No. 86,427

CATARINA GONZALES, INDIVIDUALLY AND AS NEXT FRIEND AND AGENT ON BEHALF OF EMILIO GONZALES, A MINOR CHILD,	§	IN THE PROBATE COURT
Plaintiff,	§	
v.	§	NUMBER ONE OF
DAUGHTERS OF CHARITY HEALTH SERVICES OF AUSTIN d/b/a CHILDREN'S HOSPITAL OF AUSTIN, A DEPARTMENT OF BRACKENRIDGE HOSPITAL, ET AL.,	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

GUARDIAN AD LITEM'S TRIAL BRIEF ON LEGAL ISSUES

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Stephen Jody Helman, the court-appointed Guardian ad Litem for Emilio Gonzales in the above-entitled and numbered cause, and files this, his Trial Brief on Legal Issues, respectfully showing the Court as follows:

I.

Brief Statement of the Case

This case involves the administration of life-sustaining treatment for Emilio Gonzales ("Emilio"), a 17-month old child who is a patient at Children's Hospital of Austin ("CHOA"). Emilio was admitted to CHOA on December 28, 2006, suffering from respiratory distress and other conditions. Shortly after his admission, Emilio was intubated with an endotracheal tube and moved to the Pediatric Intensive Care Unit ("PICU"), where he has received treatment for

more than four months. Emilio suffers from a number of different medical problems, the most serious of which is a progressive neurodegenerative metabolic disease that has destroyed a significant portion of his brain.[1] At all times relevant to this case, health care decisions for Emilio have been made by his mother and natural guardian, Catarina Gonzales ("Catarina" or "Plaintiff").

Shortly after his admission to CHOA, Emilio was placed on a ventilator and began receiving life-sustaining treatment.[2] In February of 2007, a disagreement arose between Catarina and Emilio's treating physicians concerning the appropriateness of continuing to administer life-sustaining treatment. Although Catarina requested that life-sustaining treatment be continued, Emilio's physicians felt that this course of action was inappropriate. When the parties were unable to resolve their disagreement informally, Emilio's physicians sought to resolve the impasse by invoking the procedures set forth in Section 166.046 of the Texas Health and Safety Code. Under this statute, after the physicians' decision to withhold life-sustaining treatment had been reviewed and approved by CHOA's ethics committee, CHOA and the physicians were required to make reasonable efforts to transfer Emilio to another physician or facility that would honor Catarina's decision to administer life-sustaining treatment. The statute also required CHOA and the physicians to continue to provide life-sustaining treatment to Emilio for a period of ten days after Catarina's receipt of the last written decision issued by the Ethics Committee.

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[1] Although the physicians at CHOA initially thought that this metabolic disorder might be Leigh's disease, a definitive diagnosis of Leigh's disease has never been made.

[2] For purposes of this brief, the term "life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. This is also the definition of "life-sustaining treatment" under Section 166.002(10) of the Texas Health and Safety Code.

Efforts to transfer Emilio to another facility within the ten-day period proved unsuccessful. Catarina instituted this proceeding on March 20, 2007, seeking a temporary restraining order, a temporary injunction, and a permanent injunction to prevent CHOA and Emilio's treating physicians from withholding life-sustaining treatment. On March 21, 2007, Catarina, CHOA, and the physicians entered into a Rule 11 agreement that extended the time for administering life-sustaining treatment to April 10, 2007. This Court verbally issued a temporary restraining order on April 10, 2007,[3] and subsequently extended the temporary restraining order to May 15, 2007, with the agreement of all parties. A hearing on Catarina's request for a temporary injunction is currently scheduled for May 8, 2007.

At the Court's request, the Guardian ad Litem is submitting this brief to address some of the more important legal issues that affect Emilio's interests in this case.

II.

Argument and Authorities

1. EMTALA Does Not Apply to This Case.

One of the issues raised by the Court in an earlier discussion with counsel is whether the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C.S. § 1395dd (LexisNexis 2007), prevents CHOA and Emilio's physicians from withdrawing the life-sustaining procedures that he is currently receiving. As will be demonstrated below, EMTALA is not applicable to this case.

[3] The Court subsequently signed a written temporary restraining order on April 13, 2007.

(a) The Requirements of EMTALA.

Congress enacted EMTALA due to its "concern that hospitals were 'dumping' patients unable to pay, by either refusing to provide emergency medical treatment or transferring patients before their emergency conditions were stabilized." *Brooks v. Md. Gen. Hosp. Inc.*, 996 F.2d 708, 710 (4th Cir. 1993). EMTALA sought to correct this problem by imposing certain duties on hospitals that have entered into Medicare provider agreements.

Under EMTALA, hospitals with an emergency medical department have a duty to provide an appropriate medical screening procedure to determine whether a patient who comes to the emergency medical department for treatment has an emergency medical condition. 42 U.S.C.S. § 1395dd(a). The term "emergency medical condition" is defined as "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in (i) placing the health of the individual . . . in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part." *Id.* § 1395dd(e)(1)(A).

If a person is diagnosed as having an emergency medical condition, EMTALA imposes a duty on the hospital either to provide the additional medical examination and treatment required to stabilize the patient's medical condition,[4] or to provide for the patient's transfer to another medical facility. *Id.* § 1395dd(b). The treatment required to stabilize a patient under EMTALA is that treatment "necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." *Id.* § 1395dd(e)(3)(A). A patient cannot be transferred prior to stabilization unless

[4] A hospital's duty to provide stabilizing treatment to a patient is tied to the staff and facilities available at the hospital.

the patient or the patient's surrogate decision maker requests a transfer in writing after being informed of the risks involved and the obligations of the hospital under EMTALA, or the hospital has obtained a proper certification that the medical benefits expected from the transfer outweigh the risks involved. *Id.* § 1395dd(c)(1). Under either of the permissible statutory bases for transferring a patient prior to stabilization, a transfer cannot take place unless there is a qualifying receiving facility that agrees to accept the patient and to provide appropriate medical treatment. *Id.* § 1395dd(c)(1)(B), (c)(2). State and local laws that conflict with these provisions of EMTALA are preempted. *Id.* § 1395dd(f).

(b) EMTALA Does Not Apply After a Patient Is Admitted to the Hospital.

In the present case, Emilio came to CHOA's emergency department in respiratory distress on December 28, 2006. All parties concede that Emilio had an "emergency medical condition" at the time he was treated in the emergency department.[5] After being screened and treated in the emergency department, Emilio was admitted to CHOA as an inpatient on December 28, 2006. He was moved to the PICU for more specialized care on the following day. He has been an inpatient at CHOA and has been treated for his respiratory problems and other medical conditions in the PICU for over four months.

The final regulations issued under EMTALA expressly provide that the Act does not apply if a person with an emergency medical condition is admitted to the hospital as an inpatient for further treatment. In this regard, Section 489.24(a)(1) of the regulations provides as follows:

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[5] Emilio's medical condition manifested itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably have been expected to place his health in serious jeopardy. *See id.* § 1395dd(e)(1)(A).

> In the case of a hospital that has an emergency department, if an individual (whether or not eligible for Medicare benefits and regardless of ability to pay) "comes to the emergency department", . . . the hospital must—
>
> > (i) Provide an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition exists. The examination must be conducted by an individual(s) who is determined qualified by hospital bylaws or rules and regulations and who meets the requirements of § 482.55 of this chapter concerning emergency services personnel and direction; and
> >
> > (ii) If an emergency medical condition is determined to exist, provide any necessary stabilizing treatment, as defined in paragraph (d) of this section, or an appropriate transfer as defined in paragraph (e) of this section. *If the hospital admits the individual as an inpatient for further treatment, the hospital's obligation under this section ends, as specified in paragraph (d)(2) of this section.*

42 C.F.R. § 489.24 (a)(1)(2007) (emphasis added). Paragraph (d)(2) of the same regulation provides as follows:

> *If a hospital has screened an individual under paragraph (a) of this section and found the individual to have an emergency medical condition, and admits that individual as an inpatient in good faith in order to stabilize the emergency medical condition, the hospital has satisfied its special responsibilities under this section with respect to that individual.*

Id. § 489.24 (d)(2) (emphasis added).

As noted above, it is undisputed that Emilio was admitted to CHOA for treatment as an inpatient on December 28, 2006, after he had been screened and treated in CHOA's emergency department. It is also undisputed that Emilio was admitted to CHOA as an inpatient in good faith for the purpose of treating and stabilizing his emergency medical condition. In light of these uncontroverted facts, the regulations issued under EMTALA clearly provide that the duties

imposed upon Emilio's health care providers under the Act ceased when he was admitted to the hospital as an inpatient.

(c) Even if We Did Not Have Final Regulations in This Case, EMTALA Would Nevertheless Not Apply Because Emilio's Emergency Medical Condition Has Been Stabilized.

From a medical perspective, there seems to be no doubt that Emilio can now be safely transferred to another facility for continued treatment. In fact, CHOA and Emilio's physicians have been involved in efforts to transfer Emilio to another facility for several months. Under these circumstances, it seems reasonably clear that CHOA has satisfied any duty that it had under EMTALA to stabilize Emilio's emergency medical condition.[6] Consequently, EMTALA does not apply to the life support issues that are currently before the Court.

In *Bryan v. Rectors & Visitors of the University of Virginia*, 95 F.3d 349 (4th Cir. 1996), the Fourth Circuit Court of Appeals held that EMTALA does not provide a cause of action for failing to provide life-sustaining medical treatment after a patient's emergency medical condition has been stabilized. In holding that EMTALA does not require a hospital to provide indefinite treatment after a patient has been stabilized, the Fourth Circuit stated:

> Under this interpretation, every presentation of an emergency patient to a hospital covered by EMTALA obligates the hospital to do much more than merely provide immediate, emergency stabilizing treatment with appropriate follow-up. Rather, without regard to professional standards of care or the standards embodied in the state law of medical malpractice, the hospital would have to provide treatment indefinitely -- perhaps for years -- according to a novel, federal standard of care derived from the statutory stabilization requirement. We do not find this reading of the statute plausible.

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[6] As noted above, stabilizing treatment under EMTALA is treatment "necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility." 42 U.S.C.S. § 1395dd(e)(3)(A).

> . . . *Once EMTALA has met that purpose of ensuring that a hospital undertakes stabilizing treatment for a patient who arrives with an emergency condition, the patient's care becomes the legal responsibility of the hospital and the treating physicians. And, the legal adequacy of that care is then governed not by EMTALA but by the state malpractice law that everyone agrees EMTALA was not intended to preempt.*

95 F.3d at 351 (emphasis added). Thus, although EMTALA preempts inconsistent state law with respect to a hospital's duty to provide stabilizing treatment for a patient with an emergency medical condition, EMTALA does not prevent health care providers from withholding life support under applicable state law after a patient's emergency medical condition has been stabilized.

Contrary to the argument advanced by the Plaintiff in her trial brief, this case is *not* governed by the decision in *In re Baby "K"*, 16 F.3d 590 (4th Cir. 1994). In the *Baby "K"* case, the patient was an anencephalic infant who had been taken to a hospital's emergency department on two prior occasions for treatment of respiratory problems. On each occasion, the child was provided with breathing assistance and, after being stabilized, was discharged to a nursing home. When Baby K was taken to the emergency department a third time for treatment of respiratory distress, the hospital filed suit to determine whether it was required to provide emergency medical treatment to anencephalic children that the hospital and its physicians considered to be inappropriate. The hospital claimed that its only treatment obligation to Baby K under EMTALA was the duty to provide her with warmth, nutrition, and hydration—the same treatment that the hospital and its physicians gave to all anencephalic children. The hospital based its position partly on a Virginia statute that exempted physicians from providing treatment that they considered to be medically or ethically inappropriate.

The Fourth Circuit ruled against the hospital, holding that hospitals and physicians have a duty under EMTALA to provide stabilizing treatment for patients with emergency medical conditions, and that EMTALA does not include an exception for stabilizing treatment that physicians consider medically or ethically inappropriate. The Fourth Circuit also held that EMTALA requires hospitals and physicians to provide stabilizing treatment for emergency medical conditions, and that Baby K's emergency medical condition was respiratory distress, not her general medical condition of anencephaly. Although *In re Baby "K"* specifically addressed the nature of the duty to provide stabilizing treatment under EMTALA, it did *not* impose any federal obligation on hospitals and physicians to continue treatment after a patient's condition had been stabilized. As the Fourth Circuit said when it reviewed the *Baby "K"* decision in *Bryan v. Rectors & Visitors of the University of Virginia*, 95 F.3d 349 (4th Cir. 1996):

> The holding in Baby K thus turned entirely on the substantive nature of the stabilizing treatment that EMTALA required for a particular emergency medical condition. The case did not present the issue of the temporal duration of that obligation, and certainly did not hold that it was of indefinite duration.

95 F.3d at 352. Thus, the Plaintiff cannot rely on *In re Baby "K"* to support the proposition that EMTALA preempts Section 166.046 of the Texas Health and Safety Code and prevents the hospital and physicians in this case from acting under the Texas statute. To the contrary, the Fourth Circuit's subsequent decision in *Bryan* clearly indicates that EMTALA does *not* prevent health care providers from withholding life support under applicable state law after a patient's emergency medical condition has been stabilized.

2. The Withholding of Life Support in This Case Does Not Violate Section 504 of the Rehabilitation Act of 1973.

Another issue raised by the Court in an earlier discussion with counsel is whether Section 504 of the Rehabilitation Act of 1973 prevents CHOA and Emilio's physicians from withdrawing the life-sustaining procedures that he is currently receiving. For the reasons discussed below, the Guardian ad Litem does not believe that Section 504 prevents the withholding of life-sustaining treatment in this case.

(a) The Requirements of Section 504.

Section 794 of Title 29 of the United States Code, often referred to as Section 504 of the Rehabilitation Act of 1973, provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C.S. § 794(a) (LexisNexis 2007).[7] Thus, the elements that a plaintiff must prove to state a claim under Section 504 are: (i) the plaintiff is an individual with a disability, (ii) the plaintiff is otherwise qualified for the benefit sought, (iii) the plaintiff was discriminated against solely by reason of his disability, and (iv) the program or activity receives federal financial assistance.

The statute defines an "individual with a disability" as "any person who—

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

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[7] A relevant regulation more specifically provides: "In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap . . . [d]eny a qualified handicapped person these benefits or services." 45 C.F.R. § 84.52(a) (2007).

(iii) is regarded as having such an impairment."

Id. § 705(20)(B). It seems reasonably clear that Emilio, who cannot see or hear and cannot even breathe without assistance, meets the definition of an individual with a disability. *See Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 624 (1986) (stating in dicta that "an infant who is born with a congenital defect" is a "handicapped individual" within the meaning of a prior version of section 504, which referred to a "handicapped individual" rather than an "individual with a disability").

"Program or activity" is defined to include "an entire corporation, partnership, or other private organization, or an entire sole proprietorship . . . which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation . . . any part of which is extended Federal financial assistance." 29 U.S.C.S. § 794(b)(3). The regulations define "Federal financial assistance" as "any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of . . . [f]unds . . . ." 45 C.F.R. § 84.3(h)(1) (2007); 28 C.F.R. § 41.3(e) (2007). The Fifth Circuit has held that the receipt of Medicare and/or Medicaid funds by an entity constitutes Federal financial assistance. *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1042 (5th Cir. 1984).

(b) Due to the "Otherwise Qualified" Requirement of the Statute, Section 504 Only Applies to Medical Treatment Decisions if the Individual's Disability Is Unrelated to, and Thus Improper to Consideration of, the Medical Services in Question.

As noted above, Section 504 of the Rehabilitation Act of 1973 does not apply unless the plaintiff is an individual who is "otherwise qualified" for the benefit sought. A number of courts have concluded that a disabled person is not "otherwise qualified" under Section 504 if the person would not have needed the treatment in the absence of his or her disability. Under these

cases, if a disabled person claims that medical services have been administered or withheld in a discriminatory manner, Section 504 does not apply to the claim unless the individual can show that his or her disability is unrelated to, and thus improper to consideration of, the medical services in question.

For example, in *Grzan v. Charter Hospital*, 104 F.3d 116, 120-21 (7th Cir. 1997), the plaintiff brought suit against a psychiatric hospital, alleging that she had received discriminatory treatment for her condition while she was a patient at the hospital. In holding that the plaintiff, Ms. Grzan, did not satisfy the "otherwise qualified" requirement of Section 504 of the Rehabilitation Act, the Seventh Circuit pointed out that Section 504 does not apply to situations in which a person's disability is directly related to, and forms the basis of, the medical care sought. The court's extensive discussion of the "otherwise qualified" requirement includes a detailed analysis of other cases that had previously addressed the issue:

> Grzan was not "otherwise qualified" to receive psychiatric treatment from Charter. "Otherwise qualified" means that were she not handicapped, Grzan would have qualified for the program or treatment she was denied because of her handicap. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of [her] handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979) (emphasis added). Grzan is not "otherwise qualified" because, absent her handicap, she would not have been eligible for treatment in the first place. Charter Hospital treats psychiatric patients. Grzan was a psychiatric patient. She therefore qualified for Charter's program, and was in fact treated, albeit negligently according to her complaint. Had she not suffered from the psychiatric condition, she would not have qualified for Charter's program and would not have been treated, negligently or otherwise. "Without a showing that the non-handicapped received the treatment denied to the 'otherwise qualified' handicapped, the appellants cannot assert that a violation of section 504 has occurred." *Johnson by Johnson v. Thompson*, 971 F.2d 1487, 1494 (10th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993).
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> Our conclusion that Grzan is not "otherwise qualified" is consistent with the decisions of other circuits. In *United States v. University Hospital, State*

University of New York at Stony Brook, 729 F.2d 144, 156 (2d Cir. 1984), the Second Circuit stated:

> Section 504 prohibits discrimination against a handicapped individual *only where the individual's handicap is unrelated to, and thus improper to consideration of, the services in question . . . . Where medical treatment is at issue, it is typically the handicap itself that gives rise to, or at least contributes to, the need for services.*

The court went on to restate, with approval, defendants' argument that "the 'otherwise qualified' criteria of section 504 cannot be meaningfully applied to a medical treatment decision." *Id.* In its analysis adopting the defendants' argument, the court noted that "the mainstream of cases under section 504 exemplifies [that] the phrase 'otherwise qualified' is geared toward relatively static programs or activities such as education, employment, and transportation systems." *Id.* (citations omitted). In *Johnson*, the Tenth Circuit followed *University Hospital* and held: "The term *otherwise qualified* cannot ordinarily be applied 'in the comparatively fluid context of medical treatment decisions without distorting its plain meaning.' " 971 F.2d at 1493-94 (quoting *University Hospital*, 729 F.2d at 156).

Allegations of discriminatory medical treatment do not fit into the four-element framework required by section 504. Rather, an examination of these elements as a whole suggests that the statute simply does not address such claims. The Tenth Circuit said as much in *Johnson*:

> Such a plaintiff must prove that he or she was discriminatorily denied medical treatment because of the [handicap] and, at the same time, must prove that, in spite of the [handicap], he or she was 'otherwise qualified' to receive the denied medical treatment. Ordinarily, however, if such a person was not so handicapped, he or she would not need the medical treatment and thus would not 'otherwise qualify' for the treatment.

104 F.3d at 120, 121 (emphasis added and some citations omitted). Thus, according to the Second Circuit, the Seventh Circuit, and the Tenth Circuit, relief under Section 504 of the Rehabilitation Act for discriminatory medical treatment is not available unless the plaintiff is

able to show that his or her disability is unrelated to, and thus improper to consideration of, the medical services in question.[8]

It is important to note that the court in *Grzan* also examined the legislative history of Section 504 of the Rehabilitation Act and found that its application of the statute was consistent with the legislative history. *Id.* at 122 (concluding that Congress never contemplated that Section 504 would apply to medical treatment decisions of this nature). *See also Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 645 (1986) (noting that "[t]he legislative history of the Rehabilitation Act does not support the notion that Congress intended intervention by federal officials into treatment decisions traditionally left by state law to concerned parents and the attending physicians or, in exceptional cases, to state agencies charged with protecting the welfare of the infant."); *United States v. Univ. Hosp., State Univ. of N.Y.*, 729 F.2d 144, 157 (2d Cir. 1984) ("Before ruling that congress intended to spawn [litigation relating to medical treatment] under section 504, we would want more proof than is apparent from the face of the statute."). An excellent summary of the legislative history of Section 504 can be found in Erin A. Nealy, Comment, *Medical Decision-Making for Children: A Struggle for Autonomy*, 49 S.M.U. L. Rev. 133, 147 (1995), in which the author concludes that "nothing in the legislative history of Section

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[8] A good example of a case in which the plaintiff satisfies the "otherwise qualified" requirement is *In re Baby "K"*, 832 F. Supp. 1022 (E.D. Va. 1993). In the *Baby "K"* case, the plaintiff was an anencephalic infant who was suffering from respiratory distress and sought treatment at a local hospital. Even though the plaintiff would have been entitled to receive ventilator treatment for her respiratory problems had she not suffered from anencephaly, the hospital refused to provide ventilator treatment because the hospital's standard practice was to provide only warmth, nutrition, and hydration to anencephalic children. Thus, the plaintiff's disability in *Baby "K" was not in any way related to the medical treatment that she sought from the hospital.* Under these facts, the district court properly held that the plaintiff was "otherwise qualified" to receive ventilator treatment from the hospital, and that she had a valid claim against the hospital under Section 504 of the Rehabilitation Act of 1973. Although the district court's decision was appealed, the Fourth Circuit affirmed the lower court's decision on the sole basis that a withdrawal of treatment from the plaintiff would violate EMTALA. The Fourth Circuit did not address the Rehabilitation Act issues. *See In re Baby "K"*, 16 F.3d 590, 592 (4th Cir. 1994).

504 suggests that Congress intended to authorize federal interference with a physician's medical judgment," and that "Section 504 does not in any way mandate a hospital to provide . . . medically futile treatment, even in the face of the parent's demands." *Id.* at 142, 145. *See also Lesley v. Chie*, 250 F.3d 47, 49 (1st Cir. 2001) (holding that, in the context of a claim of disability discrimination under Section 504 of the Rehabilitation Act, "the doctor's judgment is to be given deference absent a showing by the plaintiff that the judgment lacked any reasonable medical basis.").

Although *Grzan* did not involve the application of Section 504 to decisions involving the termination of life support, the Eleventh Circuit Court of Appeals specifically addressed that issue in *Schiavo v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005). In the *Schiavo* case, the parents of Theresa Schiavo sought a temporary restraining order to require the defendants to provide life support for their daughter. The plaintiffs asserted, among other things, that the defendant hospice organization had violated Section 504 of the Rehabilitation Act of 1973 by failing to provide life support for their daughter. In rejecting the plaintiffs' claim, the Eleventh Circuit pointed out that the plaintiffs' daughter could not satisfy the "otherwise qualified" requirement of Section 504 as a matter of law, and that Section 504 was never intended to apply to decisions involving the termination of life support:

> Count Seven asserts a claim against the Defendant Hospice under § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. As the district court explained, Theresa Schiavo is not "otherwise qualified" within the meaning of this Act "because she would not have had any need for a feeding tube to deliver nutrition and hydration but for her medical condition." *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161, (M. D. Fla. 2005); *see Grzan v. Charter Hosp. of Northwest Indiana*, 104 F.3d 116, 121 (7th Cir. 1997) ("Grzan is not 'otherwise qualified' because, absent her handicap, she would not have been eligible for treatment in the first place."). The Rehabilitation Act, like the ADA, was never intended to apply to decisions involving the termination of life support or medical

> treatment. *See United States v. Univ. Hosp., State Univ. of N.Y.*, 729 F.2d 144, 156 (2d Cir. 1984) ("If Congress intended section 504 to apply in this manner, it chose strange language indeed."); *id.* at 157 ("The legislative history, moreover, indicates that Congress never contemplated that section 504 would apply to treatment decisions of this nature."); *Johnson v. Thompson*, 971 F.2d 1487, 1493-94 (10th Cir. 1992) (agreeing with University Hospital and stating that "ordinarily, however, if a person were not so handicapped, he or she would not need the medical treatment and thus would not 'otherwise qualify' for the treatment").

403 F.3d at 1294 (emphasis added and some citations omitted).

The Guardian ad Litem believes that the approach taken by the courts in *Grzan*, *Schiavo*, and other cases is correct, and that Section 504 only applies to medical treatment decisions if the individual's disability is unrelated to, and thus improper to consideration of, the medical services in question. In the present case, the "otherwise qualified" requirement cannot be satisfied because Emilio would have no need for life-sustaining treatment in the absence of his disability. Stated differently, if Emilio did not have his disability, he would not be eligible for the life-sustaining treatment that his mother now asks the Court to provide. Under these circumstances, Emilio, like Theresa Schiavo, is not an "otherwise qualified" individual under Section 504 of the Rehabilitation Act as a matter of law, and the withholding of life-sustaining treatment would therefore not constitute a violation of the Act.

(c) The Guardian Ad Litem's Position Is Also Supported by the Final Regulations Promulgated Under Section 504 of the Rehabilitation Act.

The final regulations promulgated under Section 504 of the Rehabilitation Act refer to guidelines relating to health care for handicapped infants, which were attached as an appendix to

the regulations, as guiding principles with respect to infant care. 45 C.F.R. § 84.55(f)(1)(ii)(A) (2007).[9] These guidelines provide as follows:

> (1) With respect to programs and activities receiving Federal financial assistance, health care providers may not, solely on the basis of present or anticipated physical or mental impairments of an infant, withhold treatment or nourishment from the infant who, in spite of such impairments, will medically benefit from the treatment or nourishment.
>
> (2) Futile treatment or treatment that will do no more than temporarily prolong the act of dying of a terminally ill infant is not considered treatment that will medically benefit the infant.

Id. Part 84, Appendix C. The United States Supreme Court has invalidated the four mandatory components of the regulations, but has *not* addressed the validity of the section of the regulations that suggested adherence to these guidelines. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 613 (1986). Thus, these guidelines may be entitled to some weight in a determination of whether medical treatment decisions violate the Rehabilitation Act. These guidelines suggest that a physician's decision to discontinue Emilio's medical treatment because such treatment will do no more than temporarily prolong Emilio's act of dying would not be a violation of the Rehabilitation Act.

3. The Withholding of Life Support in This Case Does Not Violate the Americans with Disabilities Act.

Plaintiff also asserts that the Americans with Disabilities Act (the "ADA") prevents CHOA and Emilio's physicians from withdrawing the life-sustaining procedures that he is currently receiving. For the reasons discussed below, the Guardian ad Litem does not believe that the ADA prevents the withholding of life-sustaining treatment in this case.

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[9] Although Emilio is not an infant, regulatory authority addressing the withdrawal of life support from infants is instructive.

(a) The Requirements of the ADA.

Section 302 of the ADA provides as follows:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C.S. § 12182(a) (LexisNexis 2007). Discrimination is defined to include:

> [T]he imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations.

Id. § 12182(b)(2)(A)(i). Although Plaintiff has made multiple allegations of discrimination under various parts of Section 302 of the ADA, this appears to be the allegation that is primarily applicable to this case. Plaintiff's other claims will not be separately addressed in this brief. However, the analysis in this section of the brief is equally applicable to each of the Plaintiff's allegations under Section 302.

To state a claim under this section of the ADA, a plaintiff must prove that: (i) he is an individual with a disability, (ii) the defendant is a public accommodation, (iii) the defendant denied the plaintiff the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the defendant, and (iv) this denial was based on plaintiff's disability.[10]

[10] Unlike Section 504 of the Rehabilitation Act of 1973, Section 302 of the Americans with Disabilities Act does not contain a requirement that an individual be "otherwise qualified" to enjoy these goods, services, facilities, etc.

A disability is defined as:

> (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (ii) A record of such an impairment; or
>
> (iii) Being regarded as having such an impairment.

Id. § 12102(2); 29 C.F.R. § 1630.2(g) (2007). The regulations define physical or mental impairment as:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or
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> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). Substantially limits means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id. § 1630.2(j)(1). Major life activities are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 36.104 (2007); 29 C.F.R. § 1630.2(i).

A professional office of a hospital is included in the definition of a public accommodation if its activities affect commerce. 42 U.S.C.S. § 12181(7) (LexisNexis 2007); 28 C.F.R. § 36.104.

Under these statutory definitions, Emilio's various impairments, including but not limited to visual, speech, and hearing impairments, constitute a disability under the ADA because they substantially limit Emilio's ability to perform most, if not all, major life activities. CHOA's office also qualifies as a public accommodation under the statute.

(b) The ADA Does Not Prevent the Withholding of Life Support in This Case.

The definition of discrimination in Section 12182(b)(2)(A)(i) of the ADA suggests that, in making medical treatment decisions, physicians may consider criteria that are necessary to the medical decision-making process, such as Emilio's medical condition. The legislative history of the ADA also suggests that physicians may consider a patient's disabilities when they are relevant to medical treatment. Erin A. Nealy, Comment, *Medical Decision-Making for Children: A Struggle for Autonomy*, 49 S.M.U. L. Rev. 133, 147 (1995) (quoting Senate Committee on Labor and Human Resources, The Americans with Disabilities Act of 1989, S. Rep. No. 116, 101st Cong., 1st Sess., *reprinted in* House Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Public Law 101-336 (ADA), at 161 (1991)) ("A committee report of the House of Representatives states that 'nothing in this legislation is intended to prohibit a physician from providing the most appropriate medical treatment in the physician's judgment . . . .'"). This legislative history suggests that the ADA intended to prohibit discrimination based on a patient's disabilities that are unrelated to the medical treatment at issue. As the author of the above-cited law review article concluded:

> In cases involving treatment characterized as futile, the physician's best judgment is that a particular treatment will have no therapeutic or palliative benefit. Therefore, the ADA should not be used to force such treatment.

> The legislative history illustrates the main premise underlying the analysis. Congress noted that a physician who specializes in burn patients could not refuse to treat the burns of a deaf person because of the deafness. This is so because a person's hearing status is unrelated to his or her burn conditions. On the other hand, Congress did not state that physicians are prohibited from providing different types of treatment where a patient's disability is directly related to, or intertwined with, the medical condition being treated. As discussed above, judicial decisions have rejected a broad construction of the Rehabilitation Act and "the ADA expressly contemplates that the voluminous precedent arising out of Section 504 of the Rehabilitation Act may serve as guidance for determinations involving the ADA." *In short, a reasonable construction of the ADA is to permit physicians to make treatment decisions based on their best medical judgments, particularly when a consideration of the disability is necessary due to its proximity to the acute medical condition.*

49 S.M.U. L. Rev. at 147 (emphasis added).

There is a paucity of case law addressing medical treatment decisions under the ADA. However, the analysis to determine whether an action violates the ADA is very similar to the analysis to determine whether an action violates Section 504 of the Rehabilitation Act. *See* 42 U.S.C.S. § 12201(a) (LexisNexis 2007) ("Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title."); *Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000) ("Discrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases . . . ."); *id.* at 1305 n.2 ("Cases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa."); *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999) (quoting *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998)) ("The ADA and the RA are 'similar in substance' and, with the exception of the RA's federal funding requirement, 'cases interpreting either are applicable and interchangeable.'"); *Tips v. Regents of Tex. Tech Univ.*, 921 F. Supp. 1515, 1517 (N.D. Tex. 1996) ("It is generally recognized that in passing the ADA, Congress was extending the

non-discrimination principles contained in Section 504 to public and private employers not covered as well as embracing services and programs provided by states and municipalities . . . . For this reason, courts called on to interpret and apply the provisions of the ADA have found past interpretations of Section 504 to be both instructive and authoritative for issues arising under the ADA."). Therefore, the analysis and cases cited in section 2 of this brief also apply to the issues discussed in this section of the brief.[11]

As discussed in section 2 of this brief, several courts have concluded that the ADA, and/or Section 504 of the Rehabilitation Act of 1973, does *not* apply to medical decisions that are directly related to a patient's disability. *E.g., United States v. Univ. Hosp., State Univ. of N.Y.*, 729 F.2d 144, 157 (2d Cir. 1984). In addition, the Eleventh Circuit has specifically held that the ADA, like Section 504 of the Rehabilitation Act of 1973, *was never intended to apply to decisions involving the termination of life support. Schiavo v. Schiavo*, 403 F.3d 1289, 1294 (11th Cir. 2005). Although the United States Supreme Court has not ruled directly on the medical treatment issue under the ADA or Section 504 of the Rehabilitation Act of 1973, the court has observed that "[t]he legislative history of the Rehabilitation Act does not support the notion that Congress intended intervention by federal officials into treatment decisions traditionally left by state law to concerned parents and the attending physicians or, in exceptional cases, to state agencies charged with protecting the welfare of the infant." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 645 (1986).

[11] To avoid unduly lengthening this brief, the analysis and cases cited in section 2 of this brief are hereby incorporated by reference for all purposes in this section 3.

While the Guardian ad Litem has not located any appellate decision that specifically applies the ADA to medical treatment issues, he is aware of one lower court decision that found that a hospital's refusal to provide medical treatment to a disabled person constituted a violation of the ADA. *See In re Baby "K"*, 832 F. Supp. 1022 (E.D. Va. 1993). In the *Baby "K"* case, a federal district court in Virginia held that a hospital had violated the ADA by failing to provide ventilator treatment to an anencephalic infant who was suffering from respiratory distress. The hospital refused to provide the requested treatment to Baby K because the hospital's practice was to provide only warmth, nutrition, and hydration to anencephalic children. Under these facts, the district court found that the hospital's actions involved impermissible discrimination under the ADA because the hospital had denied ventilator services to a disabled infant when the same services would have been provided to an infant without disabilities. *Id.* at 1029. The Court should note that this is *not* the situation in Emilio's case because *neither CHOA nor Emilio's physicians are withholding medical treatment to Emilio that would be given to a child that did not have any disabilities.* To the contrary, since the treatment at issue in this case is life-sustaining treatment under Chapter 166 of the Texas Health and Safety Code, it is difficult to understand how a non-disabled person (for purposes of the ADA) would ever be considered to receive this type of treatment.[12] Thus, common sense indicates that the withholding of life-sustaining treatment would not involve the situation presented in the *Baby "K"* case, where a disabled child was refused medical services that would otherwise have been provided to a non-disabled child.

[12] Section 166.002(10) of the Texas Health and Safety Code defines "life-sustaining treatment" as treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration.

The guidelines discussed in section 2(c) of this brief may also have some bearing on the proper resolution of the ADA issues. These guidelines, which were referenced under the final regulations promulgated under Section 504 of the Rehabilitation Act, addressed health care for handicapped infants. The guidelines suggest that a physician's decision to discontinue Emilio's medical treatment because such treatment will do no more than temporarily prolong Emilio's act of dying is not a violation of the ADA.

Finally, the Fifth Circuit has held that an owner of a place of public accommodation "need not modify or alter the goods and services that it offers in order to avoid violating Title III." *McNeil v. Time Ins. Co.*, 205 F.3d 179, 188 (5th Cir. 2000). It is arguable that requiring doctors to provide medical treatment even when their medical judgment suggests that such treatment is futile and harmful to the patient is requiring doctors to alter the services they offer. Under the holding in *McNeil*, the physicians in this case should not be required to alter their services in this manner to avoid violating the ADA.

This section of the brief has addressed Plaintiff's claims under Title III of the ADA. The Plaintiff also asserts that Title II of the ADA prevents CHOA and Emilio's physicians from withdrawing Emilio's life support. Specifically, Plaintiff's Title II claim is made under Section 202 of the ADA, which states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.S. § 12132 (LexisNexis 2007). The only difference between the Plaintiff's Title II and Title III claims is that *Section 202 includes a requirement that the individual be "qualified" that*

is similar to the "otherwise qualified" requirement under the Rehabilitation Act of 1973.[13] Thus, the analysis and cases in this section and in section 2 of this brief with respect to Plaintiff's Title III and Rehabilitation Act claims, and specifically the cases holding that a disabled person is not "otherwise qualified" if he or she would not have needed the treatment in the absence of his or her disability,[14] also apply to Plaintiff's Title II claim. When the Court examines Plaintiff's Title II claim under the analysis and cases applicable to her Title III and Rehabilitation Act claims, it will be apparent that Plaintiff's Title II claim, like her other claims, must be rejected.

For all of these reasons, the Guardian ad Litem believes that neither Section 302 nor Section 202 of the ADA applies to the current situation, and that a withdrawal of Emilio's life support does not constitute a violation of the ADA.

4. The Withholding of Life Support in This Case Does Not Violate Section 121.003 of the Texas Human Resources Code.

Plaintiff also argues that Section 121.003 of the Texas Human Resources Code prevents CHOA and Emilio's physicians from withdrawing the life-sustaining procedures that he is currently receiving. As will be discussed below, the Guardian ad Litem does not believe that this statute prevents the withholding of life-sustaining treatment in this case.

(a) The Requirements of the Texas Statute.

Section 121.003 of the Texas Human Resources Code provides that "[p]ersons with disabilities have the same right as the able-bodied to the full use and enjoyment of any public facility in the state." TEX. HUM. RES. CODE ANN. § 121.003(a) (Vernon 2006). The

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[13] Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C.S. § 12131(2) (LexisNexis 2007).

[14] *E.g., Grzan v. Charter Hosp.*, 104 F.3d 116, 120-21 (7th Cir. 1997).

discrimination prohibited by the statute includes "a refusal to allow a person with a disability to use or be admitted to any public facility, . . . and a failure to . . . provide auxiliary aids and services necessary to allow the full use and enjoyment of the public facility." *Id.* § 121.003(d).

A "person with a disability" is defined as "a person who has a mental or physical disability, including mental retardation, hearing impairment, deafness, speech impediment, visual impairment, or any health impairment that requires special ambulatory devices or services." *Id.* § 121.002(4). The definition of a public facility is broad and includes "a building to which the general public is invited" and "any other place of public accommodation, amusement, convenience, or resort to which the general public or any classification of persons from the general public is regularly, normally, or customarily invited." *Id.* § 121.002(5).

Emilio, who *inter alia* has the physical impairments of deafness and visual impairment, is a person with a disability under the statute. Despite the lack of authority, due to the breadth of the statute's definition of a public facility, it appears that CHOA would constitute a public facility under the statute.

(b) Section 121.003 Does Not Prevent the Withholding of Life Support in This Case.

The Guardian ad Litem has not been able to locate any case authority to indicate whether Section 121.003 of the Texas Human Resources Code applies to discrimination involving medical decisions. Online searches of the legislative history of Section 121.003 also failed to suggest whether the statute was intended to apply to medical treatment decisions.

However, in an unpublished opinion, a Texas court of appeals has suggested that the analysis under Chapter 121 of the Texas Human Resources Code should be the same as that under the ADA because the statutory provisions are similar. *Brown v. Vasquez*, No. 04-02-

00664-CV, 2003 Tex. App. LEXIS 6893, at *4 n.1 (Tex. App.—San Antonio Aug. 13, 2003). As discussed in section 3 of this brief, the ADA does not apply to this case, and the withdrawal of Emilio's life support without his mother's consent does not constitute a violation of the ADA.[15] Consequently, the Guardian ad Litem asks this Court to conclude that Section 121.003 of the Texas Human Resources Code, like the ADA, does not apply to Emilio's situation, and that the withdrawal of life-sustaining treatment in this case would not constitute a violation of the Texas statute.

5. Chapter 166 of the Texas Health and Safety Code is Not Unconstitutional on Due Process Grounds.

Plaintiff claims that Chapter 166 of the Texas Health and Safety Code violates the due process clauses of the Federal and Texas Constitutions. For the reasons set forth below, the Guardian ad Litem believes that this claim is without merit.

(a) Due Process in General.

The Fourteenth Amendment to the Federal Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Similarly, Article I, Section 19 of the Texas Constitution provides that "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." These "due process clauses" encompass two related rights: the right to procedural due process and the right to substantive due process.

Procedural due process guarantees notice, an opportunity to be heard, and other procedural safeguards before a person can be deprived of "life, liberty, property, privileges, or

[15] *See* the analysis and cases in section 3 of this trial brief, which are hereby incorporated by reference for all purposes in this section 4.

immunities." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In other words, procedural due process prevents the government from punishing a person or from taking a person's property until there has been a hearing at which it has been determined that the action in question is authorized by an applicable statute or regulation. Paul Brest, et al., *Processes of Constitutional Decisionmaking: Cases and Materials*, 1400 (2000).

Procedural due process claims are usually evaluated under the rational basis test. This lenient form of constitutional scrutiny requires a court to uphold a statute if it is reasonably related to the accomplishment of a legitimate governmental interest. The individual seeking to have a statute declared unconstitutional under the rational basis test bears the burden of proof. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). The court begins the analysis by presuming that the statute is valid and that the legislature did not act arbitrarily in enacting the statute. *Id.* All reasonable doubts are resolved in favor of the lawful exercise of the legislature's power. *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991).

On the other hand, substantive due process forbids the government from restricting certain personal liberty interests regardless of the process provided. Questions of substantive due process involving *fundamental* rights are evaluated under a strict scrutiny test, which means that the statute will only be found constitutional if the infringement in question is narrowly tailored to serve a compelling state interest. When non-fundamental rights are at issue the rational basis test is used. *Reno v. Flores*, 507 U.S. 292, 301-302 (1993). There are a limited number of interests that are considered "fundamental." They include enumerated rights set forth in the Bill of Rights, such as freedom of speech and religion. The category of "fundamental" rights also includes certain rights that have been established through judicial interpretation of the Federal

Constitution, such as a woman's right to have an abortion under certain circumstances without interference from the state. *Roe v. Wade*, 410 U.S. 113 (1973).

In analyzing the due process claims made by Plaintiff, it is important to note that the application of the due process clauses of the Federal and Texas Constitutions are indistinguishable. *See, Univ. of Texas Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995).

(b) This Case Involves Letting a Patient Die, Not Making a Patient Die, and This is an Important Legal Distinction.

The first step in any due process analysis is to determine whether a constitutionally protected interest is at issue. In the present case, Plaintiff claims that Emilio's right to life is at issue, and that the action proposed by CHOA and Emilio's physicians is tantamount to taking Emilio's life. The Supreme Court's decision in *Vacco v. Quill*, 521 U.S. 793, 800 (1997), reveals that this line of reasoning is fatally flawed. In *Vacco*, the Supreme Court considered the constitutionality of a New York law prohibiting physicians from assisting terminally ill patients to commit suicide. *Id.* at 799-800. In upholding the law, the Supreme Court emphasized the fundamental difference between physician-assisted suicide and the removal of life-sustaining treatment from a terminally ill patient. *Id.* at 800-801. The court noted that when life-sustaining treatment is removed from a terminally ill patient, the patient dies from an underlying fatal disease or pathology; however, if a patient ingests lethal amounts of medication prescribed by a doctor, the patient is killed by the medication. *Id.* at 801. The court pointed out that, from a legal perspective, there is a "distinction between letting a patient die and making a patient die." *Id.* at 846.

In the present case, if Emilio's treating physicians withhold the life-sustaining treatment that he is currently receiving, they will be allowing Emilio's terminal, incurable disease to run its

course. As the Supreme Court pointed out in *Vacco*, this is *not* the same thing as purposefully ending Emilio's life. Thus, it is not appropriate to characterize this case as one involving the right of a hospital or physicians to take Emilio's life. Rather, the appropriate inquiry in this case is whether Emilio has a constitutionally protected interest in the continuation of life-sustaining treatment.

(c) Emilio Does Not Have a Fundamental Right to Continue to Receive Life-Sustaining Treatment.

As an initial matter, it is worth noting that *there is no constitutional right to medical treatment. Johnson v. Thompson*, 971 F.2d 1487, 1495 (10th Cir. 1992), cert. denied, 113 S. Ct. 1255 (1993); s*ee also, Bowen v. American Hospital Assn.*, 476 U.S. 610 (1986); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989). Even if the Supreme Court were to reverse course and find that such an interest exists, it is highly unlikely that it would be recognized as a fundamental interest that would trigger strict scrutiny of Chapter 166 of the Texas Health and Safety Code. In this regard, our courts have been very reluctant to expand the concept of substantive due process, and they have exercised the utmost care when asked to "break new ground in this field." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). In *Glucksberg*, the Supreme Court explained that "[b]y extending constitutional protection to an asserted right or liberty interest, [the court], to a great extent, place[s] the matter outside the arena of public debate and legislative action." *Id.* The Supreme Court in *Glucksberg* declined to recognize the existence of a fundamental right to commit suicide. *Id.* at 728. Thus, not all important, intimate, and personal decisions are protected by the due process clause. *Id.* at 727. Furthermore, courts must look to the Constitution when deciding whether an interest is fundamental, *not* to the importance of the asserted interest. *Vacco*, 521 U.S. at 799. Given the

Supreme Court's treatment of the removal of life-sustaining treatment and suicide, together with the lack of any constitutionally guaranteed right to medical treatment, the Guardian ad Litem does not believe that Emilio has a fundamental right to continue to receive life-sustaining treatment.

(d) If Emilio is Found to Have a Non-Fundamental Right to Continue to Receive Life-Sustaining Treatment, the Validity of the Texas Statute Will be Determined Under the Rational Basis Test, and the Statute Will be Found Constitutional.

Since Emilio does not have a fundamental right to receive life-sustaining treatment, the best that Plaintiff can hope for in this case is that a court will find that Emilio has a non-fundamental interest in the continuation of life support. Because a fundamental right is not involved, the reviewing court will be required to use the rational basis test to determine the constitutionality of the Texas statute. Under the rational basis test, the Texas statute will be upheld unless it is found to be wholly arbitrary and totally without value in the promotion of a legitimate state objective. *Kite v. Marshall*, 661 F.2d 1027, 1030 (5th Cir. 1981).

In this case, the Texas legislature enacted Section 166.046 of the Texas Health and Safety Code to protect the integrity and ethics of medical professionals and to eliminate uncertainty from end-of-life issues for patients and their families. *See* House bill analysis for Tex. S.B. 1260, 76th R.S. (1999) and Tex. S.B. 1320, 78th R.S. (2003) and Dr. Amir Halvey and Amy L. McGuire, *The History, Successes, and Controversies of the Texas "Futility" Policy*, 43 Houston Lawyer 38, 39-40 (2006). The state has a legitimate interest in protecting the integrity and ethics of medical professionals. *Glucksberg*, 521 U.S. at 731. Furthermore, eliminating uncertainty from end of life issues is also a legitimate government interest.

Since Section 166.046 of the Texas Health and Safety Code was enacted in an effort to promote legitimate state objectives, the only remaining issue under the due process analysis required by *Kite v. Marshall* is whether Section 166.046 has pursued these objectives in an arbitrary and irrational manner. As noted above, Plaintiff has the burden of proving that the statute is unconstitutional, and it will be presumed that the statute is valid and that the legislature did not act arbitrarily in enacting the statute. *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002). In addition, all reasonable doubts will be resolved in favor of the lawful exercise of the legislature's power. *Boykin v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991).

There is no evidence to suggest that Section 166.046 is unreasonable or arbitrary. To the contrary, the statute attempts to protect both patients and their treating physicians by establishing specific, non-arbitrary rules regarding the process for determining whether life sustaining treatment should be stopped in the event of a conflict between the patient's representative and his treating physicians. As such, Section 166.046 is not arbitrary or unreasonable in its pursuit of a legitimate governmental interest and does not violate substantive due process. The question now becomes whether Chapter 166 of the Texas Health and Safety Code affords Emilio procedural due process before infringing on any interest he may have.

In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court upheld a Washington regulation that allowed for the involuntary treatment of mentally ill inmates with anti-psychotic drugs. The Court noted that the procedural issue in the case was whether Washington's non-judicial mechanisms for determining when a prisoner was to be involuntarily medicated were sufficient. *Id.* at 220. The Washington regulation specified that if an inmate and his physician disagreed about the necessity for medication, a hearing committee composed of disinterested

medical and prison personnel would decide whether medication was necessary. The plaintiff, a prisoner who was subject to involuntary treatment at one of the state's prison facilities, asserted that only a court should decide whether to medicate an inmate against his will. *Id.* at 229.

Ultimately, the Supreme Court decided that the state regulation provided adequate protection of the inmates' rights, and that judicial review of the hearing committee's decision was not necessary to comply with due process requirements. The court even went so far as to state that *the inmates were better served by having medical professionals, not a judge, decide whether they should be medicated. Id.* at 231. The court went on to note that:

> [t]he Policy provides for notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses. The procedural protections are not vitiated by meetings between the committee members and staff before the hearing . . . . We reject also respondent's contention that the hearing must be conducted in accordance with the rules of evidence or that a "clear, cogent, and convincing" standard of proof is necessary. This standard is neither required nor helpful when medical personnel are making the judgment required by the regulations here.

Id. at 235 (citations omitted). The Supreme Court's language cuts against Plaintiff's claims that the ethics committee meeting she attended did not provide Emilio with due process, and that the executive session held by the committee was improper.[16]

Section 166.046 of the Texas Health and Safety Code, like the Washington regulation at issue in *Harper*, will pass constitutional muster under a rational basis test. The statute involves at least two legitimate governmental objectives that are being pursued by the state: (i) the protection of medical professionals' integrity and ethics and (ii) the removal of uncertainty from end-of-life issues. The procedure outlined by Section 166.046 is not arbitrary, and it is rationally

[16] It should be noted, that the standard for the analysis of a prisoner's constitutional rights can differ from the standard applied to normal citizens. However, in *Harper*, the rational basis test was used, and the regulation was upheld as rationally related to a legitimate penological purpose. *Id.* at 221, 233.

related to the achievement of these objectives. The statute sets out a procedure by which the patient and his physicians may be heard by an ethics committee or medical committee if there is a disagreement concerning the appropriateness of the life-sustaining treatment requested by the patient. *See* Section 166.046(a). The patient's physicians cannot be members of the committee. *Id.* The patient has a statutory right to attend the committee meeting and to receive certain explanatory information before the meeting. *See* Section 166.046(b). The statute does not prevent the patient from having an attorney or any other representative present at the committee meeting to represent the patient's interests, nor does the statute impose any restrictions on the ability of the patient or the patient's representative to present or cross-examine witnesses at the committee meeting.

If the committee supports the physicians' decision not to apply life-sustaining treatment, and if the patient still disagrees with that decision, the statute requires the physicians to make a reasonable effort to transfer the patient to another physician who is willing to comply with the patient's request. *See* Section 166.046(d). Life-sustaining treatment must be provided to the patient during the review process and for a period of ten days after the patient receives written notice of the committee's decision. *See* Section 166.046(e). The patient's physicians are authorized to withdraw life–sustaining treatment at the end of this ten-day period unless the patient secures an order from a court of competent jurisdiction to extend the time period. *Id.* To obtain such an order, the patient must prove by a preponderance of the evidence that there is a reasonable expectation that a physician or facility willing to honor the patient's decision will be found if the requested extension of time is granted. *See* Section 166.046(g).

Although Section 166.046 is by no means perfect and could certainly be improved to make it fairer and less burdensome to patients and their representatives,[17] perfection is not the standard for due process review. Under the rational basis test that is applicable to this case, since Section 166.046 of the Texas Health and Safety Code was enacted to promote legitimate state objectives, Section 166.046 must be upheld unless the statute has pursued those objectives in an arbitrary and irrational manner. If the Supreme Court did not see any due process problems with the Washington regulation that was upheld in the *Harper* case, it seems highly unlikely that any court would strike down Section 166.046, which provides both non-judicial and judicial remedies for patients who desire to challenge a physician's decision regarding life-sustaining treatment. Indeed, the Texas statute has been praised as an "effective model" for a "process-based state statute" to resolve disputes between physicians and patients concerning end-of-life treatment. Patrick Moore, *An End-of-Life Quandary in Need of a Statutory Response: When Patients Demand Life-Sustaining Treatment that Physicians are Unwilling to Provide*, 48 B.C. L. REV. 433, 468 (2007). For all of these reasons, the Guardian ad Litem believes that Section 166.046 will survive Plaintiff's due process challenges.

6. <u>Plaintiff's Separation of Powers Argument is Without Merit.</u>

Article II, Section 1, of the Texas Constitution provides as follows:

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[17] The statute includes a short notice period for the committee meeting (48 hours) and requires a patient to secure a court order to continue life-sustaining treatment within ten days after receiving notice of the committee's decision. This ten-day period is particularly burdensome because it is difficult to get before a court on ten days notice to have a meaningful hearing on any matter, much less a hearing on the important issues addressed by Section 166.046. Although this case demonstrates that the use of a temporary restraining order ("TRO") can be an effective procedure to get before a court on an emergency basis, the TRO procedure does not allow a patient to present and cross-examine live witnesses unless the court decides to hold a hearing on a request for a temporary injunction. In addition, the denial of a request for a TRO is generally not an appealable order. The potential problems with Section 166.046 were discussed by Justice Fowler in her concurring opinion in *Nikolouzos v. St. Luke's Episcopal Hospital*, 162 S.W.3d 678 (Civ. App.—Houston [14th Dist.] 2005, no pet.).

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted

The Plaintiff claims that the Texas legislature has improperly infringed on the judicial branch's ability to hear claims involving constitutional issues by limiting the type of review available to patients in Emilio's situation. Specifically, Plaintiff faults Section 166.046 of the Texas Health and Safety Code because it does not allow for judicial review of the ethics committee's finding that life-sustaining treatment should be removed. This claim is without merit for several reasons.

First, as was discussed in section 5 of this brief, Emilio does *not* have a constitutional interest in continuing the life-sustaining treatment that he currently receives. Consequently, the legislature has *not* impermissibly abridged the ability of the judiciary to review constitutional questions, and the authority cited by Plaintiff is inapplicable.

Second, the holding in *Washington v. Harper*, 494 U.S. 210 (1990) plainly demonstrates that *procedural due process does not necessarily entail access to the courts.* In upholding a state regulation that authorized a committee of disinterested medical and prison personnel to resolve disputes concerning the need to administer anti-psychotic drugs to prison inmates, the Supreme Court in *Harper* specifically approved the state's use of non-judicial personnel to make these types of decisions:

> Notwithstanding the risks that are involved, we conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge. *The Due Process Clause "has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." Though it cannot be doubted that the decision to medicate has societal and legal*

implications, the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms.

494 U.S. at 231 (emphasis added and citations omitted). Thus, there is no constitutional impediment to having medical decisions made by medical professionals, not a judge, as long as the decisions are made under fair procedural mechanisms. As noted in section 5 of this brief, the procedures set forth in Section 166.046 of the Texas Health and Safety Code satisfy due process requirements under both federal and state law; therefore, the fairness of the procedural mechanisms utilized by the statute should not be an issue.

For each of these reasons, the Court should reject Plaintiff's separation of powers argument.

7. Chapter 166 of the Texas Health and Safety Code is Not Unconstitutional on Equal Protection Grounds.

Plaintiff claims that Chapter 166 of the Texas Health and Safety Code violates the equal protection clause of the Texas Constitution. For the reasons set forth below, the Guardian ad Litem believes that this claim, like Plaintiff's due process claim, is without merit.

(a) Equal Protection in General.

Article I, Section 34, of the Texas Constitution provides that "[a]ll free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Similarly, the Fourteenth Amendment to the Federal Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." These "equal protection clauses" do not prohibit the government from classifying persons. Rather, they focus on the methods the government uses when it makes the classifications. The federal and state equal

protection clauses seek to ensure that similarly situated persons will be treated in a similar manner without unnecessarily diminishing the ability of the legislature to enact laws and regulations. *Avery v. Midland County*, 390 U.S. 474, 484 (1968). When the state is forced to distinguish between citizens, the distinctions cannot be "arbitrary or invidious." *Id.* The evaluation of an equal protection claim is the same under the federal and state constitutions. *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 257 & n.4 (Tex. 2002).

In the majority of cases, courts analyze equal protection challenges using the rational basis test. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83-84 (2000). Under the rational basis test, a statute is presumed constitutional as long as it is rationally related to a legitimate governmental purpose. *Owens-Corning v. Carter*, 997 S.W.2d 560, 580 (Tex. 1999). If a fundamental right is implicated or a suspect classification is used to distinguish between individuals, courts use a strict scrutiny test, which requires that the classification or law be narrowly tailored to serve a compelling government interest.[18] *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-458 (1988) (discussing fundamental rights); *Adarand Constructors v. Pena*, 515 U.S. 200, 228 (1995) (discussing suspect classifications).

(b) Plaintiff's Claim Regarding the Right to Make Decisions Regarding Emilio's Care.

In her individual capacity, Plaintiff claims that Section 166.046 of the Texas Health and Safety Code violates the equal protection clause of the Texas Constitution because, in determining the appropriateness of administering life-sustaining treatment for Emilio, the opinion of a physician is "privileged" over Plaintiff's opinion. As an initial matter, it must be

[18] There is also an intermediate level of scrutiny, used in a limited amount of cases, such as those involving gender discrimination.

determined whether Section 166.046 should be subject to the rational basis test or strict scrutiny by the court. Since Section 166.046 does not discriminate against Plaintiff based on her membership in a suspect class, such as race or nation origin, this particular path to strict scrutiny is closed to Plaintiff. Consequently, strict scrutiny cannot be applied in this case unless a fundamental right is restricted by Section 166.046.

The United States Supreme Court has recognized the fundamental right of parents to "make decisions concerning care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). The Texas Supreme Court has also concluded that this natural parental right is an essential, basic civil right. *Holick v. Smith*, 685 S.W.2d 18, 20, (Tex. 1985). Although Plaintiff's equal protection argument is not well-defined in her pleadings or trial brief, Plaintiff's claim appears to be that her fundamental right to make decisions regarding the care, custody and control of her child has been restricted by Section 166.046 because the statute allows a hospital's ethics committee to make a final decision regarding the administration of life-sustaining treatment for Emilio. Based upon this analysis, Plaintiff claims that the constitutionality of Section 166.046 must be determined by subjecting the statute to strict scrutiny.

The Guardian ad Litem disagrees with this analysis for several reasons. First, the parental rights relied upon by Plaintiff are not absolute. *See, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977) (no parental right to demand approval before corporal punishment is inflicted by public school teachers and administrators); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (no parental right to veto a minor's decision to terminate a pregnancy); *Runyon v. McCrary*, 427 U.S. 160 (1976) (no parental right to educate children in private segregated academies). Indeed,

the Fifth Circuit has expressly acknowledged that "parental authority falls short of being constitutionally absolute." *Kite v. Marshall*, 661 F.2d 1027, 1029 (5th Cir. 1981). After examining the decisions in *Ingraham v. Wright*, *Planned Parenthood v. Danforth* and *Runyon v. McCrary*, the Fifth Circuit in *Kite* pointed out that these cases exemplify circumstances in which "the Supreme Court refrained from clothing parental judgment with a constitutional mantle." *Id.* The Guardian ad Litem believes that subjecting a child to futile and potentially painful medical treatment is beyond the scope of a parent's constitutionally protected rights, and that strict scrutiny of Section 166.046 is, therefore, not appropriate.

Second, but equally important, there is *no constitutional right* to medical treatment[19] and Emilio does *not* have a fundamental right to receive life-sustaining treatment.[20] Thus, a distinction needs to be made in this case between Plaintiff's right to make decisions concerning the care, custody and control of her son, which she arguably has, and the right to force Emilio's healthcare providers to perform life–sustaining procedures they deem inappropriate, which she clearly does not have. Simply stated, Plaintiff does not have any fundamental constitutional right–whether on behalf of herself or Emilio–to insist upon the continued administration of life-sustaining treatment. Consequently, the right that Plaintiff seeks to enforce in this case is not a fundamental right, and the constitutionality of Section 166.046 must be determined by applying the rational basis test.

As noted above, under the rational basis test, a statute is presumed constitutional as long as it is rationally related to a legitimate governmental purpose. *Owens-Corning v. Carter*, 997

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[19] *Johnson v. Thompson*, 971 F.2d 1487, 1495 (10th Cir. 1992), cert. denied, 113 S. Ct. 1255 (1993); *see also, Bowen v. American Hospital Assn.*, 476 U.S. 610 (1986); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989).

[20] See the discussion of this issue in section 5(b) of this brief.

S.W.2d 560, 580 (Tex. 1999). Plaintiff has the burden of proving that the classification imposed by the law is arbitrary and that it could not serve a legitimate governmental goal. Section 5(d) of this brief contains a lengthy discussion of Section 166.046 of the Texas Health and Safety Code and the legitimate governmental interests that the state sought to promote in enacting the statute. Section 5(d) of the brief also demonstrates that Section 166.046 is rationally related to a legitimate governmental purpose, and that the statute does not classify persons in an arbitrary manner. In fact, since Section 166.046 applies the same rules any time there is a disagreement between a physician and a parent concerning the suitability of administering life-sustaining treatment to a terminally ill child, it is difficult, if not impossible, to see how Plaintiff has been treated differently than others in her situation.[21] There is no unequal treatment in this case because the law treats Plaintiff like every other parent in her situation. Consequently, Plaintiff's equal protection argument based on her parental rights should be rejected.

(c) Plaintiff's Claim Regarding Emilio's Right to Access the Courts.

Plaintiff also argues on Emilio's behalf that Section 166.046 of the Texas Health and Safety Code deprives her son of equal protection by eliminating his right to file a lawsuit or bring a criminal complaint against the health care providers. She alleges that other persons receiving medical care, but not subject to the statute, would have the right to these remedies. Her complaint focuses on Section 166.045 of the Texas Health and Safety Code, which provides as follows:

> A physician, health professional acting under the direction of a physician, or health care facility is not civilly or criminally liable or subject to review or

[21] Even if Plaintiff is compared to all patients and patient representatives who are involved in disagreements with physicians concerning the appropriateness of administering life-sustaining treatment, the statute still treats Plaintiff the same as all other members of the class.

> disciplinary action by the person's appropriate licensing board if the person has complied with the procedures outlined in Section 166.046.

TEX. HEALTH & SAFETY CODE § 166.045(d) (Vernon 2007). This statute protects health care providers from civil and criminal liability, if they follow the steps set out in Section 166.045 for discontinuing life-sustaining treatment. Thus, any suit by Emilio's estate for the removal of his ventilator against his mother's wishes would fail as long as the requirements of Section 166.046 were satisfied.

Assuming that the legislature has the power to grant immunity from civil and criminal liability to doctors, the issue becomes whether that power was arbitrarily used against a particular group of people by the state. Since Emilio is not a member of a suspect class, Plaintiff seeks to invoke strict scrutiny of Section 166.045 by claiming that the statute restricts Emilio's access to the courts. *See LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986). However, a cursory review of the statute makes it clear that Emilio's access to the courts is not completely restricted. In fact, there is no civil or criminal protection under Section 166.045 unless Emilio's physicians comply with the provisions of Section 166.046. Consequently, this Court should conclude that Emilio's access to the courts is not so restricted as to implicate a fundamental right, and that the rational basis test should be applied to determine the constitutionality of Section 166.045.[22]

As noted above, under the rational basis test, a statute is presumed constitutional as long as it is rationally related to a legitimate governmental purpose. *Owens-Corning v. Carter*, 997 S.W.2d 560, 580 (Tex. 1999). Plaintiff has the burden of proving that the classification imposed by the law is arbitrary, and that it could not serve a legitimate governmental goal.

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[22] This argument is further addressed in section 8 of this brief, which discusses the "open courts" issue.

The legislature is allowed to "select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). In the present case, the state can argue that it has regulated the removal of life-sustaining treatment in this particular situation to protect patients from questionable decisions by doctors, and to protect doctors from suit by distraught or angry patients. This is a legitimate governmental interest for the state, and Section 166.045 promotes the interest. The state can also argue that other, non-terminal patients and their treating physicians do not need this type of regulation. Thus, Section 166.045 is rationally related to a legitimate governmental purpose, and the statute does not classify persons in an arbitrary or unreasonable manner. Indeed, since Section 166.045 applies every time a patient-physician disagreement is resolved under the procedures set forth in Section 166.046, there is no unequal treatment in this case because the law treats Emilio like all other patients in his situation. Consequently, Plaintiff's equal protection argument based on Emilio's right to access the courts is without merit.

8. Section 166.046 of the Texas Health and Safety Code Does Not Violate the Open Courts Provision.

Plaintiff claims that Section 166.046 of the Texas Health and Safety Code violates the open courts Provision of the Texas Constitution. This argument should be rejected for the reasons set forth below.

(a) The Open Courts Provision.

Article I, Section 13, of the Texas Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

This section of the Constitution is commonly referred to as the "open courts" provision, and it provides for three separate rights: "(1) courts must actually be available and operational; (2) the legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies must be afforded, so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress." *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625 (Tex. 1996) (internal quotation marks omitted).[23]

Plaintiff focuses on the third right. This aspect of the open courts doctrine "is premised upon the rationale that the legislature has no power to make a remedy by due course of law contingent upon an impossible condition." *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990). In other words, the legislature cannot legislate in a way that makes it impossible for citizens to utilize the courts to vindicate their rights.

There is a two-prong test for establishing an open courts violation. First, a litigant must show that she has a well-recognized common law cause of action that is being restricted. Second, she must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Diaz v. Westphal*, 941 S.W.2d 96, 100 (Tex. 1997); *Sax v. Votteler*, 648 S.W.2d 661, 666 (Tex. 1983).

(b) Plaintiff's Claims.

Plaintiff claims that Emilio's right to an "open court" in which to seek a civil remedy against CHOA and his health care providers has been abridged by Section 166.046 of the Texas Health and Safety Code. However, as discussed in the preceding paragraph, this claim must fail

[23] There is no provision in the Federal Constitution corresponding to Texas' open courts guarantee. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988).

unless Plaintiff can show the existence of a common law cause of action to receive life-sustaining treatment deemed inappropriate by one's treating physicians. Plaintiff has not cited any cases or other legal authorities to support her position on this crucial issue. In addition, as CHOA pointed out in an earlier brief filed with the Court, the provisions of Section 166.046(g), which afford an extension of time for the continuation of life-sustaining treatment in certain limited circumstances, is proof that such a right did not exist at common law. Since Plaintiff has failed to prove the existence of the common law right that forms the basis of her alleged open courts violation, she has failed to satisfy the first prong of the test outlined in *Diaz v. Westphal*, and her claim should be rejected. *See Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 356, fn. 8 (Tex. 1990).

Assuming for the sake of argument that Plaintiff could satisfy the first prong of the open courts test, the second prong of the test requires Plaintiff to show that the restrictive nature of Section 166.046 is unreasonable or arbitrary when balanced against the purpose and basis of the statute. As discussed in section 5(d) of this brief, the legislative history of Section 166.046 reveals that one of the purposes of the statute was to provide for a transfer procedure and ethics review process in cases where a terminally ill patient (or the patient's representative) disagrees with health care providers about the appropriateness of continuing aggressive, life-sustaining treatment.[24] Although not explicitly mentioned in the legislative history, it can reasonably be inferred that the basis for the statute was the need to remove uncertainty from various end-of-life issues for patients and their families, as well as to enable doctors to act in accordance with their professional ethics without fear of being sued. *See,* Dr. Amir Halvey and Amy L. McGuire, *The*

[24] House bill analysis for Tex. S.B. 1260, 76th R.S. (1999) and Tex. S.B. 1320, 78th R.S. (2003).

History, Successes, and Controversies of the Texas "Futility" Policy, 43 Houston Lawyer 38, 39-40 (2006).

The question then becomes whether the restrictions imposed by the statute in pursuit of these goals are unreasonable or arbitrary. The procedural aspects of Section 166.046 are discussed in detail in section 5(d) of this brief, and that discussion will not be repeated here. It is sufficient to note that the statute provides both non-judicial and judicial remedies for patients who desire to challenge a physician's decision regarding life-sustaining treatment. Although it can be argued that the ten-day period for accessing the courts under Section 166.046(g) is inadequate, this case clearly demonstrates that it is possible to access the courts and have meaningful judicial review of Chapter 166 issues without regard to the ten-day period set forth in Section 166.046(g). While it is certainly true that Section 166.045 provides civil and criminal protection for Emilio's health care providers, this protection does not exist unless the health care providers comply with the provisions of Section 166.046 and allow Emilio to exercise all of the non-judicial and judicial remedies provided for in the statute. The statute has no effect on Emilio's ability to access the courts for the recovery of damages or other relief if his health care providers fail to comply with Section 166.046. As pointed out in section 5(d) of this brief, Section 166.046 is not perfect, but perfection is not the standard by which the statute is to be judged. The test is whether the restrictions imposed by the statute in pursuit of its objectives are unreasonable or arbitrary. The Guardian ad Litem submits that Plaintiff cannot satisfy her burden of proving unreasonableness or arbitrariness in this case.

9. Section 166.046 of the Texas Health and Safety Code Does Not Grant Judicial Powers to a Hospital Ethics Committee in Violation of the Texas Constitution.

Plaintiff claims that Section 166.046 of the Texas Health and Safety Code grants judicial powers to a hospital ethics committee in violation of Article V, Section 1, of the Texas Constitution. This claim fails for the reasons discussed below.

(a) Judicial Power.

Article V, Section 1, of the Texas Constitution provides as follows: ·

> The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law.
>
> The Legislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto.

This provision specifically vests the state's judicial power in the courts. Plaintiff contends that Section 166.046 of the Texas Health and Safety Code is unconstitutional because it grants judicial powers to hospital committees in violation of Article V, Section 1.

(b) Plaintiff's Claims.

Plaintiff claims that CHOA's ethics committee exercises judicial power under Section 166.046 by (i) hearing and deciding issues of fact, (ii) interpreting the law to determine the hospital's duties to its patients, and (iii) making decisions regarding the taking of life. The Guardian ad Litem believes that the ethics committee's decisions are medical in nature and do not constitute an impermissible exercise of judicial power.

The Texas Supreme Court has stated that an administrative agency authorized by statute to "conduct full-scale audits, encompassing legal as well as factual determinations, and to hold

hearings for the redetermination of deficiency assessments" is not exercising "judicial power" as that term is used in Article V, § 1. *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 fn. 7 (Tex. 1993); *see also, Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 635 (Tex. 1996); *Beyer v. Employees Retirement Sys.*, 808 S.W.2d 622, 627 (Tex. App.—Austin 1991, writ denied). Even though CHOA's ethics committee is not an administrative agency, the Texas Supreme Court's exploration of the metes and bounds of "judicial power" in *Flag-Redfern* is applicable to this case. Specifically, *Flag-Redfern*, and the other cases cited above, show that a decision-making body can make legal and factual determinations without exercising "judicial power." 852 S.W.2d at 485. Furthermore, under the cases cited above, even classifying the ethics committee meeting as a "hearing" would not transform its decision into an exercise of judicial power. *Id.*

Additionally, it is worth noting that Plaintiff is forced to stretch the definition of "judicial power" that she offers to make the committee's actions fit within its confines. According to the Texas Supreme Court's decision in *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996), deciding issues of fact "made by pleadings" is one aspect of judicial power. *Id.* at 923. Plaintiff, however, asks this Court to ignore the fact that there were no pleadings before the ethics committee in this case, and to find that the committee exercised judicial power merely by making findings of fact. Plaintiff's characterization of the committee's use of the procedure set out in Section 166.046 as "deciding a question of law" is also doubtful. Although the committee followed the procedure set forth in Section 166.046, there is no evidence to suggest that the statute guided the committee in making a determination as to whether Emilio's life support should be removed. The decision to remove life support was medical in nature, not legal. For

these reasons, there is no merit to Plaintiff's claims that the ethics committee exercised judicial power by hearing and deciding issues of fact or interpreting the law to determine the hospital's duties to its patients.

Plaintiff's last judicial power claim is that the ethics committee's actions intrude upon the state's power to take life through judicial proceedings. The Supreme Court's decision in *Vacco v. Quill*, 521 U.S. 793 (1997) is helpful in resolving this claim. In *Vacco*, the Supreme Court upheld the constitutionality of a New York law prohibiting physicians from assisting terminally ill patients to commit suicide. In upholding the law, the court pointed out the difference between physician-assisted suicide and the removal of life-sustaining treatment from a terminally ill patient. *Id.* at 800-801. The court noted that when life-sustaining treatment is removed from a terminally ill patient, the patient dies from an underlying fatal disease or pathology; however, if a patient ingests lethal amounts of medication prescribed by a doctor, the patient is killed by the medication. *Id.* at 801. The court pointed out that, from a legal perspective, there is a "distinction between letting a patient die and making a patient die." *Id.* at 846.

The holding in *Vacco* shows that there is a recognized legal difference between removing life-support from a terminally ill patient and the taking of a life. The decision to remove life-support is a medical determination, which the ethics committee had the authority to make under Section 166.046 because a conflict existed between the patient's representatives and his treating physicians. This type of decision-making cannot be considered an exercise of judicial power from either a practical or legal standpoint. Since Plaintiff cannot show that the ethics committee exercised "judicial power," as that term is defined by the Texas Supreme Court, she fails to make a valid constitutional claim under Article V, § 1.

10. Section 166.046 of the Texas Health and Safety Code Does Not Abrogate Emilio's Right to Trial by Jury in Violation of the Texas Constitution.

Plaintiff claims that Section 166.046 of the Texas Health and Safety Code abrogates Emilio's right to trial by jury in violation of Article I, Section 15, of the Texas Constitution. For the reasons discussed below, the Guardian ad Litem believes that this claim, like all of the other claims asserted by Plaintiff, must fail.

(a) Trial by Jury.

Article I, Section 15, of the Texas Constitution provides as follows:

> The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

This provision preserves a right to trial by jury only for those actions, or analogous actions, available at the time that the constitution of 1876 was adopted. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 450 (Tex. 1993). Thus, it only applies if, in 1876, a jury would have been allowed to try the action or an analogous action. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 636 (Tex. 1996). Parties do not have an automatic right to be heard in district court; rather, jurisdiction may be conferred by the Texas Constitution or other law "on some other court, tribunal, or administrative body." Tex. Const. art. V, § 8.

(b) Plaintiff's Claims.

Plaintiff claims that a common law cause of action for physician negligence existed at the time the Texas Constitution was enacted. *Brooke v. Clarke*, 57 Tex. 105 (Tex. 1880). She

argues that Section 166.046 of the Texas Health and Safety Code impermissibly restricts Emilio's access to the courts by granting immunity to healthcare providers for negligent and criminal behavior associated with removing life-sustaining treatment. The Supreme Court of Texas has generally affirmed a litigant's right to a trial by jury in Texas trial courts. *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 292 (Tex. 1975); *Citizens State Bank v. Caney Invs., Inc.*, 746 S.W.2d 477, 478 (Tex. 1988).

There are several problems with Plaintiff's claim under Article I, Section 15. First, and perhaps most importantly, Plaintiff is not asserting a cause of action for negligence against CHOA or any of Emilio's physicians. To the contrary, the only claim asserted by Plaintiff in this case is the right to force CHOA and Emilio's physicians to continue to administer life-sustaining treatment to Emilio against their professional judgment. As pointed out in section 8 of this brief, Plaintiff has not been able to prove the existence of such a right in 1876 or at any other time. The constitutional provision that preserves the right to trial by jury has no application to a right that did not exist at the time the Texas Constitution was adopted.

Finally, even if Plaintiff were asserting a malpractice claim in this case, Section 166.046 does not eliminate Emilio's right to a jury trial, but merely limits the definition of negligent behavior in certain cases involving the administration or withholding of life-sustaining treatment. In this regard, Section 166.046 effectively eliminates the possibility that healthcare providers will act negligently in removing life-sustaining treatment as long as they satisfy the requirements of the statute. Emilio, his representative, or his estate, could still bring a cause of action against CHOA or his physicians if they do not comply with the provisions of Section 116.046. Furthermore, it appears that Emilio could bring an action against his doctors for medical

malpractice if it is determined that they incorrectly diagnosed his condition, and that he was injured by actions taken before the removal of life-sustaining treatments. There is a clear distinction between limiting a specific area of liability and denying access to a jury. Section 166.406 does the former, but not the latter. Consequently, Plaintiff's claim under Article I, Section 15, of the Texas Constitution should be denied.

III.

Conclusion and Prayer

The Guardian ad Litem respectfully requests that this Court deny the legal arguments advanced by Plaintiff for the reasons set forth in this trial brief. The Guardian ad Litem also requests such other and further relief, at law or in equity, to which he may show himself justly entitled.