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

ROBIN FRAZIER, *et al.*,	)	
	)	
Plaintiffs,	)	No. 18 CV 1991
	)	
v.	)	
	)	
JOHN BALDWIN,	)	Judge Feinerman
	)	
Defendant.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

INTRODUCTION

Plaintiffs submit this supplemental memorandum in response to the Court's request that Plaintiffs submit a brief setting forth the particular relief they seek on their motion for a preliminary injunction (ECF No. 3). As explained below, Plaintiffs request relief similar to that granted by the district court in *Bleeke v. Server*, 1:09-CV-228, 2010 WL 1138928 (N.D. Ind., Mar. 19, 2010). In *Bleeke*, the court granted a preliminary injunction prohibiting the Indiana Department of Corrections from restricting contact between a parolee who had been convicted of a sex offense and his own children without affording him notice and a hearing before a neutral decisionmaker. The same procedural protections are appropriate here.

ARGUMENT

Under the test set forth by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "identification of the specific dictates of due process generally requires

consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

An analysis of these factors demonstrates that the Department of Corrections must provide pre-deprivation process, including the opportunity to be heard by a neutral decisionmaker, before imposing a parole restriction prohibiting parent-child contact.

A. A Fundamental Right Is At Stake

As to the first *Mathews* factor, there is no dispute that the private interest at stake here—the Plaintiffs' right to have custodial relationships with their minor children—is a fundamental right. See Plfs. Br. at 16–17; Def Br. at 6; *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) ("the fundamental right of parents to make decisions concerning the care, custody, and control of their children" is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].")

B. The Department's Policy Presents a Serious Risk of Erroneous Deprivations

As to the second *Mathews* factor, the risk of an erroneous deprivation under the Department of Corrections' current policy is great. The Department deprives every parent who is on parole for a sex offense of contact with her minor children for a period of at least six months without taking into account the individual

characteristics of the parolee and without reliance on any evidence concerning whether the parolee poses a danger to her child. Likewise, the Department vests parole agents (in consultation with treating therapists) with complete discretion to decide whether to restore parent-child contact after six months. The parole agents' decisions are unconstrained by any criteria, and a parolee has no opportunity to contest restrictions on her ability to have contact with her children.

The Seventh Circuit has emphasized that thorough procedural protections are constitutionally required before a government entity can deny a parent custody of his or her child, even temporarily. See *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) ("Minimally, [due process] means that governmental officials will not remove a child from his home without an investigation and pre-deprivation hearing resulting in a court order of removal, absent exigent circumstances.") (citing *Mathews*, 424 U.S. at 333).[1]

While Plaintiffs recognize that parolees may be entitled to somewhat less due process than people who are not under the supervision of the Department of Corrections, due process rights do not evaporate simply because a person is on MSR. For example, in *Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992), the Seventh

[1] Likewise, Illinois law provides a robust process that must be observed when the government seeks to remove a child from his or her parents' custody. 750 ILCS 50/0.01, *et seq*. In particular, if the Department of Children and Family services seeks to remove a child from his or her parent, it must file a petition before a juvenile court judge. During the proceedings, both parent and child are entitled to be represented by counsel. 750 ILCS 50/13 (c). The party that seeks to terminate a parents' rights must prove by "clear and convincing evidence" that the parent is "unfit" based on criteria set forth in the statute. 750 ILCS 50/8. The parent has an opportunity to appear, present evidence on her behalf, and to rebut the claims of unfitness. A judge's decision to terminate parental rights must be set forth in writing and is appealable on an expedited basis. 750 ILCS 50/20.

Circuit found that a Wisconsin prisoner was entitled to due process before being required to take antipsychotic drug injections as a condition of his parole. *Id*. at 1486–88. The Court found that the decision to require the parolee to receive the injections could not be rendered by his parole agent and an examining psychiatrist. *Id.* at 1498, 1500 ("we conclude that the defendants' current procedure — with its heavy emphasis upon the judgment of the individual parole agent — is constitutionally inadequate.") Likewise, in *Hadley v. Buss*, 385 Fed. Appx. 600, 603 (7th Cir.2010), the Seventh Circuit held that some process was due before a prison can take away an inmate's "good time credit" for failure to participate in a sex offender therapy program. The Court wrote that due process requires "that a prisoner receive written notice of the charges at least 24 hours in advance of the hearing; an opportunity to present testimony and evidence to a neutral decision-maker; and a written explanation supported by some evidence in the record." Some similar procedural protections are warranted here to appropriately balance Plaintiffs' rights and the Department's interests.

C. Pre-Deprivation Process Would Not Compromise the Department's Interests

As to the third *Mathews* factor, the Department of Corrections' interest in protecting children is of course important. However, absent specific evidence that a child would be endangered by having contact with his or her parent, the Department's interest in preventing parent-child contact cannot be said to be compelling. *Croft v. Westmoreland County Children & Youth Servs*., 103 F.3d 1123, 1125 (3d Cir. 1997) ("a state has no interest in protecting children from their

parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that the child has been abused or is in imminent danger of abuse.")

As for the fiscal or administrative burden that providing procedural due process would entail, the Department of Corrections already has in place the infrastructure to provide the process that Plaintiffs request. The Department already conducts a pre-release evaluation of every person who has been convicted of a sex offense pursuant to Illinois law. 725 ILCS 207/1 *et. seq.*, and 730 ILCS 5/3-6-2(j) ("Any person convicted of a sex offense … shall be required to receive a sex offender evaluation prior to release into the community from the Department of Corrections.") Moreover, the infrastructure for a pre-release hearing concerning the propriety of imposing a restriction on parent-child contact is already in place. The Prisoner Review Board conducts monthly hearings at every IDOC facility concerning parole conditions, revocations and other related matters. See, Illinois Prisoner Review Board, Operations and Hearing Information (available at: https://www2.illinois.gov/sites/prb/Pages/Operations.aspx).

D. The Specific Relief Requested

In *Bleeke v. Server*, 1:09-CV-228, 2010 WL 1138928, at *5 (N.D. Ind., Mar. 19, 2010), the plaintiff was on parole for a sex offense from the Indiana Department of Corrections. He sued to enjoin Indiana's parole board from restricting his ability to live with and have contact with his two minor children. After undertaking a thorough analysis of the *Mathews* factors, the Court granted the plaintiff's motion

for a preliminary injunction, concluding that due process required the parole board to observe the following procedures before restricting parent-child contact:

- The parolee must receive "advance written notice of the time and place of a hearing on the imposition of conditions limiting his contact with his children";
- "A person or panel of persons not personally involved in [the parolee's] supervision must preside at the hearing and render a decision on the imposition of conditions restricting his contact with his children";
- The parolee "must be permitted to appear in person and to be heard at the hearing";
- The parolee "must be permitted to call witnesses and present documentary evidence in opposition to the imposition of the disputed conditions";
- The parolee "must be afforded the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation";
- "Following the hearing, the decisionmaker must issue a written statement as to the evidence relied upon and the reasons for the determination whether or not there exists reasonable cause to believe that [the parolee] poses a risk to his children sufficient to ban or limit his contact with them..."

Id. at *6–*7.

Plaintiffs request that this Court order the Department of Corrections to adopt similar procedures. If the Department seeks to impose a restriction on parent-child contact on a particular parolee, the parolee should be afforded a hearing concerning the need for this condition; the parolee should have an opportunity to present evidence and rebut evidence presented against her; and the decision regarding whether or to what extent to restrict parent-child contact should be rendered in

writing by a neutral decisionmaker (likely the Prisoner Review Board) rather than by a parole agent and/or therapist.[2]

Respectfully submitted,

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[2] Plaintiffs would not object to the Department's being afforded a reasonable amount of time to comply with these procedures. In *Bleeke*, the Court gave the Indiana parole board sixty days to hold the required hearing. *Id.* at *6. The same time frame would be appropriate here.