



MR-TN-001-001

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED BY *mm* D.C.

95 SEP 26 PM 4: 52

PEOPLE FIRST OF TENNESSEE,)
on behalf of its members,)
)
CARL BEARD, by his next)
friend Wendy Kurland,)
)
SANDRA HOWARD, by her next)
friend Elizabeth)
Henderson,)
)
HERMAN WALTER RUNIONS, by his)
next friend Sarah R. Todd,)
)
HARVEY RICHARD WATSON, by his)
next friend Jodie Wheeler,)
)
CLARENCE WILSON, by his next)
friend Wilma Williamson,)
)
KEITH COLLINS, by his mother)
and next friend, Joyce)
Cisco,)
)
STEVELYN DANIEAL TUCKER, by her)
parents and next friends,)
Carolyn and Steve Tucker,)
Plaintiffs,)
)
v.)
)
THE ARLINGTON DEVELOPMENTAL)
CENTER,)
)
NED McWHERTER, in his official)
capacity as Governor of)
the State of Tennessee,)
)
MONA REEVES-WINFREY, in her)
official capacity as)
Superintendent of the)
Arlington Developmental)
Center,)
)
THE TENNESSEE DEPARTMENT OF)
MENTAL HEALTH AND MENTAL)
RETARDATION,)

ROBERT J. HOLLO
CLERK, U.S. DIST. CT.
W.D. OF TN, MEMPHIS

No. 92-2213-M1/V

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79 (a) FRCP on 9/27/95

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EVELYN C. ROBERTSON, JR., in	)
his official capacity as	)
Commissioner of Mental Health	)
and Mental Retardation,	)
	)
MARJORIE NELLE CARDWELL, in her	)
official capacity as	)
Assistant Commissioner for	)
Mental Retardation,	)
	)
THE TENNESSEE DEPARTMENT OF	)
HEALTH,	)
	)
RUSSELL WHITE, in his official	)
capacity as Commissioner	)
of Health,	)
	)
MANNIE MARTIN, in his official	)
capacity as Director of	)
the Bureau of Medicaid,	)
	)
THE TENNESSEE DEPARTMENT OF	)
HUMAN SERVICES,	)
	)
ROBERT GRUNOW, in his official	)
capacity as Commissioner	)
of Human Services,	)
	)
BETTY GAYLE, in her official	)
capacity as Assistant	)
Commissioner for Social	)
Services,	)
	)
PATSY MATTHEWS, in her official	)
capacity as Assistant	)
Commissioner for	)
Rehabilitation Services,	)
	)
Defendants.	)
	)
	)
PARENT-GUARDIAN ASSOCIATION OF	)
ARLINGTON DEVELOPMENTAL CENTER	)
	)
Intervenor.	)

ORDER GRANTING CLASS CERTIFICATION

Before the Court is plaintiffs' motion for class

certification, renewed on June 12, 1995.^[1] For those reasons

^[1] On February 11, 1992, the plaintiffs moved for class certification. The Parent-Guardian Association of the Arlington Developmental Center (PGA) filed a motion for leave to intervene for the purpose of opposing class certification, which leave was granted. A brief evidentiary hearing was held on the motion for class certification on April 28, 1993, after which the Court allowed the parties to supplement the record until July 1, 1993.

U.S.A. v. State of Tennessee, Civil Action No. 92-2062

On January 21, 1992, the United States of America filed suit against the State of Tennessee and named defendants, including the Superintendent of Arlington Developmental Center, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997, et seq. Trial began in that case, United States of America v. State of Tennessee, et al. No. 92-2062 MI/A, on August 30, 1993 (while the motion for class certification in the present case was pending), and the Court issued a comprehensive opinion in open court on November 22, 1993, followed by written Supplemental Findings of Fact on February 17, 1994. The Court found pervasive violations of Arlington residents' rights under the Fourteenth Amendment in almost every aspect of care and services.

In its ruling on November 22, 1993, the Court issued a preliminary injunction to deal with the immediate threat to human life at Arlington. As to permanent injunctive relief, the Court afforded the State of Tennessee an opportunity to comment upon the proposed injunctive order submitted by the United States and directed the Commissioner of the Tennessee Department of Mental Health/Mental Retardation to submit a plan to remedy the violations of constitutional rights and educational opportunities.

Upon motion by the United States, filed February 9, 1994, and by Order docketed April 5, 1994, the Court appointed Dr. Linda O'Neill, an expert with extensive experience in mental retardation, program evaluation, and systemic reform and restructuring of mental retardation services, to serve as Expert Facilitator to assist the parties in U.S.A. v. State of Tennessee, et al., to develop an acceptable plan for remedying the conditions at Arlington, or, if no agreement could be reached, to develop a remedial plan for consideration by the Court. In August, 1994, the United States and the State of Tennessee reached agreement on the terms of a Remedial Order to correct the violations of Arlington residents' constitutional rights. The agreement was entered as a stipulated Remedial Order, and filed on September 2, 1994. The order provides for extensive improvements in care and services at Arlington and obligates the State of Tennessee to reduce the population of Arlington to no more than 200 persons, subject to the state's receiving approval from the Federal Health Care Financing Administration to use federal funds for community placement of Arlington residents.

The Instant Case: People First, et al. v. Arlington Developmental Center, et al.

In the instant case, in February 1994, plaintiffs filed a Motion for Partial Summary Judgment asking the Court to enter its findings on liability as findings in this case. A hearing was held on this motion on April 29, 1994. The Court did not decide plaintiffs' outstanding motions for class certification, partial summary judgment, or other motions. Rather, on September 30, 1994, the Court entered an (Cont.)

stated below, the motion is GRANTED.^[2]

Statement of the Case

This case was filed on December 12, 1991, by People First of Tennessee, a statewide advocacy organization governed by people with disabilities, on behalf of its members, and by five residents of Arlington Developmental Center ("Arlington") to redress unlawful conditions at Arlington, on behalf of themselves and all others similarly situated. Two other individual residents of Arlington were added as named plaintiffs in subsequent motions for leave to amend the complaint. Plaintiffs asserted that defendants denied them minimally adequate living arrangements, habilitation and services at Arlington, in violation of their rights under the First and Fourteenth Amendments, and certain federal statutes.

The case was filed in the Middle District of Tennessee and subsequently transferred to this Court on the defendants' motion for change of venue. Defendants also filed a motion to dismiss the complaint which was denied as to plaintiffs' Due Process and

(Cont. from previous page) Order Staying Proceedings and denying all outstanding motions without prejudice. The Court instructed the parties to review the Remedial Order and advise the Court how they wished to proceed in this case. At a status conference on March 31, 1995, the plaintiffs informed the Court that they wished to refile the motions and proceed to trial.

^[2] The motion for class certification was filed on June 12, 1995, along with a motion to enter the court's findings and order on liability in U.S.A. v. State of Tenn., et al., as findings and orders in this case, a motion for consolidation, and a motion for further relief. These motions will be addressed in a separate order(s).

First Amendment claims.^{3/} More recently, defendants have filed a motion to dismiss the complaint.

With regard to the motion for class certification, plaintiffs have proposed the following class definition:

All persons who on or after December 12, 1989, have resided, or are residing or will reside at the Arlington Developmental Center; all persons who have been transferred to Arlington from other settings such as intermediate care facilities or skilled nursing facilities but remain defendants' responsibility; and all persons at risk of being placed at Arlington Developmental Center.^{4/}

Defendants contend, inter alia, that the proposed class definition is too expansive in that it includes former residents and those "at risk" of being placed at ADC. Moreover, they argue that because a number of parents and/or legal guardians oppose their children's or wards' participation in this law suit, there are an insufficient number of residents to meet the numerosity requirement of a class action suit.

Rule 23(a) of the Federal Rules of Civil Procedure provides:

Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous

^{3/} The court dismissed plaintiffs' claims under Title XIX of the Social Security Act, Sections 100 and 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, certain First Amendment claims set out in Count IV(b), (d), and (e) of plaintiffs' Amended Complaint, and claims under the Equal Protection Clause. (See Order on Motion to Dismiss, Dec. 22, 1992.)

^{4/} Included within the proposed class are three categories: those who have resided at Arlington at any time from December 12, 1989 to present; those who are residing at Arlington currently; and all persons at risk of being placed at Arlington in the future.

that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The Court will address each of these prerequisites below.^{5/}

Numerosity

Rule 23(a)(1) requires that the class of similarly situated individuals be so numerous that joinder of all members would be impracticable. Numerosity, however, is judged on the particular facts and circumstances of this case, and not on the basis of mere numbers, Senter v. General Motors Corporation, 532 F.2d 511, 523 n.24 (6th Cir. 1976), cert. denied, 429 U.S. 870 (1976) (citing Cash v. Swifton Land Corp., 434 F.2d 569, 571 (6th Cir. 1970)). Further, plaintiffs need not show the precise number of class members. Evans v. U.S. Pipe and Foundry Company, 696 F.2d 925, 930 (11th Cir. 1983).

Central to the resolution of the issues in this case is the contention by the defendants and intervenor that the majority of the parents and guardians of Arlington residents oppose the goals of this lawsuit and thus there is an insufficient number of residents to form a class for this suit. In support of this contention, the Parent Guardian Association ("PGA") has submitted

^{5/} Commonality and typicality will be discussed even though the Court has already indicated that typicality and commonality have been adequately addressed by plaintiffs, as indicated in a telephonic conference on May 3, 1995, regarding plaintiffs' motion to compel discovery, wherein the Court sustained defendants' objections to plaintiffs' discovery requests designed to establish commonality and typicality.

for the Court's consideration the responses to two questionnaires previously sent by the PGA to parents, relatives and guardians of Arlington residents in January and April 1992, indicating disagreement with this suit; and has provided the Court with declarations from parents and guardians stating their opposition to plaintiffs' claims for class certification as well as to the request of People First of Tennessee to serve as a class representative.

Although these submittals from the parents and/or guardians do indicate that a number of guardians and conservators object to their wards' participation in the lawsuit for those reasons discussed infra, these objections do not defeat the numerosity requirement of class certification.

At present, the population of Arlington Developmental Center is approximately 385 persons. During the time of the first class certification hearing and at the time of trial in United States of America v. State of Tennessee, et al., Civil Action No. 92-2062, the population was approximately 423 persons, thirty of them minors. The attrition is because some Arlington residents have died during the last two years, and some have left the institution for other settings.

All but approximately 150 of the residents have guardians, conservators or parents who hold various rights and powers of the

resident. The guardianship orders for many residents are not uniform. Some have limited guardians and others have plenary guardians.

Examples of limited guardianship orders would be those original probate court orders appointing limited guardians for plaintiffs Watson and Runions, dated April 8, 1986 and November 16, 1987 respectively. Appendix A. These give the limited guardians the responsibility to consent or make decisions relative to medical and mental examinations, including administration of psychotropic medication; participation in studies supervised by qualified individuals; and participation in activities which are reasonable and necessary for the habilitation of the resident. The limited guardianship order for plaintiff Wilson is identical to those of Watson and Runions, except that it does not contain a provision for consent for participation in studies. Appendix A, p. 6-8.

Before this lawsuit was filed, guardianship orders typically assigned the same powers and duties to the limited guardian as were assigned to the guardians of Runions and Watson.^[6] See

^[6] On March 16, 1992, Mona Reeves-Winfrey, Superintendent of ADC petitioned the Probate Court of Shelby County to substitute Comcare, Inc. for Guardianship and Trust Corporation (GTC) as guardian for Runions and Watson. Comcare, Inc. has a contract with the State of Tennessee and ADC "to provide guardianship services to Arlington residents who require guardians but who have no family members available to act as guardian." Order of March 16, 1992, In re: Herman Walter Runions, Probate Ct. No. 8-5506 (Appendix B, p. 1). In addition to substituting Comcare for GTC, the power "to protect the respondent's personal well-being and legal interests" was also added to the orders substituting (Cont.)

Appendices C & D. That language with relatively minor variations is contained in the great majority of Guardianship Orders for ADC residents. See Appendixes C & D.

After the lawsuit was filed, the format changed and an additional power -- "[t]o protect [the resident's] personal well-being and legal interests" -- was added. Appendix B. Although plaintiffs seek a finding that those guardianship orders which add the power "to protect the person's well-being and legal interests" are an obvious effort by defendants to prevent ADC

(Cont. from previous page) guardianship. Appendix B, p. 2. When this lawsuit was filed, GTC expressed no position on Runions' and Watson's participation in this suit. (But see Declaration of Comcare, Inc. at 4, filed July 14, 1995.)

As of April 28, 1993, 220 adult residents at Arlington had court-appointed guardians or conservators; 176 adult residents at Arlington did not have court-appointed guardians or conservators; and 30 Arlington residents were minors. Affidavit of Dianna Taylor (filed May 12, 1993). Of the 220 adult residents at Arlington who had court-appointed guardians or conservators, approximately (some documents were incomplete) 178 had individuals appointed as guardians or conservators, and 42 had a contract corporate guardian or conservator appointed (either Comcare, Inc. or Guardianship and Trust Corporation of Tennessee). (2-Volume submission by State of Tennessee Relating to ADC Guardianship Orders, filed under seal May 12, 1993.)

On July 24, 1995, updated lists, reflecting changes in the resident population since the May 12, 1993 submittal, and copies of additional guardianship orders were filed. (Exhibit 30, Hearing July 24, 1995.) Exhibit 30 does not contain copies of all orders to which reference is made in the exhibit. (See Exhibit 30, Hearing, July 24, 1995.) At least one (1) pre-1993 Order Appointing Limited Guardian was included in the list and exhibit (Exhibit 30 was to contain only post April 28, 1993 orders). (See Exhibit 30, In the Matter of Annie B./Hardeman County Chancery No. 8393 (Dec. 20, 1989).) Twenty (20) conservatorship or guardianship orders are contained in Exhibit 30 (Hearing, July 24, 1995).

One hundred thirty-seven (137) declarations have been filed by intervenor in opposition to class certification. (See Intervenor's Notice of Filing Declarations (104 declarations), filed June 9, 1995; Intervenor's Notice of Filing Declarations (second submission) (29 declarations) filed July 13, 1995; Intervenor's Notice of Filing Declarations (third submission) (4 declarations) filed July 21, 1995.)

residents from participating in this suit without the guardian's permission, the Court need not reach this point to make a ruling on the motion for class certification.^[7]

Two of the individual named plaintiffs, Carl Beard and Stevelyn Tucker, have limited or natural guardians who have consented to their participation as plaintiffs in this case. Beard brings this action by a next friend with the consent of his limited guardian. Tucker brings this action by her parents and natural guardians. A third plaintiff, Keith Collins, is an adult without a guardian. He brings this action by his mother as his next friend.

It is clear from the applicable Tennessee guardianship statutory provisions and the guardianship orders entered that the guardians of most Arlington residents have only limited powers. A new Tennessee conservatorship statute became effective on January 1, 1993, T.C.A. § 34 chs. 11-13; most Arlington residents' guardians were appointed under the previous statute, T.C.A. § 34-1-101, et seq. Under both statutes, all powers that have not specifically been removed from the ward and vested in the guardian are retained and may be exercised by the ward. The current law provides that

If the court determines a conservator is needed, the

^[7] This evidence may have some bearing on the issue of whether defendants violated plaintiffs' First Amendment rights. The Court, however, is not ruling on that question at this time.

court shall enter an order which shall

...
(2) Enumerate the powers removed from the respondent and vested in the conservator. To the extent not specifically removed, the respondent retains and shall exercise all powers of a person who has not been found to be a disabled person.

T.C.A. §34-13-107.^[8]

None of the limited guardianship and conservatorship orders of Arlington residents contain provisions purporting to deprive wards of the right to associate with others, to confer with counsel of their choice, or to participate in litigation through a next friend or class representative. Thus, Arlington residents, with limited guardianship and conservatorship orders retain the right to do anything not specifically deprived of them by the limited guardianship orders.^[9]

Further, it is settled law in Tennessee that the rights of minors and other persons under legal disability may not be waived

^[8] Similarly, the pre-1993 statute provided:

Deprivation of respondent's rights.- The court may deprive the respondent of the right to vote, dispose of property, execute instruments, make purchases, enter into contractual relationships, hold a valid Tennessee driver's license, give consent to medical and mental examinations and treatment, or do such other act of legal significance the court deems necessary or advisable.

T.C.A. 34-4-111, repealed by Act of 1992, ch. 794, § 50.

^[9] It is also clear that under Tennessee law that, except as narrowly limited by orders of guardianship, Arlington residents retain their other basic civil rights and liberties. For example, T.C.A. 33-3-101 provides that, "[n]o person shall be deprived of his [or her] liberty on the grounds that he [or she] is, or is supposed to be, mentally ill, mentally retarded, or in need of mental treatment, except in accordance with the provisions of this title." At Part II of Title 33 Tennessee adopted, as a matter of public policy, a declaration of special rights of the mentally retarded which at Article I provides that a "mentally retarded person has the same basic rights as other citizens of the same country and same age." T.C.A. 33-5-201.

by a natural or legal guardian. "The general rule is that a guardian may not waive the rights of an infant or an incompetent." Childress v. Madison County, 777 S.W.2d. 1, 6 (Tenn. Ct. App., 1989) (citing 39 Am. Jur. 2d *Guardian & Ward* § 102 (1968); 42 Am. Jur. 2d *Infants* § 152 (1969)).

Indeed, legal authority supports the proposition that minors and other persons under a legal disability retain the rights of other citizens and that parents and guardians lack the power to waive the fundamental rights of their children and wards. Thus, a minor or ward has standing to sue to enjoin violations of his or her constitutional rights despite the parent's or guardian's consent to the practices or conditions being challenged. See Milonas v. Williams, 691 F.2d 931, 943 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983) (parent cannot authorize the state to limit a child's liberty without showing good cause); see also Doe by Doe v. Austin, 848 F.2d 1386, 1392 (6th Cir.), cert. denied, 488 U.S. 967 (1988) (the commitment of mentally retarded adults upon application by a parent or guardian is to be considered involuntary); Thomas S. by Brooks v. Morrow, 601 F.Supp. 1055 (W.D.N.C. 1984), aff'd, 781 F.2d 367 (4th Cir. 1986), cert. denied sub. nom. Kirk v. Thomas S. by Brooks, 476 U.S. 1124 (1986) (young man with retardation whose court-appointed guardian had consented to his admission to a state institution had standing to sue the Secretary of the North Carolina Department of Human Resources and his guardian for

violating his right to minimally adequate habilitation and unnecessarily restraining his liberty).

As for the Arlington residents whose guardians have the authority "to protect their well-being and legal interest," even if this clause is interpreted to authorize the guardian to bring civil litigation on behalf of the ward, such authority cannot be exclusive. Bonnie S. v. Altman, Civ. No. 87-3709, slip. op. at 5 (D.N.J. April 19, 1988) (quoting S. BRAKEL, ET AL., THE MENTALLY DISABLED AND THE LAW 437 (3d ed. 1985) ("[m]odern authorities generally regard the requirement that a guardian sue or be sued for the incompetent person as a protection of the interests of the incompetent person rather than as a limitation on his or her capacity to institute suit" (emphasis added by the court))). (Decision is attached to Plaintiffs' Proposed Findings of Fact and Conclusions of Law dated July 4, 1993, as Appendix C).

To hold that a person confined to an institution must obtain the consent of his or her appointed guardian to sue for violations of constitutional rights would render those rights meaningless. Altman at 1. In a lawsuit in which plaintiffs challenge conditions to which their guardians have acceded and, in fact, defend, "wards cannot be forbidden from suing without their guardians' consent. That consent, by definition, is unlikely to be forthcoming." Id. at 5 (citations omitted).

Given the complexity of the housing, habilitation and service issues experienced by members of the proposed class, given the application of a common legal standard of review to all putative class members, plaintiffs satisfy the requirement of numerosity under Rule 23(a)(1) in that joinder of all members would be impracticable.

Commonality and Typicality

The second and third requirements of Rule 23(a) are that there be questions of law and fact common to the class and that the claims of the named plaintiffs be typical of those in the class. Since "the commonality and typicality requirements of Rule 23(a) tend to merge . . .," General Telephone Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982), these will be discussed together.

Rule 23(a)(2) requires that there be "questions of law and fact common to the class." Similarly, the requirement of Rule 23(a)(3) requires that for typicality to exist there must be a common element of fact or law. Senter, 532 F.2d at 523. Plaintiffs' claims are typical of those of the class as long as "the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984), cert. denied 470 U.S. 1004 (1985); see also Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10th Cir. 1975).

The defendants apparently do not challenge the commonality of the proposed class. However, the intervenor contends that the commonality requirement is not met because of the diverse circumstances and unique characteristics of each Arlington resident. Since commonality refers to the defendants' conduct and is not defeated by the presence of individual differences among class members, intervenor's argument is without merit. See Adamson v. Bowen, 855 F.2d 668, 676 (10th Cir. 1988); Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985); and see Baby Neal v. Casey, 43 F.3d 48, 56-57 (3d Cir. 1994) (commonality requirement can be met even though class members have individual circumstances, relying on Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 61 L. Ed. 2d 176 (1979).)

While each individual class member in the instant case, requires individualized services, class members as a whole need similar types of habilitation and services, such as adequate physical therapy, proper feeding techniques, habilitation plans and behavioral programming. The common factual inquiry with respect to all class members is whether defendants are providing constitutionally adequate habilitation as well as whether defendants are prohibiting residents from associating with certain individuals in violation of their First Amendment rights. Furthermore, based on the record before the Court, the claims of the proposed plaintiff class arises from the same patterns and practices and are based on the same legal theory.

Adequacy of Representation

Rule 23(a)(4) requires the representative parties to be able to fairly and adequately protect the interests of the class as a whole. This prerequisite contains two requirements: that the named plaintiffs themselves have no interests antagonistic to those of the rest of the class, and that plaintiffs' counsel be qualified, experienced and generally able to conduct the proposed litigation. See Griffin v. Carlin, 755 F.2d 1516, 1533 (11th Cir. 1985) (citing Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969)).

As discussed above, the central issue with regard to class certification appears to be whether the lack of consent by parents and guardians for the participation of their sons, daughters and wards in the litigation, renders plaintiffs inadequate representatives of the class. This issue arises from the fact that the great majority of Arlington residents cannot express a choice regarding whether to participate in this lawsuit or a choice regarding the relief that should be entered. This, for a substantial number of the residents, is so because of their particular disabilities along with lack of experience, training and/or assistance in communicating.

The defendants' and intervenor's object to People First as class representatives based principally upon their perception of the "remedial objective" of People First of Tennessee which they

characterize as institutional closure for its own sake.^[10] The defendants and intervenor do not claim that the individual named plaintiffs have the same remedial objective(s) as People First; and further do not appear to object to the participation of plaintiffs Carl Beard, Keith Collins and Stevelyn Tucker in this lawsuit through their next friends and parents. Thus, defendants and intervenor appear to concede that at least three individual plaintiffs in this action are proper class representatives under Rule 23(a)(4).

The defendants and intervenor, however, contend that plaintiffs cannot represent the majority of Arlington residents, and that four of the seven named plaintiffs (Sandra Howard, Herman Runions, Harvey Watson, and Clarence Wilson) are precluded

^[10] People First has standing to bring this action on behalf of its members who are members of the proposed class, as well as to protect its own interests as an organization, which are affected by defendants' alleged refusal to allow People First to communicate with its members and to allow members to attend People First meetings. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) (to establish standing as representative organization, proposed representative must show that members have been injured in fact and that members could have brought suit in their own right); also see Warth v. Seldin, 422 U.S. 490 (1975). At least nine members of the proposed class, including individual plaintiffs Sandra Howard and Clarence Wilson, are members of People First of Tennessee who have formal membership applications on file with the organization. At least nine additional members of the proposed class have attended People First meetings.

The testimony at the hearing showed that People First has been interested in problems at Arlington since March 1991, when the Department of Justice issued its Letter of Finding to Governor McWherter. After the Letter of Finding was issued, People First convened a special board meeting to discuss the findings. The officers of People First also met with the Commissioner of Mental Health/Mental Retardation and left the meeting convinced that the state would not resolve the problems voluntarily.

At the March 1991 special People First board meeting, after discussion of the findings, a motion was made to ask attorneys to come to the next regular board meeting, in June 1991, to discuss litigation.

from serving as class representatives, because they have limited guardians who have not consented to their participation as plaintiffs in this action.

As discussed more fully above, the parents and guardians lack the authority to waive the fundamental rights of their children and wards; moreover, any authority by the parents or guardians to bring civil litigation on behalf of their ward is not exclusive.

Additionally, a court may not refuse to certify a class merely because some class members may prefer to leave a potential violation of their rights unremedied. Martino v. McDonald's System, Inc., 81 F.R.D. 81, 85 (N.D. Ill. 1979), (citing 3B MOORE'S FEDERAL PRACTICE, ¶ 23.06-2, 23-197 (1978)); Cullen v. New York State Civil Service Commission, 435 F.Supp. 546, 559 (E.D.N.Y. 1977), *appeal dismissed*, 566 F.2d 846 (2d Cir. 1977).

The holding of the Court of Appeals in Halderman v. Pennhurst, 612 F.2d 84, 109-111 (3d Cir. 1979) is squarely on point in this regard. Pennhurst was a class action suit brought by the Pennsylvania Association for Retarded Citizens and named plaintiffs who were residents of the institution or at risk of placement there. The state defendants challenged certification of the class as proposed by plaintiffs, arguing that a "conflict" existed between the plaintiff organization, which supported

community placement, and the vast majority of the parents and guardians, who wished the institution to remain open. The Court of Appeals rejected the defendants' argument and held that the Pennsylvania Association for Retarded Citizens, the named plaintiffs and next friends were proper class representatives because they had alleged and proved violations of Pennhurst residents' constitutional rights that affected all of the residents, not simply those who wished a transfer from Pennhurst. Where the issue was the defendants' liability, disagreement over relief had no bearing on class certification:

At the liability stage, therefore, important questions of law were common to all members of the class. Thus, *regardless of any subsequent disagreement as to the appropriate relief, we can think of no persuasive reason to have fractionated the class at that early juncture.*

612 F.2d at 109 (emphasis added).

Additionally, courts have found individualized decisions at the remedial stage fully compatible with class certification. See Pennhurst, 612 F.2d 84, 110-111 (3d Cir. 1979), rev'd on other grounds, 451 U.S. 1 (1981).

In the instant case, ample protection exists for the interest of any class member who opposes the relief sought by plaintiffs. It is clear that the interest of any class member who desires to maintain the status quo will be adequately represented by the intervenor or, perhaps, by the defendants. Plaintiffs need not show "that the whole or a majority of the class

considers his [or her] representation adequate." Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2d Cir. 1968).

In Richard C. v. Snider, 1993 WL 757634 (W.D. Pa.), the court was faced with an objection by an intervenor parent association, similar to that voiced here against People First, to the class representative status of the Pennsylvania Association for Retarded Citizens (PARC) and the Pennsylvania Protection & Advocacy Association. The intervenor claimed that the organizations were not proper class representatives because "they follow a philosophy that institutions such as Western Center are unnecessary and obsolete, are never appropriate for the placement of mentally retarded persons and should be closed." Id. at *5. In response, the court found that

Although opposing intervenors overstate the position of these organizational plaintiffs, it is true that they advocate the community placement and support, where it is appropriate, of persons residing in Western Center and similar institutions. Their position, however, is not antagonistic to the interests of the class members, notwithstanding the disagreement of the opposing intervenors.

Id.

Based on the foregoing, the Court finds that the named plaintiffs, together with People First of Tennessee, are appropriate representatives in this case. In making such a determination, the Court is mindful that to the extent that the views or goals of the parents and guardians are in conflict with those of the named plaintiffs and People First of Tennessee, those views or goals appear to be adequately represented by the

Parent Guardian Association which has been allowed to intervene in this action. By allowing intervention by the PGA and by certifying the class, the Court is assuring all affected parties the opportunity to be heard on the merits of plaintiffs' claims.

Competency of Counsel

There appears to be no dispute as to the competency of plaintiffs' counsel to represent the class. They are experienced in class action litigation, appear to have extensive knowledge of community service systems and extensive experience enforcing the rights of former institutional residents after they move to the community. A brief outline of each counsel's experience is set out below.

Jack Derryberry has handled class action litigation in antitrust actions, employment discrimination actions, and actions under the Equal Protection Clause. He has an extensive practice in the educational rights of persons with disabilities and also has extensively represented persons with disabilities in civil commitment cases. He serves as a Land Commissioner for the United States District Court for the Middle District of Tennessee.

Edward G. ("Woody") Connette graduated from Davidson College in 1974 and from University of North Carolina Law School in 1977. He has been engaged in the practice of law since graduation from law school. Since 1987, Connette has been a partner in Lesesne & Connette, where his primary emphasis is general civil trial work.

He has served as lead counsel or co-counsel in numerous class actions.

Earle J. Schwarz graduated from Brown University in 1975 and received his J.D. from Vanderbilt University in 1980, where he served as Authorities Editor for the Vanderbilt Journal of Transnational Law. He is a diplomate of the Court Practice Institute, a recipient of the Pro Bono Panel for Senior Citizens Service Award in 1984, and member of the Panel of Arbitrators of the American Arbitration Association. Mr. Schwarz is a partner in the Waring Cox law firm in Memphis, Tennessee. He has served as counsel in federal and state class action lawsuits.

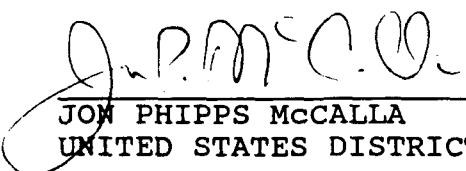
Judith Gran and Frank Laski of the Public Interest Law Center of Philadelphia are class counsel for many of institutional residents and former residents who now live in the community. Ms. Gran graduated from Wellesley College, the University of Chicago, and Temple University School of Law, where she served on the Temple Law Quarterly. Mr. Laski graduated from the University of Massachusetts and Harvard University School of Law. He is President of TASH (the Association for Persons with Severe Handicaps), a leading professional organization in the field of services for persons with severe disabilities.

In addition to meeting the requirements of Rule 23(a), the Court concludes that the requirements of Rule 23(b)(2) have also

been satisfied.

For the reasons set out above, it is hereby ORDERED that a class of plaintiffs is certified to include: all persons who on or after December 12, 1989, have resided, or are residing at the Arlington Developmental Center; all persons who have been transferred from Arlington Developmental Center to other settings such as intermediate care facilities or skilled nursing facilities but remain defendants' responsibility; and all persons at risk of being placed at Arlington Developmental Center.

Entered this 26 day of September 1995.



JON PHIPPS McCALLA
UNITED STATES DISTRICT JUDGE

APPENDIX A

(Guardianship Orders appointing Limited Guardians for Plaintiffs Runions, Watson and Wilson, dated April 8, 1986, November 16, 1995, and October 2, 1989, respectively.)

IN THE PROBATE COURT OF SHELLEY COUNTY, TENNESSEE

IN THE MATTER OF:

NO. B-5506

HERMAN RUNIONS

ORDER APPOINTING LIMITED GUARDIAN

This cause came to be heard on January 22, 1986 and March 31, 1986 before The Honorable Leonard D. Pierotti, upon the sworn petition of H. Russell White, as superintendent of the Arlington Developmental Center, the sworn written report of Hak Es Pyun, M.D., a physician licensed to practice in the State of Tennessee, the report of the guardian ad litem, the answer of the respondent, the respondent's motion to amend or supplement petition for limited guardianship, the sworn testimony of Walter Antonow, Ph.D. and Jan Lusk, employees of the Arlington Developmental Center; and of M. Jill Copeland, Ph.D., executive director of Guardianship and Trust Corporation of Tennessee, the statements of counsel, and the entire record of this proceeding:

Based upon the foregoing, the following facts and circumstances appear to the Court, and the Court so finds:

1. That the respondent, Herman Runions, is a disabled person within the meaning of T.C.A. Section 34-4-101 et seq., due to mental retardation and other conditions, and is in need of a limited guardian.
2. That it appears to the Court that a continued and diligent search for a relative or natural resident of Tennessee to serve as a limited guardian was made after timely continuance of this matter for good cause shown.
3. That under all of the above set forth facts and circumstances, the petitioner's motion to amend or supplement petition for limited guardianship should be granted.
4. That Guardianship and Trust Corporation of Tennessee, a Tennessee corporation is a suitable person to be named as limited guardian of the respondent and should be so named.
5. That the respondent should be deprived of the rights specified in the sworn joint petition heretofore filed.
6. That respondent is a resident of Arlington Developmental Center and an indigent person.

7. That no property of the resident is to be controlled by the aforesaid limited guardian.
8. That the interdisciplinary team of Herman Runions at the Arlington Developmental Center shall by and through its leader make a written report to this court describing the named limited guardian's functioning every six (6) months succeeding this order's entry, until further ordered by this Court.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. The petitioner's aforesaid motion is hereby granted.
2. That the respondent be deprived of the following powers and rights:

- (a) to give consent and make other informed decisions relative to medical and mental examinations and treatment including, but not limited to, admission to health care facilities, surgery, and administration of psychotropic medication;
- (b) to consent to participation in studies supervised by qualified professionals;
- (c) to consent to participation in activities which are reasonable and necessary for the habilitation of the respondent;

and that such powers and rights hereby be vested in Guardianship and Trust Corporation of Tennessee as limited guardian, pursuant to T.C.A. Section 34-4-101 et seq.

3. That the said limited guardian shall comply with those duties imposed by T.C.A. Section 34-4-101 et seq., including making and filing with this Court an annual report, but no bond shall be required pursuant to T.C.A. Section 34-4-114.

4. That in the event of an anticipated discharge of the respondent from the Arlington Developmental Center, Guardianship and Trust Corporation may be allowed to resign as limited guardian after approval of this Court, upon written petition being filed with notice to all parties.

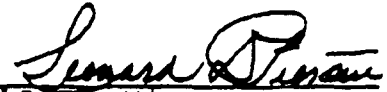
5. That the costs of this proceeding shall be paid by the State pursuant to T.C.A. Section 33-3-503(b), due to respondent's indigency.

6. That Richard Winchester, attorney for the respondent and guardian ad litem be awarded three hundred dollars (\$300.00) as a fee.

7. That the interdisciplinary team of Herman Runions at the Arlington Developmental Center shall by and through its leader

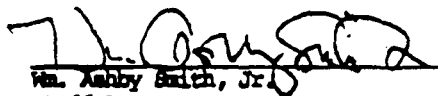
make a written report to this court describing the named limited guardian's functioning every six (6) months succeeding this order's entry, until further ordered by this Court.

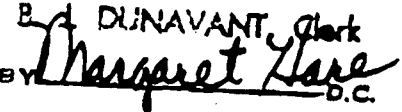
BY THE COURT

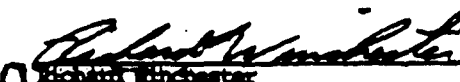

Leonard D. Pierotti
Probate Judge

Dated: 4/8/86

APPROVED AS TO FORM:


Wm. Ashby Smith, Jr.
Staff Attorney
Arlington Developmental Center
P.O. Box 399
Arlington, Tennessee 38002

A TRUE COPY ATTEST
B. DUNAVANT, Clerk
BY  Margaret Hare
D.C.


Robert Winchester
Attorney for the Respondent
and Guardian Ad Litem
300 Winchester Building
Fifth Floor
2 Third St., South
Memphis, TN 38103-2787

IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

IN RE:

HARVEY RICHARD WATSON

No. B-10381

ORDER APPOINTING LIMITED CO-GUARDIANS

This cause came to be heard on November 16, 1987, upon the sworn joint petition of H. Russell White, as superintendent of the Arlington Developmental Center, and Charlyne McLean Watson, mother of the respondent, the sworn written report of George Lovejoy, M.D., a physician licensed to practice in the state of Tennessee, the report of the guardian ad litem, the sworn testimony, the statements of counsel, and the entire record in this cause.

From all of which it appears to the Court and the Court finds:

1. That the respondent, Harvey Richard Watson, is a disabled person within the meaning of Tenn. Code Ann. § 34-4-401 et seq., due to profound mental retardation;
2. That Guardianship And Trusts Corporation Of Tennessee and Charlyne McLean Watson are suitable persons to serve as the limited co-guardians for the respondent;
3. That the respondent should be deprived of the rights specified in the sworn petition heretofore filed;
4. That the respondent is a resident of Arlington Developmental Center and an indigent person;
5. That no property of the respondent is to be controlled by the limited co-guardians.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the respondent be deprived of the following powers and rights:
 - a. To give consent and make other informed decisions relative to medical and mental examinations and treatment, including, but not limited to, surgery and administration of psychotropic medication;

EXHIBIT B

b. To consent to participation in studies supervised by qualified professionals; and

c. To consent to participation in activities which are reasonable and necessary for the habilitation of the respondent.

2. That said powers and rights hereby are vested in Guardianship And Trust Corporation Of Tennessee and Charlyne McLean Watson as limited co-guardians, pursuant to Tenn. Code Ann. § 34-4-101 et seq.

3. That the said limited co-guardians shall comply with those duties imposed by Tenn. Code Ann. § 34-4-101 et seq., but no bond shall be required pursuant to Tenn. Code Ann. § 34-4-114; and

4. That ^{the respondent is an indigent person and} the costs of this proceeding shall be paid by the state of Tennessee pursuant to Tenn. Code Ann. § 33-3-803(b), including an attorney's fee to William E. Frulla, adversary counsel, in the amount of \$200.00 and an attorney's fee to George P. Collier, guardian ad litem, in the amount of \$200.00.

Leonard D. Smith
JUDGE
DATE: 11/14/87

Approved As To Form:

William Ashby Smith, Jr.
Staff Attorney
Arlington Developmental
Center
P.O. Box 399
Arlington, TN 38002

William E. Frulla
WARRING COX
1300 Morgan Keegan Tower
50 North Front Street
Memphis, TN 38103
(901) 576-8000
Adversary Counsel

S. Shepherd Tate
W. Price Morrison, Jr.
MARTIN, TATE, MORROW &
MARTON, P.C.
6060 Poplar Avenue,
Suite 295
Memphis, TN 38119
(901) 763-4800

George P. Collier
629 Poplar Avenue
Memphis, TN 38108
(901) 523-8015
Guardian Ad Litem

Attorneys for Petitioner
Charlyne McLean Watson
MARSHALL, SMITH & ASSOCIATES

A TRUE COPY ATTEST
B. J. DUNAVANT, Clerk

By: [Signature]

- 2 -

IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

IN RE:
CLARENCE WILSON

*
* No. B-13936
*
*

ORDER APPOINTING LIMITED GUARDIAN

THIS CAUSE came to be heard on September 20, 1989 before the Honorable Donn A. Southern, upon the sworn petition and amended petition of Mona Reeves-Winfrey, as Superintendent of the Arlington Developmental Center, the sworn written Report of George P. Jones, M.D., a physician licensed to practice in the State of Tennessee, the Report of the guardian ad litem, the sworn testimony of Kay Carlton, Social Worker at the Arlington Developmental Center, and Craig Ralls, Social Worker with Comcare, Inc., the statements of counsel and the entire record in this proceeding; from all of which, the Court finds as follows:

1. That the respondent, Clarence Wilson, is a disabled person within the meaning of Tennessee Code Annotated (hereinafter "T.C.A.") Section 34-4-101 et seq. due to mental retardation and other conditions.
2. That Comcare, Inc. is a suitable entity to serve as the limited guardian for the respondent.
3. That the respondent should be deprived of the rights specified in the Petition heretofore filed in this cause.
4. That the respondent is a resident of the Arlington Developmental Center and an indigent person.
5. That there is no property owned by the respondent which should be controlled by the limited guardian.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the respondent is found to be a disabled person within the meaning of T.C.A. Section 34-4-101 et seq.
2. That the respondent be deprived of the following powers and rights:
 - (a) to give consent and make other informed decisions relative to medical and mental examinations and treatment including, but not limited to, admission to health care facilities, surgery and administration of psychotropic medication;
 - (b) to consent to participation in activities which are reasonable and necessary for the habilitation of the respondent;and that, such powers and rights hereby be vested in Comcare, Inc. as limited guardian for the respondent.
3. That Comcare, Inc. is a willing and suitable entity to serve as limited guardian for the respondent; and that, it is in the best interests of the respondent that Comcare, Inc. be, and the same hereby is, appointed as limited guardian for CLARENCE WILSON.
4. That the costs of this proceeding shall be paid by the State of Tennessee pursuant to T.C.A. Section 33-3-503(b), due to the respondent's indigency.
5. That there is no property of the respondent which is to be managed by the limited guardian; therefore, no bond shall be required of the limited guardian pursuant to T.C.A. Section 34-4-114.
6. That Clarence Halmon, guardian ad litem and attorney for the respondent, be awarded a fee of two hundred fifty dollars (\$250.00) for his services in this cause.

Donna Southern
Judge

10/2/89
Date

APPROVED FOR ENTRY:

Albert H. Allen
Albert H. Allen
Attorney for Petitioner

A TRUE COPY ATTEST

B. J. DUNAVANT, Clerk
BY Brenda Roberts D.C.

Clarence Halmon
Clarence Halmon
Guardian Ad Litem and
Adversary Counsel

Appendix B

**(Guardianship Orders for Runions and Watson, dated March 16,
1992.)**

IN THE MATTER OF:
HERMAN WALTER RUNIONS

)
)

NO. 8-5506
DIV. I

ORDER SUBSTITUTING LIMITED GUARDIAN

This cause came to be heard on the 16th day of March, 1992, upon the sworn petition of Mona Reeves-Winfrey Superintendent of the Arlington Developmental Center, a facility of the Tennessee Department of Mental Health and Mental Retardation, upon the testimony of Lucy Billings, West Tennessee representative for Comcare, Inc., and upon the entire record in this cause, from which it satisfactorily appears to the Court that:

1. By order dated April 8, 1986, the ward Herman Walter Runions was found to be a disabled person under the Limited Guardianship Proceedings for Disabled Persons Law of this State and at that time the Guardianship and Trust Corporation of Tennessee was appointed as limited guardian for such ward.

2. The ward at all times relevant hereto has been a resident of the Arlington Developmental Center, a facility of the Tennessee Department of Mental Health and Mental Retardation.

3. At the time the limited guardianship was established, the Arlington Developmental Center and the State of Tennessee had a contract with the Guardianship and Trust Corporation of Tennessee to provide guardianship services to Arlington residents who require guardians but who have no family members available to act as guardian.

4. Subsequent to the limited guardianship order in this matter Arlington Developmental Center and the State of Tennessee have granted a contract to Comcare, Inc., under which contract Comcare, Inc., would provide guardianship services previously rendered by Guardianship and Trust Corporation of Tennessee.

5. The change in the guardianship service contract was based solely upon fiscal and administrative considerations and was not to indicate any dissatisfaction with the Guardianship and Trust Corporation of Tennessee.

6. Comcare, Inc., is an acceptable and appropriate party to serve as limited guardian in this matter and that it is in the best interests of the ward that such substitution of limited guardianship be granted by the Court.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that:

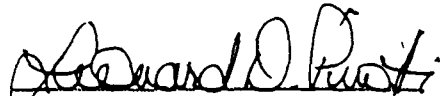
1. The Guardianship and Trust Corporation of Tennessee be, and hereby is, removed as the limited guardian in this matter.

2. Comcare, Inc., be, and hereby is, appointed as successor limited guardian for the ward Herman Walter Runions to serve without bond under the same terms and conditions as heretofore provided for the Guardianship and Trust Corporation of Tennessee, and, further, to protect the personal well-being and legal interests of the ward.

3. The Clerk of this Court is directed to issue Letters of Limited Guardianship to Comcare, Inc.

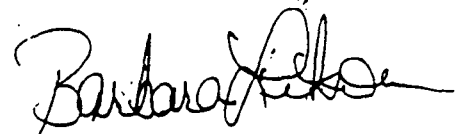
4. The Guardianship and Trust Corporation of Tennessee is to issue a full and final report to this Court within sixty (60) days regarding its activities as limited guardian.

5. All costs in this matter are assessed against the State of Tennessee.


Judge

3-16-92
Date

Mary M. Horton
Mary M. Horton (BPR No. 11537)
Attorney for Petitioner
Tennessee Department of
Mental Health and
Mental Retardation
Arlington Developmental Center
P.O. Box 586
Arlington, TN 38002-0586
(901)867-2921



IN THE PROBATE COURT OF SHELBY COUNTY, TENNESSEE

IN THE MATTER OF:	)	NO. B-10381
	)	
HARVEY WATSON		DIV. I

ORDER SUBSTITUTING CO-LIMITED GUARDIAN

This cause came to be heard on the 16th day of March, 1992, upon the sworn petition of Mona Reeves-Winfrey Superintendent of the Arlington Developmental Center, a facility of the Tennessee Department of Mental Health and Mental Retardation, upon the testimony of Lucy Billings, West Tennessee representative for Comcare, Inc., and upon the entire record in this cause, from which it satisfactorily appears to the Court that:

1. By order dated November 16, 1987, the ward Harvey Watson was found to be a disabled person under the Limited Guardianship Proceedings for Disabled Persons Law of this State and at that time the Guardianship and Trust Corporation of Tennessee was appointed to serve with the ward's mother Charlyne McLean Watson as co-limited guardian for such ward.
2. The ward at all times relevant hereto has been a resident of the Arlington Developmental Center, a facility of the Tennessee Department of Mental Health and Mental Retardation.
3. At the time the limited guardianship was established, the Arlington Developmental Center and the State of Tennessee had a contract with the Guardianship and Trust Corporation of Tennessee to provide guardianship services to Arlington residents who require guardians but who have no family members available to act as guardian.
4. Subsequent to the limited guardianship order in this matter Arlington Developmental Center and the State of Tennessee have granted a contract to Comcare, Inc., under which contract Comcare, Inc., would provide guardianship services previously rendered by Guardianship and Trust Corporation of Tennessee.
5. The change in the guardianship service contract was based solely upon fiscal and administrative considerations and was not to

Attorney's copy

include any dissatisfaction with the Guardianship and Trust Corporation of Tennessee.

6. Comcare, Inc., is an acceptable and appropriate party to serve as co-limited guardian in this matter and that, it is in the best interests of the ward that such substitution of co-limited guardianship be granted by the Court.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. The Guardianship and Trust Corporation of Tennessee be, and hereby is, removed as the co-limited guardian in this matter.

2. Comcare, Inc., be, and hereby is, appointed as successor co-limited guardian for the ward Harvey Watson to serve without bond under the same terms and conditions as heretofore provided for the Guardianship and Trust Corporation of Tennessee, and, further, to protect the personal well-being and legal interests of the ward.

3. The Clerk of this Court is directed to issue Letters of Co-Limited Guardianship to Comcare, Inc.

4. The Guardianship and Trust Corporation of Tennessee is to issue a full and final report to this Court within sixty (60) days regarding its activities as co-limited guardian.

5. All costs in this matter are assessed against the State of Tennessee.

Leonard A. Perotti
Judge

3/16/92
Date

Mary M. Horton
Mary M. Horton (BPR No. 11537)
Attorney for Petitioner
Tennessee Department of
Mental Health and
Mental Retardation
Arlington Developmental Center
P.O. Box 586
Arlington, TN 38002-0586
(901)867-2921

Annita M. Munn



Appendix D

**(Part of Defendants' supplemental submission relating to
Guardianship Orders previously filed under seal on May 12, 1993.)**

A. Orders for the appointment of a Conservator of the Person, under the new conservatorship law, Tenn. Code Ann. §§34-11-101 et seq. and 34-13-101 et seq. The appointed Conservators, by Order, are given "full authority over the person of the Respondent. . . which authority shall include but not be limited to the following powers and rights:

- (a) To give consent to and to make other informed decisions relative to medical and mental examinations and treatment including, but not limited to, admission to health care and residential facilities, surgery, and the administration of psychotropic medication;
- (b) To consent to participation in studies supervised by qualified professionals;
- (c) To consent to participation in activities which are reasonable and necessary for the habilitation of the Respondent;
- (d) To protect Respondent's personal well-being and legal interests.

1. B [REDACTED] Jeffrey
2. C [REDACTED] Flora
3. E [REDACTED] Pamela
4. E [REDACTED] Donna
5. G [REDACTED] James Leroy
6. H [REDACTED] Jerome
7. H [REDACTED] Melynda
8. L [REDACTED] Teresa
9. L [REDACTED] Vicki
10. M [REDACTED] Michael

11. M [REDACTED] Devona
12. M [REDACTED] Freddie Glenn
13. N [REDACTED] Brownlow
14. S [REDACTED] James
15. S [REDACTED] Jayna Marie
16. S [REDACTED] David Vincent
17. T [REDACTED] Kandethies
18. W [REDACTED] Floyd
19. W [REDACTED] Donatella
20. Y [REDACTED] Kathy Ann

B. Orders appointing Limited Guardians and vesting them with the following powers and rights:

- (a) To give consent to and make other informed decisions relative to medical and mental examinations and treatment including, but not limited to, admission to health care and residential facilities, surgery, and the administration of psychotropic medication;
- (b) To consent to participation in studies supervised by qualified professionals;
- (c) To consent to participation in activities which are reasonable and necessary for the habilitation of the Respondent;
- (d) To protect Respondent's personal well-being and legal interests.

1. A [REDACTED] Mary
2. A [REDACTED] Debbra
3. B [REDACTED] Carl
4. B [REDACTED] James
5. B [REDACTED] Gerald Wayne
6. B [REDACTED] Anthony Burnell
7. B [REDACTED] Ronald Stanton
8. C [REDACTED] Elton Eugene
9. D [REDACTED] Necole
10. D [REDACTED] Robbie Jane
11. F [REDACTED] Larry
12. G [REDACTED] Micheal V.
13. G [REDACTED] Phillip A.

14. H [REDACTED] Claude
15. H [REDACTED] Sondra
16. H [REDACTED] Donna
17. J [REDACTED] James*
18. K [REDACTED] Catherine Jane
19. I [REDACTED] Kenneth
20. L [REDACTED] Gregory Maurice
21. L [REDACTED] Bobby Lee*
22. M [REDACTED] Trevor*
23. M [REDACTED] Miriam
24. M [REDACTED] John*
25. P [REDACTED] Jerry Patterson ("Pat")
26. R [REDACTED] Jules Mark
27. R [REDACTED] Karen
28. R [REDACTED] Herman*
29. S [REDACTED] Oliver
30. S [REDACTED] Bobbie
31. S [REDACTED] Keri Michele
32. T [REDACTED] Candethous
33. T [REDACTED] Humphrey

*See Order Substituting Limited Guardian, adding the power and right to protect the personal well-being and legal interests of the ward.

34. W [REDACTED] Louis Wayne
35. W [REDACTED] Sterling
36. W [REDACTED] Dale Allen
37. W [REDACTED] Clara
38. Y [REDACTED] Lloyd Hayes*

*See Order Substituting Limited Guardian, adding the power and right to protect the personal well-being and legal interests of the ward.

C. Orders appointing Conservators with the following specified powers and rights:

- (a) To give consent to make other informed decisions relative to medical and mental examinations and treatment including, but not limited to, admissions to health care and residential facilities, surgery, and the administration of psychotropic medication;
- (b) To consent to participation in studies supervised by qualified professionals;
- (c) To consent to participation in activities which are reasonable and necessary for the habilitation of the Respondent;
- (d) To protect Respondent's personal well-being and legal interests.

- 1. D[REDACTED] Timothy Guinn
- 2. R[REDACTED] John Paul
- 3. W[REDACTED] Terry Alan

D. Orders appointing Limited Guardian or Conservator of the person, with the following powers:

- (1) To consent to and make other informed decisions relative to any and all medical and mental examinations and treatments, and psychological services, including but not limited to, admission to medical care programs, residential facilities, surgery and the administration of any appropriate medication, including but not limited to, psychotropic medication.
- (2) To consent to participation in studies supervised by qualified professionals.
- (3) To consent to participation in activities which are reasonable and necessary for the care, training and habilitation of respondent.
- (4) To protect respondent's personal well being and legal interests.

1. K██████████Robert

F. Orders appointing Limited Guardians or Conservators and vesting them with the following powers and rights:

- (a) To give consent and make other informed decisions relative to medical and mental examinations and treatment including, but not limited to, admission to health care and residential facilities, surgery, and administration of psychotropic medication;
- (b) To consent to participation in studies supervised by qualified professionals;
- (c) To consent to participation in activities which are reasonable and necessary for the habilitation of the respondent;

- 1. A [REDACTED] Rebecca
- 2. A [REDACTED] Marvin
- 3. A [REDACTED] Joseph Lynn
- 4. B [REDACTED] Carol Ann
- 5. B [REDACTED] Darren
- 6. B [REDACTED] Amy Patricia
- 7. B [REDACTED] Mary
- 8. B [REDACTED] Francis ("Andy")
- 9. B [REDACTED] Deadre Mae
- 10. C [REDACTED] Andre
- 11. C [REDACTED] Judith
- 12. C [REDACTED] Gregory
- 13. C [REDACTED] Esta Lynn
- 14. C [REDACTED] Julia Rebecca

E. Orders appointing Limited Guardians and vesting them with the following powers and rights:

- (a) To give consent to and make other informed decisions relative to medical and mental examination and treatment, including, but not limited to, surgery and administration of psychotropic medication;
- (b) To consent to participation in studies supervised by qualified professionals; and
- (c) To consent to participation in activities which are reasonable and necessary for the habilitation of the respondent;
- (d) To protect the personal well being and legal interests of the respondent.

1. W [REDACTED] Harvey Richard [See Order Substituting Co-Limited Guardian for power in (d)]

15. C [REDACTED] Lisa Virginia
16. D [REDACTED] Diane
17. D [REDACTED] James
18. D [REDACTED] Dennis
19. E [REDACTED] Dianna Lynn
20. F [REDACTED] Lois Regina
21. F [REDACTED] Gary
22. G [REDACTED] Johnny
23. G [REDACTED] Glenn
24. G [REDACTED] Melvin
25. G [REDACTED] Jerry
26. G [REDACTED] Belinda Kay
27. H [REDACTED] Clarence Jerome
28. H [REDACTED] Charlotte Anita
29. H [REDACTED] Susan
30. H [REDACTED] Sherry Diane
31. J [REDACTED] Adrian Marcel
32. J [REDACTED] Anthony
33. J [REDACTED] Deborah Gail
34. K [REDACTED] Tina Cheville
35. L [REDACTED] Carla
36. L [REDACTED], Robert Clyde
37. L [REDACTED] Frederick Maurice

38. M[REDACTED] Micheal
39. M[REDACTED] Sandra K.
40. M[REDACTED] Micheal David
41. M[REDACTED] Fred
42. M[REDACTED] Murray E.
43. M[REDACTED] Valentina
44. M[REDACTED] A.J.
45. M[REDACTED] Leonard Andrew
46. N[REDACTED] Stuart Gregory
47. O[REDACTED] Laurie L.
48. P[REDACTED] Barbara
49. P[REDACTED] Charles Bridgeman
50. P[REDACTED] Beverly Ann
51. P[REDACTED] Charles
52. R[REDACTED] Rose Anne
53. R[REDACTED] Clifton S.
54. R[REDACTED] Betty
55. S[REDACTED] Ruth Ann
56. S[REDACTED] Barbara Jean
57. S[REDACTED] David O'Neil
58. S[REDACTED] Linnie
59. S[REDACTED] Cindy M.
60. S[REDACTED] Micheal

61. S [REDACTED] Rebecca L.
62. T [REDACTED] Arnold Wayne
63. T [REDACTED] Lisa
64. T [REDACTED] Lessie
65. T [REDACTED] Jessie
66. V [REDACTED] Linda
67. V [REDACTED] Terry Lee
68. V [REDACTED] Donald Keith
69. W [REDACTED] James Micheal
70. W [REDACTED] Alfreida
71. W [REDACTED] Archie
72. W [REDACTED] David
73. W [REDACTED] Barbara

G. Orders appointing Conservators of the person, with the following powers and rights:

- (a) The powers listed in Tenn. Code. Ann. §34-4-207 [the same duties and powers as the guardian of a minor];
- (b) To give consent and make other informed decisions relative to any and all medical and mental examinations and treatment and psychological services, including, but not limited to, admission to medical health care programs, residential facilities, surgery, and administration of any appropriate medication, including, but not limited to, psychotropic medication;
- (c) To consent to participation in studies supervised by qualified professionals;
- (d) To consent to participation in activities which are reasonable and necessary for the care, training and habilitation of the Respondent;

1. M [REDACTED] Donna L.

H. Orders appointing Conservators or Guardians of the person:

1. A████ Terrell Lynn
2. A████ Phillis Joy
3. A████ Sparkie Wren
4. B████ Bobbie
5. B████ Richard
6. B████ Nancy Jane
7. E████ Leslie
8. G████ Jimmy
9. H████ Roger Douglas
10. J████ Denny Bryan
11. K████ Charlotte, Elizabeth
12. M████ Orphis Adell
13. M████, Howard Parker
14. M████ O'Linda
15. M████ Ira Justin
16. R████ David Jay
17. S████ Stephen Thomas
18. T████ Charles Anderson
19. V████ Jack Lee
20. W████ Phillip Lester
21. Y████ Timothy Bernard

I. Orders appointing Limited Guardians and vesting them with the following powers and rights:

- (a) The right to give consent and make other informed decisions relative to medical and mental examination and treatments including, but not limited to, surgery and administration of psychotropic medication.
- (b) The right to consent to participation in studies supervised by qualified professionals.
- (c) The right to consent to participation in activities which are reasonable and necessary for the habilitation of the respondent.

- 1. A [REDACTED] Johnny Glenn
- 2. B [REDACTED] Mary Catherine
- 3. B [REDACTED] Melanie Heather Ann
- 4. B [REDACTED] Annie
- 5. C [REDACTED] Omie
- 6. C [REDACTED] John Jeffrey
- 7. C [REDACTED] Paige Andrea
- 8. C [REDACTED] Glenn Allen
- 9. C [REDACTED] Donald Ray
- 10. D [REDACTED] David Leslie
- 11. D [REDACTED] Lisa Gail
- 12. D [REDACTED] Charles
- 13. E [REDACTED] Donald
- 14. F [REDACTED] Scott Thomas

15. F█████ Idella Louise
16. F█████ William David
17. H█████ M. G.
18. J█████ Merrill
19. J█████ Garrett
20. K█████ Micheal Anthony
21. K█████ Lana
22. M█████ Emmett Evans
23. O█████ Douglas E.
24. P█████ Gladys
25. P█████ Darryl K.
26. S█████ Kathleen Lynn
27. S█████ Glenna J.
28. T█████ Jenny Sue
29. T█████ Tyrone
30. T█████ Larry Richard
31. W█████ Christopher Andrew
32. W█████ James
33. W█████ Francine Lois
34. W█████ Brian Kelly
35. W█████ Thomas Wayne

J. Orders appointing Limited Guardians and vesting them with the following powers and rights:

- (a) To give consent and make other informed decisions relative to medical and mental examinations and treatment including, but not limited to, admission to health care facilities, surgery and administration of psychotropic medication;
- (b) To consent to participation in activities which are reasonable and necessary for the habilitation of the respondent;

1. T [REDACTED] Larry

2. W [REDACTED] Clarence

K. Orders appointing Limited Guardians, with the following powers:

- (a) To consent to admission to the Arlington Developmental Center as a full-time resident;
- (b) To consent to appropriate treatment plans or training as suggested by the Arlington Developmental Center;
- (c) To consent to medical and mental examination and treatment;
- (d) To consent to discharge from Arlington Developmental Center;
- (e) To consent to admission into other professional programs providing services for the mentally retarded upon discharge from the Arlington Developmental Center.

1. H [REDACTED] Tony Lavelle

2. J [REDACTED] Ethel Mae

L. Orders appointing Limited Guardians with the following powers and duties:

- (a) To make provision for the ward's care, comfort, maintenance, and support;
- (b) To make decisions about custody of the ward and to make custodial arrangements, with consideration given to the needs and desires of the ward;
- (c) To make reasonable effort to secure for the ward training, education, medical and psychological services, and social and vocational opportunities as appropriate, as well as to assist the ward in the development of maximum self-reliance and independence;
- (d) To give or withhold consent to such medical and mental examinations and treatments of the ward as the limited guardian shall determine to be appropriate.

1. H [REDACTED] Timothy Lee

2. S [REDACTED] Earlene

- M. Orders appointing Limited Guardians with the following powers and duties:
- a. Custody of the ward;
 - b. To make provision for the ward's care, comfort, maintenance, and support;
 - c. To secure training, education, medical and psychological services, and social and vocational opportunities as are appropriate, as well as to assist the ward in development of maximum self-reliance and independence;
 - d. To consent to medical and mental examinations and treatment including but not limited to admission to and discharge from health care facilities, surgery, administration of psychotropic medication, participation in studies conducted by qualified professionals, and participation in activities which are reasonable and necessary for the ward's habilitation.

- 1. C [REDACTED] Teresa Annette
- 2. K [REDACTED] Judy Catherine

- N. Orders appointing Limited Guardians with the following powers and duties:
- a. To make suitable provisions regarding care, comfort, maintenance, and support;
 - b. To make reasonable efforts to secure for the ward training, education, medical, and psychological services;
 - c. To consent to appropriate medical and mental examinations and treatments on behalf of the ward.

1. W[REDACTED] Jacqueline Deneen

O. Orders appointing Limited Guardians with the following powers and duties:

- a. Custody of the ward;
- b. To make provision for educational, medical, and psychological services and social opportunities;
- c. To make provision for the ward's care, comfort, maintenance, and support.

1. T [REDACTED] Vernon Lee

P. Orders appointing Conservators of the person, with the following powers and rights:

- (a) To make decisions and arrangements, similar to those which would be made by the parent of a minor child, about the custody and residence of the disabled person.
- (b) To make arrangements for the proper care, training and treatment of the disabled person.
- (c) To make application on behalf of the disabled person for certain benefits where appropriate, such as Social Security and Medicaid.
- (d) To make decisions about medical and surgical treatment on behalf of the disabled person.

1. A [REDACTED] Sandra
2. H [REDACTED] Nedra Elaine
3. H [REDACTED] Kimberly Andrea
4. M [REDACTED] Orta Kelly
5. R [REDACTED] Darlene
6. R [REDACTED] George Edward
7. S [REDACTED] Loretta
8. S [REDACTED] Charles L.
9. T [REDACTED] Rickey David
10. W [REDACTED] Matthew Scott

- Q. Orders appointing Limited Guardians with the following powers and rights:
- a. To give consent and make other informed decisions relative to medical and mental examinations and treatments including, but not limited to surgery and administration of psychotropic medication;
 - b. To consent to participation and studies supervised by qualified professionals;

1. S [REDACTED] Timothy

- R. Orders appointing Limited Guardians with the following powers:
- a. To secure medical and mental health treatment and to consent to surgery;
 - b. To secure services appropriate to assist the ward in the development of maximum self-reliance.

1. F [REDACTED] Alice

- s. Orders appointing Limited Guardians with the following powers:
- a. Those provided by Tenn. Code Ann. §§ 34-4-101 et seq.
 - b. To consent to any and all medical or mental examinations and treatment;
 - c. To authorize the ward's institutionalization;
 - d. To dispose of all other matters.

1. J [REDACTED] Carla Marie

T. Orders appointing Limited Guardians with the following powers:

- a. To consent to medical and psychological care and treatment;
- b. To execute all instruments necessary in order to admit the ward to Arlington Developmental Center for treatment.

1. K [REDACTED] Mary Kay

2. W [REDACTED] Carol Jean

- U. Orders appointing Limited Guardians with the following powers and duties:
 - a. To admit to any hospital, clinic, or otherwise for health, education, welfare, or medical treatment;
 - b. To consent to medical treatment.

1. S [REDACTED] Russell

v. Orders appointing Limited Guardians with the following powers and duties:

a. Consenting to medical care and treatment in the ward's best interest.

1. P [REDACTED] Sandra L.

2. W [REDACTED] Dana Edward

W. Orders appointing Limited Guardian or Conservator over the estate.

1. A [REDACTED] Paul David
2. B [REDACTED] Michele Ann
3. J [REDACTED] Thomas Steven

X. Orders appointing Conservators of the person, with the following powers and rights:

- (a) To give consent and make other informed decisions relative to medical and mental examinations or hospitalization and treatment including, but not limited to, surgery and the administration of psychotropic medication;
- (b) To determine where the respondent will live.

1. T [REDACTED] Brenda Ann

FILED BY HW D.C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ROBERT R. DI TROLIO
CLERK, U.S. DIST. CT.
W.D. OF TN, MEMPHIS

PEOPLE FIRST OF TENNESSEE,
on behalf of its members,

CARL BEARD, by his next
friend Wendy Kurland,

SANDRA HOWARD, by her next
friend Elizabeth
Henderson,

HERMAN WALTER RUNIONS, by his
next friend Sarah R. Todd,

HARVEY RICHARD WATSON, by his
next friend Jodie Wheeler,

CLARENCE WILSON, by his next
friend Wilma Williamson,

KEITH COLLINS, by his mother
and next friend, JOYCE
CISCO,

STEVELYN DANIEAL TUCKER, by her
parents and next friends,
Carolyn and Steve Tucker,

Plaintiffs,

v.

THE ARLINGTON DEVELOPMENTAL
CENTER,

NED McWHERTER, in his official
capacity as Governor of
the State of Tennessee,

MONA REEVES-WINFREY, in her
official capacity as
Superintendent of the
Arlington Developmental
Center,

THE TENNESSEE DEPARTMENT OF
MENTAL HEALTH AND MENTAL
RETARDATION,

CERTIFIED TRUE COPY
ROBERT R. DI TROLIO
U.S. DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

BY F. J. Herron
DEPUTY CLERK

No. 92-2213-M1/V

2N

EVELYN C. ROBERTSON, JR., in)
his official capacity as)
Commissioner of Mental Health)
and Mental Retardation,)
)

MARJORIE NELLE CARDWELL, in her)
official capacity as)
Assistant Commissioner for)
Mental Retardation,)
)

THE TENNESSEE DEPARTMENT OF)
HEALTH,)
)

RUSSELL WHITE, in his official)
capacity as Commissioner)
of Health,)
)

MANNIE MARTIN, in his official)
capacity as Director of)
the Bureau of Medicaid,)
)

THE TENNESSEE DEPARTMENT OF)
HUMAN SERVICES,)
)

ROBERT GRUNOW, in his official)
capacity as Commissioner)
of Human Services,)
)

BETTY GAYLE, in her official)
capacity as Assistant)
Commissioner for Social)
Services,)
)

PATSY MATTHEWS, in her official)
capacity as Assistant)
Commissioner for)
Rehabilitation Services,)
)

Defendants.)
)
)

PARENT-GUARDIAN ASSOCIATION OF)
ARLINGTON DEVELOPMENTAL CENTER)
)

Intervenor.)
)

ORDER GRANTING MOTION TO ENTER FINDINGS FROM 92-2062 IN THIS CASE
AND
GRANTING MOTION TO INTERVENE
IN CIVIL ACTION NO. 92-2062

Before the Court is plaintiffs' Motion for Entry of The Court's Findings And Orders on Liability in United States of America V. State of Tennessee, et al., Civil Action No. 92-2062, as Findings of Fact in This Case, and Motion to Consolidated, filed June 12, 1995. More specifically, plaintiffs assert that defendants should be prevented from litigating the issue of defendants' liability for violation of plaintiffs' substantive due process rights⁽¹⁾ because that issue has already been decided by the Court in U.S.A. v. State of Tennessee, Civil Action No. 92-2062. Plaintiffs are not seeking issue preclusion on their First Amendment claim since that claim was not litigated in Civil Action No. 92-2062; but they argue that for purposes of judicial economy both cases should be consolidated. For those reasons stated below, the Motion to Enter Findings is GRANTED and the Motion for Consolidation will be treated as a Motion to Intervene, which is GRANTED.

The doctrine of issue preclusion, also known as collateral estoppel, is used to prevent unnecessary relitigation of issues

⁽¹⁾ The parties both agree, and the Court has previously noted, that the substantive due process claim in the present matter is identical to the substantive due process claim litigated in U.S.A. v. State of TN.

that previously have been decided. Generally, issue preclusion is appropriate where an issue in a prior action was raised, litigated, and actually determined and where the estopped party (defendants) had a full and fair opportunity to be heard on this issue in the prior action. See NLRB v. Master Slack Corp., 773 F.2d 77, 81-81 (6th Cir. 1985). The doctrine, in federal cases, is no longer limited by the need for mutuality of the parties. Allen v. McCurry, 449 U.S. 90, 94-95 (1980) (citing Blinder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971)). Thus, a plaintiff who was not a party to a prior federal suit can, under many circumstances, use collateral estoppel "offensively" in a subsequent case against the party who lost in the earlier suit. See Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

The trial in U.S.A. v. State of Tennessee, et al. began on August 30, 1993 and ended on October 26, 1993. During the trial the United States presented a total of 17 witnesses, together with a large number of depositions and deposition excerpts. The state of Tennessee began its defense on September 10, 1993, ultimately presenting the live testimony of 20 witnesses plus a large number of depositions. In rebuttal the United States presented the testimony of three witnesses and the video deposition of Dr. Susan Hyman. Over 440 exhibits were introduced at trial and considered by the court. Based on the extensive evidence presented in this case, the Court entered detailed

findings of fact, assessing credibility of witnesses, resolving conflicts in testimony, and weighing the sufficiency of evidence. Specifically, in oral findings of November 22, 1993 (Addendum docketed February 18, 1994) and Supplemental Findings of Fact filed February 18, 1994, the Court found that conditions at Arlington did not meet minimally adequate constitutional standards and, therefore, defendants were found to have violated the due process rights of residents at Arlington Developmental Center.

All of the defendants named in U.S.A. v. State of Tennessee, et al., are officials of the State of Tennessee who are sued in their official capacity. Named defendants include Don Sundquist, Governor of the State of Tennessee, Marjorie Nelle Cardwell, Commissioner of the Tennessee Department of Mental Health and Mental Retardation, and Max Jackson, Superintendent of Arlington Developmental Center.

In the matter currently before the Court, all defendants are named in their official capacity as well. As this Court has previously noted, "When a suit is brought against employees of a state or a county or other political subdivision in their official capacity, the governmental entity with whom they are employed is, for all practical purposes, the actual party in the case." (Addendum to Supp. Find. of Fact at 3.) Thus, both cases share a common defendant, the State of Tennessee.

A review of the record of U.S.A. v. State of Tennessee, et al. reflects that defendants had a full and fair opportunity to litigate the key issue of whether conditions at Arlington met minimally adequate due process standards prescribed by the Constitution. Additionally, allowing defendants a second opportunity to litigate the same issues already decided by the Court in U.S.A. v. State of Tennessee, et al. would be a waste of judicial resources. Furthermore, defendants agree in their motion to dismiss that collateral estoppel or *res judicata* applies to this case, although they argue that application of either doctrine should result in dismissal of the case. See Motion to Dismiss, filed June 12, 1995.^[2] Thus, defendants are barred by the doctrine of issue preclusion from again litigating their liability under this substantive due process claim.^[3] Accordingly, the Motion for Entry of the Court's Findings is GRANTED.

Since plaintiffs have established that they meet the conditions for applying the doctrine of issue preclusion, the prior findings of fact, including supplemental findings of fact (Supplemental Findings, docketed February 18, 1994 (docket entry

^[2] The motion to dismiss will be addressed by the Court in a separate order of the Court.

^[3] In so ruling, the Court, upon reviewing the record, notes that nonmutual offensive collateral estoppel is applicable against the State of Tennessee under the facts in this case and thus the limitation of this doctrine by United States v. Mensoza, 464 U.S. 154 (1984), is not applicable. See, e.g., Colorado Springs Production Credit Association v. Farm Credit Administration, 666 F. Supp. 1475 (D.Col. 1987).

#251); Addendum docketed February 18, 1994 (docket entry #252)), by the Court in Civil Action No. 92-2062 ARE HEREBY ENTERED as findings of fact in this case. Furthermore, the Court having previously found that the Remedial Order, docketed September 2, 1994 (docket entry #338), is the appropriate remedy in this matter for violation of the plaintiffs' due process rights, IT IS HEREBY ORDERED that the Remedial Order, docketed September 2, 1995, IS ENTERED as the final Order in this matter as a remedy for defendants' violation of plaintiffs' Fourteenth Amendment rights.

Consolidation

Plaintiffs have additionally moved for consolidation of the present case with Civil Action No. 92-2062 pursuant to Federal Rule of Civil Procedure 42(a) which allows a Court to consolidate cases when pending actions involve a common question of law or fact to avoid unnecessary costs or delay. Upon consideration of the motion in this matter, it appears that consolidation is not applicable. See Frazier v. Garrison I.S.D., et al., 980 F.2d 1514, 1531-32 (5th Cir. 1993).

However, it appears that plaintiffs are actually seeking to intervene in Civil Action No. 92-2062, under Federal Rule of Civil Procedure 24. Based on the record before the Court and the

facts and circumstances in this case,^[4] it is the opinion of this Court that the interest of plaintiffs in Civil Action No 92-2213, as well as the intervenors', are not adequately represented in Civil Action No. 92-2062 and that those interests would be adversely affected if plaintiffs and intervenors were not allowed to intervene in the case of U.S.A. v. State of Tennessee.^[5] See United States v. Detroit International Bridge Company, 7 F.3d 497 (6th Cir. 1993) (district court's denial of motion to intervene filed approximately 8 month after the settlement agreement was dated was an abuse of discretion).

Based on the foregoing, the Motion to Enter Findings is GRANTED and the Motion to Consolidate will be treated as a motion to Intervene which is GRANTED.

^[4] Since December 11, 1992 plaintiffs and intervenor in this case have been allowed to attend depositions and receive documents in USA v. State of Tennessee, et al., Civil Action No. 92-2062. Rule 16(b) Scheduling Order (docketed December 11, 1992). Plaintiffs first sought consolidation with Case No. 92-2062 by motion filed February 7, 1994. See also, Order Directing Plaintiffs and Intervenor to Execute Protective Order (filed December 28, 1992) (allowing presence and receipt of discovery materials by People First plaintiffs and intervenor). Intervention in Civil Action No. 92-2062 will not unduly delay or prejudice the adjudication of the rights of the original parties in that case; moreover, the intervening parties' interests (both the People First plaintiffs and the Parent-Guardian Association) are not adequately represented by the existing parties. Thus, intervention in case no. 92-2062 is appropriate under both Rule 24(a) and 24(b). See U.S. v. Oregon, 839 F.2d 635, 638 (9th Cir. 1988) (state mental health facility residents entitled, as a matter of right, to intervene in federal government civil rights action against state).

^[5] Since defendants addressed this issue in their Response to the motion to consolidate, the Court has considered the question of prejudice and determines that intervention would best serve the interests of justice.

Because First Amendment association rights remain to be resolved in this case, a Rule 16(b) follow-up scheduling conference ~~has~~ been set at 9:00 a.m. on Thursday, October 19, 1995 in this case to establish final discovery and motion deadlines on those issues and to set trial and pretrial dates. Counsel should be prepared to address all issues set out in the Court's Standing Order on Rule 16(b) conferences.

Intervenors People First, et al. and the Parent-Guardian Association are also hereby given notice of hearings currently set for 9:30 a.m. on Tuesday, October 10, 1995 and 9:00 a.m. on Friday, October 27, 1995 in Civil Action No. 92-2062.

SO ORDERED this 27 day of September 1995.



JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE