No. 05-2978, 05-2979

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

H.P. and **R.N.**, by their next friend, **Susan Pierce**; **DISABILITY RIGHTS CENTER**, **INC**

Plaintiffs – Appellants

v.

KURT KNICKREHM, in his official capacity as Director of the Arkansas Department of Human Services; **JAMES C. GREEN**, Dr., in his official capacity as Director of Developmental Disabilities Services; **KAY BARNES**; **GROVER MILTON EVANS**; **WESLEY KLUCK**; **RANDY LANN**; **SUZANN MCCOMMON**; **THOMAS DOLISLAGER**; **LUKE HEFFLEY**, in their official capacities as members of the Board of Developmental Disabilities Services;

Defendants – Appellees

FAMILIES AND FRIENDS OF CARE FACILITY RESIDENTS; ELLEN SUE GIBSON

Intervenors – Appellees/ Cross - Appellants

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

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS FAMILIES AND FRIENDS OF CARE FACILITY RESIDENTS; ELLEN SUE GIBSON

William F. Sherman
Attorney at Law
221 West 2nd Street, Suite 504
Little Rock, AR 72201
(501) 372-3148

Counsel for Appellees/Cross-Appellants

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ARKANSAS LAW DID NOT, AS CONCLUDED BY THE DISTRICT COURT, DENY DUE PROCESS BY GIVING PARENTS AND GUARDIANS THE ULTIMATE AUTHORITY ON DISCHARGES FROM THE HUMAN DEVELOPMENT CENTERS

1. Cross-Appellees have not adequately responded to the argument on cross-appeal.

In its Response Brief, Disability Rights Center, hereinafter "DRC," ignores the evidence and law presented by Cross-Appellants**,** Families and Friends of Care Facility Residents (hereinafter FF/CFR) and Ellen Sue Gibson in their brief, that there were genuine issues of material fact on the matter of parent-guardian authority regarding public law and policy for discharges from the Arkansas human development centers ("HDCs"), which are licensed as Intermediate Care Facilities for Mentally Retarded ("ICFs/MR"). Under Rule 56, Federal Rules of Civil Procedure, the DRC Motion for Summary Judgment should have been denied in its entirety. See Fed. R. Civ. P. 56(c). The moving party, in this case DRC, must demonstrate an absence of evidence to support the non-moving parties' case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). There were a multitude of facts in evidence which showed the State's ultimate authority for admissions and discharges to Arkansas' ICFs/MR and not, as DRC alleges, and as the lower Court found, parents and guardians. Specific facts showing there were and are genuine issues for trial were set forth in Cross-Appellants' brief, summarized as follows:

(1) The pleadings and records in this case are devoid of any assertion by cross-appellant leaders or other representatives that family and guardians have the authority attributed to them by the District Court.

(2) Arkansas law and practice did not and do not require parent or guardian consent for the parent's child or the guardian's ward to be discharged from a center. See the Court's adverse ruling on this point, Opinion and Order, 11-23-04, P.14; JA, p.445. The State's new regulation, DDS HDC Admission and Discharge Rules, pp. 1, 3; JA 497, 499 (adopted in response to Court Order of 11/23/04), formalizes the discharge power of the Interdisciplinary Team. See Response Brief of Appellants/Cross-Appellees, at 8, which states incorrectly under "Statement of Facts" that "[t]he voluntarily admitted individual can only be withdrawn from the center by an application made by the parent or guardian...," citing §20-48-412. Reading this section to prohibit resident discharges without guardian consent is at the core of Cross-Appellees' case and argument on appeal. The statute does not provide as DRC alleges and the lower court found that **"**Arkansas law falls short in that it does not require that HDC superintendents discharge residents when they no longer require HDC services," citing Ark. Code Ann. §20-48-412 (a). Opinion and Order, 11-23-04, p. 14; JA, p. 445. The statute applies to discharges by parent-guardian request, not discharges over parent-guardian objection (emphasis added) No witness on the motion for summary

judgment stated that the State applies or has applied that section, §20-48-412 (a), to give parents and guardians such ultimate authority. Section 20-48-412(b), providing for court commitments, clearly provides for discharge without parental consent and over parental objection, leaving discharge to "the judgment of the board and the superintendent" or "the sole judgment of the board." Ark. Code Ann., 520-48-412(b) (Repl. 2001).

(3) DRC reiterates its misstatement in its "Argument I" that "residents are not discharged unless a guardian or family member requests discharge." Response Brief of Cross-Appellees, p. 19; Id., pp. 20,24. This statement is simply incorrect and untrue. DRC's arguments flow from a basic misinterpretation of the legal procedures for discharges found in policies for Arkansas' ICFs/MR at present and before the policies were modified in response to the Court's November 23, 2004 decision. In its Response Brief, DRC does not answer or even address Cross-Appellants' arguments on pages 26-30 of their Brief, which concluded that there was substantial evidence that state authorities, and not guardians, have and exercise ultimate authority to make discharge decisions for HDC residents. Brief for Cross-Appellant, pp. 26, 31. These arguments include the following:

(a) A statement that "the guardian is the only one who can provide consent or withhold consent" does not say or imply that the guardian has the ultimate authority on discharges. Id., p. 26. As explained by Dr. Charles Green,

Director of DDS/Arkansas' Developmental Disabilities Services, the "treatment team" has authority to decide whether an individual would benefit from discharge, and whether an individual ward should leave "would depend on what the treatment team thought was best" and "how the guardian participated in the team process." Dr. Green further explained, that "anyone can request to be discharged from an HDC" but they are "not always" discharged, because the discharge process is more complex than an individual's simple request.

(b) Dr. James C. Green and former superintendent Boyd Hancock never indicated in their depositions that the guardian had ultimate authority "and can override doctors, IDT members, and even the HDC superintendents." Brief for Cross-Appellees, p. 22. Although Ms. Gibson did make a decision to discharge her son H.P. from Booneville HDC in 1987, she had actual custody of her son for his entire life to that point and there were many indications of difficulties she experienced in procuring appropriate and safe care for her adult son who is her legal ward with dual diagnosis in different settings then and later. Gibson Dep. 3/29/04 , pp. 8, 11; JA 269, 272.

(c) Arkansas policy provides for situations in which individuals could be discharged over guardian objection, and the District Court erred in overlooking existing Arkansas policy and practice.

– Judy Adams, SE Arkansas HDC Superintendent, in her Affidavit stated that the "interdisciplinary team ... periodically reviews the resident's progress and determines whether the resident continues to benefit from active treatment, whether continued placement is warranted, and whether other placements may be available and in the resident's best interests." Adams Aff. (7-01-04) p. 1; JA 217. She stated further that "[d]ischarge planning begins at the time of admission," that "[f]irst attempts to seek a community placement for ... [R.N.] were made on 11/22/02" and that "[r]epeated attempts were made until a placement was located and ... [R.N.] was discharged." Id., p. 1; JA 217.

– SEAR HDC staff advised the guardian for R.N. that they wanted to place him outside, that he needed to go on and graduate up, and that he was ready for less structure. Harris Dep. 6/22/04, p. 19; JA 319.

– The ultimate authority on discharges lies with the State under Policy No. 1053, which provides that individuals may be transitioned from the HDC based on recommendation from the interdisciplinary team or the Office of Long-Term Care. DDS Director's Office Policy No. 1053 (Eff. Date: December 1, 1997); AA 23, et seq (see text, A-1). This state policy comports with federal law and practice. See 32 CFR Ch. IV. §§483.12 and 441.302(d) (2005 Edition).

(d) Under Policy No. 1076, the responsible party for an HDC resident may appeal the discharge decision. AR DDS Directors Policy No. 1076 (Eff. Date: July 1, 1996); JA 8 (See text, A-2).

(e) Cross- Appellants never contended nor supported the theory that parental consent on discharge was the practice or rule.

(4) In its Response Brief, DRC does not respond to Cross- Appellants' assertion that it was error for the District Court to conclude that there was deposition testimony showing "that Gibson has the final say over whether H.P. will ever leave the center." The Court relied on "docket entry number 65, Ex.2 at 37," a page from the Green deposition (attached to Plaintiff's Motion for Summary Judgment); Order, 11/23/04, p.11; JA 442. Cross-Appellees referred to the extract from the Green deposition which is shown in Appellant's Appendix (AA), p.155 (Dep. of Green). In its Brief, Cross-Appellants recited three problems with this deposition evidence:

(a) The Green testimony actually submitted by Cross-Appellee cuts off Dr. Green's response to a question on guardian's authority; and FF/CFR Counsel concurs that this oversight should have been caught earlier, when the motions for summary judgment were submitted; but counsel objects to the statement and inference by DRC that "FF/CFR/Ellen Sue Gibson openly admit they were aware that Appellees did not include that additional

information from Dr. Green's deposition...." See Response Brief of DRC, p. 21; it is a huge leap from expressing enforcement of a motion and Response, as did Cross-Appellants, to having knowledge of a missing page (the significance in making the point is that Dr. Green was asked "[s]o you're saying the guardian's decision trumps...?" His answer is not shown in the record). The record on appeal does not show, therefore, that Green testified as the leading question might imply.

(b) The Green testimony in no way related to the experience of Gibson on her son's interdisciplinary team; and

(c) The actual testimony shown in the Green deposition, p. 37, does not support the Court's firm conclusion. Dr. Green testified that "only the guardian provides consent or withholds consent," which in context of the regulations simply means that the parents and guardians do have a choice between ICF/MR services and community services. See 32 CFR, Ch. IV (10-1-03 addition), in particular subpart G – Home and Community-based Services; Waiver Requirements §§441.300 – 441.303 and §441.302(d), which specifies that eligible Medicaid recipients "be...(2) given the choice of either institutional or home and community-based services." JA 463. There is nothing in this evidence which supports a conclusion that the guardian had the ultimate authority on discharges. Cross-Appellees' response to Cross-

Appellants' arguments on this point is wholly inadequate. The aforesaid federal regulations are carried forward in the most recent rendition of the Code of Federal Regulations. Id., 10-1-05 Edition

(5) The DRC response to Cross-Appellants' argument that the lower court erred is contained under Cross-Appellees' Point I.a., alleging that "[t]he 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." Response Brief of DRC, p. 18. As primary support, DRC cited three decisions, two from the United States Supreme Court and one from the Eighth Circuit Court. Addington v. Texas, 441 U.S. 418, 425 (1979); Vitek v. Jones, 445 U.S. 480, 491-92 (1980); Collins v. Bellinghausen, 153 F. 3d 591, 596 (8th Cir. 1998).

In Addington, the central issue was the burden of proof required for civil commitment of a person with mental illness for treatment in a hospital for persons with mental illness. A Texas probate court found in Addington that an individual was mentally ill and required hospitalization. A Texas appellate court reversed, holding that the proper standard of proof was "beyond a reasonable doubt." The Supreme Court of Texas granted a writ of error. Texas v. Addington, 21 Tex. Sup. J. 19, 557 S.W. 2d 511 (1977). On grant of certiorari, the United States Supreme Court held that to meet due process requirements, the standard in mental illness

commitment cases is greater than preponderance of the evidence but less than the reasonable-doubt standard. The Texas standard, "clear, unequivocal, and convincing" evidence, was held by the Supreme Court to be constitutionally adequate. Addington, 441 U.S. at 433. Pertinent to the present case, the Supreme Court stated that the "[e]ssence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Id. p. 431. The Court stated further, "[a]s the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum." Id. The aforesaid analysis from Addington supports Cross-Appellants' position that the State needs a flexible response in assuring that admission and discharge procedures for persons with mental retardation satisfy due process. The case at bar concerns public policy for admissions to a public facility for persons with mental retardation, not mental illness.

The other two cases cited by Cross-Appellees were also mental health, not mental retardation, situations. In Vitek et al. v. Jones, supra, when the situation was transfer of a Nebraska state prisoner to a state mental hospital, the ruling of the three-judge panel District Court was that the state statute permitting such a transfer based on a decision of the Director of Correctional Services was unconstitutional, and that the individual prisoner was entitled to an adversarial hearing with

"qualified and independent assistance." Miller v. Vitek, 437 F. Supp. 569 (D. Neb. 1977). The Supreme Court affirmed the District Court decision that such an involuntary transfer of a state prisoner to a mental hospital "implicated a liberty interest protected by the Due Process Clause." Four Justices signed the decision, and Justice Powell concurred in part, joining in the opinion but objecting to the universal right of inmates to a licensed attorney. Id., pp. 494, 497-98, 499. Vitek is not on point because it presented the distinctive issue of rights under civil commitments for mentally ill persons. See Heller v. Doe, 509 U.S. 312, 321-28 (1993), which discussed the justifications for different, distinguishing admission laws and policies for persons with mental illness. More apropos to the present case, however, are the two Supreme Court decisions relied upon by the District Court in finding that state non-judicial, administrative procedures satisfy due process requirements, Parham v. J.R., 442 U.S. 584 (1979) and Secretary of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979). The District Court recognized that a "neutral fact finder" should make the inquiry and that Arkansas procedure required two physicians for admissions. Opinion and Order, pp. 12-13. For the annual review decisions, Arkansas procedure relies on the independent judgment of medical professionals.

The last case, Collins v. Billinghausen, supra, involved the situation of transfer of an elder person from a nursing home to a granddaughter's home, and

then the subsequent commitment of the grandmother because the former nursing home resident was not receiving adequate care in her granddaughter's home. Collins offers absolutely no support to the DRC/Cross-Appellees' position in the present appeal.

2. Cross-Appellants have a vital interest in the issue raised by the District Court in its partial grant of the DRC Motion for Summary Judgment.

The question may be asked why parents and guardians should care about the District Court's ruling on the DRC Motion for Summary Judgment after the Court's due process concerns were resolved by the Court's Order of June 9, 2005. Addendum, 6/9/05 Order, pp. 1, et seq.

(1) There is concern that the lower court's first ruling will bring a measure of inflexibility on the matter of discharges, which would not be in the best interest of families and their severely disabled loved ones. DRC cites Mathews v. Eldridge, 424 U.S. 319 (1976) on its point that the Arkansas procedure denies Mr. Porter's right to be free. Brief for Cross-Appellees, pp. 14-15, 16. The Mathews case involved a mental health commitment. The United States District Court, Western District of Virginia, ruled that certain administrative procedures established by the Secretary of Health, Education and Welfare for assessing continued existence of a disability for Social Security disability eligibility were unconstitutional. The District Court rule that the procedures were unconstitutional because termination of benefits required an evidentiary hearing. Eldridge v.

Weinberger, 361 F. Supp. 520, (W.D. Va., 1973), aff'd, 493 F. 2d. 1230 (4th Cir. 1974). The United States Supreme Court reversed, holding that an evidentiary hearing is not required prior to termination of disability benefits. And yet the administrative procedures for eligibility determination satisfy due process. The Court opined that "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" and that "[D]ue process is flexible and calls for such procedural protections as the particular situation demands," citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) and Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Mathews v. Eldridge, 424 U.S. at 334. Distinguished from the present case, Mathews is a mental health case; but in its general language quoted above, it adds support to the parent-guardian concern and interest.

(2) There is the ever-present parent-guardian concern that DRC and the broader interests which it represents (unidentified specifically in the record) will be given additional support through the Court's findings and judicial language, to undermine further state-operated facilities and programs. There are examples of the DRC broader commitment against the HDC service system in its Reply Brief, as follows:

(a) The DRC/Cross-Appellees' argument, with a devotion to such language as "confinement in an institution, as in the present case," is language of

shibboleth (e.g., code or signal words) of those who support the deinstitutionalization movement, the objective of which is to close every center for mentally retarded persons in the United States (publicly operated). Brief for DRC, p. 18; with language substantially replicated at 14-15, 17, 22-23, 24, and 26-27, 28-29, 30-31, 32, 36-37, 38, 41. There is not one word of recognition that the individuals for their own protection would be confined just as much and maybe more so in the alternative community living arrangements.

(b) Another shibboleth is that families have "*conflicts of interest*" in making placement decisions. Brief for DRC, p. 30. Observing that parents do not always act in the best interest of their children is akin to saying that given the human condition, people make mistakes. This reality is no doubt justification for leaving placement decisions ultimately with State authorities, not the families. Such a broad generalization as this simplistic statement ignores the realities of the degree of abilities of parents to hold up to the often crushing duty of caring for their loved one with severe disabilities and also the degree of disabilities of the persons needing out-of-home services.

Cross-Appellant's statement that the "District Court conceded 'parents and guardians sometimes act against the best interest of their children and wards'" is also misleading and incomplete without the Court's cautionary sentence

which follows: "Although this unfortunate fact is reason for caution, it is not the rule." Opinion and Order, 11/23/04, Addendum, p. 12.

(c) In their polemic on the statutory authority for law enforcement to assist HDC superintendents in returning residents who "leave the institution without permission," DRC emphasizes what it regards as the "often permanent and involuntary nature of confinement at the HDCs," citing Ark. Code Ann. §20-48-410. Such authority, contends DRC, allows existence of facilities without "enclosure walls, fences, or other barriers in order for an individual to be involuntarily confined" in an HDC. Brief for Appellant/Cross-Appellee, p. 23. There is in this polemic no recognition given to a clear concern of the caregivers to protect the individual from death, harm or other abuse. DRC, an advocacy group representing a quasi-governmental authority, apparently fails to grasp important realities in the care of persons with severe disabilities.

(d) In summary, Cross-Appellants submit that their concerns and interest involve the prospects of the State's commitment to continue operating and adequately maintaining its service system for our persons afflicted with severe mental retardation. This principal concern encompasses the range of corollary issues, including budgetary sufficiencies and staff support.

(3) Superintendents should "discharge residents when they no longer require HDC services," but it should be obvious that the issues and processes for

ascertaining the requirement are rather complex, involving oversight of the interdisciplinary teams and a recognition that predictions of success in alternative settings may, and do in some cases, prove to be inaccurate. A flexible response is therefore necessary to address service needs of persons eligible for HDC admission.

CONCLUSION

The Court of Appeals should reverse that part of the District Court's Opinion and Order of November 23, 2004 which granted in part Appellants' motion for summary judgment and which held that Arkansas law denied due process by not requiring HDC superintendents to discharge residents when they no longer required HDC services. Law and practice prior to the District Court's November 23, 2004 Opinion and Order clearly were not supportive of the lower Court's decision on this point.

FAMILIES AND FRIENDS OF CARE FACILITY RESIDENTS (FF/CFR) AND ELLEN SUE GIBSON,

By: ___/s/ William F. Sherman___
William F. Sherman,
their attorney
AR BAR NO. 64066

504 Pyramid Place
221 West Second Street
Little Rock, AR 72201
(501) 372-3148

CERTIFICATE OF SERVICE

I, William F. Sherman, herby state that a true and exact copy of the foregoing Reply Brief of Appellees/Cross-Appellants, Families and Friends of Care Facility Residents; Ellen Sue Gibson has been served upon the following attorneys of record for the parties:

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

Ms. Lori Freno
Assistant Attorney General
AR Department of Human Services
323 Center Street, Suite 200
Little Rock, AR 72201

Ms. Janet C. Baker
Ms. Dana K. McClain
Mr. Adam H. Butler
Disability Rights Center
1100 N. University, Suite 201
Little Rock, AR 72207

On this 24th day of May, 2006.

/s/ William F. Sherman
William F. Sherman

CERTIFICATE OF SCANNING
AND VIRUS FREE NATURE OF CD

I, William F. Sherman, hereby certify that a true and exact copy of the foregoing Reply Brief of Cross-Appellants, Families and Friends of Care Facility Residents and Ellen Sue Gibson, filed with the Court of Appeals on May 24, 2006, has been copied onto this CD, has been scanned by Norton Antivirus 2005, and is virus free.

/s/ William F. Sherman
William F. Sherman

STATE OF ARKANSAS)
)
COUNTY OF PULASKI)

SUBSCRIBED AND SWORN TO before me, a Notary Public, in and for the aforesaid county and state, on this _____ day of May , 2005.

_____
Notary Public

My Commission Expires:

ADDENDUM TO REPLY BRIEF OF CROSS-APPELLANTS