No. 95-3541

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

THOMAS J. RIDGE, Governor of the Commonwealth of Pennsylvania; FEATHER HOUSTOUN, Secretary, Dep't of Public Welfare; NANCY THALER, Deputy Secretary of Mental Retardation, Office of Mental Retardation; ALAN M. BELLOMO, Director, Ebensburg Center; COMMONWEALTH OF PENNSYLVANIA,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The United States contends in this appeal that the district court applied the wrong legal standards in ruling on our claims that the Ebensburg Center does not satisfy constitutional standards in the areas of habilitation, protection of physical safety, and seizure treatment. In defending the district court's ruling, the state does not rely on findings made by the district court under the appropriate legal standards, and it does not demonstrate that the record supports only one resolution of the factual issues. Indeed, much of the state's brief addresses facts not relevant to the issues on appeal. Accordingly, the district court's judgment should be reversed and the case remanded.

ARGUMENT

I

THE DISTRICT COURT'S HOLDING THAT EBENSBURG HAS NO OBLIGATION TO PROVIDE TRAINING DESIGNED TO IMPROVE RESIDENTS' CONDITIONS REQUIRES REVERSAL

1. As we explained in our opening brief (Br. 28, 33),[1/] the district court did not determine whether the Ebensburg Center gives residents training that would provide a reasonable opportunity for them to improve their conditions. Rather, it adopted the Second Circuit's dictum that "[w]here the state does not provide treatment designed to improve a mentally retarded individual's condition, it deprives the individual of nothing guaranteed by the Constitution." United States v. Pennsylvania, 902 F. Supp. 565, 618 (W.D. Pa. 1995) (quoting Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1250 (2d Cir. 1984)). Evaluating the Center's services against only a rule of nondeterioration, the district court found them "adequate for maintenance, which is constitutionally acceptable." Id. at 620 (discussing physical therapy assessments); see also id. at 617-618, 632.

As we explained (Br. 24-32), that holding is erroneous as a matter of law. Youngberg v. Romeo, 457 U.S. 307 (1982), established the principle that states must exercise professional

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[1/] "R. __" refers to entries on the district court's docket sheet. "Br. __" and "St. Br. __" refer to pages in the United States' opening brief and the Commonwealth of Pennsylvania's answering brief, respectively. "J.A. __" refers to pages in the joint appendix. "__ Tr. __" refers to pages in the trial transcript for the dates indicated. Transcript pages not included in the joint appendix are attached as Addendum B to this brief.

judgment in providing training rationally and realistically designed to enhance residents' ability to exercise their liberty interests (Br. 25-29). The record reflects that the state did not do so; while Ebensburg may purport to seek the goal of improvement, it does not implement programming in a manner that could reasonably be expected to reach that result (Br. 33-36). Because the district court applied the wrong legal standard,[2/] and that error necessarily affected its decision, the judgment should be reversed and the case remanded.

2. In response, the state makes two principal legal arguments. First, the state contends that Youngberg contains no "general statement of a right to improvement" (St. Br. 40). The Youngberg Court held that the right to training is derivative of the other liberty interests retained by institutionalized persons. Youngberg, 457 U.S. at 322. This holding clearly entails a right to training designed to improve residents ability to exercise their liberty interests. In Youngberg, the Court held that because Nicholas Romeo possessed liberty interests in safety

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[2/]The state suggests that the district court's holding was more limited. In the state's reading, the court held only that Ebensburg's training need not actually improve residents' conditions (St. Br. 39). The district court's own language refutes that contention. See Pennsylvania, 902 F. Supp. at 618 (no violation "[w]here the state does not provide treatment designed to improve a mentally retarded individual's condition") (internal quotation marks omitted) (emphasis added); ibid. (no violation because "professional judgment is exercised in an effort to preserve and/or maintain" residents' condition) (emphasis added). The state rightly notes that the court appeared to approve a right to training if the failure to provide it "results in the loss of a recognized liberty interest," ibid., but the reference to "the loss" of such an interest is consistent with the district court's general rule of nondeterioration.

and freedom from restraint, the state had an obligation to exercise professional judgment in providing training designed to enhance his ability to exercise those interests. Id. at 324. All of the training the United States seeks in this case would serve the interests in safety and freedom from restraint (Br. 34-35); Youngberg is therefore directly controlling.

Second, the state argues that Ebensburg residents have no right to training to enable them to leave their confinement because most of them "are not involuntarily committed" (St. Br. 38). The district court correctly rejected that argument. Pennsylvania, 902 F. Supp. at 581 n.6. The nominally "voluntary" residents at Ebensburg did not enter as a result of their own choice. Rather, they were admitted to the institution because a Pennsylvania statute allowed their parents or guardians to turn them over to state custody. See 50 Pa. Stat. Ann. 4402, 4403. The mere fact that the residents' parents may have made a voluntary choice does not relieve the state of the obligation to provide the residents themselves -- all of whom are now over 18 (see Pennsylvania, 902 F. Supp. at 617 n.42) -- with constitutionally adequate care. See Doe v. Austin, 848 F.2d 1386, 1392 (6th Cir.), cert. denied, 488 U.S. 967 (1988).

Indeed, the sole reason the state permits parents to admit their children to the institution is for "examination, treatment and care." 50 Pa. Stat. Ann. 4402(a), 4403(a). State regulations require that each resident "shall receive active treatment." 55 Pa. Code 6210.61. And the Center's mission statement

declares that its "goal for each person admitted" is to aid in the resident's development "so that he or she may achieve maximum functioning" (J.A. 1116). These state statutory and administrative provisions "create objective expectations" (Rogers v. Okin, 738 F.2d 1, 6 (1st Cir. 1984) (internal quotation marks omitted)) that people who are admitted to the institution will actually receive treatment and training. Accordingly, they create a liberty interest in habilitation. See Thomas S. v. Flaherty, 699 F. Supp. 1178, 1203 (W.D.N.C. 1988) (finding state-created liberty interest in habilitation on basis of similar provisions), aff'd, 902 F.2d 250 (4th Cir.), cert. denied, 498 U.S. 951 (1990); see also Layton v. Beyer, 953 F.2d 839, 845 (3d Cir. 1992) ("A liberty interest may arise from the laws of the states, as well as from the Due Process Clause."); Clark v. Cohen, 794 F.2d 79, 94-95 (3d Cir.) (Becker, J., concurring) (collecting cases), cert. denied, 479 U.S. 962 (1986).

Moreover, this Court has recognized that the state incurs affirmative duties under the Due Process Clause where it "impose[s] some kind of limitation on a [person's] ability to act in his own interests." Horton v. Flenory, 889 F.2d 454, 458 (3d Cir. 1989). Here, even aside from the state action of "endors[ing], adopt[ing] and enforc[ing]" the parents' decision to confine their children "voluntarily" to Ebensburg (Smith v. Allwright, 321 U.S. 649, 664 (1944)), state restraints on liberty are inherent in the Center's continuing custody of those residents. See D.R. v. Middle Bucks Area Vocational Tech. Sch., 972

F.2d 1364, 1370 (3d Cir. 1992) (en banc) (state owes affirmative duties to those in its "physical custody"), cert. denied, 506 U.S. 1079 (1993). This Court has noted "the full time severe and continuous state restriction of liberty" in the institutional environment. Id. at 1371.[3/] And despite the state's contention that Ebensburg residents are "free to leave the facility" (St. Br. 38), the district court found that many residents are not able, as a practical matter, to do so. Pennsylvania, 902 F. Supp. at 581 n.6. A commitment that is initially voluntary may become, de facto, an involuntary one. See Kennedy v. Schafer, 71 F.3d 292, 295 (8th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3727 (U.S. Apr. 19, 1996) (No. 95-1697); Doe v. Public Health Trust, 696 F.2d 901, 904-905 (11th Cir. 1983); United

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[3/]For this reason, this Court's decision in Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459 (3d Cir. 1990), is inapposite. Fialkowski involved an individual voluntarily placed in a community living arrangement by his parents. In concluding that "Walter Fialkowski's personal liberty was not substantially curtailed by the state in any way," this Court found it significant that he retained a substantial degree of liberty within the community living arrangement. Id. at 461, 465-466. Nor is Monahan v. Dorchester Counseling Center, 961 F.2d 987 (1st Cir. 1992), apposite. Unlike this case, Monahan did not involve individuals placed in a congregate institution by their parents. Rather, it involved an adult who voluntarily admitted himself to a group home for the mentally ill. See id. at 988. During his six days living in the group home, Monahan received outpatient mental treatment (id. at 988-989) and could have left at any time. See id. at 992. And Walton v. Alexander, 44 F.3d 1297 (5th Cir. 1995) (en banc), involved a student at a state residential school who retained "the option of leaving at will, an option that was never withdrawn." Id. at 1305. In any event, Walton's reasoning is inconsistent with this Circuit's cases, because it rejects this Court's "primar[y]" focus on "physical custody." D.R., 972 F.2d at 1370; see Walton, 44 F.3d at 1299.

States v. Pennsylvania, 832 F. Supp. 122, 124 (E.D. Pa. 1993).[4/]

3. The state also contends that the facts are insufficient to demonstrate that Ebensburg's habilitation falls below constitutional standards. Notably, the state does not point to a single finding in which the district court determined that the state exercises professional judgment to implement programs in a manner that can be expected to enhance residents' ability to exercise their liberty interests. That is because the district court relied exclusively on its erroneous legal conclusion that the state's only constitutional duty is one of maintenance. The case must thus be remanded unless "the record permits only one resolution of the factual issue." Pullman-Standard v. Swint, 456 U.S. 273, 292 (1982).

The evidence cited by the state does not satisfy that burden. For example, the United States' expert witnesses identified over 40 residents who exhibited behavioral problems or were subjected to chemical restraints,[5/] and who had not been provid-

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[4/]See also Doe v. Austin, 848 F.2d at 1392 ("[T]he practice of relying upon some affirmative act on the part of profoundly and severely retarded persons to signal their will to escape confinement, coupled with the presence of a parent or guardian who may have played a pivotal role in institutionalizing the admittee in the first instance, creates a quite palpable danger that the adult child will be 'lost in the shuffle.'"); Halderman v. Pennhurst State Sch. & Hosp., 784 F. Supp. 215, 222 (E.D. Pa.) (finding that the "notion of voluntariness" in admission or release from an institution is "an illusory concept"), aff'd, 977 F.2d 568 (3d Cir. 1992) (table).

[5/]Our opening brief also referred to mechanical restraints (Br. 13). The state contends that this reference "misrepresents the record" because "the cited testimony does not even mention mechanical restraints which were discontinued at Ebensburg" (St.

(continued...)

ed with behavioral programs to address these problems or reduce the need for restraints (Br. 13). Those experts also found a large number of residents who had not received training in important adaptive skills (ibid.). They made these findings on the basis of visits to the institution, interviews with Ebensburg employees, statistical analyses of data in selected residents' records, as well as comprehensive review of the records of a sample of the residents. See 8/2/93 Tr. 9-11, 60-68 (Russo); 8/3/93 Tr. 59-62 (Fahs). The state's own surveyors had reported similar deficiencies on many occasions since 1983 (J.A. 1183-1186).[6/]

In attempting to rebut this evidence, the state asserts that the individuals cited by the United States' experts had received programs to address their behavioral problems, but that the experts simply objected to the fact that individual target

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[5/](...continued)
Br. 22). But while the testimony referred to in the "see, e.g." cite in our opening brief discusses only chemical restraints, the record clearly reflects a use of mechanical restraints as well. See, e.g., J.A. 297-298 (Russo) (Center placed Ann B. in a restraint chair and did not attempt to change behavioral program to reduce need for that restraint); U.S. Exh. 993 (reporting repeated use of restraint chair on Ann B. even during trial). The record also reflects that when the Center discontinued use of its principal mechanical restraint (the papoose board) in late 1992, it significantly increased its use of the prone, takedown-style bodily restraint known as floor control (U.S. Exh. 998 (attached as Addendum A)).

[6/]The state suggests that the district court found that all of the problems noted by the surveyors "ha[d] been corrected" (St. Br. 27). But the court found only that plans of correction had been implemented, not that those plans actually cured the deficiencies. The fact that surveyors have continued to cite the same deficiencies year after year demonstrates that the plans did not do so. See J.A. 1179-1192, 1198-1208.

behaviors were not separately labeled (St. Br. 20). But the state points to only 2 of the more than 40 instances cited by the United States' experts.[7/] And it does not address at all the deficiencies its own surveyors had repeatedly identified throughout the years. The state also refers to general testimony that residents received programs to address their problem behaviors, or that it is not always possible to eliminate these behaviors entirely (St. Br. 18-19, 21-23). But this evidence does not rebut the numerous specific instances in which the United States' witnesses and the state's own surveyors had found a failure to provide any programs that even attempted to reduce the incidence of particular behaviors.

The United States' experts also testified that, as a general practice, the state did not revise training programs when they failed to reduce target behaviors; again, the experts' findings were consistent with those rendered by the state's own surveyors throughout the years (Br. 13-14). But the state contends that these findings are "based upon the false assumption that if injuries continue then the program must be ineffective" (St. Br.

[7/]Even with regard to these examples, the record does not support the state's contentions. For example, the state cites the testimony of its own expert, Dr. Hauser, to assert that Denise V.'s program for aggression is also sufficient to address her severe self-injurious behavior, because "self-injurious behavior is generally considered to be aggression against one's self." (St. Br. 20 (quoting J.A. 712)). But in the answer immediately following the one quoted by the state, Dr. Hauser admits that "[i]f you're aggressive to somebody else, it wouldn't be considered to be self-injurious behavior. If he's aggressive toward others, they should have a way to deal with that behavior" (J.A. 712).

21-22). An examination of the expert testimony proves that assertion untrue. As that testimony demonstrates, the Center failed to revise residents' programs even when harmful behaviors continued unabated and a variety of workable alternatives existed (J.A. 300-307 (Russo); 474-475 (Amado)).

Finally, evidence at trial demonstrated that Ebensburg fails to follow its own policies requiring that all residents receive at least five hours of active treatment per day; in many instances, residents receive only a few minutes of active interaction (Br. 11-12). As the state notes (St. Br. 22-23), its expert Dr. Reid found the amount of meaningful activity at Ebensburg to be "representative of about the average in the field" (J.A. 771). For several reasons, however, Dr. Reid's testimony does not compel the conclusion that the Center provides a constitutionally adequate amount of active treatment. First, Ebensburg's policies reflect the state's professional judgments regarding what training is necessary; the state's failure to follow those policies indicates that professional judgments are not being implemented. See Thomas S. v. Flaherty, 902 F.2d 250, 252 (4th Cir.), cert. denied, 498 U.S. 951 (1990). Second, Dr. Reid admitted that he measured only whether residents were engaging in an age-appropriate activity with an apparent purpose; this measure significantly overstates the extent to which meaningful training was occurring (J.A. 798-802). Dr. Reid's comparative evidence would not be dispositive in any event, for a state may not defend an institution "simply by showing that it is no more unconstitutional than

are comparable institutions in other states, or that it is as good as or better than comparable institutions elsewhere." Welsch v. Likins, 550 F.2d 1122, 1128 (8th Cir. 1977). The proper question is whether the active treatment at Ebensburg constitutes an exercise of professional judgment in an effort to improve residents' ability to enjoy their constitutionally-protected liberty interests. The record demonstrates that it does not. This Court should remand for consideration of that record under the appropriate legal standard.

II

THE DISTRICT COURT'S CONCLUSION THAT EBENSBURG ADEQUATELY PROTECTS RESIDENTS' SAFETY SHOULD BE VACATED

1. As we explained in our opening brief (Br. 4-9), evidence at trial demonstrated that the Ebensburg Center failed to satisfy its constitutional obligation to protect residents' physical safety. The Center has insufficient direct care staff to intervene when residents are engaging in harmful behaviors (Br. 5), direct care staff are not adequately trained to intervene -- and do not intervene -- when those behaviors occur (Br. 5-7), direct care staff have delayed in summoning nurses following injuries (Br. 8), and direct care staff have abused residents (Br. 8-9). As a result of these lapses, Ebensburg residents have suffered numerous preventable injuries (Br. 6-8).

With one exception,[8/] the district court did not address

[8/]The district court rejected the nursing delay claim on the basis of an erroneous rule that no violation could be found because the failure to summon nurses was the fault of the direct care staff and not the nurses themselves. See Br. 41-42.

any of these issues. Indeed, the state does not point to a single finding in which the court addressed the issues of understaffing, intervention, or abuse. The state simply claims that these issues were subsumed in the district court's general conclusion "that there was adequate protection of physical safety" (St. Br. 42; accord St. Br. 26-27). But a district court may not leave its underlying findings unarticulated. Rather, "it is necessary that the trial court specify these subordinate facts upon which the ultimate factual conclusions must rest." H. Prang Trucking Co. v. Local Union No. 469, 613 F.2d 1235, 1238 (3d Cir. 1980). Because the district court did not do so, the judgment may not be affirmed unless the state demonstrates that the record permits only one resolution of the factual questions. Pullman-Standard, 456 U.S. at 292. The state did not satisfy that burden.

2. The state makes two responses to the evidence of understaffing and the lack of staff intervention. First, the state contends that the United States' argument rests on the "simplistic[]" conclusion "that if injuries occurred then a constitutional violation exists" (St. Br. 16-17, 41). But that is untrue. Dr. Russo, for example, concluded that the Center's process of training direct care staff was systemically inadequate only after he conducted "extensive documentation and review of the training process at Ebensburg" (J.A. 310-311). The United States' experts also relied on their own observations of staff, as well as review of resident records; these records indicated that injuries occurred in circumstances when staff intervention would have been

appropriate (J.A. 310 (Russo); 476-479, 485-488 (Amado)). Evidence also demonstrated a large number of instances in which particular residents had repeatedly engaged in the same harmful behaviors without effective intervention (Br. 6-8). The circumstances surrounding residents' injuries suggested that staffing levels were insufficient as well (J.A. 479 (Amado); 8/4/93 Tr. 48-54 (Amado)). And the United States did not rely solely on the testimony of its experts. The state's own surveyors found in their 1993 evaluation (conducted during trial) that the failure of staff to intervene was a "systemic" deficiency (Br. 5-6).

Second, the state contends that reliance on the number of incidents reported at the Center overstates the rate of injuries, and that Ebensburg's injury rate compares favorably to the average in facilities for developmentally disabled persons (St. Br. 14-16). But that is essentially irrelevant. The Center falls below constitutional standards not because of the existence of any particular number of injuries but rather because the injuries that do occur result from the failure to exercise professional judgment (Br. 37-38).[9/] Where, as here, injuries result from the state's failure to take appropriate action in the face of a history of injuries and an apparent risk of future harm (see Shaw v. Strackhouse, 920 F.2d 1135, 1148-1149 (3d Cir. 1990)), the fact that injuries occur in higher rates elsewhere is

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[9/]In any event, the evidence demonstrated that incident reports were both an over- and an underinclusive measure of the number of injuries at Ebensburg. While not all incident reports involve serious injuries, not all injuries are reported. See Pennsylvania, 902 F. Supp. at 640 & n.66.

not a sufficient defense. See Welsch, 550 F.2d at 1128.

3. Two former Ebensburg employees -- Robin Hebenthal and Damien Tackett -- testified that they had witnessed multiple incidents of abuse at the Center, and that they had experienced intimidation after reporting those incidents (Br. 8-9). The district court did not make any findings on this question, and the state does not point to any evidence contradicting Hebenthal and Tackett's testimony. The state simply contends that the district court was not obligated to address this issue, because the testimony involved only "exaggerated, and possibly unreliable, isolated incident[s] of abuse" (St. Br. 42; see also St. Br. 25-26). But the fact that two employees witnessed several instances of abuse during their very short tenures certainly raises a question regarding whether abuse was more widespread. And the district court has an obligation to make credibility findings on the record. See H. Prang Trucking Co., 613 F.2d at 1238. Absent such findings, this Court cannot presume that the district court found Hebenthal and Tackett's unrebutted testimony regarding abuse and intimidation unreliable.[10/]

[10/]The state suggests that the district court found Tackett's testimony to be suspect (St. Br. 25). But in the portion of the opinion cited by the state, Pennsylvania, 902 F. Supp. at 590, the district court was addressing the entirely distinct issue of whether residents were bathed properly. And while the district court referred to Tackett, it did not find his testimony suspect; the court simply refused to credit an out-of-court statement made by an anonymous employee. That finding is simply irrelevant to Hebenthal and Tackett's allegations of staff abuse.

III

THE DISTRICT COURT'S REFUSAL TO ISSUE INJUNCTIVE RELIEF AGAINST THE CENTER'S CONSTITUTIONALLY DEFICIENT TREATMENT OF SEIZURE DISORDERS SHOULD BE REVERSED

1. As the district court noted (Pennsylvania, 902 F. Supp. at 592), there has been a consensus in the neurological profession for over a decade regarding the proper treatment of status epilepticus. That consensus was reflected in a treatment protocol published by the Epilepsy Foundation of America (EFA) in 1993 (J.A. 1209-1215). Although status epilepticus cannot be diagnosed until 30 minutes of seizure activity has taken place, it is necessary to administer medication significantly earlier in order to prevent the condition's harmful, long-term effects (Br. 15-16). The EFA protocol states that "antiepileptic drug administration should be considered whenever a seizure has lasted 10 minutes" (J.A. 1210). Contrary to the state's contention that the 10-minute time frame "distorts" and "misrepresents" the record (St. Br. 9), witnesses for both parties generally agreed that medication should be administered after 10 minutes.[11/] Moreover, anticonvulsant medication must, insofar as possible, be administered intravenously: "intramuscular therapy has no place treating status epilepticus or seizures in general" (J.A. 1211).

[11/]The United States' expert testified that, under the protocol, "treatment to stop the seizure begins ten minutes after the seizure starts" (J.A. 1072 (Coulter)). The state's expert stated that he "wouldn't quarrel with" the 10-minute time frame, although "[i]f he said nine minutes or eleven minutes, [he] wouldn't quarrel with that either." (J.A. 1097 (Grossman)). Most important, Dr. Grossman did not disagree with the need to administer medication before the 30-minute period for diagnosing status epilepticus.

As we explained in our opening brief (Br. 16), Ebensburg substantially departs from this standard. The Center is not licensed to administer intravenous medication, and it does not summon ambulances in sufficient time to allow paramedics to do so within the 10-minute time frame set forth in the EFA protocol. Ambulances have been summoned well after the 10-minute period, and they have taken 20 minutes or more to arrive (J.A. 179-195 (Alvarez)). Thus, the Center has generally relied on oral or intramuscular administration of anticonvulsant medication to treat seizures.

In finding no constitutional violation, the district court addressed only one aspect of this issue -- the Center's use of intramuscular medications. Because the primary care physicians at the Center are general practitioners, not neurologists, the district court found no reason to hold the state to the standards set forth by the EFA. Pennsylvania, 902 F. Supp. at 592-593. And because the court found the Center's administration of intramuscular medications to be sufficient, it found no reason to consider whether ambulances have been called in sufficient time to allow intravenous medications to be administered within 10 minutes (id. at 593 n.18). Significantly, the district court did not find that Ebensburg complies with the EFA protocol.

In defending the district court's ruling, the state contends that it would be "grossly unfair" to hold the Center retroactively to a standard that was not published until 1993 (St. Br. 8). But, as the district court recognized, the EFA protocol repre-

sented the standard of care that had been widely recognized among neurologists for a decade or more. In light of the fact that more than half of the Center's residents have been diagnosed with epilepsy, the state had an obligation to treat them according to the minimum standards of the most relevant medical discipline (Br. 44-46).[12/] Moreover, the United States seeks only prospective relief, and the state has not even suggested that its practices now are any different from what they were before the publication of the EFA protocol in 1993. Accordingly, concerns about retroactivity should not preclude relief in this case.

Contrary to the state's contention, an order requiring the Center to comply with the EFA protocol would not mean that "states must hire only neurologists to treat seizures" (St. Br. 43). There is no reason why general practitioners cannot order the administration of intravenous medications. And those medications can be administered by general practitioners, nurses, or other qualified professionals. They can even be administered by paramedics in an ambulance. See St. Br. 8. The only requirement is that the physician ordering the medication do so in accordance with the generally accepted standards set forth in the EFA document -- in particular, the requirement that intravenous medication be administered significantly before the 30-minute

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[12/]Indeed, the Center employed a consulting neurologist prior to 1993, and, given its resident population, Ebensburg's primary care physicians have substantial experience treating seizure disorders. See, e.g., St. Br. 14. These physicians should have been on notice of the standards for treating status epilepticus well before the publication of the EFA document.

time frame for diagnosing status epilepticus. The record demonstrates that the state has not complied with those standards.

The state also makes several factual arguments. In no case, however, does the state point to any findings made by the district court. And the testimony it cites does not compel the conclusion that the Center's acute seizure treatment comports with constitutional standards. First, the state points to testimony that intravenous medication need not be administered after 10 minutes of seizure activity (St. Br. 7). But both the United States' witnesses and the EFA protocol state the contrary (Br. 15-16), and even the witnesses cited by the state did not deny the necessity of administering medication well before 30 minutes have elapsed. Second, the state contends that the United States' witness Dr. Alvarez did not make clear whether the examples of improper treatment he cited involved "a series of distinct seizures" or "uninterrupted seizures that might become status" (St. Br. 6-7). Accordingly, the state finds it "deceptive[]" to claim that ambulances have not been summoned for several hours in some cases (St. Br. 10). But even a series of seizures can constitute status epilepticus (J.A. 1209), and in the cases cited by Dr. Alvarez ambulances were not summoned for several hours after seizures had begun (J.A. 181-184, 188-192).

Finally, the state asserts that the residents referred to by Dr. Alvarez did not suffer harm as a result of the Center's seizure treatment (St. Br. 9). But Dr. Alvarez testified that these individuals suffered harm following the Center's substan-

dard treatment, and that the circumstances indicated that the treatment may have been a factor in the harm they suffered (J.A. 189, 192-193). A "remedy for unsafe conditions need not await a tragic event." Helling v. McKinney, 113 S. Ct. 2475, 2481 (1993). The Center's improper treatment of acute seizure episodes creates a significant risk of harm to residents and is thus a proper target of prospective relief.

2. The district court found that Ebensburg physicians had not made any professional judgment whatsoever in monitoring and responding to the side effect of sedation caused by Dilantin, an anticonvulsant drug. Pennsylvania, 902 F. Supp. at 595-596.[13/] On appeal, the state contends that the facts demonstrate that professional judgment was exercised and that the record reflects only isolated lapses in care (St. Br. 44 n.12, 47-49). But the state does not even attempt to show that the district court's finding is clearly erroneous.

The state does, however, defend the district court's decision to deny relief on the ground that the violation did not result from an institutional "policy or custom" (St. Br. 43-47). But the "policy or custom" requirement is a unique rule crafted to effectuate Congress's intent to limit municipal liability under 42 U.S.C. 1983; the district court had no basis for applying that requirement in this Civil Rights of Institutionalized

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[13/]The court did not make similar findings regarding other side effects or other anticonvulsants, because it found no "failure to detect or respond to other side effects on a widespread basis." Id. at 595 n.22.

Persons Act (CRIPA) case against a state. See Br. 47-48. The state relies on the Supreme Court's statement that "CRIPA is legislation pertaining to 'a specific class of § 1983 actions'" (St. Br. 44 (quoting Felder v. Casey, 487 U.S. 131, 148 (1988))). But the Felder Court's statement did not relate to 42 U.S.C. 1997a, the provision of CRIPA that authorizes civil actions by the Attorney General. Rather, the Court was discussing 42 U.S.C. 1997e, which expressly imposes an exhaustion of remedies requirement on certain Section 1983 actions brought by prisoners. See Felder, 487 U.S. at 148 (relying on this provision, which imposes an exhaustion requirement on a specific class of Section 1983 actions, as evidence that Congress did not intend for exhaustion requirements to be imposed on Section 1983 actions generally).

In any event, Youngberg places an affirmative duty on the state to assure that professionals make judgments in the areas of protected liberty interests and implement those judgments. This duty is broader than the obligation to avoid deliberate indifference to constitutional rights. See Shaw, 920 F.2d at 1145. When a plaintiff establishes that a state or its agents fail to assure the exercise of professional judgment required by Youngberg, as the district court found here, the plaintiff is entitled to relief even if the failure is not pursuant to a "policy or custom" (Br. 48-49). And, as we explained in our opening brief (Br. 50), the record here reflects deliberate indifference, which itself establishes a "policy or custom."

IV

THE DISTRICT COURT CORRECTLY HELD THAT THE UNITED STATES COMPLIED WITH ALL REQUIREMENTS OF THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT

The United States may file a complaint under CRIPA only when the Attorney General "has reasonable cause to believe" that a state is subjecting institutional residents (42 U.S.C. 1997a(a)):

> to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities.

The Attorney General must personally sign the complaint. 42 U.S.C. 1997a(c). She must also certify that she has given the state notice and an opportunity for consultation prior to filing suit. 42 U.S.C. 1997b. The United States is entitled to "such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities." 42 U.S.C. 1997a(a).

The United States has satisfied all of CRIPA's requirements here. Then-Attorney General Barr personally signed the complaint in this action (R. 1). He also personally certified that he had complied with the notice requirements in 42 U.S.C. 1997b, that this case "is of general public importance," and that he had "the 'reasonable cause to believe' set forth in 42 U.S.C. § 1997a to initiate this action" (R. 1). And the United States established at trial that equitable relief was "necessary to ensure the full enjoyment" of Ebensburg residents' rights.

The state, however, contends that the United States did not satisfy the requirements set forth in CRIPA. It argues that CRIPA required the United States to "establish[] at trial that there were egregious and flagrant conditions, grievous harm, [and] a pattern or practice" (St. Br. 31 (emphasis added)). The state relies exclusively on an excerpt from the statute's legislative history (id. at 31-32). However, "[i]t is axiomatic that statutory interpretation properly begins with the language of the statute itself, including all of its parts. There is no need to resort to legislative history unless the statutory language is ambiguous." Velis v. Kardanis, 949 F.2d 78, 81 (3d Cir. 1991). The district court correctly held that CRIPA, by its terms, does not require the United States to establish "egregious and flagrant conditions," "grievous harm," and a "pattern or practice" at trial. Pennsylvania, 902 F. Supp. at 578-579. These elements apply only to the Attorney General's determination that she has reasonable cause to bring suit. Ibid.

The plain language of the statute make this reading clear. The terms "egregious or flagrant conditions," "grievous harm," and "pattern or practice" appear only in the clause describing the content of the Attorney General's "reasonable cause" determination. 42 U.S.C. 1997a(a). The United States' only burden at trial is to establish that equitable relief is "necessary to insure the full enjoyment of [residents' federal] rights, privileges, or immunities." Ibid. This statutory language makes clear that "the Attorney General is vested with the discretion to

bring suit whenever she is satisfied that a case is serious enough to warrant federal involvement;" once that determination is made, the United States does not face any higher burden of proof at trial than do other plaintiffs. United States v. Pennsylvania, 863 F. Supp. 217, 219 (E.D. Pa. 1994); see also Messier v. Southbury Training Sch., 916 F. Supp. 133, 137 n.2 (D. Conn. 1996). The state appears to concede this point (St. Br. 44-45). Indeed, when Congress has intended to require the United States to prove the existence of a pattern or practice at trial, it has done so explicitly. See 42 U.S.C. 1971(e) (requiring judicial finding of a pattern or practice of voting discrimination as prerequisite to certain relief); 42 U.S.C. 2000e-6 (requiring the Attorney General to allege in the complaint "facts relating to [the] pattern or practice" of employment discrimination).

Nothing in CRIPA's legislative history detracts from the plain import of the statutory language. The state points to a passage from the conference report, which observed that the "pattern or practice" and "egregious or flagrant" language "establish[] a standard for the Department of Justice's involvement that reflects Congressional sensitivity to the fact that a high degree of care must be taken when one level of sovereign government sues another in our Federal system." H.R. Conf. Rep. No. 897, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S.C.C.A.N. 832, 835. But Congress did not find judicial enforcement of those standards necessary. Rather, Congress

intended to guide the Attorney General's prosecutorial discretion and allow her to "engag[e] in a program of selective litigation against those institutions where the most egregious constitutional deprivations affect the largest number of people." S. Rep. No. 416, 96th Cong., 1st Sess. 17 (1979), reprinted in 1980 U.S.C.C.A.N. 787, 799. Because of "the importance of harmonious Federal-State relations," Congress assured that the United States complied with those standards by requiring the Attorney General personally to sign the complaint. H.R. Conf. Rep. No. 897, supra, at 13, reprinted in 1980 U.S.C.C.A.N. at 837. Once the Attorney General decides that reasonable cause exists, however, that decision is judicially "unreviewable" (S. Rep. No. 416, supra, at 29, 1980 U.S.C.C.A.N. at 811), for "Congress -- like the courts -- operates on the assumption that the Attorney General of the United States will perform faithfully his statutory responsibilities." Morris v. Gressette, 432 U.S. 491, 506 n.23 (1977).[14/]

[14/]The state also contends that the United States did not provide sufficiently detailed information to satisfy CRIPA's notice requirement (St. Br. 30-31). The state did not assert this defense in the district court; accordingly, it is waived. See Frank v. Colt Indus., 910 F.2d 90, 100 (3d Cir. 1990). In any event, the plain terms of the statute require only that the Attorney General certify that she has satisfied the notice requirement. 42 U.S.C. 1997b. A court may not look behind a facially valid certification to determine whether sufficient notice was actually given. See United States v. Illinois, 803 F. Supp. 1338, 1340-1341 (N.D. Ill. 1992); United States v. New York, 690 F. Supp. 1201, 1204 (W.D.N.Y. 1988); H.R. Conf. Rep. No. 897, supra, at 14, reprinted in 1980 U.S.C.C.A.N. at 838; cf. United States v. Hawaii, 564 F. Supp. 189, 192-193 (D. Haw. 1983) (reviewing whether notice sufficient where certification, on its face, was equivocal regarding whether notice requirement was satisfied).

In any event, the United States seeks institution-wide injunctive relief in this case. While merely isolated instances of constitutional violations would not justify that relief, the record in this case demonstrates an institution-wide violation. Indeed, the United States has established that a pattern or practice of egregious and flagrant conditions have caused grievous harm to Ebensburg residents. As we have explained, our contentions on appeal relate to institution-wide practices that constitute a substantial departure from accepted professional standards, institution-wide failures to make any professional judgment, and improper acts and omissions occurring with sufficient frequency at Ebensburg to raise a strong inference that violations are not isolated.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully Submitted,

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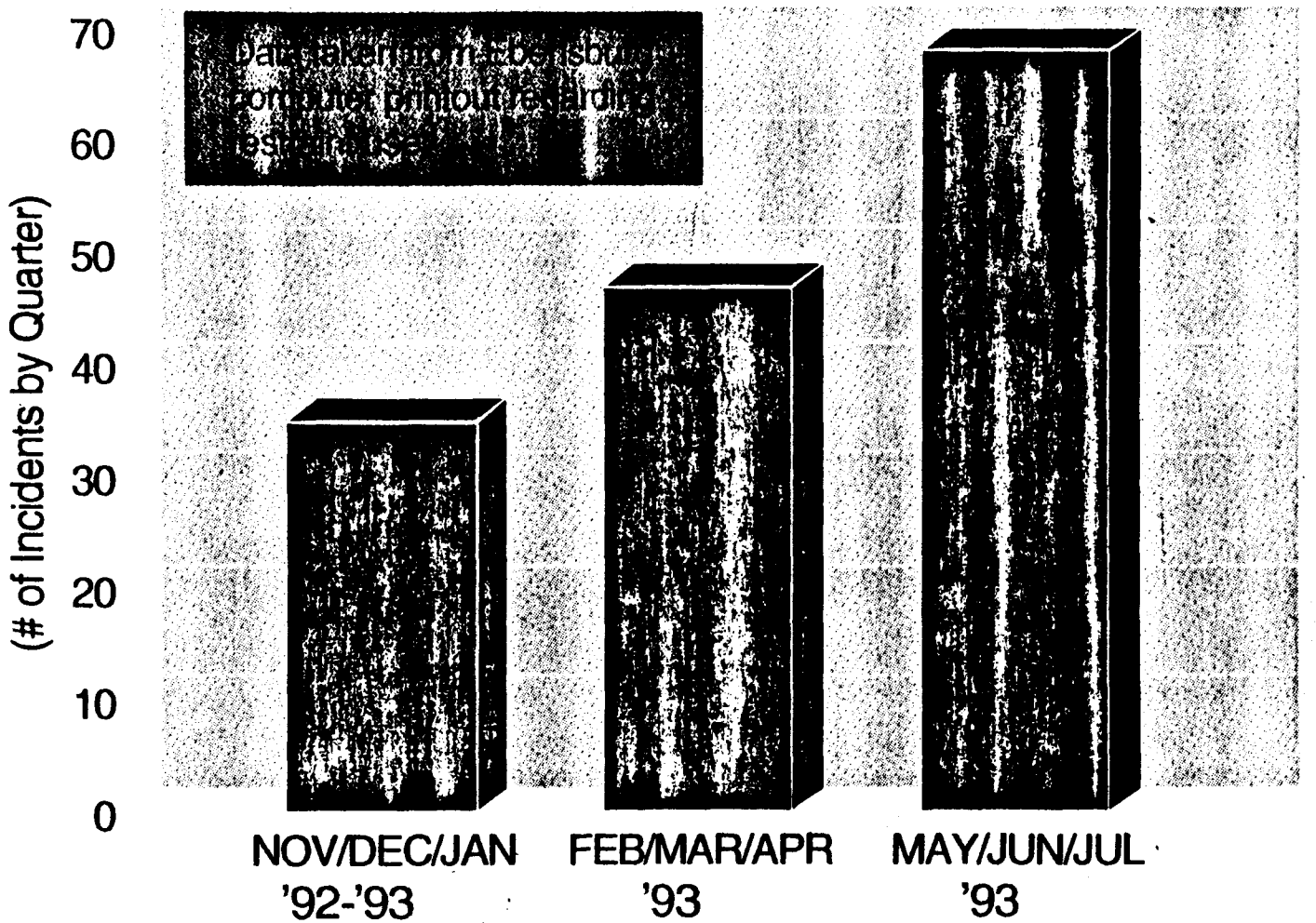
A D D E N D U M A

United States v. Pennsylvania

Incidents of floor control since Ebensburg eliminated use of papoose board



+ Last use of the Papoose Board occured on Nov. 9, 1992. One instance of floor control in November before Nov. 9, 1992 is omitted.

PLAINTIFF'S EXHIBIT 998

A D D E N D U M B

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

UNITED STATES OF AMERICA

Plaintiff

vs. Civil Action No. 92-33-J

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

PROCEEDINGS

Transcript of bench trial continuing on Monday, August 2nd, 1993, United States District Court, Johnstown, Pennsylvania, before Honorable D. Brooks Smith, District Judge.

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

Q Dr. Russo, did you visit Ebensburg Center in connection with this litigation?

A Yes, I visited on three occasions: September 21st, 22nd and 23rd, 1992, was my first tour.

October 22nd and 23rd, 1992, was the second tour.

And then as a third tour, February 9th, 1993.

Q What was the purpose of your visit?

A To identify the adequacy of treatment, psychological treatment being provided to the individuals who lived at Ebensburg. I evaluated whether or not the psychology services at that facility fall within generally accepted practices for psychology. And I evaluated whether individuals as a result of Ebensburg psychology services are being harmed or are at risk of harm.

Q Now, how did you spend your time while you were at Ebensburg?

A My reviews of the facility were really multi-faceted. I did a number of things, both with respect to the actual living units and the records and documents. That is, I reviewed and visited all of the living units and the day programs at the institution across all three of my visits at a variety of times of the day, into the evening and the early morning. In addition, I evaluated records on a large number of the clients. I reviewed other treatment notes, supporting documentation, state policies as were necessary. I interviewed a number of

individuals both at the direct care treatment level as well as at the administrative and management level.

Q By the end of your tour in October -- the end of your second tour, had you formed a preliminary opinion about the psychology services at Ebensburg?

A I had begun to formulate, at the end of my first tour, an initial formulation of some of the areas of concern at the Ebensburg Center.

Q And following your tour in October, did you review records?

A I don't recall having reviewed extensive records between tours.

Q Okay. But since your October tour have you reviewed records?

A Yes, have.

Q About how many records have you reviewed?

A Approximately fifty records. This is more than a ten percent sample of the residents at the Ebensburg Center, where the population is approximately four hundred-seventy.

Q Based on your tours and your review of resident records, have you been able to adequately form an opinion about psychology services at Ebensburg?

A Yes, I have.

Q And based upon those tours and your interviews and your review of records and documents, what is your opinion regarding

the adequacy of psychology services at Ebensburg?

A I find that the psychology services at the Ebensburg Center fail to comport with accepted professional standards.

Q What is the role of a psychologist in providing services to individuals with mental retardation in a residential setting like Ebensburg?

A Appropriate practice for psychologists in a setting like Ebensburg specifies a number of roles for the practitioner of psychology. First of all, and very importantly, they have to be involved with a total habilitative plan for the individual. That is, to work on positive, skills-oriented, developmentally-oriented programming; to assess the environment of care and the quality of life of the individuals; to assess psychological function, both through standardized assessments and, more basically, behavioral assessments.

In addition, they have to develop behavioral programs both for positive skills training, and for the decelerative or reduction programs for very difficult behaviors. They have to utilize the methodologies of behavioral science and apply those to the problems of the population, such that they collect data Those data are evaluated under accepted paradigms and practices, and then treatment plans are revised based upon the data that are provided.

Q Is what you've just described consistent with the way

conceptualizations of behavioral treatment, what is the domain of behavioral treatment and what is the methodology of this whole area of clinical application.

MS. PRESTON: I've handed the Court a signed affidavit. We're about to introduce an exhibit that was created by the same outfit that did the behavior data analysis that the Court saw the first day of trial. This is an affidavit from the same person and she's finally back in town, and this one is signed --

Why I don't get Doctor -- I don't know how to do this. I would like the Court to read this affidavit. This woman was given behavior data from Ebensburg's programs, and Dr. Russo will testify he asked that a regression analysis be performed on this data. And she has done that, and the next exhibit that we will introduce is the analysis of that behavior data. And this affidavit documents the procedures she went through to perform that regression analysis.

At this time, Your Honor, I'll go back and clean up where I left off. I'd like to move into evidence Plaintiff's Exhibit 117.

THE COURT: Admitted.

MS. PRESTON: 154.

THE COURT: Admitted.

MS. PRESTON: And the affidavit of Maureen Martella.

THE COURT: I think you also had a Plaintiff's 93.

MS. PRESTON: I'm sorry, I missed it. I would like to move that, too, Your Honor.

THE COURT: It is admitted.

There any objection to 99?

MR. YORK: No, Your Honor.

THE COURT: 99 will be admitted.

Q I've handed you, Dr. Russo, what has been marked as Exhibit 783. Can you explain what this exhibit is to the Court?

A This exhibit are graphical representation of data taken from the individual client records at the Ebensburg Center over time, and a subsequent procedure being applied to these data in the form of a traditional regression analysis. As I went into units at the Ebensburg Center, I felt very frustrated initially trying to figure out what levels problems were occurring at a - and how changes had occurred over the period of time. That is the way in which data were represented were descriptive as opposed to graphical; they were words rather than numbers.

A standard convention in the field is to represent data graphically over time, so that one can inspect those data and determine the trend. That is, is the behavior getting worse, better or staying the same. And so what I requested the Justice Department to do is to provide a graphical representation of data over a reasonable period of time.

What you see here, I believe, is that all of these

data -- or at least a year for each of the clients, representing about the last year of treatment. These are data which are taken from behavior plans or reports of behavior plans or they are restrictive procedure reviews, and at the top you will see the name of the individual, where the data came from, that is, from the behavior plan objective, what the target behavior is; on the abscissa, or the horizontal axis of the graph, we have here the dates over which data are taken; these are consecutive twenty-eight days intervals as per the data system at Ebensburg. And we display on the ordinate, or the vertical axis, the percentage of hourly intervals of whatever it was or whatever the metric of measurement was that they used. So this is a fairly standard way to represent graphical data. That is, we look at the occurrence of the behavior over time, and we begin to ask the question, what's happening here.

What we have done is we have also used a common statistical technique, regression analysis. What regression analysis is is a simple descriptive statistic which provides a line of best fit. It asks the statistical question what straight line would best describe this set of data. That is, would it be a line that was flat, indicating no change; or a line that was positive, indicating that the behavior was accelerating over time; or a line that was negative. It's just a way, statistically, for us to get a sense of where things are

going.

These data were all generated in a standard statistical program in Lotus 1-2-3, which is a widely available methodology or software package for the clinicians to utilize.

Q And have you had a chance to review the results of the regression analysis?

A Yes, I have. And, in general, what my regression analysis showed is that, in general, some individuals were showing increases in behavior, some individuals were showing no change, and some individuals were showing decreases in the occurrence of a given behavior. But as I began to look at the data, you will notice at the bottom of each chart two terms, R-squared and the slope of the regression line. The slope of the regression line indicates what the line looks like. A positive number indicates a slight upward slope, a negative number indicates a downward slope, and a zero or essential zero function indicates no change.

The R-squared is a statistical measure of the relationship between that line which is a best guesstimate and the actual points that have occurred, and what it seeks to say is that if we had to predict where the next point was, it would give us our confidence as to how closely we could predict it. That is, a high R-squared would indicate that we could probably predict with great likelihood where the next point would be. A low R-squared say that the data that make up that line really

are all over the place.

We would expect as a function of adequate treatment that individuals would have behavior that would follow an orderly progression of change. In general, what we found when we reviewed these data was a very low R-squared value; that is, very significant variability in the data, whether the data generally were going up or down in most cases. What we conclude, in general, is that it's very unlikely that a treatment effect has occurred in most of these cases.

That is, what we see over time are data which suggest -- for example, in the first one, Sandy W., no change over time. Data in the second case, Irvin B., to reduce aggression, which shows that over the period, April, 1991 through January, 1993, two things happened. The rate of aggression actually increased despite treatment efforts, and the variability of the data through visual inspection actually increased, which would suggest to me as a clinical psychologist, as a behavioral psychologist that we don't have a handle on this issue, clinically.

The staff has not used such data to base their clinical decisions on despite the fact that this is a standard convention to look at this over a period of years. This is particularly true because much behavior is cyclical. That is, it can be high one month and down the next, or high one season. Detecting the patterns or trends is part of the technology tha

one should bring to bear.

Q Could we go to yet the third client's regression analysis in this book, the analysis for a client called Ann B.?

A Right.

Q What does this graph track?

A This graph presents the number of hours that this individual client has spent in a restraint chair. That is a specially padded and constructed chair designed to restrain her from producing self-injurious behavior.

This individual is a very interesting client. She has had a chronic problem with self-injurious behavior. Data are documented very clearly in her chart from January, 1986. When we go back to January, 1986, a very interesting data set occurs; that is, that in January, 1986, she is in restraint an hour and fifty minutes. In April of '86, when we have the next piece of data, she is in restraint an hour and fifteen minutes. These are relatively low levels compared to what we see here, that today she's at -- between two hundred fifty and over three hundred hours a month. The question is "why."

And as I have evaluated the data, what becomes clear is that when she was at an hour and fifteen minutes of self-injurious behavior, the staff at the facility introduced the restraint chair. That resulted in a rather immediate and significant increase in her use of restraint. There are a whole class of individuals with self-injurious behavior,

Your Honor, who use restraint as a reinforcer. That is, it's what they seek to obtain in self injury. The self injury produces the restraint that they need from the environment. It's a way of communicating this need for restraint. By giving Ann B. a restraint chair, they basically fed into her problem.

Now, is that wrong in and of itself? The answer is no. When one makes informed clinical judgments, one isn't wrong. The simple fact is that for approximately a three year period, after that restraint chair was put in, they did not significantly change the behavioral training program on this individual and reduce the need for that chair, thereby creating an enormous dependence, chronic restraint, and a perpetuation of a history of self injury.

Q Is Ann B. suffering any harm as a result of sitting in a restraint chair for approximately three hundred hours a month?

A First of all, during the time when she is in the restraint chair she is not receiving positive habilitation, skills development, or other alternative behaviors that would help her to get around this problem.

There is also -- and I'm not a physician -- an indication in the chart that she has had bowel obstructions and has had a colostomy as a result of that. There is some indication that this treatment regimen may have been responsible for that.

Q Now, leaving for a moment the individuals in this book,

did you -- I've put on your podium there Plaintiff's Exhibit 669. Could you tell the Court what this graph represents.

A Yes. This is an aggregate of all of the regression data that are presented here in Plaintiff's Exhibit 783. What we did in this graph is we said looking across all of the people, what could one expect to predict would be the course of treatment for the average resident? That is, if I said to myself could I guess whether as a result of being in Ebensburg a resident would do better or worse or stay the same; and what we did is we just took the slope lines, Your Honor, of all of these photographs and plotted them here as individual data along the vertical axis.

And basically what we find is that this describes a normal bell-shaped curve, in essence. A normal bell-shaped curve in statistics and psychology typically indicates chance. That is, the likelihood of guessing whether a client would do better or worse as a result of placement in Ebensburg, using their own behavioral data, taken from their own records, over time, independent of whether they used the right treatment, the wrong treatment or whatever, is aligned with chance.

Some people have done a little bit better, some people have done a little bit worse; but the great majority of people have remained unchanged by their experience at the Ebensburg Center.

THE COURT: We're going to take our morning recess at this time.

It's ten-forty. We'll take a brief recess.

(Whereupon, the morning recess was taken.)

(Witness resumes stand.)

(In open court.)

MS PRESTON: Before we start, Your Honor, Dr. Russo would like to correct a misstatement he made on the record.

Q Dr. Russo, when you spoke about seeing data filled out ahead of time on your tour, what did you mean to say?

A When I was on tour, I saw instances of missing data. I became aware of data that was filled in before the fact, through a review of records after my tours.

Q Thank you, Dr. Russo.

In your professional opinion, does Ebensburg revise behavior programs when it's necessary?

A No, it does not.

Q Are the individuals at Ebensburg suffering harm as a result of this failure?

A Yes, I believe that they are. In many cases of the data, that I reviewed, individuals were subjected to significant harm through a series of repeated incidents as a result of a lack of effective and timely revision of behavior programs.

Q Can you provide the Court with any examples of individuals who are being harmed by the failure to effectively revise

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

UNITED STATES OF AMERICA

Plaintiff

vs. Civil Action No. 92-33-J

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

PROCEEDINGS

Transcript of bench trial continuing on Tuesday, August 3rd, 1993, United States District Court, Johnstown, Pennsylvania, before Honorable D. Brooks Smith, District Judge.

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

THE COURT: Do you have voir dire, Mr. York?

MR. YORK: No, Your Honor.

THE COURT: Very well. Proceed.

MR. FARANO: Thank you, Your Honor.

BY MR. FARANO:

Q Dr. Fahs, were you hired by the United States Department of Justice?

A Yes, I was.

Q And have you visited Ebensburg Center in connection with this litigation?

A I visited the Ebensburg Center on two occasions.

Q And can you tell the Court when that was?

A I visited first in September of 1992, and returned again for a short visit in February of 1993.

Q Okay. What were you hired to do?

A I was asked to take a look, to evaluate the Ebensburg Center with regards to psychiatric issues, psychiatric care, with particular attention of -- with regards to the use of psychotropic medications for the clients at the Ebensburg Center.

Q And how were you able to assess the psychiatric services at Ebensburg Center? What did you do?

A A variety of ways. Obvicusly, visiting the facility, the first -- my first visit there was for a full week. And I had the opportunity to sit in on about a dozen or so psychiatric

consultation visits with the psychiatrist who was there; had the opportunity to interview several of the individuals who worked at the Ebensburg Center, the director, the assistant director, director of medical services, director of the pharmacy, director of nursing, as I mentioned, the consulting psychiatrist, several of the psychologists, the director of psychology, and other staff members who's names I can't -- I mean who's positions I can't recall, because they would be as I was walking through the facility.

In addition, a review of records -- a number of records.

Q Can you estimate how much total time you spent at the facility during your tour?

A How much total time? Well, the first week there, as I mentioned, that was a full week, five -- well, five-and-a-half days, and then the return visit in February was, I believe, about a day-and-a-half. That was a shorter, somewhat, visit --

Q Okay. Can you --

A -- I can't estimate the number of hours, for the visits, because -- it was days, I guess.

Q Counting both your visits, have you been able to visit all the residential living areas at Ebensburg Center at one time or another?

A I think I have -- yes, I visited all of the living centers, and I think the bulk, if not all, of the training

areas.

Q And can you estimate, approximately, how many total resident records you reviewed at Ebensburg Center?

A In the neighborhood of thirty to forty records.

Q How did you go about selecting the individual resident records that you reviewed?

A Well, my -- I had been asked, as I mentioned earlier, to pay attention to the use of psychotropic medications, and so my primary interest was in those individuals who were taking psychotropic medications. All the records that I had asked for were from people who were taking medications, and that's what I got from a print-out of -- that I was provided.

In addition, people came to my attention because they were being reviewed at the psychiatric consultation visit that I attended, the first date that I was there.

So, again, I was -- the bulk of my records were either randomly selected from the list of people I got on medications, or came up in consultation visits in one way or the other.

Q Can you really explain why it was important for you to review the medical records in assessing conditions at Ebensburg Center?

A Well, the -- the medical record is the ongoing contemporaneous reflection of the care of the individual. It's where the thinking process is reflected. It's where the actual occurrences of what happened are recorded. It aids not only

me, somebody who wants to review things, but it also aids people who are taking care of the individual at the time to review what other individuals are thinking about it. So, it -- the medical record is really a -- a very important keystone of medical evaluation.

Q Now, you mentioned you had interviewed a number of individuals at Ebensburg Center in doing your assessment. Did you feel that you were able to talk to whoever you needed to talk to in order to properly come up with an assessment of psychiatric services and care offered at Ebensburg Center?

A Yes. I was -- I was impressed with the staff at Ebensburg Center, was very forthcoming in making records and individuals available to me.

Q Can you briefly describe the pertinent characteristics of the Ebensburg Center population with respect to what they require by way of psychiatric care and services, by way of background.

A The individuals at Ebensburg Center, as I mentioned, are similar to individuals in other state-run facilities that I'm familiar with. They -- the individuals at Ebensburg Center tend to be severely and profoundly mentally retarded. There tends to be a large number of people who are medically fragile, a large number of people with severe psychiatric difficulties, severe behavioral problems. It's -- they are very similar to the individuals that I have taken care of over the last many

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

UNITED STATES OF AMERICA

Plaintiff

vs. Civil Action No. 92-33-J

COMMONWEALTH OF PENNSYLVANIA, et al.,

Defendants

PROCEEDINGS

Transcript of bench trial continuing on Wednesday, August 4th, 1993, United States District Court, Johnstown, Pennsylvania, before Honorable D. Brooks Smith, District Judge.

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Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

the instruction sheet. That's the accountability sheet that indicates a person has been trained. Was never offered the time or opportunity by management to in-service the eleven-fifteen p.m. to seven-thirty a.m. shift on any behavioral program.

Q Is it important then that the third shift understand each individual in their -- in their unit when they're providing services for them?

A Oh, it's critical that all the staff who work with an individual know how to work with that individual. And it would be nice if people would sleep through the night. It's characteristic for people who display behavioral difficulties to not sleep through the night. Many are up and about and interacting with staff. So these staff definitely need to know how to interact with these residents.

MS. PRESTON: At this time I would like to move three exhibits into evidence. The first one is 640-AA; it is the excerpt from the Stratton deposition.

THE COURT: Admitted.

MS. PRESTON: 107, the collection of incident reports.

THE COURT: Admitted.

MS. PRESTON: And 181, the grievance report.

THE COURT: Admitted.

Q Turning now to the number of staff --- of direct care staff at Ebensburg, during your tours did you observe

situations where there appeared to be inadequate numbers of direct care staff?

A Yes, I did.

Q Can you -- well, I'll do it this way --

MS. PRESTON: Your Honor, should I just put your copy here --

Q I'm handing you what's been marked as Plaintiff's 212. Could you explain to the Court what this exhibit represents.

A This is a memo dated 10/5/92 from David Devine regarding visits that he made to residential and program areas on 9/30/92.

Q Could you explain to the Court some of the concerns that this -- that were noted in this memo.

A Certainly. He reports that on his visit to Harmony House Learning Center at East One between twelve-oh-five and twelve-thirty that he observed the day room area and there were no meaningful interactions, as well as quotas were not met. As far as staff-resident ratios, they were one to eleven. He summarizes that entry with, "We would not have met Title XIX standards in the day room.".

In Harmony House Learning Center, East Two, between twelve-thirty and twelve-forty, "I observed that the visually handicapped --" in this visually handicapped area they were not in compliance, as there was a one to ten or one to eleven ratio; and again notes, "We would not have met Title XIX

standards due to ratios."

The third observation is in Harmony House Learning Center, East Two, between twelve-forty and twelve-fifty p.m. And he says, "I observed individuals in the quiet room area who were sleeping. We were out of compliance with the ratio of one to ten. There was an RSA in on overtime who revealed to me that she did not know the individuals and didn't have their behavioral characteristics." He summarizes with "We certainly would not have met Title XIX standards.".

His next entry is Harmony House Learning Center, East Two, again, from twelve-fifty to one p.m. He was observing the activities in the daily living area and discovered a one to twelve ratio with two RSAs and no meaningful interaction. He cites C.D. with -- one of the residents with no socks on, and says it was explained to him that she eats them. He summarizes with "This needs to be evaluated behaviorally."

And the next entry is in Harmony House Learning Center, socialization room, from one to one-oh-five; and he notes that "What management needs to do is determine what are alternate activities, fully explain and train staff as to what needs to be done, and for supervisory manager to monitor to correct the apparent problems. Management and supervisors must need to creatively look at all other resources to find ways to meet ratios, as we are presently jeopardizing Title XIX."

The next page is a memo dated 10/6/92, again from Mr. Devine, regarding visits in residential and program areas on 10/5/92. And he reports that in the Harmony Learning Center, East One Day Room, from one-thirty to one-fifty there was one RSA and one FGP with eleven individuals, as one of RSA was on break. A short time later an RSA did return from break, but in the intervening time "We would not have met ratios."

And the last entry is in Harmony House Learning Center, Visually Handicapped Area, from two-fifteen to two-thirty p.m., he says, "There were two RSAs involved with twelve individuals in alternate activities; and the program monitor, a social worker, was on break, although she did return."

Q Now, I'm handing you what's been marked as Plaintiff's 214. Again, could you explain to the Court what this exhibit represents.

A This is another memo from Dave Devine, dated 9/16/92. And these are daily visits to the residential and program areas again.

He's reporting first on Laurel House, East One, from ten to ten-twenty-five, and he notes that individuals S.K., P.S. and D.K. were sitting unattended and uninvolved for at least fifteen minutes. In fact, the entire twenty-five minute period he was there observing, one individual -- that he didn't observe one individual do anything for themselves, as

everything was done for them. And he questions whether that would have met the MA or Title XIX standards again.

The next observation is in the JFK Learning Center at ten-thirty a.m., which is a half hour into the day program time; and in the pre-vocational area he says there's an absence of the program monitor, and that the program lacked direction. It seemed as if the RSAs were waiting for the next scheduled activity to occur, which was toileting, prior to the lunch time meal. He questions whether the facility would meet MA standards given what he observed during this time in this program operation.

And the next memo is dated 10/6/92, regarding daily visits to program areas on 10/1/92. This is also from Dave Devine, again, in the JFK pre-vocational area, from one-forty to one-fifty-five. Now, I'll just read that.

"I observed programming in this area and my findings are as follows: There was no program monitor in this area, and there were two RSAs with twelve individuals doing alternative activities. The RSA advised there was no pre-vocational being offered, as the program monitor was off for the day. The RSA was working, looking for direction regarding defining, doing alternate activities. They are looking for direction, and it is incumbent upon management to provide."

In the next entry, also in JFK, in the Self Help Area, from two to two-thirty. He reports there were two RSAs

providing alternate activities to all individuals, one RSA on break. There was no program monitor, as he was on vacation, and there is no back-up system in place to fulfill staffing requirements.

These observations by Mr. Devine raised several concerns. One is the staff seem to be inadequately trained to operate under their own direction and initiative. In the absence of supervision, they are at a loss. It also appeared to be an inadequate number of supervisors to support the staff in providing the services needed by the residents and for which they had been scheduled during those times. It brings us right back to the pattern of harm, I talked about earlier in the morning.

Q Based upon your review of documents in this case, have you formed an opinion about the levels of direct care staffing on the weekends at Ebensburg?

A Yes, I have. Although I've never been there on the weekends, I have read entries in depositions from staff members who have testified that there are fewer staff on the weekends than there are on during the week. This raises additional concerns because on the weekends there is no day program. So, people are even more left to their own devices.

Q What levels of direct care staff do you feel would be minimally adequate to provide active treatment for individuals at Ebensburg who are very physically or behaviorally involved?

A Well, assuming competent staff who are able to work with small groups of people successfully, I would find a ratio of one staff to three residents to be adequate. But that's contingent upon the staff people being trained to work with small groups effectively. Ratios and staff competence have a particular relationship. There's a point at which no matter how many staff you have, it's irrelevant, because they don't have the skills to make a difference anyway.

Q This exhibit is also in evidence.

MS. PRESTON: Your Honor, I give you a copy just for you to refer to.

Q I'm handing you what's already in evidence as Plaintiff's 58; and I ask you, Dr. Amado, could you read from Page 1 of this. This is a 10/21-25, 1991, Ebensburg Medical Assistant Survey. Could you read, please, from Page 1 of the survey. Under -- it's -- it's the page with the Bates Number at the bottom 4059, and the segment that starts "In Harmony, West One."

A "In Harmony, West One, on October 21st, 1991, at seven-oh-eight a.m., Client 1673 was seen completely nude in the TV room with several other clients present. Three staff persons were moving around, in and through the TV room, without any attempt to redirecting the individual. The client left the area and returned twice on his own. He was not redirected until seven-eighteen a.m., when a staff person was

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 1996, two copies of the foregoing Reply Brief for the United States were served by first-class mail, postage prepaid, on the following counsel for the appellee:

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