IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

H.P. and R.N., *et al.* **PLAINTIFFS**

v. **Case No. 4:03CV00812 SWW**

KURT KNICKREHM, *et al.*, **DEFENDANTS**

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

For their brief in support, official-capacity defendants Kurt Knickrehm and James C. Green, as well as official-capacity defendant Board members[1] Kay Barnes, Randy Lann, Wesley Kluck, Thomas Dolislager, Grover Evans, Suzann McCommon, and Luke Heffley, set forth the following:

I. STATEMENT OF FACTS

Plaintiffs Robert Norman and Harve Porter are individuals with developmental disabilities.[2] Norman, who was a resident of the Southeast Arkansas Human Development Center ("SEAHDC") transitioned to a residence at Friendship Community Care Inc., in Russellville, Arkansas, in January of 2004. (Complaint at ¶ 42). Porter currently resides at the Alexander Human Development Center ("AHDC"). Arkansas courts have adjudicated both men as

[1] Ron Carmack and Don Dunn are no longer DDS Board members. Upon the expiration of their terms, Thomas Dolislager and Luke Heffley replaced them. Because Carmack and Dunn were sued in their official capacities only, Federal Rule of Civil Procedure 25(d)(1) provides that Dolislager and Heffley be "automatically substituted" as parties.

[2] Plaintiff Disability Rights Center ("DRC") is the federally authorized protection and advocacy system for the State of Arkansas under 42 U.S.C. § 15043 (a)(2)(A)(i). Susan Pierce, nominated as next friend of Robert Norman and Harve Porter, is employed by DRC.

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legally incapacitated and each has a court-appointed guardian. Norman's guardian is Charlie Harris, a vocational counselor with Pathfinders, Inc., who has known Norman for over a decade and who acts as "sort of a surrogate father" to Norman. (Harris Stmt. at 6).[3] Porter resides at the AHDC. His guardian is his mother, Sue Ellen Gibson, with whom Porter has lived for approximately 85 percent of his life. (2nd Am. Comp. at ¶¶ 21-23, 26-27).

The AHDC and SEAHDC are two of six state operated Intermediate Care Facilities ("ICF/MR") for people with developmental disabilities. (Affidavit of James C. Green, Ph.D., attached as exhibit 2). The Centers provide medical, residential, habilitation, recreational, and educational services to people who are developmentally disabled, as well as people who are dually diagnosed as having a mental illness in addition to a developmental disability. Id. The Centers likewise serve people who are medically fragile or who have severe aggressive behaviors in addition to having a developmental disability. Id. They operate full time with total care available twenty-four hours per day, seven days per week. Id.

The Centers operate under the Arkansas Department of Human Services, Division of Developmental Disabilities Services ("DDS")[4], and the Developmental Disabilities Services Board ("DDS Board"). Id. Although the DDS Board is authorized by statute to regulate admission to and discharge from

[3] "Stmt." refers to the sworn statement taken by the Disability Rights Center of Charlie Harris, attached as exhibit 1.

[4] Defendant Kurt Knickrehm is the Director of the Arkansas Department of Human Services; defendant James C. Green is the Director of the Division of Developmental Disabilities Services.

the Centers, it has delegated this authority to the DDS Director. (Carmack Dep. at 12-13, attached as exhibit 3).

When someone applies for human development center admission, an admission team composed of cognitive professionals, including a psychologist, reviews the admission application. See, Green affidavit. Each team is empowered to refuse admission to any person who does not satisfy the clinical standards for admission. Id. Upon admission, each resident is appointed an interdisciplinary team, which includes the resident and the resident's guardian, if any. The interdisciplinary team periodically reviews the continuing need for human development center placement. Id.

Robert Norman

Robert Norman was admitted to SEAHDC in August, 1999, under unusual circumstances. (2nd Am. Comp. at ¶ 36). Following a charge of criminal attempt to commit arson, an Arkansas circuit court ordered that Norman undergo a mental health evaluation. Id. at ¶ 35. Being a long-time participant at Pathfinders, Norman viewed his Pathfinders vocational counselor Charlie Harris as "sort of a surrogate father." (Harris Stmt. at 6). Understanding that the courts required Norman to either find a supervised living place or go to jail, Harris "started immediately looking for placement" for Norman. Id. at 7, 11-12. In seeking an appropriate placement, Harris worked with, among others, Norman's psychiatrist at the Greater Little Rock Mental Health Center. Id. He also discussed the matter with Norman's public defender. [5] Id. at 12. Harris believes that he was referred

[5] An attorney represented Norman throughout his criminal proceeding.

to SEAHDC by Norman's psychiatrist, and he then took Norman to SEAHDC and "moved him in." Id. at 8.

Because Harris was so involved with Norman, the Center discussed with him the possibility of becoming Norman's limited legal guardian. (Harris Stmt. at 8, 18). Specifically, former SEAHDC social worker Carol Moore approached Harris about becoming Norman's guardian, reasoning:

> [Harris] and Robert [Norman] were very close, from what I understand, in talking with both of them. Robert very much was dependent on [Harris] for support, because [Norman] had little to none . . .
>
> Charlie [Harris] seemed to truly care about Robert and not just as somebody who had worked with Robert. He really seemed to care about him. And my understanding, Robert's mother, I don't remember if it was emotional or physical, her health was . . . very poor. Robert really cared about Charlie too. Charlie was his father figure.

Id. at 14, 26-27. Harris knew that Norman had to be removed from his home because his mother could not take care of him or control him. Id. at 7. He was also aware that Norman's biological father was deceased. Id. at 19. Harris spoke with Norman about becoming his guardian, and Norman was in agreement. Id. at 10.

In January of 2000, Arkansas Circuit Judge John Plegge entered an order in Norman's case acquitting him by reason of mental disease or defect. (2nd Am. Comp. at ¶ 38; Exhibit 4). Judge Plegge ordered that Norman be committed to the custody of SEAHDC pursuant to Ark. Code Ann. § 5-2-314(b), which in summary provides that if a criminal defendant who is acquitted of certain crimes on the ground of mental disease or defect that the court "shall order the defendant

committed to the custody of the Director of the Department of Human Services for an examination by a psychiatrist or licensed psychologist." Ark. Code Ann. § 5-2-314(b); Exhibit 4. The court also ordered that the psychological or psychiatric report be filed with the Pulaski County Probate Court[6] and that a hearing on the report "shall take place not later than ten (10) days following the filing of the above report." Id. Judge Plegge noted that "[i]f the defendant [Norman] is in need of counsel for said hearing, counsel shall be appointed immediately upon filing of the report." Id. On February 23, 2000, however, Arkansas Probate Judge Mary Ann McGowan dismissed the probate court action, explaining that because Norman had never been found fit to proceed to trial that it was inappropriate to acquit him pursuant to Ark. Code Ann. § 5-2-301 et seq. (Exhibit 29).

During his stay at the SEAHDC Norman resided in one of the Center's group homes, which is separated from the main campus and is a "more residential type setting." (Moore Stmt. at 31 (Exhibit 5); Harris Stmt. at 31 (Exhibit 1); Affidavit of Judy Adams, (Exhibit 6) and Photo Exhibits 7-10. He was also employed by McDonald's and for a couple of other employers in the community. (Harris Stmt. at 18).

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[6] At the time of this Order, state probate courts were entities separate from the circuit courts, with the prior having a limited jurisdiction. Amendment 80 to the Arkansas Constitution, however, drastically changed the structure of the courts. As discussed *infra,* the State circuit courts now have jurisdiction over "all matters previously cognizable by Circuit, Chancery, Probate and Juvenile Courts." Ark. Const. Amend 80, § 19(B).

Although Norman never told Harris that he wanted to leave SEAHDC, Harris began seeking an appropriate community placement for Norman. (Harris Stmt. at 11, 18). Professionals at the SEAHDC also worked toward placing Norman in the community, notifying Harris that Norman "needed to go on and graduate up, because he was, you know, ready for less structure." Id. at 19, 20. As early as September of 2001, Norman was being considered for a community placement in El Dorado. (See Moore Stmt. at 24). Eventually, the Center and Harris were successful in locating an appropriate placement for Norman at Friendship Community Care. (2nd Am. Comp. at 11). Harris is comfortable with this placement because it provides Norman the "strict supervision" that he continues to need. (Harris Stmt. at 22).

On June 22, 2004, plaintiff Disability Rights Center took a sworn, transcribed statement from Harris. At the end of the statement, when counsel asked, "[i]s there anything else that you think we need to know regarding . . ," Harris interjected:

> No, mainly, if this was a misplaced, the wrong place for him, if you will look at the record, though, he needed to be somewhere, because when [Norman's] cousin mutilated him in that park, that's when the real . . . you know, and I think that's where the courts might have failed . . . because the guy nearly died. And this is, we are talking about a person with mental retardation that functions on a six- or seven-year-old [level], and he is out in the middle of the park at three o'clock in the morning, and he winds up on a guy's porch, naked, mutilated, totally, from head to toe, and the guy took the box cutter up his anus, and he is permanently on a colostomy, and yet it took a little fire in the garbage can in the Laundromat, which was just a . . . I don't think the building was in danger, and it was just, you know, he was just acting out. But anyway, it was obvious he needed placement, no matter where it was.

(Harris Stmt. at 20-21). When counsel then asked, "[i]n other words, he needed help," Harris explained:

> Or there, or either prison, and that what Judge Plegge said, for his safety. I mean, the guy would disappear, and he wound up in Hot Springs for a week and didn't know where he was, didn't have his medication, and he was on psychotropic drugs. And, you know, the guy needed somewhere, or he would be dead now, probably. So no matter where he went, he needed out of his mother's home, not because she is a bad person, but she couldn't control him. And we are talking about a person with mild mental retardation and schizophrenia and just running the streets and running his life, or ruling his life and ruining it. So he needed placement. That's all that it is.

Id. at 21-22.

Harve Porter

Harve Porter's mother, Sue Ellen Gibson, is his court appointed legal guardian. Porter, who is 39 years old, has lived at home with his mother (and at times other family members) during approximately 85 percent of his life. (2nd Am. Comp. at ¶ 21-23, 26-27). Porter is moderately mentally retarded, has mental illness (including intermittent explosive disorder), and suffers from a seizure disorder, among other health conditions. (affidavit of Judy Adams, Exhibit 6).

Gibson first applied for HDC admission for her son on April 3, 1987, on a "respite," or temporary basis. (2nd Am. Comp. at ¶ 22). Porter returned to his family home two months later on June 4, 1987. Id. at ¶ 23. Acting on the advice of her attorney, Gibson became Porter's court-appointed legal guardian in February of 1995, following her divorce from Porter's father. (Gibson Dep. at 7-8 (Exhibit 24)).

Porter remained in his mother's home for the next ten years. (2nd Am. Comp. at ¶ 26). In early 1998, Gibson again applied for HDC admission for her son. Id. As Gibson explained, she felt this placement was appropriate because "[h]e had hurt hi[m]self. He had scratched his face up, and he had got to where he would run off. He wouldn't mind me, and he would run off and hide, and we lived on the road, and I was afraid he would get run over." (Gibson Dep. at 11). Following Porter's placement at the SEAHDC, his visits to his mother's house would usually be cut short because Porter would tear up the house or destroy something. (Moore Stmt. at 20). Social worker Carol Moore, who provided care for Porter as well as Norman, explained, "[w]hen Harve [Porter] is in a good mood, he is one of the most jovial people you'll ever meet, but when he is angry, he is very angry." Id. at 20. Describing Porter's explosive behavior that she experienced during her tenure at the Center, Moore noted that "Harve was not only a threat to others, he was a threat to himself. I have watched him lay on the floor and bust his head open, intentionally." Id. at 21.

Porter remained at the SEAHDC until October 22, 2003, at which time he was transferred to the AHDC at his request and that of his mother. (Gibson Dep. at 9, 10; 2nd Am. Comp. at 30).[7] Porter currently resides at the AHDC, having recently spent several weeks at his mother's home while convalescing from surgery intended to ameliorate his seizure disorder. At Porter's request, he

[7] This transfer followed an allegation by Porter that he had been abused at the Center. A subsequent investigation found the allegation unsubstantiated, but suspicious. (2nd Am. Comp. at ¶ 29).

returned to the AHDC from his mother's home early, that is, before the scheduled end of his visit. (affidavit of Kay Shaw (Exhibit 10)).

As of March 29, 2004, Porter had never told his mother that he wanted to leave the Alexander HDC and expressed no reservation about residing at the Center. (Gibson Dep. at 9).[8] During his deposition on that same day, Porter testified that he was happy at the Alexander HDC. (Porter Dep. at 15 (Exhibit 11)). In response to questioning by a DRC attorney, he also testified that he did not want to leave the Center. Id. at 20. It was not until the attorney "reminded" Porter about their recent conversation that Porter testified he wanted to move to "Texarkana." Id. Specifically, Porter testified:

> Q: [First DRC attorney] Harve, do you want to leave here and move somewhere else?
>
> A: [Porter] No.
>
> Q: Do you remember talking to me a few days ago?
>
> A: But I'd like to move to Texarkana.
>
> Q: [Second DRC attorney] You would like to move to Texarkana, is that what you said?
>
> A: Right.

Id. at 20. More recently, Porter has told Center staff that he wants to move to the Arkadelphia HDC because he believes, and correctly so, that there are more woodworking opportunities at Arkadelphia than Alexander. Thus, Porter's

[8] Porter had mentioned to SEAHDC superintendent Boyd Hancock on several occasions, however, that he wanted to "go home." (Hancock Dep. at 15 (Exhibit 12). Porter had previously told his mother that he wanted to move to the Arkadelphia HDC because of its woodworking program, but he now "loves it here" because the Center provides Porter with woodworking materials. (Gibson Dep. at 23-24).

currently expressed preference is to live at a human development center. (Affidavit of Kay Shaw, Exhibit 10).

II. CAPACITY TO SUE

Defendants acknowledge the DRC may sue to vindicate the rights of disabled persons, including Porter and Norman. However, under the present circumstances, Porter and Norman, appearing by DRC employee Susan Pierce as their next friend, are not proper plaintiffs.

Fed. R. Civ. P. 17(c) provides that incompetent persons may sue and be sued through representatives. The term "incompetent person" in Rule 17(c) refers to "a person without the capacity to litigate." Thomas v. Humfield, 916 F.2d 1032, 1035 (5th Cir. 1990), aff'd 32 F.3d 566 (5th Cir. 1994), cert. denied, 513 U.S. 1167 (1995). Next friends appear in court on behalf of persons who are unable to seek relief themselves, usually because of mental incompetence. Whitmore v. Arkansas, 495 U.S. 149, 162 (1989).

Fed. R. Civ. P. 17(b) provides that the capacity of a person to sue is determined by the law of the person's domicile. It is undisputed that under Arkansas law, Porter and Norman lack the capacity to sue and be sued, and therefore must appear through a representative.

Fed. R. Civ. P. 17(c) states: ""Whenever an ... incompetent person has a ... general guardian or like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An ... incompetent person *who does not have a duly appointed representative* may sue by a next friend or by a guardian ad litem." (Emphasis added). Porter and Norman each have a court

appointed guardian of the person, thus, the guardians are the real parties in interest, not Susan Pierce as next friend. Consequently, Ms. Pierce should be dismissed. And, because neither guardian joins in the complaint (Porter's guardian affirmatively resists the complaint), Porter and Norman should be dismissed as well.

The principles embodied in the Federal Rules are the same principles upon which this defense is based. Specifically, defendants maintain that state law regarding capacity is controlling, and that personal representatives appointed under state law are the only proper persons to act on behalf of incompetent persons in circumstances where such individuals cannot act for themselves. Of course, in federal civil proceedings, the fundamental interest at stake is more likely property than liberty; however, one's entitlement to due process is the same in either case. Federal rules entrust all the decisions in connection with federal litigation -- to sue, be sued, compromise and settle -- to guardians. The State of Arkansas does the same with respect to decisions about where the ward will live. Defendants submit that for purposes of the instant due process analysis, there is no difference between the two.

III. RELEVANT STATE STATUTES AND RULES

State law imposes three conditions for admission to a human development center: each individual must: 1) be developmentally disabled; 2) be incapable of managing his or her affairs; and 3) need the care and treatment provided at a center. All three conditions must be independently established by psychological tests. Ark. Code Ann. § 20-48-404.

Admission may be voluntary or by judicial commitment. Voluntary admission is made upon application of a parent or, as in this case, a guardian. See, Ark. Code Ann. § 20-48-405. If the conditions of voluntary admission are met, and if the necessary resources are available to provide the requested services, then no commitment order is required. Ark. Code Ann. § 20-48-406(b).

Ark. Code Ann. § 20-48-405 provides that guardians may apply for admission of a ward to a human development center. The guardians' authority is derived from the probate code, which empowers them to make decisions for their wards, including where the wards will live. Thus, we must turn to the probate code in order to discuss the guardians' authority as well as the procedural protections governing the appointment of guardians and their empowerment to act in place of their wards.

Guardians may only be appointed for incapacitated persons, who are defined to include individuals under age eighteen whose disabilities have not been removed[9] and individuals impaired by "mental deficiency" "to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety...."[10] "Essential requirements" for health and safety include "health care, food, shelter, clothing, and protection without which serious illness or serious physical injury will occur." Ark. Code Ann. § 28-65-101. Consequently, minors and incapacitated adults are unable as a matter of law to make or communicate decisions about their shelter arrangements.

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[9] Ark. Code Ann. § 28-65-104(1).
[10] Ark. Code Ann. § 28-65-101 (5)(A).

Guardianship petitions are subject to numerous procedural protections. For example, notice of the hearing must be given to the alleged incapacitated person.[11] The court must determine that the alleged incapacitated person is "either a minor or otherwise incapacitated."[12] Unless the person is a minor, there must be a professional evaluation[13], and incapacity must be shown by "the oral testimony or sworn written statement of one (1) or more qualified professionals, whose qualifications shall be set forth in their testimony or written statements."[14] At the hearing, the respondent has the right to "(1) Be represented by counsel; (2) Present evidence on his or her own behalf; (3) Cross-examine adverse witnesses; Remain silent; Be present; and (6) Require the attendance by subpoena of one (1) or more of the professionals who prepared the evaluation."[15] Petitioner has the burden of proof by clear and convincing evidence.[16]

Guardians must care for and maintain the ward and see that the ward is protected and "properly" educated.[17] Guardians of the person have custody of their wards[18] and are therefore empowered to decide where the ward shall live, subject to the continuing jurisdiction of the circuit courts. Guardians must make decisions (i.e., decisions that are not prohibited by Ark. Code Ann. § 28-65-302) in a manner that is consistent with the prudent exercise of their fiduciary duties.

To that end, circuit courts have jurisdiction to review "all matters" of

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[11] Ark. Code Ann. § 28-65-207.
[12] Ark. Code Ann. § 26-65-210.
[13] Ark. Code Ann. § 28-65-212.
[14] Ark. Code Ann. § 28-65-211(b)(1).
[15] Ark. Code Ann. § 28-65-213(a)(1)-(6).
[16] Ark. Code Ann. § 28-65-213(b).
[17] Ark. Code Ann. § 28-65-301 (a)(1).
[18] Ark. Code Ann. § 28-65-301(3).

guardianship[19], and therefore may at any time review each guardian's acts and omissions and enter orders assuring that each guardian acts in his or her ward's best interests. See, In re Guardianship of Markham v. Buck, 32 Ark. App. 46, 50 (1990). Furthermore, the circuit courts are *expressly* empowered to review guardians' placement decisions. Ark. Code Ann. § 28-65-303.

Admission to the human development centers is a multi-step process. First, DDS must determine that the applicant is developmentally disabled in order for the applicant to be eligible for any DDS services.[20] Second, the applicant's developmental disability must be established by testing[21]. Third, the applicant must satisfy DDS Policy 1086 regarding human development center admission.

DDS policy 1086 requires a "comprehensive review" of the individual's physical, emotional, social, and cognitive status by the interdisciplinary team[22]. Eligibility for admission is contingent on independent (i.e., independent of the applicant's guardian) professional determinations that: 1) the individual is eligible for DDS services; 2) the individual's need for human development center services is "clearly established and documented"[23]; 3) "admission is in the best interest of the individual"[24]; and 4) the individual's "needs cannot at the current time be met in the community."[25]

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[19] Ark. Code Ann. § 28-65-107.
[20] See, DDS Policy 1075, entitled "TESTING REQUIREMENTS TO DETERMINE ELIGIBILITY FOR DDS SERVICES," attachment 14.
[21] See, DDS Policy 1075 (Exhibit 14), for testing requirements.
[22] See, DDS Policy 1086(3) (Exhibit 15).
[23] Id.
[24] Id.
[25] Id. (Emphasis in original)

Within thirty days of admission, the preadmission evaluation is reviewed and updated to reconsider social, cognitive, communicative, and sensory-motor factors, adaptive behavior, and independent living skills. As part of the process, the residents diagnosis and prognosis are recorded, long range goals are adopted, and an individual program plan is written[26].

At each stage of the process, DDS' determinations are subject to administrative appeal[27]. All final agency determinations are subject to judicial review under Ark. Code Ann. § 25-15-212 (the Arkansas Administrative Procedure Act).

IV. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the dispute may be decided solely on legal grounds. Holloway v. Lockhart, 813 F.2d 874 (8th Cir. 1987); FED. R. CIV. P. 56. The moving party must show that the record does not disclose a genuine dispute on a material fact. It is then the respondent's burden to adduce evidence and specific facts showing that there is a genuine dispute. If the respondent fails to carry that burden, summary judgment is granted. Counts v. M.K.- Ferguson Co., 862 F.2d 1338, 1339 (8th Cir. 1988). As the Supreme Court stated in Celotex Corp. v. Catrett, 477 U.S. 317 (1986): "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."

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[26] See, DDS Policy 3007-I (Exhibit 28).
[27] See, DDS Policy 1076 (exhibit 16). are subject to judicial review under Ark. Code Ann. § 25-15-212 (the Arkansas Administrative Procedure Act).

The party moving for summary judgment has the initial burden of informing the court of the basis for its motion and identifying the pleadings, admissions, discovery documents and affidavits it contends show the absence of a genuine issue of material fact. Id. at 323. However, this burden does not require the moving party to *negate* the other party's claims. The movant meets its burden merely by pointing out that there is an absence of evidence to support the nonmoving party's case. Id. at 325. The nonmoving party must then go beyond its own pleadings to designate specific facts raising a genuinely triable issue. Id. at 324; see also Counts, supra.

In order to establish that a genuine issue of material fact exists, the nonmoving party must meet a three-pronged test. Under this test, the nonmoving party must demonstrate that:

1. There is a factual dispute;
2. The disputed fact is material to the outcome of the case; and,
3. The dispute is genuine.

RSBI Aerospace, Inc. v. Affiliated FM Ins. Co., 49 F.3d 399 (8th Cir. 1995). A dispute is genuine only if a reasonable jury could return a verdict for either party. Id.; see also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1966); McLaughlin v. Esselte Pendaflex Corp., 50 F.3d 507, 510 (8th Cir. 1995).

V. SUMMARY OF THE ISSUE

The plaintiffs allege that the Developmental Disabilities Services Board ("Board") and the Department of Human Services ("DHS") must provide them with a judicial hearing before furnishing human development center services, and

that the failure to provide a judicial hearing violates plaintiffs' rights to due process and equal protection. See e.g., Second Amended Complaint at ¶ 49. As a threshold matter, this contention ignores the fact that the official-capacity defendants are not empowered to provide the plaintiffs with a judicial hearing. Similarly, because none of the present defendants are an attorney in law or fact for plaintiffs Norman and Porter, they have no avenue of arranging for such judicial hearings.[28]

By contrast, plaintiff Disability Rights Center as advocate and counsel for Norman and Porter may *at any time* (either pre- or post-admission) seek review of any HDC resident's placement if they feel that the resident's guardian is not acting in his or her best interest. Simply stated, the DRC can advocate on behalf of HDC residents by filing an action in the Arkansas circuit courts (including a pre-admission petition for injunction) that would afford the resident all the procedural protections that the plaintiffs seek in this lawsuit. Because these procedural protections are readily available at the state level (and are certainly available to both Norman and Porter), the plaintiffs' procedural due process claim must fail.

Considering the above, the principal contention in the plaintiffs' complaint may be stated as follows: it is unconstitutional for the Board, DHS, or both to admit any individual who is developmentally disabled and incapacitated to a human development center upon application for such services submitted by the

[28] This representation assumes, of course, that neither plaintiff is an "endangered adult" as defined by Ark. Code Ann. § 5-28-101 (5) (Supp. 2003))

individual[29] or the individual's guardian unless the individual or the individual's guardian first produces a judicial order approving or directing the admission. This brings the pivotal question of law into sharp focus: does state law vest court-appointed guardians with the authority to act on behalf of their wards for the purpose of determining care and custody? If the answer is yes, then the human development centers are providing care upon request and there is no constitutional deprivation. Conversely, if the guardian lacks the authority to determine the custody of the ward, then the state may not rely on the guardian's applications and authorizations. The guardian's authority is a question of state statutory probate law. Critically, the plaintiffs are not challenging the constitutionality of Arkansas' probate laws.

VI. ARGUMENT

A. Continued Standing

In their motion to dismiss, separate defendants argued that the plaintiffs lack standing to bring this action. This Court disagreed, holding the plaintiffs have "a concrete, substantial liberty interest in not being confined unnecessarily" and that "plaintiffs' right to due process is absolute and does not change according to whether their admission to state institutions was correct, justified, or necessary." Accordingly, this Court found that plaintiffs' allegations of

[29] The individual plaintiffs are legally incapacitated and thus cannot contract for human development center services, so the guardian must apply. However, plaintiffs assert that the guardian cannot make valid application, either, so under plaintiffs' theory of the case, only a judge may properly seek human development center placement for an incapacitated person with a guardian.

confinement without process sufficiently alleged an injury in fact. Feb. 12, 2004, Order, p. 6.

Defendants have no quarrel with the notion that the right to procedural due process does not hinge on whether the outcome of the process would favor plaintiff. However, Carey v. Piphus, 435 U.S. 247, 266 (1978), should not be read to require procedure for procedure's sake. Rector v. City and County of Denver, 348 F.3d 935, 943 (10th Cir. 2003). "The Fourteenth Amendment, by its terms, does not guarantee due process; it protects against deprivations of life, liberty, or property without due process. Unless a person asserts some basis for contending a governmental deprivation of life, liberty, or property, he is not injured by defective procedures he has no occasion to invoke." 348 F.3d at 943-944, relying on the following passage from Michael H. v. Gerald D., 491 U.S. 110, 127 n. 5 (1989) (plurality opinion) ("We cannot grasp the concept of a 'right to a hearing' on the part of a person who claims no substantive entitlement that the hearing will assertedly vindicate.").

Robert Norman no longer resides at a human development center. Rather, due to the persistent efforts of the Center and Mr. Harris, Norman is residing in a community group home. Because Norman is no longer subject to the alleged unconstitutional confinement that gave rise to his claims, his request for injunctive relief is moot. See, Jane Doe v. Kurt Knickrehm, et al., Case No. 4:03CV00205 SWW, Order filed 10/3/03 at 8 (citing Martin v. Sargent, 780 F.2d 1334 (8th Cir. 1985) (holding that inmates claims for injunctive and declaratory relief were moot where prisoner was no longer imprisoned under the conditions

giving rise to his claim)). For purposes of the motion to dismiss, the Court had to accept as true plaintiffs' allegations that they were confined in a state institution against their wishes with no chance of having a hearing regarding their confinement. Feb. 12, 2004, Order, p. 10. At this stage, however, the supported evidence shows that plaintiffs' allegations are flawed because:

1) Under Arkansas law, guardians have the legal duty and responsibility to act on behalf of and in the best interest of their wards, who in this case are Norman and Porter. These guardians requested and consented to human development center placements and continued stays for their wards (although the admission of Norman was unusual in that it was effectively forced by the court and Harris merely aided Norman in the admission process). Those requests were the legal equivalent of plaintiffs seeking their own placements.[30]

2) State circuit courts retain jurisdiction not only to administer guardianships in the best interest of the ward, but also to hear the ward's objections, if any, to the guardian's conduct, specifically including institutional placement. See, Ark. Code Ann. § 28-65-303. In other words, while a ward may file a petition to remove his or her guardian, a ward also may file a petition to challenge the specific actions of his or her guardian *without* asking that the guardian be removed. Consequently, Porter and Norman have an opportunity for a judicial hearing at any time if they disagree with any decisions that their guardians are making on their behalf.

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[30] Defendants recognize that the Court has determined that state action occurred when the state agreed to provide services to plaintiffs. However, state action acquiescing to a request for services is not confinement, because confinement is by definition is involuntary.

3) Federal law directs the DRC to "pursue legal administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services or habilitation, or who are being considered for a change in ... living arrangements...." 42 U.S.C. § 15043(a)(2)(A)(i). Accordingly, the DRC is empowered to seek relief in the state circuit courts for any developmentally disabled individuals that have guardians. In fact, the DRC is presently engaged in litigation to remove a guardian in Pope County Circuit Court, thereby establishing that there is nothing to preclude the DRC from likewise representing Norman, Porter, or both, as to any claims that they may have against the manner in which their guardians are exercising their statutory authority.

B. Norman and Porter Have Not Been Confined

Black's Law Dictionary defines confinement as the "State of being confined; shut in; imprisoned. Confinement may be by either a moral or a physical restraint, by threats of violence with a present force, or by physical restraint of the person." BLACK'S LAW DICTIONARY 157 (5th abridged ed. 1983); U.S. v. Pray, __ F.3d ___, ___ (3rd Cir., July 2, 2004) (citing BLACK'S and using imprisonment and confinement synonymously); Woodward v. Correctional Medical Services of Illinois, 368 F.3d 917, 925 (7th Cir. 2004) (defining "lockdown" as confinement). Human development centers do not fall into this category. At the places where Mr. Norman lived and Mr. Porter now lives, there are no barrier fences, no barbed wire, no bars, no locked doors, no security screens on windows, and no security force to impose a threat of violence with a

present force. Thus, plaintiffs were not and are not confined within the legal meaning of the term.

Plaintiffs' allegation of confinement hinges on the fact that human development centers would attempt to locate and return a resident if he or she left the center on his own without his guardian or the staff's knowledge. However, the same can be said of hospitals, nursing homes, residential care facilities, assisted living facilities, small (10-bed or less) intermediate care facilities for the mentally retarded, sheltered workshops, apartments and group homes maintained for the developmentally disabled, as well as Porter's mother's home. Indeed, DRC and Pierce contend that Porter is confined during visits at his mother's home because she monitors and limits his movements and activities in order to assure his safety[31]. Thus, according to the DRC, the minimum amount of monitoring and supervision necessary for Harve's safety is confining. If so, then Mr. Porter is either confined or unsafe. Under this reasoning, there are only two types of developmentally disabled incapacitated adults: 1) confined; 2) neglected.

Taking the plaintiffs' argument to its logical conclusion, a hearing and judicial determination is necessary every time center staff transports Porter for a visit in his mother's home or returns him because both trips involve state action that results in "confinement." Indeed, the expansive analysis advanced by plaintiffs would necessitate judicial determinations as a condition of any invasive healthcare procedures that are not welcomed by the ward. As discussed below,

[31] See, depositions of Nan Ellen East, DRC Chief Executive Officer, at 54 and Susan Pierce, next friend, at 12-13 (Exhibits 17 and 18, respectively).

the United States Supreme Court flatly rejects such inflexible notions of due process.

C. Procedural Due Process

1. Procedural Due Process is not an end unto itself

The plaintiffs allege that they are suffering an ongoing procedural due process deprivation stemming from their placement at human development centers. That is, they challenge the constitutionality of state laws or policies permitting their admission to human development centers without judicial process *in addition to* circuit court guardianship proceedings and attendant ongoing hearing opportunities.

The due process clause provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV, § 1. Procedural due process is "[A] guarantee of fair procedure." Zinermon v. Burch, 494 U.S. 113, 125 (1990).

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. Parratt, 451 U.S., at 537; Carey v. Pipus, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property").

Id. (Emphasis in original).

> It is a well-settled principle, however, that the requirements of procedural due process apply only when there has been a deprivation of life, liberty, or property within the meaning of the Fifth or Fourteenth Amendment. See, Matthews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L. Ed. 2d 18 (1976); Board of Regents v. Roth, 408 U.S. 564, 569-72, 92 S.Ct. 2701, 2705-06, 33 L. Ed. 2d 548 (1972); Williams v. Nix, 1 F.3d 712, 717 (8th Cir. 1993). Not every "grievous loss visited upon a person by the [government] is sufficient to invoke the procedural protections of

> the Due Process Clause." Meachum v. Fano, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976).

Schneider v. U.S., 27 F.3d 1327, 1332-33 (8th Cir. 1994).

The plaintiffs assert that Porter and Norman were or are deprived of procedural due process because the Board and DHS did not provide them with a judicial hearing regarding their placement at a human development center. However, judicial process is not an end unto itself. There must be an underlying deprivation under color of state law of, in this case, a liberty interest, and the deprivation must have occurred without an opportunity to be heard. Against this backdrop, three problems with the plaintiffs' assertion become apparent.

First, a deprivation is by definition a taking or confiscation imposed contrary to the plaintiffs' interests. Porter and Norman, acting either directly or through their court-appointed guardians, sought out and applied for the particular human development center services that they received and, in Porter's case, continue to receive. Providing requested governmental services is not a governmental taking. Second, the plaintiffs had and continue to have an opportunity to be heard in state circuit court, but have declined to avail themselves of that opportunity. Third, there are no liberty interests at stake because the plaintiffs have not been "confined."

2. Plaintiffs were afforded all procedural process that isdue

Harve Porter and Robert Norman were adjudicated incapacitated in proceedings governed by statutes that required notice to them[32], a professional

[32] Ark. Code Ann. § 28-56-207 (b).

evaluation[33], a hearing where they had the right to be present, be represented by counsel, present evidence, cross-examine witnesses, remain silent, and require attendance of professionals[34]. Petitioners had the burden of proof by clear and convincing evidence. Id. Thus, the judicial determination that Porter and Norman were unable to make their won shelter decision, and that a guardian should be appointed to make those decision for them, was subject to a full panoply of due process protections.

Probate, now circuit, courts appointed guardians to Norman and Porter in order to enable the protection of the plaintiffs' best interests by, inter alia, administering Porter and Norman's custody and placement. Those courts have jurisdiction to review "all matters" of guardianship[35], and therefore may review each guardian's activities and enter orders assuring that each guardian acts in plaintiffs' best interests. See, In re Guardianship of Markham v. Buck, 32 Ark. App. 46, 50 (1990). Furthermore, the circuit court is *expressly* empowered to review a guardian's placement decision. Ark. Code Ann. § 28-65-303. Thus, plaintiffs continue to enjoy a full panoply of due process protections in connection with their guardians' decisions, including shelter decisions.

Putting aside the state court hearings and attendant relief available in connection with the guardians' acts, omissions, or removal, there are two additional avenues affording procedural due process in state court. First, the probate courts, and now the circuit courts, maintain the power to entertain

[33] Ark Code Ann. § 28-65-212.
[34] Ark. Code Ann. § 28-65-213.
[35] Ark. Code Ann. § 28-65-107.

challenges to the *procedures* the form the subject matter of this case. Second, plaintiffs may file declaratory judgment actions. Ark. Code Ann. § 16-111-101 et seq.; Ark. Code Ann. § 25-15-207; Ark. R. Civ. P. 57; Bennett v. Nat'l Ass'n for Advancement of Colored People, 236 Ark. 750, 270 S.W. 79 (1963). Considering that this is a declaratory judgment action, the availability of identical relief in a state declaratory judgment action presumably is adequate.

Additionally, applicants have an opportunity for administrative hearings and judicial review of DDS eligibility and human development center admission decisions. In summary, state court judicial review, will full and adequate remedies, are presently available to plaintiffs.

The initial and ongoing availability of state court judicial forums is all the process that is due. Holley v. Deal, 948 F. Supp. 711, 718 (M.D. Tenn. 1996). "[I]f Plaintiff disagrees with the appointment of the limited guardian, has claims for breach of fiduciary duty of the limited guardian, or has reasons to remove the limited guardianship, those claims are not properly brought in [Federal District Court] and do not, without more, raise a constitutional claim." Id.

3. Parham v. J.R.

In Parham v. J.R., 442 U.S. 584 (1979), the Supreme Court rejected the inflexible due process concepts advanced by plaintiffs, holding that "[w]hat process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made. Not every determination by state officers can be made most effectively by use of 'the procedural tools of judicial or administrative decision making.'" 422 U.S. at 608 (citations omitted). Noting that the question

of admission to a mental hospital is essentially medical, the Court stated that medical doctors should make an independent judgment about what the patient requires. Id. Applying this reasoning to the familiar balancing test in Matthews v. Eldridge, 424 U.S. 319, 335 (1976), the Court held that due process "has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." 422 U.S. at 607. After noting the importance of professional judgment to hospital admission, the Court held that due process is satisfied by an independent (i.e., independent of the parents) review of the necessity of hospitalization by a doctor. 442 U.S. at 606-617.

For each human development center admission by a guardian, there are two independent professional reviews. The first independent review is carried out as part of the guardianship proceedings, and clinically establishes the ward's incapacity. The second independent review takes place when an admission team composed of cognitive professionals, including a psychologist, determines if the applicant is eligible for DDS services *and* satisfies the clinical standards for admission *and* needs the placement. After that, the continuing need for human development center placement is reviewed periodically by a similarly independent procedure. These independent safeguards surpass the protections discussed and approved in Parham. See, 422 U.S. at 607. Reading Heller v. Doe[36] (permitting relaxed procedures for admission to developmental disabilities services compared to admission to mental hospitals) in conjunction with Parham (holding that cognitively disabled and incapacitated persons may be admitted to mental hospitals on the application of their parents subject to an independent professional

[36] 509 U.S. 312 (1993).

determination of need), it necessarily follows that wards may be admitted to human development centers on the application of their court-appointed guardians and favorable determination of the admission review committee. (Admittedly, Parham concerns minors and the present case concerns adults. Still, the reasoning in Parham applies with like force to a situation in which an individual cognitively functions at the level of a minor due to a developmental disability, and thus suffers the same type of incapacitation).

Ignoring Parham, the plaintiffs appear to maintain that whenever the guardian's residential decision is not acceptable to the incapacitated ward, the decision-making power must be automatically transferred to a judge. Parham expressly rejects that notion as to parents and their children. 422 U.S. at 603. Applying the Parham reasoning to this case, the fact that a ward may balk at the developmental disability care that the guardian arranges does not diminish the guardian's judicially-ordered authority, particularly considering that a full panoply of due process rights are available to the ward should he or she opt to exercise them.

4. Exhaustion of state remedies

In ruling on the defendants' motions to dismiss, this Court characterized the defendants' exhaustion argument as follows: "Plaintiffs' procedural due process claims are not ripe for review because plaintiffs have failed to exhaust their state remedies by petitioning for termination of their guardianships." Feb. 12, 2004, Order, p. 10. This Court then reasoned that "Plaintiffs do not wish to have their guardians removed, [so] termination proceedings would not provide an

adequate remedy," thus concluding that the plaintiffs' procedural due process claims were ripe for review. Id.

As noted above, circuit courts are not limited to entertaining petitions to remove guardians; they can entertain *any* challenges plaintiffs may lodge in connection with the placements obtained on plaintiffs' behalf by their guardians. Furthermore, the circuit courts are empowered to entertain challenges to the complained of *procedures*. Finally, plaintiffs can appeal and obtain circuit court review of the DDS decisions on their applications. Therefore, Court's conclusion that there is no adequate remedy in circuit court bears revisiting.

Exhaustion of state remedies is a condition precedent to any federal procedural due process action under 42 U.S.C. § 1983. Booker v. City of St. Louis, 309 F.3d 464, 468 (8th Cir. 2002) (citing Wax'n Works v. City of St. Paul, 213 F.3d 1016, 1019 (8th Cir. 2000) ("[u]nder federal law, a litigant asserting a deprivation of procedural due process must exhaust state remedies before such an allegation states a claim under § 1983.)). That is, procedural due process challenges in federal court must await the exhaustion of the challenged procedures. Cornish v. Blakely, 336 F.3d 749, 753 (8th Cir. 2003). In Gaunce v. deVincentis, 708 F.2d 1290, 1293 (7th Cir.), cert. denied, 464 U.S. 978 (1983), a case relied upon by the Cornish court, the Seventh Circuit held that: "[s]o long as effective means for judicial review are ultimately available where the constitutional claims can be raised, appellant may not dispense with the requirement of prior administrative review, otherwise judicial review would be an

abstract process." Accord, Robinson v. Dow, 522 F.2d 855, 857-858 (6th Cir. 1975).

Assuming arguendo that the plaintiffs have stated viable constitutional due process claims, they are barred from pursing them in federal court because they did not exhaust available state law remedies. Although Norman and Porter have remedies available to them under state law, they failed to pursue those remedies in state court. Consequently, the plaintiffs are barred from pursuing them before this Court.

As discussed earlier, Arkansas law mandates that a guardian of a person must "care for and maintain the ward." Ark. Code Ann. § 28-65-301(a)(1). This includes deciding where the ward should reside and making most decisions regarding the ward's medical care and treatment. If Norman and Porter believe that their guardians are not acting in their best interests, they may avail themselves of remedies against those guardians in the state probate courts and *must* avail themselves of those remedies as a mandatory prerequisite to stating a viable constitutional due process claim. Whether Norman and Porter's guardians are acting in their wards' best interests in making placement decisions is precisely the type of matter that is appropriate to advance before a state probate, now circuit, court. There is nothing to prevent the plaintiffs from seeking pre- or post-admission process from the state circuit courts, and the plaintiffs have not pled otherwise. Their constitutional due process claim must fail because the plaintiffs have not availed themselves of these state law remedies.

D. Equal Protection

The Second Amended Complaint contends that state law and DHS/DDS policies violate Norman and Porter's equal protection rights because they "do not provide the same or similar protections to [Norman and Porter] as are provided to individuals with mental illness who are involuntarily admitted to a treatment program or facility pursuant to Ark. Code Ann. § 20-47-201 et seq. (2nd Am. Comp. at ¶ 52). The plaintiffs allege that they are "similarly situated" to people with mental illness as "both face the threat of institutionalization through involuntary commitment procedures." (2nd Am. Comp. at ¶ 51).

The Equal Protection Clause of the Fourteenth Amendment, § 1, forbids states from denying any person within its jurisdiction the equal protection of the laws. "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are *in all relevant respects* alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) (citation omitted) (emphasis added).

Thus, every equal protection analysis must begin by ascertaining whether plaintiffs have identified persons who are alike in all relevant respects but have been treated favorably by the government. "Absent a threshold showing that [the plaintiff] is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim." Keevan v. Smith, 100 F.3d 644, 648 (8th Cir. 1996) (citations omitted). "Treatment of dissimilarly situated persons in a dissimilar manner by the government does not violate the Equal Protection Clause." Id.

Plaintiffs' argument that they are "similarly situated" for constitutional equal protection purposes with people who suffer from mental illness was rejected by the United States Supreme Court in Heller v. Doe, 509 U.S. 312, 323 (1993). Additionally, mental illness and mental retardation are by definition different and, in fact, mutually exclusive[37]. Mental illness is defined as

> "[A] substantial impairment of emotional processes, or of the ability to exercise conscious control of one's actions, or of the ability to perceive reality or to reason, when the impairment is manifested by instances of extremely abnormal behavior or extremely faulty perceptions.
>
> (2) **It does not include** impairment solely caused by:
>
> (A) Epilepsy;
>
> (B) **Mental retardation**;
>
> (C) Continuous or noncontinuous periods of intoxication caused by substances such as alcohol or drugs; or
>
> (D) Dependence upon or addiction to any substance such as alcohol or drugs.

Ark. Code Ann. § 20-47-202 (j) 1, 2 (Supp. 2001) (Emphasis added). Mental retardation is defined as:

> "(A) A person with a mental deficit requiring him to have special evaluation, treatment, care, education, training, supervision, or control in his home or community, or in a state institution for the mentally retarded; or
>
> (B) A functionally retarded person who may not exhibit an intellectual deficit on standard psychological tests, but who, because of other handicaps, functions as a retarded person. **Not included is a person whose primary problem is mental illness, emotional disturbance**, physical handicap, or sensory deficit.

Ark. Code Ann. § 20-48-202 (6) (Repl. 1991) (Emphasis added).

Moreover, there are significant differences between a human development center and the Arkansas State Hospital:

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[37] Though the definitions are mutually exclusive, persons may be both mentally ill and developmentally disabled.

1) The Arkansas State Hospital is an acute care hospital licensed by the Arkansas Health Department and accredited by the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"). Because the Arkansas State Hospital is an institution for mental diseases, patients between the ages of 21 and 65 are not Medicaid eligible at all. 42 U.S.C. § 1396d (a) (xiii) (15); 45 C.F.R. § 233.60 (a) (3) (ii); Connecticut Dep't of Income Maint. v. Heckler, 471 U.S. 524, 530 (1985) (citing 42 U.S.C. § 1396d (a) (14) and (18) (B)).

By contrast, human development centers are intermediate care facilities for the mentally retarded.

> The term "intermediate care facility for the mentally retarded" means an institution (or distinct part thereof) for the mentally retarded or persons with related conditions if –
>
> (1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals and the institution meets such standards as may be prescribed by the Secretary;
>
> (2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this title is receiving active treatment under such a program.

42 U.S.C. 1396d (a) (xiii) (15). "An institution for the mentally retarded is not an institution for mental diseases ("IMD")." 45 C.F.R. § 233.60 (a) (3) (iii). Nor are human development centers hospitals; they are Medicaid-certified long-term care facilities licensed by the Arkansas Department of Human Services, Division of Medical Services, Office of Long-Term Care. Centers are not accredited by JCAHO.

2) The Arkansas State Hospital confines patients by means of physical restraints (bars, screens and locks) and threat of present force (security guards). Human development centers have none of that.

3) Patients at the Arkansas State Hospital are mentally ill. They typically receive rehabilitative care, primarily with medication, for brief periods of time until stabilized and then are generally discharged. Residents at the human development centers are developmentally disabled. As the designation "long-term care facility" implies, human development centers are not places for brief treatments. Residents receive habilitative care, often without medication, focusing on learning and improving basic daily living and socialization skills.

4) Prosecutors have the authority to bring actions for the protection of the mentally ill who are gravely disabled[38], but no equivalent authority exists to protect the interests of developmentally disabled individuals who may be a danger to themselves or others.

Accordingly, plaintiffs are not similarly situated with respect to mentally ill persons committed to the Arkansas State Hospital, and the Arkansas State Hospital is not similar to a human development center. Because plaintiffs have failed to make this threshold showing, the equal protection claim fails without further analysis.

Even if plaintiffs had identified a similarly situated classification that is treated favorably, the equal protection claim would still fail. "[U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the

[38] See, Ark. Code Ann. § 20-47-208.

classification rationally further a legitimate state interest." Bills v. Dahm, 32 F.3d 333, 335 (8th Cir. 1994).

Plaintiffs assert that strict scrutiny applies in the present case "[b]ecause the interest implicated here is a fundamental liberty interest and Plaintiffs Harve Porter and Robert Norman are similarly situated to the individuals with mental illness who are subject to involuntary commitment procedures." (2nd Am. Comp. at ¶ 53). But Porter and Norman are not similarly situated to individuals with mental illness, nor are they similarly situated to persons who are involuntary committed to the Arkansas State Hospital. Neither Porter nor Norman was placed at an HDC pursuant to the "legal commitment" provisions set forth in Ark. Code Ann. § 20-48-406(c). Rather, they were both admitted through the voluntary admission process. Had they been placed through a legal commitment, Ark. Code Ann. § 20-48-406(c) provides due process, including a hearing, that culminates in an "order of commitment" pursuant to Ark. Code Ann. § 20-48-407

This Court recognized the critical distinction between voluntary admissions and legal commitments to human development centers in Jane Doe v. Kurt Knickrehm, et al., (Case No. 4:03CV00205 SWW, Order filed 10/3/03 at p. 8). Finding that the plaintiffs had not satisfied the numerosity, commonality, and typicality requirement of Federal Rule of Civil Procedure 23(a) based upon this distinction, among others, this Court explained that "Arkansas law provides a pre-deprivation hearing for individuals who are involuntarily committed to the State's

human development centers." Id. at 8.[39] Because both Norman and Porter were voluntarily admitted to a human development center, they are not "similarly situated" with people who are "legally committed" to a human development center.

In Heller, the Court rejected an equal protection claim challenging Kentucky statutes that required a lower standard of proof in "commitments for mental retardation" than for persons who suffered solely from a mental illness. Id. at 328. As an initial matter, the Court recognized that because the classification at issue "neither involve[d] fundamental rights nor proceed[ed] along suspect lines," that it should be "accorded a strong presumption of validity." Id. at 319. The Court found that "rational-basis review" applied; i.e., the classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Id. at 321 (citation omitted).[40]

Regarding the relevant burden of production under rational-basis review, the Court explained:

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[39] Although one might argue that Norman's initial admission was in effect involuntary (which it was not), he undoubtedly received a full panoply of procedural protections throughout his criminal case and it is beyond argument that he was *not* legally committed pursuant to Ark. Code Ann. §20-48-406(c).

[40] Although the Court did not conclusively hold that rational basis review was the appropriate standard, it suggested as much, explaining, "[w]e have applied rational-basis review in previous cases involving the mentally retarded and the mentally ill." Heller, 509 U.S. at 321 (citing Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985)). The Court reaffirmed the principle that mental retardation did not qualify as a "quasi-suspect" classification for equal protection purposes in Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 357 (citing Cleburne, 473 U.S. at 435).

> [a] State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional . . . and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.

Id. at 320-21. The Court then reasoned that a rational basis for the distinction existed, including the fact that "mental retardation is a permanent, relatively static condition" as opposed to mental illness, that treatment of people with a developmental disability is generally much less invasive than treatment of people with a mental illness, and that it is easier to diagnose a developmental disability than a mental illness. Id. at 322-323, 324, 328. Although Arkansas' "involuntary commitment laws" are not at issue in the present case, the Heller Court's recognition that there is a rational basis for distinguishing between people with developmental disabilities and people with mental illness is directly relevant to and dispositive of the plaintiffs' equal protection claim.

E. Federal Law Obligates the Human Development Centers to Accept the Applications Filed on Plaintiffs' Behalf by Their Guardians.

Because they are Medicaid-certified ICF-MR's, the Alexander and Southeast Arkansas Human Development Centers must comply with Medicaid requirements by deferring to the plaintiffs' legal representatives' decisions that the plaintiffs would be best served at a human development center. 42 C.F.R. §

435.302 (d). To put it another way, Medicaid law requires that human development centers accept and act upon an application for services filed by a guardian on behalf of his or her ward. Human development centers cannot comply with this Medicaid mandate and at the same time reject applications submitted by lawfully-appointed guardians that are not accompanied by a judicial admission order.

VII. CONCLUSION

When individuals lack the capacity to make safe decisions about where to live, Arkansas law provides for court appointed guardians to stand in the individual's shoes and make those decisions as a legal surrogate. Ark. Code Ann. § 28-65-301 (a)(3) (Repl. 2004). Guardians are the custodians of their wards and thus may choose the wards' place of residence. However, this statutory plan has several important limitations. First, there is a list of prohibited decisions (for example, consent to abortion or experimental medical procedures[41]) that are beyond the power of guardians and are reserved to the courts. Second, guardianship must be ordered "only to the extent necessitated by the person's actual mental, physical, and adaptive limitations" and used "only as is necessary to promote and protect the well-being of the person...." Ark. Code Ann. § 28-65-105. Third, upon application by the ward, the ward's counsel, or DRC, circuit courts may review any decision made by a guardian.

Plaintiffs want to prohibit guardians from exercising their custodial and general guardianship authority to choose their wards' residences. To accomplish

[41] See, Ark. Code Ann. § 28-65-302.

that, they have asked this Court to judicially expand the list of prohibited decisions. Such a judicial amendment of unchallenged state law would nullify state circuit court orders authorizing guardians to act in the best interest of their wards with respect to custody.[42] In other words, for every choice of residence deemed to be confining (which, according to plaintiffs, includes every conceivable safe residence) judicial decisions would supplant the decisions of guardians regardless of whether the ward objects to or would challenge the guardian's decision. Because the plaintiffs have not challenged the constitutionality of the Arkansas General Assembly's allocation of responsibility as enacted in the Arkansas probate code, there is no basis for the Court to recast the present statutory arrangement.

Plaintiff Robert Norman lacks standing to pursue the present action. Assuming arguendo that he has standing, both he and Harve Porter have available a full panoply of due process protections under existing state law that allow them to challenge any action (or inaction) of their guardians, either directly or through an advocate such as the DRC. Plaintiffs' due process rights therefore substantially exceed the requirements of the Constitution. Because Norman and Porter have not exercised their right to obtain process (pre or post admission) in the state courts, they are barred from advancing a constitutional procedural due process claim before this Court.

The plaintiffs' equal protection claim must also fail, as they have failed to identify anyone with whom they are similarly situated in all relevant respects who

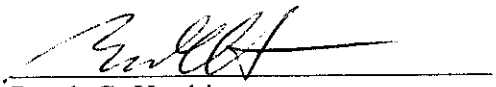
[42] For this reason, defendants respectfully suggest that abstention, as argued in earlier motions, is appropriate.

the state treated more favorably than they. At bottom, people who are voluntarily admitted to a human development center by their guardians are not similarly situated with people who are involuntarily committed to either the Arkansas State Hospital or a human development center. Consequently, neither Arkansas law nor DHS/DDS Policies allowing voluntary human development center admission run afoul of the Constitution.

For the foregoing reasons, the official-capacity defendants respectfully request that this Court grant summary judgment in their favor pursuant to Federal Rule of Civil Procedure 56, and that it dismiss the plaintiffs' Second Amended Complaint in its entirety.

Respectfully submitted,

ARKANSAS DEPARTMENT OF HUMAN SERVICES

By: 

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CERTIFICATE OF SERVICE

I, Breck Hopkins, certify that I have served a copy of the foregoing Statement of Material Facts on Janet C. Baker, Dana K. McClain, and Adam H. Butler, Attorneys at Law, Disability Rights Center, 1100 North University, Suite 201, Little Rock, AR 72207, and on William F. Sherman, Attorney at Law, 504 Pyramid Place, 221 West Second Street, Little Rock, Arkansas, 72201 by depositing same in the United States Mail in a properly addressed envelope with adequate postage this 27 day of July, 2004.

_____
Breck Hopkins

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

Exhibits Attached to Original Document in Courts's Case File