IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. COMMONWEALTH OF PENNSYLVANIA; Robert Casey, Governor of the Commonwealth of Pennsylvania; Karen F. Snider, Secretary, Department of Public Welfare; Nancy Thaler, Deputy Secretary of Mental Retardation, Office of Mental Retardation; Alan M. Bellomo, Director, Ebensburg Center; Defendants.	Civil No. 92-33J Hon. D. Brooks Smith

UNITED STATES' PROPOSED CONCLUSIONS OF LAW

AND

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UNITED STATES' PROPOSED CONCLUSIONS OF LAW AND MEMORANDUM OF LAW

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INTRODUCTION

During opening statements on the first day of trial of this case, Plaintiff, the United States of America, averred that the evidence in this case will prove Defendants, the Commonwealth of Pennsylvania, et al., have failed and are continuing to fail to provide Ebensburg Center residents their fundamental constitutional rights to:

1. adequate care of their basic needs;

2. reasonable safety and protection from harm;

3. appropriate training programs to prevent harm, undue restraint, regression, and to promote growth, development, and independence; and

4. adequate medical care.

Tr. 7/26/93 at 13-16.

The United States has fully proved each and every one of these assertions through the extensive record developed in this case over the course of more than four weeks of live testimony, excerpts from the deposition testimony of thirty-five witnesses admitted into evidence as admissions of a party opponent, and numerous other exhibits, including summaries and excerpts of the Defendants' own business records, as well as photographs and videotapes of conditions at Ebensburg. The cumulative evidence in this case is uncontrovertible and overwhelming. It can lead to only one conclusion: Defendants have violated and are continuing to violate the basic constitutional rights of Ebensburg residents. The support in the record for each of the United States' legal claims is set forth in the United States'

Proposed Detailed Findings of Fact and highlighted in the United States' Proposed Summary of Findings of Fact.[1/] Set forth herein are proposed conclusions of law, a discussion of the relevant constitutional standards, and a description of the nature of the relief the United States believes is necessary to vindicate the constitutional rights of Ebensburg residents.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1345.

2. Venue in the Western District of Pennsylvania is proper pursuant to 28 U.S.C. § 1391.

3. The United States has standing to bring this action pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997(a), et seq.

4. Ebensburg Center ("Ebensburg") is an "institution" within the meaning of CRIPA, 42 U.S.C. § 1997(1).

5. Defendants named in the Complaint and their successors in office are legally responsible, in whole or in part for the

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[1/] Because the Court indicated that this is a fact intensive case in which the ultimate issues will turn on the evidence, the United States prepared comprehensive proposed findings of fact which synthesize the extensive evidence, including admissions by Defendants in deposition testimony. Citations in support of the propositions in this brief refer both to sections in the Proposed Detailed Findings of Fact (indicated by a §) as well as paragraphs in the Summary of Proposed Findings of Fact (indicated by a ¶). Any examples included in this brief are illustrative only. The United States' Proposed Detailed Findings of Fact sets forth a more comprehensive list of Defendants' significant deficiencies in each one of the areas discussed. See also the client summaries in the Appendix to the Proposed Detailed Findings of Fact which illustrate how deficiencies at Ebensburg have had an impact on the lives of the people who live there.

operation of and conditions at Ebensburg and for the care and treatment of persons residing at Ebensburg.

6. Defendants are required under the Due Process Clause of the Fourteenth Amendment to the Constitution to provide Ebensburg residents with adequate care of their basic human needs.

7. Defendants are required under the Due Process Clause of the Fourteenth Amendment to the Constitution to provide reasonable safety for all residents at Ebensburg.

8. Defendants are required under the Due Process Clause of the Fourteenth Amendment to the Constitution to provide residents of Ebensburg such training as may be reasonable in light of their liberty interests, including their interests in safety, independence, and freedom from unreasonable restraints and regression.

9. Defendants are required under the Due Process Clause of the Fourteenth Amendment to the Constitution to provide Ebensburg residents with adequate medical care.

10. Defendants are failing to provide Ebensburg residents with adequate care of their basic human needs in violation of their constitutional right to such care.

11. Defendants are failing to provide Ebensburg residents with reasonable safety in violation of their constitutional right to such safety.

12. Defendants are failing to provide Ebensburg residents such training as is necessary to protect their liberty interests in reasonable safety, independence, and freedom from undue

restraints and regression, in violation of their constitutional right to such training.

13. Defendants are failing to provide Ebensburg residents adequate medical care in violation of their constitutional right to such care.

14. Unless enjoined by this Court, Defendants will continue to violate the constitutional rights of Ebensburg residents as described in ¶¶10 to 13, above.

15. The acts, practices, failures to act, and omissions of Defendants require both prohibitory and mandatory injunctive relief in order to protect the constitutional rights of Ebensburg residents.

MEMORANDUM OF LAW

I. DEFENDANTS HAVE FAILED IN THEIR DUTY TO PROVIDE EBENSBURG RESIDENTS WITH CONSTITUTIONALLY ADEQUATE CARE

This action for injunctive relief was brought by the United States, plaintiff herein, by and through the Attorney General, against Defendants, Commonwealth of Pennsylvania et al., pursuant to CRIPA on February 10, 1992.[2/] The Complaint alleges that the Defendants are violating the constitutional rights of the approximately 472 mentally retarded and developmentally disabled people who live at the Ebensburg Center, a state-operated facility. As such, the facts and issues in this case center

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[2/] A summary of the procedural history of this case is set forth in § I of the United States' Proposed Detailed Findings of Fact and will not be repeated again here.

around the unconstitutional conditions of care and treatment to which Ebensburg residents are subjected.

This lawsuit was the product of the Commonwealth's intransigence over a protracted period of time to either correct voluntarily the conditions at Ebensburg depriving residents of their constitutional rights or to negotiate an enforceable settlement agreement. Defendants' longstanding failure to provide adequate personal care, safety, training, and medical treatment to the individuals entrusted to the Commonwealth's care at Ebensburg violates their basic liberty interests under the Due Process Clause of the Fourteenth Amendment. In a series of cases spanning more than two decades, the Supreme Court has acknowledged repeatedly that institutionalization involves a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972).[3/] Indeed, as Justices O'Connor and Souter recently emphasized in their concurrence in Reno v. Flores, ___ U.S.___, 113 S. Ct. 1439, 1454-55 (1993), it is "clear beyond cavil" that institutionalization, which is a "decisive and unusual event," implicates a person's core liberty interests. Equally clear and of longstanding origin is the corresponding precept that where the deprivation of liberty occurs in a state-operated facility, such as Ebensburg, the State has an

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[3/] See also Jackson v. Indiana, 406 U.S. 715 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975); Parham v. J.R., 442 U.S. 584 (1979); Youngberg v. Romeo, 457 U.S. 307 (1982); DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 199-200 (1989); Foucha v. Louisiana, ___ U.S. ___, 112 S. Ct. 1780, 1785 (1992).

affirmative responsibility under the Fourteenth Amendment to provide constitutionally adequate services. Youngberg v. Romeo, ("Youngberg") 457 U.S. at 317.[4] See also Welsch v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977) (if a state chooses to operate an institution for people with mental retardation, the services must meet constitutional standards). As noted by Chief Judge Seitz some fourteen years ago in his concurring opinion in a Third Circuit decision involving Pennhurst, "[t]he existence of a constitutional right to care and treatment is no longer a novel legal proposition." Romeo v. Youngberg, 644 F.2d 147, 176 (3d Cir. 1980).[5] On appeal of that case, the Supreme Court delineated some of the substantive due process rights of mentally retarded institutionalized persons and the state's concomitant responsibilities. The state's obligations include, inter alia, a duty to provide: adequate care of basic human needs; reasonable

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[4] As this Court has recognized, the Commonwealth of Pennsylvania's duty to provide constitutionally adequate services extends to both voluntarily and involuntarily committed residents at Ebensburg. United States v. Pennsylvania, No. 92-33J (W.D. Pa. May 6, 1993 Memorandum Order). Although Defendants again attempted to raise this matter at trial, the United States filed a motion in limine seeking to exclude any evidence on this issue because it had already been decided. See United States' Motion In Limine to Strike Defendants' First Issue of Law and Fact and To Exclude Evidence at Trial, filed on July 20, 1993 and United States' Notice of Supplemental Authorities in Support of Pending Motions filed on October 1, 1993.

[5] The plaintiff in that case, Nicholas Romeo, like a number of people at Ebensburg, was profoundly retarded and living in an institution operated by the Commonwealth of Pennsylvania. Mr. Romeo claimed that State officials were violating his constitutional rights by failing to protect him from injuries, unnecessarily restraining him, and not providing him with adequate training to abate his aggressive behaviors.

safety; adequate medical care; freedom from undue bodily restraint; and training to ensure safety and facilitate the ability to function free from bodily restraints. Youngberg, 457 U.S. at 319, 324. More than a decade after the Supreme Court made its pronouncements in Youngberg, Ebensburg residents are still waiting to realize these basic rights.

There is a significant body of case law delineating the range of conditions that rise to the level of constitutional violations found by other courts when faced with institutional deficiencies similar to those before the Court in this litigation. When read in the context of the facts in this case, these cases demonstrate that Ebensburg residents have been, and are being, denied their constitutional rights. Because the United States provided the Court with an extensive summary of the case law in the Pre-Trial Stipulation, applicable law will only be highlighted here in very summary fashion. The purpose of this memorandum is to focus on additional issues that arose during the course of this litigation, including the scope of the right to training, the extent to which "professional judgment" is applicable to the Court's determination of constitutional rights in CRIPA actions, the burden of proof at trial, and the authority of the Court to order the requested relief in the face of the significant constitutional violations that have been established by the evidence in this case.

II. DEFENDANTS' FAILURE TO PROVIDE EBENSBURG RESIDENTS WITH THEIR BASIC CARE NEEDS VIOLATES THEIR DUE PROCESS RIGHTS

There is no question that individuals with mental retardation who live in a state operated facility have a right to decent and humane care of their basic human needs. Youngberg, 457 U.S. at 315; United States v. Tennessee, No. 92-2062-M1/A, slip op. at 31, 42 (W.D. Tenn. Nov. 22, 1993) (hereinafter "Tennessee Opinion") (copy attached) (poor bathing practices, lack of general care, residents naked in the bathroom, failure to change diapers); Lelsz v. Kavanagh, 673 F. Supp. 828, 833-34 (N.D. Tex. 1987); Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473, 491 (D.N.D. 1982), aff'd, 713 F.2d 1384 (8th Cir. 1983) (court could not conceive of a more basic privacy interest than the interest in not being viewed unclothed). The Commonwealth has failed and continues to fail to provide even this primary level of custodial care to all Ebensburg residents. Instead, while under Ebensburg's care, residents who lack the ability to cry out for help or to swat away bugs have had to endure "massive amounts of ants crawling over entire body," the persistence of flies on their bodies and food, and, in Theresa B.'s case, an infestation of maggots in her ear. ¶11; §IV. Attention to the needs of residents gives way to staff convenience as staff perform their custodial care and housekeeping responsibilities. ¶15; §IV; §V.D. While staff are busy with other responsibilities, residents have been left behind in vacant buildings or have wandered off their living units where they are later found outside in dangerous situations, such as on

highways, in cars, locked in a trunk, injured, and exposed to the elements without proper protection. ¶15; §V.D. These and numerous other incidents in evidence in this case constitute neglect and deprive Ebensburg residents of their basic right to adequate care.

III. DEFENDANTS' FAILURE TO PROTECT EBENSBURG RESIDENTS FROM HARM VIOLATES THEIR DUE PROCESS RIGHTS TO ADEQUATE SAFETY

Defendants have failed and are continuing to fail to protect the individuals who live at Ebensburg from serious harm. Those within the care and custody of state-operated facilities have a fundamental due process right to reasonably safe living conditions, which is the state's "unquestioned duty" to provide. Youngberg, 457 U.S. at 315-18, 324. See also DeShaney, 489 U.S. at 199-200 (citing Youngberg for the proposition that states are obligated to ensure "reasonable safety" of institutionalized people); Jackson v. Fort Stanton Hosp. & Training School, 757 F. Supp. 1243, 1306 (D.N.M. 1990), rev'd in part on other grounds, 964 F.2d 980 (10th Cir. 1992) (state failed to provide reasonable conditions of safety for residents in two state-operated mental retardation facilities thereby violating their constitutional rights); Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1246-7 (2d Cir. 1984) (residents have a constitutional right to a safe environment in state institutions; Association for Retarded Citizens, 561 F. Supp. at 486 (constitutional right to "reasonably safe" environment in state-operated facility includes supervision and protection from attack by others). The Commonwealth has abrogated its primary

responsibility to provide reasonable safety to the residents of Ebensburg by subjecting them to conditions in which they repeatedly suffer serious injury and other significant harm. On both an individual staff level as well as on a systemic level, Ebensburg has failed to take adequate action to protect the very individuals who have been entrusted to the State's care, even in the face of directives from the State to take action. ¶¶ 18, 20, 22, 23, 24, & 30; §V.D; §V.E; §V.F.3. In some situations, staff have inflicted abusive acts on residents. ¶27; §V.C.2(d). In other situations, staff are not present to prevent harm or, when present, they fail to intervene to protect residents. ¶¶ 24, 28; §V.D.; §V.E. Preventable resident injuries and accidents occur because the deployment of direct care staff is inadequate to ensure even minimally adequate supervision of residents. ¶135; §V.D; §XV.B. There are simply too few direct care staff who are inadequately trained to respond to a variety of dangerous behaviors in which Ebensburg residents engage. ¶53; §XV.C; §VII.H.

Ebensburg fails to act despite clear knowledge of these behaviors and the harm that they have caused. ¶29; §V.F.1. Ebensburg staff have failed to adequately monitor and intervene when residents engage in dangerous eating behaviors. ¶¶ 87, 88; §XI.E. They have also failed to adequately monitor residents known to eat inedible objects to keep them from ingesting harmful substances. ¶25; §V.D.; §V.E. Ebensburg staff additionally do not provide adequate supervision and do not intervene

appropriately to stop residents from engaging in self-injurious and aggressive behaviors resulting in serious harm. ¶28; §V.D.; §V.E. Federal courts have repeatedly found that the failure of institutions to provide supervision sufficient to prevent residents from injuring themselves or others, in fact situations similar to the evidence in this case, constitutes a violation of residents' constitutional rights. See, e.g., Tennessee Opinion at 28, 46 (entering a preliminary injunction, sua sponte, for failure of direct care staff to properly supervise individuals with known behavior disorders, including eating disorders); Society for Good Will, 737 F.2d at 1246; Bernstein v. Lower Moreland Township, 603 F. Supp. 907 (E.D. Pa. 1985); R.A.J. v. Miller, 590 F. Supp. 1310 (N.D. Tex. 1984); Association for Retarded Citizens, 561 F. Supp. at 486.

Untrained Ebensburg staff have also caused resident injury and placed residents at risk of substantial harm. They feed, handle, transfer, and lift residents with significant disabilities in unsafe ways. ¶¶95-97 128, 129; §X.B.4; § XI.D.2; §XI.D.5; §XI.D.8; §XIV.F.5. Federal courts have also found these same practices at other institutions constitute harmful conditions that violate residents' rights to reasonable safety. See, e.g., Lelsz, 673 F. Supp. at 847, 860-861 (dangerous feeding practices by untrained and improperly supervised staff at state mental retardation facility fell below professionally acceptable standards, exposed residents to risk of harm, and were unconstitutional); Association for Retarded Citizens, 561 F.

Supp. at 478-80 (feeding practices deficient in state mental retardation facility where residents were fed in improper and "dangerously awkward" positions and too fast); Tennessee Opinion at 24; accord Society for Good Will, 737 F.2d at 1246.

The facts in evidence in this case demonstrate overwhelmingly that the Defendants have failed and continue to fail to meet their obligation to provide safe conditions at Ebensburg. Regrettably, even in the face of this lawsuit, Ebensburg continues to be an unsafe place to live and a place that is actually becoming yet more unsafe as time goes on. In the year and a half following the filing of the Complaint, overall injuries and other incidents of significant harm have escalated at Ebensburg. ¶18; §V.B. Injuries due to unknown causes increased by more than 50% in the year following the lawsuit. ¶24; §V.B. The number of mealtime chokings at Ebensburg in the first four months, alone, of 1993 almost equalled the total number of chokings during the entire year in 1991. ¶89; §XI.E.2. As both James W.'s and Denise V.'s mothers were testifying, James and Denise continued to suffer injuries at Ebensburg. ¶23; §V.A; §VII.E.1. Even as the United States rested its case-in-chief on August 4, 1993 -- the very day that Dr. Amado was testifying about Ebensburg's failure to protect its residents from harm -- Carol D., who has known pica behavior, was found by a nurse crouched on the floor, cyanotic, and gasping for breath. A nurse removed six inches of shirt from Carol's throat. ¶25; §V.D. State surveyors inspecting Ebensburg as the

Defendants were putting on their case persistently observed staff failing to intervene in the face of unsafe behaviors, a problem that Defendants admit is a "systemic" one. ¶28; §V.E. The Defendants' failure to provide safe conditions violates Ebensburg residents' basic constitutional right to be protected from harm in the environment in which they are confined.

IV. DEFENDANTS' FAILURE TO PROVIDE EBENSBURG RESIDENTS ADEQUATE TRAINING PROGRAMS VIOLATES THEIR DUE PROCESS RIGHTS

The Constitution requires state administrators of public institutions to provide training programs and other services which will advance and protect the basic liberty interests of residents, including their rights to reasonable safety, protection from harm, and freedom from undue bodily restraint. Youngberg, 457 U.S. at 324. Such training programs must be based upon appropriate assessments, developed to meet residents' individualized needs, consistently implemented, and designed to teach residents those skills necessary to live more normally and to avoid developing or exhibiting dangerous and other anti-social behaviors. See, e.g., Society for Good Will, 737 F.2d at 1250; Thomas S. v. Flaherty, 699 F. Supp. 1178, 1192, 1200-01 (W.D.N.C. 1988), aff'd, 902 F.2d 250 (4th Cir.), cert. denied, 498 U.S. 951 (1990); Jackson, 757 F. Supp. at 1308; Woe v. Cuomo, 638 F. Supp. 1506, 1517 (E.D.N.Y.), aff'd in part, remanded in part, 801 F.2d 627 (2d Cir. 1986); Lelsz, 673 F. Supp. at 849-50, 861; Association for Retarded Citizens, 561 F. Supp. at 479.

The evidence in this case clearly demonstrates that, in the absence of appropriate training programs at Ebensburg, residents

have suffered both serious injury and undue restraint. ¶¶31, 58; §VI; §VI.A.4; §VI.B.1; §VI.B.2.d; §VIII.B. These deficiencies deprive Ebensburg residents of their constitutional right to adequate training programs. See, e.g., Thomas S., 699 F. Supp. at 1186-192, 1199-1200 (constitutional rights of a class of mentally retarded persons confined in a state institution, many of whom had self-injurious or aggressive behaviors, had been violated by inter alia: failure to provide reasonably safe conditions; unreasonable use of physical and chemical restraints; inappropriate use of psychotropic medications causing adverse effects which were inadequately treated; and failure to provide minimally adequate habilitation); Association for Retarded Citizens, 561 F. Supp. at 486-7 (constitutional rights of class of mentally retarded people confined in state institution violated where defendants failed to provide, inter alia, adequate assessment, staff, and training to acquire needed skills).

A. Defendants are not protecting Ebensburg residents' liberty interest in training programs to ensure protection from harm

In the twelve months following the filing of this lawsuit, injuries and incidents of harm directly attributable to residents' behaviors increased by more than 40% at Ebensburg. ¶46; §VII.A. They continued to increase, even as this case was being tried. ¶46; §VII.A. Behavior management programs are grossly inadequate to address residents' serious behaviors, many of which have been created by the Defendants' deficient care and long term institutionalization in the first instance. ¶¶46, 47,

49, 50; §VII.E; §VII.F; §VII.G; §VII.I. In violation of longstanding and universally accepted standards and State and facility policy, Ebensburg's behavior management practices are deficient in four major and basic areas: assessment; program development; program implementation; and program review and revision. ¶43; §VII. A number of residents do not even have a behavior management program to address serious behaviors. ¶46; §VII.E. The failure to provide appropriate training and behavior programs where the risk of bodily injury exists violates the rights of Ebensburg residents to reasonable safety and protection from harm. Youngberg, 457 U.S. at 324; Tennessee Opinion at 38; Homeward Bound v. Hissom Memorial Ctr. (hereinafter "Homeward Bound Opinion"), No. 85-C-437-E, slip op. at 4, 7 (N.D. Okla. July 24, 1987) (copy attached).

The majority opinion in Youngberg was narrowly focused on Nicholas Romeo's individual rights and the specific facts of his case. The Court therefore limited its decision to the specific training that Mr. Romeo required to address his behaviors.[6/] The right to training to ensure protection from harm, however, goes far beyond a limited right to a narrowly drawn behavior program to address existing harmful behaviors. By necessity, it

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[6/] As the Court observed, "The record reveals that respondent's primary needs are bodily safety and a minimum of physical restraint, and respondent clearly claims training related to these needs [footnote omitted]." Youngberg, 457 U.S. at 317-18. Moreover, the Court further stated that, "On the basis of the record before us, it is quite uncertain whether respondent seeks any 'habilitation' or training unrelated to safety and freedom from bodily restraints." Id. at 318.

encompasses a much broader right to training, or habilitation, that extends to all residents at Ebensburg. This is because harmful behaviors inevitably develop without meaningful learning opportunities throughout the day. As described by Dr. Stark, a "pattern of harm" resulting in injury, undue restraint, and physical and mental deterioration is destined to occur absent meaningful training programs to stimulate and teach residents important skills. ¶40; §II; §VI.B.1.[7] As such, the right to protection from harm of every individual who does not receive training is implicated and the safety of every individual who does not receive training is at risk.

There is universal agreement among the United States' three psychology experts, the Commonwealth's psychology expert, and Defendants, themselves, that a failure to provide adequate

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[7] This pattern of harm is pervasive at Ebensburg. There are too many individuals with special needs confined in too small a space with too few staff and a lack of meaningful and stimulating things for the residents to do. This cramped and monotonous existence would be difficult for most individuals to endure for a prolonged period of time. It has been dangerous and destructive for the mentally retarded individuals who have been subjected to decades of this existence at Ebensburg. Residents live in groups of approximately twenty-four individuals, with whom they spend the majority of their time, day after day, idle in large dayrooms on the living units. The residents do not have adequate activities and staff interaction, particularly during mealtimes, medication administration, and afternoon and evening hours. Significant periods of the day are consumed waiting for staff to complete care-taking responsibilities, such as bathing, toileting, and dressing, for the many residents for whom they are responsible. Rather than staff using these occasions as learning opportunities, these duties take on a custodial function. The scanty block of time during weekdays devoted to "program" hours off the living units is similarly wrought with much idle time for a number of individuals. Often, staff spend so little time with residents that programming is rendered meaningless.

training programs to people with mental retardation inevitably leads to harm. ¶33; §VI.B.1. A number of federal courts have adopted this theory in post-Youngberg decisions, finding a broad based right to training that enhances residents' level of functioning, teaches them self-care skills and those skills associated with daily living, and are sufficient to prevent deterioration. See, e.g., Thomas S., 699 F. Supp. at 1186, 1200-01 (mentally retarded persons may develop maladaptive behaviors due to environmental deficiencies; they have a right to adequate habilitation in a setting designed to reduce self-abuse and aggression); Lelsz, 673 F. Supp. at 849-850, 861 (programs at a state mental retardation facility held to be unconstitutional where they were not relevant, did not apply to daily life, used inappropriate materials, and did not provide enough staff-resident interaction); Society for Good Will, 572 F. Supp. at 1348 (E.D.N.Y. 1983)(harmful or inappropriate behaviors attributed, at least in part, to non-stimulating environment; failure to provide adequate programming results in deterioration, serious intellectual, emotional, and physical damage, and irreversible loss of potential), cited with approval, 737 F.2d at 1251. See also Jackson, 757 F. Supp. at 1309; Mihalcik v. Lensink, 732 F. Supp. 299, 303 (D. Conn. 1990); Griffith v. Ledbetter, 711 F. Supp. 1108, 1111 (N.D. Ga. 1989); Armstead v. Pingree, 629 F. Supp. 273, 276 (M.D. Fla. 1986); Association for

Retarded Citizens, 561 F. Supp. at 487; Homeward Bound Opinion at 5, 29-32.[8/] As one court has aptly stated:

> Given the great difference that minimum self-care skills make in the life of most mentally retarded persons, this court regards the acquisition and maintenance of those skills as essential to the exercise of basic liberties. Not only will these skills free residents from the restraint of others who now "help" the residents perform basic functions, these skills will also enable the residents to do a great variety of activities which formerly they could not.

Association for Retarded Citizens, 561 F. Supp. at 487 (emphasis in original).

The evidence in this case demonstrates that Ebensburg does not provide residents with the opportunity to develop skills that are essential to the exercise of their basic liberties. For example, only eleven people at Ebensburg have toileting programs.

[8/] These post-Youngberg cases join a rich history of pre-Youngberg cases which have found a broad-based right to training, including: Scott v. Plante, 641 F.2d 117 (3d Cir. 1982), vacated and remanded in light of Youngberg, 458 U.S. 1101 (1982), aff'd, 691 F.2d 634 (3d Cir. 1982); Gary W. v. Louisiana, 437 F. Supp. 1209, 1219 (E.D. La. 1976); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973); Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978); In re Ballay, 482 F.2d 648 (D.C. Cir. 1973); Flakes v. Percy, 511 F. Supp. 1325 (W.D. Wis. 1981); Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980); Johnson v. Solomon, 484 F. Supp. 278 (D. Md. 1979); Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd, remanded and rev'd on other grounds sub nom., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

§VI.B.2.d.[9/] Few individuals at Ebensburg have communication programs. ¶38; §VI.B.3; §VI.B.3.d. Residents who need occupational therapy programs to assist them with their level of functioning in such areas as eating, dressing, and personal self care, do not have such programs. ¶38; §VI.B.3.c. Ebensburg's occupational and speech therapy staff freely admit that Ebensburg residents are being denied the opportunity to reach their potential because they are not receiving these services. §VI.B.3.c; §VI.B.3.d. Moreover, Ebensburg does not provide its residents who have significant physical disabilities with meaningful opportunities to gain skills to enable them to exercise some control over their environment. ¶36; §VI.B.2.c. Instead, despite Ebensburg policy, they are discriminated against on the basis of their physical disabilities and are deprived of the opportunity to even be off their living units for more than one hour a day for programs. ¶36; §VI.B.2.c.

As Dr. Stark testified on the first day of trial, mental retardation is not curable. §II. The effects of mental retardation can be alleviated, however, by teaching individuals with mental retardation necessary adaptive skills to enable them to function at their fullest capacity. ¶6; §II. Indeed, the individuals whose liberty has been deprived by confinement at

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[9/] The Lelsz court found that a similar failure to attempt intensive toilet training was "an assault on clients' dignity" and violative of due process rights. Lelsz, 673 F. Supp. at 847-848.

Ebensburg have been placed there for the very purpose of learning skills to achieve their full potential. ¶8; §III.

There is widespread recognition among courts that such habilitation is a basic part of providing services to people with mental retardation. For example, in Heller v. Doe, ___ U.S.___, 113 S. Ct. 2637, 2645 (1993), the Supreme Court endorsed the proposition that appropriate treatment for people with mental retardation is "'habilitation' which consists of education and training aimed at improving self-care and self-sufficiency skills" (emphasis added). The Third Circuit has recognized that people with mental retardation "require special and continuing care called 'habilitation' to function optimally in society." Philadelphia Police & Fire Ass'n for Handicapped Children v. City of Philadelphia, 874 F.2d 156 (3d Cir. 1989). Writing for the Third Circuit, Chief Judge Gibbons defines habilitation as "'teaching and training the retarded basic life and social skills,' such as walking, talking, eating, toileting, socializing, using money, traveling, and working." Id. (citation to record omitted). Significantly, the Third Circuit specifically recognizes that regression is inevitable when people with mental retardation are not provided with continuous training opportunities, stating that: "These lessons [of basic life and social skills], however, are not learned permanently by mentally retarded persons: once habilitation ceases, they begin to regress." Id. In keeping with the Third Circuit's appreciation of the importance of habilitative training, this Court has

similarly recognized that "the Fourteenth Amendment guarantees certain substantive rights against undue infringement," including the right to a "minimum level of habilitation." Lee v. Gateway Inst. & Clinic, 732 F. Supp. 572, 576 (W.D. Pa. 1989), aff'd, 908 F.2d 963 (3d Cir. 1990); Anderson v. Everett Area School Bd., 732 F. Supp. 39, 40 (W.D. Pa. 1989).

In sum, in order to advance basic liberty interests, courts have widely recognized that affirmative steps must be taken to provide all people with mental retardation adequate training, which includes teaching them new skills and promoting their growth and development. Such growth and development protects them from harm, enhances their ability to function independently, and advances their overall basic interests in liberty. However labeled and whether based on a right to protection from harm or broader liberty interests, a number of courts have uniformly concluded, when faced with these issues, that institutionalized mentally retarded persons have a right to adequate training which will give them a reasonable opportunity to grow and develop and to acquire and maintain those life skills that will enable them to function as effectively as their capacities permit.

B. Defendants are not protecting Ebensburg residents' liberty interest in training programs to prevent undue restraint

Ebensburg residents have also suffered undue restraint in the absence of adequate training and behavior management programs. ¶58; §VIII.B. They are thus trapped in the vicious cycle of being punished for the behaviors that result from the

very lack of services that the Defendants have an obligation to provide. Indeed, restraints have been imposed on a number of residents for behaviors that Ebensburg has failed to address at all or to address adequately. ¶¶57, 58; §VIII.A.1; §VIII.B. Although some nine months after the United States filed its Complaint, Defendant's terminated their use of some of the more professionally unacceptable and grotesque forms of bodily restraints at Ebensburg (such as straight jackets and velcro wrap papoose boards which completely immobilize residents), they concomitantly increased dramatically their use of floor control and psychotropic medications on both a long term and emergency chemical restraint basis. ¶¶59, 60, 62, 63; §VIII.C; §VIII.D; §VIII.E.[10/] Ebensburg residents have been seriously injured through Defendants' use of floor control, which consists of several staff forcing residents to the floor and restraining them in a face-down position. ¶61; §VIII.E. Psychotropic medications have been used as chemical restraints on a dramatically more frequent emergency basis in the absence of any psychiatric consultation at Ebensburg. ¶63; §VIII.A; §VIII.D. Without appropriate training and behavior management programs to address the underlying behaviors, such restraint is per se unreasonable

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[10/] In Sabo v. O'Bannon, 586 F. Supp. 1132, 1140 (E.D. Pa. 1984), the court explicitly held that the use of drugs as chemical restraints carries the same due process protections as other bodily restraints. Such chemical restraints were recognized as equally restrictive and potentially more harmful than physical restraints. As a result, the court held that undue chemical restraints violate residents' constitutional right to liberty.

and a violation of constitutional standards. Youngberg, 457 U.S. at 324.

V. DEFENDANTS' FAILURE TO PROVIDE RESIDENTS ADEQUATE MEDICAL CARE VIOLATES THEIR DUE PROCESS RIGHTS

There is no dispute between the parties that in all areas of broad based medical care, professional standards require certain basic steps. First, individuals who are "at risk" of health problems must be identified. §X.A.2(a); §X.B.3(a). Second, they must be adequately assessed through comprehensive evaluations based on reliable data and an interdisciplinary approach, where warranted. Third, an appropriate treatment plan must be devised. Fourth, the plan must be consistently implemented by qualified staff. Where non-professional staff are involved, such staff must receive adequate training to carry out their specific responsibilities with respect to the particular individual to whom they are providing care. Fifth, the efficacy of the treatment must be monitored and reviewed in a meaningful way through appropriate data and any necessary revisions in the course of treatment must be made and implemented. ¶¶76-80.

The evidence in this case demonstrates that in each of the areas of concern at Ebensburg, including treatment of aspiration and gastroesophageal reflux, seizures, mental illness, physical disabilities, nutritional management, and other nursing and health related problems, defendants are not meeting these five basic standards. §IX; §X; §XII; §XIII; §XIV. First, in term of identifying people "at risk," Ebensburg has failed to do this in critical areas, including identifying residents who are at risk

of aspiration and gastroesophageal reflux. ¶77; §X.A.2. Direct care staff have failed to notify nurses following serious injuries. ¶103; §X.B.2. Nurses have failed to notify doctors about such significant health concerns as occult blood in stool and vomitus. ¶104; §X.A.4; §X.A.5; §XII.B.1. Staff fail to recognize that residents are in status epilepticus. ¶¶109-110; §XIII.A.4. Second, there is a universal failure to adequately assess Ebensburg residents in each of the areas at issue in this litigation. Doctors fail to perform medical work-ups for aspiration and gastroesophageal reflux. ¶78; §X.A. Psychiatric, physical therapy, and nutritional management assessments are so deficient as to be non-existent. ¶¶65-75; ¶¶81-86; ¶¶119-134; §IX.A.2; §X.B.3(b); §XIV.F.1. Necessary diagnostic tests for seizures are not performed. §XIII.B.2. Nursing assessments for chronic and acute illnesses are inadequate. ¶¶103-108; §XII.B.1.; §XII.B.4. Third, deficiencies also exist across the board in developing and implementing adequate treatment plans. Ebensburg doctors have frequently failed to develop any treatment plan for serious, chronic illnesses other than to simply "monitor" the resident. ¶¶78-80; §X.A.4; §X.A.5. The failure to intervene at an early stage in such progressive problems as aspiration and gastroesophageal reflux has resulted in preventable death at Ebensburg. ¶80; §X.A.4. Both nutritional and physical management plans are non-existent at Ebensburg due to a generalized lack of information about appropriate and necessary interventions and an insufficient number of qualified

staff. ¶¶81-86; §X.B.2; §XIV.F.2; §XIV.F.3. Physical and occupational therapists do not even participate in annual reviews and the interdisciplinary process. ¶133; §XIF.2.b. There is inadequate neurology consultation time to address seizure management issues, including protecting residents from injuries due to seizures and selecting a course of treatment for adequate and appropriate seizure management without untoward side effects. ¶¶112-117; §XIII.B.1; §XIII.B.3; §XIII.B.4. Necessary protocols and procedures do not exist in such key areas as emergency treatment of status epilepticus and nursing care plans for aspiration. ¶¶103-108; ¶111; §XII.B.3; §XIII.A.4. Psychiatric treatment is a hit-or-miss proposition at Ebensburg in the absence of adequate assessments to formulate an appropriate diagnosis. ¶65-71; §IX.A.2; §IX.A.3. Ebensburg doctors fail to follow consultants' recommendations and to document any rationale for not following the recommendations. ¶99-102; §IX.A.7; §XIII.B.5.

Fourth, in the few situations where Ebensburg has developed treatment interventions, they are often not followed. For example, feeding plans are not implemented. ¶¶87-98; §X.B.4; §XI.D.5. The psychiatrist's and neurologist's recommendations are not implemented. ¶116; §IX.A.7; §XIII.B.5. Positioning guidelines for individuals with aspiration and gastroesophageal reflux are not carried out. ¶¶91-98; §XI.D.5. Direct care staff charged with the day to day responsibilities of handling, lifting, transferring, and feeding residents with significant

disabilities receive little or no training. ¶129; §X.B.4; §XIV.F.6. Fifth, Ebensburg also fails in all areas to monitor the status of residents' conditions and to revise treatment plans when warranted. Critical data to make informed decisions is lacking in psychiatric care, nutritional management, physical management, and nursing care. ¶72; ¶¶81-86; ¶¶103-108; ¶¶119-134; §IX.A.2; §IX.A.3; §XII.B.4; §XIV.F.1. Recordkeeping practices are deficient across the board at Ebensburg, from doctors' and nurses' notes to consultant recommendations. ¶¶68-69; ¶¶99-101; §IX.A.2.b; §IX.A.3; §XII.A.1; §XII.A.2; §XII.A.3; §XII.B.4; §XIII.B.6.

The totality of these deficiencies represent a fundamental and systemic failure to provide adequate medical care that comports with accepted professional standards. When faced with similar types of deficient practices in other institutions serving people with mental retardation, courts have found that they not only constitute inadequate medical care, they also violate residents' rights to safety because of the life-threatening and debilitating risks that they pose.

For example, in the area of services for people with physical disabilities, courts have held that: the constitutional liberty interest encompasses the right to necessary adaptive equipment and techniques to reduce the risk of physical deterioration among people who are non-ambulatory, Thomas S., 699 F. Supp. at 1200; inadequate staffing, supervision, and provision of physical therapy services and equipment at a state-operated

mental retardation facility violated the residents' constitutional rights, Lelsz, 673 F. Supp. at 847, 860-1; residents were denied their constitutional rights in a state mental retardation facility where they were not receiving required positioning necessary to maintain body flexibility and there was a shortage of physical therapy and occupational therapy staff, Society for Good Will, 572 F. Supp. at 1324-5; and a state institution's failure to provide adequate physical therapy, occupational therapy and adaptive equipment and a sufficient number of trained physical and occupational therapists and direct care staff resulted in unconstitutional restraints on the residents' movement and liberty. Homeward Bound Opinion at 2-3, 21-23, 47-49.

In the area of emergency response to status seizures, the Tennessee court entered a preliminary injunction sua sponte enjoining a state operated facility from treating status epilepticus with IM Valium, finding that no standard of care recognizes the administration of IM Valium for status epilepticus. Tennessee Opinion at 28, 39-40, 46. The Tennessee court held that "[m]edical care within the institution, particularly for patients with seizure disorders, is so deviant from any recognized principles of medical care that any patient suffering prolonged seizures or status epilepticus may be in immediate peril of his life." Tennessee Opinion at 28.

In the area of general medical care, courts have held that residents in a state operated facility are constitutionally

entitled to adequate, emergency, routine, and preventive treatment for ordinary and chronic ailments. See, e.g., Lelsz, 673 F. Supp. at 834 ("Medical care includes not only life-preserving or emergency care, but also regular and preventive treatment for ordinary and chronic ailments.")(emphasis added). Failures to communicate needed medical information among staff, leading to a lack of professionally acceptable integrated medical care, have also been found to deprive institutional residents of their constitutional rights. Lelsz, 673 F. Supp. at 843, 845.

In the area of psychiatric care, courts have held that adherence to the rights explicated by Youngberg and its progeny requires that drugs be prescribed and administered according to professional judgment by a qualified professional. Psychotropic medications, like other medications, may have harmful side effects. Those effects may be short term, such as depression of the central nervous system, or permanent, such as tardive dyskinesia, the effect of which may be "analogous to that resulting from radical surgical procedures [such] as a prefrontal lobotomy." Rennie v. Klein, 720 F.2d 266, 276 (3d Cir. 1983) (Weis, J., concurring); Sabo v. O'Bannon, 586 F. Supp. 1132, 1135, 1140 (E.D. Pa. 1984). Hence, it is necessary that such medications be prescribed and administered only for appropriate reasons and be properly monitored if residents are to remain free from unreasonable risks of harm resulting from their use.[11/] As

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[11/] That such harm may be serious is unquestioned. In Sabo, the plaintiff's son choked to death while hospitalized as a result of central nervous system depression and suppression of

noted by the court in Sabo, "if the right to safe conditions includes the right to be free from a pattern of attacks and injuries, then it must also protect against the alleged unsafe administration of drugs." Sabo, 586 F. Supp. at 1140. Courts have also found that where psychotropic drugs are prescribed pursuant to unacceptable processes and procedures, including unacceptable data collection, residents are being chemically restrained and their constitutional rights are being abridged. Lelsz, 673 F. Supp. at 843, 845, 852.

In the area of feeding and nutritional management, courts have held that improper positioning during feeding, which runs the risk for aspiration and loss of life, deprives residents of their constitutional rights. Association of Retarded Citizens, 561 F. Supp. at 480, 486; Homeward Bound Opinion at 23; Jackson, 757 F. Supp. at 1308 (finding that staff members are not adequately trained in proper feeding techniques before they begin working with residents with complex needs, and that "[i]mproper feeding techniques can place residents in danger of choking on food.").

In sum, Defendants' significant deficiencies in the areas of general medical and nursing care, seizure management, psychiatric care, and nutritional and physical management constitute substantial departures from accepted professional standards and

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the gag reflex caused by overmedication. Sabo, 586 F. Supp. at 1140.

deprive residents of their basic constitutional rights to adequate medical care and reasonable safety.

VI. A PROFESSIONAL JUDGMENT STANDARD IS NOT APPLICABLE TO CRIPA CASES

A. The professional judgment standard arises in actions for damages

The constitutional requirement that states provide institutionalized persons reasonable safety, adequate medical care, and adequate food, clothing, and shelter is absolute. Youngberg, 457 U.S. at 315-316. Whether a state is meeting its duty to provide this level of care is not subject to the kind of "professional judgment" analysis Defendants urge this court to apply in their Motion for Judgment on Partial Findings. Nowhere in Youngberg, 457 U.S. 307 is it suggested that the "professional judgment" standard be utilized in evaluating whether an institution is protecting its residents from harm. See, e.g., Association for Retarded Citizens, 561 F. Supp. at 486 ("professional judgment" standard not considered in claims involving basic care needs and protection from harm).

As contemplated by Youngberg, safety is an objective standard that can be measured through objective criteria. There is overwhelming evidence in this case that Defendants do not provide reasonable safety to Ebensburg residents. This objective evidence of harm ranges from escalating overall injury rates, including those due to unknown causes, to the failure of direct care staff to intervene to protect residents from dangerous eating behaviors, self-injury, and aggression. Analysis of these

facts does not require reference to "professional judgment" or a determination as to "which of several professionally acceptable choices should have been made." Youngberg, 457 U.S. at 321. It is abundantly clear that Ebensburg residents are not being protected from harm.

The concept of "professional judgment" was introduced into the discussion of the rights of institutionalized persons in Youngberg. In Youngberg, the professional judgment standard was applied only to the decisions by professionals made with respect to Mr. Romeo's training, and then only in evaluating those decisions in the context of his §1983 action for money damages against persons responsible for his care. The Court utilized what Defendants have characterized as the professional judgment "standard" in analyzing the issue of what training was constitutionally due Mr. Romeo. In giving direction to lower courts confronted with suits for damages by individuals such as the one before it, the Court urged that, in evaluating the decisions made by professionals regarding training given to a particular institutionalized individual for purposes of determining liability for monetary damages, "courts must show deference to the judgment exercised by a qualified professional." 457 U.S. at 322. This admonition was primarily intended to ensure that institutional personnel not be readily subject to actions for money damages. The Court specifically stated that "[t]he administrators, and particularly professional personnel, should not be required to make each decision in the shadow of an

action for damages." Youngberg, 457 U.S. at 322-325 (emphasis added).

Courts should only use a professional judgment standard, then, when reviewing decisions regarding the provision of training to an individual institutionalized person in the context of an action for monetary damages under 42 U.S.C. § 1983. Indeed, the Third Circuit in Shaw v. Strackhouse, 920 F.2d 1135 (3d Cir. 1990), applied the professional judgment standard in the context of a § 1983 action. However, the Shaw case was not a case regarding the provision of training. Rather, Shaw was a case about failure to protect from harm, and, as such, the professional judgment standard had no place in that discussion. The Shaw court thus wrongly considered whether professional judgment was exercised in analyzing whether Embreeville, another state-operated facility for mentally retarded persons, failed to protect Ricky Shaw from harm. Shaw, 920 F.2d at 1145-46. That analysis is contrary to Youngberg.

The raison d'etre for the professional judgment standard is absent in CRIPA actions. In such actions, the United States seeks only injunctive relief against state officials in their official capacities. There is no personal liability involved. Thus, the Supreme Court's concern in Youngberg about protecting individual professionals from a drumbeat of damage actions is not an issue here. In the context of this action brought under CRIPA to evaluate overall conditions of confinement at Ebensburg -- to determine the presence of systemic deficiencies that defeat the

delivery of adequate care -- the "professional judgment" standard is thus inapposite. See, e.g., Homeward Bound Opinion at 47-48 (constitutional -- not damages -- case articulating the Youngberg protections in which words "professional judgment" do not appear).[12/]

B. Much of the evidence in this case does not involve professional judgment

The professional judgment standard is inapposite in this case for another, more fundamental, reason. That is, much of the evidence at trial concerns situations that do not even involve professional judgments.

There can be no professional judgment where, as at Ebensburg, no judgments are made in the first place. The evidence shows that there are Ebensburg residents exhibiting dangerous behaviors that are resulting in severe and repeated injuries for whom Ebensburg has not even provided a behavior program. Even where behavior programs are provided, they continue year after year with no revision in the face of lack of progress, or worse yet, increasing maladaptive behaviors. In the area of medical care, Ebensburg doctors fail to develop long-term

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[12/] There is a difference between professional judgments and professional standards or practices. Professional standards are, of course, relevant to a determination of the constitutionality of conditions because they provide the framework for a determination of whether an institution's practices in such areas as medical care and training are acceptable. As such, the United States' experts testified about generally accepted standards and whether Ebensburg's practices departed from them. Evaluating conditions against professional standards is significantly different than scrutinizing individual professional judgments and is clearly more in keeping with the systemic focus in this case.

individualized medical plans of care for residents who have been hospitalized for aspiration, are at risk of aspirating, or have a history of gastroesophageal reflux; the doctors completely fail to "work-up" obvious markers for reflux; the medical staff fails to obtain needed help from specialized medical consultants (such as gastroenterologists or pulmonologists); the Ebensburg doctors routinely abdicate any opportunity for professional judgment by "treating" individuals (often in emergency situations) via the telephone, thus placing a nurse in the position of having to make medical assessment, diagnosis and treatment judgments that are the exclusive responsibility of the doctors; psychotropic medications are prescribed without justification and without review for their efficacy; residents are not even screened to determine who is at risk of aspiration; and people with significant disabilities are not adequately assessed and do not receive physical therapy or physical management services. §IX; §X; §XIII; XIV. These examples of situations where no decisions are made cannot reflect professional judgment because no judgments are made in the first place.

There can also be no professional judgment where, as at Ebensburg, professional decisions about what services a resident receives are based not on individual needs, but are based on what is available. Jackson, 757 F. Supp. at 1312; Thomas S., 699 F. Supp. at 1200 (W.D.N.C. 1988); Clark v. Cohen, 613 F. Supp. 684, 704 and n.13 (E.D. Pa. 1985), aff'd, 794 F.2d 79 (3d Cir. 1986), cert. denied, 479 U.S. 962 (1986). The evidence demonstrates

that Ebensburg residents are provided canned behavior programs and canned skills training programs that fail to take into account individual needs because that is all that is available.[13/] At best, Defendants only provide Ebensburg residents with occupational therapy services four days a week, regardless of their needs, because the aides must spend the fifth day cleaning equipment and doing paperwork. §XIV.F.3.b(iii). Despite Ebensburg's knowledge that residents are experiencing extreme difficulty during mealtimes, the professionals who are charged with their care believe that all they can provide is "trial and error" treatment until they receive some outside expertise and technical assistance. ¶97; §XI.B. The evidence also demonstrates that in spite of the fact that Defendants recognize the need to place each and every resident of Ebensburg into the community, no such placements occur because there are no community placements available and residents remain at Ebensburg indefinitely. §XVIII.

There can be no professional judgment where, as at Ebensburg, there are not enough qualified professionals to make judgments. Ebensburg staff, including the Director of Occupational Therapy, the Director of Nursing, occupational therapy aides, and members of the Dysphagia Team admit they need training and technical assistance to perform their functions, but Ebensburg fails to provide the training. §X.B. 5; §XII.B.5;

[13/] Reliance on "canned" treatment programs and the "word processor approach" to psychology services violates due process. Lelsz, 673 F. Supp. at 848-50.

§XIV.F.3.e. Moreover, the number of professional staff is inadequate to perform necessary functions. As evidenced by the numerous admissions in deposition testimony, the Defendants, themselves, have identified a need for additional doctors, neurology and psychiatry consultation time, psychologists, physical, occupational, and speech therapists, and therapy aides. §I.B.3.c; §IX.A.2(b)(ii); §XII.A.4; §XIII.B.5.c; §XIII.B.5.d; §XIV.D. The Dysphagia Team does not feel that it has adequate time to assess residents, to ensure that mealtime interventions are implemented, and to monitor and train direct care staff. §X.B.6.a. The current staffing configuration in these areas results in the failure to provide Ebensburg residents with needed services and departs from accepted professional standards. Deficiencies in the number of professional staff is exacerbated by the use of professional staff to accomplish non-professional tasks due to shortages in direct care staff. For instance, the few psychologists on staff at Ebensburg are forced to drive buses and act as dental hygienists by suctioning people during dental procedures. Similarly, Ebensburg's few occupational therapy aides and speech therapists are pulled from their client training responsibilities to diaper and transport residents. Courts have uniformly held that such critical understaffing in state mental retardation facilities implicates constitutional rights. See, e.g., Lelsz, 673 F. Supp. at 843, 858-9, 860; Association for Retarded Citizens, 561 F. Supp. at 478; Jackson, 757 F. Supp. at 1309.

There can be no professional judgment where, as at Ebensburg, there is inadequate recordkeeping. Ebensburg's deficiencies in collecting, recording, and reviewing appropriate data and information about residents' behavioral and physical conditions have directly and adversely affected residents' care and treatment. The facility's failure to record adequate data about individuals' behaviors has led to an inability to make professionally based decisions about training programs and has resulted in undue physical and chemical restraints. Incomplete records about individuals' physical and health status similarly result in inadequate planning and provision of critical health care services, including physical, nutritional, and seizure management and the use of psychotropic medications. §IX.A.2; §IX.A.3; §XIII.B.6. In addition, nursing and medical progress notes frequently are not entered when an individuals's condition warrants it, resulting in gaps of critical information needed to provide adequate care. §X.A.4; §X.A.5; §XII.A. Physical therapists do not review progress notes because they are "backed up" and have to "triage" what has to be done at Ebensburg. §XIV.E. Courts have repeatedly found that a facility's failure to maintain adequate records about the course of treatment contributes to constitutional inadequacies. See, e.g., Jackson, 757 F. Supp. at 1306, 1310; Association for Retarded Citizens, 561 F. Supp. at 480; Woe, 638 F. Supp. at 1514.

There can be no professional judgment where, as at Ebensburg, recommendations of treating professionals are not even

implemented. For example, the consult psychiatrist's recommendations to decrease or discontinue an individual's medications have not been implemented. §IX.A.7. Similarly, the advice of the consult neurologist has been repeatedly ignored; his recommendations to decrease the anticonvulsant medications of those residents on chronic polypharmacy and his expressed concerns about the potential for negative side effects for those individuals on high doses of medication have been regularly disregarded. §XIII.B.3; §XIII.B.4; §XIII.B.5.a. Courts have found that the failure to implement the recommendations of treating professionals violates due process. Jackson, 757 F. Supp. at 1312; Clark, 794 F.2d at 87; Thomas S., 781 F.2d at 375; Lelsz, 673 F. Supp. at 835.

There can be no professional judgment where, as at Ebensburg, facility staff do not even follow their own policies. The evidence establishes that as long ago as 1988, the Commonwealth issued behavior management policies that Ebensburg has never complied with and is failing to follow more than five years later. The evidence establishes that, contrary to Ebensburg's mission statement, residents do not receive training to assist them in functioning as independently as possible. ¶8; §III. The evidence also establishes that Ebensburg discriminates in its application of its active treatment policy, failing to provide five hours of continuous training off living units for its residents with the most significant physical disabilities. ¶36; §VI.B.2.c. Ebensburg also fails to follow its own policy

for lifting and transferring residents with physical disabilities. §XIV.F.5. Moreover, the evidence establishes that physical therapists do not follow regulations promulgated by the Pennsylvania State Board of Physical Therapy and Ebensburg contract objectives. ¶132; §XIV.E. Courts have found that where a professional departs from institutional or departmental treatment policies, no professional judgment is exercised. See, e.g., Thomas S., 902 F.2d at 252; Society for Good Will, 572 F. Supp. at 1329 (canned treatment programs were contrary to institution's own policies).

C. Assuming professional judgment applies, it is not being exercised at Ebensburg.

Assuming, arguendo, that the professional judgment does apply, it is clear that professional judgment is not being exercised at Ebensburg because professional standards are not used in making individual treatment/training decisions. Each of the United States' experts reviewed numerous records of Ebensburg residents, not to second-guess Ebensburg professionals or establish personal responsibility/liability, but to ascertain whether a) professional standards were applied in making these decisions, and b) to determine whether these decisions were part of a pattern that would indicate, for example, failure to make timely or appropriate diagnoses, to monitor residents' conditions or progress in meeting training objectives, or to take actions when problems were identified in the residents' records. If

professional standards or practices are not employed in making a decision, professional judgment is not exercised.[14/]

The United States has more than met its burden to show that the professionals at Ebensburg, when they do make decisions, are not making the decisions based on accepted professional practices or standards. The decisions of the Ebensburg professionals are therefore not "professional judgments." In each and every area of constitutional import, Defendants fail to take the prerequisite steps to make a professional judgment. In the areas of general medical care, neurology, psychiatry, nursing, physical management, nutritional management, and psychology, Ebensburg fails to apply accepted professional standards to formulate a professional judgment -- in each area, Ebensburg fails to identify residents in need, to adequately assess their needs, to develop appropriate plans to address the needs, to implement the plans, to monitor their efficacy, and to make revisions when necessary. While actions are presumed to be professional if made by a qualified person and implemented accordingly, that presumption may be overcome by showing that the decision is a substantial departure from accepted professional opinion, practice, or standards. Youngberg, 457 U.S. at 323. Deference to professional judgment "does not mean binding and unquestioned

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[14/] That is, if a professional makes a decision that is not based on accepted professional practices or standards, it is not a "professional judgment." An example of this is the use of IM medications at Ebensburg to control status seizures. The use of IM medications for such a purpose is not an accepted professional practice. § XIII.A.4.b. Decisions to use them are not professional judgments.

acceptance." Association for Retarded Citizens, 561 F. Supp. at 488. These considerations are particularly relevant to the circumstances at Ebensburg, outlined above, where substantial departures from accepted professional standards are the rule, not the exception.

VII. ANY LAST MINUTE IMPROVEMENTS AT EBENSBURG HAVE NOT CORRECTED THE DEFICIENCIES AND DO NOT REMOVE THE NEED FOR THE REQUESTED RELIEF

As was demonstrated at trial, the deficiencies existing at Ebensburg are longstanding in nature and, critically, what very few steps Defendants have taken were taken only after the United States filed its lawsuit. For instance, in spite of a 1988 State requirement that functional analyses be performed, Defendants only began performing functional analyses for its residents with severe behavior problems starting in March 1993, and only after the United States propounded interrogatories asking for a list of functional analyses together with the dates the analyses were performed. The evidence shows that Ebensburg only began competency based feeding training after the United States rested its case. The evidence shows that Ebensburg did not start daily risk management meetings until March 1993 and only after discussion with an outside expert that Ebensburg hired for purposes of this litigation and subsequently decided not to call as a witness at trial. Defendants failed to eliminate use of the papoose board for restraint until late 1992. Most significantly, the evidence shows that even after initiation of these minimal actions, deficient practices and harm persist at Ebensburg. In

spite of being on notice about these and many other conditions resulting in the deprivation of the constitutional rights of the people who live at Ebensburg, Defendants' unwillingness to remedy deficiencies over a protracted period of time establishes that the offending conditions are likely to continue and/or recur.

It is well established that defendants cannot evade a judgment against them where they attempt to correct deficiencies at the eleventh hour under the threat of a trial, particularly under circumstances such as those in this case where the defendants were on notice for years of the violations alleged by the United States. See, e.g., United States v. W.T. Grant Co., 345 U.S. 629, 632 n.5 (1953)("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." The Third Circuit has adopted the W.T. Grant approach. Zellous v. Broadhead Associations, 906 F.2d 94, 100 (3d Cir. 1990); International Bhd. of Boilermakers v. Kelly, 815 F.2d 912, 916 (3d Cir. 1987); United States v. Article of Drug, 362 F.2d 923, 928 (3d Cir. 1966); Hendricks v. Gilhool, 709 F. Supp. 1362, 1372 (E.D. Pa. 1989).

VIII. THE UNITED STATES HAS MET ITS BURDEN OF PROOF IN DEMONSTRATING CONSTITUTIONAL VIOLATIONS

In an action pursuant to CRIPA, the United States is under precisely the same burden of proof as plaintiffs in other civil rights cases involving institutional conditions. This burden is to demonstrate by a preponderance of the evidence that

Defendants' actions violate residents' constitutional rights.[15/] In the only adjudicated CRIPA decision to date, the United States District Court for the Western District of Tennessee has confirmed that the burden placed on the United States in a CRIPA case is no different than the burden placed on litigants in other similar litigation. Tennessee Opinion at 4.

The United States has clearly demonstrated constitutional violations at Ebensburg by a preponderance of the evidence. The Defendants did not attempt to rebut the vast majority of evidence propounded by the United States in this case. Unlike the United States' witnesses who supplemented their ultimate opinions through testimony and exhibits with specific examples about most of the residents at Ebensburg, few of Defendants' witnesses actually discussed the people at Ebensburg who are affected by this litigation.[16/] Defendants did not offer into evidence a single piece of documentary evidence about any individual at

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[15/] See United States' Memorandum on Standard of Proof at Trial, filed on July 26, 1993, and United States' Notice of Supplemental Authorities in Support of Pending Motions, filed on October 1, 1993, for detailed discussions of this issue. Since the filing of the October Notice, the court in United States v. Tennessee issued its oral ruling in a CRIPA case similar to this one involving conditions at a state-operated mental retardation facility in Tennessee. A copy of this ruling is attached.

[16/] As set forth in the procedural history in §I of the Detailed Proposed Findings of Fact, the United States' experts specifically discussed more than 200 residents during their collective testimony based upon thousands of hours of on-site and record reviews. Additional information about more than 450 of the approximately 472 Ebensburg residents is in evidence through exhibits in this case.

Ebensburg.[17] Instead, Defendants' witnesses testified about global conclusions, often based on inadequate, incomplete, and incorrect information. They further often relied on representations by Ebensburg staff to conclude that practices were adequate or appropriate, rather than conducting their own independent reviews.[18] In many cases, the scope of their reviews were significantly more limited than those of the United States' experts. Moreover, none of Defendants' independent experts had ever set foot on Ebensburg prior to 1993. Most of their evaluations were restricted to what was occurring at Ebensburg fully one year after this lawsuit was filed.

What the Commonwealth did not put on in its case is as instructive as what it did put on. The only Ebensburg staff to testify were the Facility Director and his assistant. None of the directors of any clinical area of services at Ebensburg testified, except through admissions in depositions. The Director of Medical Services did not testify. The Director of Nursing did not testify. The Director of Psychology did not testify. The Director of Occupational Therapy did not testify. The Director of Speech Therapy did not testify. And no member of

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[17] They did offer into evidence cursory one page parent comment sheets filled out by the parents testifying for the United States.

[18] As the court in Tennessee observed, "[t]he testimony of experts, of course, is affected by the reliability of the information they receive on which they base their expert testimony. If they receive inaccurate or incomplete information, then the testimony provided by the expert may be of limited or little value." Tennessee Opinion at 12-13.

Ebensburg's Dysphagia Team testified. The Commonwealth did not retain an independent expert in neurology or physical therapy to assess the adequacy of conditions at Ebensburg. Instead, they relied on the testimony of their consulting neurologist and physical therapist to render opinions on the adequacy of their own care. Despite representations early in the case, the Commonwealth did not present a videotape to the Court to show an "alternative" view of conditions at Ebensburg. The Commonwealth did not dispute any summary chart of deficiencies entered into evidence by the United States or question the accuracy of any chart for any reason.[19/]

In sum, the United States has met its burden of proof and Defendants have not rebutted the overwhelming evidence that the United States has presented in support of its case.

REMEDIAL MEASURES

The Defendants' failure to correct longstanding deficiencies at Ebensburg despite repeated notification of these deficiencies requires an injunctive order that is comprehensive, specific, and contains a mechanism to ensure compliance.[20/]

[19/] The only possible exceptions are Mr. Bellomo's opinion that an area of improvement was not included on one summary chart clearly labeled and intended to highlight deficiencies identified by State surveys and Dr. Sheppard's testimony that she did not consider to be significant the recent deficiencies on the chart summarizing State survey deficiencies at Ebensburg relating to mealtime practices. Tr. 10/13/93 (Bellomo) at 159-160.

[20/] The Court has before it the United States' Motion for Remedy Hearing Following Liability Determination filed November 1, 1993.

An order issued by this Court should address each area in which deficiencies were found. The order proposed by the United States includes provisions relating to, inter alia, feeding practices, nutritional, physical, and seizure management, nursing, staffing, recordkeeping, and training programs. Each of the provisions relates to deficiencies proven at trial as set forth in the United States' Proposed Findings of Fact. Each is necessary to ensure that residents of Ebensburg are provided constitutional levels of care. The order also identifies areas where Defendants must take immediate action to address deficiencies posing a risk of serious injury, significant illness, or death.

It is important that Defendants' obligations under any order are unambiguous. Thus, the order the United States proposes is quite specific in describing the steps the Defendants must take. The evidence demonstrates that the Defendants will need guidance on how to cure the deficiencies at Ebensburg. The proposed order therefore requires that Defendants retain outside expertise to implement necessary corrective actions.

The Defendants in this case have a documented history of inability to remedy deficiencies that deprive residents of their constitutional rights. Thus, any order for injunctive relief must contain a mechanism to ensure compliance. The mechanism we propose is a monitor. The monitor would be chosen by the United States, subject to court approval. His/her duties would be to regularly visit Ebensburg to monitor compliance. The monitor

would be authorized to retain appropriate experts and have access to the facility and its staff and records. The monitor's findings would be reported to the Court and the parties.

We believe the appointment of a monitor is appropriate and warranted here. In cases where states have demonstrated an inability to provide constitutional levels of care, courts have not been reluctant to appoint special masters, monitors, and independent experts to ensure compliance with their orders. See, e.g., United States v. Michigan, 680 F. Supp. 928, 953-957 (W.D. Mich. 1987) (independent expert); United States v. Guam, No. 91-00020, slip op. (D. Guam 1991) (monitor); Halderman v. Pennhurst, No. 74-1345, slip op. (E.D. Pa. 1990) (special master); Association for Retarded Citizens, 561 F. Supp. at 495 (monitor for compliance reporting); Ruiz v. Collins, 503 F. Supp. 1265, 1385 (S.D. Tex. 1988); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 962-963 (2d Cir.) (master appointed due to complexity of consent decree), cert. denied, 464 U.S. 915 (1983); Gary W. v. Louisiana, 601 F.2d 240, 244-45 (5th Cir. 1970).

The benefits of a monitor here are numerous. First, the monitor would provide the Court and the parties with an impartial, current, and accurate description of conditions at Ebensburg and the status of compliance. Second, a monitor would have a greater ability to perform on-site inspections and maintain continuing oversight than would the United States -- which, in lieu of a monitor, would be solely responsible for

monitoring compliance. Third, a monitor would not be in an adversary role, but rather would be providing an independent evaluation of Defendants' compliance.

In light of the continuing, indeed increasing, harm that Ebensburg residents are suffering, the proposed order has provisions for ceasing further admissions to Ebensburg and taking more aggressive action to place people in appropriate community settings. This action is in keeping both with Defendants' views about how best to serve people with mental retardation, as well as prevailing views in the field. It is broadly and commonly accepted today that large congregate care institutions are ill suited to provide adequate services to the special needs of people with mental retardation. The Defendants universally endorse community placement as the most appropriate setting to provide adequate services to Ebensburg residents. Despite this belief, the number of people at Ebensburg has remained relatively constant over the past three years. Although Defendants are making efforts to find appropriate community placements for people living at other State institutions, they are not making the efforts at Ebensburg.[21/] Courts faced with the types of

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[21/] Ebensburg has determined that every individual who lives there can and should be placed in the community and has developed a community placement plan for each resident. Three circuits, including the Third Circuit, have held that the state's failure to implement such decisions which bear directly on whether the individual's needs can be met in the institution or should be met elsewhere, i.e., in a community placement, violates due process. In the words of the district court in Jackson :

> What can be said is that the individualized determinations were made by IDTs [an interdisciplinary

persistent problems that plague Ebensburg have aptly described the institutional paradox and the benefits of community services:

> Institutions, by their very structure -- a closed and segregated society founded on obsolete custodial models -- can rarely normalize and habilitate the mentally retarded citizen to the extent of community programs created and modeled upon the normalization and developmental approach components of habilitation.

Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1318 (E.D. Pa. 1977), aff'd in part, rev'd in part, 612 F.2d 84, 114 (3rd Cir. 1979) ("It is probably true, as the trial court found, that in general institutions are less effective than community living arrangements in facilitating the right to habilitation in the least restrictive setting."), rev'd on other grounds, 451 U.S. 1 (1981).

It is well within the power of a federal court to order broad based remedies to correct constitutional violations. There

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> team] ... who after assessing the strengths and needs of the individual residents against the available resources in a particular setting, determined that in their professional judgment a particular resident should be recommended for community placement. ..., defendants' failure to implement the recommendations of their own treating professionals violates due process.

Jackson, 757 F. Supp. at 1312 (rev'd in part, only to the extent of finding error in that part of the injunction enjoining state officials from considering "costs" as a factor in making community placement recommendations) 964 F.2d 980, 992 (10th Cir. 1992). See also, Thomas S. v. Flaherty, 699 F. Supp. 1178 (W.D.N.C. 1988), aff'd, 902 F.2d. 250 (4th Cir. 1990), cert. denied, 111 S. Ct. 373 (1991); Clark v. Cohen, 794 F.2d 79 (3rd Cir. 1986); Kirsch v. Thompson, 717 F. Supp. 1077 (E.D. Pa. 1988) (utilizes a Youngberg liberty interests analysis to direct state officials to transfer plaintiff to a community program).

is specific precedent in the Western District of Pennsylvania for even closing facilities that can not be brought into constitutional compliance. In Inmates of the Allegheny County Jail v. Wecht, 699 F. Supp. 1137, 1147 (W.D. Pa. 1988), appeal dismissed, 873 F.2d 57 (3rd Cir. 1989), Chief Judge Cohill ordered that a jail be closed and a new facility constructed. His analysis of the court's authority applies equally to the facts of this case:

> When the totality of conditions in a penal institution violates the Constitution, the trial court's remedies are not limited to the redress of specific constitutional rights. ... Rather, the nature of the violation determines the scope of the remedy. [Citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).] Moreover, in fashioning a remedy for constitutional violations, federal courts must order full and effective relief.

CONCLUSION

In summary, the evidence in this case has overwhelmingly demonstrated that the Defendants have failed, and continue to fail, to provide the individuals who live at Ebensburg with reasonable safety and adequate basic care, training programs, and medical care. These widespread deficiencies violate Ebensburg residents' constitutional rights and have caused residents to suffer significant harm. These violations have occurred and will continue to occur, unless, and until, the Commonwealth of

Pennsylvania is subject to the proposed Court order requiring it to provide constitutional conditions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the pleadings listed below were sent by overnight mail, postage prepaid, this 16th day of February 1994, to counsel of record:

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Pleadings sent by overnight mail:

1. United States' Proposed Detailed Findings of Fact (Volume I);
2. United States' Proposed Detailed Findings of Fact (Volume II);
3. Appendix to United States' Proposed Detailed Findings of Fact;
4. United States' Proposed Summary Findings of Fact;
5. United States' Proposed Conclusions of Law and Memorandum of Law; and
6. United States' Proposed Order.

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