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

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| **HARVE PORTER, *et al.*,** | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No.4:03 CV00812SWW |
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| **KURT KNICKREHM, *et al.*,** | ) | |
| | ) | |
| Defendants, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| **FAMILIES AND FRIENDS OF CARE FACILITY RESIDENTS AND ELLEN SUE GIBSON** | ) | |
| | ) | |
| Defendant Intervenors. | ) | |

**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION CLAIMS**

Plaintiffs seek summary judgment on their Due Process and Equal Protection claims pursuant to Federal Rule of Civil Procedure 56 and Arkansas Local Rule 56.1. As demonstrated below, the motion should be granted on both claims because there are no disputed issues of material fact and Plaintiffs are entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Arnold v. City of Columbia, Mo.*, 197 F.3d 1217, 1220 (8th Cir. 1999).

## I. INTRODUCTION

Plaintiffs brought this action to challenge the constitutionality of Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.) and Development Disability Services Director's Office Policy Manual ("Manual") numbers 1020, 1037, 1053, and 1086 because Arkansas law and policies fail to provide adequate judicial hearings at which adults whose liberty is at stake can contest the state's effort to institutionalize them.

Plaintiff Harve Porter is an adult diagnosed with moderate mental retardation who is currently involuntarily confined at the state's Alexander Human Development Center ("ALHDC). Plaintiff Robert Norman is an adult diagnosed with mild mental retardation and mental illness who was involuntarily confined at the state's Southeast Arkansas Human Development Center ("SEAHDC") at the time this action was filed. Mr. Norman is currently in a community placement but remains at risk of being involuntarily confined in a state Human Development Center ("HDC"). *See Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 594 n.6 (1999). Plaintiff Disability Rights Center, Inc., ("DRC") is a federally funded, non-profit organization dedicated to advancing the rights of individuals with disabilities in Arkansas, including individuals with mental retardation. *See* 42 U.S.C. § 15043 *et seq.*

Plaintiffs seek a declaration that certain provisions of the Arkansas Mental Retardation Act and policies of the Arkansas Division of Developmental Disabilities Services governing admission and discharge from HDCs are unconstitutional. They also seek an order granting Harve Porter a judicial hearing in accordance with procedures and standards comporting with due process of law as mandated by the Court until such time as the Arkansas General Assembly enacts constitutional procedures pertaining to admission and discharge.

## II. STATEMENT OF THE CASE

### A. Introduction.

On October 14, 2003, Plaintiffs Harve Porter and Robert Norman, two adults with mental retardation, and DRC filed their complaint against two employees of the Department of Human Services and the members of the Board of Developmental Disabilities Services ("Board") in their official capacities.[1] The complaint alleged that defendants had involuntarily confined them in an HDC in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Specifically, Plaintiffs Porter and Norman alleged that the state's admission and discharge procedures for its HDCs set forth in Ark. Code Ann. § 20-48-401 *et seq*. (Michie 2003 Suppl.) and Manual numbers 1020, 1037, 1053 and 1086 are unconstitutional because they do not provide adequate judicial hearings at which persons whose liberty is at stake can contest the state's effort to institutionalize them.

Plaintiffs maintain that such hearings must include the following due process protections: (a) the right to be present; (b) the right to appointed counsel, if indigent; (c) the right to present evidence in his or her own behalf; (d) the right to cross-examine witnesses; (e) the right to view any and all petitions and reports in the court file of his or her case; (f) the right to subpoena witnesses; (g) the right to periodic judicial review; (h) the right to be placed in the least restrictive environment; and (i) the right to adequate and timely notice of the above rights.

In addition, Plaintiffs maintain that before the state may involuntarily confine them it must prove by clear and convincing evidence that the individual sought to be confined poses a

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[1] In May 2004, Thomas Dolislager was appointed by the Governor to the Developmental Disabilities Services Board to serve until January 15, 2010. He replaces Don Dunn. Also in May 2004, Luke Heffley was appointed by the Governor to the Developmental Disabilities Services Board to serve until January 15, 2010. He replaces Ron Carmack. Messrs. Dolislager and Hefley are substituted as defendants. *See* Fed. R. Civ. P. 25(d).

substantial risk of harm to him or herself or others and requires a level of supervision and care that can only be provided by one of the state's HDCs.

**B. This Court's Resolution of Defendants' Motion to Dismiss.**

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

Next, the Court found that Plaintiffs had alleged "state action" because they claim that they were confined without a hearing in a state institution against their wishes. The Court also found that Plaintiffs' claims for procedural due process are ripe for review and that Plaintiffs have not failed to exhaust any relevant state remedies. Lastly, the Court concluded that *Younger* abstention was unwarranted because nothing in the record indicated that Plaintiffs' guardianship cases are ongoing judicial proceedings under *Younger*. Plaintiffs were thus allowed to proceed with their procedural due process claims. Defendants Families and Friends of Care Facility Residents ("FF/CFR") and Ellen Sue Gibson's motion to intervene was granted. Defendants FF/CFR and Ellen Sue Gibson's motion to redact names was denied.[2]

[2] Plaintiffs' original complaint also alleged a violation of the Equal Protection Clause on the ground that the procedures to which they claim they are entitled but have been denied are made available to individuals with mental illness in Arkansas. The Court granted, without prejudice, the motion to dismiss this claim on the ground that Plaintiffs failed to allege that they are similarly situated to mentally ill individuals who are committed to state institutions. Thereafter, Plaintiffs moved to amend the complaint, among other things, to revise their Equal Protection claim in accordance with the Court's opinion. That motion was granted on March 12, 2004, and Plaintiffs' second amended complaint was filed on March 16, 2004.

## III. STATEMENT OF FACTS

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

The Arkansas Department of Human Services ("ADHS") is the state agency responsible for providing treatment, programming and other services to individuals with disabilities throughout Arkansas. Defendant Kurt Knickrehm is the Director of the ADHS and is appointed by and serves at the pleasure of the Governor. Ark. Code Ann. § 25-10-101(b). As Director of ADHS, Defendant Knickrehm is required to direct and supervise the DDS, the Division of Medical Services, the Division of Mental Health Services and all other ADHS divisions. Ark. Code Ann. § 25-10-102(b)(1)(A).

Defendant James C. Green is the Director of DDS, the state agency responsible for providing services to qualified Arkansas citizens with developmental disabilities. Defendant Green is ultimately responsible for the provision of all services to Plaintiffs by authority delegated to him by the Board.

Defendant Board is authorized to issue regulations concerning the admission, discharge, care, custody, placement, training and discipline of individuals receiving developmental disability services in the HDCs. Ark. Code Ann. § 20-48-205(b). The HDCs are under control of the Board. *See* Ark. Code Ann. § 25-10-102(b)(2)(A).

**A. Statutory Procedures.**

Ark. Code Ann. §20-48-401 *et seq.* creates the statutory framework for admission and discharge to and from the HDCs. To be admitted to an HDC, a parent or guardian of a mentally defective person submits a petition to the Board requesting admission for mentally defective person. Ark. Code Ann. § 20-48-405.

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

On the other hand, the Board may determine that the individual should be admitted to the HDC by legal commitment. *Id.* § 20-48-406(c). In that case, the Board files a petition for commitment with the probate court of the county in which the individual resides. A hearing is held to determine whether the individual should be committed. Once admitted through these proceedings, an individual may not be discharged until the Board and HDC superintendent find his or her condition warrants the discharge. *Id.* § 20-48-412.

**B. Administrative Procedures.**

Defendants have supplemented statutory procedures regarding admission and discharge to the HDCs through the adoption of certain policies and procedures. Manual numbers 1020.

1037, 1057 and 1086 create the administrative framework for admission and discharge to the HDCs. Number 1020 sets out the procedure by which an individual requests services from DDS. Number 1037 addresses "HDC therapeutic/trial leaves"; number 1053 "establishes the discharge process and establishes guidelines for discharge of individuals from the HDCs operated by DDS"; and number 1086 "establishes the referral and placement procedures for services from the HDCs."

**C. Plaintiff Harve Porter.**

Harve Porter is a 39 year-old individual with moderate mental retardation and developmental disabilities who is currently involuntarily confined at the ALHDC. He has been involuntarily confined in various HDCs and has never been granted a judicial hearing to determine whether he should be forced to live his life in an institutional setting in the custody of the State of Arkansas. On numerous occasions, Harve Porter has stated to HDC and DRC staff that he wishes to leave the HDC, but he has not been permitted to do so. (Plaintiffs' Exhibit 6, Hancock depo. p.15.4, Plaintiffs' Exhibit 7, Affidavit of Griffin J. Stockley, Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.19.12 and Plaintiffs' Exhibit 3, Affidavit of Susan Pierce).

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

On June 4, 1987, BHDC released Mr. Porter to his family and he was formally discharged on June 23, 1987. On December 2, 1994, Defendant-Intervenor Ellen Sue Gibson, Mr. Porter's mother, filed a Petition for Appointment of Guardian of the Person and Estate of Harve Porter. (*In the Matter of Harve Edward Porter, an Incapacitated Person*, Polk County

Probate #G 94-27). An order appointing Ms. Gibson guardian of the person and estate of Mr. Porter was issued on February 22, 1995. (*In the Matter of Harve Edward Porter, an Incapacitated Person*, Polk County Probate #G 94-27).

The SEAHDC took custody of Mr. Porter on March 30, 1998, on a "respite" admission. ALHDC then took custody of Mr. Porter for diagnosis and evaluation on May 6, 1998. SEAHDC regained custody of Mr. Porter on May 13, 1998, for yet another "respite" admission. His status then changed on May 28, 1998, to a "regular" admission. Mr. Porter was allegedly the victim of abuse at SEAHDC on or about September 8, 2003, (Plaintiffs' Exhibit 5, Porter depo. p.18.12) and was discharged on October 22, 2003, from SEAHDC and transferred to ALHDC where he remains confined. (Plaintiffs' Exhibit 4, Gibson depo. p.13.6).

**D. Plaintiff Robert Norman.**

Robert Norman is a 44 year-old individual with mild mental retardation who also has a mental illness. On August 2, 1999, Mr. Norman, who had been charged with arson, was committed to the "Arkansas State Hospital or other suitable facility" by the Honorable John B. Plegge to undergo a mental health evaluation. (*State of Arkansas v. Robert Norman,* Pul. Cir. #98-4532). SEAHDC took custody of Mr. Norman on a "respite" admission on or about August 3, 1999. His status at SEAHDC was changed in September 1999, to a "regular" admission. Judge Plegge entered an order on January 7, 2000, acquitting Mr. Norman of arson by reason of mental disease or defect and committed him to SEAHDC. On February 23, 2000, the Honorable Mary Ann McGowan dismissed an Act 911 action against Mr. Norman pending in probate court, finding that because he had been found unable to participate in his defense against the arson charge a "final order could not have been entered in his criminal case until such time as

Respondent was found fit to proceed." (*In the Matter of Robert Norman,* Pul. Probate # PCV 2000-281).

In Spring 2000, Carol Ann Moore, a former Social Worker at SEAHDC, asked Charlie Harris, a friend of the Norman family, if he would be willing to become Robert Norman's guardian. (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.14.13). "We were encouraged. . . for all of the individuals to have some type of guardian, whether it be limited or full guardianship." (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.27.10). "We were encouraged to find guardians for everyone, to assist them in making decisions that they might be incapable of making, to keep them from leaving, in some instances." (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.16.18). "I understand that [the encouragement] came from beyond our facility, that that came from Little Rock." (Plaintiffs Exhibit 9, Sworn Statement of Carol Ann Moore, p.16.6). "I couldn't say that it was the Director of DDS, in particular. It may have been the attorneys for DDS. I could not give you somebody specific." (Plaintiffs Exhibit 9, Sworn Statement of Carol Ann Moore, p.16.11).

An attorney for the ADHS filed a guardianship petition in Bradley County Probate Court on April 25, 2000, seeking a permanent limited guardianship for Charlie Harris over Robert Norman "for the purpose of consenting to non-emergency medical treatment, placement and programming that are in Respondent's best interest." (*In the Matter of Robert Norman, an alleged Incapacitated Person,* Bradley Probate # GD-2000-10-1). "The guardianship hearing was held at our facility [SEAHDC]." (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.15.17). Ms. Moore attended the guardianship hearing as did Robert Norman, but Charlie Harris did not attend. (Plaintiffs' Exhibit 8, Sworn Statement of Charlie Harris, p.10.18).

On August 14, 2000, letters of permanent limited guardianship over Robert Norman were issued to Charlie Harris.

Plaintiff Norman was involuntarily confined at SEAHDC from August 14, 2000, until January 15, 2004, when he was moved into a community placement at Friendship Community Care, Inc., in Russellville Arkansas, where he presently resides. While he was confined at SEAHDC, Robert Norman stated to employees of the SEAHDC and DRC staff he wished to leave the facility. (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.24.9, Plaintiffs' Exhibit 7, Affidavit of Griffin J. Stockley and Plaintiffs' Exhibit 3, Affidavit of Susan Pierce). However, he was not permitted to leave until approximately three months after this action was filed.

## IV. ARGUMENT

### A. The State's Failure To Provide Adults With Mental Retardation Adequate Procedures for Admission To Or Release From Civil Commitment In State Human Development Centers Violates Plaintiffs' Rights To Due Process of Law.

#### 1. Plaintiffs are Entitled to Due Process Protections Because Their Involuntary Confinement by the State of Arkansas Constitutes an Infringement of Their "Liberty Interests" Protected From Arbitrary Deprivation by the Due Process Clause of the Fourteenth Amendment.

The United States Supreme Court has identified confinement in an institution as a deprivation of liberty protected by the Due Process Clause of the Fourteenth Amendment. "It is undisputed that civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979)(emphasis added)("clear and convincing" standard of proof is constitutionally required in civil commitment proceeding.); *see also Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Collins v. Bellinghausen*, 253 F.3d 591, 596 (8th Cir. 1998)(where individual was summarily removed from nursing home and

subjected to involuntary commitment procedures, "it was clearly established that liberty from bodily restraint is protected by the Due Process Clause of the Fourteenth Amendment. This liberty interest is implicated in involuntary commitment proceedings.").

This same liberty interest was implicated when Plaintiffs Harve Porter and Robert Norman were involuntarily confined without being afforded procedural due process. Mr. Porter was involuntarily admitted to SEAHDC on March 30, 1998. In Spring 2000, after Judge McGowan dismissed the action pending in probate court, Mr. Norman was involuntarily confined to the SEAHDC by mutual agreement of SEAHDC staff and Mr. Norman's guardian, Charlie Harris. (Plaintiffs' Exhibit 8, Sworn Statement of Charlie Harris, p.7.21).

"[I]n the majority of cases, the admissions application is made by the guardian." (Plaintiffs' Exhibit 1, Craft depo. p.19.10). The admission team determines if admission to an HDC is appropriate for that individual. (Plaintiffs' Exhibit 1, Craft depo. p.16.9). The team consists of psychologists, social workers, residential services, medical services, and other professionals in those areas. (Plaintiffs' Exhibit 6, Hancock depo. p.14.12). All members of the team are employees of the HDCs. (Plaintiffs' Exhibit 1, Craft depo. p.18.15). Although the HDC superintendent considers the team's recommendation (Plaintiffs' Exhibit 6, Hancock depo. p. 14.9), [t]he superintendent makes the final decision whether to admit or not." (Plaintiffs' Exhibit 6, Hancock depo. p. 14.9 and Plaintiffs' Exhibit 2, Green depo. p.24.18).

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

(Plaintiffs' Exhibit 2, Green depo. p.35.6). "Certainly anyone can request to be discharged from an HDC." (Plaintiffs' Exhibit 2, Green depo. p.35.12). However, "[t]hey are not always discharged." (Plaintiffs' Exhibit 2, Green depo. p.35.14). If the individual says that he or she no longer wants to be in an HDC, it is up to their guardian to decide whether to accede to the resident's wishes. (Plaintiffs' Exhibit 6, Hancock depo. p.14.17). In this case, as Boyd Hancock, former superintendent of SEAHDC put it, "It was normal for Harve Porter to tell me he wanted to leave the HDC." (Plaintiffs' Exhibit 6, Hancock depo. p.15.8). However, "[t]he guardian is the only one who can provide consent or withhold consent." (Plaintiffs' Exhibit 2, Green depo. p. 37.23).

Finally, underscoring the often permanent and involuntary nature of confinement at the HDCs, if an individual leaves the HDC without permission, law enforcement "shall, upon the written request of the superintendent, return to the human development center or hold in custody an individual who has escaped or who has been temporarily released from the center under a permit to visit." Ark. Code Ann. § 20-48-410. "If they are gone for a significant length of time, you contact the Sheriff's Office so that they can help you look." (Plaintiffs' Exhibit 2, Green depo. p.32.18). Harve Porter, "would run off quite a bit." (Plaintiffs' Exhibit 6, Hancock depo. p. 30.16-20). When he disappeared, the policy was that, "[w]hen they're gone, we always look, you know, get an alert for them. If they're gone a certain time, there are procedures that we follow. We notify the authorities." (Plaintiffs' Exhibit 6, Hancock depo. p.31.3-5 and 31.7).

"That happened with Harve Porter. If he was gone over a certain amount of time, we would have to notify the local authorities and they would look, aid in the search. The authorities had to pick him up before. I don't know how many times. It was often." (Plaintiffs' Exhibit 6, Hancock depo. p.31.12, 31.18, and 31.20). After the disappearances, "[w]e put him on closer

watch, and told people to watch him closer. That's all you can do." (Plaintiffs' Exhibit 6, Hancock depo. p.31.23). Each time that Mr. Porter ran away from the confinement, "[h]e was always going home." (Plaintiffs' Exhibit 6, Hancock depo. p.32.2). During the individual's confinement, the "HDC assumes responsibility for. . . making sure that they are in a safe environment and that they are provided care." (Plaintiffs' Exhibit 2, Green depo. p.43.9). "The HDC provides food, shelter, individualized training, job training, all that based on their abilities or their level of functioning, speech therapy, physical therapy, social work, case management, behavioral management, psychiatric care, if needed, psychological testing and evaluation, recreation, special education, if they were in the appropriate age group, nursing, 24-hour nursing care, 24-hour waking staff, transportation, dental, eye, all medical type care that was necessary." (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.29.6). "They go off the grounds for haircuts and recreation." (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.29.22). "Basically, I guess everything else was on campus." (Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.30.3).

In enacting the Americans with Disabilities Act, Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(5). Furthermore, "[c]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 601. Instead of promoting a healthy and educational atmosphere, in many instances, the confinement promotes degeneration in the individual and lack of growth that is supposed to be fostered in these institutions. Indeed, defendants

themselves acknowledge that "[m]any supposed 'short term' stays in. . . an Intermediate Care Facility for Mental Retardation become extended stays that last a lifetime." (Plaintiffs' Exhibit 11, *The Olmstead Plan in Arkansas*, p.21). Defendants' concession that many short-term stays become extended stays that last a lifetime demonstrates the importance of having pre-deprivation procedures that comport with due process.

In sum, Plaintiffs' involuntary commitment constitutes the deprivation of a "liberty" interest and thus triggers the procedural protections of the Due Process Clause of the Fourteenth Amendment. We now turn to the question of what process is due.

**2. Plaintiffs Are Entitled to the Full Panoply of Procedural Due Process Protections Under the *Mathews v. Eldridge* Balancing Test.**

Once it is determined that an individual possesses a "liberty" interest that has been subjected to deprivation (as shown immediately above), one further question remains: How much process is due? In answering that question, courts are required to apply the balancing test first enunciated in *Mathews v. Eldridge,* 424 U.S. 319 (1976). That test has perhaps been best described in *Parham v. J. R.,* 442 U.S. 584 (1979):

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

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

Thus, the interests of Plaintiffs Porter and Norman must be weighed against the interests of the state.

**a. Plaintiffs' freedom -- the private interest affected by Defendants' action -- is of vital importance.**

There is no greater private interest than freedom. *See Hamdi v. Rumsfield,* 124 S.Ct. 2633 (2004). Plaintiffs Porter and Norman's fundamental liberty interest is curtailed by Arkansas' statutes and policies. While the mass of Americans live freely with the right to come and go as they choose, "individuals with disabilities continually encounter various forms of discrimination, including ... segregation." 42 U.S.C. § 12101(a)(5). Plaintiffs Porter and Norman are segregated from the rest of society by their involuntarily confinement in HDCs and the limited possibility of regaining their freedom. As the Supreme Court has noted, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action. *Hamdi,* 124 S.Ct. at 2646. "We have always been careful not to 'minimize' the importance and fundamental nature' of the individual's right to liberty." *Id.* at 2646 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

Rights recognized as "fundamental" by the Court, such as liberty, impose upon the judiciary a special responsibility to scrutinize strictly any legislation or state policy that circumscribes such rights and to determine whether any limitations placed on them are justified by a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702, 767 (1997). The necessary justification for disallowing due process procedures for admitting individuals in HDCs is lacking. Put another way, the state's interest in placing certain individuals in HDCs, however compelling that interest may be, does not outweigh the individual's interest in liberty.

Indeed, in *Youngberg v. Romeo,* the Supreme Court considered the liberty interests of adults with mental retardation confined by the state in an institution. 457 U.S. at 316. To be sure, the plaintiff there did not challenge the *procedures* that led to his confinement. Nevertheless, *Youngberg* is highly instructive here, because the Court characterized the

plaintiff's interest as "a right to freedom from bodily restraint" *Id.* at 316, and noted that "[i]n other contexts, the existence of such an interest is clear in the prior decisions of this Court. Indeed, '[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Id.* (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979)). "This interest survives criminal conviction and incarceration. Similarly, it must also survive involuntary commitment." *Id.* at 316.

In a case directly on point, *Clark v Cohen*, 794 F.2d 79 (3rd Cir. 1986), the court had occasion to consider the procedural due process rights of people with mental retardation who were involuntarily committed to institutions. The Third Circuit upheld a district court ruling that a woman with mental retardation who had been confined for over 28 years without a hearing "had been deprived of her liberty to be free from commitment without due process." *Id.* at 86. The court found that "due process required periodic reviews of her continuing need for institutionalization." *Id.* at 86. Similarly, the process that relegates individuals such as Messrs. Porter and Norman to HDCs violates their procedural due process rights. Once confined within the HDCs, individuals can only be discharged with the permission of their guardian.

In sum, there can be no doubt that the Plaintiffs' freedom, which is the liberty interest at stake in this case, is of paramount importance. It is indeed the most elemental of all freedoms protected by the Constitution. *Hamdi,* 124 S.Ct. at 2646.

**b. Arkansas' civil commitment system poses an enormously high risk of an erroneous deprivation of the Plaintiffs' interest in freedom from bodily restraint.**

Arkansas law and policies regarding HDC admission and discharge present an enormously high risk of erroneous deprivation of the fundamental right to freedom from bodily

restraint. That is so because, instead of relying on the traditional judicial due process protections that are the hallmark of the Due Process Clause, Arkansas' current system perpetuates the fallacy of "voluntary" confinement and relies upon the discretion of individuals – guardians and family members whose interests often conflict with the interests and the stated desires of the institutionalized individuals whose freedom hinges upon their decisions.

**(i) The so-called "voluntary" confinement of individuals with mental retardation.**

Defendants' defense of its standardless system of civil commitment for individuals with mental retardation is built around a fiction: that Plaintiffs and others like them are placed and remain in HDCs "voluntarily" and thus the State owes them no procedural protections. Thus, before addressing whether Arkansas' statutes or policies either individually or together provide sufficient procedural protections for individuals being admitted to or discharged from the HDCs, we must first examine case law on the "voluntariness" question. Those decisions shed light on whether what occurred here to Harve Porter and Robert Norman can sensibly be considered "voluntary" commitment. Those rulings have considered identical circumstances and concluded that "voluntary confinement" is a legal fiction when applied to adults. This Court should do so as well.

In *Doe by Doe v. Austin,* 848 F.2d 1386 (6th Cir. 1988), the defendants maintained that the adult plaintiffs had not been involuntarily committed to an institution because their parents had "voluntarily" committed them. The Sixth Circuit rejected that argument. The court acknowledged that *Parham v. J.R.,* 442 U.S. 584 (1979) had held that parents could commit their *minor* children and thereby waive any due process protections, but nonetheless ruled that *Parham's* reasoning simply did not apply to *adults.* "The Court in *Parham* was concerned with the commitment of minor children, and its conclusions flow more or less naturally from the

unique and traditional relationship shared between parent and child." *Id.* at 1393 (quoting *Parham*, 442 U.S. at 602-03). "Moreover," the Court elaborated, "the interest of the parents in avoiding 'significant intrusion into the parent-child relationship' as noted in *Parham* is simply not as great in the case of an adult." *Id.* (quoting *Parham*, 442 U.S. at 610).

With this distinction in mind, the Sixth Circuit refused to tolerate a system in which defendants could hide behind the pretense that adults with mental retardation are admitted to and remain in institutions on their own volition:

> [T]he notion that the continuing confinement of the class members is voluntary notwithstanding the possible involuntariness of their initial confinement is, at best, an illusion. Indeed, the practice of relying upon some affirmative act on the part of profoundly and severely retarded persons to signal their will to escape confinement, coupled with the presence of a parent or guardian who may have played a pivotal role in institutionalizing the admittee in the first instance, creates a quite palpable danger that the adult child will be 'lost in the shuffle' (citation omitted). We decline to adopt a measure of voluntariness for the commitment of adults that favors form over substance.

*Austin*, 848 F.2d at 1392.

*Austin* then went on to set minimum due process procedures for adults with mental retardation which included notice, opportunity to present witnesses and to cross-examine the state's witnesses, and the right to an independent decision maker with the authority to implement his or her decision. *Austin*, 848 F.2d at 1393 n.6 (relying on *Vitek v. Jones*, 445 U.S. 480 (1980)).

After *Austin*, state defendants have continued to argue that *Parham* should apply to adults, but this contention continues to be rejected. Relying extensively on *Austin*, the court in *Heichelbech v. Evans*, 798 F. Supp. 708, 712-14 (M.D. Ga. 1992) ruled that an adult could challenge his commitment even where his guardian ad litem disagreed, thus rejecting defendants'

argument, identical to that of defendants here, that only the guardian had the power to challenge his ward's commitment to a state hospital for persons with mental illness. *Id.* at 712-14.

Similarly, in *Thomas S. v. Flaherty,* 699 F.Supp.1178 (W.D.N.C. 1988), the court considered the due process rights of more than 200 plaintiffs whose confinement in psychiatric institutions the state deemed "voluntary." The commitments of these individuals, the court held, "were not truly voluntary. In holding that the term 'voluntary" as applied to these individuals was meaningless, the court was simply refusing to honor form over substance. *See also Bonnie S. v. Altman*, 683 F.Supp.100, 101 (D.N.J. 1988)("no more vital right exists in our society than the ability to challenge commitments through adequate due process. To require the individuals so confined to obtain the consent of their keepers in order to launch those challenges would render the right meaningless.").

Two state appellate courts have also ruled that wards that have been admitted to mental hospitals by their guardians have a right to due process hearings after making a request for their release. *See Von Luce v. Rankin*, 267 Ark. 34, 588 S.W.2d 445 (Ark. 1979), *Lippman v. Johnson,* 68 Ohio App.2d 233, 429 N.E. 2d 167 (1980). Although neither court explicitly addressed the issue of "voluntariness," by according due process rights to wards, the necessary predicate for both courts' rulings was the view that a guardian's determination that her ward should stay confined does not make the ward's commitment "voluntary". Indeed, quite the opposite: These courts' rulings poignantly illustrate that the ward is held by the State against his or her will.

The confinement of the Plaintiffs in this case has undoubtedly been involuntary. Both Harve Porter and Robert Norman have expressed on numerous occasions that they wanted to leave the HDCs, either to return home or find other placement. (Plaintiffs' Exhibit 6, Hancock

depo. p.15.4, Plaintiffs' Exhibit 13, Affidavit of Griffin J. Stockley, Plaintiffs' Exhibit 9, Sworn Statement of Carol Ann Moore, p.21.1 and Plaintiffs' Exhibit 3, Affidavit of Susan Pierce). Both Plaintiffs have been appointed guardians, but were not afforded a judicial hearing to determine whether they should be forced to live in an HDC. (Plaintiffs' Exhibit 6, Hancock depo. p.14.6 & 14.7, and Plaintiffs' Exhibit 8, Sworn Statement of Charlie Harris, depo. p.10.18).

To claim that Harve Porter and Robert Norman, as adults with mental retardation, are voluntary patients is nothing more than a device to avoid the strictures of due process. Maintaining the fiction that individuals with mental retardation are, or could again be, "voluntary" admittees to an institution makes transparent the heightened risk, in a system lacking due process protections, that an erroneous deprivation of liberty will occur.

Put another way, the notion of voluntariness in this context would, if accepted, ensure that no meaningful steps will be taken to sharpen the factual and legal issues that are part of every admission to Arkansas' HDCs. Instead, its acceptance would make certain that only one viewpoint, that of the guardian or administrator of the institution, is considered when an adult with mental retardation is admitted to an HDC, often for the rest of his or her life.

**(ii) <u>The current system is beset by conflicting interests.</u>**

Though it may be comforting to assume that family members and legal guardians have only the best interests of their wards at heart, we know that is not always the case. The financial burden of caring for individuals with mental retardation in the home of their family member or guardian can often be overwhelming. Placing an individual in a state HDC relieves the family member or guardian of that financial burden since Medicaid pays for the majority of services provided at the HDCs. (Plaintiffs' Exhibit 2, Green depo. p.31.22).

Moreover, the interests of people who are required to spend their lives in an institution often conflict with the interests of those responsible for admitting or discharging them. In many instances, family members or legal guardians are persuaded by the state that care in an HDC is the only appropriate placement for their ward thus ensuring the continued existence of the institution. When Ellen Sue Gibson moved Harve Porter into the HDC, neither she nor the interdisciplinary team considered a less restrictive environment for Mr. Porter. It was never discussed. (Plaintiffs' Exhibit 4, Gibson depo. pgs 8-10). Allowing HDC employees, no matter how well-intended or well-qualified, to make the administrative decision, along with the guardian, to confine individuals in institutions for the rest of their lives exponentially increases the risk of erroneous decisions.

It can be assumed that a significant percentage of the people working in the six communities in Arkansas where the HDCs are located make their living at the institutions. Failing to acknowledge that employees benefit from thriving institutions in these communities would be to ignore reality. Given the relative lack of standards for confining individuals with mental retardation in HDCs, it is certainly inappropriate for HDC employees to be called upon to apply the standards, as is the case under Arkansas law and DDS policies.

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

retardation at severe risk of losing their liberty even when they are capable of functioning outside an institutional setting.

**c. Possible deprivation of Plaintiffs' freedom demands a pre-confinement judicial hearing.**

The value of Plaintiffs' proposed substitute procedures, pre-confinement judicial hearings, far outweighs the administrative burden judicial hearings might impose in light of the importance of the liberty interest at stake for Mr. Porter and Mr. Norman.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Within this flexible regime, at bottom, however, "the fundamental requirement of due process is the opportunity to be heard, "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Unfortunately for Plaintiffs, Arkansas' HDC admission and discharge statutes and policies are at odds with fundamental notions of due process. None of Arkansas' statutes or policies contains a mandatory hearing process that applies to admission or discharge. No Arkansas statute or policy even provides an individual the right to disagree with the initial placement or discharge in an HDC.

In theory, the Arkansas statutes contemplate alternative procedures for admission to an HDC: "voluntary" admissions or legal commitment. "A parent or guardian" files a verified petition with the Board, which states, among other things, "whether the petitioner desires that the individual be admitted voluntarily or by commitment." Ark. Code Ann. § 20-48-405(a)(7). Thereafter, it is within the unfettered and unreviewable discretion of the Board as to how an individual enters an HDC: "The board may permit the voluntary admission of the individual to a center for such period of time as the board may deem necessary for the proper care, training, and

education of the individual. The admission shall be by action of the board without the necessity of any court procedure." Ark. Code Ann. § 20-48-406(b).

The Board "may determine that the individual should be admitted to a center by legal commitment only. In that event, the board shall file the petition for admission with the probate court of the county in which the individual resides." Ark. Code Ann. § 20-48-406(c)(1). Statutory procedures to be followed in "court commitments" contain only the following requirements: The Court in its discretion "may appoint one (1) or two (2) reputable physicians to examine the individual and report to the court the mental status of the individual...or it may adopt the report of the physician appointed by the board..." Ark. Code Ann. § 20-48-406(c )(3). At "the hearing on the petition, the court shall determine whether or not the individual should be committed to a center for care, treatment, and training and shall enter an appropriate order in accordance with its determination." Ark. Code Ann. § 20-48-406(c)(4).

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

Statutory requirements relating to discharge from an HDC are even more at odds with fundamental notions of due process - indeed, they are nearly non-existent. An individual admitted to an HDC as a "voluntary" admission, "may be withdrawn from the HDC at any time

upon the application of the parent or guardian who has legal custody of the individual" upon "thirty (30) days notice in writing...." Ark. Code. Ann. § 20-48-412(a). Individuals committed by a probate court may only be discharged if in the "judgment of the board and the superintendent, his or her condition justifies the discharge." Ark. Code. Ann. § 20-48-406(b).

Plainly, once admitted, adults with mental retardation, such as Messrs. Porter and Norman, are essentially incarcerated for life, unless released at the discretion of the very persons who are holding them, without any access to judicial process and the fundamental due process guarantees that judicial process ordinarily entails.

The question whether due process requires that the finder of fact in a proceeding to commit an individual with mental retardation to an institution be a judicial officer is a matter of some debate. In *Doe by Doe v. Austin,* 668 F.Supp. 597 (W.D.Ky. 1986) the district court found that such commitment results in an extreme curtailment of personal liberty.

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

*Id.* at 600.

The Sixth Circuit did not agree with the lower court's decision in this regard. Although acknowledging that "as a matter of policy, precommitment review by a judicial officer would ensure the most vigorous protection of the mentally retarded, and thus, might be preferable, it has been noted in a variety of situations that due process does not require that the neutral trier of fact be legally trained or a judicial or administrative officer." *Austin*, 848 F.2d at 1393. However, the cases cited by the Sixth Circuit do not support that court's conclusion. *Id.* The only case that

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

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

*Id.* at 480.

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

Other cases cited in *Austin*, such as *Goldberg v Kelly*, 397 U.S. 254 (1970)(requiring trial-like administrative hearing prior to welfare benefits termination), and *Parham,* 442 U.S. at 607, either do not involve liberty interests or, as discussed earlier, involve liberty interests of children. On the other hand, the Supreme Court has repeatedly recognized that when a fundamental, unconditional liberty interest is at stake, a judicial hearing is required before that interest may be circumscribed.

The fundamental nature of the interest at stake in this case—freedom from bodily restraint and the opportunity to live on one's own in the community —necessitates that pre-

deprivation judicial hearings be held to avoid an erroneous institutionalization. Indeed, Defendants have admitted that short-term stays in intermediate care facilities for the mentally retarded often become what amounts to a life sentence. (Plaintiffs' Exhibit 11, *The Olmstead Plan in Arkansas,* p.21).

In sum, the current state's admission and discharge procedures for HDCs are fundamentally unfair for they are infected with a myriad of problems. Adults with mental retardation subject to involuntary confinement have little, if any, prospect of preventing erroneous deprivations of liberty. For these reasons, the value of pre-confinement judicial hearings for admission and discharge to the HDCs is central, particularly in light of the massive curtailment of liberty that institutionalization entails.

**d. Protection of Plaintiffs' "Liberty Interest" far outweighs the fiscal and administrative burden imposed by pre-confinement judicial hearings.**

The most visible burden on the state would be the cost of judicial hearings. Concededly, courts have found that "the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Mathews*, 424 U.S. at 347. However, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision." *Id.* at 348. Certainly, the welfare of the state is immeasurably enhanced when the needs of its citizens with disabilities are correctly identified. The cost to the government of implementing due process procedures is not *de minimus,* but it pales beside the human cost of lives spent in institutions that could beneficially be spent in the community. Presently, over 12,000 individuals with developmental disabilities are well served throughout

Arkansas – outside the institutional setting - by responsible community providers who are licensed by the state. (Plaintiffs' Exhibit 3, Affidavit of Susan Pierce).

In weighing the societal costs, most states have decided to provide procedural protections for individuals with mental retardation who are subject to involuntary civil commitment. For the Court's convenience, Plaintiffs attach a chart that tracks the involuntary commitment laws pertaining to people with mental retardation (Plaintiffs' Exhibit 10, Chart tracking involuntary commitment laws for individuals with mental retardation). Of the 50 jurisdictions reviewed, 33 provide judicial hearing for individuals with developmental disabilities prior to admission to a facility/program. The fact that Arkansas is an extreme outlier is important not only because it demonstrates the state's failure to live up to the basic norms, but because it illustrates that providing judicial hearings for adults with mental retardation whose liberty is at stake is eminently practicable. Such hearings are costly, but not overwhelmingly so, as the practice in most other states shows.

### B. The State's Failure To Provide Procedures For Adults With Mental Retardation Similar To Procedures Provided For Adults With Mental Illness Violates Plaintiffs' Rights to Equal Protection Of The Laws.

Legislation frequently involves making classifications that either advantage or disadvantage one group of persons, but not another. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. Plaintiffs are being denied these protections because admission and discharge procedures from the state's six HDCs set forth in Ark. Code Ann. §20-48-401 *et seq.* and Manual numbers 1020, 1037, 1053, and 1086 fail to provide the same or similar procedures to Plaintiffs as are provided to individuals with mental illness who

are committed to a facility pursuant to Ark. Code Ann. §20-47-201 *et seq.* (Plaintiffs' Second Amended Complaint, para. 52, March 16, 2004).

Generally, where fundamental rights and liberties are at stake, classifications that might invade or restrain them must be closely scrutinized and carefully confined. *Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 464 (8th Cir. 1999). The Supreme Court in *Heller v Doe*, 509 U.S. 312 (1993), avoided deciding this issue of strict scrutiny, holding "the issue [was] not properly presented" on appeal. "Both parties have been litigating this case for years on the theory of rational basis review which...does not require the State to place any evidence in the record, let alone the extensive evidentiary showing that would be required for these statutes to survive heightened judicial scrutiny." *Heller* at 318.

Plaintiffs, unlike the plaintiffs in *Heller*, have contended from the filing of their complaint that they "have a fundamental liberty interest in constitutionally adequate admission and discharge procedures in the state's HDCs. Insofar as these procedures, whether statutory or mandated by policy, impact a fundamental liberty interest of Plaintiffs, they are subject to the judicial standard of strict scrutiny." (Plaintiffs' Second Amended Complaint, para. 25, October 14, 2003).

Plaintiffs are challenging Arkansas' statutes and policies, which infringe upon their fundamental right to be free from undue physical restraints. *Foucha v. Louisiana,* 504 U.S. 71 (1992). This Court is therefore required to analyze the challenged statutes and policies under a strict scrutiny standard. *Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc.,* 167 F.3d at 464.

**a. Plaintiffs Harve Porter and Robert Norman are similarly situated to individuals with mental illness who are involuntarily confined or who are at risk of involuntary confinement.**

The first step in an equal protection analysis focuses on whether the Plaintiffs are similarly situated to another group for purposes of the challenged government action. *Klinger v. Department of Corrections* 31 F.3d 727, 731 (8th Cir. 1994) (citing *More v. Farrier*, 984 F.2d 269, 271 (8th Cir. 1993)). It is important to note the challenged government action in this case is the state's ability to deprive Plaintiffs of their fundamental right to be free from bodily restraint without providing them an opportunity to be heard "at a meaningful time and in a meaningful manner." *Morrisey,* 408 U.S. at 481. By failing to provide due process for individuals with mental retardation, the state has found that one group, individuals with mental illness, should get due process protections to ensure their liberty interest is not erroneously deprived and another group, individuals with mental retardation, is somehow not worthy of any due process protections before their liberty is deprived, often for the rest of their lives.

Defendants have alleged, and Plaintiffs are willing to concede, that there are differences in the way mental retardation and mental illness manifest themselves and are treated. *See Heller v. Doe,* 501 U.S. 312 (1993). However, Plaintiffs here do not contend, as did plaintiffs in *Heller,* that the *disabilities* of mental illness and mental retardation are similar in all ways. Rather, Plaintiffs Harve Porter and Robert Norman allege they are similarly situated for equal protection purposes because, like individuals with mental illness, they are individuals with a disability at risk of involuntary confinement.

The Eighth Circuit in *Klinger*, 31 F.3d 727 (8th Cir. 1994) found that women inmates were not similarly situated to male inmates at Nebraska State Penitentiary (NSP) for the purpose of challenging prison programs and services. *Klinger* at 728. However, the court found "male

and female inmates are similarly situated for purposes of the process by which the Department makes programming decisions." *Id.* at 733 n 4. Thus, Plaintiffs, may not be similarly situated with individuals who are mentally ill so as to allow them to challenge their *treatment* in the HDCs; however, Plaintiffs are similarly situated to individuals with mental illness to challenge the *unequal process* by which the State deprives them of their freedom.

**b. Defendants fail to offer a compelling reason to justify unequal treatment of people with mental illness and mental retardation prior to institutionalization.**

In Part IV.A. above, Plaintiffs showed that the challenged statutes and policies burden their fundamental right to be free from bodily restraint without due process of law. In the equal protection context, that showing shifts the burden to the state to prove that the statutes and policies serve a compelling state interest and are narrowly tailored to achieve that interest. If there are less drastic means by which a compelling state interest may be served, then the less burdensome approach must be used. *See, e.g., Lawrence v. Texas*, 559 U.S. 558 (2003), *Zablocki v. Redhail* 434 U.S. 374 (1978), *Dunn v. Blumstein*, 405 U.S. 330 (1972), *Shapiro v. Thompson*, 394 U.S. 618 (1969) (reversed in part on other grounds). "Only rarely are statutes sustained in the face of strict scrutiny. *Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

Defendants have not provided Plaintiffs or this Court a compelling justification for the differing procedures for civil commitment of individuals with mental retardation and individuals with mental illness. Defendants' failure dictates that this Court find that the admission and discharge procedures for HDCs violate the Equal Protection Clause of the Fourteenth Amendment.

**c. The challenged statutes and policies are not narrowly tailored to achieve a compelling state interest.**

Even if the Court finds that Defendants, in responding to this brief, have positied a compelling state interest, the challenged statutes and policies would still violate the Equal Protection Clause because those statutes and policies are not narrowly tailored to meet any interest, no matter how speculative it may be at this juncture.

To determine whether the challenged statutes and policies are narrowly tailored to justify the differing standards for the institutionalization of individuals with mental illness and individuals with mental retardation, this Court must first analyze the current procedures for the two similarly situated groups of individuals.

Individuals with mental disabilities, those with mental illness and those with mental retardation, are treated very differently by the State of Arkansas. Arkansas has enacted a comprehensive code for individuals with mental illness subjected to involuntary confinement in a "hospital or to a receiving facility or program." Ark. Code Ann. § 20-47-210. These procedures are set forth in Ark. Code Ann. § 20-47-211 *et seq.* and call for the full range of procedural due process, including a judicial hearing.

Though the statute authorizes immediate confinement if an individual is a danger to self or others, the individual must be served with a petition and a "statement of the following rights: (1) That he or she has the right to effective assistance of counsel, including the right to a court-appointed attorney; (2) That he or she and his or her attorney have a right to be present at all significant stages of the proceedings and at all hearings except that no attorney shall be entitled to be present upon examination of the person by the physician or any member of the treatment staff pursuant to an evaluation, whether initially or subsequently; (3) That he or she has the right to present evidence in his or her own behalf; (4) That he or she has the right to cross-examine witnesses who testify against him or her; (5) That he or she has a right to remain silent; and (6)

That he or she has a right to view and copy all petitions, reports, and documents contained in the court file." Ark. Code Ann. § 20-47-213 requires an examination of the person. Ark. Code Ann. § 20-47-213 sets out the hearing procedure for a 45-day maximum involuntary admission and requires that the person be proven by "clear and convincing" evidence to be "of danger to himself or others." Ark. Code Ann. § 20-47-215 permits additional periods of confinement pursuant to the procedures set forth above.

The state has failed to enact similar laws for individuals with mental retardation. *See* Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.) and Manual numbers 1020, 1037, 1053 and 1086. In conducting an equal protection analysis, a comparison of the two statutory regimes ordinarily would be appropriate. However, the vast disparity between the protections afforded individuals with mental illness and those afforded individuals with mental retardation prior to institutionalization (as discussed earlier in this brief) renders a comparison unnecessary. Plaintiffs cannot fathom a scenario under which this Court could find that statutes and policies that are entirely void of constitutionally adequate Due Process procedures are narrowly tailored to meet any state interest.

Under the challenged statutes and policies, Defendants have the authority to confine the most innocent of our citizens in institutions for their entire lives with the mere stroke of a pen. It is a sad and ultimately futile argument that champions more procedural protections for heinous criminals and alleged terrorists than individuals whose only crime was to be born with fewer mental resources than "ordinary" persons. Such a scheme does not provide adults with mental retardation the equal protection of the laws.

## V. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for summary judgment and declare unconstitutional the challenged provisions of the Arkansas Mental Retardation Act and policies of the Arkansas Division of Developmental Disabilities Services. The Court should also grant Harve Porter a judicial hearing in accordance with procedures and standards comporting with due process of law as mandated by the Court until such time as the Arkansas General Assembly enacts constitutional procedures pertaining to admission to and discharge from HDCs.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I, Janet C. Baker, do hereby certify that a copy of the above and foregoing Plaintiffs' Brief in Support of Motion for Summary Judgment on Fourteenth Amendment Due Process and Equal Protection Claims was served upon the following by placing a true and correct copy in the U.S. Mail postage prepaid, on this 27th day of July 2004.

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