From the Courts

by Margaret R. Moreland*

Delays in Program Placement

In 1996, the U.S. District Court for the Middle District of Alabama granted a preliminary injunction in favor of a class of juveniles who had brought an action against the Director of the Alabama Department of Youth Services (DYS) for violating a prior consent order regarding the failure to provide timely evaluation and placement of juveniles in DYS custody as required by law. Alabama Code § 12-15-61(c) requires that DYS "accept all children committed to it within seven days of notice of disposition." The district court found that there remained "scores of juveniles held in detention centers throughout the state awaiting rehabilitative services" and that "evaluations for these juveniles [were] routinely not initiated within seven days nor completed within fourteen days, as required. ..." The court stated that financial constraints were not an adequate defense to the allegations and that failure of DYS to evaluate and place juveniles within a reasonable time caused "unjustifiably prolonged restraints on [their] liberty" in violation of the rights guaranteed by the Fourteenth Amendment. Although DYS then agreed, in a settlement agreement reached in 2001, that it would henceforth comply with the requirement to accept custody within seven days, delays in placement continued.

J.B., a minor, was adjudicated a delinquent and committed to DYS custody on May 18, 2005, but, pending his transfer to DYS, he was detained in a county youth facility for 41 days without rehabilitative or drug-treatment services. He was then placed in an intensive treatment program, followed by a bridge program, and subsequently released. After violating after-care, he was again adjudicated a delinquent and, this time, he was detained for 35 days before being placed in a drug-treatment facility. J.B. commenced a class action against the Director of DYS, in his individual capacity, claiming that he had caused J.B. "to suffer unjustifiable restraint on his liberty" and that he was deliberately indifferent to J.B.'s right to be placed in a rehabilitation program in a timely fashion. The DYS Director claimed that the action was barred because he was protected from liability by the Eleventh Amendment.

In **J.B. v. Wood,** 2010 U.S. Dist LEXIS 28867 (M.D. Ala. March 25, 2010), the district court found that, while the Eleventh Amendment does not shield government officials against claims for money damages, *in their individual capacity*, in this case the Director of DYS was entitled to qualified immunity. The U.S. Supreme Court has held that, when a constitutional violation is alleged, the initial question is whether or not the official's behavior violated "clearly established federal statutory or constitutional law of which a reasonable person would have known." **Hope v. Pelzer,** 536 U.S. 730, 737 (2002). There was considerable doubt as to whether the district court in the 1996 litigation had determined that the delay in placement was a constitutional violation, collaterally estopping the defendant from relitigating that issue. Whatever the decision on that point, however, the court here noted that the plaintiff also was required to establish that the Director was deliberately indifferent to placement delays.

Deliberate indifference requires a showing of a risk of serious harm (the objective factor) and a "culpable state of mind" (the subjective factor). **Sims v. Mashburn,** 25 F.3d 980, 983 (11th Cir. 1994). Many courts have recognized that serious drug and/or alcohol addiction is sufficient to establish the objective factor. In addition, the district court in this case stated: "Although there is no evidence that J.B. suffered serious injury or pain, ... in light of the greater vulnerabilities of juveniles to the physical stresses associated with chemical dependency relative to adults, ... J.B.'s dependency without treatment had the potential to result in serious injury or pain." In addition, J.B.'s assessment had placed him in the high-risk category. Nevertheless, the claim fails with relation to the subjective factor.

The court found that the DYS Director had no actual knowledge of the delay in J.B.'s placement and, even if he had knowledge, his failure to act could be viewed as no more than negligence. J.B.'s placement history was not out of the ordinary. In accord with written policy, placements are made only after all the relevant information is received by DYS. Even then, there is an additional delay since the placement committee meets only once a week. The result, the court noted, is that "juveniles are held in detention at DYS without receiving credit, notice of when they will be placed, or the necessary rehabilitative or drug-treatment services." Although the placement delays were "long-standing, pervasive, and well documented," however, the court concluded that it could not be inferred that the Director was aware of the risk to J.B., since a "delay in placement of an otherwise physically and mentally healthy child does not create a risk of harm." Lack of knowledge precluded the finding of a constitutional violation and, therefore, the DYS Director was entitled to qualified immunity with regard to J.B.'s federal claim.

The court stated that failure of DYS to place juveniles within a reasonable time caused "unjustifiably prolonged restraints on [their] liberty" in violation of the Fourteenth Amendment.

Comment: The district court observed that DYS placement delays were the result of a "systemic" shortage of spaces in juvenile rehabilitation and drug-treatment facilities. The problem was "longstanding"

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and had been the subject of judicial scrutiny since the 1990s. While acknowledging that there were "financial constraints," in 1996, the district court stated that this was an "inadequate defense." In the current case, the court noted that, "J.B.'s dependency without treatment had the potential to result in serious injury or pain." Nevertheless, the court in this case seemed more inured to the situation than outraged.

Freedom of Religion

In **Iron Thunderhorse v. Pierce,** 2010 U.S. App. LEXIS 2713 (5th Cir. February 9, 2010), the Court of Appeals for the Fifth Circuit addressed the requirements imposed by the Religious Land Use and Institutionalized Persons Act (RLUIPA), **42 U.S.C.** §§ 2000cc et seq. Iron Thunderhorse, who is incarcerated in the Polunsky Unit of the Texas Department of Criminal Justice (TDCJ), states that he is a Quinnipiac Indian and practices Native American Shamanism. His claim alleges that TDCJ policies violated his rights under RLUIPA by preventing him from practicing his faith. After a bench trial, the magistrate judge granted some of the injunctive relief requested by the plaintiff, ordering TDCJ:

- To recognize Native American Shamanism as a faith with its own tenets;
- To allow the plaintiff to request designation of a reasonable number of holy days and traditional food for feast days; and
- To allow him reasonable access to pipe ceremonies, a medicine bundle, a clay flute, and a small drum.

The requests for relief with regard to the length of his hair, performing pipe ceremonies in his cell, and wearing a colored headband were denied. Iron Thunderhorse appealed these denials.

RLUIPA provides: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." It is up to the plaintiff to prove that a particular activity is a "religious exercise," which the U.S. Supreme Court has defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

In response, a defendant must show a compelling governmental interest that is being met in the least restrictive way possible. The Supreme Court has also asserted, however, that the courts must accord due deference "to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of costs and limited resources."

The appellate court found that the issue of prison hair-length policy under RLUIPA had already been settled in the Fifth Circuit—in favor of the government. The restriction on long hair was seen as the least restrictive way of satisfying the government's compelling interest in security. The argument that prisoners might hide weapons and contraband in their long hair was accepted, as well as the assertion that the policy would aid in the recapture of escapees, who would have a more difficult time altering their appearance than they would if they had been allowed to wear long hair. On the other hand, the court acknowledged that a 2005 decision in the Ninth Circuit rejected this justification and granted an injunction against enforcement of a similar hair policy—partially because the federal prisons in Oregon, Colorado, and Nevada allow inmates to have long hair or permit religious exemptions to their hair-length policies.

The court also had no trouble endorsing the TDCJ position on the wearing of colored headbands and the performance of pipe ceremonies inside an inmate's cell. It was held that Iron Thunderhorse failed to establish that the wearing of a white headband, which was allowed, rather than a colored one, created a substantial burden on the exercise of his faith. The prohibition against colored headbands was part of a broader policy designed to prevent inmates from wearing anything that would promote gang affiliation, and Iron Thunderhorse did not challenge this justification. His argument was merely that he was unable to purchase white headbands, because the only approved vendor failed to handle his orders properly. TDCJ's only failure here, the failure to approve an efficient vendor, "does not rise to the level of a RLUIPA violation."

The court found that the pipe ceremony, on the other hand, is important in practicing Native American Shamanism and therefore, a prohibition against it does create a substantial burden. Nevertheless, TDCJ was again able to present a valid justification for prohibiting the ceremony inside an inmate's cell. The court found "no reason to question the TDCJ's position that the prohibition on incendiary items within the cell is the least restrictive way to prevent inmates from starting fires in their cells. Also, although Iron Thunderhorse could not perform the pipe ceremony while confined to his cell in administrative segregation, when returned to the general population he would be able to participate in the group pipe ceremonies that the prison allows to take place outdoors.

Iron Thunderhorse's claim that the failure to recognize Native Americans as a racial category deprived him of benefits was also rejected. He did not present any evidence that there were "legitimate rehabilitative, cultural programs, services, and activities that could, should, or would be available if such category existed," and, in fact, the TDCJ Regional Director testified that there were no such benefits for Native Americans. Similarly, the inmate presented no evidence to support his contention that not allowing him to have a ceremonial pipe, drum, clay flute, and medicine bundle until he is released from administrative segregation creates an incentive for keeping him confined there "as long as possible." The court dismissed this argument as "entirely speculative." The decision of the magistrate judge was affirmed in full.

Comment: A petition for certiorari was filed on May 18, 2010. Subsequently, a Brief in Opposition and the Petitioner's Reply have been filed. The Supreme Court has also requested the Solicitor General to submit a brief on the matter. The question presented is: "Did the Court of Appeals misinterpret the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc et seq., to require only a minimal showing that a prison grooming rule that concededly imposes a substantial burden on religious exercise is the 'least restrictive means of furthering [a] compelling governmental interest,' contrary to the decisions of other circuits and the literal terms of the statute?" The documents in the case may be found at *http://www.scotusblog.com/case-files/cases/iron-thunderhorse-v-pierce*. ■