

**IN THE  
INDIANA COURT OF APPEALS  
CAUSE NO. 49A02-0812-CV-1140**

STEVEN THOMAS, by his mother and )	
next friend Yulondia Thomas, and )	
DERRICK DAUSMAN, by his mother )	
and next friend Connie Dausman, )	
	) Appeal from the Marion County Superior
Plaintiffs/Appellants, )	Court
	)
v. )	Trial Court Cause No. 49D13-0802-PL-7019
	)
ANNE WALTERMANN MURPHY, in )	The Honorable S.K. Reid, Judge
her official capacity as Secretary of the )	
Indiana Family and Social Services )	
Administration, and CATHY BOGGS, )	
in her official capacity as Director of the )	
Div. of Mental Health and Addiction, )	
	)
Defendants/Appellees. )	

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**BRIEF OF APPELLANTS**

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## STATEMENT OF THE ISSUES

1. Whether the trial court erred in determining that this case is not ripe for review, given that the agency policy presently at issue, wherein all criminal defendants in Indiana who are adjudicated to possess insufficient comprehension to stand trial pursuant to Indiana Code § 35-36-3-1, *et seq.*, are automatically and indefinitely placed in the restrictive environs of a state institution operated by the Division of Mental Health and Addiction for the provision of “competency restoration services,” has undisputedly been applied to the appellants and given that release planning and consideration for alternative placements is something that must be undertaken—and is undertaken for all other patients—beginning at the very outset of a patient’s institutionalization.
2. Whether the trial court erred in determining that it was prohibited from reaching the merits of the appellants’ claims by the separation-of-powers doctrine encapsulated in Article 3, Section 1 of the Indiana Constitution.
3. Whether the agency policy presently at issue—which is applied to incompetent criminal defendants regardless of the needs of the particular patient, regardless of the severity of the offense with which he or she has been charged, and regardless of the likelihood that the patient may ultimately gain competency—violates Indiana law and the Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

## I. NATURE OF THE CASE

The plaintiffs [hereinafter, “appellants”] appeal the trial court’s order granting summary judgment to the defendants [hereinafter, “the State,” “the Division,” or “the agency”] pursuant to Rule 56 of the Indiana Rules of Trial Procedure. The trial court held that a policy of the Indiana Family and Social Services Administration whereby all criminal defendants in Indiana who are adjudicated to possess insufficient comprehension to stand trial pursuant to Indiana Code § 35-36-3-1, *et seq.*, are automatically and indefinitely placed in a state institution operated by the Division of Mental Health and Addiction for the provision of “competency restoration services” does not violate Indiana law or the United States Constitution. *See* Findings of Fact and Conclusions of Law and Judgment on Plaintiffs’ Motion for Summary Judgment; Order Granting Summary Judgment to the Defendants, at 11–18 (Appendix of Appellants [“App.”], at 19–26).<sup>1</sup>

## II. COURSE OF THE PROCEEDINGS

On February 14, 2008, Steven Thomas filed his Verified Class Action Complaint for Declaratory and Injunctive Relief, in which he sought to enjoin a policy of the Indiana Family and Social Services Administration (App. 27–38), although Mr. Thomas’s request for class certification was voluntarily withdrawn on April 9, 2008 (App. 39–40). On May 22, 2008, Mr. Thomas filed his Motion for Leave to File First

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<sup>1</sup> This document is referenced throughout this brief as “Findings of Fact,” “Conclusions of Law,” or “Order,” depending on which portion of the trial court’s entry is referenced.

Amended Verified Complaint for Declaratory and Injunctive Relief (App. 41–44), which was granted by the trial court on May 28, 2008 (App. 63–64), and which added Derrick Dausman as a party plaintiff. On August 19, 2008, the appellants filed their Motion for Summary Judgment (App. 265–70), to which the State responded on October 10, 2008 (App. 280–82).

The trial court entered final judgment on December 17, 2008, in which it granted summary judgment in favor of the State (App. 9–26).

### III. DISPOSITION OF THE ISSUES

Although the State did not separately move for summary judgment, the trial court nonetheless entered summary judgment on the State’s behalf pursuant to Rule 56(B) of the Indiana Rules of Trial Procedure. In so doing, it held that the appellants’ claims are not yet ripe for review, Conclusions of Law, ¶ 1 (App. 19), but nonetheless reached the merits of these claims, holding that “[t]he relief requested by the [appellants] asks this court to infringe upon the duties and powers of the legislature and to usurp statutory discretion afforded” to the State, *id.*, ¶ 3 (App. 20), and that there is no constitutional violation, *id.*, ¶¶ 14–17 (App. 23–25). The trial court therefore denied the appellants’ Motion for Summary Judgment and entered summary judgment in favor of the State. Order, at 18 (App. 26).<sup>2</sup>

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<sup>2</sup> The first named defendant in the trial court was E. Mitchell Roob, Jr., who was sued in his official capacity as Secretary of the Indiana Family and Social Services Administration. On January 5, 2009, Mr. Roob was succeeded in that capacity by Anne

## STATEMENT OF FACTS

### I. FACTS CONCERNING DERRICK DAUSMAN

Derrick Dausman is a developmentally disabled individual who presently resides at Logansport State Hospital in Cass County, Indiana. Verified Motion of Derrick Dausman for Temporary Restraining Order (“TRO Motion”), ¶ 5 (App. 66); Deposition of Danny Meadows, M.D. (“Meadows”), at 63–64 (App. 262). Prior to June 23, 2008, Mr. Dausman was a resident of Kosciusko County, Indiana, where he resided with his mother for his entire life, with the exception of a period of time for almost two (2) years in which he was living on his own with constant support from his mother. First Amended Verified Complaint for Declaratory and Injunctive Relief (“Complaint”), ¶ 27 (App. 50); TRO Motion, ¶ 4 (App. 66). Mr. Dausman has an IQ in the low-to-mid 50s, which places him below the first percentile for adults his age and in the lower portion of the range for mild mental retardation. Aff. of Dr. Henry G. Martin, Ph.D. (“Martin”), ¶ 13 & Exh. 1 (App. 178, 181–85).

Prior to his transfer to Logansport State Hospital, Mr. Dausman received services on an outpatient basis from the Cardinal Center, Inc., which is a community-based not-for profit organization that offers supports and assistance to individuals with developmental disabilities in north-east Indiana. Aff. of Mick Stanley (“Stanley”), ¶¶ 4, 6 (App. 186–87); Aff of Kevin Charles Planck (“Planck”), ¶¶ 4, 10 (App. 191–93).

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Waltermann Murphy, who is therefore substituted as a defendant on appeal pursuant to Rule 17(C)(1) of the Indiana Rules of Appellate Procedure.

Through the Cardinal Center, Mr. Dausman obtained employment at R.R. Donnelley & Sons—a printing company in Warsaw, Indiana—where he worked in a full-time capacity as a cardboard stacker. *Aff. of Stanley*, ¶ 6 (App. 187); *Aff. of Planck*, ¶ 10 (App. 192–93). However, his transfer to Logansport State Hospital caused Mr. Dausman to lose that job. *Aff. of Stanley*, ¶ 6 (App. 187); *Aff. of Planck*, ¶ 10 (App. 192–93); TRO Motion, ¶ 3 (App. 66).

In December of 2006, Mr. Dausman was charged with child molestation, in violation of Indiana Code § 35-42-4-3. *Complaint*, ¶ 30 (App. 50–51); *Answer to First Amended Complaint (“Answer”)*, ¶ 30 (App. 198). Mr. Dausman was subsequently determined to possess insufficient comprehension to stand trial, in accordance with Indiana Code § 35-36-3-1, *et seq.*, and was therefore committed to the Division of Mental Health and Addiction on April 21, 2008. *Complaint*, ¶ 31 (App. 51); *Answer*, ¶ 31 (App. 198).

On June 23, 2008, Mr. Dausman was transferred to Logansport State Hospital, where he presently resides. TRO Motion, ¶ 5 (App. 66); *Dep. of Meadows*, at 63 (App. 262). At least one (1) medical professional has indicated that this placement is not the least restrictive environment appropriate to Mr. Dausman’s needs or the health and safety of himself and others. *See Aff. of Martin*, ¶ 16 (App. 179). Rather, Dr. Henry Martin has indicated that Mr. Dausman should be treated on an outpatient basis with supports in the community. *Id.*, ¶ 17 (App. 179). The Cardinal Center has accordingly

indicated that, upon his discharge from Logansport State Hospital, it “is planning to take all steps necessary to find a placement for [Mr. Dausman] either in one (1) of fifteen (15) group homes that it operates or in a different supported living environment.” Aff. of Stanley, ¶ 7 (App. 188); Aff. of Planck, ¶ 11 (App. 193). In either of these placements, Mr. Dausman would be under twenty-four (24) hour supervision and would receive training and supports, including, if necessary, the provision of competency restoration services. Aff. of Stanley, ¶ 7 (App. 188); Aff. of Planck, ¶ 11 (App. 193). Contrary to Dr. Martin’s opinion, treatment professionals at Logansport State Hospital have indicated that institutionalization is appropriate for Mr. Dausman. *See, e.g.*, Decl. of Julio Lozano, M.D., Regarding Derrick Dausman (“Lozano – Dausman”), ¶ 13 (App. 287); Decl. of Nancy Maxwell Regarding Derrick Dausman (“Maxwell – Dausman”), ¶ 24 (App. 296).

However, because Mr. Dausman has been found incompetent to stand trial for a criminal charge, he simply may not be considered for placement outside the restrictive environs of a state institution. *See* Dep. of Cathy Boggs (“Boggs”), at 19–20 (App. 87–88). Indeed, in light of the evidence indicating that Mr. Dausman is not likely to *ever* regain competency, *see* Aff. of Martin, ¶¶ 11, 14 (App. 178–79), it is possible that he will be confined to a state institution for the remainder of his life, *see* Dep. of Boggs, at 19 (App. 87) (indicating that Indiana law has been interpreted to require the provision of competency restoration services indefinitely); Dep. of George Parker, M.D. (“Parker”), at 46–49 & Exh. 3 (App. 224–26, 245–49).

## II. FACTS CONCERNING STEVEN THOMAS

Steven Thomas is a thirty-nine (39) year old developmentally disabled individual who also presently resides at Logansport State Hospital in Cass County, Indiana. *Aff. of Yulondia Thomas*, ¶ 2–4 (App. 172–73). Prior to February 13, 2008, Mr. Thomas was a resident of Marion County, Indiana, where he resided with his mother. *Id.*, ¶ 3 (App. 172). Because of his developmental disability, which is classified as mild mental retardation, Mr. Thomas presently has the emotional and cognitive skills of someone who is five (5) or six (6) years of age. *E.g.*, *Dep. of Parker*, at 16–18 & Exhs. 1 (App. 209–10, 230–35).

On or about September 12, 2006, Mr. Thomas was charged with child molestation, in violation of Indiana Code § 35-42-4-3. *Complaint*, ¶ 15 (App. 48); *Answer*, ¶ 15 (App. 197). Mr. Thomas was subsequently determined to possess insufficient comprehension to stand trial, in accordance with Indiana Code § 35-36-3-1, *et seq.*, and was therefore committed to the Division. *Complaint*, ¶ 16 (App. 48–49); *Answer*, ¶ 16 (App. 197). At the hearing on Mr. Thomas’s competency, Dr. George Parker, M.D., testified that “an attempt to restoration [to competency]” should be made “in an outpatient setting such that it would not require removal from his home where he has lived with his mother for his entire life.” *Dep. Parker*, at 23 & Exh. 2 (App. 213, 239).<sup>3</sup>

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<sup>3</sup> Dr. George Parker, M.D., is an associate professor of clinical psychiatry and the

This testimony was in keeping with Dr. Parker's previous assessment, in which he noted that

Mr. Thomas should not be referred to the Indiana Division of Mental Health & Addiction for inpatient restoration to competence. It is my opinion, with reasonable medical certainty, that Mr. Thomas is unlikely to become competent to stand trial in the foreseeable future, even with restoration efforts, as his cognitive deficits in the areas of concentration, vocabulary and abstract abilities are both significant and longstanding in nature. In addition, placement in a state hospital would be very confusing for [Mr. Thomas], who has lived at home his entire life. . . . Mr. Thomas would be at risk of victimization at the hands of other, more functional patients in the hospital.

*Id.* at 19–20 & Exh. 1 (App. 211, 235). Other medical professionals have similarly concluded that placement in the restrictive environs of a state institution might lead to the victimization of developmentally disabled individuals. *See, e.g.*, Dep. of Meadows, at 52–54 & Exh. 2 (App. 259–60, 263–64); Aff. of Martin, ¶ 16 (App. 179).

After conducting a hearing on Mr. Thomas's competence to stand trial, on December 14, 2007, the criminal court ordered that Mr. Thomas be "committed to the Division of Mental Health and Addiction to provide competency restoration services or enter into a contract for the provision of competency restoration services by a third party in the location where [Mr. Thomas] currently resides." Complaint, ¶ 17 & Exh. 1 (App. 49, 59–60); Answer, ¶ 17 (App. 197). At the time, Mr. Thomas resided at home

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Director of Forensic Psychiatry at Indiana University School of Medicine, and he examined Mr. Thomas in that capacity. Dep. of Parker, at 6–7, 16, 22 & Exh. 2 (App. 204–05, 209, 212, 240–41). However, Dr. Parker also serves as the Medical Director of the Division of Mental Health and Addiction of the Indiana Family and Social Services Administration. *Id.* at 26–27 (App. 214–15).

with his mother. Complaint, ¶ 19 (App. 49); Aff. of Yulondia Thomas, ¶ 3 (App. 172).

Notwithstanding this order, on February 13, 2008, Mr. Thomas was transported to Logansport State Hospital, where he presently resides. Complaint, ¶ 19 (App. 49); Aff. of Yulondia Thomas, ¶ 4 (App. 172–73). Since his transfer to Logansport State Hospital, Mr. Thomas has not demonstrated any significant behavioral problems, nor has he proven dangerous to himself or others. Dep. of Meadows, at 59–60 (App. 261). Indeed, the medical staff at Logansport State Hospital has repeatedly indicated that Mr. Thomas has proven cooperative, well-behaved, and capable of completing his activities of daily living without assistance. Findings of Fact, ¶ 10 (App. 13) (citing numerous assessments conducted by professionals at Logansport State Hospital).

The staff at Logansport State Hospital has also indicated that “[a] structured, 24-hour placement” in the community will be recommended for Mr. Thomas, including certain outpatient therapies. *See* Comprehensive Psychiatric Evaluation, at 10 (App. 135); Comprehensive Treatment Plan, at 2 (App. 158). Dr. Parker—who serves as the Medical Director of the Division but who evaluated Mr. Thomas in his individual capacity—has similarly recommended outpatient treatment for Mr. Thomas. Dep. of Parker, at 19–20, 23, 51–52 & Exhs. 1–2 (App. 211, 213, 227, 235, 239–42). To the contrary, treatment professionals at Logansport State Hospital have indicated that institutionalization is appropriate for Mr. Thomas. *See, e.g.,* Decl. of Nancy Maxwell Regarding Steven Thomas (“Maxwell – Thomas”), ¶ 27 (App. 292).

Regardless, because Mr. Thomas has been found incompetent to stand trial for a criminal charge, he simply may not be considered for placement outside the restrictive environs of a state institution, notwithstanding the recommendations of Dr. Parker or the treatment team at Logansport State Hospital., for *all* incompetent defendants are placed at one state institution or another. Dep. of Boggs, at 19–20 (App. 87–88). Indeed, in light of the significant evidence indicating that Mr. Thomas is not likely to *ever* regain competency, *see* Dep. of Parker, at 47–48 & Exhs 1–2 (App. 225, 233–35, 238–39); Aff. of Martin, ¶ 11 (App. 178), it is possible that he will be confined to a state institution for the remainder of his life, *see* Dep. of Boggs, at 20 (App. 88).

### III. FACTS CONCERNING THE AGENCY’S POLICY

#### A. *Competency Restoration Services*

The Division of Mental Health and Addiction of the Indiana Family and Social Services Administration (“the Division”) is responsible for the operation of state psychiatric institutions in Indiana, including Logansport State Hospital. Dep. of Boggs, at 10, 12 (App. 79–80); *see also* IND. CODE § 12-24-1-3. An individual may be placed in a state institution following an involuntary civil commitment, following a voluntary civil commitment, or following an adjudication that he or she is not competent to stand trial for a criminal charge. Dep. of Boggs, at 13–14 (App. 81–82).

Criminal defendants who have been adjudicated incompetent to stand trial are automatically committed to the agency for the provision of competency restoration

services. *Id.* at 18 (App. 86); *see also* IND. CODE § 35-36-3-1(b). The agency has not entered into a contract with any third-party for the provision of these services, Dep. of Boggs, at 19 (App. 87); Defendants' Response to Interrogatories, ¶ 7 (App. 114–15); Decl. of Boggs, ¶ 3 (App. 283), and does not provide these services on an outpatient basis or in community-based placement alternatives, Dep. of Boggs, at 20 (App. 88). Rather, these services are only provided in state psychiatric institutions such as Logansport State Hospital. *Id.* at 19–20 (App. 87–88).

In addition, the Division has interpreted state law to require that these services be provided indefinitely, regardless of whether a particular patient is likely to regain competency in the future. *Id.* at 19 (App. 87); Dep. of George Parker, at 46–49 & Exh. 3 (App. 224–26, 245–49). Therefore, so long as the criminal charges remain pending, an individual who is adjudged incompetent to stand trial will be forever committed to a state institution regardless of whether he or she is likely to regain competency in the future and regardless of whether medical and psychiatric treatment professionals recommend alternative placement. Dep. of Boggs, at 19–20 (App. 87–88).

Pursuant to state law, the statutory gatekeeper for an individual who has been adjudged incompetent to stand trial is the Division, although this responsibility has been delegated to two (2) individuals in the Office of the General Counsel within the Indiana Family and Social Services Administration. *Id.* at 25–26 & Exh. 4 (App. 89–90, 95); *see also* IND. CODE § 12-24-12-10(b)(1). As such, these individuals have the

responsibility for determining when institutionalized patients are ready for discharge from a state institution. Dep. of Boggs, at 27 (App. 91). However, in the case of patients who have been adjudged incompetent to stand trial, not until the underlying criminal charge has been dismissed do these individuals “assist in stepping that person to another gatekeeper who . . . may return [the] individual to the community.” *Id.* at 29 (App. 93).

A treatment team on each unit of a state institution is responsible for the daily care of patients assigned to that unit. *Id.* at 15 (App. 83). The members of that team might include psychologists, psychiatrists, physicians, or social workers, *id.* at 15–16 (App. 83–84), who are collectively responsible for creating an individualized treatment plan for each patient and for assisting with the provision of services determined by this plan, *id.* at 16 (App. 84). Soon after the arrival of a patient to a state institution, the treatment team begins planning for the patient’s eventual release. *Id.*; Dep. of Parker, at 49–50 (App. 226); Dep. of Meadows, at 41–42 (App. 257–58). This is considered good clinical practice. Dep. of Parker, at 50 (App. 226).

Developmentally disabled individuals against whom criminal charges are not pending are routinely transitioned from a state institution to a less restrictive environment. Dep. of Adrienne Shields (“Shields”), at 15–19 (App. 104–08). This alternative environment may consist of available Medicaid home and community based waiver services, a group home setting, an intermediate care facility for the mentally

retarded, or an extensive support home designed for individuals with behavioral problems. *Id.* at 15–17 (App. 104–06). Unlike the transition of individuals against whom criminal charges are pending, the transition of other individuals is determined by the treatment team at the state institution in consultation with the Bureau of Developmental Disabilities Services (“BDDS”). *Id.* at 12–15 (App. 101–04); *see also* Aff. of Planck, ¶ 15 (App. 194) (indicating that the Cardinal Center may not accept an individual for placement in one of its group homes until the patient has received a referral from BDDS).

Since 2002, at least seven hundred thirty-seven (737) individuals were committed to the Division following an adjudication that they were incompetent to stand trial for a criminal charge. Defendants’ Response to Interrogatories, ¶ 1 (App. 111). The vast majority of these individuals were thereafter transferred to Logansport State Hospital, although a significant number of incompetent defendants were also transferred to other state institutions. *See id.*, ¶ 3 (App. 112–13). During this same period, at least sixty (60) developmentally disabled individuals were committed to the Division following an adjudication that they were incompetent to stand trial, including seven (7) such individuals during the first three (3) months of 2008. Defendant’s First Supplemental Response to Plaintiff’s First Set of Interrogatories, ¶ 2 (App. 117–18). Once again, the vast majority of these individuals are transferred to Logansport State Hospital. *See id.*, ¶ 4 (App. 118–20).

### *B. Non-Restorable Criminal Defendants*

In September of 2007, Dr. George Parker—the Medical Director for the Division—authored a paper entitled “Draft White Paper: Incompetent to Stand Trial, Restoration of Competence, and Unrestorable Defendants.” *See* Dep. of Parker, at 39–40 & Exh. 3 (App. 221, 245–49). According to Dr. Parker, some institutionalized patients who are not presently competent to stand trial will *never* be restored to competency. *Id.* at 46 (App. 224); *see also* Dep. of Meadows, at 38–41 (App. 257); Aff. of Martin, ¶ 11 (App. 178). Although professionals nonetheless use the phrase “competency restoration,” most of these patients have never possessed competency. Dep. of Parker, at 46–47 (App. 224–25). Non-restorable patients fall into one (1) of two (2) broad categories: patients with a developmental disability that has been stable for some time and that detrimentally affects the patients’ ability to learn material; or patients who have suffered permanent brain damage. *Id.* at 47 & Exh. 3 (App. 225, 246–49); *see also* Dep. of Meadows, at 38–41 (App. 257); Aff. of Martin, ¶ 11 (App. 178). Because not all of these patients would otherwise require institutionalization, “some [criminal] defendants have remained in the state hospital for years, not due to treatment need, but due to their legal status.” Dep. of Parker, at 39–40 & Exh. 3 (App. 221, 246).<sup>4</sup>

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<sup>4</sup> This is in keeping with Indiana law, which defines a developmental disability in terms of the likelihood that it will last indefinitely. *See* IND. CODE § 12-7-2-61. Most such disabilities result from genetic abnormalities, although some may result from brain injuries or infections prior to, during, or shortly after birth. Aff. of Martin, ¶ 10 (App. 177–78). Common examples of developmental disabilities include autism, cerebral

## SUMMARY OF THE ARGUMENT

This case is not about the immediate placement of the appellants, both of whom are developmentally disabled individuals who have been charged with a crime in Indiana. To the contrary, this case is about an agency policy wherein criminal defendants adjudicated to possess insufficient comprehension to stand trial pursuant to Indiana Code § 35-36-3-1, *et seq.*, are not even considered for placement outside of the restrictive environs of a state institution, notwithstanding the clear mandate of Indiana law and the present existence of alternative placements.

1. The trial court erred as a matter of law when it determined that this case is not ripe for review. The question of whether a case is ripe for adjudication turns both on “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). While the hardship to the appellants caused by the withholding of judicial consideration is self-evident, in an action challenging the practice or policy of a state agency, ripeness is established as a matter of law by a showing that the “law, policy, or

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palsy, and mental retardation. *Id.* Both Steven Thomas and Derrick Dausman are mentally retarded individuals with IQs in the lower-50s. *See* Dep. of Parker, at 17–19 & Exh. 1 (App. 210–11, 233); Aff. of Martin, ¶¶ 13–14 (App. 178–79). If a developmentally disabled individual does not gain competence within one (1) year, the likelihood that he will ever regain competence begins to approach zero. Dep. of Parker, at 48 (App. 225). As of the filing of this brief, nearly fourteen (14) months have passed since Mr. Thomas was found incompetent to stand trial, Complaint, ¶ 17 & Exh. 1 (App. 49, 59–60), and more than nine (9) months have passed since Mr. Dausman was found incompetent to stand trial, *id.*, ¶ 32 & Exh. 2 (App. 51, 61–62).

practice actually has been applied to [the plaintiffs] in a way that harms them.” *Walker v. Wisconsin State Legislative Council*, 536 F.Supp.2d 992, 995 (W.D. Wis. 2007) (citation omitted). The Division has not contended and may not seriously contend that the policy at issue has not been applied to the appellants, and therefore this case is ripe.

Even were ripeness not established by a demonstration that the challenged policy has been applied to the appellants, however, the Division is obligated “to conform with its constitutional and statutory duty to *consider* the appropriateness of community placement” for institutionalized patients in their care. *Messier v. Southbury Training Sch.* [*Messier II*], 562 F.Supp.2d 294, 326 (D. Conn. 2008) (citation omitted) (emphasis added). In Indiana, all individuals committed to the Division against whom criminal charges are not pending are routinely considered for alternative placements, as the Division is required to constantly “facilitate and plan” these transitions, IND. CODE § 12-24-12-9. However, this consideration is entirely lacking in the case of individuals who have been adjudicated incompetent to stand trial for a criminal charge, and the very lack of consideration on the same terms and conditions as all other patients represents cognizable injury that is ripe for review.

2. Additionally, the trial court erred in determining that it was prohibited from reaching the merits of the appellants’ claims by the separation-of-powers doctrine of the Indiana Constitution. The appellants—unlike the plaintiff class in *Y.A. v. Bayh*, 657 N.E.2d 410 (Ind. Ct. App. 1995), *trans. denied*—are asking the judiciary to *enforce*

legislative enactments, and there is absolutely no authority for the proposition that the judiciary may not enjoin a state agency to comply with a mandatory provision of state law. *See, e.g., Center Township v. Coe*, 572 N.E.2d 1350, 1358 (Ind. Ct. App. 1991). Similarly, although there is doubtless a finite amount of discretion afforded the Division to render placement and treatment decisions, no state agency possesses the discretion to violate state law or the United States Constitution, and judicial action in the present case therefore does not infringe on the authority of the executive branch.

3. Insofar as the only defenses ever mounted to the appellants' state law claims concerned the ripeness of those claims and the alleged violation of the separation-of-powers doctrine, it is clear that the policy presently at issue violates Indiana law. After all, the Division is required to provide "competency restoration services" in the "least restrictive environment" appropriate for a patient, IND. CODE § 35-36-3-1(b), and is required to constantly "facilitate and plan" each patient's transition from a state institution to a placement in the community, IND. CODE § 12-24-12-9. Neither of these mandates is served by a policy wherein all incompetent criminal defendants are automatically placed in the restrictive environs of a state institution, with no consideration ever given to alternative placement.

4. Moreover, the policy presently at issue also violates the Fourteenth Amendment to the United States Constitution. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the United States Supreme Court explained unequivocally that the Due Process Clause "requires

that the courts make certain that *professional judgment* [in determining the reasonable conditions of safety for a particular individual] in fact was exercised,” *id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980)) (emphasis added); accordingly, the courts “must show deference to the judgment exercised by a qualified professional,” *id.* at 322. This requirement extends to the decision to keep a resident in an institution instead of placing him or her in a community setting, which must also be “a rational decision based on professional judgment.” *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1249 (2d Cir. 1984). However, the Division’s policy ensures that professional judgment is entirely removed from the decision-making process, and placement decisions are instead made by attorneys without regard to the needs of a particular placement. Thus, this policy exists in direct contravention to the Division’s “constitutional . . . duty to consider the appropriateness of community placement” for institutionalized patients in its care. *Messier II*, 562 F.Supp.2d at 326.

## ARGUMENT

### I. STANDARD OF REVIEW

The standard for the granting of summary judgment in Indiana is clear:

Summary judgment is appropriate only if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Neither the trial court, nor the reviewing court, may look beyond the evidence specifically designated to the trial court.

*Best Homes, Inc. v. Rainwater*, 714 N.E.2d 702, 705–06 (Ind. Ct. App. 1999) (citing *Barnes v. Antich*, 700 N.E.2d 262, 265 (Ind. Ct. App. 1998)). The appellate review of a ruling on

summary judgment utilizes the same standard of review as that utilized by the trial court. *See, e.g., Hart Conversions, Inc. v. Pyramid Seating Co., Inc.*, 658 N.E.2d 129, 130 (Ind. Ct. App. 1995). In this case, the trial court issued findings of fact and conclusions of law in support of its summary judgment determination. However,

[t]he entry of specific findings and conclusions does not alter the nature of a summary judgment[,] which is a judgment entered when there are no genuine issues of material fact to be resolved. Thus, in the summary judgment context, [this Court is] not bound by the trial court's specific findings of fact and conclusions of law. They merely aid [in the appellate] review by providing [this Court] with a statement of reasons for the trial court's actions.

*Heritage House of Salem, Inc. v. Bailey*, 652 N.E.2d 69, 75 (Ind. Ct. App. 1995), *trans. denied* (internal citations omitted).

## II. BACKGROUND TO THE LAW CONCERNING INDIVIDUALS WHO LACK SUFFICIENT COMPREHENSION TO STAND TRIAL FOR A CRIMINAL OFFENSE.

Under state law, if a criminal court finds that a defendant lacks “the ability to understand the proceedings and assist in the preparation of [his or her] defense,” the court is required to “delay or continue the trial and order the defendant committed to the division of mental health and addiction.” IND. CODE § 35-36-3-1(b). The Division of Mental Health and Addiction then must

provide competency restoration services or enter into a contract for the provision of competency restoration services by a third party in the:

- (1) location where the defendant currently resides; or
- (2) least restrictive setting appropriate to the needs of the defendant and the safety of the defendant and others.

*Id.* The only exception to this requirement is if the defendant is serving an unrelated executed sentence in the Department of Correction “at the time the defendant is committed to the division of mental health and addiction,” *id.*, a scenario that is not applicable at present.

After ninety (90) days, if a substantial probability does not exist that the defendant will be restored to competency, the state institution is required to “initiate regular commitment proceedings” against the individual. IND. CODE § 35-36-3-3(b). Even if the defendant does, after ninety (90) days, possess a substantial likelihood of being restored to competency, if he or she has not been so restored within six (6) months, the state institution is likewise required to “institute regular commitment proceedings” against the individual. IND. CODE § 35-36-3-4. Such commitment does not require inpatient hospitalization; rather, the patient may be committed to any appropriate facility—a list that includes a community mental health center, a psychiatric unit of a hospital, a community residential program for the developmentally disabled, or an intermediate care facility for the mentally retarded, *see* IND. CODE § 12-26-11-1—or treated at an outpatient facility. *See* IND. CODE § 12-26-14-1.

III. THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANTS’ CLAIMS ARE NOT RIPE FOR REVIEW, FOR IT IS UNDISPUTABLE THAT THE POLICY PRESENTLY AT ISSUE IS BEING APPLIED TO THE APPELLANTS AND THAT THE DIVISION POSSESSES THE IMMEDIATE DUTY TO CONSIDER THE APPELLANTS FOR ALTERNATIVE PLACEMENTS.

The trial court concluded first that the appellants’ claims in this cause are not

ripe for review, and must therefore be dismissed. Conclusions of Law, ¶ 1 (App. 19). However, this conclusion was erroneous for at least two (2) reasons: *first*, when the practice or policy of a governmental entity is challenged, ripeness is established by a showing that the practice or policy has in fact been applied to the plaintiffs, and the Division has never disputed and cannot seriously dispute that the policy presently at issue has been applied to both Mr. Thomas and Mr. Dausman; *and second*, in Indiana, the Division begins planning for the transition of all patients in its custody—with the exception of those against whom criminal charges are pending—from the very outset of the patients’ institutionalization, and it possesses a constitutional and statutory duty to consider and prepare the appellants’ transition to the community that is entirely lacking from the Division’s current treatment of the appellants.

*A. Ripeness exists in the present case insofar as the appellants are challenging a governmental practice or policy that has undisputedly been applied to them.*

The question of whether a case is ripe for adjudication turns both on “‘the fitness of the issues for judicial decision’ and ‘the hardship to the parties of withholding court consideration.’” *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Development Comm’n*, 461 U.S. 190, 201 (1983) (quoting and citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). As one federal appellate court has concluded, “in the absence of any significant agency or judicial interests militating in favor of delay, we cannot imagine how the hardship factor could ever tip the balance against judicial review.” *Hotel & Rest. Employees Union v. Smith*, 846 F.2d 1499, 1508 (D.C. Cir. 1988) (internal quotation

omitted).

Moreover, even if the appellants would not suffer significant hardship from the withholding of judicial consideration, in an action challenging the practice or policy of a state agency, ripeness is established as a matter of law by a showing that the “law, policy, or practice actually has been applied to [the plaintiffs] in a way that harms them.” *Walker v. Wisconsin State Legislative Council*, 536 F.Supp.2d 992, 995 (W.D. Wis. 2007) (citation omitted); *see also Hotel & Rest. Employees Union*, 846 F.2d at 1508 (To establish ripeness, one of the plaintiff’s “task[s] at a merits proceeding . . . would be . . . to convince the court the practice has been applied against [its] members.”); *Espinoza v. Texas Dep’t of Pub. Safety*, No. 3:00-CV-1975-L, 2007 WL 1393751, at \*3–4 (N.D. Tex. May 11, 2007) (“Because [the state agency] applied its regulation to [the plaintiff], her claim is ripe for adjudication.”).

Of course, the trial court did not find, and the Division cannot seriously contend, that the policy presently at issue has not been applied to either Mr. Thomas or Mr. Dausman. After all, Mr. Thomas was transported to Logansport State Hospital even after the criminal court heard testimony from multiple experts and explicitly ordered that he receive services while continuing to reside in his home. *See* Complaint, ¶ 17 & Exh. 2 (App. 49, 59–60). Similarly, Mr. Dausman was transported to the state institution even though no qualified professional at the time determined such placement suitable to his needs, *see, e.g., Aff. of Martin*, ¶¶ 16–17 (App. 179) (indicating that a state

institution is not the least restrictive environment for Mr. Dausman and that he should be “provided with supports in the community” instead), and even though a residential facility offering constant supervision was prepared to arrange for Mr. Dausman to reside at one of its facilities, *see* Aff. of Stanley, ¶ 7 (App. 188); Aff. of Planck, ¶ 11 (App. 193). As the policy presently at issue has been applied to each of the individual appellants, the present controversy is most assuredly ripe for adjudication.

*B. In Indiana, the Division must begin planning for the transition of all patients in its custody from the very outset of the patients’ institutionalization, and the failure to do that for patients with pending criminal charges represents non-theoretical injury that is being experienced at present.*

Moreover, as one court has stated in a remarkably similar context to the present case, the Division is obligated “to conform with its constitutional and statutory duty to *consider* the appropriateness of community placement” for institutionalized patients in its care. *Messier v. Southbury Training Sch. [Messier II]*, 562 F.Supp.2d 294, 326 (D. Conn. 2008) (quoting *Messier v. Southbury Training Sch. [Messier I]*, 183 F.R.D. 350, 358 (D. Conn. 1998)) (emphasis added). In addressing the defendants’ argument that community placement may not be appropriate, practical, or possible for many members of the plaintiff class, the court in *Messier II* indicated that this was irrelevant to the disposition of the case. The court thus concluded that the defendants “had failed adequately [in their duty] to *provide for the evaluation* of all class members for community placement.” *Id.* at 345 (emphasis added).

Although the “statutory duty” referenced in *Messier II* was the integration mandate of the American with Disabilities Act of 1990, 28 C.F.R. § 35.130(d), whereas the statutory duties invoked at present are the Division’s duties to provide services in the “least restrictive setting appropriate,” IND. CODE § 35-36-3-1(b), and to “facilitate and plan” patients’ transitions to the community, IND CODE § 12-24-12-9, this is a difference of little consequence. For all individuals committed to the Division against whom criminal charges are not pending, consideration for these alternative placements is routinely rendered, and patients are transitioned to these alternative facilities when either the Division determines such a transition appropriate or when a court of law orders such a transition. *See* Dep. of Parker, at 49–50 (App. 226); Dep. of Meadows, at 41–42 (App. 257–58); Dep. of Shields, at 14–16 (App. 103–05). This consideration is entirely lacking in the case of individuals who have been adjudicated incompetent to stand trial for a criminal charge, and the very lack of consideration on the same terms and conditions as all other patients represents cognizable injury that is ripe for review.<sup>5</sup>

Although treatment professionals at Logansport State Hospital have indicated that they believe that placement to constitute the “least restrictive environment” for

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<sup>5</sup> In this vein, ripeness has, at the very least, been statutorily created by Indiana Code § 12-24-12-9, which makes release-planning a requirement as soon as an individual is admitted to a state institution. The doctrine of statutory standing is well-established, *see, e.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 286–90 (1992) (Scalia, J., concurring in the judgment), and “standing question[s] . . . bear[] close affinity to questions of ripeness,” *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) (citing multiple cases).

each of the appellants, this conclusion is no doubt mediated by the fact that the Division is under a legal duty to provide so-called “competency restoration services,” IND. CODE § 35-36-3-1(b), to each of the appellants and that the Division has chosen to provide such services only in these restrictive environs, *Dep. of Boggs*, at 20 (App. 88). Thus, under the Division’s present policy—the policy that is challenged in the case at bar—Logansport State Hospital *does* constitute the “least restrictive environment” suitable to the appellants’ needs, simply because it constitutes the *only* environment in which competency restoration services are offered. This conclusion, therefore, is entirely circular. Indeed, one of the justifications proffered for the Division’s conclusions that Logansport State Hospital represents the “least restrictive environment” for either appellant is the mere fact that the Division does not offer services in the community. *See* Decl. of Lozano – Dausman, ¶ 10 (App. 286–87); Decl. of Maxwell – Thomas, ¶ 24 (App. 291); Decl. of Maxwell – Dausman, ¶ 21 (App. 296); Decl. of Meadows – Thomas, ¶ 10 (App. 298); Decl. of Meadows – Dausman, ¶ 10 (App. 301). Clearly the Division may not justify its failure to comply with Indiana law by the fact that it has failed to comply with Indiana law.

The fact of the matter remains that under the Division’s present policy, Dr. Parker—even though he serves as the Medical Director for the Division—may not contact Mr. Thomas’s treatment team to explain why he believes placement in the community to be appropriate for Mr. Thomas, *see* *Dep. of Parker*, at 19–20, 23, 51–52 &

Exhs. 1–2 (App. 211, 213, 227, 235, 239–42). Similarly, Dr. Martin may not explain why he believes community placement to be suitable for Mr. Dausman’s needs, *see* Aff. of Martin, ¶ 16 (App. 179), nor may the employees of the Cardinal Center detail for the Division precisely what services and what supervision they would offer to Mr. Dausman, *see* Aff. of Stanley, ¶¶ 5–8 (App. 187–88); Aff. of Planck, ¶¶ 5–12 (App. 191–93). This latter point is particularly noteworthy insofar as the Cardinal Center offers 24-hour supervision for all patients in its care, and would do so for Mr. Dausman. Aff. of Stanley, ¶ 7 (App. 188); Aff. of Planck, ¶¶ 8–9, 11 (App. 192–93).<sup>6</sup>

Despite the Division’s arguments to the contrary, this case must be resolved on its merits.<sup>7</sup>

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<sup>6</sup> Moreover, in order to determine whether this case is ripe for adjudication, it is important to examine the specifics of the appellants’ legal claims. Their claim under Indiana Code § 12-24-12-9, for instance, does not mature whenever the Division deems them suitable for a less restrictive setting; rather, the Division is under the duty to “facilitate and plan” the appellants’ transition to an alternative placement *as soon as they are admitted*. Similarly, the appellants’ argument under *Youngberg v. Romeo*, 457 U.S. 307 (1982), alleges the unconstitutionality of a policy whereby the ultimate placement decision rests with the Office of the General Counsel of the Indiana Family and Social Services Administration, rather than with qualified treatment professionals; this is a claim alleging a deficiency in the deliberative process rather than a claim seeking the appellants’ release, and it is simply no answer for the Division to argue that some treatment professionals believe both appellants to currently reside in an appropriate setting, for the Division’s own policy has entirely removed these same treatment professionals from the decision-making process. The appellants’ other legal claim likewise concerns the unavailability of alternative placements, and this is an injury that exists *now*.

<sup>7</sup> The appellants do not contend and have never contended that the fitness of their claims for resolution is contingent upon the demonstration that they are presently suitable for a less restrictive placement than Logansport State Hospital. To the contrary,

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DETERMINED THAT IT WAS PREVENTED FROM REACHING THE MERITS OF THE APPELLANTS' CLAIMS BY THE SEPARATION-OF-POWERS DOCTRINE ENCAPSULATED IN ARTICLE 3, SECTION 1 OF THE INDIANA CONSTITUTION.

Relying largely on this Court's decision in *Y.A. v. Bayh*, 657 N.E.2d 410 (Ind. Ct. App. 1995), *trans. denied*, the trial court in this case concluded that the relief sought by the appellants "asks th[e judiciary] to infringe upon the duties and powers of the legislature and to usurp the statutory discretion afforded to the Division of Mental Health and Addiction." Conclusions of Law, ¶ 3 (App. 20). However, this conclusion is fundamentally flawed for two (2) reasons: *first*, the appellants—unlike the plaintiff class in *Y.A.*—are asking the judiciary to *enforce* legislative enactments, and there is absolutely no authority for the proposition that the judiciary may not enjoin a state agency to comply with state law; *and second*, although there is doubtless a finite amount

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the Division is under the immediate duty to evaluate the needs of each appellant and under the continuing duty to "facilitate and plan" their transitions to the community. *See* IND. CODE § 35-36-3-1(b); IND CODE § 12-24-12-9.

However, in the event that this Court concludes that the appellants must demonstrate that they are presently suitable for an alternative placement, the trial court erred in finding that the undisputed facts demonstrate that Logansport State Hospital "is the least restrictive environment" for the appellants. Findings of Fact, ¶ 21 (App. 15). The Division admitted as much in responding to the appellants' Motion for Summary Judgment, when it argued that "nothing could be more disputed than whether assignment to [Logansport State Hospital] is the least restrictive assignment for Thomas and Dausman." Defts.' Response to Mot. for Summ. Judgment, at 23 (App. 281); *see also* Dep. of Parker, at 23 & Exh. 2 (App. 213, 239) (indicating that "an attempt to restoration [to competency]" for Mr. Thomas should be made "in an outpatient setting such that it would not require removal from his home where he has lived with his mother for his entire life"); *Aff. of Martin*, ¶ 16 (App. 179) (indicating that placement at a state institution is not the least restrictive environment appropriate to Mr. Dausman's needs).

of discretion afforded the Division to render placement and treatment decisions, no state agency possesses the discretion to violate state law or the United States Constitution.<sup>8</sup>

*A. Judicial action in the present case does not unconstitutionally infringe on the authority of the Indiana General Assembly.*

Although the trial court held that reaching the merits of this case would constitute a judicial intrusion into the traditional province of the Legislature, Conclusions of Law, ¶¶ 3–5 (App. 20–21), to the contrary this action seeks to compel the defendants to *abide* by statutes enacted by the Indiana General Assembly.

The trial court’s reliance on *Y.A.* is therefore misplaced. In *Y.A.*, this Court was asked to interpret a provision of the state constitution requiring the Legislature “to provide, by law, for the support of institutions for the education of the deaf, the mute, and the blind; and for the treatment of the insane.” *Y.A.*, 657 N.E.2d at 414 (quoting IND. CONST. art. 9, § 1). In determining that the plaintiff class in *Y.A.* could not compel

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<sup>8</sup> It is not immediately clear from the trial court’s decision whether it considered Article 3, Section 1 of the Indiana Constitution to prohibit it from reaching *all* of the appellants’ claims or simply their state law claims. To the extent that the trial court held that the doctrine of separation-of-powers could be invoked to prevent it from reaching the merits of the appellants’ federal claims, this holding was erroneous for an additional reason. After all, it is beyond dispute that the “construction” of federal constitutional requirements is, “by virtue of the Supremacy Clause, the governing law in Indiana, despite the provisions of the Indiana Constitution.” *State Bd. of Tax Comm’rs v. News Pub. Co., Inc.*, 180 Ind. App. 131, 387 N.E.2d 488, 490 (Ind. Ct. App. 1979). In the case of a conflict “between the Federal and State Constitutions, ‘the Supremacy Clause of course controls.’” *Stout v. Bottorff*, 246 F.Supp. 825, 831 (S.D. Ind. 1965) (quoting *Reynolds v. Sims*, 377 U.S. 533, 584 (1964)).

the creation of facilities not presently in existence, the court held that the vague statutes requiring the Division of Mental Health “to ensure that Indiana citizens have access to appropriate mental health and addiction services that promote individual self-sufficiency” did not amount to a legislative requirement that all needy individuals receive appropriate care. *Id.* at 416–18 (quoting IND. CODE § 12-21-1-1). However, this case is certainly distinguishable, for—unlike in *Y.A.*—the present appellants are not seeking the creation of new facilities altogether; rather, they seek only to enforce a mandatory provision of state law, and thus for the full continuum of currently existing community placements to be made available to them.

Regardless of the trial court’s conclusions regarding the separation-of-powers, there can simply be no explanation for the Division’s refusal to treat *any* criminal defendant other than on an in-patient basis at a state institution. After all, the cost of housing a patient on an inpatient basis at a state institution generally ranges from \$428 to \$807 each *day*. Defendants’ Response to Plaintiff’s Second Set of Interrogatories, ¶¶ 1–2 & Exh. A (App. 121–22, 124). However, at least one professional has recommended that Steven Thomas receive outpatient treatment only once or twice a week while residing in his own home, *Dep. of Parker*, at 24 (App. 213), the cost of which surely pales in comparison to the cost of institutionalization. *See id.* at 39–40 & Exh. 3 (App. 221, 248) (noting that “[o]utpatient restoration [services] could be an efficient use of resources, as it could prevent the use of a state hospital bed”). Similarly, for patients

such as Mr. Dausman who reside in the general vicinity of a state institution operated by the Division, the decision to offer on an outpatient basis the same restorative services that are currently offered only on an inpatient basis would doubtless possess absolutely no negative impact on the Division's funds. *See id.* at 45 (App. 224).

Even were this not so, unlike the statutes at issue in *Y.A.*, the statutes at issue in the present case contain unambiguous language dictating where the Division “shall provide competency restoration services,” IND. CODE § 35-36-3-1(b) (emphasis added), and that the Division “has the . . . dut[y] . . . [t]o facilitate and plan the committed individual's transition from [a] state institution to the community or to other appropriate placement,” IND. CODE § 12-24-12-9 (emphasis added). This Court has never determined that the judiciary lacks the power to enforce a mandatory provision of state law, but has instead repeatedly determined such provisions enforceable notwithstanding governmental assertions concerning a supposed lack of funds, and there is no reason to presently depart from these established principles.

In this manner, the present case is far more akin to *Center Township v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991), wherein this Court stressed in the context of poor relief that “the statutory duty to provide benefits is not limited by practicality, and ‘[t]emporary lack of funds is not an excuse.’” *Y.A.*, 657 N.E.2d at 417 (quoting *Coe*, 572 N.E. 2d at 1358) (alteration in original). Indeed, Indiana courts have long held that a finite amount of available appropriations cannot excuse a governmental failure to

perform a mandatory duty. Said the Indiana Supreme Court in *Newcomer v. Jefferson Township*, 181 Ind. 1, 103 N.E. 843 (1914), which concerned poor relief: “The law is just as mandatory that the relief shall be given at the expense of the township, as it is that the overseer shall provide it. . . . It is not a voluntary service, but an obligation imposed by law.” *Id.* at 845. And in 1940, this Court again reiterated that “[t]he fact that the facilities for rendering [mandatory] aid . . . were not adequate . . . would not relieve the township from the statutory obligation of furnishing the aid as provided. Such aid is mandatory under the statute.” *Whitlatch Clinic & Hosp. of Milan v. Carpenter*, 107 Ind. App. 436, 25 N.E.2d 263, 265–66 (1940).

Indeed, in a series of cases entirely apposite to the case at bar, courts in other jurisdictions have repeatedly determined legislative requirements similar or identical to the requirements presently at issue to be judicially enforceable. *See, e.g., Arnold v. Dep’t of Health Servs.*, 775 P.2d 521, 529–534 (Ariz. 1989) (holding that the defendants had violated state law by failing to provide community mental health services to the plaintiffs and “find[ing] no merit in the defendants’ separation of powers argument,” for “[i]t is an appropriate judicial function to determine whether the legislature has created a duty and whether the duty has been breached”); *Ass’n for Retarded Citizens v. Dep’t of Developmental Servs.*, 696 P.2d 150, 154 (Cal. 1985) (concluding that state law bestowed upon developmentally disabled individuals a right “to be provided with services that enable [them] to live a more independent and productive life in the

community,” and that the defendant had no authority to limit this right to the level of available appropriations); *Goebel v. Colorado Dep’t of Insts.*, 764 P.2d 785, 797–98 (Colo. 1988) (determining enforceable a statutory provision requiring that patients be provided with “medical and psychiatric care and treatment suited to meet [their] individual needs and delivered in such a way as to keep [them] in the least restrictive environment possible,” and declaring that the defendants had violated this provision by “fail[ing] to provide the required broad continuum of coordinated community treatment and support services”) (final alteration in original); *In re J.S.*, 880 P.2d 976, 979–981 (Wash. 1994) (holding that the judiciary possesses the authority to order a state agency to provide “less restrictive treatment” even though “no such placement was [presently] available”); *McGraw v. Hansbarger*, 301 S.E.2d 848, 856–59 (W. Va. 1983) (holding that “[i]t is the obligation of the State to provide the resources necessary to accord inmates of State mental institutions the rights which the State has granted them”) (alteration in original).

The simple fact of the matter is that the Division may not choose to allocate its resources in a manner contrary to controlling law, and there is absolutely no authority for the proposition that it may.

*B. Judicial action in the present case does not unconstitutionally infringe on the authority of the Division of Mental Health and Addiction.*

The trial court next concluded that it was prevented from reaching the merits of the appellants’ claims because doing so would constitute a usurpation of “the statutory

discretion afforded to the Division of Mental Health and Addiction.” Conclusions of Law, ¶ 3 (App. 20); *see also id.*, ¶¶ 6–9 (App. 21–22).

However, this conclusion is also fundamentally flawed for the very simple reason that *no* state actor possesses discretion to act in a manner contrary to law or the United States Constitution. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 138 n.15 (1984) (Stevens, J., dissenting) (stating conclusively that “officials have no discretion to violate the law”); *Porter-Summey v. White*, No. 03-10050, 2007 WL 2413107, at \*5 (E.D. Mich. Aug. 21, 2007) (stating, in the context of a due process claim, that “an agency does not have ‘discretion’ to ignore the Constitution”); *Miller v. Caldera*, 138 F.Supp.2d 10, 13 (D.D.C. 2001) (holding that a governmental agency “does not have discretion to act contrary to the Fifth Amendment”); *Brockmann v. Dep’t of the Air Force*, 27 F.3d 544, 549 (Fed. Cir. 1994) (holding that “[a]n agency does not have discretion to violate the Constitution” and that a legislature “can no more confer such discretion upon an agency than it can enact unconstitutional legislation”); *McClure v. Secretary of the Commonwealth*, 766 N.E.2d 847, 859 n.3 (Mass. 2002) (stating that a state legislature “does not have discretion to downgrade the importance of either of [two] constitutional mandates”); *Weaver v. Pennsylvania Bd. of Prob. & Parole*, 688 A.2d 766, 782 (Pa. Commw. Ct. 1997) (holding that a state actor “does *not* have discretion to violate the U.S. Constitution or the Pennsylvania Constitution” but rather “has a *mandatory duty* to exercise its discretion in compliance with them”) (emphasis in original).

Thus, even though there is undoubtedly a certain amount of discretion afforded the Division in rendering treatment decisions for institutionalized patients, *see, e.g.*, IND. CODE § 12-24-1-4 (permitting the Division to transfer patients between state institutions); IND. CODE § 12-26-3-1 (permitting the Division to admit patients who seek to voluntarily commit themselves to a state institution), this limited discretion may not be relied upon by the state agency to justify statutory or constitutional violations. To hold otherwise would be to jettison numerous well-established procedural safeguards against involuntary or indefinite institutionalization in favor of a system wherein the Division could unilaterally decide to obtain and maintain custody over any mentally ill or developmentally disabled individual that it chose. *See, e.g.*, IND. CODE § 12-24-19-3 (requiring the release of an institutionalized patient to the “least restrictive setting” under certain circumstances, regardless of the Division’s desires); IND. CODE §§ 12-26-3-4,5 (requiring the release of any voluntarily committed individual upon his or her request, unless a court order to the contrary is obtained); IND. CODE § 12-26-7-5 (providing that an individual may not be involuntarily committed to a state institution except after a hearing and upon a judicial finding that he or she is “mentally ill and either dangerous or gravely disabled”); IND. CODE § 12-26-15-3 (providing that a civilly committed individual may annually request a judicial hearing to review his or her commitment, regardless of whether the Division believes necessary the individual’s continued institutionalization).

Clearly the Division does not, and cannot, possess “exclusive discretion,” Conclusions of Law, ¶ 8 (App. 22), to determine where disabled individuals in Indiana should be placed, and clearly any discretion that the Division *is* afforded simply may not be exercised in a manner inconsistent with controlling law.<sup>9</sup>

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<sup>9</sup> The trial court notes that the Division’s “discretion to manage its budget within [its] legislative allotments was recently discussed and confirmed” by this Court in *In re Contempt of Wabash Valley Hospital, Inc.*, 827 N.E.2d 50 (Ind. Ct. App. 2005). Conclusions of Law, ¶ 7 (App. 21–22). In *Wabash Valley Hospital*, however, this Court interpreted Indiana Code § 12-26-5-1, *et seq.*, which permits a trial court to order the emergency detention of certain individuals to “a facility.” *Wabash Valley Hosp.*, 827 N.E.2d at 58. Under Indiana law, the term “facility” is substantively defined so as to permit a hospital or other institution to decline the admission of an individual when the facility lacks resources to provide adequate treatment to a particular patient. *Id.*; *see also* IND. CODE § 12-7-2-82(3). In the absence of a statutory scheme requiring such treatment, the Court thus determined only that the trial court lacked authority to require that the hospital admit a patient for whom it lacked the resources to care, *Wabash Valley Hosp.*, 827 N.E.2d at 58–60, and the issue in that case is therefore best characterized as whether the courts may require the admission of a patient when Indiana law indicates that they can not. The Court did not address the mandates of Indiana Code § 35-36-3-1(b) or Indiana Code § 12-24-12-9, and its decision in *Wabash Valley Hospital* can therefore offer limited guidance.

In a similar vein, the trial court’s reliance on *Logansport State Hospital v. W.S.*, 655 N.E.2d 588 (Ind. Ct. App. 1995), and *In re Commitment of A.N.B.*, 614 N.E.2d 563 (Ind. Ct. App. 1993), is also misplaced. In *W.S.*, this Court held only that the judiciary could not compel a state institution to hire additional staff. *See W.S.*, 655 N.E.2d at 590. And in *A.N.B.*, this Court held that, absent statutory authority, the judiciary cannot compel the Division to assume financial responsibility for the care of a child admitted to a state mental health facility. *See A.N.B.*, 614 N.E.2d at 567. Insofar as neither of these cases concerned statutory mandates, they, too, can offer little guidance at present. Indeed, this Court in *A.N.B.* even recognized that the Division *would* be responsible for assuming “the costs of special education, non-medical care, and room and board” if the child in that case were “handicapped,” and that the Division *had* breached its duty to “make arrangements for the [child’s] admission to an appropriate facility,” for both of these duties arose from mandatory provisions of Indiana law. *See id.* (relying on the mandates of Indiana Code § 12-24-13-5 and Indiana Code § 12-26-2-9, respectively).

- V. THE TRIAL COURT ERRED IN ENTERRING SUMMARY JUDGMENT ON BEHALF OF THE DIVISION AS TO THE APPELLANTS' CLAIMS UNDER INDIANA LAW, FOR STATE LAW SPECIFICALLY REQUIRES THE STATE TO CONSIDER INCOMPETENT DEFENDANTS FOR COMMUNITY PLACEMENT AND TO BEGIN "FACILITAT[ING] AND PLAN[NING]" THIS ALTERNATIVE PLACEMENT AS SOON AS A PATIENT IS ADMITTED TO A STATE INSTITUTION.

Indiana law mandates that incompetent criminal defendants such as the appellants be provided services in the "least restrictive environment" appropriate to their needs and that, even for those who are initially institutionalized, the Division continuously "facilitate and plan" patients' transitions to the community. The trial court did not reach the merits of the appellants' claim under Indiana Code § 35-36-3-1(b) and barely reached the merits of their claim under Indiana Code § 12-24-12-9, instead concluding that it was prohibited from reaching the merits of these claims by the doctrine of separation-of-powers encapsulated in Article 3, Section 1 of the Indiana Constitution. Conclusions of Law, ¶¶ 2-7 (App. 19-22). Insofar as the only defense ever mounted to the appellants' claims in this regard concerns the separation-of-powers doctrine, *see supra* Part IV, the trial court's decision must be reversed.<sup>10</sup>

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<sup>10</sup> The trial court went to great lengths to make clear that Indiana Code § 35-36-3-1(b) does not require the Division to enter into a contract for the provision of competency restoration services. Conclusions of Law, ¶ 8 (App. 22). The appellants do not dispute and have never disputed that the decision whether to provide competency restoration services itself or to enter into a contract for the provision of such services rests squarely with the Division. However, regardless of whether or not the Division chooses to exercise its discretion to enter into a contract for the provision of such services, no discretion exists in *where* these services must be provided: they "*shall* provide [such] services in the . . . location where the [criminal] defendant currently resides[,] or . . . least restrictive setting appropriate to the needs of the defendant and the safety of the

*A. The Division has breached its duty under Indiana Code § 35-36-3-1(b) to consider the appellants for placement in a less restrictive environment than a state institution.*

Indiana law unequivocally requires the Division to provide services to an incompetent defendant in one of two places: in the location where the patient resides, or in the “least restrictive setting appropriate” to his needs and the safety of himself and others. IND. CODE § 35-36-3-1(b). The trial court did not find, nor could it, that these services are currently provided anywhere outside the restrictive confines of state institutions, and it is exceedingly clear that *all* criminal defendants determined incompetent to stand trial are therefore relocated to these institutions. Dep. of Boggs, at 19–20 (App. 87–88). It is similarly clear that these locations are more restrictive than numerous alternative placements that are not even considered. *E.g.*, Dep. of Shields, at 15–19 (App. 104–08) (reciting examples of alternative placement options and indicating that these options are considered less restrictive than placement in a state institution).

If the Legislature had intended that all incompetent defendants be placed in state institutions, without any consideration or hope for alternative placement, it could have made this intent clear. *Cf., e.g., City of Fort Wayne v. Pierce Mfg., Inc.*, 853 N.E.2d 508, 520 (Ind. Ct. App. 2006), *trans. denied* (holding that had the Legislature desired to create a cause of action under a particular statute, “such an intent could have been made clear”); *Scuro v. State*, 849 N.E.2d 682, 687 n.8 (Ind. Ct. App. 2006), *trans. denied* (stating explicitly that “[h]ad the Legislature intended [a particular result] mechanisms were available to defendant and others.” IND. CODE § 35-36-3-1(b) (emphasis added).

express that intent”) (quoting *Kelly v. State*, 527 N.E.2d 1148, 1155 (Ind. Ct. App. 1988), *summarily aff’d on trans.*, 539 N.E.2d 25 (Ind. 1989)).

In the present case, not only could the Legislature easily have written Indiana Code § 35-36-3-1(b) to effectuate the intention that incompetent individuals be placed in state institutions regardless of whether they are likely to regain competence and regardless of whether treatment professionals recommend alternative placements, but the Legislature expressly *jettisoned* this requirement in favor of the current statute. Prior to 2004, the statute required that an incompetent defendant be “committed to the division of mental health and addiction to be confined by the division in an appropriate psychiatric *institution.*” H.E.A. 1300, 2004 Gen. Assem., Reg. Sess., P.L. 77-2004, § 5 (Ind. 2004) (emphasis added). However, this language was amended to its current form by the Legislature five (5) years ago. *Id.*<sup>11</sup>

Notwithstanding the clear move by the Legislature *away* from a requirement that all incompetent defendants be placed in a state institution, the Division has steadfastly refused to alter its placement of these individuals. To bestow upon the statute the meaning ascribed to it by the Division would be to hold that the actions of the

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<sup>11</sup> Moreover, Indiana is certainly not alone in requiring the provision of competency restoration services in settings less restrictive than a state institution, at least under some circumstances. *See, e.g.*, CAL. PENAL CODE §§ 1370, 1600; COLO. REV. STAT. ANN. § 16-8-111(b); D.C. CODE § 24-531.05; FLA. STAT. ANN. § 916.304(1); 725 ILL. COMP. STAT. ANN. 5/104-17(b); IOWA CODE ANN. § 812.6; MICH. COMP. LAWS ANN. § 330.2032; NEV. REV. STAT. ANN. § 178.425(3); N.J. STAT. ANN. § 2C:4-6; N.D. CENT. CODE § 25-03.1-20; OR. REV. STAT. ANN. § 161.370(2); VT. STAT. ANN. tit. 13, § 8843; VA. CODE ANN. § 19.2-169.2; WIS. STAT. ANN. § 971.14(5)(a).

Legislature should be given no effect. *See, e.g., Hannis v. Deuth*, 816 N.E.2d 872, 876 (Ind. Ct. App. 2004) (citing *State v. Rumble*, 723 N.E.2d 941, 944 (Ind. Ct. App. 2000)) (holding that “in construing a [statutory] provision, [courts must] assume that the legislature did not enact a useless provision”).<sup>12</sup>

*B. The Division’s policy presently at issue is violative of its duty under Indiana Code § 12-24-12-9 to “facilitate and plan” the transition of all institutionalized persons from a state institution to the community or other alternative placement.*

Under state law, the Division is the statutory gatekeeper for an incompetent defendant. *See* IND. CODE § 12-24-12-10(b)(1); Dep. of Boggs, at 25–30 & Exh. 4 (App. 89–95). As such, the Division possesses an ongoing duty “[t]o facilitate and plan the committed individual’s transition from the state institution to the community or to other appropriate placement.” IND. CODE § 12-24-12-9. Although Indiana courts have

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<sup>12</sup> The trial court made several findings concerning the quantity and quality of services that are provided at Logansport State Hospital. *See, e.g.,* Findings of Fact, ¶¶ 19–20, 22 (App. 15). However, these findings, of course, miss the point. First, it is exceedingly well-established that “commitment for any purpose represents a significant deprivation of liberty,” *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Jones v. U.S.*, 463 U.S. 354, 361 (1983))—and, by extension, undoubtedly constitutes cognizable injury. After all, there is little doubt that *any* person would receive more services at Logansport State Hospital than he or she is presently receiving, but this fact does not transform the state institution into the “least restrictive environment” suitable to his or her needs, safety, and well-being.

Moreover, the Division may simply not defend against an allegation that it fails to offer services in community settings, as required by Indiana law, by indicating that these services are only offered at state institutions. This is clearly a circular argument, and the trial court’s findings in this regard are therefore best understood as merely reiterating the undisputed fact that the Division simply does not offer services to incompetent defendants outside of the restrictive environs of a state institution. *See, e.g.,* Dep. of Boggs, at 20 (App. 88).

not had occasion to further develop the contours of this requirement since the statute's enactment in 1995, its language is clear. Insofar as the Division has ensured that the appellants' "transition from the state institution to the community or to other appropriate placement" will never occur absent the dismissal of the pending criminal charges or a restoration to competence that may not happen, it is impossible to conceive how they are nonetheless "facilitat[ing] and plan[ning]" this transition.

Although the trial court relied on this Court's relatively recent decision in *In re Contempt of Wabash Valley Hospital, Inc.*, 827 N.E.2d 50 (Ind. Ct. App. 2005), for its conclusion that the gatekeeping statute has not been violated, *see* Conclusions of Law, ¶ 13 (App. 23), this reliance was erroneous. In recognizing that "admissions decisions implicate professional judgment and expertise about treatment alternatives" and that "[f]acilities are generally in a better position to make admissions decisions than trial courts," *id.* at 58–59, the *Wabash Valley* Court held only that immediate bed-space may not be compelled for a needy individual, *id.* at 58–61; *see also supra* note 9. The Court said absolutely nothing about the statutory requirement that involuntarily institutionalized individuals be continuously transitioned to community placement, *see* IND. CODE § 12-24-12-9, and did not once invoke the gatekeeping statutes presently at issue.

What is important for present purposes, even in light of the *Wabash Valley* court's holding, is that the Division has implemented a policy wherein "professional judgment

and expertise about treatment alternatives,” *Wabash Valley Hosp.*, 827 N.E.2d at 59, are removed entirely from the equation. To the contrary, the placement of incompetent defendants is pre-ordained without any consideration of the professional judgment required by *Wabash Valley* and the Fourteenth Amendment to the United States Constitution, *see infra* Part VI, and this pre-ordained placement lasts indefinitely notwithstanding the statutory mandate that the Division “facilitate and plan” all institutionalized individuals’ transitions to the community, IND. CODE § 12-24-12-9.<sup>13</sup>

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<sup>13</sup> The trial court found, as a matter of fact, that “[c]ommunity programs cannot provide the same quality or quantity of services to [the appellants] as are provided . . . at Logansport State Hospital.” Findings of Fact, ¶ 20 (App. 15). However, this is a distortion of the evidence that was actually proffered by the Division. Rather than indicating that such programs—including competency restoration services—*cannot* be offered in the community, the Division only reiterated the undisputed fact that such programs *are* not offered in the community. *See, e.g.*, Decl. of Maxwell – Thomas, ¶ 24 (App. 291) (indicating that Mr. Thomas is receiving services that *are* not available in the community); Decl. of Maxwell – Dausman, ¶ 21 (App. 296) (indicating that Mr. Dausman is receiving services that *are* not available in the community). Of course, this case is not about the vast array of services that the Division no doubt offers at its state institutions.

To the contrary, this case is about whether the Division violates Indiana law and the United States Constitution by failing to treat any incompetent criminal defendant in a locale that is less restrictive than its state institutions. The undisputed evidence was not only that competency restoration services may be successfully provided in the community, but also that they have been previously both in Indiana and elsewhere. *See* Aff. of Dr. Joel A. Dvoskin, Ph.D., A.B.P.P., ¶¶ 20–22, 24–25 (App. 277–78); Dep. of Parker, at 25–26, 37, 39, 57 & Exhs. 2–3 (App. 214, 220–221, 229, 244, 248). Were the Division convinced that either appellant represents a danger to himself or his community, there is absolutely nothing preventing it from seeking the civil commitment of Mr. Thomas or Mr. Dausman. This would require the Division to demonstrate that institutionalization is actually necessary for a particular individual, and would provide the appellants with procedural safeguards against their arbitrary commitment. *See* IND. CODE § 12-26-6-1, *et seq.*

VI. AS THE DIVISION'S POLICY IS VIOLATIVE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT ON BEHALF OF THE DIVISION AS TO THIS CLAIM.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Although this provision certainly serves as "a guarantee of fair procedure," *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring), it also "contains a substantive component that bars certain . . . wrongful government actions regardless of the fairness of the procedures used to implement them," *Kellogg v. City of Gary*, 562 N.E.2d 685, 699 (Ind. 1990) (quoting *Zinerman v. Burch*, 494 U.S. 113, 125 (1990)) (internal quotation omitted). This substantive component of due process extends into the realm of the treatment of individuals whose care has been placed in the hands of the State.<sup>14</sup>

*A. An institutionalized patient has a due process right to appropriate placement in the least restricting environment practicable that is violated when alternative placement options are uniformly foreclosed based solely on the pendency of criminal charges.*

While the Supreme Court in *Youngberg v. Romeo*, 457 U.S. 307 (1982), reiterated its belief that a state may constitutionally restrict the movement of institutionalized

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<sup>14</sup> The United States Supreme Court "repeatedly has recognized that . . . commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (citing numerous cases); *see also, e.g., In re Commitment of Bradbury*, 845 N.E.2d 1063, 1065 (Ind. Ct. App. 2006). While this liberty interest extends most certainly to the fact of commitment itself, *see, e.g., Vitek v. Jones*, 445 U.S. 480, 491–94 (1980), it also encompasses both the right to "reasonable conditions of safety and freedom from unreasonable restraints" and the right to "minimally adequate habilitation," *Youngberg v. Romeo*, 457 U.S. 307, 321–23 (1982).

individuals when necessary to “protect them as well as others from violence,” *id.* at 320, it also recognized for the first time the constitutional right of a committed individual to “minimally adequate habilitation,” *id.* at 316–19. In addressing the contours of this right, the Court explained unequivocally that the Constitution “requires that the courts make certain that *professional judgment* [in determining the reasonable conditions of safety for a particular individual] in fact was exercised,” *id.* at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (3d Cir. 1980)) (emphasis added); accordingly, the courts “must show deference to the judgment exercised by a qualified professional,” *id.* at 322.

The right to be free from bodily restraint is thus breached “when an individual is restrained unless the decision was made ‘pursuant to an appropriate exercise of judgment by a health professional.’” *Estate of Cole v. Fromm*, 94 F.3d 254, 262 (7<sup>th</sup> Cir. 1996) (quoting *Wells v. Franzen*, 777 F.2d 1258, 1261 (7<sup>th</sup> Cir. 1985), and noting that the rule derives from the Supreme Court’s decision in *Youngberg*). Like any other decision to place restraints on a patient’s freedom, the decision to keep a resident in an institution instead of placing him or her in a community setting must be “a rational decision based on professional judgment.” *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1249 (2d Cir. 1984). Indeed, the *Youngberg* Court itself defined the professionals who are qualified to render placement decisions: “[T]reatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and

training of the mentally retarded.” *Youngberg*, 457 U.S. at 323 n.30.

Notably absent from this list is “FSSA legal counsel,” to whom this decision-making authority has been unilaterally delegated by the Division. *See* Dep. of Boggs, at 26–28 & Exh. 4 (App. 90–92, 95) (noting that the gatekeeping responsibilities of the Division have been delegated to two (2) attorneys in the Office of the General Counsel); Dep. of Parker, at 22–23 & Exh. 2 (App. 212–13, 240) (indicating that placement decisions for incompetent defendants are made by attorneys). Thus, contrary to the Court’s teachings in *Youngberg* and its progeny, in Indiana incompetent patients have been specifically removed from consideration for placements that are likely to be in the best interest of the individual or other patients. Notwithstanding medical considerations or professional recommendations, such patients are ineligible for placement in a community mental health center, a psychiatric unit of a hospital, a community residential program, or an intermediate care facility for the mentally retarded. They are similarly ineligible for outpatient treatment, even when this treatment is available and recommended by medical professionals.<sup>15</sup>

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<sup>15</sup> In light of the requirements of *Youngberg*, it is particularly noteworthy that restrictions on the appellants’ freedom have repeatedly been imposed notwithstanding the recommendations of even the treatment professionals at Logansport State Hospital. For instance, when both Steven Thomas’s treatment team and the superintendent of the institution approved a two-hour leave of absence such that Mr. Thomas’s mother could take him out to dinner for his birthday, Mr. Thomas’s designated gatekeeper—the Office of the General Counsel of the Indiana Family and Social Services Administration—denied this request. *See* Leave of Absence Request and Denial, at 1–4 (App. 161–64). Additionally, Mr. Thomas has been unable to “attend[] any community

B. Other courts addressing the issue have determined that institutionalized individuals possess an absolute right to “treatment comporting with the judgment of qualified professionals,” and this right has been undeniably denied in the present case.

As one court has stated, “[t]he constitutional right . . . to treatment comporting with the judgment of qualified professionals is well established.” *Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1199 (W.D.N.C. 1988), *aff’d*, 902 F.2d 250 (4<sup>th</sup> Cir. 1990). Thus, in a series of cases apposite to the case at bar, federal courts have reiterated the constitutional mandate that institutionalized patients receive treatment and placement decisions based on the advice of qualified professionals. In *Thomas S. v. Morrow*, 781 F.2d 367 (4<sup>th</sup> Cir. 1986), for instance, the Fourth Circuit Court of Appeals demanded that a patient’s placement be based on “a discrete recommendation for treatment . . . made by qualified professionals to meet the needs of an individuals.” *Id.* at 376 (citing *Youngberg*, 457 U.S. at 319 n.25). In *Morrow*, the plaintiff was an adult individual who had been a ward of the state of North Carolina his entire life and, as a result, had been placed in numerous institutions. *See id.* at 369–73. After the state refused to provide such treatment, the plaintiff initiated suit for “only the treatment that professionals at a state hospital have proscribed.” *Id.* at 374. In ordering this treatment, the court emphasized that *Youngberg* contemplated “a discrete recommendation for treatment . . . made by qualified professionals to meet the needs of an individual,” *id.* at 376, and that the failure to exercise professional judgment violated due process.

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based programs due to his legal issues.” *See Treatment Plan Review*, at 2 (App. 160).

Similarly, in another case decided shortly after *Youngberg*, the Third Circuit Court of Appeals decided not only that an institutionalized patient had a right to receive placement on the basis of the recommendations of treatment professionals, but also that the plaintiff had an absolute *right* to placement in a community setting. See *Clark v. Cohen*, 794 F.2d 79, 87 (3d Cir. 1986) (*en banc*).<sup>16</sup> Said the court: “[*Youngberg v. Romeo* requires that restraints be imposed only to the extent required by the judgment of professionals in charge of the involuntarily committed.” *Id.* Thus, when faced with the “unanimous professional opinion that [the plaintiff] should be in a far less restrictive environment,” the court did not hesitate to conclude that her “substantive liberty right to appropriate treatment” had been violated. *Id.*

And in a case almost entirely on par with the case at bar, one court has recently concluded that *Youngberg* and its progeny impose on a state institution the “constitutional . . . duty to *consider* the appropriateness of community placement” for institutionalized patients in its care. *Messier v. Southbury Training Sch.* [Messier II], 562 F.Supp.2d 294, 326 (D. Conn. 2008) (quoting *Messier v. Southbury Training Sch.* [Messier I], 183 F.R.D. 350, 358 (D. Conn. 1998) (*Id.* on class certification)) (emphasis added). In *Messier*, the plaintiffs consisted of a class of mentally retarded individuals

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<sup>16</sup> The court need not determine at present whether such a right exists, for the present case arises only as a challenge to a policy whereby the Division ensures that professional judgment is, in fact, *not* exercised in rendering placement decisions. The appellants only seek an injunction requiring that their placement be determined on the basis of the advice of medical or psychiatric treatment professionals.

committed to a particular institution who brought suit to challenge, *inter alia*, the defendants' failure "to exercise professional judgment in making decisions about whether or not to place class members in the community rather than" in a state institution. *Id.* at 298. In that case, recommendations concerning patients' placements were made by an interdisciplinary treatment team, but the administrative authorities responsible for actually determining placements refused to refer patients for community placement, regardless of the recommendations of treatment professionals. *Id.* at 326–28. The court, however, concluding that this policy existed in contravention to the "professional judgment" standard of *Youngberg*, first rejected the defendants' argument that "community placement may not be a possibility or a necessity" for every patient, for the mere failure to *consider* such alternative placements was violative of constitutional mandate, *id.* at 326, and then found wanting the lack of "a formal mechanism for considering community placement" for patients, *id.* at 328.

In the present case, professional opinion suggests that placement outside of a state institution might be in the best interest of the appellants, but the undisputed facts demonstrate that community placement has never been and cannot be seriously considered for either individual. Moreover, Mr. Thomas and Mr. Dausman are only two (2) individuals to whom the Division's policy has been applied; numerous other individuals have similarly been subjected to a policy that ensures that professional judgment is *never* exercised in determining their placement. Under such circumstances,

it is clear that the Division's practice or policy violates the due process rights articulated by the Supreme Court in *Youngberg*.<sup>17</sup>

## CONCLUSION

For the foregoing reasons, the trial court erred in entering summary judgment in favor of the Division. This decision should be reversed, and summary judgment should be entered in favor of the appellants.

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<sup>17</sup> Shortly after *Youngberg*, the Seventh Circuit Court of Appeals held that the due process rights of a class of mentally retarded individuals who had been placed in state institutions were not denied by the state's refusal to provide community placement for these individuals. See *Phillips v. Thompson*, 715 F.2d 365, 367-68 (7<sup>th</sup> Cir. 1983). This case, however, can be of no assistance to the Division at present, for the *Phillips* court determined that "professional judgment in fact was exercised" in determining the placement of these individuals. *Id.* at 368 (citing *Youngberg*, 457 U.S. at 320-22). In the present case, of course, the Division's practice or policy has denied the appellants any opportunity to have professional judgment determinative of their individual placements. Moreover, the *Phillips* decision has been explicitly called into question. See, e.g., *Clark v. Cohen*, 794 F.2d 79, 97 n.12 (3d Cir. 1986) (Clark, J., concurring) ("The *Phillips* court based its conclusion on an incorrect reading of *Youngberg* . . . in which *Youngberg* meant that involuntarily committed people had a right to treatment only insofar as the treatment was necessary to support their freedom from physical constraints. . . . [T]his position is simply incorrect; *Youngberg* expressly stated that it was not concerned with the question of a general due process right to treatment.") (internal citations omitted). Ultimately, however, this is not a debate in which this Court need engage, as the statute expressly requires treatment in "the least restrictive setting appropriate," IND. CODE § 35-36-3-1(b).

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**

I hereby verify, pursuant to Rule 44(E) of the Indiana Rules of Appellate Procedure, that this brief contains no more than fourteen thousand (14,000) words, including footnotes and excluding the parts of the brief exempted by Rule 44(C) of the Indiana Rules of Appellate Procedure.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served on the following persons by U.S. mail, postage pre-paid, on this 2nd day of February, 2008:

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