

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION**

**UNITED STATES OF AMERICA,**

**PLAINTIFF**

**v.**

**CASE NO. 4:09CV00033 WRW**

**STATE OF ARKANSAS, *et al.*,**

**DEFENDANTS**

**ANSWER AND AFFIRMATIVE DEFENSES**

Defendants State of Arkansas, Governor Mike Beebe in his official capacity only, John M. Selig in his official capacity only, James C. Green in his official capacity only, and Calvin Price in his official capacity only, hereby answer the Complaint and aver the following:

1. **PARAGRAPH ONE (1)** is **ADMITTED** in part and **DENIED** in part.

Defendants specifically **DENY** that they are “egregiously and flagrantly depriving individuals . . . of rights, privileges, or immunities secured and protected by the Constitution and laws of the United States.” Defendants further **DENY** any implication that the Plaintiff has complied with the Civil Rights of Institutionalized Persons Act (“CRIPA”) or is entitled to any injunctive relief. Defendants **ADMIT** that the United States Attorney General is filing this Complaint on the behalf of the United States of America.

2. **PARAGRAPH TWO (2)** is **ADMITTED**.

3. **PARAGRAPH THREE (3)** is **DENIED** as stated. By way of further answer, the United States is authorized to initiate actions of this type but only after full compliance with CRIPA. Defendants **DENY** any implication that the Plaintiff has in this case fully complied with CRIPA.

4. **PARAGRAPH FOUR (4)** is **ADMITTED** in part and **DENIED** in part.

Defendants **ADMIT** that the United States Attorney General has certified that all pre-filing requirements have been met. Defendants **DENY** that such pre-filing requirements have been met.

5. **PARAGRAPH FIVE (5)** is **ADMITTED**.

6. **PARAGRAPH SIX (6)** is **ADMITTED** in part and **DENIED** in part.

Defendants **DENY** that the State of Arkansas owns the Conway Human Development Center (“CHDC”), but **ADMIT** that the Board of Developmental Disabilities Services owns and has charge of that property. Defendants **DENY** that the State operates the CHDC or is responsible for the services and supports provided to individuals who reside at the CHDC. Defendants **ADMIT** that the Board of Developmental Disabilities Services (which is a Board authorized under State law, *see* Ark. Code Ann. § 20-48-401 *et seq.*) is responsible in its official capacity for the operation of the CHDC and to provide services and supports to CHDC residents, to the extent that the Board has not otherwise delegated its authority to the Director of Developmental Disability Services.

7. **PARAGRAPH SEVEN (7)** is **ADMITTED** in part and **DENIED** in part.

Defendants **ADMIT** that the CHDC is a State facility but **DENY** that the State controls the operations of the CHDC. *See* Response to ¶ 6, *supra*. Defendants **ADMIT** that the CHDC provides services to persons with developmental disabilities.

8. **PARAGRAPH EIGHT (8)** is **ADMITTED** in part and **DENIED** in part.

Defendants **ADMIT** that Mike Beebe is the Governor of the State of Arkansas, but **DENY** that he is responsible for the operation of the CHDC. *See* Response to ¶ 6, *supra*.

9. **PARAGRAPH NINE (9)** is **ADMITTED** in part and **DENIED** in part.

Defendants **ADMIT** that John Selig is the Director of the Arkansas Department of Human Services, but **DENY** that he has responsibility for overseeing the operation of the CHDC. *See* Response to ¶ 6, *supra*.

10. **PARAGRAPH TEN (10)** is **ADMITTED** in part and **DENIED** in part.

Defendants **ADMIT** that Dr. James C. Green is the Director of the Division of Developmental Disabilities Services of the Arkansas Department of Human Services, and further **ADMIT** that he is responsible for overseeing the operation of the CHDC *to the extent* that the Board of Developmental Disabilities Services has delegated that authority to him. *See* Response to ¶ 6, *supra*. Defendants **DENY** the remaining allegations set forth in paragraph ten of the Complaint.

11-12. **PARAGRAPHS ELEVEN (11)** and **TWELVE (12)** are **ADMITTED**.

13. **PARAGRAPH THIRTEEN (13)** is **ADMITTED** in part and **DENIED** in part.

Defendants **ADMIT** that those Board members and other State officials who operate the CHDC have certain responsibilities as to the operation of CHDC and for the health and safety of the persons residing at CHDC. *See* Response to ¶ 6, *supra*. However, since the Plaintiff does not define those responsibilities, this paragraph must be **DENIED** to the extent that it does not recognize any limits to those responsibilities. Defendants **DENY** the remaining allegations set forth in **PARAGRAPH THIRTEEN (13)** of the Complaint.

14. **PARAGRAPH FOURTEEN (14)** is **ADMITTED**.

15. **PARAGRAPH FIFTEEN (15)** is a **LEGAL CONCLUSION** to which no responsive pleading is required. To the extent that a response is deemed to be necessary, Defendants **ADMIT** that those Board members and other State officials who operate the CHDC have certain obligations to the individuals residing at CHDC, but **DENY** this paragraph to the

extent that it fails to identify those obligations. The remaining allegations set forth in

**PARAGRAPH FIFTEEN (15) are DENIED.**

16. **PARAGRAPH SIXTEEN (16)** is a **LEGAL CONCLUSION** to which no responsive pleading is required. To the extent a response is deemed to be necessary, Defendants **ADMIT** that those Board members and other State officials who operate the CHDC have certain obligations under the Americans with Disabilities Act with regard to the individuals residing at the CHDC, but **DENY** this paragraph to the extent it fails to identify those obligations. The remaining allegations set forth in **PARAGRAPH SIXTEEN (16)** are **DENIED.**

17. **PARAGRAPH SEVENTEEN (17)** is a **LEGAL CONCLUSION** to which no responsive pleading is required. To the extent that a response is deemed to be necessary, Defendants **ADMIT** that those Board members and other State officials who operate the CHDC have certain obligations under the Individuals with Disabilities Education Act with regard to the individuals residing at the CHDC, but **DENY** this paragraph to the extent it fails to identify these obligations. The remaining allegations set forth in **PARAGRAPH SEVENTEEN (17)** are **DENIED.**

18. **PARAGRAPH EIGHTEEN (18)** is **ADMITTED** in part and **DENIED** in part. Defendants **ADMIT** that those Board members and other State officials who operate the CHDC act under color of state law in providing care and services to individuals who reside at the CHDC. Defendants **DENY** that those Board members and other State officials who operate the CHDC have “failed to act” to the extent that this is meant to imply any failure to act when required by law. The remaining allegations set forth in **PARAGRAPH EIGHTEEN (18)** are **DENIED.**

19. **PARAGRAPH NINETEEN (19)** is **DENIED** as stated. Defendants **ADMIT** that individuals who receive services at CHDC have developmental disabilities that require treatment, supports, and services. Defendants **DENY** that these individuals reside at CHDC because Defendants determined that they were developmentally disabled. The reasons these individuals reside at CHDC are more numerous and diverse than any of the Defendants just making such a determination.

20.-26. **PARAGRAPHS TWENTY (20) THROUGH TWENTY-SIX (26)** are **DENIED**.

27. In response to **PARAGRAPH TWENTY-SEVEN (27)**, Defendants incorporate herein by reference as though fully set forth their answers to paragraphs thirteen (13) through twenty-six (26) above.

28.-29. **PARAGRAPHS TWENTY-EIGHT (28) AND TWENTY-NINE (29)** are **DENIED**.

30. In response to **PARAGRAPH THIRTY (30)**, Defendants incorporate herein by reference as though fully set forth their answers to paragraphs thirteen (13) through twenty-six (26) above.

31.-32. **PARAGRAPHS THIRTY-ONE (31) AND THIRTY-TWO (32)** are **DENIED**.

33. In response to **PARAGRAPH THIRTY-THREE (33)**, Defendants incorporate herein by reference as though fully set forth the answers to paragraphs thirteen (13) through twenty-six (26) above.

34.-35. **PARAGRAPHS THIRTY-FOUR (34) AND THIRTY- FIVE (35)** are **DENIED**.

36. **PARAGRAPH THIRTY-SIX (36)** is a **LEGAL CONCLUSION** to which no responsive pleading is required. To the extent that a response is deemed to be necessary, Defendants **DENY** that the Plaintiff is entitled to seek equitable or declaratory relief under the circumstances of this case.

37. Defendants specifically **DENY** that the Plaintiff is entitled to any of the relief requested in the Complaint.

38. Defendants further note that they are not admitting any allegation in any paragraph of the Complaint unless they have specifically so stated.

### **AFFIRMATIVE DEFENSES**

#### **First Affirmative Defense – Answer**

1. As their First Affirmative Defense, Defendants incorporate their Answer by reference as though fully set forth.

#### **Second Affirmative Defense – Standing – Failure To Meet Statutory Preconditions**

2. As their Second Affirmative Defense, Defendants state:

a. The Plaintiff has never provided proper notification as required by 42 U.S.C. § 1997c(b)(A)(i) as to “the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities.”

b. The Plaintiff has failed to provide “the supporting facts giving rise to the alleged conditions, including the dates and time period” as required by 42 U.S.C § 1997c (b)(A)(ii).

c. The Plaintiff has failed to provide a description of “the minimum measures which the Attorney General believes may remedy the alleged conditions and the alleged pattern or practice of resistance” as required by 42 U.S.C. § 1997c(b)(A)(iii).

d. The Plaintiff has failed to comply with preconditions required by CRIPA before filing the Complaint. 42 U.S.C. § 1997c.

**Third Affirmative Defense – No Statutory Violation**

3. As their Third Affirmative Defense, Defendants state:

a. The Plaintiff cannot establish grievous harm resulting from a pattern or practice involving flagrant or egregious conditions. 42 U.S.C. § 1997c.

b. The Plaintiff cannot demonstrate facts to support a claim under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997j.

**Fourth Affirmative Defense – Professional Judgment**

4. As their Fourth Affirmative Defense, Defendants state:

a. Defendants’ treating professionals have exercised professional judgment and have not substantially departed from professionally accepted standards in rendering care, treatment and training to the residents at CHDC.

b. The Plaintiff cannot establish facts to support a constitutional deprivation.

**Fifth Affirmative Defense – Substantial Performance**

5. As their Fifth Affirmative Defense, Defendants state that their obligations to the putative class have been substantially performed in accordance with existing law. Only a failure of a state agency to comply substantially will subject it to liability.

**Sixth Affirmative Defense – Standing – No Actual Injury**

6. As their Sixth Affirmative Defense, Defendants state that, none of the residents at CHDC has suffered an actual or threatened injury caused by and resulting from the putatively illegal conduct of Defendants.

**Seventh Affirmative Defense – Compliance With Applicable Federal Regulations**

7. CHDC has passed all surveys by the Centers for Medicare and Medicaid Services (“CMS”) and has remained eligible for federal financial participation. See 42 C.F.R. Part 483, Subpart I, Sections 483.400-483.480. CHDC has substantially complied with all applicable federal regulations for intermediate care facilities for persons with mental retardation. CHDC meets or exceeds all accepted professional standards.

**Eight Affirmative Defense – Accreditation By CARF**

8. CHDC is fully accredited by the Commission on Accreditation of Rehabilitation Facilities (“CARF”). The requirements used by CARF in accrediting facilities exceed accepted professional standards. CHDC exceeds accepted professional standards.

**Ninth Affirmative Defense – Failure To State A Claim – Eleventh Amendment Immunity**

9. As their Ninth Affirmative Defense, Defendants state that Plaintiff has no right to declaratory or injunctive relief as a result of any alleged violations of the Constitution of the United States, applicable federal law, or applicable federal regulation, and the litigation of such claims in the federal courts against the State of Arkansas is barred by the Eleventh Amendment of the United States Constitution.

**Tenth Affirmative Defense – Qualified Immunity**

10. As their Tenth Affirmative Defense, Defendants state that they are entitled to qualified immunity.

**Eleventh Affirmative Defense – Fundamental Alteration**

11. As their Eleventh Affirmative Defense, Defendants state that the relief proposed by the Plaintiff would constitute a fundamental alteration of the state system of providing services to persons with developmental disabilities. The Plaintiff is barred by law from requiring a fundamental alteration.

**Twelfth Affirmative Defense – Control of the CHDC**

12. Because the Board of Developmental Disabilities Services is charged with operating the CHDC and providing services and supports to individuals who reside at the CHDC except to the extent that it has delegated its authority to the Director of Developmental Disabilities Services (*see* Ark. Code Ann. § 20-48-401 *et seq.*), the State of Arkansas, Governor Mike Beebe, and John Selig, who are not authorized to control the care and services provided at the CHDC, are not proper parties in this litigation.

**Thirteenth Affirmative Defense – Failure To State A Claim**

13. As their Thirteenth Affirmative Defense, Defendants state that Plaintiff has failed to state a claim upon which relief can be granted.

WHEREFORE, Defendants respectfully request that that the Complaint be dismissed in its entirety, that judgment be entered in their favor, and all other relief that is just and proper.

Respectfully submitted,

DUSTIN McDANIEL  
Attorney General

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2009, I electronically filed the foregoing with the Clerk of Courts using the CM/ECF system, which shall send notification of such filing to the following:

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There are no parties to be notified manually.

/s/ Lori L. Freno  
LORI L. FRENO