

IN THE  
INDIANA COURT OF APPEALS

No. 49A02-0812-CV-1140

STEVEN THOMAS, by his mother and, )  
next friend Yulondia Thomas, and )  
DERRICK DAUSMAN, by his mother )  
and next friend Connnie Dausman, )

Appellants, )

v. )

ANNE WALTERMANN MURPHY, in )  
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, )

Appellees. )

Appeal from the Marion Superior Court  
Civil Division No. 13

Cause No. 49D13-0802-PL-7019

The Honorable S.K. Reid, Judge

**BRIEF OF APPELLEES**

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2. Whether the trial court correctly determined that it was prohibited from infringing on the constitutional authority and prerogatives of the General Assembly and the Division of Mental Health and Addiction under the Separation of Powers doctrine embodied in Article III, Section 1 of the Indiana Constitution.

3. Whether the trial court correctly decided that the Plaintiffs have no viable claim under Indiana law and the Fourteenth Amendment to the United States Constitution.

### STATEMENT OF THE CASE

**A. Nature of the Case.** The Plaintiffs requested an injunction requiring the Division of Mental Health and Addiction (“Division” or “DMHA”) to place them in community placement based on claims that Division policy/procedure violated state law and the Fourteenth Amendment.

**B. Course of the Proceedings.** The original action was filed by Thomas on February 14, 2008 (Chronological Case Summary, “CCS,” Appendix of Appellants, “App.,” 2). The Plaintiffs’ motion for class certification was withdrawn on April 9, 2008 (CCS 3, App. 3). On May 28, 2008, the two Plaintiffs were granted permission to file an amended complaint adding Dausman as a named Plaintiff (CCS 4, App. 4). In the Plaintiffs’ First Amended Verified Complaint for Declaratory and Injunctive Relief, they contended that the Defendants, Secretary of the Indiana Family and Social Services Administration and Director of the Division of Mental Health and Addiction (hereafter, collectively, “Division”) (App. 41), failed to comply with Indiana Code §§ 35-36-3-1 *et seq.*, § 12-24-12-9 and the Fourteenth Amendment to the United States Constitution and that the Defendants should be enjoined from placing developmentally disabled persons charged with criminal offenses who are determined to be incompetent to stand trial in state facilities (App. 10 and 11).

The Plaintiffs' request for preliminary injunctive relief was denied on August 22, 2008 (CCS 6, App. 6). Prior to that date, on August 19, 2008, the Plaintiffs filed a motion for summary judgment (CCS 6, App. 6), and the Defendants responded to that motion on October 14, 2008 (CCS 7, App. 7). The Plaintiffs replied on October 22, 2008. *Id.*

**C. Disposition.** After hearing argument, on December 17, 2008, the trial court entered detailed Findings of Fact and Conclusions of Law and Judgment on Plaintiffs' Motion for Summary Judgment; Order Granting Summary Judgment to the Defendants (App. 9-26). The Court concluded that the hypothetical claims made by the Plaintiffs were not ripe (Conclusion No. 1, App. 19) and that Separation of Powers principles warranted summary judgment for the Defendants (Conclusion Nos. 2-8, App. 19-22). The trial judge also concluded that the Defendants had not violated Indiana law or the Fourteenth Amendment to the United States Constitution (Conclusion Nos. 8-18, App. 22-25). In its judgment, the trial judge denied the Plaintiffs' motions for summary judgment and stated that "[p]ursuant to the terms of T.R. 56(B), summary judgment should be and is hereby **GRANTED** in favor of the defendants E. Mitchell Roob, in his official capacity as Secretary of the Indiana Family and Social Services Administration,<sup>1</sup> and Cathy Boggs, in her official capacity as Director of the Division of Mental Health and Addiction" (App. 26).

## STATEMENT OF THE FACTS

### A. Facts Concerning Steven Thomas.

Steven Thomas ("Thomas") is a thirty-nine (39) year old developmentally disabled individual who presently resides at Logansport State Hospital in Cass County, Indiana (Aff. of Yulondia Thomas, at ¶¶ 1-4, App. 172). Prior to February 13, 2008, Mr. Thomas was a resident

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<sup>1</sup> Since that date Anne Waltermann Murphy succeeded Roob as Secretary of the Indiana FSSA.

of Marion County, Indiana, where he resided with his mother. *Id.* Because of his developmental disability, which is classified as mild mental retardation, Thomas presently has the emotional and cognitive skills of someone who is five (5) or six (6) years of age (Dep. of Parker, 16-18).

On or about September 12, 2006, Thomas was charged with child molestation, in violation of Indiana Code § 35-42-4-3 [First Amended Verified Complaint for Declaratory and Injunctive Relief (“Complaint”), at ¶ 15, App. 48; Answer to First Amended Complaint (“Answer”), ¶ 15, App. 197]. 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, at ¶ 16, App. 48-49; Answer, at ¶ 16, App. 197). At the hearing on Mr. Thomas’ 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. of Dr. George Parker, M.D. (“Parker”), p. 23 & Exh. 2, App. 213, 239].

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.

*See Parker Dep.*, pp. 19-20 & Exh. 1, App. 211, 235.

After conducting a hearing on Thomas’ competence to stand trial, on December 14, 2007, the criminal court ordered that 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.” See Complaint, ¶ 17 & Exh. 1, App. 49, 59-60; Answer ¶ 17, App. 197. At the time, Thomas resided at home with his mother (Complaint, ¶ 19; Aff. of Y. Thomas, ¶ 4, App. 172-73).

On February 13, 2008, Thomas was transported to Logansport State Hospital, where he presently resides (Complaint, ¶ 19, App. 49; Aff. of Y. Thomas, ¶ 4, App. 172-73). Since his transfer to Logansport State Hospital, Thomas has not demonstrated any significant behavioral problems (Dep. of Meadows, at 59–60, App. 261). The medical staff at Logansport State Hospital has indicated that Thomas has proven cooperative, well-behaved, and capable of completing his activities of daily living without assistance (Findings of Fact, ¶ 10, App. 13).

Dr. Lozano and Ms. Maxwell state that Thomas is “thriving” in his new environment (Lozano-Thomas, ¶ 14, Supplemental Appendix of Appellees (“SA”) 45; Maxwell-Thomas, ¶ 23, SA 61). Both suggest that he is progressing toward competence, and Dr. Lozano testified that restoration is likely within one year (Lozano-Thomas, ¶ 15, SA 45).<sup>2</sup> The treating psychiatrist believes that restoration of competency is likely. *Id.*

#### **B. 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,” at ¶ 5, App. 66); Dep. of Meadows, at 63–64,

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<sup>2</sup> The Plaintiffs’ claim (Brief of Appellants, p. 10) that Thomas “may” not be placed outside of the restrictive environs of a state institution is not a fact but is instead, a hypothesis of Plaintiffs’ counsel. The suggestions that Thomas is not likely ever to regain competency (Brief of Appellants, p. 10) or that it is likely that he will be in a state institution for the rest of his life are merely hypotheses and not facts as suggested by counsel’s use of the word likely. Moreover, it is contrary to evidence that restoration of Thomas’ competence is likely.

App. 262). Prior to June 23, 2008, Dausman was a resident of Kosciusko County, Indiana, where he resided with his mother for most of his 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 (Complaint, at ¶ 27, App. 50; TRO Motion, at ¶ 4, App. 66). 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 Martin, ¶ 13 & Exh. 1, App. 178, 181-85).

Prior to his transfer to Logansport State Hospital, Dausman received services on an outpatient basis from the Cardinal Center, Inc., which is a community-based not-for-profit organization that offers support 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," at ¶¶ 4, 10, App. 191-93). Through the Cardinal Center, Dausman obtained employment at R.R. Donnellys & 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, at ¶ 10, App. 192-93). Dausman lost that job when he was sent to Logansport State Hospital (Aff. of Stanley, ¶ 6, App. 187; Aff. of Planck, ¶ 10, App. 192-93; TRO Motion, at ¶ 3, App. 66).

In December of 2006, Dausman was charged with child molestation, in violation of Indiana Code § 35-42-4-3. *See* Complaint, ¶ 30, App. 50-51; Answer, at ¶ 30, App. 198. Dausman was subsequently determined to possess insufficient comprehension to stand trial, in accordance with Indiana Code § 35-36-3-1, *et seq.*, and was committed to the Division on April 21, 2008 (Complaint, ¶ 31, App. 51; Answer, ¶ 31, App. 198). On June 23, 2008, Dausman was transferred to Logansport State Hospital, where he resided when the trial court entered its order in this case (TRO Motion, at ¶ 5, App. 66; Dep. of Meadows, p. 63, App. 262). The treatment

team at the Jayne English Unit (JEU) has determined that Logansport is the least restrictive environment for Dausman (Lozano-Dausman, ¶ 13, SA 53; Maxwell-Dausman, ¶ 24, SA 66), and the treatment team also determined that Dausman may be restored to competency (Aff of Lozano, ¶ 12, App. 287).<sup>3</sup>

**C. Facts concerning the Division's Policy.**

**1. Competency Restoration Services.**

The Division is responsible for the operation of state psychiatric institutions in Indiana, including Logansport State Hospital (Dep. of Boggs, pp. 10, 12, App. 79-80). 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, pp. 13-14, App. 81-82). A treatment team on each unit of a state institution is responsible for the daily care of patients assigned to that unit (Dep. of Boggs, p. 15, App. 83). The members of that team might include psychologists, psychiatrists, physicians, or social workers 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 (Dep. of Boggs, pp. 15-16, App. 83-84). Soon after the arrival of a patient at a state institution, the treatment team begins planning for the patient's eventual release. *Id.*; Dep. of Meadows, pp. 41-42, App. 257-58.

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<sup>3</sup> Plaintiffs' claims (Brief of Appellants, p. 5) that Logansport State Hospital is not the least restrictive environment for Dausman or that he may not be restored to competency are simply not facts. To the contrary, Dr. Lozano, the treating psychiatrist, declares Dausman is progressing and that he expects that he will be restored to competency and that Logansport State Hospital is the least restrictive environment for Dausman (Aff of Lozano, ¶ 12, App. 287). Further, the speculation of Plaintiffs' counsel (Brief of Appellants, pp. 5-6, regarding a possible community placement for Dausman) is just that, speculation - not fact.

Criminal defendants who have been adjudged incompetent to stand trial are committed to the Division for the provision of competency restoration services (Dep. of Boggs, p. 18, App. 86). The Division has not entered into a contract with any third-party for the provision of these services (Dep. of Boggs, p. 19, App. 87; Defendants' Response to Interrogatories, ¶ 7, App. 114-15) and does not provide these services on an outpatient basis or in community-based placement alternatives (Dep. of Boggs, p. 20, App. 88). The services are provided in state psychiatric institutions such as Logansport State Hospital (Dep. of Boggs, pp. 19-20, App. 87-88). The Division understands state law to require that these services are to be provided indefinitely, regardless of whether a particular patient is likely to regain competency in the future (Dep. of Boggs, p. 19, App. 87; Dep. of Parker, pp. 46-49 & Exh. 3, App. 224-26, 245-49).

Pursuant to state law, the statutory gatekeeper for an individual who has been adjudged incompetent to stand trial is the Division, although the Division has delegated this responsibility to two (2) individuals in the Office of the General Counsel within the Indiana Family and Social Services Administration (Dep. of Boggs, pp. 25-26 & Exh. 4, App. 89-90, 95). *See also* Indiana 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, p. 27, App. 91). In the case of patients who have been adjudged incompetent to stand trial, if criminal charges are dismissed, these gatekeepers "assist in stepping that person to another gatekeeper who . . . may return [the] individual to the community" (Dep. of Boggs, p. 29, App. 93).

Since 2002, at least seven hundred thirty-seven (737) individuals were committed to the Division following an adjudication that they are 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.* at ¶ 3. 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). Most of these individuals were transferred to Logansport State Hospital (Defendant's First Supplemental Response to Plaintiff's First Set of Interrogatories, ¶ 4, App. 118-20). As of October 9, 2008, there were thirteen (13) developmentally disabled individuals (who had been determined to be incompetent to stand trial) in state operated facilities (Aff. of Gregory, SA 88-90).

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

In September of 2007, Dr. George Parker (Medical Director for the Division) authored a paper entitled "Draft White Paper: Incompetent to Stand Trial, Restoration of Competence, and Unrestorable Defendants" (Dep. of Parker, pp. 39-40 & Exh. 3, App. 221, 245-49). According to Dr. Parker, some institutionalized patients who are not presently competent to stand trial may never be restored to competency (Dep. of Parker, p. 46, App. 224). Although professionals use the phrase "competency restoration," most of these patients have never possessed competency (Dep. of Parker, pp. 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 (Dep. of Parker, p. 47 & Exh. 3, App. 225, 246-49; Dep. of Meadows, pp. 38-41, App. 257; Aff. of Martin, ¶ 11, App. 178). Because not all of these patients would otherwise require institutionalization, Dr. Parker noted that "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, pp. 39–40 & Exh. 3, App. 221, 246).

**D. Facts regarding Logansport State Hospital and the treatment of Thomas and Dausman.**

The JEU at Logansport State Hospital is populated by persons who are dually diagnosed as mentally ill and developmentally disabled (Lozano-Thomas, ¶ 5, SA 44; Wright, ¶¶ 5, 7, 8, SA 74; Meadows-Thomas, ¶ 6, SA 77; Meadows-Dausman, ¶ 6, SA 83). The staff on JEU are adequately trained to provide care and services to the developmentally disabled (Lozano-Thomas, ¶ 4, SA 43-44; Lozano-Dausman, ¶ 4, SA 51-52; Wright, ¶ 6, SA 74; Meadows-Thomas, ¶ 5, SA 77; Meadows-Dausman, ¶ 5, SA 83).

While in the care of the Division of Mental Health and Addiction, Thomas and Dausman have been provided with comprehensive services including legal education, sexual responsibility, basic education, fitness education, community access training, life skills training and behavior modification (Lozano-Thomas, ¶¶ 9, 10, SA 44; Lozano-Dausman, ¶ 9, 10, SA 52-53; Meadows-Thomas, ¶ 9, SA 77; Meadows-Dausman, ¶ 9, SA 83). Community programs cannot provide the same quality or quantity of services to Thomas and Dausman as are provided at JEU at Logansport State Hospital (Maxwell-Dausman, ¶¶ 13-15, 18, 20-21, 23, SA 65-66; Maxwell-Thomas, ¶¶ 20, 24, SA 61; Wright, ¶ 11, SA 75; Meadows-Thomas, ¶ 10, SA 77; Meadows-Dausman, ¶ 10, SA 83). JEU is the least restrictive environment for Thomas and Dausman. (Lozano-Thomas, ¶ 17, SA 45; Lozano-Dausman, ¶ 13, SA 53; Maxwell-Dausman, ¶ 24, SA 66; Maxwell-Thomas, ¶ 27, SA 62).

JEU is an appropriate placement for Thomas and Dausman and they can benefit from continued treatment there (Meadows-Thomas, ¶¶ 12, 14, SA 78; Meadows-Dausman, ¶¶ 12, 14, SA 84). Neither Thomas nor Dausman has been victimized at Logansport State Hospital

(Lozano-Thomas, ¶ 19, SA 46; Lozano-Dausman, ¶ 15, SA 53; Maxwell-Dausman, ¶ 23, SA 66; Maxwell-Thomas, ¶ 26, SA 62). Thomas is thriving, progressing and becoming independent at Logansport State Hospital (Lozano-Thomas, ¶ 14, SA 45; Maxwell-Thomas, ¶¶ 20, 23, SA 61). Both Thomas and Dausman have admitted the incidents leading to their respective criminal charges (Maxwell-Thomas, ¶ 12, SA 59-60; Maxwell-Dausman, ¶ 17, SA 65).

DMHA currently has no contracts to provide community-based restoration services, which would require a level of supervision and monitoring that is not currently available in the community (Boggs, ¶¶ 3, 4, SA 41-42). Providing outpatient services for restoration to competency in the community would require more resources and thus more funding than has been given to FSSA and DMHA (Boggs, ¶¶ 5, 6, , SA 42).

#### **SUMMARY OF THE ARGUMENT**

1. In this case, the Plaintiffs requested that the trial court enter an injunction essentially prohibiting their placement in a state hospital in the event that medical and psychiatric treatment professionals recommended placement in a less restrictive setting, such as community placement. However, in this case, the treating professionals have not recommended placement of the Plaintiffs in a community setting. On the contrary, the treating professionals believe that the Logansport State Hospital is the best and least restrictive placement for the Plaintiffs. As the Plaintiffs' request for relief is based on uncertain future events, their claims are not ripe for review.

2. The doctrine of Separation of Powers prevents the judicial branch of government from interfering with discretionary decisions made by the legislative and executive branches that are within the authority of those branches. In this case, the Plaintiffs have asked the courts to set

aside lawful, discretionary actions of the legislature and the Division. Consequently, the trial court properly decided that this action is barred by the doctrine of Separation of Powers.

3. The Division has complied with Indiana Code § 35-36-3-1 *et seq.* by placing Thomas and Dausman in the Logansport State Hospital which is the least restrictive placement and a placement which provides services that may restore both Plaintiffs to competency so that they may stand trial or be returned to the community, depending on future developments. State law does not require the Division to contract for community services. The record also shows that the Division has planned for the return of the Plaintiffs to court, the community or other appropriate placement as required by Indiana Code § 12-24-12-9. Finally, the record in this case does not establish any violation of the Fourteenth Amendment to the United States Constitution as the record establishes that qualified professionals are making the treatment decisions for both Plaintiffs and that they are receiving appropriate services in the least restrictive setting.

## ARGUMENT

### Standard of Review

The trial court decided this case in the Defendants' favor in a summary judgment proceeding. "The party appealing from the grant of summary judgment has the burden of persuading the appellate tribunal that the trial court erroneously determined that there is no material issue of fact and the movant was entitled to summary judgment as a matter of law." *Ind. Bd. of Public Welfare v. Tioga Pines*, 622 N.E.2d 935, 940 (Ind. 1993). When reviewing a grant or denial of summary judgment, the appellate court applies the same standard as the trial court and reviews questions of law *de novo*. *Allen v. Great American Reserve Ins. Co.*, 766 N.E.2d 1157, 1161 (Ind. 2002).

**1. The trial court correctly determined that this case is not ripe for review.**

The essence of the Plaintiffs' request for relief in this lawsuit was stated in Paragraph No. 4 of their request for relief in their amended complaint, which asked the trial court to "[e]nter a preliminary injunction, later to be made permanent, prohibiting the defendants from placing an individual who has been found to possess insufficient comprehension to stand trial for a criminal charge and who is likely to be restored to competency such that he or she will be able to stand trial for that charge at a state institution operated by the Division of Mental health and Addiction **when the medical and psychiatric treatment professionals recommend placement in a less restrictive setting**" (App. 34-35). Emphasis in bold added. The Plaintiffs' request is purely hypothetical and, therefore, as properly determined by the trial judge, this matter is not ripe for adjudication. In this regard, the trial judge stated:

Plaintiffs assert that they are asking for a community assignment "if and when their treatment team determines such placement appropriate," (Memorandum, p. 2.) That is purely hypothetical and, therefore, not ripe for adjudication. See *Ind. Dep't of Env'tl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 642 N.E.2d 331, 336-337 (Ind. 1994). "Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than abstract possibilities. . . ." *Id.* at 336. An individual's speculations are not the proper subject matter of the court. See *Logan v. Royer*, 848 N.E.2d 1157, 161 (Ind. Ct. App. 2006) (ripeness is an aspect of subject matter jurisdiction.). Therefore, there is no ripe issue before the court and this action must be dismissed.

(Conclusion No. 1, App. 19).

In this case, the undisputed facts show that the treatment teams for Thomas and Dausman have not recommended that either of the Plaintiffs be placed in a community setting and that both are currently in an environment that is the least restrictive and most beneficial to them. The record establishes that while in the care of the Division, Thomas and Dausman have been provided with comprehensive services including legal education, sexual responsibility, basic

education, fitness education, community access training, life skills training and behavior modification (Lozano-Thomas, ¶¶ 9, 10, SA 44; Lozano-Dausman, ¶ 9, 10, SA 52-53; Meadows-Thomas, ¶ 9, SA 77; Meadows-Dausman, ¶ 9, SA 83) and that community programs cannot provide the same quality or quantity of services to Thomas and Dausman as are provided at JEU at Logansport State Hospital (Maxwell-Dausman, ¶¶ 13-15, 18, 20-21, 23, SA 65-66; Maxwell-Thomas, ¶¶ 20, 24, SA 61; Wright, ¶ 11, SA 75; Meadows-Thomas, ¶ 10, SA 77; Meadows-Dausman, ¶ 10, SA 83). The treatment team has determined that at this time, JEU is the least restrictive environment for Thomas and Dausman (Lozano-Thomas, ¶ 17, SA 45; Lozano-Dausman, ¶ 13, SA 53; Maxwell-Dausman, ¶ 24, SA 66; Maxwell-Thomas, ¶ 27, SA 62).

The record shows that JEU is an appropriate placement for Thomas and Dausman and they can benefit from continued treatment there (Meadows-Thomas, ¶¶ 12, 14, SA 78; Meadows-Dausman, ¶¶ 12, 14, SA 84). Neither Thomas nor Dausman has been victimized at Logansport State Hospital (Lozano-Thomas, ¶ 19, SA 46; Lozano-Dausman, ¶ 15, SA 53; Maxwell-Dausman, ¶ 23, SA 66; Maxwell-Thomas, ¶ 26, SA 62). Dr. Lozano and Ms. Maxwell state that Thomas is “thriving” in his new environment. (Lozano-Thomas, ¶ 14, SA 45; Maxwell-Thomas, ¶ 23, SA 61). Both suggest that he is progressing toward competence, and Dr. Lozano testifies that restoration is likely within one year (Lozano-Thomas, ¶ 15, SA 45). The treatment team at the JEU has also determined that Dausman may be restored to competency (Aff of Lozano, ¶ 12, App. 287). The event that would trigger a ripe lawsuit has not occurred, that is, the treating professionals have not recommended a community placement for either Thomas or Dausman.

As plaintiffs’ claims of rights violations are based on uncertain future events, they are not ripe for review by this Court. See *Ind. Dep’t of Env’tl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643

N.E.2d 331, 336-337 (Ind. 1994). “Ripeness relates to the degree to which the defined issues in a case are based on actual facts rather than abstract possibilities. . . .” *Id.* at 336. In the *Chem. Waste* case, the matter was not ready or ripe for review because the plaintiff’s complaints related to a permit modification that had not been decided by the agency and that depended on rules that had not yet been finalized. This case is similar in that the Plaintiffs request a community placement on the basis of a possible future decision, an action that is hypothetical at this point. They ask for relief in the event that the treating professionals recommend a community placement for either Thomas or Dausman, which is something the treating professionals have not yet done.

The Plaintiffs have simply jumped into litigation based upon mere speculation. They fail to articulate any correct, ripe facts demonstrating violation of statutory or due process rights. An individual’s speculations are not the proper subject matter of the court. See *Logan v. Royer*, 848 N.E.2d 1157, 161 (Ind. Ct. App. 2006) (ripeness is an aspect of subject matter jurisdiction.). Here, there is no evidence of any actual rights violations, in that the treating professionals have made it clear that the placement of Thomas and Dausman at the Logansport State Hospital is the least restrictive placement for them and that they are being benefited and being restored to competency. There is no evidence of any intent by anyone in the Division to commit violations in the future. There is no evidence that their placements are currently incorrect or not in the least restrictive environment. Because the case is not ripe for review, the trial court could not exercise subject matter jurisdiction over the Plaintiffs’ claims. As determined by the trial judge, the Plaintiffs were not entitled to summary judgment on their hypothetical, speculative claims. Given the speculative, hypothetical premise of their claims (that Defendants may continue to

hold them in a state hospital if the treating professionals were to determine that they should be placed in a community setting), the trial court properly acted in dismissing this action.

Speculation that there might be a determination in the future that the Plaintiffs or one of them might be recommended for community placement by the treatment team and that this would occur before restoration to competency and would occur when the child molest charges are still pending and would occur when the legislature has appropriated funds (see the argument below about Separation of Powers) and would occur when someone who might not even be a state employee at this time would have a procedure that precludes assignment to community programs even if all of the above is true is speculation upon speculation. That claim is nothing the trial court or this court can or should address at this time. The Plaintiffs' claims are not ripe for adjudication.

In the Brief of Appellants, p. 21, the Plaintiffs claim the trial court incorrectly applied the ripeness doctrine in their case for two reasons, but they are incorrect. First, they claim that the ripeness doctrine does not bar a lawsuit challenging a governmental practice or policy when the practice or policy has been applied against the plaintiff, but in this case, the so-called practice or policy has not been applied to them. In this case, the treating professionals have not recommended a community placement, and the Division has not refused to follow the recommendations of the treating professionals. The hypothetical the Plaintiffs propose has not occurred and may never occur.

Second, the Plaintiffs suggest that planning for future community placement of a person begins when a person is committed to a state hospital with the exception of those persons facing criminal charges. This claim is incorrect and also rests on a hypothetical, that is, a possible determination by a treatment team that a person facing charges should be placed into the

community. Moreover, the Plaintiffs are also wrong with respect to this contention in another sense, as it is clear that planning for the potential return of a person facing criminal charges occurs when those persons are first placed in state hospitals. After all, the effort of the treatment team is to provide services to a person which will enable him to competently understand criminal charges which may ultimately return that person to the community, at least in the sense that the person will no longer be housed at a state hospital. In this regard, the Plaintiffs present a very misleading picture to this Court when it points out that since 2002, at least seven hundred thirty-seven (737) individuals were committed to the Division following an adjudication that they are incompetent to stand trial for a criminal charge (Defendants' Response to Interrogatories, ¶ 1, App. 111), and that at least sixty (60) developmentally disabled individuals were committed to the Division following an adjudication that they were incompetent to stand trial (Defendant's First Supplemental Response to Plaintiff's First Set of Interrogatories, ¶ 2, App. 117-18). They ignore the most significant statistic, that is, as of October 9, 2008, only thirteen (13) developmentally disabled individuals facing criminal charges continued to reside in state operated facilities (Aff. of Gregory, SA 88-90). That means that forty-seven (47) developmentally disabled persons facing criminal charges were treated and released to some other setting or had the criminal charges dismissed so that they are no longer an issue. There is no basis for the Plaintiffs' speculation that they will not be released from the hospital when they are restored to competency or for some other reason, such as dismissal of the criminal charges they are facing or many other possible future events.

*Pac. Gas & Elec Co. v. State Energy Res. Conserv. & Development Comm'n*, 461 U.S. 190, 201 (1983), and cases cited therein, do not support the Plaintiffs' claim that this case is ripe because they have not shown the fitness of their speculative claim for judicial review and have

not shown hardship. The treating mental health professionals have determined that Logansport State Hospital is the proper and least restrictive placement for Thomas and Dausman and that progress in their treatment is occurring. Moreover, *Hotel & Rest. Employees Union v. Smith*, 846 F.2d 1499, 1508 (D.C. Cir. 1988), provides no support for the Plaintiffs' position. The *Smith* case is not controlling in Indiana and does not support the Plaintiffs in any event because they have not established that any policy is creating any type of hardship for them. The professional treatment team has determined that their current placement is appropriate, and speculation about possible future decisions does not create a hardship that does not now exist. The cases cited by the Plaintiffs at page 22 of their brief do not support the position of the Plaintiffs relating to ripeness for the same reasons as the *Smith* case, as the Plaintiffs are speculating about a policy or practice (holding them in the hospital after a recommendation by treating professionals for community placement, which has not yet occurred and may never occur) that has not been applied to them.

Further, comments of counsel at page 22 of the Brief of Appellants are simply incorrect. The trial court simply did not order that Thomas receive services while continuing to reside at his home. The Commitment Order for Thomas (App. 59-60) simply does not say what Plaintiffs' counsel says that it says. In relevant part, the trial judge determined that Thomas was not competent to stand trial and that "[p]roceedings shall be delayed and continued and **the defendant is hereby 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 the defendant currently resides" (App. 59). [Emphasis in bold added]. The Division was given discretion by the order and chose to place Thomas at Logansport State Hospital where excellent resources were available to restore

Thomas to competency. If Thomas feels that an order of the committing court is not being followed, he should file a petition for contempt in that court and not a new case in the civil court.

Regarding Dausman, the Plaintiffs do not cite the commitment order, and it is clear from affidavit evidence from the treatment team at Logansport State Hospital that the hospital was the appropriate placement for him. The treatment team at the Jayne English Unit determined that Logansport is the least restrictive environment for Dausman (Lozano-Dausman, ¶ 13, SA 53; Maxwell-Dausman, ¶ 24, SA 66), and the treatment team has also determined that Dausman may be restored to competency in the future (Lozano-Dausman, ¶ 12, SA 53). Further, Dr. Martin's personal opinions about Dausman are essentially irrelevant as the question posed by the Plaintiffs in this case was whether they should be placed in the community setting if and when the treating professionals made such recommendation. Dr. Martin is not one of treating professionals.

Regarding planning for community placements of persons similar to Thomas and Dausman, the Plaintiffs point to no authority suggesting that the instant case is ripe for review. The case of *Messier v. Southbury Training Sch.*, 562 F.Supp.2d 294, 326 (D. Conn. 2008) is a case having no precedential value in Indiana, and it does not suggest that the Plaintiffs' request for future relief is ripe. The court in *Messier*, a class action case generally relating to all developmentally disabled persons in certain Connecticut facilities, did not address the kind of ripeness question presented by the particular claims of the two individuals in the instant case who have not yet been recommended for community placement by the treating professionals and who have been determined to be a danger to the community. The court in *Messier* merely suggested that community placement for developmentally disabled persons should be considered

but that community placements may not be appropriate for all developmentally disabled persons. 562 F.Supp.2d at 326.

Moreover, contrary to the contention of the Plaintiffs' counsel, the evidence in this case suggests that treating professionals at the Indiana State Hospitals plan for community placements for all persons committed to the hospitals, including the developmentally disabled persons facing criminal charges (Parker dep., p. 49, App. 226). Regarding incompetent persons facing criminal charges, the obvious intention from the beginning of the hospital stay is to return them to the community by restoring them to competence – to face the criminal charges or perhaps to simply return them to the community if the charges are dismissed. The Plaintiffs' claim that the Division is not meeting its obligation of release planning for Thomas and Dausman is simply not borne out by the record. Planning for the release of persons will always be connected with the particular aspects of the commitment of the individual. A primary consideration for persons committed for competency restoration services is to restore them to competence as soon as practical and return them to the community. In these circumstances, the record simply does not support the Plaintiffs' claim that the Division has disregarded any duty to plan community placements for them, to the extent required by Indiana Code § 12-24-12-9. Indiana Code § 12-24-12-9(2) requires that the Division “. . . facilitate and plan the committed individual's transition from the state institution to the community or to another appropriate placement,” and the record establishes that this is being done.

**2. The trial court correctly determined that it was prohibited from infringing on the constitutional authority and prerogatives of the General Assembly and the Division of Mental Health and Addiction under the Separation of Powers doctrine embodied in Article III, Section 1 of the Indiana Constitution.**

**A. The Doctrine of Separation of Powers.**

The court's jurisdiction in this case is constrained by the Separation of Powers clause of Article III, Section 1 of the Indiana Constitution. *Y. A., supra*. Article III, §1 of the Indiana Constitution establishes the three branches of state government and directs that "no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Thus, the powers of the three branches of state government are not merely equal, they are exclusive with respect to the duties assigned to each. *State v. Morgan Superior Court*, 249 Ind. 220, 231 N.E.2d 516, 519 (1967). Each of the three branches must be free from the control or coercive influence of the others. *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270, 279 (1941). The doctrine of Separation of Powers recognizes that "each branch of the government has specific duties and powers that may not be usurped or infringed upon by the other branches of government." *Smith v. State*, 829 N.E.2d 1021, 1025-26 (Ind. Ct. App. 2005).

As recognized by the trial judge, the relief requested by Plaintiffs asked the trial court 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. The doctrine of Separation of Powers prohibited the trial court from taking such action.

**B. The courts may not override the discretion of the General Assembly in enacting legislation, funding programs, and providing fiscal allotments, nor can it override the agency's discretion in managing its fiscal allotments.**

Specifically with regard to services for the mentally ill, Article 9, § 1 of the Indiana Constitution provides:

It shall be the duty of the General Assembly 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.

This provision confers upon the General Assembly the authority to enact laws affecting the mentally ill. *Y.A. v. Bayh*, 657 N.E. 2d at 415. The ultimate responsibility for complying with this constitutional mandate rests with the legislature. *Id.* Where the legislature delegates certain responsibilities, it is the responsibility of the body to whom the delegation has been made to comply with the statutory provisions. *Y.A.*, 657 N.E. 2d at 415-16. A court cannot judicially legislate or rewrite statutes created by the General Assembly. See generally *Matter of the Estate of Parson v. Grabert*, 344 N.E.2d 317, 320 (Ind. Ct. App. 1976); see also *Meade Electric Company v. Hagberg*, 159 N.E.2d 408, 414 (Ind. Ct. App. 1959).

The Division of Mental Health and Addiction, a division of the Indiana Family and Social Services Administration, is the state agency mandated by statute to provide certain mental health services to the population throughout the State of Indiana. Indiana Code §12-11-1.1 *et seq.*, §12-11-2.1 *et seq.*, and §12-24 *et seq.*; *Y. A., supra*. “The legislature provides funding to the agency for purposes of fulfilling its statutory mandate, and the agency must provide those services within the constraints of its budget. As a result, the overall statutory scheme and supporting case law give the agency, and its state-operated facilities, wide discretion to manage bed space and provide services and programs. See generally *Logansport State Hospital v. W.S.*, 655 N.E.2d 588 (Ind. Ct. App. 1995) (holding that a trial court violated Separation of Powers by ordering the division to hire additional staff because it is the express duty of the General Assembly to provide for the staffing and maintenance of facilities).

The agency’s discretion to manage its budget within the legislative allotments was recently discussed and confirmed by the Court of Appeals in *In Re Contempt of Wabash Valley*

*Hospital, Inc.*, 827 N.E.2d 50, 60 (Ind. Ct. App. 2005). See also *In Re the Commitment of A.N.B.*, 614 N.E.2d 563 (Ind. Ct. App. 1993); *Y. A. by Fleener v. Bayh*.

Indiana Courts have recognized the fiscal restraints under which DMHA operates and have acknowledged that it is a legislative function to resolve those burdens, not a judicial one.

*Y.A. v. Bayh*, 657 N.E. 2d at 415.

The constitutional provisions are not without limitations. Those limitations may be imposed by common sense and the constraints placed upon government to distribute and apportion available funds for the needs and programs which exist and which must be established for the welfare of all citizens. *Y.A.* 657 N.E. 2d at 417. The courts are not enabled to direct the General Assembly to raise more funds for a particular purpose. *Y.A.*, 657 N.E. 2d at 418. The remedy available to citizens who do not approve of how the legislative or executive branch is carrying out its responsibilities is to replace the public officials who are failing to carry out their responsibilities.

Prior to the decision in *Y.A.*, the Indiana Court of Appeals upheld the underlying administrative and statutory framework in *In Re the Commitment of A.N.B.*, 614 N.E. 2d 563, 567 (Ind. Ct. App. 1993), stating as follows:

We are sympathetic to Judge Eggers, who recognized the problems of bureaucratic red tape and inadequate legislative funding and tried to hurdle them on A.B.'s behalf. . . . The statutory and administrative scheme, however, is neither ill-conceived, nor irrational, and the General Assembly acted within its prerogative when it allocated the financial burdens as it did. Should an interested party wish to compel the Division or some other agency to perform a particular duty, like making arrangements for placement, the proper procedure is to institute an action in mandamus.

Citing *In re the Commitment of T. J.*, 614 N.E. 2d 559 (Ind. Ct. App 1993).

Although under Indiana Code § 35-36-3-1(b)(2), the Division is permitted by statute to contract for community restoration when it is “. . . appropriate to the needs of the defendant and

the safety of the defendant and others,” nothing in the statute requires such contracts be created.

This is an option left to the discretion of the agency, within the constraints of its budget.

In her deposition, Cathy Boggs, the Director of the Division of Mental Health and Addiction, testified that DMHA has not entered into any contracts for the provision of restoration services in the community (Boggs Deposition, pp. 19, 20, App. 87-88). Restoration services are provided at all five of the state hospitals serving adults (Boggs Dep., pp. 19, 20, App. 87-88). Moreover, the fiscal impact of providing restoration services in the community is significant. (Boggs Declaration, ¶¶ 5, 6, SA 42). The Plaintiffs, who were aware of the Separation of Powers defense because it was raised in opposition to the request for preliminary injunctive relief, failed to present the court with any undisputed material evidence showing how much (or how little) it would cost to provide the security and programs in the community that are provided to both Thomas and Dausman (and, presumably, to others in similar circumstances) at the Jayne English Unit. The agency has established that it lacks the fiscal resources to provide such services outside of its hospitals (Boggs’ Declaration, ¶¶ 3-6, SA 41-42), and the legislature has not provided additional funding or legislation to provide such services. The Plaintiffs have not countered that assertion in any way.

Under the doctrine espoused in *Y. A.*, 657 N.E. 2d at 417, the agency is acting within its discretion to apportion funds, enter into contracts and otherwise fulfill its statutory mandate. A court may not usurp the agency’s exclusive discretion and order that restoration services be provided in the community, as requested by the plaintiffs. Likewise, the court cannot dictate to the legislature that it raise more funds for the particular purpose of providing community restoration services. *Y. A.*, 657 N.E.2d at 417-18. Based upon the doctrine of Separation of Powers, a court may not substitute its judgment for that of the legislature and the executive

branch. Thus, the trial court correctly concluded that the Plaintiffs were not entitled to summary judgment and that it could not disregard the discretion and authority given to the legislature and the Division.

**C. A court may not override the discretion of the agency and its treatment professionals under Indiana Code § 35-36-3-1 et seq.**

Some individuals cannot safely be served in the community. Both Thomas and Dausman have admitted the facts that resulted in the child molestation charges against them (Maxwell/Thomas, ¶ 12, SA 59-60; Maxwell/Dausman, ¶ 17, SA 65). The declarations, and most particularly that by Nancy Maxwell, the Behavioral Clinician and sexual responsibility trainer, show that Thomas searches for victims in the community and knows how to and does “groom” them (Maxwell/Thomas, ¶¶ 13-19, SA 60-61) and that Dausman is easily manipulated and might well have been manipulated into the acts that resulted in his arrest, such that he is subject to being manipulated into more situations of the same type (Maxwell/Dausman, ¶¶ 15-17, SA 65). They are dangerous to children in the community. There is no showing that they would not repeat their conduct. Individuals who are charged with serious crimes would not be appropriate for community-based restoration services. Community-based restoration services would be appropriate only for individuals who are not dangerous to self or others, but this is not the case at this point for Thomas or Dausman as they are still at risk to harm young children in the community setting. Indiana Code § 35-36-3-1(b)(2) permits DMHA to contract for community restoration when it is “. . . appropriate to the needs of the defendant and the safety of the defendant and others.” This statute gives the agency and its professionals the discretion to determine when community restoration is “appropriate to the needs of the defendant and the safety of the defendant and others.”

Plaintiffs do not and cannot cite authority in support of their position that they are entitled to be placed in the community when no appropriate placement exists. The state does not have a duty to provide placements outside the scope of fiscal resources, nor is the state required to provide every conceivable community placement. There are no available placement options for restoration in the community (Boggs Declaration, ¶¶ 3-6, SA 41-42). The same comprehensive and integrated services and programs that Thomas and Dausman are receiving in the JEU are not also available in the community.<sup>4</sup> The legal duty imposed by statute and case law is to provide services in the least restrictive suitable environment and for both Thomas and Dausman, two psychiatrists and a behavioral clinician have stated that the least restrictive suitable environment is Logansport State Hospital at this time. The agency is acting well within its discretion in keeping Thomas and Dausman at Logansport State Hospital and providing restorative services to them there. The trial court appropriately recognized that it could not override the agency's discretion, which the Court would have to do if judgment were granted to the Plaintiffs. Therefore, the trial court properly denied the Plaintiffs' motion for summary judgment, and recognized that the Plaintiffs were inappropriately asking the judicial branch of government to

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<sup>4</sup> As noted in the Statement of the Facts in this brief, while in the care of the Division of Mental Health and Addiction, Thomas and Dausman have been provided with comprehensive services including legal education, sexual responsibility, basic education, fitness education, community access training, life skills training and behavior modification (Lozano-Thomas, ¶¶ 9, 10, SA 44; Lozano-Dausman, ¶ 9, 10, SA 52-53; Meadows-Thomas, ¶ 9, SA 77; Meadows-Dausman, ¶ 9, SA 83). According to the treating professionals, community programs cannot provide the same quality or quantity of services to Thomas and Dausman as are provided at JEU at Logansport State Hospital (Maxwell-Dausman, ¶¶ 13-15, 18, 20-21, 23, SA 65-66; Maxwell-Thomas, ¶¶ 20, 24, SA 61; Wright, ¶ 11, SA 75; Meadows-Thomas, ¶ 10, SA 77; Meadows-Dausman, ¶ 10, SA 83). In sum, JEU is the least restrictive environment for Thomas and Dausman, at least at the present time. (Lozano-Thomas, ¶ 17, SA 45; Lozano-Dausman, ¶ 13, SA 53; Maxwell-Dausman, ¶ 24, SA 66; Maxwell-Thomas, ¶ 27, SA 62).

invade the lawful province of the legislature and the Division and to rewrite the law and the state budget to suit the Plaintiffs.

**D. The courts may not usurp the Division's statutory discretion, inherent under the civil commitment statutes, to make treatment and placement decisions.**

Once a patient is involuntarily committed in Indiana, the responsibility for his custody, care and treatment rests with the facility to which he is committed, in conjunction with the statutory gatekeeper. Indiana Code § 12-26-7-5. The gatekeeping function is an integral part of the commitment process in both voluntary and involuntary commitments.

Under Indiana Code §12-7-2-91.4, the "gatekeeper" is defined as:  
an entity identified in IC 12-24-12-10 that is actively involved in the evaluation and planning of and treatment for a committed individual beginning after the commitment through the planning of the individual's transition back into the community, including case management services for the individual in the community.

The statutory gatekeeper for Thomas and Dausman is the DMHA under Indiana Code §12-24-12-10(b)(1) because of their lack of comprehension to stand trial. This means that the Division of Mental Health and Addiction performs the gatekeeping role for both Thomas and Dausman, making admission decisions and other placement decisions.

The role of the gatekeeper was recently discussed at length and confirmed by the Indiana Court of Appeals in *In Re Contempt of Wabash Valley Hospital, Inc., supra*. The Court of Appeals in that case acknowledged "the General Assembly's determination that the ultimate authority over admissions decisions should rest with the institutions themselves." 827 N.E.2d at 58. The Court of Appeals further recognized the need for unbridled discretion in placement decisions:

. . . admissions decisions implicate professional judgment and expertise about treatment alternatives. Facilities are generally in a better position to make admissions decisions than trial courts. The General Assembly's balancing takes

into account not only the courts' needs but also the difficulties presented when facilities lack control over the size of the populations they are required to treat.

*Id* at 58-59.

Although the *Wabash Valley* case dealt specifically with an admission issue, the Court of Appeals clearly upheld the broad discretion of the facilities and the division in any and all placement decisions, including placement into the community. The courts may not usurp that discretion, and to do so violates the doctrine of Separation of Powers. In these circumstances, the trial court properly recognized that the Plaintiffs were not entitled to judgment because to do so would constitute usurpation of the division's discretion, contrary to the Separation of Powers.

**E. The Plaintiffs have not cited any factual or legal authority establishing that the trial judge incorrectly decided the Separation of Powers matter.**

The Plaintiffs contend that the doctrine of Separation of Powers has no application to this case because they are asking the judiciary to require the Division to comply with state law, but this contention is simply incorrect. As noted above, the legislature has given discretion and authority to the Division to determine how competency restorative services will be managed and the agency has determined to handle such services in-house at this point as a result of a lack of comparable services in the community setting or funding to develop such services in the community setting (Boggs Declaration, ¶¶ 3-6, SA 41-42). Second, the Plaintiffs contend that the Division is violating state law, but this contention is incorrect as the authority to provide restorative treatment services at state hospitals or by contract has been given to the Division. *See*

Indiana Code § 35-36-3-1(b).<sup>5</sup> Rather than offering any actual authority supporting their position, the Plaintiffs observe that it is costly to treat a person needing restorative services on an inpatient basis (\$428 to \$807 per day, Defendants' Response to Plaintiffs' Second Set of Interrogatories, ¶¶ 1, 2 & Exh. A (App. 121-22, 124). Again, the Plaintiffs offer no rebuttal to the evidence that the legislature has not provided sufficient funds for contracts in a community setting or that there are no available community placements offering the substantial services offered at Logansport State Hospital for persons accused of serious crimes. Instead, the Plaintiffs say that the cost of outpatient treatment for Thomas "surely pales in comparison to the cost of institutionalization" (Brief of Appellants, p. 29). However, the Plaintiffs offer not one iota of evidence to support their speculation about effectiveness and cost. There is no evidence of how much it would cost to start and maintain a program of restoration services in the community, let alone how much it would cost to provide the Plaintiffs the same broad array of services that they now receive at Jayne English Treatment Center, which is specifically designed and operated for care of the developmentally disabled.

The Plaintiffs also offer no evidence to support their speculative contention (Brief of Appellants, p. 30) that the Division could easily provide outpatient services in the community to Dausman who lived near a state hospital. Moreover, as previously discussed, the Plaintiffs completely ignore the medical assessment that both Plaintiffs constitute a danger to children at the present time in the community setting (Lozano/Thomas, ¶¶ 11-13, 16 SA 45;

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<sup>5</sup> If the court finds that the defendant lacks this ability, it shall delay or continue the trial and order the defendant committed to the division of mental health and addiction. The division of mental health and addiction shall 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. Indiana Code § 35-36-3-1(b)

Lozano/Dausman, ¶ 11, App. 53). Regarding Dausman, Dr. Lozano concluded that Logansport is currently the least restrictive environment suitable for Derrick Dausman's needs" (¶ 13, SA 53) and "Derrick Dausman can benefit from continued treatment in the Jayne English Unit" because the "Jayne English Unit is the only facility in the state that can address this kind of problem and provide this level of integrated services to focus on all aspects of his health and well-being" (¶ 14, App. 53). Dr. Lozano's assessment of Thomas was similar (¶¶ 9-10, 16-18).

Contrary to the Plaintiffs' claim, the Division is unquestionably complying with Indiana Code § 35-36-3-1(b), which simply does not require that the Division contract for inferior and inappropriate services in the community setting. Moreover, the Plaintiffs have not shown as a factual or legal matter that the Division is violating Indiana Code § 12-24-12-9 by refusing to plan for their transition to a community or other appropriate placement (such as a state prison if they are restored to competency and convicted of the criminal charges that they currently face for child molesting). It is clear that the treating professionals believe that both Thomas and Dausman may be restored to competency in the foreseeable future and that the goal is to treat behaviors that are unacceptable in the community so that they may be made competent and returned to the community. See Declaration of Lozano/Thomas, ¶¶ 6-19, SA 44-45; Declaration of Lozano/Dausman; ¶¶ 6-15, SA 52-53; Declaration of Maxwell/Thomas, ¶¶ 8-27, SA 59-62 and Declaration of Maxwell/Dausman, ¶¶ 9-24, SA 64-66.

Contrary to Plaintiffs' claim, this case is not similar to *Center Township v. Coe*, 572 N.E.2d 1350 (Ind. Ct. App. 1991). The *Center Township* case did not address a Separation of Powers question. Instead, this Court found that there was a statutory mechanism for the Trustee to address a temporary lack of funds and that the trustee was required to follow the law. 572 N.E.2d at 1358. In contrast, in this case, the Division has fully complied with state law as

discussed above by providing restorative services in state hospitals which are designed to restore competence and return the person to the community or other appropriate placement. The Plaintiffs never even claim that restorative services are not being provided in the state hospitals but only that they should be provided at some other location. The Division has determined to continue providing services at the hospitals, and Plaintiffs have not identified funds that could be committed to providing community-based restoration services.

Similarly, the cases that the Plaintiffs cite at pages 31 and 32 of their brief from other states are inapplicable to the case at bar. Those cases are not controlling here and none of those cases address Indiana law or establish in any way that the Division was or is required to enter into contracts for community placements of developmentally disabled persons who have been determined to be incompetent to stand trial and to require restorative services in Indiana. The Plaintiffs have not shown that the Division has breached a duty under Indiana law. Contrary to their claim at page 32 of their brief, the Plaintiffs have not shown that the Defendants have misallocated resources contrary to controlling law. There is no evidence about the allocation of resources except the uncontradicted declaration of Cathy Boggs that no funds have been provided for restoration services in the community.

While it may be correct as claimed by the Plaintiffs that the Division has no authority to act in a manner contrary to law or to violate the United States Constitution,<sup>6</sup> the Plaintiffs have shown no such violations in this case. Further, none of the state statutes cited by the Plaintiffs at page 34 of their brief is actually relevant and controlling with respect to the Division's clear authority under Indiana law to place developmentally disabled persons who are incompetent and facing criminal charges in appropriate state institutions to restore their competence, as such

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<sup>6</sup> The Plaintiffs cite no controlling authority from the Indiana or the United States Supreme Court regarding this assertion. *See* Brief of Appellants, p. 33.

action is expressly permitted by Indiana law. *See* Indiana Code § 35-36-3-1(b)(2).

**3. The trial court correctly decided that the Plaintiffs have no viable claim under Indiana law and the Fourteenth Amendment to the United States Constitution.**

**A. The Plaintiffs have no viable state law claim.**

Although their request for relief in this case clearly relates to possible future actions, the Plaintiffs suggest that the trial court ignored their state law claims. The fact is that the Plaintiffs clearly have no viable state law claims. First, at pages 36-37 of their brief, they suggest that Indiana Code § 35-36-3-1(b) requires the Division to place some developmentally disabled persons in the community in the first instance when such persons are found incompetent to stand trial and are facing criminal charges. But, as discussed above, Indiana Code § 35-36-3-1(b) clearly authorizes the Division to place all such disabled persons in state hospitals, if it so chooses. Again, Indiana Code § 35-36-3-1(b) provides:

If the court finds that the defendant lacks this ability, it shall delay or continue the trial and order the defendant committed to the division of mental health and addiction. **The division of mental health and addiction shall 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.**

[Emphasis in bold added].

Thus, the statute plainly authorizes the Division to place disabled persons in state hospitals that provide for competency restoration services when those hospitals are the least restrictive setting appropriate to the needs of the criminal defendant and the safety of the criminal defendant and others. When the language of a statute is clear, no interpretation is necessary because “when a statute is clear, we (the appellate court) do not impose other

constructions upon it.” *Huffman v. Office of Environmental Adjudication*, 811 N.E.2d 806, 812 (Ind. 2004).

Contrary to the argument of the Plaintiffs, Thomas and Dausman clearly have no standing to challenge the application of the statute. The undisputed evidence establishes that both Thomas and Dausman are being housed at the Logansport State Hospital because it is the least restrictive setting appropriate to their needs, their safety and the safety of others. *See* Declaration of Lozano-Thomas, ¶¶6-18, SA 44-45; Declaration of Lozano-Dausman, ¶¶ 6-15, SA 52-53; Declaration Maxwell-Thomas, ¶¶ 8-27, SA 59-62; Declaration of Maxwell-Dausman, ¶¶ 9-24, SA 64-66; Risk Assessment Evaluation for Thomas, SA 70-71; Declaration of Wright, ¶¶ 5-11, SA 74-75; Declaration of Meadows-Thomas, ¶¶ 9-14, SA 77-78; and, Declaration of Meadows-Dausman, ¶¶ 9-14, SA 83-84. “In Indiana the standing requirement is stated in terms of the requirement of a party to show injury.” *Id.* Further, “[c]ourts are open only to those who have been injured, and a party who seeks to overthrow a statute must affirmatively show that he has been prejudiced thereby.” *Lamb v. State*, 325 N.E.2d 180, 185 (Ind. 1975) (citations omitted). *See also Marion County v. State*, 888 N.E.2d 292, 297 (Ind. Ct. App. 2008) (party must be able to show direct injury in order to challenge a statute). Here, neither Thomas nor Dausman has any legal basis to complain about the Division’s understanding of Indiana Code § 35-36-3-1(b) as they have not shown any injury to themselves relating to the Division’s exercise of its discretion. Thomas and Dausman are where they should be, and the statute plainly permits their placement at Logansport State Hospital. In these circumstances, the Plaintiffs have cited no authority suggesting that their placement in a state hospital for restorative services violates any liberty interest secured by the federal or state constitutions. *See* further discussion in next section.

Further, the Plaintiffs' contention is specious to the extent that they claim that the Division cannot plan for the transition of the Plaintiffs back to the community or other appropriate placement merely because they may be housed in the hospital until their competence is restored, criminal charges are dismissed or they are released for some other reason. As previously noted, the undisputed testimony is that the Division plans for the release of every patient, including patients such as the Plaintiffs. It is apparent from the Declarations of the treating professionals, including Dr. Lozano, Dr. Meadows and Maxwell as cited above, that the Division is effectively planning for the release of Thomas and Dausman by making every effort to make them competent and better able to cope with life in the community outside of the hospital. The record shows that the requirements of Indiana Code § 12-24-12-9 are being met.

Any changes to the law in 2004, as embodied in Indiana Code § 35-36-3-1 *et seq.* merely provide additional options to the Division should funding become available and adequate community programs are put in place. Thus, the Division's understanding of the law is not incorrect. It is constrained by funding and the lack of existing, valid options in Indiana. Until funding is put in place and the Division develops good alternatives to the restorative programs at the hospitals, the doctrine of Separation of Powers prevents the courts from substituting their judgment for that of the legislature and the Division.

In any event, the Plaintiffs may claim that professional judgment is not part of the decision to place developmentally disabled persons in state hospitals at the current time, but again they cite no supporting evidence. On the contrary, evidence presented by the Defendants establishes that the state hospitals are currently the most appropriate placements for such individuals. *See Boggs Declaration, ¶ 4, SA 42* (outpatient restoration services for individuals charged with serious crimes would require a level of supervision and monitoring that is not

currently available in the community); Declaration of Lozano/Thomas, ¶ 10, SA 44 (“The comprehensive and integrated services that Steven Thomas is receiving at Logansport State Hospital are not available in the community”), ¶ 17, SA 45 (“Logansport is currently the least restrictive environment suitable for Steven Thomas’ needs”); Declaration of Meadows/Dausman, ¶ 10, SA 83 (“The comprehensive and integrated services that Derrick Dausman is receiving at Logansport State Hospital are not available in the community”), ¶¶ 9-14, SA 83-84 (Logansport provides unique programming very much needed by Dausman).

**B. There is no viable constitutional claim in this case.**

Plaintiffs claim a constitutional violation. As they envision the right, once a psychiatrist—any psychiatrist—opines that restoration services might be provided in the community, DMHA has no choice but to provide those services in that manner. Although the Plaintiffs have attempted to put together an argument that such a right exists, it does not. Nothing in the Constitution requires that the DMHA go along with the opinion of a psychiatrist, if the psychiatrist even gives an opinion.

Reliance on *Youngberg v. Romero*, 457 U.S. 307 (1982), is misplaced. The case does not, as Plaintiffs suggest, hold that an institutionalized patient’s placement must be determined by medical and psychiatric treatment professionals. The issue was whether the plaintiff had a right to care and the court held that there is a right to minimally adequate care. The court held in *Youngberg*:

In determining what is “reasonable” - in this and in any case presenting a claim for training by a State - we emphasize that courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.

457 U.S. at 322.

That is much different from holding that any psychiatrist who testifies in any criminal court can direct the placement of a person who is incompetent to stand trial. The court recognized in *Youngberg* that courts should not be deciding which of several competing acceptable professional choices should have been made. The issue of where care should be provided was not even an issue in the case: "And he does not argue that if he were still at home, the State would have an obligation to provide training at its expense." 457 U.S. at 317. Nothing in the case supports a conclusion that if any psychiatrist gives an opinion that community treatment is possible for a probable child molester then that person is entitled to treatment at home, no matter what the authorities decide and no matter what threat he presents to society.

*Estate of Cole v. Fromm*, 94 F. 3d 254, 262 (7th Cir. 1996), *Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1199 (W.D. N.C. 1988) *aff'd*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990), and *Thomas S. v. Morrow*, 781 F.2d 367 (4th Cir. 1986), are along the same lines. They say that professional judgment must be exercised but never say who must exercise that judgment and never hold that the physician or psychiatrist can dictate placement to the state agency charged with making placement decisions.<sup>7</sup> None of the cases creates a situation in which the

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<sup>7</sup> While it is correct that two attorneys in the Office of General Counsel play a gatekeeping role for the Division with respect to incompetent persons facing criminal charges who are committed to the Division by courts (Boggs' dep., 26-28, App. 90-92), Boggs' testimony does not suggest that these individuals or attorneys have controlled the decisions of the Division with respect to the provision of restorative services for such individuals. The fact is, as discussed in this brief, that the restorative services currently available through the Division are carried out in the state hospitals, and each hospital has particular programs. The declarations of the treating professionals establish that Logansport State Hospital is a proper placement for the Plaintiffs. The gatekeepers do not actually make the decision to place such persons in a hospital. The gatekeepers' role with respect to incompetent persons who are facing criminal charges is to act as part of a team and to assist the professionals with the legal task of reporting to the court and keeping track of such persons. There is no evidence that attorneys, rather than medical professionals, decide the content of medical programs or treatment or make medical judgments about whether a person is competent or ready to return to the court, the community or other appropriate placement.

opinion of one physician, psychiatrist or psychologist controls over the considered decision of a state agency empowered to make the subject determination. The Seventh Circuit held in *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983), that the class of mentally retarded persons did *not* have a right to treatment in the community rather than in a state hospital, and that opinion more directly responds to the position assumed by these Plaintiffs. The Plaintiffs' attempt to limit the applicability of that case falls short. The case holds that there is no affirmative duty to create a less restrictive community residential setting for the class in that case. Likewise, there is no right to such an assignment here.

The Court in *Society for Goodwill to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984), reached the same conclusion, that there is no right to treatment in the community. In this case, the federal district court had ordered that several hundred retarded adults be placed in the community but the Second Circuit reversed, finding no such right in the Constitution.

*Clark v. Cohen*, 794 F.2d 79, 87 (3d Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 962 (1986), is no help to the Plaintiffs. There is no claim in this instant case that the Plaintiffs are incorrectly diagnosed. Clark was involuntarily, illegally and indefinitely committed to a state institution for twenty-eight years through a petition containing an inaccurate diagnosis and without periodic review of her condition, in violation of her procedural due process rights. The Plaintiffs, on the other hand, do not challenge their diagnoses and had a hearing before the criminal courts where they were represented by counsel or had the right to be represented. Thereafter, the Division evaluated them and has been providing them with restorative services. In contrast, in *Clark* the unanimous and uncontradicted opinion was that the plaintiff belonged in a community setting. The defendants in that case presented no justification for their choices. There was no showing of any judgment being exercised at all.

In contrast, here the Plaintiffs have been found to have probably committed child molesting while in the very community residential setting to which they are demanding a return. That assignment would not provide safety to society as mandated in the statutes. The Division would be derelict in its duties to release Plaintiffs into the community before it reaches a decision that either of them no longer presents a danger to others in the community, and no such determination has been made as yet. Indeed, the facts are otherwise and Drs. Lozano and Meadows and Ms. Maxwell have declared that Thomas and Dausman are in appropriate, least restrictive placements. In contrast, there was no difference of opinion about releasing Clark into the community. She does not appear to have been an alleged child molester as to whom a court had found probable cause to believe that child molesting had been committed. That case is no help to the Plaintiffs here, where the decision has been committed to the professionals of the DMHA and the courts are not allowed to override the decision as to the best place to provide restoration services.

Finally, as previously discussed in this brief, *Messier*, 562 F.Supp.2d at 326-28,<sup>8</sup> does not support the Plaintiffs' claims. *Messier* was a class action by mentally retarded persons relating to the appropriateness of placing some mentally retarded persons in a community setting. That case did not hold that incompetent and developmentally disabled persons facing serious criminal charges must be considered for community placement while they are undergoing restorative services, especially when appropriate services are not currently available in the community. *Messier* also does not suggest that persons, such as Thomas and Dausman, who constitute a danger to children in the community and who are being treated in the least restrictive environment providing safety to themselves and others, must be considered for initial community

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<sup>8</sup> Again, this is a federal district court case from Connecticut that is not controlling in Indiana.

placement. The Plaintiffs have not shown any constitutional infirmity in their placement at Logansport State Hospital.

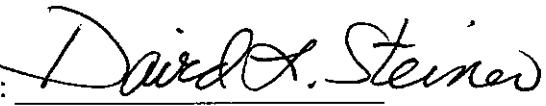
**CONCLUSION**

For the foregoing reasons, the judgment of the trial court should be affirmed.

Respectfully submitted,

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**WORD COUNT CERTIFICATE**

Pursuant to Appellate Rule 44, I verify that this brief contains no more than 14,000 words, excluding the items listed in Appellate Rule 44(C).



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**CERTIFICATE OF SERVICE**

I do certify that on the 6<sup>th</sup> day of April 2009, I served upon the following counsel in the above-entitled cause one (1) copy of the Brief of the Appellees, by depositing the same in the United States mail, first-class postage prepaid, addressed to the following persons:

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