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United States District Court, W.D. Missouri, Saint Joseph Division.

Allen PRESTON, Plaintiff,
v.
Dr. Nemesio GUTIERREZ, et al., Defendants.

No. 90–6029–CV–SJ–6. | July 23, 1993.

Attorneys and Law Firms

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Opinion

MEMORANDUM AND ORDER

SACHS, Senior District Judge.

***1** Before this court is the plaintiff's Motion for Partial Summary Judgment and the defendants' Cross Motion For Dismissal or Summary Judgment or in the Alternative Motion To Abstain. The plaintiff filed this 42 U.S.C. § 1983 action challenging the constitutionality of various conditions of his confinement at Fulton State Hospital ("Fulton") which is run by the Missouri Department of Mental Health (the "Department"), and alleging that the defendants unconstitutionally withheld Social Security payments. The plaintiff was committed to the Department on December 23, 1985, after he pleaded not guilty by reason of mental defect to a charge of burglary in the second degree and stealing over $150. The plaintiff originally filed a civil rights claim on March 12, 1990, seeking two remedies: release and back-pay of Social Security benefits. The court severed and dismissed the claim for unconditional release from this suit in its order dated May 2, 1990. In a subsequent order dated October 10, 1990, the court held that Social Security payments were not recoverable from these defendants. The plaintiff filed a supplemental complaint on September 24, 1991, seeking injunctive and declaratory relief as well as damages for past and continued administration of psychotropic medication to him without his consent.[1] The remaining defendants are Dr. Nemesio Gutierrez, the plaintiff's treating psychiatrist from February 1990 to August 1991; Mr. Stephen Reeves, Superintendent of Fulton State Hospital since January 1, 1991; and Dr. William Holcomb who was Superintendent of Fulton State Hospital during the period of August 1990 through October 12, 1990.

The plaintiff's motion for partial summary judgment requests summary judgment on the equitable claims. The plaintiff asks the court to declare that the defendants violated his procedural and substantive due process rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In addition, the plaintiff seeks injunctive relief requiring defendants to adopt and follow new policies and procedures for administering psychoactive medications that comply with the Due Process Clause. The defendants' cross motion for summary judgment raises jurisdictional defenses, including standing, ripeness and mootness. The defendants also argue that the plaintiff has not established the elements for injunctive or declaratory relief, and that in any case the court should abstain from deciding this case. Finally, the defendants argue that the defendants' current operating procedure satisfies due process. The court will address the defendants' arguments in turn.

I. STANDING

The defendants contend that the court should dismiss the case because the plaintiff has not established a case or controversy sufficient to invoke this court's jurisdiction under Article III of the United States Constitution. Specifically, the defendants argue that an intervening event, in this case the promulgation of draft Department Operating Regulation ("DOR") 4.152 entitled "Guidelines for Use of Psychoactive Medications," has rendered the plaintiff's claims conjectural, hypothetical and speculative. The plaintiff argues that the plaintiff fulfills the requirements for standing: demonstrating injury in fact including past, present and future harm; showing that the injury may be reasonably traced to the challenged action of the defendants; and showing that a favorable decision will likely redress the injury. According to the plaintiff, subsequent events do not deprive a plaintiff of standing; rather, standing is established at the time the plaintiff brings the action.

***2** The issue is whether the plaintiff has standing to request the court to declare that a past and present policy for involuntarily medicating patients is unconstitutional and to enjoin the state from further involuntary medications until the state's procedures pass constitutional muster. The Supreme Court set forth the prerequisites for parties seeking injunctive relief in *Los Angeles v. Lyons,* 461 U.S. 95 (1983).[2] In that case the plaintiff sued the City of Los Angeles and several police

officers alleging that the officers, without provocation, applied a choke-hold after stopping him for a traffic violation. The plaintiff sought damages and an injunction barring choke-holds except where a suspect threatens deadly force. The Court held that the plaintiff did not have standing, reasoning that the speculative nature of future injury did not satisfy the required showing of "any real or immediate threat that the plaintiff will be wronged again—a 'likelihood of substantial and immediate irreparable injury.' " *Id.* at 111 (citing *O'Shea v. Littleton,* 414 U.S. 488, 502 (1974)). The Court stated that for Lyons to establish standing, he would have had to allege that he would have another encounter with the police and that either, 1) all Los Angeles police always choke any citizen with whom they have an encounter, or 2) that the City ordered or authorized police officers to act in such a manner. *Id.* at 105–106. Relying on *O'Shea,* the Court disregarded the prior incident involving the choke-hold stating that " '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.' " 461 U.S. at 102.

More recently the Court distinguished *Lyons* in *County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661 (1991). In that case the plaintiff challenged a statute which allowed authorities to confine a person for forty-eight hours before making a probable cause determination. The plaintiff sought injunctive and declaratory relief while being held in the jail. In its analysis, the Court determined standing "at the time the Second Amended Complaint was filed." 500 U.S. at ——, 111 S.Ct. at 1667. The Court held that unlike the situation in *Lyons,* the plaintiff filed the complaint while in custody and while subjected to the challenged practice. Unlike the *Lyons* plaintiff, the *McLaughlin* plaintiff could show continuing present adverse effects and accordingly had standing to bring the suit.

In this case, the plaintiff has sufficiently alleged the threat of present and future harm to meet the "likelihood of substantial and immediate harm" standard. The fact that the defendants administered medications against his will in the past does not by itself confer standing for injunctive and declaratory relief. However, the plaintiff filed his complaint on August 24, 1990, and the challenged practice continued until August 1991. Just as the plaintiffs in *McLaughlin* suffered a direct and current injury as a result of their detention without a probable cause inquiry, the plaintiff here suffered direct and current injury as a result of the involuntary medication. This case, just like *McLaughlin,* is easily distinguished from *Lyons:* at the time the plaintiff filed his complaint, the objectionable practice had not ceased. *See McLaughlin,* 500 U.S. at ——, 111 S.Ct. at 1667.[3]

***3** The defendants argue that because of the Department's draft of DOR 4.152 subsequent to the plaintiff's complaint, the plaintiff no longer has standing to assert injunctive and declaratory claims based on the old policy. The defendants, however, confuse the standing and mootness doctrines. *McLaughlin* supports the plaintiff's argument that standing is determined as of the time the plaintiff files his complaint; subsequent events do not affect standing. *See also Carr v. Alta Verde Industries, Inc.,* 931 F.2d 1055, 1064 (5th Cir.1991) (time for determining standing is at the time of the complaint).[4]

II. RIPENESS

Whether an issue is ripe for review the court involves a two prong test: first, the court should evaluate the fitness of the issues for a judicial decision; and second, the court should evaluate the hardship to the parties if the court denies judicial review. *Automotive Petroleum & Allied Industries Employees Union, Local 618 v. Gelco Corp.,* 758 F.2d 1272, 1275 (8th Cir 1985). The policy behind the ripeness doctrine is to "determine whether a dispute has yet matured to a point that warrants decision." *Id.* A federal court should determine all questions, except mootness, regarding the court's subject matter jurisdiction as of the date the plaintiff files the complaint. *Carr,* 931 F.2d at 1061.

The defendants argue that the conjectural and hypothetical nature of the plaintiff's alleged injury and claim render the claims unfit for judicial resolution. In addition, they argue that no hardship will result to the plaintiff if the court withholds court consideration. Their reasoning is that an equal possibility exists that the defendants will attempt to medicate the plaintiff in the future as the possibility that the defendants will not attempt to medicate. Without a current controversy the plaintiff will remain in the same position regardless of a court's ruling.

These arguments have no merit. The defendants allege that the events subsequent to the time plaintiff filed his complaint affect ripeness. As with their theory on the standing question, the defendants confuse mootness with ripeness. As of September 24, 1990, the defendants had administered psychotropic drugs to the plaintiff without his consent, pursuant to a policy of involuntarily medicating patients. A significant threat existed that the defendants would involuntarily medicate him in the future. Thus the plaintiff's interests were sufficiently adverse to the defendants' to present a case or controversy within the court's jurisdiction. *United Food and Commercial Workers International Union, etc. v. IBP, Inc.,* 857 F.2d 422 (8th Cir.1988).

This situation is unlike *Vorbeck v. Schnicker,* 660 F.2d 1260 (8th Cir.1981), *cert. denied,* 455 U.S. 921 (1982), in

which the court dismissed a constitutional challenge to certain provisions of the personnel regulations of the St. Louis Police Department. None of the plaintiffs had been disciplined under the regulations; therefore, the court held that no case or controversy had been pleaded. Here, the plaintiff suffered a real, definite and complete injury and faced a reasonable threat of future injury.[5]

***4** In evaluating the hardship to the parties if the court fails to review the case, the court must take into account prudential considerations. *Bob's Home Service Inc. v. Warren County,* 755 F.2d 625 (8th Cir.1985). At the time of the complaint, the plaintiff had suffered an injury and had an immediate expectation that he would be subject to the same procedures in the future. If this case is not ripe for review now, it is hard to see when it will ever be. *Meadows of West Memphis v. West Memphis,* 800 F.2d 212 (8th Cir.1986). The only real question is whether the case is overripe. The defendants' statement "that the plaintiff will be, in reality, no different than at present, except that the regulatory environment has changed," (Defendants' Cross Motion at p. 5) is more relevant to the mootness question than to the ripeness inquiry. Accordingly, the court finds that the plaintiff's complaint is ripe for review.

III. MOOTNESS[6]

Under the mootness doctrine, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Bishop v. Committee on Professional Ethics & Conduct of Iowa State Bar Asso.,* 686 F.2d 1278, 1283 (8th Cir.1982). An otherwise moot action may be justiciable if the action is "capable of repetition yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Com.,* 219 U.S. 498, 515 (1911). The defendants contend that the plaintiff's declaratory and injunctive claims are moot because the defendants have revised the challenged procedures for involuntarily medicating patients,

> [p]laintiff is not subjected to the identical conditions which framed the earlier administration of medications, because plaintiff does not face the risk of confronting the alleged deficient procedural due process procedures in the past decisions to administer medications. (Defendants Cross Motion, at p. 3).

The defendants rely on the draft DOR 4.152 which would supersede the current procedure outlined in the Department of Mental Health Forensic Manual, and argue that because a new procedure is in place, the plaintiff will never again be exposed to the old procedure. Accordingly, the case does not present a case "capable of repetition, yet evading review." (Defendants Cross Motion, at p. 3).

Unlike the standing and ripeness doctrines, the mootness doctrine requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Emily Iron Cloud v. Sullivan,* No. 92–1795 (8th Cir. January 15, 1993). Therefore, in reviewing the plaintiff's challenge to the defendants' procedure for involuntarily medicating patients, the court must look at the procedure as it now stands, not as it once did. *Hall v. Beals,* 396 U.S. 45, 48 (1969).

***5** It is true that amendment of regulations or promulgation of new regulations providing relief requested can moot cases challenging those regulations. *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Com.,* 680 F.2d 810, 814 (D.C.Cir.1982). Where intervening events have completely eradicated the effects of the alleged violation, those events may moot an issue. *Id.* Unlike *Natural Resources,* however, draft DOR 4.152 does not provide the relief plaintiff requests. The draft DOR is not the official policy of the Missouri Department of Mental Health; it is no more than a draft proposal. Even if adopted, the draft would not provide the plaintiff with all requested relief.[7] The draft DOR does not provide any relief to the plaintiff let alone complete relief, and accordingly, does not moot this case.

IV. ABSTENTION

The defendants argue that the court should abstain from adjudicating this case in favor of a case pending in state court, *R.E.M. v. Schafer,* No. CV 392–506CC (Filed April 21, 1992, Circuit Court of Buchanan County, Missouri). The defendants base their *Colorado River* abstention argument on the existence of this pending litigation. The Clerk of the Circuit Court of Buchanan County has informed the court that the case has been dismissed without opinion. Accordingly, the defendants' abstention arguments based on the pending state litigation are no longer viable.[8] The defendants also argue that the court should abstain on the basis of one of two other recognized abstention principles, *Pullman* and *Burford* abstention.

A. Pullman Abstention

Pullman abstention derives from the Supreme Court's decision in *Railroad Com. of Texas v. Pullman Co.,* 312

U.S. 496 (1941), in which the Court addressed a complaint that the defendants had violated both Texas law as well as the Fourteenth Amendment of the Constitution. Because a decision on an unclear state law could avoid the constitutional issue, the Court abstained from the case stating that "a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." 312 U.S. at 500. Most cases involving *Pullman* type abstention are, like the *Pullman* case itself, actions to enjoin state or local officers from enforcing an allegedly unconstitutional state law, and a particular interpretation of the state law would make a decision on the federal constitutional question unnecessary. 17A Charles Alan Wright, et al., *Federal Practice and Procedure,* § 4242 (1988). The purpose of the abstention is to allow state courts to resolve the controlling issue of state law. The defendants contend that the definition of "hazardous treatment" in RSMo § 630.115(11) is unclear and Missouri courts have not determined whether "Missouri has granted a substantive or procedural right higher than the minimal rights found in *Harper.*" (Defendants' Cross Motion at p. 18). Therefore the court should abstain in favor of Missouri courts resolving the ambiguity of § 630.115(11).

***6** *Pullman* abstention is not appropriate in this case. Even assuming that RSMo § 630.115.1(11) is unclear, the plaintiff cites an alternative state statute, RSMo § 630.183, to support the same constitutional argument. As the discussion below illustrates, § 630.183 is clear, unambiguous and a state court resolution of any ambiguity in § 630.115(11) would not resolve any controlling issue of state law relevant to this case; the court can resolve the controlling issue of state law based on § 630.183. In addition, state court resolution of §§ 630.115 and 630.183 would not avoid the plaintiff's allegation that the defendants' procedure for involuntarily medicating patients does not comply with minimum Due Process requirements under the Constitution; the claim that the defendants violated minimum due process rights under the Fourteenth Amendment would remain. This is not the situation anticipated in *Pullman* where abstention would "avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication." 312 U.S. at 500.

B. Burford Abstention

In *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), the court abstained from an issue related to Texas state administration of the oil industry. Before the Court was a challenge, based on state law and due process, to an order of the Texas Railroad Commission granting a permit to drill four wells on a small plot of land in the East Texas oil field. The Court noted the complex problems and issues surrounding the general regulatory system of oil and gas in Texas. In addition, the Court noted that the case primarily involved questions of state law as the constitutional issues were fairly well settled. *Id.* at 328–331. Finding that the questions of the state administrative agency regulation of the Texas oil and gas industry "so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them," the Court abstained from ruling on the case. *Id.* at 332.

The defendants argue that

> the State's interest in both meeting the qualified liberty interest involved in the administration of medication while at the same time establishing a coherent State policy which attempts to meet both the liberty interest concern and also satisfy the State's obligation to provide care and treatment of those in it's (sic) custody arguable constitutes a matter of substantial public concern, and when combined with the similar pending state court suit would be consistent with a *Burford* type approach. (Defendants' Cross Motion at p. 19).

The court disagrees. As mentioned above, the pending state court suit is no longer pending. In addition, this case does not involve a complex scheme of state regulations or state administrative processes regarding administration of medication to state hospital patients. The case does not involve an assertion that the federal claims are "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *New Orleans Public Service, Inc. v. Council of New Orleans,* 491 U.S. 350, 361 (1989). Unlike the circumstances of *Burford,* this case does not present basic problems of Missouri policy toward the treatment of patients. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 815 (1976) (no *Burford* abstention where no decision of the state claim would impair effort to implement state policy). Rather, this case presents the comparatively less complex analysis of whether the procedures for involuntarily medicating patients comports with due process. Accordingly, *Burford* type abstention is not appropriate.

IV. DUE PROCESS

***7** The plaintiff argues that the defendants' procedure for involuntarily medicating patients with psychotropic drugs violates the Due Process Clause of the Fourteenth Amendment. This argument necessarily has "both substantive and procedural aspects." *Harper,* 494 U.S. 210, 220 (1990). The procedural aspects must be examined in terms of the substantive rights at stake. *Id.* Thus the court will first determine whether the defendants' procedures ensure the plaintiff's substantive rights and then examine whether the procedures provide sufficient process.

A. Substantive Due Process

No question exists that under the Due Process Clause of the Fourteenth Amendment the plaintiff "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Id.* at 221–222. This court previously held in this case that involuntary patients in Missouri psychiatric hospitals possess such a liberty interest. The issue here is the level of protection the Fourteenth Amendment affords this liberty interest, or "what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will." *Id.* at 220. A related issue is whether Missouri recognizes a more extensive liberty interest. If so, this broader liberty interest would define the plaintiff's actual substantive rights. *Mills v. Rogers,* 457 U.S. 291, 300 (1982). The court must therefore review Missouri law to determine whether Missouri provides a greater liberty interest than the Fourteenth Amendment.

Missouri Revised Statute § 630.175, entitled "Physical and chemical restraints prohibited, exceptions" states that:

> 1. No patient, resident or client of a residential facility or day program operated, funded or licensed by the department shall be subject to physical or chemical restraint, isolation or seclusion unless it is determined by the head of the facility or the attending licensed physician to be necessary to protect the patient, resident, client or others....
>
> 3. Physical or chemical restraint, isolation or seclusion shall not be considered standard treatment or habilitation and shall cease as soon as the circumstances causing the need for such action have ended.

The Missouri legislature defines "chemical restraint" in RSMo § 630.005.1(2) as:

> medication administered with the primary intent of restraining a patient who presents a likelihood of serious physical injury to himself or others, and not prescribed to treat a person's medical condition.

Missouri Revised Statute § 630.183, entitled, "Officers may authorize medical treatment for patients," states that:

> Subject to other provisions of this chapter, the head of a mental health or mental retardation facility may authorize the medical and surgical treatment of a patient or resident under the following circumstances:
>
> (1) Upon consent of a patient or resident who is competent;
>
> (2) Upon consent of a parent or legal guardian of a patient or resident who is a minor or legally incapacitated;
>
> ***8** (3) Pursuant to the provisions of chapter 431, RSMo;
>
> (4) Pursuant to an order of a court of competent jurisdiction.

Missouri Revised Statute § 630.115.1(11), "Patients' entitlements," states that:

> 1. Each patient, resident or client shall be entitled to the following without limitation:
>
> (11) To not be subjected to any hazardous treatment or surgical procedure unless he, his parent, if he is a minor, or his guardian consents; or unless such treatment or surgical procedure is ordered by a court of competent jurisdiction.

The plaintiff argues that based on the above statutory authority, Missouri law creates a liberty interest in involuntary patients not to have psychoactive medication administered involuntarily unless the patients "are dangerous to themselves or others as a result of mental illness and, after considering and rejecting other less intrusive alternatives, the medication is medically indicated to control the dangerous behavior." (Plaintiff's Motion, at p. 14).

The court finds that § 630.175 is irrelevant to this case. In § 630.175, the Missouri legislature creates a right in patients not to have "chemical restraints" used except if the head of the facility or the attending licensed physician determines that the patient is a threat to himself or others. However, the legislature defines "chemical restraints" as medication administered with the primary intent being restraint, not medical treatment. Thus the plaintiff's interest under this statute is limited to the administration of medication for the primary purpose of restraint, not for medical treatment. The plaintiff has not alleged that the defendants administered psychotropic drugs with the

primary intent being restraint.

Sections 630.183 and 630.115.1(11) do address a patient's rights with regard to medical treatment, however, these statutes contribute more to the discussion below of the plaintiff's procedural due process rights. If a patient or representative does not consent, the statutes provide that the state may not administer treatment without a court order. However, the statutes do not provide the substantive standard a court must apply before ordering involuntary medication. Because no state statute provides a substantive standard for the situation in which the intent is to medically treat the plaintiff with psychotropic drugs, the court will examine what substantive rights the Due Process Clause provides to the plaintiff when faced with administration of psychotropic drugs for treatment purposes.

The Supreme Court has never elucidated the minimum substantive rights protected under the Fourteenth Amendment for involuntarily medicating prison inmates with psychotropic drugs. In *Washington v. Harper,* the Court declined such an analysis stating that "[u]pon full consideration of the state administrative scheme, however, we find that the Due Process Clause confers upon respondent no greater right than that recognized under state law." 494 U.S. at 222. The Court then held that a prison regulation allowing involuntary administration of psychotropic drugs if the prisoner suffers from a mental disorder and poses a likelihood of harm to himself or others did not violate the prisoner's substantive due process rights. The Court defined the test as a balance between the prisoner's medical interest and the State's interest, adopting the Court's analysis in *Turner v. Safley,* 482 U.S. 78 (1987):

> ***9** First there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it ... [S]econd, a court must consider 'the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally' ... [T]hird, 'the absence of ready alternatives is evidence of the reasonableness of a prison regulation,' but this does not mean that prison officials 'have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.' 494 U.S. at 224–225.

The Court, applying these factors, upheld the State's policy as a rational means of furthering legitimate objectives.

In *Riggins v. Nevada,* 504 U.S. 127, 112 S.Ct. 1810 (1992), Justice O'Connor noted that the Court had "not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings." 112 S.Ct. at 1815. Justice O'Connor did state that "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness," and had Nevada demonstrated that "treatment with antipsychotic medication was medically appropriate, and, considering less intrusive alternatives, essential for the sake of the patient's own safety or the safety of others," Nevada would have satisfied due process. *Id.* at 1815.

The Eighth Circuit has provided more guidance. In a pre-*Harper* case, *Dautremont v. Broadlawns Hospital,* 827 F.2d 291 (8th Cir.1987), the court found that the defendants had administered psychotropic drugs to a patient who was dangerous to himself and others. The court relied on *Youngberg v. Romeo,* 457 U.S. 307 (1982), to hold that the involuntary mental patient's liberty interest in not being administered psychotropic drugs against his will was outweighed by the government's legitimate objective to return the patient's behavior "to that which is acceptable to society and by the professionals' reasonable judgment here that that objective can best be accomplished by the administration of certain types and levels of psychotherapeutic drugs." 827 F.2d at 300. The court in *Dautremont,* however, did not address the question whether "behavior which is acceptable by society" is equivalent to or lesser than "dangerous to self or others."

In *United States v. Watson,* 893 F.2d 970 (8th Cir.), *cert. denied,* 497 U.S. 1006 (1990), decided just a month before *Harper,* the court balanced the right of prisoners to refuse psychotropic medications with the defendants' interest in the safe administration of a psychiatric ward in a federal prison. In that case the court rejected the argument that the "professional judgment" standard standing alone satisfied substantive due process,[9] stating that,

> [w]e believe that *Youngberg* protects prison inmates from the forced administration of psychotropic drugs except when prison officials, in the exercise of their professional judgment, believe that such medication is required to control the prisoner in the general prison population. 893 F.2d at 980.

***10** The court defined "behavior society would deem acceptable" as behavior that allows functioning within the general prison population. The court then equated functioning within the general prison population with functioning without danger to self or others, seemingly answering the question left open in *Dautremont:*

> the purpose of Holmes' confinement is to serve the term of the sentence he received for the crime of which he was convicted. This purpose dictates restraining Holmes only insofar as necessary to prevent him from harming himself or others. Evidence on the record shows that Holmes functions adequately within the general population of the Mental health Unit of the Medical Center without psychotropic medications. Extending *Youngberg* to its fullest limit on the facts of Holmes' case does not require that he submit to the forcible administration of psychotropic medications, either to insure his own safety or that of other inmates or hospital personnel. Nor is the possibility that such medication might improve Holmes' condition sufficiently to enable his release justification for medicating him against his will. 893 F.2d at 980.

The court, however, held that due process does not require that the government use the least restrictive treatment. Even if solitary confinement would be the least restrictive form of treatment, the court held that as long as officials exercise professional judgment in administering psychotropic drugs to a patient to prevent that patient from endangering himself or others, due process is satisfied. 893 F.2d at 982.

The only post *Harper* decision in the Eighth Circuit addressing this issue further defined the standard. In *Cochran v. Dysart,* 965 F.2d 649 (8th Cir.1992), the court interpreted *Harper* to require at a minimum, a finding of danger to self or others before the patient could be involuntarily medicated with psychotropic drugs. The court vacated a lower court order that had found that the patient had been afforded his *Harper* rights. Noting that the medical report necessary to determine the motivation behind the defendants' treatment of the patient was not in the record, the court stated:

> Dr. Gallinanes feels [Cochran] is dangerous to himself and others without medication. Dr. Gallinanes' medical reports, however, are not in the record; there is no indication of the basis of Dr. Gallinanes' 'feeling' or what 'medication' Cochran allegedly cannot do without; and there is no other record evidence of dangerousness ... Moreover, we note that the stated 'reason for treatment' on Dr. Jacobs' March 1 report read '[c]ontrol symptoms of mental illness allowing for transfer to less restrictive quarters and participation in more programs.' The report also stated that, according to Dr. Gallinanes, psychotropics 'will eventually help [Cochran] improve his reality testing,' his delusions of grandeur 'respond to treatment,' and he is 'less agitated when on medication.' Under *Harper,* none of these reasons justifies forcibly medicating Cochran with potentially fatal psychotropic drugs. 965 F.2d at 650–651.

***11** This language indicates that treatment or rehabilitation does not justify involuntarily medicating patients with psychotropic drugs; rather, the reasoning of *Harper* requires a finding of danger to self or others before administering such psychotropic drugs involuntarily.[10]

The court agrees with the analysis and standards announced by the *Watson* and *Cochran* courts.[11] The court believes that balancing the "potential of psychotropic drugs for altering a patient's mental processes and the risk of severe side effects, including irreversible damage," (893 F.2d at 979) with the state's treatment obligation and interest in safety, the Due Process Clause requires that officials exercise more than just professional judgment when involuntarily medicating involuntary mental patients, they must exercise professional judgment that the medication is necessary to insure the safety of the patient or others.

The question remains whether the Department's current policy violates a patient's substantive due process rights. In response to the plaintiff's argument that no substantive standard exists for the decision to involuntarily administer psychotropic drugs, the defendants state that the decision is "physician driven." (Doc. # 78 at 19). Indeed, the Missouri Department of Mental Health Forensic Manual[12] (Plaintiff's Exhibit 1) requires the treating physician to "substitute his or her professional judgment for the patient and determine the need for the psychotropic medication." (Plaintiff's Exhibit 1, p. 3.1). If the treating physician determines that the psychotropic medication is "clinically necessary," and if a second opinion agrees that psychotropic medication is "therapeutically indicated," then "the patient shall be told of the decision and be medicated, even if he or she refuses to consent." (Plaintiff's Exhibit 1, at p. 3.2). As discussed above, the Due Process Clause requires that the state may only overcome a patient's liberty interest in refusing psychotropic drugs with a finding that in the exercise of professional judgment, the patient is dangerous to himself or others. To the extent the policy allows administration of psychotropic drugs without requiring a finding of dangerousness; the policy is unconstitutional as a violation of the plaintiff's substantive due process rights.[13]

B. Procedural Due Process

The procedural due process analysis "concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance ... the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient." *Harper,* 494 U.S. at 220. Just as with the substantive due process analysis, the court must first determine if the state has enhanced the Constitution's procedural protections. *Mills,* 457 U.S. at 300. The plaintiff argues that the Missouri legislature has created the expectation that a patient will not be involuntarily medicated absent a court order.

***12** Revised Missouri Statute § 630.183 sets forth the four situations under which the defendants could have authorized the plaintiff's medical treatment: 1) the plaintiff consented; or 2) if the plaintiff is a minor or legally incapacitated, his parent or legal guardian consented; or 3) pursuant to a contract meeting the requirements of chapter 431; or 4) pursuant to a court order. Section 630.115.1(11) entitles the plaintiff not to be subjected to "hazardous treatment" unless he, or his guardian consents, or unless a court orders the treatment. The defendants argue that the Missouri courts have not defined what qualifies as "hazardous treatment" in § 630.115.1(11), therefore the court should abstain from the state law entitlement issue. The defendants, however, present no argument alleging ambiguities in § 630.183.

In § 630.183, the Missouri legislature has created a procedural right in patients not to be subjected to medical treatment absent their consent or their parent or legal guardian's consent, if the patient is a minor or legally incapacitated, or pursuant to a chapter 431 contract or pursuant to a court order. State procedural rules, however, generally do not create federally protected rights. *Meis v. Gunter,* 906 F.2d 364, 369 (8th Cir.1990), *cert. denied,* 498 U.S. 1028 (1991) ("A violation of state law, without more is not the equivalent of a violation of the Fourteenth Amendment."); *Vruno v. Schwarzwalder,* 600 F.2d 124, 130 (8th Cir.1979) ("The simple fact that state law prescribes certain procedures does not mean that the procedures thereby acquire a federal constitutional dimension."). *See also Rogers v. Okin,* 738 F.2d 1, 8 (1st Cir.1984), *cert. denied,* 484 U.S. 1010 (1988). A state law prescribing procedural restrictions may take constitutional form if it contains "a combination of 'explicitly mandatory language in connection with requiring specific substantive predicates.' " *Rogers,* 738 F.2d at 7 (quoting *Hewitt v. Helms,* 459 U.S. 460, 472 (1983)).

The court is convinced that the Missouri legislature did not intend for § 630.183 to create a constitutionally protected liberty interest for two reasons. First, § 630.183 does not contain the necessary mandatory language that "demands the conclusion that the state has created a protected liberty interest." *Id.* The statute must use "mandatory" as opposed to "discretionary" language in describing what limits the standards or criteria have on the officials' conduct. *Dautremont,* 827 F.2d at 299. The Missouri legislature chose the word "may" to limit the discretion of the head of a mental health facility in § 630.183. If the legislature intended the statute to create a liberty interest, the legislature could have used the phrase "may only".

Second, if the legislature had intended for § 630.183 to create a liberty interest, then promulgation of 630.115.1(11) would have been unnecessary. Section 630.115.1(11) modifies the word "treatment" with the word "hazardous," and creates a procedural right not to be subjected to "hazardous treatment" without consent or a court order; its very existence cuts against the argument that § 630.183 creates a liberty interest. If the legislature intended to create a liberty interest not to be subjected to any treatment without consent or a court order in § 630.183, then passage of § 630.115.1(11) creating a right not to be subjected to "hazardous treatment" without consent or a court order was repetitive and meaningless. Under Missouri law, the legislature is presumed not to pass meaningless statutory provisions. *Osage Outdoor Advertising, Inc. v. Missouri Highway and Transp. Com.,* 680 S.W.2d 164 (Mo.App.1984). Accordingly, the court finds that § 630.183 does not create any constitutionally protected procedural liberty interests.

***13** The court also finds that § 630.115.1(11) does not create a procedural liberty interest not to be subjected to "hazardous treatment" without consent or a court order. While the statute certainly contains mandatory language, the term "hazardous treatment" is nowhere defined within the statute and does not provide sufficient specificity to meet the "specific substantive predicates" standard described in *Hewitt v. Helms,* 459 U.S. at 472. The statute can not be said to place significant substantive limits on the discretion of state officials. *Meis,* 906 F.2d at 368. This statute is unlike the procedures for judicial review listed by the Massachusetts Supreme Judicial Court in *Rogers.* In that case, the procedures contained specific and unambiguous conditions. Here, the term "hazardous treatment" is sufficiently ambiguous to keep the statute from creating a procedural liberty interest. Perhaps if the legislature had defined "hazardous treatment" to specifically include treatment with psychotropic drugs, then this case would be closer to *Rogers.* Like § 630.183, § 630.115.1(11) creates a procedural right only, "it does not give rise to the procedural protections envisioned by the fourteenth amendment." *Buckley v. Barlow,* No. 93–1302, slip op. at 3 (8th Cir., July 8, 1993).

If the state has not enhanced the Constitution's procedural protections to the level of a liberty interest, the court must then evaluate what minimum procedure the Due Process

Clause requires. To determine what minimum procedures the Constitution requires, the court must balance the rights and interests at stake in the particular case. In *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), the Court set forth the factors for a court to consider: the private interests at stake, the governmental interests involved and the value of procedural requirements in determining what process is due. *Washington v. Harper,* 494 U.S. at 229. In *Washington,* the Court analyzed the state's procedures and held that they satisfied due process. The court noted that the "forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. The Court found, however, that an inmate's interests are adequately protected and "perhaps better served" by allowing medical professionals to decide whether or not to medicate, rather than a judge, as long as "fair procedural mechanisms" exist. *Id.* at 231. In determining that *Washington* provided "fair procedural mechanisms" the Court emphasized that "independence of the decisionmaker is addressed to our satisfaction by these procedures." *Id.* at 233. The Court also noted that the Washington procedures provides an opportunity to be heard which "must be granted at a meaningful time and in a meaningful manner." *Id.* at 235. Finally the Court noted that the inmate has under state law the opportunity to obtain "judicial review of the decision by way of a personal restraint petition or petition for an extraordinary writ." *Id.*

***14** The plaintiff in this case argues that at a minimum the state must provide patients with a hearing before an impartial officer, prior notice of the proposal and the justifications to medicate, the right to be present throughout the hearing, the right to present and cross examine witnesses, and judicial review. Under the current policy, the psychiatrist must discuss with the patient the elements of informed consent in regard to psychotropic medication, and the patient must register his or her refusal in writing, or the staff must note the refusal. The physician must consider the patient's treatment, condition, specific need for the medication, possible side effects, previous reactions to the medication, progress with and without medication, duration of any previous medication and the results. If the physician determines that the patient needs the treatment, the physician shall obtain a second opinion which shall be well documented in the medical record. If the consulting physician agrees that the medication is therapeutically indicated, the patient shall be informed of the decision and medicated even without consent.

On its face the procedure appears to have some problems. The policy could very well be constitutionally deficient. However, there appears to be some dispute as to how the policy is actually implemented, and therefore, what process is actually provided. The court feels that a discussion of whether or not the policy complies with due process is premature until there is a hearing, at which point the court may determine exactly what process is provided before determining whether or not the policy comports with minimum due process requirements.[14]

INJUNCTIVE AND DECLARATORY RELIEF

The plaintiff requests the court to declare that the defendants violated his procedural and substantive due process rights and declare that the defendants' policies for involuntarily medicating patients with psychotropic drugs violates due process. The defendants argue that the court should exercise its discretion and not award the plaintiff declaratory relief.

Limited declaratory relief may be helpful and will be given.

The plaintiff also requests that the court issue an injunction ordering the defendants to cease from administering psychotropic drugs under the current policy until the defendants adopt a new policy which complies with the substantive and procedural requirements of due process. The defendants contend that the plaintiff has no entitlement to injunctive relief because: 1) the plaintiff has adequate legal remedies; 2) the plaintiff does not face the threat of irreparable injury; and 3) the balancing of the competing claims of injury and the public interest tilts in favor of the state; therefore injunctive relief should not be granted.

The Eighth Circuit outlined the prerequisites for injunctive relief in *Rogers v. Scurr,* 676 F.2d 1211, 1214 (8th Cir.1982), using language such as, "an injunction must be tailored to remedy specific harm shown," and "[i]n order for an injunction to issue, a right must have been violated." Courts should exercise judicial restraint unless either a constitutional violation has already occurred or the threat of such a violation is both real and immediate. *Id.* The issuance of injunctive relief at this time would be premature. The facts surrounding the defendants' medication of Preston with psychotropic drugs appear to be in dispute. Once a trial or hearing is held and the facts are flushed out, the court can determine at that time whether an injunction is necessary. The court's decision not to issue an injunction at this time will not suffer any hardship on the plaintiff; a stipulated injunction now protects the plaintiff from further involuntary psychotropic medication. Therefore, the court finds that injunctive relief is not appropriate in this case at this time.

***15** Accordingly, the court GRANTS the plaintiff's motion for partial summary judgment in part and DENIES plaintiff's motion for partial summary judgment in part.

The court DENIES the defendants' cross motion for summary judgment in part and DENIES the defendants' motion to abstain. The court GRANTS summary judgment to Dr. Holcomb on the equitable claims. SO ORDERED. It is further

DECLARED that the defendants' policy of involuntarily administering psychotropic drugs for treatment of involuntary mental patients violates the Due Process Clause of the Fourteenth Amendment to the extent the policy does not require a finding of "danger to self or others." SO ORDERED.

Footnotes

1 In the court's Memorandum and Order dated October 21, 1991, the court stated that "Plaintiff has asserted no other claims for damages ... As the court noted in the October order, 'only claims for injunctive relief remain.' " (Doc # 44 quoting from Doc # 21). Upon review of the plaintiff's amended complaint, the plaintiff clearly checked the box marked "yes" in response to the question, "[d]o you claim actual or punitive monetary damages for the acts alleged in your complaint?" (Doc. # 27 at p. 4) In response to the subsequent question, the plaintiff stated that the reasons for claiming damages is "pain and suffering." (Doc. # 27 at p. 4). Given the liberal interpretation the complaint deserves, the amended complaint does allege damages claims along with injunctive relief.

2 While the *Lyons* case only addressed the prerequisites for seeking injunctive relief, the same principles apply with respect to declaratory relief. *See American Postal Workers Union v. Frank,* 968 F.2d 1373, 1377 n. 4 (1st Cir.1992); *Robinson v. Chicago,* 868 F.2d 959, 966 n. 5 (7th Cir.1989), *cert. denied,* 493 U.S. 1035 (1990); *Smith v. Fontana,* 818 F.2d 1411, 1421 n. 17 (9th Cir.), *cert. denied,* 484 U.S. 935 (1987).

3 Even if the plaintiff had not filed his complaint until after the defendants ceased medicating him without his consent, the plaintiff would have a strong argument for standing to assert injunctive and declaratory claims. In *Giles v. Ackerman,* 746 F.2d 614 (9th Cir.1984), *cert. denied,* 471 U.S. 1053 (1985), the plaintiff challenged the constitutionality of a county jail policy of subjecting persons booked for minor traffic offenses to a strip search. The plaintiff sought damages, injunctive and declaratory relief. The court, distinguishing *Lyons,* held that the plaintiff had standing to seek the injunctive and declaratory relief. The court noted that in *Lyons* the lower court had severed the plaintiff's damages claim requiring the Court to consider the injunctive relief standing alone, while in this case the damages claim was not severed from the injunctive and declaratory relief. The court held that *Lyons* did not apply to cases where the plaintiff brings both a claim for damages and a related claim for equitable relief in the same lawsuit. Because the plaintiff had standing to bring her damages action the court refused to dismiss the declaratory relief on standing grounds. *See also Gonzales v. Peoria,* 722 F.2d 468 (9th Cir.1983). The Ninth Circuit narrowed this exception in *Smith v. Fontana,* 818 F.2d 1411 (9th Cir.1987), in which the court stated that *Lyons* does not apply if the plaintiff bases her claims for damages and equitable relief on a single legal theory and the same operative facts. If the plaintiff must prove additional facts to prevail on the equitable relief, then *Lyons* dictates that the plaintiff lacks standing to bring the equitable relief.

Under this exception, the plaintiff in this case would certainly have standing to assert his injunctive and declaratory claims. However, it appears that the Ninth Circuit is in the minority in this interpretation of *Lyons.* The Seventh Circuit has expressly rejected the approach in *Robinson v. Chicago,* 868 F.2d 959 (7th Cir1989). In addition it appears that the Ninth Circuit approach would contradict cases decided in other circuits, including the Eighth Circuit's decision in *Martin v. Sargent,* 780 F.2d 1334 (8th Cir.1985). *See also American Postal Workers Union v. Frank,* 968 F.2d 1373 (1st Cir.1992); *Johnson v. Moore,* 958 F.2d 92 (5th Cir.1992); *Facio v. Jones,* 929 F.2d 541 (10th Cir.1991); *Tucker v. Phyfer,* 819 F.2d 1030 (11th Cir.1987); *Buie v. Jones,* 717 F.2d 925 (4th Cir.1983); *Curtis v. New Haven,* 726 F.2d 65 (2nd Cir1984).

However, even under the majority approach the plaintiff would have standing. Shortly after deciding *Lyons,* the Court in *Kolender v. Lawson,* 461 U.S. 352 (1983), held that a plaintiff requesting injunctive and declaratory relief with regard to a "loitering and wandering" criminal statute, had standing where the plaintiff had been stopped fifteen times in less than a two year period. The Court stated that these fifteen stops were sufficient to establish a "credible threat" that the plaintiff would be stopped again under the statute. 461 U.S. at 355 n. 3. Given the recurrent involuntary medication administered to the plaintiff in the circumstances of this case, the decision in *Kolender* would appear to confer standing on the plaintiff to seek injunctive and declaratory relief.

In addition, the plaintiff continues to be confined to the Fulton State Hospital, and no evidence exists that he has recovered from his psychiatric condition or that authorities are ready to discharge him from his commitment. The plaintiff alleges that the defendants continue to involuntarily medicate patients with psychotropic drugs without providing due process. A stipulated injunction currently protects the plaintiff from involuntarily administered psychotropic drugs. However, if the court were to dismiss on the basis of standing, the defendants would seek to lift the injunction, again subjecting the plaintiff to the threat of involuntary medication, "[a]gainst this background, it is not 'absolutely clear,' absent the injunction, 'that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Vitek v. Jones,* 445 U.S. 480, 487 (1980).

4 Even with a change in regulation, the court for purposes of the injunctive and declaratory claims, would look at the regulation as it now stands, not as it once did. *See Hall v. Beals,* 396 U.S. 45, 48 (1969). The regulation's status does not affect standing, rather it affects mootness.

5 The defendants contend that the plaintiff faces no real threat of injury in the future because; 1) there is presently a stipulated

injunction against involuntarily medicating the plaintiff, and 2) until the defendants medicate the plaintiff under the newly promulgated guidelines, the guidelines are not subject to review. Because the court determines ripeness as of the date of the complaint, these subsequent events have no bearing on the ripeness issue. In addition, if the regulations have changed, the court would review the new regulations. *See Beals,* 396 U.S. at 48.

6 The plaintiff concedes, and the court agrees, that the plaintiff's injunctive and declaratory claims are moot with regard to Dr. Holcomb. Accordingly, these claims are dismissed with regard to Dr. Holcomb.

7 Even if the draft DOR would be considered official policy of the Missouri Department of Mental Health, it would not provide the relief plaintiff requests. The plaintiff does not just request a new procedure, he requests specific procedures. The plaintiff argues that before the defendants involuntarily medicate him, the Due Process Clause requires at a minimum that the defendants provide the plaintiff with: 1) advance notice; 2) an administrative hearing before an impartial hearing officer or panel, with rights to be present at the hearing; 3) the right to be represented; 4) the right to present testimony of witnesses and other evidence; 5) and the right to cross examine witnesses. In addition, the plaintiff argues that under state statutes, the defendants should have gone to court and obtained an order before legally medicating the plaintiff.

A review of draft DOR 4.152 reflects that the new procedure would not provide the plaintiff with the process plaintiff argues the Constitution requires. The new draft does not provide for the right to present testimony of witnesses and other evidence, the right to cross examine witnesses, a hearing before an impartial panel or hearing officer, or for a court order prior to medicating patients. A controversy would still exist; the defendants involuntarily medicated the plaintiff, and the plaintiff alleges that he is entitled to certain minimum process before being medicated without his consent. The new procedures would not provide that minimum process. Thus, this case is not analogous to the situation in *Sannon v. United States,* 631 F.2d 1247 (5th Cir.1980), in which the defendants promulgated regulations which provided the plaintiffs with "the right to exactly the hearing he sought." 631 F.2d at 1250.

In addition, under the repetition/evasion exception, the draft DOR would not moot this case. No evidence exists that the plaintiff has recovered from his mental illness or that the defendants are likely to release him from the Fulton facility. Given his medical history and the reasons for involuntarily medicating him in the past, it is reasonable to conclude that he will be involuntarily medicated in the future. *Washington v. Harper,* 494 U.S. 210, 219 (1990). Even if the defendants would not involuntarily medicate him under the same procedures as in 1990, "the repetition/evasion exception does not require a repetition of the exact law or behavior. The focus is on whether the same issues, arising from a repetition of a similar law or action, are likely to recur." *Williams v. Alioto,* 549 F.2d 136, 143 (9th Cir.1977). Where questions exist about the constitutionality of revised guidelines, those revisions do not moot a plaintiff's action for equitable relief based on a challenge to previous guidelines. *Williams,* 549 F.2d at 138. Given the plaintiff's contentions of what process is due and the procedure outlined in draft DOR 4.152, the issue of what process is due when defendants involuntarily medicate patients with psychotropic drugs is likely to recur.

8 While the court denies the defendants' motion to abstain from the state law questions, the court would reconsider this action if the defendants were to file a declaratory action in state court or if another action was brought in state court prior to trial in this case which addressed the same statutes at issue here.

9 The court rejected the dissent's argument and the court's decision in *United States v. Charters,* 863 F.2d 302 (4th Cir.1988), *cert. denied,* 494 U.S. 1016 (1990), that due process is satisfied when the decision to administer psychotropic drugs is made in the exercise of professional judgment. The court also distinguished *Charters* on its facts, noting that the patient in that case had improved during treatment with antipsychotic medication. The court implied that the court did actually apply more than just "professional judgment." 893 F.2d at 981 n. 15. ("[W]e express no opinion, however, on the propriety of administering psychotropic medications in order to render a mentally incompetent defendant competent to stand trial.").

10 The panel did not unanimously follow this reasoning. Judge McMillian endorsed the reasoning while Judge Wollman agreed in the remand solely on the ground that the record did not contain the necessary report. Judge Loken dissented, not in the discussion of the substantive standard, but in the necessity of the missing doctor's report. He felt that enough evidence existed in the court's closed files to establish that Cochran was dangerous. However, the opinion is consistent with *Watson* and *Dautremont* and reflects the law of the circuit. It may be noteworthy to the development of the law in this controversial field that the opinion equates psychotropic drugs with highly dangerous substances; that is, substances that are "potentially fatal."

11 Other courts as well have held that the substantive due process standard is "danger to self or others." In *Rennie v. Klein,* 720 F.2d 266, 269, 274 (3d Cir.1983), the court held that, "antipsychotic drugs may *only* be constitutionally administered to an involuntarily mentally ill patient whenever, in the exercise of professional judgment, such an action is deemed necessary to prevent the patient from endangering himself or others." 720 F.2d at 269 (emphasis added). Thus, even before *Harper,* the Third Circuit adopted the substantive standard of "danger to self or others." It should be noted that the Third Circuit seems to differentiate between those involuntarily committed to mental institutions and convicted prison inmates. This distinction is evident in the court's decision in *White v. Napoleon,* 897 F.2d 103 (3rd Cir.1990), which held that prison officials may involuntarily medicate prison inmates when the officials, in the exercise of professional judgment, deem it necessary to carry out valid medical or penological objectives. The fact that the court in *White* was faced with routine medications rather than the administration of psychotropic drugs may explain the different standard.

In *Washington v. Silber,* 805 F.Supp. 379 (W.D.Va.1992), the court interpreted *Harper* to hold that due process requires a finding of dangerousness and a finding that the treatment is in the inmate's medical interest. The court noted that a state statute,

read in isolation, which permitted authorities to involuntary administer antipsychotic drugs to an inmate if the treatment was in the best interests of the inmate, was unconstitutional. The court stated, "The statute nowhere mentions the other constitutional prerequisite—that the inmate be dangerous to himself or others." 805 F.Supp. at 384 n. 6. However, because the inmate's commitment and treatment were considered simultaneously, the court read the statute in conjunction with the state's commitment statute which required a finding of dangerousness.

12 The defendants argue that the court should treat draft DOR as the Department's policy. However, as mentioned above, the draft has not been officially promulgated and to review that document's constitutionality would be premature.

13 This decision does not express an opinion on the constitutionality of administering any medication involuntarily. This decision only relates to administering psychotropic drugs involuntarily.

14 Although the court need not decide, it is conceivable, *Cochran* notwithstanding, that treatment with all psychotropic drugs would not qualify as "hazardous treatment" under § 630.115.1(11). *Compare, Mills v. Rogers,* 457 U.S. 291, 293 n. 1, referring only to "significant risk of adverse side effects." Even if § 630.183 or § 630.115.1(11) did create a procedural liberty interest, the court would not be authorized to order the defendants to comply with the procedure. The First Circuit, on remand in the *Mills* case, observed that even though the Massachusetts Supreme Judicial Court had created procedural protections against forcible medication of involuntarily committed mentally ill patients by requiring prior court approval in a case like the present one, a federal injunction ordering state officials to comply with state procedural law would be "barred by *Pennhurst.*" 738 F.2d at 9 (referring to *Pennhurst State School v. Halderman,* 104 S.Ct. 900 (1984)).