

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

MAR 16 2004

JAMES W. McCORMACK, CLERK
By: _____
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**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

HARVE PORTER and ROBERT NORMAN,)
By Their Next Friend, Susan Pierce)

and)

DISABILITY RIGHTS CENTER, INC.,)

Plaintiffs,)

vs.)

No. 4:03 CV00812 *SKW*

KURT KNICKREHM, in his official capacity as)
Director of the Arkansas Department of Human Services,)
DR. JAMES C. GREEN, in his official capacity as)
Director of Developmental Disabilities Services,)

and)

KAY BARNES, RON CARMACK, DON A. DUNN,)
GROVER MILTON EVANS, WESLEY KLUCK,)
RANDY LANN, AND SUZANN MCCOMMON, in)
their official capacities as members of the Board of)
Developmental Disabilities Services)

Defendants)

and)

Family and Friends of Care Facility Residents)
and Ellen Sue Gibson)

Defendant Intervenors.)

SECOND AMENDED COMPLAINT

Come now Plaintiffs, Harve Porter and Robert Norman, by and through their next friend, Susan Pierce, and Disability Rights Center, by and through their attorneys Janet C.

Baker, Dana K. McClain, and Adam H. Butler, and for their Second Amended
Complaint, state:

I. PRELIMINARY STATEMENT

1. This is an action brought on behalf of Harve Porter and Robert Norman pursuant to 42 U.S.C. § 1983, and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution.
2. Plaintiff Harve Porter is an adult individual with developmental disabilities who has been involuntarily confined at two human development centers since May 28, 1998.
3. Plaintiff Robert Norman is an adult individual with developmental disabilities who was involuntarily confined at the Southeast Arkansas Human Development Center (SEAHDC) from August 14, 2000, until he was moved to Friendship Community Care Inc., Russellville, Arkansas, on or about January 15, 2004.
4. Plaintiff Disability Rights Center (DRC) is the Protection and Advocacy system for the State of Arkansas.
5. Defendants are individuals (as set out in detail below) who are authorized by state law to administer the services, programs and policies of the six human development centers in Arkansas, created and maintained “for the care, custody, treatment and training of mentally defective individuals. . .” ACA § 20-48-403(a).

6. As an adult resident of the human development centers (HDCs), Plaintiff Porter is involuntarily confined in violation of the Due Process and Equal Protection Clauses of the 14th Amendment to the U. S. Constitution. At the time Plaintiffs filed their original complaint, Plaintiff Robert Norman was an adult resident of an HDC. From August 14, 2000, until on or about January 15, 2004, he was involuntarily confined in violation of the Due Process and Equal Protection Clauses of the 14th Amendment to the U. S. Constitution. Plaintiff Norman continues to be at risk of involuntary confinement in an HDC even though he is currently living at Friendship Community Care Inc., Russellville, Arkansas.

7. Plaintiffs seek to have declared unconstitutional Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.) and DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086, insofar as these statutes and policies of Defendants deny them a right to a judicial hearing with due process procedures (as set out below). (A true and correct copy of Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.) and DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086 are attached hereto and adopted by reference as if set out word for word and identified as Exhibits 1 and 2). Further, Plaintiff Porter seeks permanent injunctive relief mandating that Defendants forthwith grant him 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 standards and procedures pertaining to admission and discharge.

II. JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343.
9. Injunctive and declaratory relief are authorized pursuant to 28 U.S.C. §§ 2201 and 2202 and Fed. R. Civ. P. 65 and 57.
10. Venue in this district is appropriate under 28 U.S.C. § 1391(b)(1) and (2) since a substantial number of the events that gave rise to this complaint occurred in this district.

III. PARTIES

Plaintiffs

11. Harve Porter is a thirty-eight (38) year old individual with developmental disabilities who is currently involuntarily confined at Alexander Human Development Center.
12. Plaintiff Robert Norman is a forty-three year old individual with mild mental retardation who also has a mental illness and was, at the time Plaintiffs' Complaint was originally filed, involuntarily confined at the SEAHDC. He was moved on or about January 15, 2004, to Friendship Community Care Inc., Russellville, Arkansas.

13. As the Protection and Advocacy system for the State of Arkansas, Disability Rights Center is authorized by federal law to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for the rights of such individuals [with developmental disabilities] within the State who are or who may be eligible for treatment, services or habilitation . . .” 42 U.S.C. § 15043(a)(2)(A)(i).

Next Friend:

14. Susan Pierce is an Advocate/Investigator for DRC. In this capacity she monitors facilities providing services to people with developmental and physical disabilities, and mental illness. She has worked for DRC for five years.

Defendants:

15. Arkansas Department of Human Services (ADHS) is the state agency responsible for the coordination and provision of treatment, programming and services to individuals with disabilities throughout Arkansas.
16. Kurt Knickrehm is the Director of the ADHS. As Director of ADHS, pursuant to Ark. Code Ann. § 25-10-102 (b)(1)(A) (Michie 2002 Repl.), Defendant Knickrehm is required to exercise his authority to direct, control, and supervise the Division of Developmental Disabilities Services (DDS), the Division of

Medical Services (DMS), the Division of Mental Health Services (DMHS) and all other divisions set forth in said statute. Defendant Knickrehm is appointed by and serves at the pleasure of the Governor. [Ark. Code Ann. § 25-10-101 (b) (Michie 2002 Repl.)].

17. Dr. James C. Green is the Director of DDS and is authorized to operate and manage said division. As director of DDS, Defendant Green is responsible in an administrative capacity for the provision and coordination of all services to Plaintiffs by authority delegated to him by the Board of DDS.
18. DDS is a division of ADHS and is responsible for the provision of treatment, programming and services provided to individuals with developmental disabilities by both community programs and human development centers throughout the State of Arkansas. However, the human development centers, as provided by law, are under the control of the Board of DDS. [Ark. Code Ann. § 25-10-102(b)(2)(A) (Michie 2002 Repl.)].
19. The Board of DDS is a seven-person board created pursuant to Ark. Code Ann. § 20-48-203 *et seq.* (Michie 2001 Repl.). Kay Barnes, Ron Carmack, Don A. Dunn, Grover Milton Evans, Wesley Kluck, Randy Lann, and Suzann McCommon are duly appointed members of the Board.
20. The Board of DDS is authorized to make regulations concerning the admission, discharge, care, custody, placement, training and

discipline of individuals receiving developmental disability services in the human development centers. [Ark. Code Ann. §20-48-205(b) (Michie 2001 Repl.)]

IV. FACTUAL ALLEGATIONS

21. Harve Porter is a thirty-eight (38) year old individual with developmental disabilities who is currently involuntarily confined at Alexander Human Development Center.
22. On April 3, 1987, Booneville Human Development Center first took custody of Harve Porter on a "respite" admission. On or about April 17, 1987, Booneville Human Development Center changed the status of Harve Porter to a "regular" admission.
23. On June 4, 1987, Booneville Human Development Center released Harve Porter to his family, and formally discharged him on June 23, 1987.
24. On December 2, 1994, Ellen Sue Gibson, mother of Harve Porter, 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).
25. On February 22, 1995, an order appointing Ellen Sue Gibson Guardian of the Person and Estate of Plaintiff Harve Porter (In the Matter of Harve Edward Porter, an Incapacitated Person, Polk County Probate #G 94-27) was issued.

26. On March 30, 1998, SEAHDC took custody of Harve Porter on a “respite” admission. Alexander Human Development Center then took custody of Harve Porter for diagnosis and evaluation on May 6, 1998.
27. On May 13, 1998, SEAHDC regained custody of Harve Porter for yet another “respite” admission. On May 28, 1998, SEAHDC then changed the status of Harve Porter to a “regular” admission.
28. On or about September 8, 2003, Harve Porter was allegedly the victim of an incident of abuse at SEAHDC that resulted in significant bruises and scratches on Harve Porter’s back.
29. An internal investigation conducted by SEAHDC staff found that Harve Porter’s injuries were caused by his bed controls, although a physician’s report dated September 18, 2003 stated, “Suspicious for abuse, but uncertain of what may have caused this.”
30. On October 22, 2003, Harve Porter was transferred from SEAHDC to Alexander Human Development Center.
31. Harve Porter is currently involuntarily confined at Alexander Human Development Center pursuant to “regular” admission procedures, which include either statutory process (Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.)) or administrative process (DDS Director’s Office Policy Manual policy numbers 1020, 1037, 1053 and 1086).

32. Harve Porter has moderate mental retardation. Though he has been involuntarily confined in various human development centers for several years, he 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.
33. On numerous occasions, Harve Porter has stated to human development center and DRC staff that he wishes to leave the Human Development Center, but has not been permitted to do so.
34. Robert Norman is a forty-three year old individual with mild mental retardation who also has a mental illness.
35. On August 2, 1999, Robert Norman, who had been charged with arson, was committed to the "Arkansas State Hospital or other suitable facility" by Honorable John B. Plegge to undergo a mental health evaluation. (State of Arkansas v. Robert Norman, Pul. Cir. #98-4532).
36. On or about August 3, 1999, SEAHDC took custody of Robert Norman on a "respite" admission.
37. On or about September 22, 1999, SEAHDC changed the status of Robert Norman to a "regular" admission.
38. On or about January 7, 2000, Honorable John B. Plegge entered an order of acquittal of Robert Norman by reason of mental disease or defect and committed him to SEAHDC.

39. On or about February 23, 2000, Honorable Mary Ann McGowan dismissed an Act 911 action against Robert Norman pending in probate court, finding that insofar as Robert Norman had been found not to be able to participate in his defense of the charge of arson, that a "final order could not have been entered in his criminal case until such time as Respondent was found fit to proceed." (In the Matter of Robert Norman, Pul. Probate # PCV 2000-281).
40. On April 25, 2000, an attorney for the Department of Human Services for the State of Arkansas filed a guardianship petition in Bradley County seeking a permanent limited guardianship for an individual named 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).
41. On August 14, 2000, letters of permanent limited guardianship over Robert Norman setting forth the powers in paragraph seven were issued to Charlie Harris.
42. On numerous occasions Robert Norman stated to employees of SEAHDC and employees of the Disability Rights Center that he wished to leave the facility but was not permitted to do so until he

was moved to Friendship Community Care, Inc., Russellville Arkansas, on or about January 15, 2004.

43. There are six human development centers in the State of Arkansas. The human development centers provide confined institutional living for individuals with mental retardation that ranges in severity from individuals who manage their own daily needs and activities of daily living, to individuals who are unable to speak and require restraints to prevent them from injuring themselves.
44. Plaintiff Porter is involuntarily confined at Alexander HDC and was previously involuntarily confined at SEAHDC pursuant to either statutory process (Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.)) or administrative process (DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086).
45. Plaintiff Norman was confined at SEAHDC from August 14, 2000, until on or about January 15, 2004, pursuant to either statutory process (Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.)) or administrative process (DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086). Plaintiff Norman continues to be at risk of involuntary confinement in a HDC pursuant to either statutory process (Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.)) or administrative process (DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086).

V. LEGAL CLAIMS – CONSTITUTIONAL VIOLATIONS

46. Plaintiffs incorporate by reference paragraphs 1 – 45.
47. All actions complained of herein were taken under color of state law.
48. Plaintiffs Porter and Norman have a fundamental liberty interest in constitutionally adequate admission and discharge procedures to and from the human development centers in the State of Arkansas. 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.
49. Plaintiff Porter is being denied Due Process of Law as guaranteed by the 14th Amendment insofar as admission and discharge procedures for the state's human development centers set forth in Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.) and DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086 do not provide for a judicial hearing which grants plaintiffs before admission: (a) the right to be present; (b) the right to the effective assistance of appointed counsel, if indigent; (c) the right to present evidence in his own behalf; (d) the right to cross-examine witnesses; (e) the right to view any and all petitions and reports in the court file of his case; (f) the right to subpoena witnesses; (g) the right to periodic judicial review; (h) the right to

be placed in the least restrictive environment; (i) the right to adequate and timely notice of the above rights; and, (k) the right to a standard of judicial involuntary commitment which requires the state to prove by clear and convincing evidence that the individual sought to be committed poses a substantial risk of harm to himself or others and requires a level of supervision and care that can only be provided by one of the other human development centers in the State of Arkansas.

50. Plaintiff Norman was involuntarily confined at SEAHDC from August 14, 2000, until on or about January 15, 2004, and was denied Due Process of Law as guaranteed by the 14th Amendment insofar as admission and discharge procedures for the state's human development centers set forth in Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.) and DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086 do not provide for a judicial hearing which grants plaintiffs before admission: (a) the right to be present; (b) the right to the effective assistance of appointed counsel, if indigent; (c) the right to present evidence in his own behalf; (d) the right to cross-examine witnesses; (e) the right to view any and all petitions and reports in the court file of his case; (f) the right to subpoena witnesses; (g) the right to periodic judicial review; (h) the right to be placed in the least restrictive environment; (i) the right to adequate and timely notice

of the above rights; and, (k) the right to a standard of judicial involuntary commitment which requires the state to prove by clear and convincing evidence that the individual sought to be committed poses a substantial risk of harm to himself or others and requires a level of supervision and care that can only be provided by one of the other human development centers in the State of Arkansas. He continues to be at risk of involuntary confinement without due process or equal protection of the laws.

51. Plaintiffs Harve Porter and Robert Norman are individuals with mental retardation who are similarly situated to individuals with mental illness insofar as people with mental retardation and people with mental illness both face the threat of institutionalization through involuntary commitment procedures.

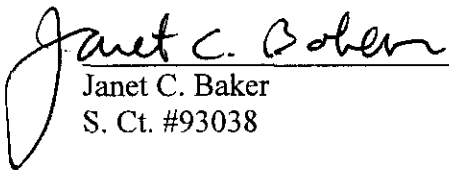
52. Plaintiffs Porter and Norman are being denied Equal Protection of the law as guaranteed by the 14th Amendment insofar as admission and discharge procedures for the state's human development centers set forth in Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.), and DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086 do not provide the same or similar protections to them 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.* (Michie 2001 Repl.).

53. Because the interest implicated here is a fundamental liberty interest and Plaintiffs Harve Porter and Robert Norman are similarly situated to individuals with mental illness who are subject to involuntary commitment procedures, Plaintiffs' equal protection claim should be reviewed under the strict scrutiny standard.

WHEREFORE, Plaintiffs pray,

- A. That the Court assume jurisdiction of this action;
- B. That the Court declare unconstitutional Ark. Code Ann. § 20-48-401 *et seq.* (Michie 2003 Suppl.) and DDS Director's Office Policy Manual policy numbers 1020, 1037, 1053 and 1086 pertaining to admission and discharge procedures of the human development centers;
- C. That the Court require Defendants to hold a judicial hearing for Plaintiff Porter which comports with minimum standards of Due Process and Equal Protection pursuant to the 14th Amendment; and
- D. For attorney's fees, for costs, and for all other proper and just relief to which the Plaintiffs may be entitled. [42 U.S.C. § 1988.]

Respectfully submitted,


Janet C. Baker
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Dana K. McClain
S. Ct. #01028

Adam H. Butler
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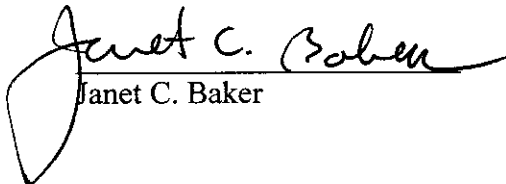
CERTIFICATE OF SERVICE

I, Janet C. Baker, do hereby certify that a copy of the above and foregoing Second Amended Complaint was served upon the following by placing a true and correct copy in the U.S. Mail postage prepaid, on this 16th day of March, 2004.

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Janet C. Baker

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

*Exhibits Attached
to Original
Document in
Courts's Case File*