ("DDS") governing admission and discharge from HDCs are unconstitutional.

On February 12, 2004, the District Court granted in part and denied in part Defendants' motion to dismiss Plaintiffs' original complaint. Following the close of discovery on July 27, 2004, Plaintiffs filed a Motion for Summary Judgment. Defendants also filed a Motion for Summary Judgment on July 27, 2004.

By Memorandum Opinion and Order dated November 23, 2004, the District Court granted in part and denied in part Plaintiffs' and Defendants' arguments. On June 9, 2005, an Order and Judgment were entered together whereby the District Court concluded that Defendants' amended proposed rules were consistent with constitutional guarantees and provided an adequate remedy in this case. The case was then dismissed. (District Court order June 9, 2005, p. 39)

This appeal will determine whether adults with mental retardation who are "involuntarily confined" or at risk of "involuntary confinement" in an HDC are entitled to pre and post confinement hearings which provide the full panoply of protections guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This matter is of significant public importance and should be allotted at least 30 minutes for oral argument.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant, Disability Rights Center, Inc., (DRC) submits the following statement:

DRC is a federal non-profit corporation. DRC does not have a parent company and no publicly held company owns 10% or more of stock in DRC.

# TABLE OF CONTENTS

Summary of case and request for oral argument .................................. i

Corporate disclosure statement .......................................................... iii

Table of contents ....................................................................... iv

Table of authorities ....................................................................... v

Statement of Jurisdiction ..................................................................... 1

Statement of the issue presented for review ........................................ 1

Statement of the case ........................................................................ 1

Statement of facts ........................................................................ 6

Summary of the argument ................................................................ 14

Argument and standard of review ...................................................... 16

Conclusion ....................................................................................... 41

Certificate of compliance .................................................................. 43

Certificate of Service ......................................................................... 44

Addendum ......................................................................................... 45

# TABLE OF AUTHORITIES

## CASES

*Addington v. Texas*, 441 U.S. 418 (1979) .......................................... 18

*Clark v. Cohen*, 794 F.2d 79 (3rd Cir. 1986) ...................................... 28

*Collins v. Bellinghausen*, 253 F.3d 591 (8th Cir. 1998) ...................... 18

*Doe by Doe v. Austin*, 668 F.Supp. 597 (W.D.Ky. 1986) .................. 38

*Doe by Doe v. Austin*, 848 F.2d 1386 (C.A. 6, Ky. 1988) .................. 38

*Falls v. Nesbitt*, 966 f.2d. 375 (8th Cir. 1992) ..................................... 16

*Foucha v. Louisiana*, 504 U.S. 71 (1992) .......................................... 27

*Goldberg v. Kelly*, 397 U.S. 254 ........................................................ 40

*Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1(1979) ................ 29

*Hamdi v. Rumsfield*, 124 S.Ct. 2633 (2004) ................................. 27,29

*Mathews v. Eldridge*, 424 U.S. 319 (1976) .............. 14,15,16,26,40,41

*Morrisey v. Brewer*, 408 U.S. 471 (1972) .......................................... 39

*Olmstead v. L.C.* 527 U.S. 581 (1999) ............................................... 24

*Parham v. J.R.,* 442 U.S. 584 (1979) ........... 1, 5, 14,16, 17,26,29,33,40

*Secretary of Pub Welfare of Pa v.*
*Instiutionalized Juveniles*, 442 U.S. 640 (year) ................................. 17

*Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) ........ 26

*United States v. Filker*, 972 F.2d 240 (8th Cir. 1992)………………..21

*United States v. Williams*, 994 F. 2d 1287 (8th cir. 1993)..........21, 25

*Vitek v. Jones*, 445 U.S. 480 (1980) ............................................... 18

*Wallin v. Minnesota Dep't of Corrections*, 153 F. 3d 681
(8th Cir. 1998)............................................................................ 26

*Washington v. Glucksberg*, 521 U.S. 702 (1997) ........................ 15, 27

*Youngberg v. Romeo*, 457 U.S. 307 (1982) ...................................... 28

**Statutes, policies and regulations**

28 U.S.C. 1291 ................................................................................ 1

28 U.S.C. 1331 ................................................................................ 1

28 U.S.C. 1343 ................................................................................ 1

42 U.S.C. 1983 ............................................................................ 1,2

42 U.S.C. 12101(a)(5).................................................................... 27

Ark. Code Ann. 20-48-205(b) ........................................................... 7

Ark. Code Ann. 20-48-401 et seq.,............................................... 2, 29

Ark. Code Ann. 20-48-402 et seq ..................................................... 3

Ark. Code Ann. 20-48-403(a)............................................................ 6

Ark. Code Ann. 20-48-404(1) ........................................................... 6

Ark. Code Ann. 20-48-404(2) ........................................................... 8

Ark. Code Ann. 20-48-405 ............................................................... 8

Ark. Code Ann. 20-48-405(a)(7) ........................................................ 34

Ark. Code Ann. 20-48-406(b) ................................................ 8,34,36

Ark. Code Ann. 20-48-406(c)........................................................ 8,31

Ark. Code Ann. 20-48-406(c)(1) ........................................................ 34

Ark. Code Ann. 20-48-406(c)(3) ........................................................ 34

Ark. Code Ann. 20-48-406(c)(4) ........................................................ 35

Ark. Code Ann. 20-48-410 ................................................................ 23

Ark. Code Ann. 20-48-412 ............................................................. 8,9

Ark. Code Ann. 20-48-412(a)............................................................ 35

Ark. Code Ann. 25-10-101(b) ............................................................. 7

Ark. Code Ann. 25-10-102(b)(1)(A) ................................................... 7

Ark. Code Ann. 25-10-102(b)(2)(A) ................................................... 8

Ark. Code Ann. 25-10-104(d)(2)......................................................... 8

Policy manual policy number 1020 ............................................ 2,9,36

Policy manual policy number 1037 .................................................. 2,9

Policy manual policy number 1053 ............................................ 2,9,36

Policy manual policy number1086………………………………2,9,36

## STATEMENT OF JURISDICTION

The Disability Rights Center, Inc., and Harve Porter appeal from a final judgment of the United States District Court for the Eastern District of Arkansas, Western Division, Honorable Susan Webber Wright, Judge. The District Court had federal question jurisdiction under 28 U.S.C. §1331, and civil rights jurisdiction under 28 U.S.C. §1343, this action arising under 42 U.S.C. §1983. Final judgment having been entered by the District Court on June 9, 2005, and a timely notice of appeal having been filed on July 1, 2005, this Court has jurisdiction under 28 U.S.C. §1291.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. **The District Court erred in applying *Parham v. J.R.*, 442 U.S. 584 (1979) to determine the amount of due process guaranteed Mr. Porter, an adult involuntarily confined by the state at an HDC.**

## STATEMENT OF THE CASE

On October 14, 2003, Plaintiffs Harve Porter and Robert Norman, two adults with mental retardation, and Disability Rights Center, Inc., an organization dedicated to advancing the interests of individuals with mental retardation, filed their complaint against two employees of the ADHS and the members of the Board of DDS in their official capacities. The complaint alleged that Defendants had involuntarily confined Messrs. Porter and

Norman in an HDC in violation of 42 U.S.C § 1983 and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Specifically, Plaintiffs Porter and Norman alleged that the state's admission and discharge procedures for its HDCs set forth in Ark. Code Ann. § 20-48-401 *et seq*. (Michie 2003 Suppl.) and DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086 are unconstitutional because they do not provide adequate judicial hearings at which persons whose liberty is at stake can contest the state's effort to institutionalize them. Plaintiffs maintained that such hearings must include the following due process protections: (a) the right to be present; (b) the right to the effective assistance of appointed counsel, if indigent; (c) the right to present evidence in his own behalf; (d) the right to cross-examine witnesses; (e) the right to view any and all petitions and reports in the court file of his case; (f) the right to subpoena witnesses; (g) the right to periodic judicial review; (h) the right to be placed in the least restrictive environment; (i) the right to adequate and timely notice of the above rights. In addition, Plaintiffs maintained that before the state may involuntarily commit them it must prove by clear and convincing evidence that the individual sought to be committed poses a substantial risk of harm to himself

or others and requires a level of supervision and care that can only be provided by one of the state's HDCs.

### B. The District Court's Resolution of Defendants' Motion to Dismiss

On February 12, 2004, the District Court granted in part and denied in part Defendants' motion to dismiss Plaintiffs' original complaint. In doing so, the District Court rejected most of Defendants' arguments. First, the District Court concluded that Plaintiffs had alleged an injury in fact and thus, Plaintiffs had standing. The District Court also found the *Rooker-Feldman* doctrine did not apply because a favorable ruling on Plaintiffs' constitutional claims would neither reverse nor void the state court decisions appointing guardians for Plaintiffs.

Next, the District Court found that Plaintiffs had alleged "state action" because they claimed that they were confined without a hearing in a state institution against their wishes. The District Court also found that Plaintiffs' claims for procedural due process were ripe for review and that Plaintiffs had not failed to exhaust any relevant state remedies.

Lastly, the District Court concluded that *Younger* abstention was unwarranted because nothing in the record indicated that Plaintiffs' guardianship cases are ongoing judicial proceedings. Plaintiffs were allowed to proceed with their procedural due process claims. Families and

Friends of Care Facility Residents ("FF/CFR") and Ellen Sue Gibson's motion to intervene was granted. Intervenors FF/CFR and Ellen Sue Gibson's motion to redact names was denied.

After Defendants answered Plaintiffs' Second Amended Complaint, Plaintiffs conducted discovery, including deposing the Director of DDS, the Alexander HDC ("ALHDC") Superintendent, Plaintiff Harve Porter's guardian, and the former Superintendent of the Southeast Arkansas HDC ("SEAHDC"). Sworn statements were also taken from Robert Norman's guardian and a former social worker at SEAHDC.

Following the close of discovery on July 27, 2004, Plaintiffs filed a Motion for Summary Judgment on both their Due Process and Equal Protection claims. Defendants also filed a Motion for Summary Judgment on July 27, 2004.

By Memorandum Opinion and Order dated November 23, 2004, the District Court granted in part and denied in part Plaintiffs' and Defendants' motions for summary judgment. In doing so, the District Court again rejected most of Defendants' arguments. First the District Court concluded that Defendants' argument challenging Plaintiffs' capacity to sue came too late and was waived. Next, the District Court found that Mr. Porter's placement at the ALHDC amounted to confinement that implicated

significant liberty interests and invoked the procedural guarantees of the Due Process Clause. Lastly, the District Court concluded that the due process requirements set forth in *Parham* dictated the minimum procedural requirements for committing mentally retarded adults to state institutions; however, the District Court concluded that Arkansas law fell short in that it did not require the HDC superintendents to discharge residents when they no longer required HDC services and that post-admission review procedures were futile unless the state was charged with an affirmative duty to discharge residents who no longer needed HDC services. The District Court dismissed Plaintiff Robert Norman's claims and he was dismissed as a party to this action. Plaintiffs' equal protection claim was dismissed with prejudice.

### C. The District Court's Resolution of Plaintiffs' and Defendants' Summary Judgment Motions

On July 27, 2004, Plaintiffs filed a Motion for Summary Judgment on both their Due Process and Equal Protection claims. Defendants also filed a Motion for Summary Judgment on July 27, 2004.

On June 9, 2005, an Order and Judgment were entered together whereby this Court concluded that Defendants' amended proposed rules (District court order appealed brief p. 39) were consistent with constitutional guarantees and provided an adequate remedy in this case. Defendants were

ordered to implement, with all possible speed, the proposed DDS HDC Admission and Discharge Rules submitted February 23, 2005, and the case was dismissed.

## STATEMENT OF FACTS

The issues involved in this appeal are a result of the State of Arkansas' failure to ensure people with mental retardation who are involuntarily confined or at risk of involuntary confinement in a state-operated HDC, receive the full panoply of protections guaranteed them under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. These are the rights that are due when a person whose liberty is at risk of unlawful deprivation.

The Arkansas Mental Retardation Act provides for the creation and maintenance of HDCs. Ark. Code Ann. § 20-48-403(a). There are six HDCs in Arkansas that provide medical, residential, habilitation and educational services. The HDCs provide confined institutional living for individuals with mental retardation that ranges in severity from individuals who manage their own daily needs and activities of daily living to individuals who are unable to speak and require restraints to prevent them from injuring themselves. Ark. Code Ann. § 20-48-404(1). Plaintiffs seek a ruling that certain provisions of the Arkansas Mental Retardation Act

governing admission and discharge from HDCs as well as admission and discharge policies of DDS are unconstitutional.

ADHS is the state agency responsible for the coordination and provision of treatment, programming and services to individuals with disabilities throughout Arkansas. As Director of ADHS, Kurt Knickrehm is the Director of the ADHS and is appointed by and serves at the pleasure of the Governor. Ark. Code Ann. § 25-10-101(b). As Director of ADHS, Defendant Knickrehm is required to exercise his authority to direct, control, and supervise the DDS, the Division of Medical Services ("DMS"), the Division of Mental Health Services ("DMHS") and all other divisions set forth in said statute. Ark. Code Ann. § 25-10-102(b)(1)(A).

Defendant James C. Green is the Director of DDS and is ultimately responsible for the provision and coordination of all services to Plaintiffs by authority delegated to him by the Board. The Board is authorized to make regulations concerning the admission, discharge, care, custody, placement, training and discipline of individuals receiving developmental disabilities services in the human development centers. Ark. Code Ann. § 20-48-205(b).

**a. Statutory Procedures**

In order to be admitted to an HDC, a parent or guardian of a mentally defective [*sic*] person submits a petition to the Board requesting admission

for mentally defective [*sic*] person. Ark. Code Ann. § 20-48-405. DDS is responsible for the provision of treatment, programming and services provided to individuals with developmental disabilities by both community programs and HDCs throughout the State of Arkansas. Ark. Code Ann. § 25-10-104(d)(2). The HDCs are under control of the Board. Ark. Code Ann. § 25-10-102(b)(2)(A).

The petition submitted to the Board must state whether the parent or guardian wants admission to be a voluntary admission or a commitment. Ark. Code Ann. § 20-48-405. After receiving the petition for admission, the Board conducts an investigation to determine the mental status and condition of the individual using standard psychological and physical examination tests. *See id.* § 20-48-404(2). After the investigation, the Board may decide that the individual is incapable of managing his or her affairs and requires the special care provided by the center and may permit voluntary admission of the individual without any court procedure. *id*. § 20-48-406(b). The voluntarily admitted individual can only be withdrawn from the center by an application made by the parent or guardian of the individual who has legal custody. *id*. § 20-48-412.

On the other hand, the Board may determine that the individual be admitted to the center by legal commitment. *id*. § 20-48-406(c). In this

instance, the Board files a petition for commitment with the probate court of the county in which the individual resides. A hearing is held to determine whether the individual should be committed to a center. Once admitted through these proceedings, an individual may not be discharged until, in the judgment of the Board and center superintendent, his or her condition validates the discharge. *id*. § 20-48-412.

**b. Administrative Procedures**

Defendants have supplemented statutory procedures regarding admission and discharge to the HDCs through the adoption of certain policies and procedures. For example, Administrative Policy #1020 contained in the DDS Director's Office Policy Manual ("DDS Manual") sets out the procedure by which an individual requests services from the DDS, the state agency responsible for providing services to qualified Arkansas citizens with developmental disabilities. Administrative policy # 1037 in the DDS Manual addresses "HDC therapeutic/trial leaves"; Administrative policy #1053 "establishes the discharge process and establishes guidelines for discharge of individuals from the HDCs operated by DDS"; and, Administrative policy # 1086 "establishes the referral and placement procedures for services from the HDCs." Under policy # 1086 the interdisciplinary team determines if admission to an HDC is appropriate for

that individual. (Nan Craft depo. p. 16.6, appendix, pg. 106). The team consists of psychologists, social workers, residential services, medical services, and other professionals in those areas. (Hancock depo. p. 14.12, appendix p. 130). All members of the team are employees or work for the HDCs. (Nancy Craft depo. p.18.15, appendix p. 107).

**c. Plaintiff Porter**

Mr. Porter is a forty-nine year old individual with moderate mental retardation and developmental disabilities who is currently involuntarily confined at the ALHDC. He has been involuntarily confined in various HDCs for several years and has never been granted a judicial hearing to determine whether he should be forced to live his life in an institutional setting in the custody of the State of Arkansas. On numerous occasions, Mr. Porter has stated to HDC and DRC staff that he wishes to leave the HDC, but has not been permitted to do so (Boyd Hancock depo. p.15.4 appendix p.131 and Affidavit of Griffin J. Stockley, appendix pgs. 135-137).

The history of Mr. Porter's involuntary confinement is rather long. On April 3, 1987, Booneville Human Development Center ("BHDC") first took custody of Mr. Porter on a "respite" admission but changed his status to a "regular" admission later that month.

On June 4, 1987, BHDC released Mr. Porter to his family and he was formally discharged on June 23, 1987. On December 2, 1994, Ellen Sue Gibson, Mr. Porter's mother, filed a Petition for Appointment of Guardian of the Person and Estate of Harve Porter. (*In the Matter of Harve Edward Porter, an Incapacitated Person*, Polk County Probate #G 94-27). An order appointing Ms. Gibson guardian of the person and estate of Mr. Porter was issued on February 22, 1995. (*In the Matter of Harve Edward Porter, an Incapacitated Person*, Polk County Probate #G 94-27).

The SEAHDC took custody of Mr. Porter on March 30, 1998, on a "respite" admission requested by his guardian. AHDC then took custody of Mr. Porter for diagnosis and evaluation on May 6, 1998. SEAHDC regained custody of Mr. Porter on May 13, 1998, for yet another "respite" admission, again at the request of his guardian. His status then changed on May 28, 1998, to a "regular" admission.

Mr. Porter was allegedly the victim of an incident of abuse at SEAHDC on or about September 8, 2003, that resulted in significant bruises and scratches on his back. An internal investigation conducted by SEAHDC staff found that the injuries were caused by his bed controls, although a physician's report dated September 18, 2003, stated, "[s]uspicious for abuse, but uncertain of what may have caused this."

Ms. Gibson testified that Mr. Porter requested a transfer to AHDC because he alleged that while at SEAHDC he was hit with a rod by Leslie Law, a SEAHDC employee, leaving stripes across his back (Ellen Sue Gibson depo. p. 13, appendix p.124). In response to this allegation, Ellen Sue Gibson contacted Adult Protective Services. (Ellen Sue Gibson depo. p. 13, appendix p. 124). Adult Protective Services conducted a surprise investigation in response to the allegation and found some discrepancies at SEAHDC regarding the alleged incident (Plaintiffs' Exhibit 8, Ellen Sue Gibson depo. p. 13, appendix p. 124).

**d. Plaintiff Robert Norman**

Mr. Norman is a forty-five year old individual with mild mental retardation who also has a mental illness. On August 2, 1999, Mr. Norman, who had been charged with arson, was committed to the "Arkansas State Hospital or other suitable facility" by the Honorable John B. Plegge to undergo a mental health evaluation. (*State of Arkansas v. Robert Norman,* Pul. Cir. #98-4532). SEAHDC took custody of Robert Norman on a "respite" admission on or about August 3, 1999. Mr. Norman's status was changed on or about September 22, 1999, at SEAHDC to a "regular" admission. Judge Plegge then entered an order on January 7, 2000, of acquittal of Mr. Norman by reason of mental disease or defect and

committed him to SEAHDC. On February 23, 2000, the Honorable Mary Ann McGowan dismissed an Act 911 action against Mr. Norman pending in probate court, finding that insofar as Mr. Norman had been found not to be able to participate in his defense of the charge of arson, that a "final order could not have been entered in his criminal case until such time as Respondent was found fit to proceed." (*In the Matter of Robert Norman,* Pul. Probate # PCV 2000-281).

Charlie Harris sought guardianship over Mr. Norman at the request of staff at SEAHDC in the spring of 2000. (Sworn Statement of Charlie Harris, p. 10, appendix p. 140). An attorney for the ADHS filed a guardianship petition in Bradley County Probate Court on April 25, 2000, seeking a permanent limited guardianship for Charlie Harris over Robert Norman "for the purpose of consenting to non-emergency medical treatment, placement and programming that are in Respondent's best interest." (*In the Matter of Robert Norman, an alleged Incapacitated Person,* Bradley Probate # GD-2000-10-1). No hearing was held (Sworn Statement of Charlie Harris, p. 10.17, appendix p. 140) and on August 14, 2000, letters of permanent limited guardianship over Robert Norman were issued to Charlie Harris.

Plaintiff Norman was involuntarily confined at SEAHDC from August 14, 2000, until on or about January 15, 2004, when he was moved

into a community placement at Friendship Community Care, Inc., Russellville, Arkansas, where he presently resides. While he was confined at SEAHDC, Robert Norman stated to employees of the Disability Rights Center that he wished to leave the facility. (Affidavit of Griffin J. Stockley, appendix pgs. 135-137). However, he was not permitted to leave until approximately three months after this action was filed. The District Court, by Memorandum Opinion and Order dated November 23, 2004, dismissed Plaintiff Robert Norman's claims and he was dismissed as a party to this action.

## SUMMARY OF THE ARGUMENT

This case will determine the process guaranteed individuals with developmental disabilities prior to being involuntarily confined in a state-operated institution. Mr. Porter is an adult. The District Court failed to treat Mr. Porter as an adult and insisted on misapplying a case involving children to the present case. *Parham v. J.R.,* 442 U.S. 584 (1979)

The District Court found that Mr. Porter's placement at the AHDC amounts to confinement that implicates significant liberty interests and invokes the procedural guarantees of the Due Process Clause. However, in applying the test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the District Court misapplied *Parham* in determining the amount of due process Mr.

Porter is owed. Because of the District Court's failure to acknowledge and treat Mr. Porter as an adult, the process the District Court determined appropriate does nothing to ensure Mr. Porter's liberty interest is protected.

The parties agree that the balancing test set forth in *Mathews* governs the Court's inquiry as to whether the state's procedures comport with due process requirements. The *Mathews* test requires consideration of three factors: One, the private interest that will be affected by the official action; two, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and three, the government's interest.

The fundamental right at stake in this case is freedom. Therefore, the private interest affected is Mr. Porter's right to be free from unnecessary confinement. The risk of erroneous deprivation of this interest is high because the state fails to provide a scintilla of protection against the unnecessary confinement of individuals to HDCs.

Rights recognized as "fundamental" by the Court, such as liberty, impose upon the judiciary a special responsibility: to scrutinize strictly any legislation or state policy that circumscribes rights recognized as fundamental and to determine whether any limitations placed on these rights are justified by a compelling state interest. *Washington v. Glucksberg*, 521

U.S. 702, 767 (1997). The necessary justification for the state's failure to provide adequate due process procedures for admitting individuals into the HDCs is lacking. The state's interest in placing individuals in HDCs is outweighed by the individual's interest in liberty.

The District Court erred in its interpretation of *Mathews* when it applied *Parham v. J.R.,* and thus erred in determining that Mr. Porter was not guaranteed a judicial proceeding prior to being involuntarily confined by the state.

## ARGUMENT

### I. The District Court erred in applying *Parham v. J.R.*, 442 U.S. 584 (1979) to determine the amount of due process guaranteed Mr. Porter, an adult involuntarily confined by the state at an HDC.

The District Court's holding that Mr. Porter, an adult, must only be afforded the same due process as children with mental illness as determined by the United States Supreme Court, in *Parham* is a question of law to be reviewed de novo. *Falls v. Nesbitt*, 966 F.2d 375, 377 ($8^{th}$ Cir. 1992).

Appellants agree with the finding of the District Court that "H.P.'s placement at the AHDC amounts to confinement that implicates a significant liberty interest and invokes the procedural guarantees of the Due Process Clause." However, the District Court erred in basing its decision on *Parham v. J.R.* to determine what due process should be required before involuntarily

confining Mr. Porter (an adult) in a state operated HDC. The Supreme Court's decision in *Parham v. J.R.,* is distinguishable from the present case in that *Parham* involved the confinement of *children* and not adults (emphasis added) as in the present case. In the District Court's memorandum and opinion order, the District Court stated:

> "Although Parham concerned the civil commitment of mentally ill children by parents or guardians, in a companion case decided the same day, the Court held that the procedural requirements set forth in Parham apply equally to the civil commitment of mentally retarded minors. Secretary of Pub. Welfare of Pa. v. Institutioanlized Juveniles, 442 U.S. 640 (1979). Likewise, this Court concludes that the due process requirements set forth in Parham dictate the minimum procedural requirements for committing mentally retarded adults to state institutions.
> (adden. pgs. 14-15)

The District Court acknowledged the distinction between both *Parham v. J.R.,* and *Secretary of Pub Welfare of Pa v. Institutionalized Juveniles*, and the present case, yet failed to offer a rationale as to why the District Court held Mr. Porter, an adult with mental retardation, is implicitly comparable to the children involved in these cases.

The District Court's error is further compounded by its suggestion that adults with mental retardation are somehow entitled to less due process than adults with "average" intelligence. This suggestion perpetuates the idea that adults with mental retardation are "less than" in the eyes of the law.

**a. The District Court was correct in its determination that Arkansas law denies due process by not requiring HDC Superintendents to discharge residents when they no longer require HDC services.**

Confinement in an institution, as in the present case, is a deprivation of liberty protected by the Due Process Clause of the Fourteenth Amendment. "It is undisputed that civil commitment *for any purpose* (emphasis added) constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979)("clear and convincing" standard of proof is constitutionally required in a civil proceeding to commit an individual involuntarily for an indefinite period to a state mental hospital.) *See also, Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Collins v. Bellinghausen,* 253 F.3d 591, 596 (8th Cir. 1998)(Case involving an individual summarily removed from a nursing home and subjected to involuntary commitment procedures. The Court noted, "it was clearly established that liberty from bodily restraint is protected by the Due Process Clause of the Fourteenth Amendment. This liberty interest is implicated in involuntary commitment proceedings.").

This same liberty interest was implicated when Mr Porter was involuntarily confined to SEACHDC on March 30, 1998, without being afforded procedural due process.

Mr. Porter was admitted to the SEAHDC upon application by his guardian because, "[i]n the majority of cases, the admissions application is made by the guardian." (Craft depo. p. 19.10, appendix pg 108). "Provision of service [at an HDC] is predicated on what the Interdisciplinary Team prescribes, providing you have consent from the legal guardian, if, indeed there is one." (Green depo. p.37.15, appendix p. 115).

After an application for admission is submitted to the field caseworker, the Interdisciplinary Team performs an evaluation. (Hancock depo. p. 13.2, appendix p. 129). "Once the team makes their recommendation, that recommendation is submitted to the center to see if the individual is appropriate for that center." (Hancock depo. p. 14.3, appendix p. 130). Although the HDC superintendent considers the team's recommendation, (Hancock depo. p. 14.9, appendix p. 130), [t]he superintendent makes the final decision whether to admit. (Hancock depo. p. 14.9, appendix p. 130). (Green depo. p. 24 or 25, appendix p. 110).

Once admitted to an HDC, residents are not discharged unless a guardian or family member requests discharge. In essence, then, the residents' liberty may be (and often is) permanently deprived. Even when, as here, residents are adamant about leaving the HDC, the decision as to whether they are allowed to leave the HDC depends on "what the treatment

team thought was best and . . . ultimately, what the guardian, how the guardian participated in the team process." (Green depo. p. 35.6, appendix p. 114). "Certainly anyone can request to be discharged from an HDC." (Plaintiffs' Exhibit 6, Green depo. p.35.12, appendix p. 114). However, "[t]hey are not always discharged." (Plaintiffs' Exhibit 6, Green depo. p.35.14, appendix p. 114).

Therefore, if the individual says that he or she no longer wants to come to a particular center, it is up to their guardian - - the very person who sought the commitment – to decide whether to accede to the resident's wishes. (Hancock depo. p. 14.17, appendix p. 130).

In this case, as Boyd Hancock, former superintendent of SEAHDC stated, "It was normal for Harve Porter to tell me he wanted to leave the HDC." (Hancock depo. p. 15.8, appendix p. 131). However, "[t]he guardian is the only one who can provide consent or withhold consent." (Green depo p. 37.23, appendix p. 115). FFCFR/Ellen Sue Gibson take issue with the fact that DRC did not include as an exhibit to their Motion for Summary Judgment an additional page from Mr. Green's deposition. However, FFCFR/Ellen Sue Gibson had ample opportunity to make that very point to the District Court and provide whatever supporting documents they felt the District Court needed to make its decision. FFCFR/Ellen Sue Gibson failed

to provide any additional information to the District Court. Instead, Intervenors FF/CFR and Ellen Sue Gibson, "accepted, endorsed, and adopted in its entirety the separate Defendants' Response to Plaintiffs' Motion for Summary Judgment". (Intervenor/Cross-appellants brief p. 33) FFCFR/Ellen Sue Gibson openly admit they were aware that Appellees did not include that additional information from Mr. Green's deposition. FFCFR/Ellen Sue Gibson do not get to provide new allegations/objections here where they failed to preserve the issue for appeal at the district court. "To properly preserve an issue for appeal, a timely objection must be made to the trial court which clearly provides the grounds for objection so that the trial court has the opportunity to prevent or correct the error." *United States v. Williams*, 994 F. 2d 1287, 1294 (8th Cir. 1993). "We will not review an issue not properly preserved, unless a gross miscarriage of justice would otherwise result." *United States v. Filker*, 972 F.2d 240, 242 (8th Cir. 1992).

FFCFR/Ellen Sue Gibson appear to believe that had this document been provided to the District Court the Court's decision would have been different. Appellants are curious as to why if FFCFR/Ellen Sue Gibson thought this information was so important they did not provide it at the proper time, which was the District Court.

In addition, FFCFR/Ellen Sue Gibson state through out their brief that the District Court was incorrect in finding that the parent/guardian have the ultimate power to have their ward discharged from the HDCs. Yet in their brief they state, “HEP’s mother, Ellen Sue Gibson, removed him from the Booneville Human Development Center, against medical advice and the recommendations of the interdisciplinary team, after he had an altercation with another resident which resulted in injuries to him”. (FFCFR/Ellen Sue Gibson brief p. 12)

This fact coupled with the testimony of Charlie Green, and Boyd Hancock in their deposition indicates the district court was correct in determining that the guardian has the ultimate authority and can override doctors, IDT members, and even the HDC superintendent. Here, the HDC had no choice but to release Harve Porter once his guardian insisted. This shows the guardian’s authority may even extend further than the District Court’s finding because here there were medical reasons as to why Harve Porter should not leave the HDC and yet Mrs. Gibson still had the sole authority to remove Harve from the institutional setting in which he was confined.

Finally, to underscore the often permanent and involuntary nature of confinement at the HDCs, should an individual leave the institution without

permission, law enforcement "shall, upon the written request of the superintendent, return to the human development center or hold in custody an individual who has escaped or who has been temporarily released from the center under a permit to visit." Ark. Code Ann. § 20-48-410. "If they are gone for a significant length of time, you contact the Sheriff's Office so that they can help you look." (Green depo. p.32, appendix p. 113 ). FFCFR/Ellen Sue Gibson' attempt to minimize this fact in their brief which states, "If someone leaves a human development center without permission of staff or their guardian, staff follow them and, if necessary, attempt to calm them and persuade them to return to the center". (Intervenor/Cross-Appellants brief p. 15). In truth, the HDC staff is to contact the police, "who shall….return or hold in custody the individual…who escaped or who has been gone for a long period of time". With the ability to have the escapee picked up and returned, there is no need to have enclosure walls, fences, or other barriers in order for an individual to be "involuntarily confined" in an HDC.

During the individual's confinement, the "HDC assumes responsibility for. . . making sure that they are in a safe environment and that they are provided care." (Green depo. p.43.9, appendix p. 116 ). However, "[c]onfinement in an institution severely diminishes the everyday life

activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead v. L.C*. 527 U.S. 581, at 601 (1999).

In sum, the District Court had ample evidence and was correct in determining that Arkansas law denies due process by not requiring HDC superintendents to discharge residents when they no longer require HDC services and that the guardian does have "sole authority" to decide whether an individual remains involuntarily confined in an institution.

## II. Mr. Porter is entitled to a pre-deprivation judicial hearing because his involuntary confinement in an HDC by the state constitutes an infringement on his liberty interest protected from arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment.

Plaintiff's involuntary commitment constitutes the deprivation of a liberty interest, and thus triggers the procedural protections of the Due Process Clause of the Fourteenth Amendment. The District Court correctly agreed with Plaintiffs and determined that Mr. Porter's "placement at the AHDC amounts to confinement that implicates significant liberty interests and invokes the procedural guarantees of the Due Process Clause". (adden. p. 11)

### a. Plaintiffs are entitled to the full panoply of procedural due process protections under the *Mathews v. Eldridge* balancing test.

Once it is determined that an individual possesses a liberty interest, which has been subjected to deprivation (as shown immediately above), one further question remains: How much procedural process is due? Appellees/Cross-Appellants fail to amply address this issue in their brief. Instead Appellees/Cross-Appellants spend an enormous amount of time discussing the laws in other states. Acknowledged by the Appellees/Cross-Appellants the District Court made it clear that the state laws that Appeellees/Cross Appellants now cite this Court to were not considered in the District Court's decision regarding Harve Porter/DRC Due Process claims. Because FFCFR/Ellen Sue Gibson adopted the separate defendants response to Appellants Motion for Summary Judgment, they fail to make proper objections or argument to the trial court in order to preserve this issue in regards to the Harve Porter/DRCss Due Process claims. *United States v. Williams*, 994 F.2d 1287, 1294 (8th Cir. 1993) The chart of State laws FFCFR/Ellen Sue Gibson discuss were used in support of Harve Porter/DRCs Equal Protection claim, which is not in front of this Court. Therefore, Harve Porter/DRC feel that chart is without relevance in deciding

what Due Process is required before involuntarily confining an individual with a developmental disability to an institution.

In answering that question, courts are required to apply the balancing test first enunciated in *Mathews v. Eldridge,* 424 U.S. 319 (1976), which all parties and the District Court agree is applicable in this case. That test has perhaps been best described in *Parham v. J. R.*

> Assuming the existence of a protectible property or liberty interest, the Court has required a balancing of a number of factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 660 (quoting *Mathews*, 424 U.S. at 335 and *Smith v. Organization of Foster Families*, 431 U.S. 816, 848-849 (1977).

Thus, the interests of Mr. Porter must be weighed against the interests of the state. *See also, Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 690 (8th Cir. 1998). In order to fully address the issue of what process is guaranteed Mr. Porter, it is necessary to address all three parts of the test in *Mathews*.

**b. Mr. Porter's freedom -- the private interest affected by Defendants' action -- is of vital importance.**

There is no greater private interest than freedom. *See Hamdi v. Rumsfield,* 124 S.Ct. 2633 (2004). Mr. Porter's fundamental liberty interest is curtailed by Arkansas' statutes and policies. While the mass of Americans live freely with the right to come and go as it chooses, "individuals with disabilities continually encounter various forms of discrimination, including ... segregation." 42 U.S.C. § 12101(a)(5).

Mr. Porter is segregated from the rest of society by his involuntary confinement in an HDC with the limited possibility of regaining his freedom. As the Supreme Court has noted, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action. *Id.* at 2646. The Court explicitly noted, "We have always been careful not to 'minimize' the importance and fundamental nature' of the individual's right to liberty." *Id*. at 2546 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

Rights recognized as "fundamental" by the Court, such as liberty, impose upon the judiciary a special responsibility. This duty is to scrutinize strictly any legislation or state policy that circumscribes rights recognized as fundamental and to determine whether any limitations placed on these rights are justified by a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997). The necessary justification for a failure to provide

procedures for admitting individuals into the HDCs is lacking. The state's interest in placing individuals in HDCs is outweighed by the individual's interest in liberty.

Two federal circuits have had occasion to consider the procedural due process rights of people with mental retardation who were involuntarily committed to institutions. In *Clark v Cohen*, 794 F.2d 79 (3rd Cir. 1986), the Third Circuit upheld a district court's ruling that a woman with mental retardation who had been confined for over twenty-eight years without a hearing "had been deprived of her liberty to be free from commitment without due process." The court found that "due process required periodic reviews of her continuing need for institutionalization." *Id.* at 86. Similarly, the process that relegates individuals such as Mr. Porter to an HDC violates their procedural due process rights. Once confined within the HDCs, individuals can only be discharged with the permission of their guardian.

In *Youngberg,* the Court specifically considered the liberty interests of adults with mental retardation confined by the state in an institution. *Youngberg*, 457 U.S. at 316. Although the Plaintiff there did not challenge the procedures that led to his confinement, the Court characterized his claim as "a right to freedom from bodily restraint." *Id*. at 316 and noted that "[i]n other contexts, the existence of such an interest is clear in the prior decisions

of this Court. Indeed, '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Id*. (quoting *Greenholtz v. Nebraska Penal Inmates*, 442, U.S. 1, 18 (1979)). "This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment." *Id*. at 316.

Although the District Court erred in applying *Parham v J.R*., to adults, it correctly surmised that when looking at confinement of children the "private interest at stake is a ward or child's interest in not being confined unnecessarily". (adden. p.12). There can be no doubt that the Mr. Porter's freedom – which is the liberty interest at stake in this case – is of paramount importance. It is, indeed the most elemental of all freedoms protected by the Constitution. *Hamdi* at 2646.

**c. The risk of an erroneous deprivation of the vital interest of freedom from bodily restraint is high.**

Arkansas law and policies regarding HDC admission and discharge present an enormous risk of erroneous deprivation of the fundamental right to freedom from bodily restraint. That is so because, instead of relying on the traditional judicial due process protections that are the hallmark of the Due Process Clause, Arkansas' current system perpetuates the fallacy of

"voluntary" confinement and relies upon the discretion of individuals – guardians and family members -- whose interests often conflict with the interests and the stated desires of the institutionalized persons whose freedom hinges upon their guardian's decisions.

Unfortunately, the District Court continued to perpetuate the fallacy of "voluntary" confinement by holding, "the State's initial admission procedures for the voluntary admission of adults to HDCs comport with due process requirements, but the current post-admission procedures fail to provide the process due". Plaintiffs cannot reconcile the idea that procedures for "voluntary" admission can comport with due process when the District Court stated *unequivocally* "Harve Porter's placement at the AHDC amounts to confinement". (adden. p. 11).

In making that determination the District Court owed Mr. Porter the right to a judicial hearing prior to "confinement" in an HDC.

**(i) <u>Conflicting Interests</u>**

Though it may be comforting to assume that family members and legal guardians have only the best interest of their wards at heart, the District Court conceded "parents and guardians sometimes act against the best interest of their children and wards. (adden. p. 12)

Placing an individual in an HDC also relieves the family member or legal guardian of a financial burden because, "[f]or the great majority of all of the HDCs, Medicaid is the primary payer." (Green depo. p.31.22, appendix p. 112). Thus, in many instances, family members or legal guardians are persuaded that care in a HDC is the only appropriate placement for their ward.

Additionally, the interests of people who are required to spend their lives in an institution often conflict with the interests of those responsible for admitting them there or discharging them. Allowing HDC employees, no matter how well-intended or well-qualified, to make the administrative decision, along with the guardian, of whether individuals will be confined in an institution for the rest of their lives, exponentially increases the risk of an erroneous decision.

It can be assumed that a significant percentage of the people working in the six communities in Arkansas where the HDCs are located make their living at the institutions. To not acknowledge that employees realize that they benefit from thriving institutions in these communities is disingenuous. Given the relative lack of standards for confining individuals with mental retardation in institutions in light of what is at stake for the individual, it is

inappropriate for HDC employees to be called upon to apply the standards, as is the case under Arkansas law and ADHS policies.

The District Court failed to address Plaintiffs' concerns that individuals who are making the decisions on whether an individual should remain in an HDC, and also rely on the HDC for employment. If the District Court had correctly found such conflict existed, the need for an independent judicial review would be heightened.

For all these reasons, the risk of the erroneous deprivation of the interest in freedom from bodily restraint is very high. The risk results because, by trumpeting of the inherently flawed notion of "voluntary" confinement of adults with mental retardation, the state is able to circumvent all due process procedures that would determine whether such adults should truly be deprived of their freedom. Moreover, the injudicious reliance upon decision makers – guardians and HDC employees —whose circumstances invite conflict with the best interests of the ward, places adults with mental retardation at severe risk of unconstitutional loss of liberty.

**d. The probable value of the proposed substitute judicial procedures is substantial in light of the importance of the implicated right and the constitutional inadequacy of the current procedures.**

The value of the proposed judicial procedures is substantial in light of the fundamental right of freedom at issue in this case. The District Court minimized the importance of this right by equating it to a relationship between a parent and child. The District Court stated "The Court (in *Parham*) contemplated that judicial hearings and other procedural barriers could discourage parents from seeking needed medical help for their children. Also, the Court recognized that an adversarial confrontation could adversely affect the relationship between parent and child". (adden. p. 30).

While it is true that access to medical care and familial relationships are important, to suggest that these concerns outweigh an adults right to be free from bodily restraint is misleading at best and dangerous at worst. Plainly stated, Mr. Porter is not a child. In any other context, the potential deprivation of an adult's liberty without judicial review would be unfathomable. In fact, such pre-deprivation review is a tenet of our judicial system that should not be compromised by virtue of the fact that Mr. Porter has a developmental disability.

The current admission and discharge procedures for Arkansas' HDCs have little, if any, prospect of preventing erroneous deprivations of liberty. Ark. Code Ann. § 20-48-401 *et seq.* creates the statutory framework for admission and discharge to and from the HDC's. In theory, the Arkansas

statutes contemplate alternative procedures for admission to an HDC: "voluntary" admissions or legal commitment. "A parent or guardian" files a verified petition with the Board, which states, among other things, "whether the petitioner desires that the individual be admitted voluntarily or by commitment." Ark. Code Ann. § 20-48-405(a)(7).

Thereafter, it is within the unfettered and unreviewable discretion of the Board as to how an individual enters an HDC: "[t]he board may permit the voluntary admission of the individual to a center for such period of time as the board may deem necessary for the proper care, training, and education of the individual. The admission shall be by action of the board without the necessity of any court procedure." Ark. Code Ann. § 20-48-406(b).

The Board "may determine that the individual should be admitted to a center by legal commitment only. In that event, the board shall file the petition for admission with the probate court of the county in which the individual resides." Ark. Code Ann. § 20-48-406(c)(1). Statutory procedures to be followed in "court commitments" contain only the following requirements: The Court in its discretion "may appoint one (1) or two (2) reputable physicians to examine the individual and report to the court the mental status of the individual…or it may adopt the report of the physician appointed by the board…" Ark. Code Ann. § 20-48-406(c )(3).

At the hearing on the petition, the court "shall determine whether or not the individual should be committed to a center for care, treatment, and training and shall enter an appropriate order in accordance with its determination." Ark. Code Ann. § 20-48-406(c)(4).

Because the statutory procedure set forth in Ark. Code Ann. § 20-48-406 is not mandatory, it in no way serves to reduce the risk of an erroneous discharge or admission to an HDC. Even if it were mandatory, the statute simply requires a probate judge to hold a hearing. Ark. Code Ann. § 20-48-406. None of the other requirements in hearings associated with due process- adequate and timely notice and an opportunity to be heard, the right to present evidence and to challenge and cross-examine adverse evidence and witnesses, the appointment of counsel for those who are indigent, appropriate standards of commitment and burden of proof – are mentioned in the statute.

Statutory requirements relating to discharge from an HDC are even more at odds with fundamental notions of due process - indeed, they are nearly non-existent. An individual admitted involuntarily to an HDC, "may be withdrawn from the center at any time upon the application of the parent or guardian who has legal custody of the individual" upon "thirty (30) days notice in writing…." Ark. Code. Ann. § 20-48-412(a).

For individuals who were committed through probate court, they may only be discharged if in the "judgment of the board and the superintendent, his or her condition justifies the discharge." Ark. Code. Ann. § 20-48-406(b). Plainly, once admitted, adults with mental retardation, such as Mr. Porter, are essentially incarcerated for life, unless released at the discretion of the very persons who are holding them, without any access to judicial process and the fundamental due process guarantees that judicial process ordinarily entails.

Administrative policy #1020, #1053 and 1086 create the administrative framework for admission and discharge. None of Arkansas' statutes or policies contains a mandatory hearing process that applies to admission or discharge nor do they even provide an individual the right to disagree with the initial placement or discharge.

Appellees/Cross-Appellants argue, "citizens who object to their admission to the state's development centers may also exercise their rights to petition, hearing, and appeal under the Arkansas Administrative Procedure Act". (Appellees/Cross-Appellants brief p. 41) The District Court, in deciding whether the guardianship law in Arkansas provides ample protections for an individual with developmental disabilities at risk of involuntary confinement stated:

"Accepting this assertion as fact, the Court does not agree that it (Ark. Guardianship statutes) lessens the need for State-initiated, periodic assessment of the need for continued institutional care. First, incapacitated individuals incapable of looking out for their own interests must depend on others to take the initiative and file petitions on their behalf. It is unreasonable to expect that the DRC can provide such services for all HDC residents." (Clarification given) (Adden. Memorandum opinion and order (11-23-04, p. 15-16.)

Applying the District Courts reasoning to the Arkansas Administrative Procedures Act, Harve Porter/DRCs are convinced that the District Court would have correctly found that the Arkansas Administrative Procedures Act, just as Arkansas Guardianship Statues, would require, "incapacitated individuals incapable of looking out for their own interest must depend on others to take the initiative and file petitions on their behalf. It is unreasonable to expect that the DRC can provide such services for all HDC residents". (Adden. Memorandum opinion and order 11-24-04, p. 15-16).

For these reasons, the value of the judicial procedures for admission and discharge to the HDCs is substantial, particularly in light of the massive curtailment of liberty that institutionalization entails.

e. **The fiscal and administrative costs that a judicial hearing would impose are outweighed by the protection of liberty interests provided by the requested due process safeguards**

At no time during his admissions to the HDCs did Mr. Porter have a judicial hearing to determine whether he should be forced to live his life confined in a state institution. In determining whether individuals with mental

retardation must be confined in institutions, most for the rest of their lives, the decision-maker is called upon to rule on a number of factual issues. In *Doe by Doe v. Austin*, 668 F.Supp. 597, 600 (W.D.Ky. 1986) the district court found that:

> …such commitment results in an extreme curtailment of personal liberty. Any decision by the state which results in such a profound deprivation of personal liberty must be accompanied by substantial due process safeguards, particularly where the person who is to be committed may be lacking in the ability to fully protect his or her procedural rights. We therefore hold that mentally retarded persons over eighteen years of age are entitled to a judicial hearing and determination of the propriety of commitment…

The district court's ruling on this issue follows decisions in other cases in which significant liberty interests were at stake and the court required a judicial hearing.

To be sure, the Sixth Circuit did not agree with the lower court's decision in this regard. Although acknowledging that "as a matter of policy, precommitment review by a judicial officer would ensure the most vigorous protection of the mentally retarded, and thus, might be preferable, it has been noted in a variety of situations that due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer." *Doe by Doe v. Austin*, 848 F.2d 1386 at 1393 (C.A. 6, Ky.) (1988).

However, the cases cited by the Sixth Circuit do not support that court's conclusion. The only case that involved personal liberty interests of

adults cited in *Austin, Morrisey v. Brewer,* 408 U.S. 471 (1972), involved the question of what process, if any, an individual was due at a parole revocation hearing. *Morrisey,* however, carefully – and properly – distinguished the liberty interest of an individual already convicted of a crime with the situation of an individual facing prosecution.

> We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a Defendant in such a proceeding does not apply to parole revocations. Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

*Id.* at 480

Thus, *Morrisey* provides no authority for depriving an adult with mental retardation of a judicial hearing. Plaintiffs' interest in liberty in this case, unlike the parole revocation context in *Morrissey*, cannot be said to be in any way "conditional" because in *Morrisey's* words, the Plaintiffs here have never been convicted of a crime and instead possess "the absolute liberty to which every citizen is entitled."

Other cases cited in *Austin*, such as Goldberg *v Kelly*, 397 U.S. 254 (1970)(requiring trial-like administrative hearing prior to welfare benefits termination), and *Parham,* 442 U.S. at 607, either do not involve liberty

interests or, as discussed earlier, involve liberty interests of children. Conversely, the Supreme Court has repeatedly recognized that when a fundamental, unconditional liberty interest is at stake, a judicial hearing is required before that interest may be circumscribed.

The most visible burden on the state would be the cost resulting from the judicial procedures. Concededly, courts have found that, "the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews*, 424 U.S. at 347. However, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Id*. at 348.

Certainly, the welfare of the state is immeasurably enhanced when the needs of its citizens with disabilities are correctly identified. The cost to the government of implementing due process procedures is not *de minimus,* but it pales beside the human cost of lives spent in institutions that could beneficially be spent in the community. Presently, thousands of persons with disabilities are well served throughout Arkansas – outside the institutional setting - by responsible community providers, as well as by family members who are supported by the State.

The District Court in its Memorandum Opinion and Order agreed that Mr. Porter is involuntarily confined, but failed to afford Mr. Porter the due process protections that adults are entitled to (prior to involuntary confinement) under the United States Constitution. (adden. p. 11).

Instead, the District Court insisted against law to the contrary, that Mr. Porter is entitled to only those protections afforded to children. In doing so, the District Court failed to acknowledge that Mr. Porter is an adult, and therefore is entitled to the full panoply of rights guaranteed him by the Due Process Clause to the United States Constitution. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

## CONCLUSION

For the forgoing reasons, Mr. Porter is entitled to a pre-deprivation judicial hearing because his involuntary confinement in an HDC by the State constitutes an infringement on his "liberty interest" protected from arbitrary deprivation by the Due Process Clause of the Fourteenth Amendment.

WHERFORE, the Plaintiffs pray this Court reverse the District Court's decision and order the state to provide a pre and post deprivation judicial hearing.

______________________________

Dana McClain
Arkansas Bar No. 02-028
Disability Rights Center, Inc.
1100 N. University, Ste 201
Little Rock, AR 72207
501-296-1775

Jan C. Baker
Adam H. Butler

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2000 Times New Roman font face in font size 14. The brief, exclusive of the table of contents and table of citations, but including the statement with respect to oral argument, contains 9,128 words.

A diskette of the brief is enclosed and identical diskettes have been provided to Mr. Breck Hopkins, Ms. Lori Freno, and Mr. Bill Sherman. The diskettes have been scanned for viruses and determined to be virus-free.

________________________
Dana McClain
Arkansas Bar No. 02-028
Disability Rights Center, Inc.
1100 N. University, Ste 201
Little Rock, AR 72207
501-296-1775

# CERTIFICATE OF SERVICE

I hereby certify that a copy of the Plaintiffs' Appellee brief has been served on the following by certified mail, return receipt requested on the ____ day of April, 2006.

Lori Freno, Asst. Attorney General
Office of the Attorney General
323 Center Street, Suite 200
Little Rock, AR 72201

Breck Hopkins
Arkansas Department of Human Services
Office of Chief Counsel
P.O. Box 1437, Slot S260
Little Rock, AR 72203-1437

William Sherman
504 Pyramid Place
221 West Second Street
Little Rock, AR 72201

____________________________
Dana McClain
Attorney for Appellants
1100 N. University Ste 201
Little Rock, AR 72207
501-296-1777

# ADDENDUM

## TABLE OF CONTENTS

**Items**

District Court Order Nov. 23, 2004……………………………..1

District Court Order June 9, 2005………………………………20