AO 440 (Rev. 5/85) Summons in a Civil Action

United States District Court

Eastern DISTRICT OF New York

BENJAMIN B., by his mother MARY B.; GARY M., by his father JONAH M.; LILA P., by her father HARLEY P.; KIRK U., by his mother CORNELIA A.; and WILLIAM M. and NATHANIEL M., by their next friend JACK GORELICK,

Plaintiffs,

V.

MARIO CUOMO, as Governor of the State of New York; STEVEN KATZ, as Commission of the New York State Office of Mental Health; ARTHUR WEBB, as Commissioner of the New York State Office of Mental Retardation & Developmental Disabilities; BARBARA SACCO, as Acting Director of the Creedmoor Psychiatric Center; and LUCY RAE SARKIS, as Director of the South Beach Psychiatric Center,

Defendants.

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

CV-86-4218

COSTANTINO, J.

AMON, M.

TO: (Name and Address of Defendant)

Arthur Webb
44 Holland Avenue
Albany, N.Y. 12229

Mario Cuomo
Executive Chamber
The Capitol
Albany, N.Y. 12224

Steven Katz
44 Holland Ave.
Albany, N.Y. 12229

Barbara Sacco
Creedmore Psychiat Center
80-45 Winchester Boulevard
Queens Village, N.

Lucy Rae Sarkis
South Beach Psychiatric Center
777 Seaview Avenue, Staten Island, N.Y.

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

Herbert Semmel
Lewis Golinker
New York Lawyers for the Public Interest
36 West 44th St.
New York, N.Y. 10036

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Benjamin B. v. Mario Cuomo

MR-NY-001-001

ROBERT C. HEINEMANN

CLERK

9 DEC 1986

DATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BENJAMIN B., by his mother MARY B.; GARY M., by his father JONAH M.; LILA P., by her father HARLEY P.; KIRK U., by his mother CORNELIA A.; and WILLIAM M. and NATHANIEL M., by their Guardian Ad Litem, JACK GORELICK, Plaintiffs, -against- MARIO CUOMO, as Governor of the State of New York; STEVEN KATZ, as Commissioner of the New York State Office of Mental Health; ARTHUR WEBB, as Commissioner of the New York State Office of Mental Retardation & Developmental Disabilities, BARBARA SACCO, as Acting Director of the Creedmoor Psychiatric Center; and LUCY RAE SARKIS, as Director of the South Beach Psychiatric Center, Defendants.	COMPLAINT

Preliminary Statement

1. Plaintiffs bring this action to challenge defendants denial of due process by reason of defendants' failure to treat plaintiffs in a facility for mentally retarded persons and to provide them with appropriate care and treatment, all as recommended by defendants' own professionals. Plaintiffs also challenge defendants' failure to provide care and treatment required by the New York State Mental Hygiene Law (MHL) and the regulations thereunder.

2. The plaintiffs are six mentally retarded adults who are patients at the Creedmoor and South Beach Psychiatric Centers. Although the plaintiffs are patients in these state psychiatric centers, five of them are not mentally ill. The five are mentally disabled solely by reason of mental retardation. Lila P., the only plaintiff who has a current diagnosis of mental illness, has been "dually diagnosed," with mental retardation as her primary mental impairment, and with schizophrenia also present but of lesser significance.

3. Since plaintiffs' admission to a state psychiatric center, the judgment of the defendants' professionals involved with their care has been that they require extensive programs and services in a facility providing care and treatment to persons with mental retardation. Transfer to a facility for the mentally retarded is required because Creedmoor and South Beach, as psychiatric centers, are not staffed or otherwise prepared to provide training to mentally retarded persons. For example, as early as November 1982, less than two months after plaintiff Benjamin B. was admitted to South Beach, a psychiatrist there reported that Benjamin B. did not belong in the mental health system:

> I could not find any evidence of a psychotic illness, his problems are [the] direct result of mental retardation and developmental disabilities. His admission to the hospital is HIGHLY INAPPROPRIATE & UNJUSTIFIED and I cannot certify for his stay in [the] hospital....Contact central administration and the special committee to work on his transfer....(emphasis in orginal).

Since that report was issued, the uniform recommendation among the South Beach professionals who have been most closely involved with Benjamin B.'s care has been that he belongs in a facility for the mentally retarded.

4. After plaintiffs were admitted to state custody, the defendants obligated themselves to protect their constitutional rights: to provide the training implementing the judgment of defendants' professional staff. Defendants have ignored the judgment of their own professionals. Plaintiffs have not been transferred and they do not receive any training at all or do not receive the training recommended by defendants' professionals. Moreover, the facility and training those professionals have recommended are eligible for funding from the federal government. By not transferring plaintiffs or providing the training the defendants already have found necessary, defendants forego these federals funds.

5. Plaintiffs seek injunctive relief mandating that the defendants immediately transfer them to a facility that has the capacity to, and will provide, the training that defendants' professionals have repeatedly stated they require and that pending transfer, plaintiffs receive training implementing the judgment of defendants' professionals.

Jurisdiction And Venue

6. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(3). Pursuant to 28 U.S.C. § 1391(b), the venue for this action lies in the United States District Court for the Eastern District of New York because the claim arose there.

7. Plaintiffs bring this action in federal court under their statutory and constitutional rights of access to federal courts. Plaintiffs have joined pendent claims under state law arising from the same factual situation. Plaintiffs invite defendants not to assert any Eleventh Amendment privilege, if any exists, so as to resolve all issues between the parties in this action and to avoid duplicative actions in federal and state courts.

Parties

8. Plaintiff Benjamin B. is 25 years old and was admitted to the South Beach Psychiatric Center in September 1982. Benjamin B. is not mentally ill. He is mentally disabled solely by reason of severe mental retardation. He brings this action by his mother, Mary B.

9. Plaintiff Gary M. is 25 years old and was admitted to the Creedmoor Psychiatric Center in September 1985. Gary M. is not mentally ill. He is mentally disabled solely by reason of severe mental retardation. He brings this action by his father, Jonah M.

10. Plaintiff Lila P. is 28 years old and was admitted to the South Beach Psychiatric Center in July 1985. Lila P. has been "dually diagnosed" with severe mental retardation as her primary mental impairment and with schizophrenia also present but of lesser significance. She brings this action by her father, Harley P.

11. Plaintiff Kirk U. is 25 years old and was admitted to the Creedmoor Psychiatric Center in September 1985. Kirk U. is not mentally ill. He is mentally disabled by reason of severe mental retardation and he also has a seizure disorder. He brings this action by his mother, Cornelia A.

12. Plaintiff William M. is 24 years old and was admitted to the Creedmoor Psychiatric Center in September 1985. William M. is not mentally ill. He is mentally disabled solely by reason of profound mental retardation. Because no relatives oversee his care, he brings this action by Jack Gorelick as guardian ad litem.

13. Plaintiff Nathaniel M. is 26 years old and was admitted to the Creedmoor Psychiatric Center in September 1985. Nathaniel M. was "dually diagnosed" in 1960 with severe mental retardation as his primary mental impairment and with childhood schizophrenia also present but of lesser significance. At the time of his admission to Creedmoor, no mental illness diagnosis was made. Because no relatives oversee his care, he brings this action by his Jack Gorelick as guardian ad litem.

14. Jack Gorelick, Ph.D., serves herein as guardian ad litem to plaintiffs William M. and Nathaniel M. These plaintiffs are, respectively, profoundly and severely retarded and are not capable of making informed decisions with regard to their care or treatment or prosecution of legal claims. Neither William M. or Nathaniel M. have parents or other relatives actively supervising or participating in decisions being made concerning their care or treatment.

15. Defendant Mario M. Cuomo, the Governor of the State of New York, is sued here in his official capacity. Governor Cuomo has overall responsibility to ensure that the agencies of the executive department of the New York State government, including the Office of Mental Health and the Office of Mental Retardation & Developmental Disabilities, act in full compliance with the New York and United States Constitutions, the laws of New York, and agency regulations. Specifically, Governor Cuomo has the overall responsibility to ensure that all persons in "state-custody" are safe and receive care, treatment programs and services suited to their individual needs as recommended by defendants' professionals and as required by state laws and regulations.

16. Defendant Steven Katz, the Commissioner of the New York State Office of Mental Health ("OMH") is sued here in his official capacity. Commissioner Katz is the chief executive officer responsible for the overall operation of the Creedmoor and South Beach Psychiatric Centers, and for ensuring that all patients in these facilities, including plaintiffs, are safe, and receive care, treatment, programs and services suited to their individual needs as recommended by defendants' professionals and as required by state laws and regulations.

17. Defendant Arthur Webb, the Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD"), is sued here in his official capacity. Commissioner Webb is the chief executive officer responsible for ensuring that plaintiffs, who are mentally retarded persons in state-custody, are safe and receive care, treatment, programs and services suited to their individual needs as recommended by defendants' professionals and as required by state laws and regulations.

18. Commissioners Katz and Webb, pursuant to the New York Mental Hygiene Law, its implementing regulations, and a cooperative agreement between OMH and OMRDD, are authorized and expected to work together to ensure that the care, treatment, programs and services provided by the State's psychiatric centers to plaintiffs are planned, developed and implemented comprehensively,

that gaps in services are eliminated, and that no plaintiff is denied treatment and services because he or she suffers from more than one disability.

19. Defendants Barbara Sacco, R.N., the Acting Director of the Creedmoor Psychiatric Center and Lucy Rae Sarkis, M.D., the Director of the South Beach Psychiatric Center, are sued here in their official capacities. Ms. Sacco and Dr. Sarkis are the chief executive officers responsible for the operation of Creedmoor and South Beach, respectively. Specifically, each has the duty to ensure that all plaintiffs are safe, and receive care, treatment, programs and services suited to their individual needs as recommended by defendants' professionals and as required by state law and regulations.

Statement of Facts

A. Plaintiffs Have Been Denied Care and Treatment in a Facility Recommended by Defendants' Professionals Responsible for Plaintiffs

20. The professional staff at Creedmoor and South Beach who are involved with plaintiffs' care have concluded that all of them require care and treatment that addresses the learning and independent functioning deficits caused by plaintiffs' mental retardation and require care and treatment in a facility with programs appropriate to mentally retarded persons.

21. In the case of plaintiff Benjamin B., in May 1984 a professional social worker at South Beach reported:

> [g]enerally , it is felt that the environs [South Beach] are unsuitable and detrimental to the well-being of Mr. B. Residential placement in a facility for the retarded is indicated and, at this time, is imperative to prevent further regression in Mr. B.'s condition.

Similarly,it is the judgment of defendants' professionals that the facilities at South Beach and Creedmoor are detrimental to the other plaintiffs and that placement in a residential facility for the mentally retarded is necessary to prevent regression in their skills and development.

22. The professional staff at Creedmoor and South Beach have sought to obtain care and treatment for plaintiffs' mental retardation by referring plaintiffs to OMRDD. OMRDD is the New York State government agency responsible for the care and treatment of mentally retarded persons.

23. OMRDD has accepted ultimate responsiblity for plaintiffs care and treatment. OMRDD has recommended that each of the plaintiffs be transferred to an OMRDD facility to receive the care, treatment, programs and services each plaintiff requires. For example, plaintiff Benjamin B. has been recommended for transfer to an OMRDD facility three and one-half years ago.

24. Defendants have not transferred plaintiffs to a facility with programs appropriate to mentally retarded persons as recommended by defendants' professionals but have continued them in psychiatric facilities lacking the staff, programs and ability to treat mentally retarded persons.

25. The failure to transfer plaintiffs to a facility for the mentally retarded and thereby implement the recommendation of defendants' professionals is not based on a lack of available funding. Upon information and belief, each year, more than $40,000, solely state funds, is being expended for each plaintiff to remain at South Beach or Creedmoor. By contrast, the federal government will provide approximately half the funding for residents in most mental retardation facilities operated by the state. By not transferring him to a facility for the mentally retarded, the defendants forego these federal funds.

B. Plaintiffs are Being Denied their Right to Care and Treatment as Recommended by Defendants' Professionals.

1. The appropriate care and treatment for mentally retarded persons such as plaintiffs

26. The type of facility that defendants' professionals have recommended for plaintiffs meet the standards applicable to Intermediate Care Facilities for the Mentally Retarded ("ICF"). ICF level care is appropriate for persons who have, inter alia, mental retardation, and habilitative and/or rehabilitative needs, evidenced by a moderate or severe deficit in their communication, learning, mobility, ability to live independently, self-control or behavior. ICF level care provides training to permit the maximal development of skills that will enable its recipients to function as independently as their handicapping conditions will permit.

27. The standards for care and treatment of mentally retarded persons in an ICF are set forth in the New York Mental Hygiene regulations at Part 681. Among other things, these standards restrict the persons who may live together, and state the intensity and type of programs that must be offered and the size and qualifications of the facilities' staffs. The Mental Hygiene regulations at §§681.6 and 681.7(b) also require defendants to develop an individual program plan for each plaintiff, and to develop sufficient programs and services to carry out each plaintiff's program plan. The standard applicable to plaintiffs are also set forth in applicable federal regulations,

42 C.F.R.§§442.400-516. These federal regulations are substantially the same in effect as the provisions of the New York State Mental Health regulations cited herein.

28. Persons in need of ICF level care must be placed with other persons who have similar ages and functioning levels. The Mental Hygiene regulations at § 681.4(c)(3)(xii)(a) prohibit housing persons who are of widely divergent ages, development levels and social needs in close proximity to one another unless there is a written plan stating how such a grouping will promote the growth and development of all the persons living together. One purpose of this requirement is to allow these persons to participate jointly in programs, recreation and other activities; and to allow them to serve as role models for, and to learn from each other.

29. Persons in need of ICF level care also must receive "active treatment." Mental Hygiene regulations at § 681.13 state that active treatment requires an individual program that prescribes an integrated program of activities, experiences or therapies necessary for the client to reach program goals or objectives with an overall purpose to help the client function at the greatest physical, intellectual, social or vocational level he or she can presently or potentially receive.

30. Active treatment also must be delivered in a manner which is normalizing and conducive to individual growth. Individual program plans are required to reflect this goal. Mental Hygience regulations at §681.1(b).

31. Among the programs and services that constitute active treatment are a specific "core" of services that must be provided on a daily basis. The Mental Hygiene regulations at § 681.7 and 681.13(dd) identify these services, which include inter alia, nutrition, recreation, self-care, and vocational training and nabilitation services.

32. Nutrition services are required to make meals a time for learning rather than simply for eating. Recipients of these services must be given utensils appropriate to their functioning levels, receive training in how to use those utensils and to eat appropriately, and be supervised by an adequate number of specifically trained staff who will promote proper eating habits and skills. Mental Hygiene regulations at § 681.7(d)(2).

33. Recreation also must be a time for learning. Each person requiring ICF level care must have the opportunity to participate in recreation at activities on a daily basis. This recreational time must be in addition to the time spent in active treatment. Mental Hygiene regulations at § 681.7(d)(3). Each

facility is required to have adequate capacity to provide transportation to and from recreation programs. Mental Hygiene regulations at §681.7(d)(6).

34. Self-care training is required to improve the person's ability to independently perform routine activities of daily living. The regulations require residents to receive training in bathing, brushing teeth, shampooing and grooming hair, shaving, and nail care. Mental Hygiene regulations at § 681.7(d)(4).

35. Habilitation services and vocational training programs, which teach skills that will be necessary for living and working in the community, also are required. This training must be appropriate to the person's chronological age and his or her level of functioning, and designed to meet the objectives of the person's individual treatment plan. It may include training related to performing household chores, as well as vocational or pre-vocational skills that will be needed for participation in day-training or employment in a sheltered workshop or in the competive economy. See Mental Hygiene regulations at § 681.7(d)(5) and §681.13(dd)(v).

36. In addition to the core services, the Mental Hygiene regulations identify services that must be provided on a "routine" basis. Routine services must be provided regularly, but not necessarily on a daily basis. They include social services,

which must be designed to maximize the person's social functioning. The regulations also identify "special" services, which must be provided when they are specified in a person's treatment plan, including speech, physical and occupational therapy. Mental Hygiene regulations at §§ 681.7(e) and (f).

37. The Mental Hygiene regulations at §§ 681.8 and 681.2 identify the types of staff and staff ratios that must be present to provide the required programs and services. The number of staff for each core, routine and special service as well as direct care staff is stated in the regulations, and is dependent upon the mix of characteristics present among the mentally retarded and multiply-handicapped persons. The regulations also mandate that all staff must undergo periodic training programs to update and improve their skills. Mental Hygiene regualtions at § 681.8 (b)(13).

38. The defendants do not provide the plaintiffs with care and treatment suited to their individual needs. Plaintiffs are not in a setting which is appropriate to their needs. They do not have appropriate individual treatment plans, they do not receive programs and services that will improve their overall

level of functioning or that will allow them to learn the skills necessary for them to be deinstitutionalized, and they do not receive all the programs and services specified in their individual plans.

2. Plaintiffs do not Reside with Persons who are of Similar Ages and Functional Levels

39. At Creedmoor and South Beach, plaintiffs do not reside with other persons who have similar ages, development levels and social needs. At South Beach, placement decisions are based on "catchment areas" for the facility; thus, plaintiffs Benjamin B. and Lila P. were placed on wards based on the geographic location in which they lived before they were hospitalized, rather than their individual needs. The mix of persons who reside with the plaintiffs is too divergent to promote the plaintiffs' functional growth and development or to maintain their level of skill and functioning at the time of their entry into the institution.

40. Plaintiff Benjamin B. has been placed on a ward at South Beach in which most patients are chronically mentally ill persons, although Benjamin B. is not mentally ill.

41. Plaintiff Lila P. resides on a ward at South Beach in which most patients are chronically mentally ill persons, although her primary diagnosis is severe mental retardation.

42. At Creedmoor, plaintiffs Gary M., William M., Nathaniel M., and Kirk U. reside together on the multiply-disabled unit ("MDU"). Also residing in the MDU are persons who are mentally ill, mentally retarded, and who have other mental and physical impairments. However, Gary M. and William M. are not multiply-disabled and they are not mentally ill. Kirk U. is multiply-disabled by severe mental retardation and a seizure disorder, but he is not mentally ill. In 1960, plaintiff William M. was dually diagnosed with severe mental retardation and childhood schizophrenia; in September 1985, upon his admission to the Creedmoor MDU, no mental illness diagnosis was made.

43. Upon information and belief, all plaintiffs reside in wards with persons who are not their age peers and who have been institutionalized for many years.

3. Plaintiffs do not Receive Programs and Services Appropriate to their Individual Needs

44. Creedmoor and South Beach do not provide programs and services that are appropriate to plaintiffs' individual needs, or that are necessary to maintain the level of skill and functioning of plaintiffs at the time of their entry into the institution. Instead, plaintiffs' lives are marked by an unchanging daily

routine largely filled with idle time. None of the plaintiffs receives care and treatment that will permit achievement of the functioning goals stated in the Mental Hygiene regulations.

45. "Active treatment" as required by the Mental Hygiene regulations is not provided.

46. At South Beach Benjamin B. receives no programs or services at all. He is not involved in any kind of structured programming as none is available for him at South Beach. He does not require and he does not participate in the psychiatric therapy that is provided to the other ward residents. Lila P. receives only three and three quarter hours of daily programming.

47. At Creedmoor, Gary M. attends a "learning center" for only one hour, three days per week, and "pet therapy" for one hour per week. Willam M. receives one hour of "ward activity" daily. Upon information and belief, neither Nathaniel M. nor Kirk U. receives active treatment as required by the Mental Hygiene regulations.

48. The failure to provide sufficient programs and services to constitute "active treatment," also deprives plaintiffs of the "core" services to which they are entitled. Plaintiffs do not receive nutrition, recreation, self-care, or training and habilitation programs and services to meet their individual needs.

49. Nutrition services which train plaintiffs in appropriate eating habits and use of utensils are not provided. OMH staff at times assist plaintiffs in eating, but plaintiffs have no structured learning program for eating.

50. Plaintiff Gary M. requires training to learn proper table manners, to use utensils, to chew his food properly and reduce the risk of choking, and to not eat inedible objects, such as cigarette butts ("pica"). Once these skills and habits are learned, Gary M. will require continued reinforcement to ensure they are practiced on a regular basis. Creedmoor provides, however, only "chopped" food to respond to Gary M.'s chewing deficit. He is not provided appropriate utensils; he uses only a spoon. During meals, he is not given individual assistance by the staff. OMH staff are assigned to watch Gary M. and the other patients, but they are not implementing any pre-planned training program to increase the appropriateness and independence of his eating habits and skills.

51. Plaintiffs William M., Nathaniel M. and Kirk U. do not receive nutrition services appropriate to their individual needs. Each plaintiff requires Creedmoor staff to supervise and assist them while eating, but Creedmoor does not provide appropriate utensils or training in how to use them, and they are not implementing any pre-planned training program to maintain or increase the appropriateness and independence of plainitffs' eating habits and skills.

52. At South Beach, Benjamin B. and Lila P. have needs that are not addressed by nutrition services. Since his admission to South Beach, Benjamin B. has ceased to eat with the use of utensils; he eats alone, away from other ward residents and with his fingers. He also hoards food beneath his clothing and in the pockets of his clothing, requiring that he be showered and changed mulitiple times during the day. Lila P. is able to use utensils, but requires reinforcement and training to use them properly. She also requires training to cease gorging on her food and then vomiting. However, the OMH staff provides only supervision to the plaintiffs at mealtimes, and neither one receives training to maintain or increase the appropriateness and independence of his or her eating habits and skills.

53. Appropriate recreation services are not provided. Plaintiffs' participation in community activities through recreation activities is not encouraged. Upon information and

belief, none of the plaintiffs has been transported to the community away from the institution for recreation activities. Recreation, when provided, is not part of a program to achieve behavioral goals in plaintiffs' program plans.

54. Plaintiffs do not receive self-care training which teaches them to maintain their skills in performing daily living activities such as bathing, grooming, and dressing or to achieve greater independence. These skills are necessary for plaintiffs to attend programming and live in the community away from the institution.

55. In September 1982, when Benjamin B. was admitted to South Beach, one characteristic of his behavior was his refusal to dress appropriately. Since his admission, this problem has worsened; Benjamin B. has been permitted to remain in pajamas and slippers throughout the day. South Beach staff do not provide training to modify his failure to dress appropriately or maintain his prior level of dress.

56. All of the plaintiffs require, but do not receive, self-care training suited to their individual needs. Their individual needs vary, but as to all of the plaintiffs, the Creedmoor and South Beach staff are only able to supervise and at times assist plaintiffs with these tasks. These staff efforts do not provide

training that will lead to achieving the behavioral goals stated in any of the plaintiffs' program plans or to maintain their level of skill and functioning.

57. Habilitation and vocational training programs, which should teach plaintiffs the skills they will require to live in the community away from the institution are not provided. These include training related to performing household chores, as well as vocational or pre-vocational tasks that plaintiffs will require to participate in community based day programming, sheltered workshop employment, or employment in the competitive economy. None of the plantiffs receives habilitation and vocational training programs that are designed to achieve behavioral goals in their program plans.

58. In addition to not providing the core services, Creedmoor and South Beach do not provide the "routine" and "special" services to which plaintiffs are entitled. Plaintiffs require extensive social services to modify and improve their inappropriate behaviors and their isolation on the wards. At Creedmoor, plaintiff Gary M. exhibits self abusive behavior (picking at his rectum) that has caused serious injury. In September 1985 Gary M. required a transfusion resulting from rectal bleeding. In January 1986, he required hospitalization for thirteen days to stop hemorrhaging resulting from rectal bleeding. OMH staff have recommended a means to control this behavior: for Gary M. to be

dressed in overalls. However, these overalls never have been provided. In addition, Gary M. is not engaged in an active program to modify this self-abusive behavior.

59. Plaintiff William M. exhibits self-abusive behavior (head-banging) that has caused serious injury. William M.'s head is scarred from this self-abuse, but he is engaged in no program to modify this behavior. Plaintiffs Nathaniel M. and Kirk U. also exhibit self-abusive or aggressive behaviors. Plaintiff Benjamin B. is oppositional to wearing clothes. However, none of these behaviors is being addressed by a behavior modification program.

60. Upon information and belief, all of the plaintiffs are isolated on their wards, with little or no interaction with other ward residents. Plaintiffs' isolation on the wards is reinforced by their limited communication skills, yet none receive comunication training as a special service to address this deficit.

4. Creedmoor and South Beach do not Provide Care and Treatment that will Enable Plaintiffs to be Deinstitutionalized

61. In total, Creedmoor and South Beach do not provide care, treatment, programs and services in a manner which is normalizing and conducive to individual growth as required by the Mental

Hygiene regulations at §§ 25.1(b) and 681.1(b). Plaintiffs are not being taught the skills and behaviors they will need to live in the community away from the psychiatric centers.

62. None of the plaintiffs is so handicapped as to require lifelong institutionalization. Persons with a degree of mental retardation equal to that of any of the plaintiffs have been successfully placed in community based residential settings. But absent the programs and services necessary to teach plaintiffs the essential skills for community living, they will be forced to remain in institutional settings.

5. Creedmoor and South Beach do not have Sufficient Numbers of Appropriately Trained Staff to Provide Plaintiffs with the Care, Treatment, Programs And Services they Require to Maintain their Skills and Developmental Levels.

63. Creedmoor and South Beach do not have sufficient staff to provide care and treatment suited to plaintiffs' individual needs. For much of the training plaintiffs require, staff must work individually with each plaintiff, while providing verbal and physical assistance, or hand-over-hand demonstrations of activities, extensive repetition of each activity. The Mental Hygiene regulations at § 681.12 identify the staff-to-patient ratios that are required for these programs and services. The staff-to-patient ratios in the plaintiffs' wards at South Beach and Creedmoor do not meet the criteria required by the regulations.

OMRDD does not provide its staff, and neither OMH nor OMRDD has contracted to have the staff of a community based service provider work with plaintiffs at the psychiatric centers.

64. The Creedmoor and South Beach staff also are not adequately trained to provide the full range of programs and services that plaintiffs require. Ongoing staff training programs are required by the Mental Hygiene regulations at § 681. 8(b)(13);(14) but there is no training in the care and treatment of mentally retarded persons for the staff at Creedmoor or South Beach.

65. The lack of sufficient numbers of staff adequately trained to provide programs and services to mentally retarded persons makes it impossible for plaintiffs to receive care and treatment that is suited to their individual needs or needed to maintain their level of skill and development.

C. Plaintiffs are not Receiving Care and Treatment Required by State Law and Regulations

66. Plaintiffs repeat and re-allege the allegations of paragraphs 1-65 of this complaint.

67. All mentally retarded and multiply handicapped persons who are patients in facilities operated by the Office of Mental Health ("OMH"), including the plaintiffs, have a right to

individualized care and treatment. The Mental Hygiene Law ("MHL") at § 33.03(a) states "[e]ach patient in a facility and each person receiving services for mental disability shall receive care and treatment that is suited to his needs, and skillfully, safely and humanely administered..."

68. Plaintiffs have not received care and treatment suited to their needs, and have not received treatment in a skillful or safe manner.

69. The New York State Mental Hygiene Law (MHL) and Mental Hygiene regulations (14 New York Code, Rules & Regulations) mandate that OMH work cooperatively with OMRDD to plan for, develop and implement a comprehensive system of programs and services to meet plaintiffs' identified needs. MHL at §§ 7.07(a)and 13.07(a). Their joint efforts are to ensure both the comprehensiveness and quality of the programs and services that are provided. Likewise, the MHL at §§ 7.09(a) and 7.15(b) and 13.09(a) and 13.15(b) authorize Commissioners Katz and Webb, respectively, to enter into agreements for the conduct and provision of services. The Mental Hygiene regulations at § 561.1(a) expressly authorize the two Commissioners to allow OMRDD to operate programs for the mentally retarded and developmentally disabled in OMH facilities. This authority is further enhanced by the MHL at § 5.05(a) which directs the Commissioners of OMH and OMRDD to jointly visit and inspect all facilities

providing care and treatment to the mentally disabled, and by the MHL at §§ 5.05(b); 5.07; 7.05; and 13.05, which direct Commissioners Katz and Webb to work together to develop long range plans for the care and treatment of the mentally disabled. The Mental Health regulations at § 27.3(d) also require OMRDD to ensure that service plans for the mentally disabled are periodically evaluated. OMH and OMRDD have entered into agreements to carry out these statutory responsibilities.

70. The MHL at § 29.13(a) and the Mental Hygiene regulations at § 27.3(a) direct defendant Sacco at Creedmoor, and defendant Sarkis at South Beach, to develop a written individualized treatment plan for every plaintiff in their facilities.

71. The Mental Hygiene regulations at § 27.1(b), implementing the MHL provisions, state that the purpose of the individual treatment plan is to provide all mentally disabled persons with an "individualized program of services which will maximize their ability to cope with their environment, will foster social and vocational competence and will enable them to live as independently as possible." Under Mental Hygiene regulations § 27.3(c), the plan's contents must describe the plaintiffs' treatment goals, and the methods, procedures, techniques and activities to be used to meet those goals. In addition, both the plaintiffs and their plans must be re-assessed

at regular intervals, to ensure the adequacy of the programs, treatment and therapies being employed. § 27(d). Upon information and belief, neither Creedmoor nor South Beach have written plans stating how the placement of any of the plaintiffs in the ward or unit in which they reside will promote their functional growth and development.

72. The plaintiffs' treatment plans do not meet the requirements of the Mental Health regulation. Among other things, the plans do not comprehensively describe plaintiffs' performance and functional disabilities, do not describe how each deficit will be addressed, or identify the goals that are to be achieved.

73. The OMH staff at Creedmoor and South Beach have not been trained to write a treatment plan or provide services adequate to address plaintiffs' individual needs. The OMH staff at the psychiatric centers are trained and experienced in evaluating, planning for and providing care, treatment and rehabilitation to persons with chronic mental illnesses. These impairments are different and distinct from mental retardation, the sole or primary mental impairment of all the plaintiffs. The Mental Hygiene regulations at §82.1(b) governing the operation of the psychiatric centers, state that the methods, procedures and practices used to provide care, treatment and rehabilitation to the mentally ill are not the same as those used to provide

training and habilitation to the mentally retarded. Developing a treatment plan for plaintiffs requires specialists in mental retardation with training and experience in that field; such specialists are not present at Creedmoor or South Beach.

74. OMRDD has not provided training to the OMH staff so that they will be able to evaluate and write treatment plans for plaintiffs. Nor has OMRDD sent its own staff to Creedmoor or South Beach to perform these these tasks directly. Neither OMH nor OMRDD has contracted for plaintiffs to be evaluated and have their treatment plans written by a qualified community based service provider.

First Claim For Relief

75. Defendants violated plaintiffs rights under the Due Process Clause of the Constitution of the United States and 42 U.S.C § 1983 by not providing care and treatment for plaintiffs in a facility for training of mentally retarded persons as determined by defendants' professionals charged with the responsibility for plaintiffs.

Second Claim for Relief

76. Defendants violated plaintiffs' rights under the Due Process Clause of the Constitution of the United States and 42 U.S.C. § 1983 by not providing care and treatment necessary to provide safe conditions for plaintiffs free of bodily harm.

Third Claim for Relief

77. Defendants violated plaintiffs' rights under the Due Process Clause of the Constitution of the United States and 42 U.S.C § 1983 by not providing care and treatment which defendants' professionals have determined necessary for adequate training of plaintiffs.

Fourth Claim for Relief

78. Defendants violated plaintiffs' rights under the Due Process Clause of the Constitution of the United States and 42 U.S.C § 1983 by not providing care and treatment necessary to preserve plaintiffs' basic self-care skills and to prevent deteriorization thereof.

Fifth Claim For Relief

79. Defendants violate plaintiffs' right to care and treatment guaranteed by the New York Mental Hygiene Law and regulations thereunder by:

(a) failing to provide plaintiffs with the care and treatment stated in their individual treatment plans;

(b) failing to provide adequate individualized treatment plans;

(c) failure to provide care, treatment programs and services appropriate to mentally retarded persons.

(d) failing to provide the care and treatment defendants' professionals have determined plaintiffs' require, and

(e) failing to provide appropriate numbers of adequately trained staff to provide the programs and services required to implement plaintiffs' individual treatment plans.

Prayer For Relief

WHEREFORE, plaintiffs request that the Court grant the following as relief:

1. Declare that defendants' failure to provide such placement and training as is necessary to implement the judgment of defendants' professional staff concering plaintiffs' placement and training needs violates his liberty guarenteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983;

2. Declare that defendants failure to provide an environment and the training for plaintiffs that protects them against physical harm and preserves their basic self-care skills violates plaintiffs liberty guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

3. Direct, through a permanent injunction, that defendants implement the judgment of defendants' professional staff concerning plaintffs' placement and training needs: i.e., that they be placed in a facility for the mentally retarded and receive the programs and services required to be provided in such facilities; and

4. Direct, through a permanent injunction, that defendants immediately provide plaintiffs with the training and environment necessary to protect plaintiffs from physical harm and to preserve their basic self-care skills.

5. Declare that as patients in OMH facilities, defendants' failure to provide all of the plaintiffs with care and treatment suited to their individual needs, based upon an individualized treatment plan, and defendants' failure to provide the staff, programs and services required to meet the goals and objectives stated in those plans, violates plaintiffs' rights to care and treatment guaranteed by the New York Mental Hygiene Law and regulations.

6. Permanently enjoin defendants to immediately commence providing all the plaintiffs with care and treatment suited to their individual needs based on an individualized assessment and treatment plan; and to immediately commence providing the staff, programs and services required to meet the goals and objectives stated in those plans;

7. Direct defendants to pay plaintiffs' litigation costs and reasonable attorneys' fees; and

8. Grant such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November , 1986

Respectfully submitted,

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