IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Robin Frazier, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 18 C 1991
	)	
John Baldwin,	)	Judge Feinerman
	)	
	)	
	)	
Defendant.	)	

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The defendant, John Baldwin, Director of the Illinois Department of Corrections, by his attorney, Lisa Madigan, Attorney General of Illinois, submits the following response to plaintiffs' supplemental brief in support of their motion for temporary restraining order. (Doc.23).

As their model for this case, plaintiffs have drawn upon the relief ordered by the Court in *Bleeke v. Server*, No. 1:09-CV-228, 2010 WL 1138928 (N.D. Ind. Mar. 19, 2010) ("*Bleeke II*"), a case similar to this one where a released sex offender sought permission from the state parole authorities to resume contact with his two children. However, this case differs from *Bleeke* in several important ways. First, although plaintiffs here suggest hearing procedures could be undertaken by the Illinois Prisoner Review Board, the PRB is not a party in this case. If the PRB is to be subject of an injunction, it would need to be joined as a defendant. Our understanding is that the PRB currently does not generally involve itself in disputes about parole instructions given by the Department of Corrections.

A second important point of dissimilarity is that although Bleeke committed a sex offense, it did not involve a child, and Judge Simon was careful in *Bleeke* to craft his remedy with that qualification in mind. *Id.* at *3 ("*In this context*—where an offender is found guilty of a sex offense *but not one against children*—I find the following procedures are minimally required to meet the requirements of due process."); *see also Bleeke v. Server*, No. 1:09–CV–228, 2010 WL 299148, at *1 (N.D. Ind. Jan. 19, 2010) ("*Bleeke I*") (conviction involved "an adult female who was over the age of 21"). The court recognized that the right to family unification was of significant constitutional significance, but was not absolute in the context of a convicted sex offender on supervised release. The court drew upon the criteria of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires an evaluation of the private interest that will be affected by the official action; the risk of erroneous deprivation through the procedures used and the probable value of any additional or substitute procedures; and the government interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Bleeke II at 3, citing Mathews*, 424 U.S. at 335. In *Bleeke II*, the court ordered that the decision as to the imposition of conditions limiting the offender's contact with his own children must be made by an independent decision-maker, not someone directly involved in his supervision on parole. *Id.* That person need not be a judicial officer. *Id.* at *4.

In addition, Judge Simon concluded that the parole board must give the offender advance written notice of a hearing on the imposition of conditions limiting his contact with his children. *Id.* The offender must be given the opportunity to marshal facts and prepare a defense. The judge also concluded that the offender be allowed to call witnesses and present documentary evidence in opposition to the imposition of such conditions, and be given the right to confront and cross-

examine adverse witnesses, unless the hearing officer specifically finds good cause not to allow that. *Id.* The court further required that the parole board issue a written statement as to the evidence relied on and the reason for the determination. "Reasonable cause," *i.e.*, reasonable cause or "probable cause" or "reason to believe" the child might be endangered if permitted to live with the offender, was the standard the court found that would minimally meet the requirements of due process. *Id., citing Dupuy v. Samuels,* 465 F.3d 757, 760 (7th Cir. 2006). Following precedent from the revocation of parole and probation cases, the court concluded the right to counsel at the hearing was not constitutionally required, at least as a general matter. *Id.*

The requirements of procedural due process involve examination of unique fact situations and no generic solution can be imposed. As an alternative example to *Bleeke*, the decision in *Parham v. J.R.*, 442 U.S. 584 (1979), might be instructive. While not involving persons on under post-release supervision, it is a case involving parental relationships with children, the important liberty interests of children, and the role of trained medical professionals in decision-making. A Georgia law permitted voluntary admission of minor children to mental hospitals by parents and guardians. The children filed suit, alleging insufficient procedural protections. The Court had to weigh a number of factors: a full adversarial hearing before admission might deter parents who in good faith seek treatment for their child; and would take time away from psychiatrists who already are compelled to spend a large part of their day not providing direct patient care. But while most parents will act in the best interests of their child, and a presumption in that direction is appropriate, some will not, so their authority cannot be absolute. Weighing these factors, the Court concluded that "an independent medical decisionmaking process, which includes the thorough psychiatric investigation described earlier, followed by additional periodic review of a child's condition, will protect children who should not be admitted; we do not believe the risks

of error in that process would be significantly reduced by a more formal, judicial-type hearing." *Id.* at 613.

Defendants would not propose a wholesale adoption of the remedies imposed in *Bleeke*; rather, something like the informal process in *Parham* would be more appropriate. Other procedures would meet the requirements of due process in the context of this case, without a full trial-type hearing, which would be administratively cumbersome and inefficient. In addition, the State's interests in protecting children are sufficiently weighty here that there is nothing wrong with an initial presumption *against* the offender having contact with any children, provided a decision can be made within a reasonable time *after* the offender's release from custody based on a reasonable review of the record at the time. This decision should focus on the offender's cooperation with his or her therapist and parole agent and a careful review of the offender's history, current adjustment in the free community, and family relationships. Nothing in *Bleeke v. Server* suggests that the decision must be made *before* the offender's release from prison; in that case, the plaintiff had been subject to Indiana's no-contact rule for nearly two years, and the court nevertheless gave the defendants an additional sixty days to provide the required hearing. *Bleeke I* at *1; *Bleeke II at *6.*

The Department is not comfortable with making a decision prior to the offender's release because of the State's important interests in protecting the public especially the protection of children. The Department would like to see the offender establish a cooperative relationship with his or her therapist and parole agent *after* release; allow for the therapist to make an initial evaluation of the person based on more than one session; and go from there. Compared to others not carrying the legal disability of a felony sex conviction, persons on parole or mandatory

supervised release do not come out of prison with the unconditional freedom to exercise constitutional rights.

The Department would suggest an alternative procedure. To meet the requirement that a decision be made in a reasonable time (much shorter than the six months called for in the Department's manual), the parole department, in conjunction with the offender's therapist, will make a determination within 30 days after the first appointment with the therapist—whether there is "reasonable cause" to believe the child might be endangered. The 30-day period assumes that the therapist can see the person reasonably promptly after release and that the offender cooperates in seeing the therapist. The therapist may require more than one appointment before he or she can make an informed recommendation. The therapist's recommendation would be given considerable weight by the parole authorities. Decisions on whether a parolee may see or contact his or her children would be reviewed every 30 days. If the offender disputes a decision restricting access, he or she could present a written statement or other written material to the Deputy Chief of Parole or his designee (not the parole agent directly supervising the case) for a review of the decision. A written decision from the parole supervisor in the form of a letter with a statement of reasons would be provided to the offender. This process would minimize the risk of error without imposing a potentially costly, cumbersome, and trial-like process on the State. Because reviews would be happening every 30 days, a full adversarial hearing every 30 days would be unnecessary, expensive, and inefficient.

In summary, the Department proposes that the offender's therapist will make a recommendation on family reunification after appropriate consideration and within a reasonably expeditious timeframe. If there is a dispute about the recommendation, a parole supervisor can review the recommendation and alter it if required, giving a statement of reasons for his decision.

Such a procedure would meet the requirements of due process without imposing substantial burdens on the Department or endangering children.

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Respectfully submitted,

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