

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 78-1490, 78-1564, 78-1602

TERRI LEE HALDERMAN, et al.,

Appellee

UNITED STATES OF AMERICA
and
PENNSYLVANIA ASSOCIATION FOR
RETARDED CITIZENS, et al.,

Plaintiffs-Intervenors-Appellees

v.

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Defendants-Appellants

FRANK L. RIZZO, et al.,

Defendants-Appellants

and

GEORGE METZGER, et al.,

Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF FOR THE UNITED STATES

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On Appeal from the United States District Court
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BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether defendants are discriminating against the plaintiff class by reason of their handicap in violation of Section 504 of the Rehabilitation Act of 1973, and whether that statute provides a private right of action.

2. Whether defendants, by maintaining plaintiffs in custody in Pennhurst, have created a classification of persons

which infringes fundamental liberties in violation of the Equal Protection clause of the Fourteenth Amendment.

3. Whether defendants have a compelling interest which will justify infringement of plaintiffs' liberties by keeping them in custody in the Pennhurst State School and Hospital.

4. Whether the injunctive relief ordered by the district court was justified by the violations found and was based upon proper equitable principles.

5. Whether the relief violates the Eleventh Amendment.

6. Whether the district court was within its discretion in allowing the United States to intervene.

7. Whether local officials were properly held liable to ^{1/}injunction.

STATEMENT

A. Procedural History

This action was commenced on May 30, 1974, as a class action by Terri Lee Halderman, a minor retarded person, against the Pennhurst State School and Hospital, its superintendent and various state officials responsible for the operation of the institution (App. 26-32). ^{2/} The complaint alleged, inter alia, that the mentally

^{1/} Two issues raised by Commonwealth defendants are not discussed in this brief: (1) whether the plaintiff class was properly certified by the district court, and (2) whether the district court erred in finding a denial of rights secured by state statute.

^{2/} Record citations in this brief are: "App" refers to the first volume of the appendix containing pleadings, orders, etc.; "App. V. II" refers to the second volume of the Appendix containing exhibits which were received in evidence; "Photos" refers to photographs in volume II which comprise U.S. Ex. 48, and are reproduced at App. V. II 321-376. "App. V. III" refers to volume three of the Appendix containing portions of the testimony; where citations is to testimony not reproduced in the Appendix, "Tr" for trial testimony and "Dep" plus a name for deposition testimony will be used. Exhibits not in App. V. II are cited to their trial numbers.

retarded residents of Pennhurst live in inhumane and dangerous conditions (App. 31-42), are consigned to idleness due to the lack of organized activities and programs designed to provide education and training (App. 33, 40-41), are subjected to unnecessary medication and unnecessary physical restraints and seclusion (solitary confinement), and, due to inadequate supervision, are subjected to numerous physical injuries (App. 33, 36, 39-40, 42).

Plaintiff Halderman specifically alleged that she personally suffered over forty (40) instances of physical injury from March 2, 1966, to November 4, 1973 (App. 34-36) and that she and her class were deteriorating and regressing emotionally, intellectually, and physically (App. 40). It was further alleged that the conditions at Pennhurst and the acts and practices of the defendants deprived plaintiff and her class of their right to ~~habilitative care~~ and treatment in the alternative least restrictive of individual liberty (App. 43-45), to equal protection of the law (App. 44), and to be free from cruel and unusual punishment (App. 45).

On November 25, 1974, leave to intervene as a plaintiff was sought by the United States pursuant to Rule 24(a) (Intervention of right) (App. 122-123) or, in the alternative to Rule 24(b) (Permissive Intervention), Federal Rules of Civil Procedure (App. 131-132), and on June 3, 1975, the Pennsylvania Association for Retarded Children (PARC), and several additional individual retarded residents of Pennhurst moved to intervene. Both motions were granted (Docket Nos. 16, 24, 40, 76 at App. 6, 7, 8). Commonwealth defendants opposed entry of the United States (Docket No. 19, App. 6), and moved to dismiss the United States as a party (Docket No. 61; App. 8; 189). After this motion was denied

(App. 190), the Commonwealth defendants sought a writ of mandamus from this Court to compel the district judge to dismiss the United States as a party; the writ was denied (App. 235). Petitions for certiorari and for a stay of this Court's order were also denied. Beal v. Broderick, 431 U.S. 933 (1977).

The complaint of the United States alleged, inter alia, that "[a]ll, or nearly all, mentally retarded residents of ... Pennhurst ... are capable of benefitting from treatment and habilitative care ..." (App. 125), that defendants have not provided Pennhurst residents with "treatment and habilitative care" and have failed to provide them with "decent and humane living conditions, and to keep [them] free from harm ..." (App. 126). The complaint alleged violations by the defendants of the Eighth and Fourteenth Amendments to the United States Constitution.

Injunctive relief was sought from the unlawful acts and practices and from "failing or refusing to correct the effects of such acts and practices, and from failing or refusing to provide treatment and habilitative care to residents of ... Pennhurst ... in accordance with standards to be developed and adopted by the Court upon the basis of the record in this case" (App. 128-129).

On January 8, 1976, PARC filed an amended complaint (App. 133-187), which added as defendants the governing authorities and mental health administrators of Bucks, Chester, Delaware, Montgomery and Philadelphia Counties, alleging that these added defendants have the duty under state law to provide county mental retardation programs for the diagnosis, care, treatment, and habilitation of the mentally retarded (App. 160-161). It was also

alleged that persons are incarcerated at Pennhurst because the defendants have failed to provide adequate services for them in the communities (App. 162), and that such confinement violated plaintiffs' rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. V) 794 (App. 181).

After a lengthy trial, the district court found for defendants on the issue of damages, and for the plaintiffs on the need for injunctive relief (App. 236-307). The court found that defendants were violating the rights of the mentally retarded class secured by the Due Process and Equal Protection clauses of the Constitution, by the Eighth Amendment, by Section 504 and by a state statute. After a separate hearing on relief when the parties were unable to agree upon necessary relief, ordered: that suitable community living arrangements be provided for Pennhurst residents; that individualized program plans be developed for each resident; that plans for the removal of Pennhurst residents from the institution to appropriate community-based mental retardation programs which meet their individual needs be devised and submitted to the court, and that a Special Master be appointed to supervise the planning and implementation of the placement of residents (App. 342-346).

In addition, the county defendants were enjoined from recommending that any individual be committed to Pennhurst and from participating in any program or activity in connection with the placement in the future of retarded persons at Pennhurst. Commonwealth defendants were enjoined from placing any additional persons at Pennhurst (App. 346-347).

The Commonwealth defendants were also enjoined to take precautions to prevent physical and psychological abuse, neglect

or mistreatment of Pennhurst residents; to enforce State Department of Welfare rules relating to physical restraints and seclusion (App. 348-349); from administering excessive or unnecessary medication; from using medication as punishment; from failing to provide a program of medical and health related services; from failing to provide individualized adaptive wheelchairs to residents who need them; from feeding any residents in the supine position; from denying residents programmed activities as punishment; and to take precautions to keep Pennhurst buildings clean, odorless and insect-free (App. 349-351).

From this order, all defendants appealed (Docket Nos. 466, 474, 476, App. 25). A stay of the order was denied by the district court (Docket No. 482, App. 25)^{3/} and by this Court.

B. The District Court Findings

The district court's opinion which incorporates its findings of fact and conclusions of law supporting liability to an injunction is reproduced at App. 241-307. All of the district court's findings will not be recited; however, it is important to note that the court found, inter alia:

1. All parties agree "that Pennhurst as an institution is inappropriate and inadequate for the habilitation of the retarded," that "inadequacies in programming ... are directly attributable to staff shortages," and that "it was admitted by the defendants that Pennhurst does not ... meet minimum standards for the habilitation of its residents" (App. 256, 251).

^{3/} 451 F. Supp. 233.

2. The environment at Pennhurst is hazardous to the residents, both physically and psychologically (App. 266) and is not conducive to "normalization", i.e., "[i]t is separate and isolated from society and represents group rather than family living" (App. 274). The principle of normalization has been accepted by the Administration of Pennhurst and by the Department of Public Welfare (App. 275).

3. "The environment at Pennhurst is not only not conducive to learning new skills, but it is so poor that it contributes to losing skills already learned" (App. 266-267); residents have deteriorated physically and intellectually, and have lost skills while at Pennhurst (App. 268-269).

4. Under the principle of normalization, retarded individuals are treated as much like non-retarded persons as is possible (App. 271).

5. "All the parties in this litigation are in agreement that given appropriate community facilities, all the residents at Pennhurst, even the most profoundly retarded with multiple handicaps, should be living in the community (App. 256); "[m]any individuals now living at Pennhurst could be moved immediately into the community and would be able to cope with little or no supervision" (App. 276).

6. All residents are not placed, consistent with state policy, in programs and living arrangements in the community because of the failure of the commonwealth and its subdivisions to provide the necessary services; it is cheaper to provide these services in the community than at Pennhurst (App. 275-77).

7. Over 18 million dollars appropriated by the Pennsylvania Legislature to provide community based facilities for mentally

retarded persons remains unspent though seven years have passed since the appropriation (App. 276-77).

8. The county defendants which control base service units responsible for arranging community and institutional placements for retarded persons have failed to investigate and recommend community alternatives for Pennhurst residents and have done little to prepare Pennhurst residents to leave Pennhurst; the county defendants are not in compliance with the Commonwealth's community living arrangement policy that at least 50% of the residents placed in community facilities be drawn from Pennhurst or other state institutions (App. 279).

9. The environment at Pennhurst is unsanitary; there is often urine and excrement on ward floors; pinworms and infectious diseases are common; obnoxious odors and excessive noise permeate Pennhurst; most toilet areas do not have towels, soap or toilet paper (App. 266-267).

10. Organized programs of education and training are generally unavailable at Pennhurst; "the average resident receives only 1 1/2 hours of programming per weekday and no programming on weekends. No one, except those in school, gets more than 3 1/2 to 4 hours per day. If one factors out those programs which are not considered beneficial, the average drops to about fifteen minutes per day" (App. 256).

11. Specialized services, i.e., physical and occupational therapy, medical and health related services, speech and hearing, are inadequate (App. 256-60).

12. "Not only is the programming at Pennhurst inadequate to meet minimum professional standards, but so are the evaluations

performed on the residents to determine what is required to adequately habilitate the individual. ... Proper habilitation cannot be provided to retarded persons unless those responsible for providing such programs are aware of the individual's needs" (App. 259).

13. Record keeping at Pennhurst is also below acceptable minimum standards (App. 260).

14. Injuries to residents by other residents, through self-abuse, and by some staff abuse are common (App. 268).

15. Seclusion or solitary confinement rooms have been used to punish aggressive behavior, contrary to the recommendation of a committee formed by Pennhurst officials to investigate their use, and seclusion is often necessary because there is inadequate staff (App. 262-263).

16. Physical restraints are used because of staff shortages, and these restraints are potentially physically harmful and have caused injuries and at least one death (App. 263-264).

17. Dangerous psychotropic drugs are often used for control and the convenience of staff and not for treatment or habilitative purposes. A statistical survey of Pennhurst residents found that 51% of the surveyed group were on such drugs. The side effects of psychotropic drug usage include lethargy, hypersensitivity to sunlight, inability to maintain gait and balance and a gum tissue condition marked by inflammation, bleeding and increased growth (App. 264-266). Drug practices at Pennhurst do not meet minimum professional standards and are physically hazardous to residents (App. 265).

18. Diet control is impossible because staff supervision is at a minimum in the large group eating areas where residents

are free to steal food from each other (App. 267).

19. Approximately half of the residents at Pennhurst have been admitted upon application of their parents or guardians, and half have been committed there by courts (App. 252); voluntariness in connection with admission and with the right to leave Pennhurst is an illusory concept. Few, if any residents now have, nor did they have at the time of their admission, any adequate alternative to their institutionalization at Pennhurst (App. 273).

20. This case "concerns solely the retarded and not persons who are mentally or emotionally ill. These are individuals who have not broken the laws, carry no contagious disease and are not in any way a danger to society" (App. 280).

21. The "... Findings and Conclusions pertain solely to the retarded at Pennhurst" (App. 307).

In its March 17, 1978, Memorandum the court further found (App. 340, 341, 343):

In view of the Court's finding that institutionalization at Pennhurst is not conducive to normalization, which is vital to the habilitation of the retarded, our Order must provide that immediate steps be taken to remove the retarded residents from Pennhurst. Great caution and care must be exercised, however, to make certain that each and every retarded resident ... can be accommodated in a community facility which will provide minimally adequate habilitation.

As was pointed out ..., the Commonwealth ... agreed that the retarded should be removed from Pennhurst and readily admitted that the only reason that the litigation was necessary was because they wished to accomplish the closing of Pennhurst as a residence for the retarded, pursuant to their own schedule which was vague and indefinite.

In its injunctive order, the district court further noted (App. 343):

The Court, on the basis of nine weeks' testimony in this case and the submissions of all parties, finds that the implementation of this Order will be impossible without the appointment of a Special Master

C. The Evidence

The evidence in the record which portrays the nature of confinement at Pennhurst, the characteristics of the Pennhurst resident population, and the alternatives which may be and have been provided by state and local officials fully support the district court's findings, and particularly the finding that Pennhurst is ". . . inappropriate and inadequate for the habilitation of the retarded" (App. 256).

The parties presented 80 witnesses and numerous documentary exhibits including photographs depicting conditions at Pennhurst to the district court. The witnesses included:

1. Thirteen experts in the various aspects of the care and training of mentally retarded persons, who inspected Pennhurst and concluded that it was not providing and could not provide the care and training which it was created to provide. No experts expressed a contrary opinion.

2. Nine parents or guardians of present or former residents of Pennhurst who testified to the conditions that they observed, that their children or relatives suffered from the effects of a debilitating environment, abuse and the lack of care, education and training while confined at Pennhurst.

3. Three former residents of Pennhurst who testified to the stultifying experience of confinement at Pennhurst.

4. Thirty-nine employees or former employees of Pennhurst who testified to the inadequacies in equipment, personnel, facilities and environment at Pennhurst which make it impossible for Pennhurst to serve its stated purpose.

5. Seven witnesses who had knowledge of the circumstances surrounding the failure of local authorities to perform their assigned functions of supporting the care and training of Pennhurst residents.

6. Two state officials who described the continuing and long-standing failure and inability of both state and local officials to execute the legislative mandate to provide care and training for all mentally retarded persons in the community despite the availability of funds to do so.

The trial transcript comprises over 4,700 pages of typed matter. Appellees have selected 1,263 pages for inclusion in the appendix which support the trial court's fact findings and the contentions of appellees. While it is impossible to describe all the evidence in this brief, a short description of life at Pennhurst and the alternative community based programs and facilities is helpful.

1. General Nature of Pennhurst

Pennhurst was established in 1908 as an institution for the care and training of mentally retarded individuals. Since its inception it has been over crowded and under staffed (App. 250 - 251). It is located at Spring City, Pennsylvania, a rural area approximately thirty miles from Philadelphia (App. 250). It is operated under the direction of the Pennsylvania Department of Public Welfare, is headed by a superintendent and employs about

1,500 persons (App. 251).

At the time of trial, it housed 1,230 mentally retarded residents (Tr. 22-123), who came there largely from five southeastern Pennsylvania counties.^{4/} Some long-time residents came from other parts of the state (Tr. 21-171, 21-172).

All of the persons residing at Pennhurst are mentally retarded individuals, some of whom also have physical disabilities (Tr. 17-5). They came to Pennhurst either through a commitment there by a state court, or by "voluntary" admission initiated by their parents or guardian (Tr. 22-122). In either case, the admissions are arranged through base service units, which are instrumentalities of the county defendants (App. V. III 1121). Since 1971, it has been the policy of Pennhurst not to accept "voluntary" placements (Tr. 21-181) and to oppose court commitments because of overcrowding (App. Vol. III, 931, Tr. 21-181-182; Tr. 21-190).^{5/}

Residents over age eighteen who are voluntary admissions are theoretically free to leave, but in fact are not free to do so. To leave Pennhurst and participate in a community based program, a community living arrangement and appropriate supportive services must be devised in conjunction with the appropriate base service unit (Tr. 21-186;

^{4/} The present population at Pennhurst is made up of 12% mildly retarded (I.Q. 52-69); 14% moderately retarded (I.Q. 36-51); 74% severely or profoundly retarded (I.Q. below 35) (Commonwealth Br. 10). However, mental retardation experts recognize that I.Q. scores, when diagnosing mental retardation, are poor measures of ability. App. V. III, 110-113.

^{5/} There have been exceptions to the no voluntary rule, e.g., in 1972, there were 76 court commitments and 13 voluntary admissions; in 1973, there were 87 court commitments and two voluntary transfers from other facilities; in 1974, there were 72 court commitments and three voluntaries; in 1975, there were 58 court commitments and 25 voluntary admissions; in 1976, there were 39 court commitments and 13 voluntaries; by trial time, in 1977, there had been seven court commitments and five voluntaries (Tr. 21-183 to 21-184).

21-205). If there is no exit plan, the staff will arrange for court commitment (Tr. 21-206). If the staff does not believe it is in the interest of the over-eighteen resident to leave Pennhurst, a court commitment is sought or staff will simply sign appropriate papers without consent of the resident to perpetuate the "voluntary" commitment (Tr. 21-206-210).

Moreover, the base service units do not provide the institution with adequate background data to evaluate individuals, and has failed to search for less restrictive alternative community based habilitation programs before seeking placement in Pennhurst (App. V. III, 921-923). The average length of stay at Pennhurst is 21 years (App. 252).

There is no dispute that given proper supportive services every resident of Pennhurst could function in the community in an appropriate program of care, education and training (App. V. III 184; Tr. 21-162; App. V. III 951). Some residents have been placed with their own or surrogate families into family care programs and other community based programs, but fewer of the severely retarded residents than mildly retarded residents have been placed in community living arrangements (Tr. 21-160 to 21-161, 21-163). The state purpose in maintaining retarded persons in Pennhurst is to ". . . provide a living environment . . . where basic needs can be met . . . however variable they may be, not only in terms of program needs, but special physical needs" (App. V. III 944). See 50 Penn. Stat. 4402, 4406.

2. Conditions at Pennhurst

We contend that the findings are tantamount to finding that confinement at Pennhurst is simply incarceration without the

benefit of habilitative services and that the evidence supports this characterization. One expert in the training of mentally retarded persons described (App. V. III, 53-55) what he saw at Pennhurst this way:

The institution has frequent conditions which violate what you might call human dignity and respect for the individuals.

We discussed some of them and without delineating them into detail, let me mention just things as dehumanizing environment; toilets without doors, without partitions; toilets without toilet paper; sometimes without tile toilets; sometimes unflushed, dirty, filthy; open showers; lack of soap or towels; lack of decorations; lack of any individualization in the living area; lack of pillows on the beds - little things like that.

Residents are being forced to eat either with their fingers or with spoons with no other kind of eating utensils. Urine on the floors, feces on the ceiling - these kinds of conditions.

Indeed, in looking at the superintendent's deposition I noted that he indicated that he felt the environment did not meet minimum professional standards; and I would certainly concur in this.

Other considerations - the clothing for many of the residents is ill-fitting. It is obviously institutional in nature.

On a number of units I found residents in partial states of nudity. On some they had no shoes

A lack of privacy is general throughout the institution. In many areas they sleep in open sleeping areas, no drapes or curtains on the windows, no quiet place where an individual can withdraw for a certain period of loneliness, usually large groupings, frequently loud music, and all blaring television sets; lack of provisions for any personal property.

* * *

. . . [Pennhurst is] unlike any home. . . .

See also App. V. III 75-76, 132.

The buildings are drab. The environment does not produce an atmosphere in which learning can take place (App. V. III 288, 486; see also photos 1,2,5,6, 7,8,9,10,13,15,16,17,19,21,22,26,27,28,29, 30,31,32,33,34,35,36, 37,39,40,41,42, and discussion of photographs at App. V. III 146, 149, 150). Because of the type of construction and lack of furnishings, noise is so excessive that individual conversation, communication and learning is impossible (Tr. 5-98, 7-126). The buildings are often either too cold or too hot, and inaccessible to the physically handicapped (App. V. III, 445-446, 451; photos 104, 105), crowded (App. V. III, 487), dirty (App. V. III, 642) or fire traps (Tr. 3-146 to 3-147; App. V. III, 446-453; Tr. 9-145).

In sleeping areas, beds are placed row upon row, up to 46 in one room (App. V. III, 446; photos 2, 9, 15, 16, 17, 19, 30, 35, 40, 41, 102, 107). All sleeping areas lack pillows, bedspreads, decoration, and provision for storage of personal property (App. V. III, 54-55, 146, 183-184).

Dayrooms, where residents spend a majority of their time, have similar characteristics; they are large with hard surfaced floors and ceilings (App. V. III 149; photo 21, 24, 26, 27, 28, 31, 99, 108), and are poorly lighted (App. V. III 448). They often contain no furniture or drapes (App. V. III 74; photo 54), and are very noisy (App. V. III 132). The dayroom environment is "barren," a place where residents are "simply sitting . . . whiling away their lives" (App. V. III 149).

Shower and bathroom areas lack privacy (Tr. 5-96; App. V. III 136; photos 5, 105). Sinks lack soap and towels (App. V. III 137-138); toilets lack toilet paper (Tr. 5-96); and the bathrooms

are filthy (App. V. III, 53-54) and dangerous (App. V. III, 140-41).^{6/}

One mental retardation expert testified (App. V. III 151):

. . . [i]ndividuals who come into this type of environment frequently lose the ability to speak. Individuals who come into crowded, chaotic environments, who were walking, tend to lose the ability to walk.

Individuals who come into this environment and they don't have proper programs, proper equipment, such as the adapted wheel-chairs I was talking about earlier - those individuals who are able to sit upright tend to lose the ability to sit upright.

In other words, individuals don't gain skills. The more likely situation is that they will lose skills.

He also testified (App. V. III 185-186):

It is my opinion that if you supply everything that you should want for Pennhurst today . . . I don't think that you would end up with a situation that would be decent to live in nor a place that would be conducive to treatment of the residents living there.

Pennhurst is grossly understaffed and is lacking sufficient numbers of professional and direct care staff to insure efficacious programming and, most importantly, to protect residents from psychological harm, physical injury, and death. According to the Acting Director of Resident Life at Pennhurst, 980 additional direct care staff positions are required merely to prevent injuries to residents (Dep. Mathews 26-30). Accident and death have occurred because of lack of staff

^{6/} ". . . excrement, urine, dirt, mops strewn about, pools of water on the floor . . . [and] unflushed toilets" were observed extensively (App. V. III 63; photo 50). Pinworm infection reflects this condition (Tr. 16-193).

supervision^{7/} (Dep. Hedson 90, 96-98; U.S. Ex. 22, Pl. Ex. 62). During January, 1977, residents suffered 833 minor and 25 major injuries, in February, 1977, 564 minor and 25 major injuries. (U.S. Ex. 15; Dep. Youngberg 78-84). After reviewing the cumulative accident summary for January, 1977, an expert witness characterized the report in the following manner (App. V. III 66):

. . . [T]he thing looks a little like a battle-field report. It appears that it is physically hazardous for the residents to be in the environment.

Specific examples of injuries sustained by residents include fractured fingers and toes, fractured ribs, fractures of both arms, fractured pelvis, fractured spine, and cut on scrotum from lack of proper positioning in wheelchair (Tr. 5-130 to 5-133; Dep. Hedson 101, 116, 119; App. V. III 68, 555). Bone fractures, many of unknown origin, were so numerous several years ago that these injuries were plotted on a graph and studied by a special committee (App. V. III 550-555). Fractures continue as do other major injuries. Numerosity and severity of injuries remains constant (Tr. 22-40 to 22-41).

There have been instances of intentional staff abuse of residents: a sexual assault (Tr. 3-114 to 3-117); physical abuse of blind children (Tr. 5-66); beatings with shackle belts (U.S. Ex. 26), chains (U.S. Ex. 37; App. V. III, 71; Dep. Hedson 116-118;

^{7/} E.g., drownings in bathtubs (U.S. Ex. 22; Dep. Hedson, 96-98); drownings in the Schuylkill River (App. V. III 67); an eleven year old strangling when tied to a chair by restraints (Pl. Ex. 62); aspiration or aspiration pneumonia, conditions created by improper feeding techniques such as feeding in a supine position (U.S. Exs. 12, 13; App. V. III 61).

8/
Dep. Boyle 56-58) and hands.

The lack of adequate training for residents is due largely to lack of professional staff (App. V. III 124). Estimates of the number of staff required to give minimal training to Pennhurst residents compared to actual number are (App. V. III 122-124):

	Necessary	Actual
Physicians	7	6
Psychologists	23	23
Dentists	7	4
Registered Nurses	95	54
Vocational Therapists	5	4
Recreational Therapists	23	0
Occupational Therapists	18	10
Special Education Teachers	51	8
Physical Therapists	14	2
Speech and Hearing Specialists	14	9
Social Workers	40	6 ^{9/}

8/ The staff person "...[p]icked up a crippled, small, retarded child, male ... by the back of his T-shirt and ... threw him in the air approximately five to seven feet and he landed on his stomach on the cement floor. He then went over and he hit the patient across the face ... with his right hand" (Tr. 3-113).

9/ These calculations were as of 1975; since that time nineteen professionals have left and their positions have been changed to direct care positions to permit recruiting of direct care persons (App. V. III 58). Such calculations are based upon the minimum standards set forth by the district court in Wyatt v. Stickney, 344 F. Supp. 387 (N.D. Ala. 1972). The standards by which these figures are calculated are generally accepted by persons in the field (App. V. III 125).

Residents at Pennhurst average 15 minutes a day in active programs (Tr. 14-60). The professionally recognized standard for habilitative programming specifies a minimum of six hours a day during the weekdays (App. V. III 34). As a result of staffing deficiencies, most, if not all residents, have needs which Pennhurst is unable to meet. Waiting lists exist for all programs (Dep. Foster 42). Many referrals for specific programming are not made because of the likelihood that space will not be available in any particular program (Dep. Foster 42).

In virtually every program department resident needs are not being met. One hundred and five school age children attend school (Tr. 3-148); however, when not in school, they are also idle (Tr. 3-140 to 3-142; 1482).

An expert testified (App. V. III 75).

There is no activity taking place there.
This is what I described as enforced idleness.
These individuals are simply vegetating
there and there seems to be no systematic
activity.

The confinement and the crowded, isolated institutional environment without meaningful activity may cause aggressive and pathological behavior^{10/} (App. V. III 543-544). One resident bit off three-quarters of the ear of another resident (App. V. III 67-68); through self-destructive behavior one resident blinded herself (Tr. 22-43); one resident--

would run to the doors that led to the
seclusion room area and batter his body
against the doors in an attempt to get into

10/ E.g., stereotyped behavior, rhythmic motions such as rocking; self-injury; severe aggression toward others. Such behavior is associated with lack of stimulation and boredom. Professionals also refer to this behavior as "maladaptive" and "stereotypic" (Tr. 5-112; App. V. III 12-13).

the . . . room and when we would not allow him in there he would assault the . . . other residents and the staff. [Tr. 19-64].

Participation in programmed activities is basic to the growth and development of mentally retarded persons (App. V. III 32; Tr. 5-87 to 5-88; App. V. III 367, 373; App. V. III 425). Analysis of Pennhurst records confirms the observations of experts: residents are not engaged in minimally adequate habilitative care and treatment programs (App. V. III 45; Tr. 5-111, 6-134, 14-64).

Resident control is maintained through the use of physical restraints,^{11/} chemical restraints (Tr. 3-81), and the placement of residents alone in a locked room, i.e., seclusion or solitary confinement (App. V. III 50; Tr. 5-120). Each has been used improperly and is harmful to residents.

Physical restraints are potentially hazardous and can create conditions in which physical injuries are more likely to occur (App. V. III 177, 549). Another element of harm caused by physical restraints is the incapacitation of the resident from learning or exercising self care skills, e.g., eating or dressing. Residents at Pennhurst have spent protracted periods of time in physical restraints (U.S. Exs. 39, 40); e.g., one person was tied to a bed for 720 hours in August, 1976, 674 hours in September, 1976 and 647 hours in October, 1976. (Dep. Mathews 64-66). Another person was confined in hand restraints for 123 hours in a one month period (Id. at 69). Another was in hand-feet restraints for 690 hours in October, 1975 (id. at 71). Seclusion is professionally unacceptable because the practice fails to incul-

^{11/} E.g., shackles, straightjackets, chest restraints, security belts, face masks, halters, and feet restraints, helmets, mittens, muffs and muff shackles (Dep. Mathews 62; photos 47-49).

cate appropriate behavior and it has been found to engender further deviancy in individuals (App. V. III 49; Tr. 5-119-20).

Medication and drug practices at Pennhurst are appreciably below minimally acceptable professional standards (App. V. III 243). Such deficiencies which endanger resident health and safety include excessive dosages of psychotropic drugs,^{12/} polypharmacy^{13/} (App. V. III 232), and administration of drugs by nonprofessional personnel on a "P.R.N." basis^{14/} (App. V. III 234-235). A random sample indicates that 40% of Pennhurst residents who are receiving medication are subjected to polypharmacy practices (App. V. III 228-29).

Psychotropic medication is being used excessively at Pennhurst solely for the convenience of staff, and has been used frequently in lieu of efficacious programming. Such usage constitutes chemical restraints of residents (Tr. 3-81). A random sample of records indicates that 51% of the residents receive psychotropic drugs; based on nationwide practices, only 25% of institutionalized mentally retarded individuals might be expected to be receiving such drugs (Tr. 3-37-38; App. V. III 236).

12/ Drugs used to control behavior (App. V. III, 213-214).

13/ Prescribing two or more drugs at the same time. "There are a whole range of hazards [of] giving two or more drugs at one time. * * * [T]hey combine and create problems * * * [t]hat's called potentiation interaction.

Also, there are a number of contraindications * * * in the medical literature, that this particular drug should not be given with another particular drug, so there is an additional hazard * * *. Finally, if one is attempting to assess, to monitor the effects of the medication * * * it is next to impossible to figure out which drug is causing what * * *" (App. V. III 229).

14/ Pro re nata, Latin for "as needed" (App. V. III 236).

Approximately 30% of orders for psychotropic medication are on a P.R.N. basis (App. V. III 234). At Pennhurst this means that an aide merely calls a nurse prior to administering the drug; there is no professional examination of the resident (Dep. Boyle 38; Tr. 16-79) Two months prior to trial, an effort was made at Pennhurst to stop this practice (Dep. Hedson 79; Tr. 17-93, 17-94). Pennhurst has failed to assure that medication practices meet minimal professional standards (App. V. III 242-43). Indeed, residents are put at risk of health and life due to the drug practices extant at Pennhurst (App. V. III 180-81).

Despite physical improvements since the late 1960's, Pennhurst has (App. V. III 486):

. . . an invisible fence; it is a segregated community. One is in there, shut off from the world.

. . . some people have passes to go out, but essentially it is a closed institution with an environment where some of life's most basic satisfactions - eating, for instance, still takes place under very unsatisfying circumstances. One's senses are still being assaulted - the smell, the noise the visual distortion - and this, you see, is for the very people who are in Pennhurst supposedly so that they develop to have a basic sensitive experience.

(See also App. V. III 543-44).

A team of three specialists in training mentally retarded persons commissioned by the state to evaluate Pennhurst found it a "dehumanizing" and "inhumane" place to live and saw no way it could be made adequate (Tr. 14-58 to 14-59).

3. Alternative Facilities and Services

Community-based facilities provide a wide range of services in normalized settings which provide mentally retarded persons with maximum opportunity to develop their abilities. Such facilities provide for more personal liberty for persons of all levels of mental and physical handicaps than is or can be provided at Pennhurst. Every expert witness testifying at trial recommended that every resident of Pennhurst be placed in appropriate community settings which meet their individual needs as soon as possible.^{15/}

Responsible Pennhurst officials have taken an indetical position seeking the expansion of appropriate community-based mental retardation facilities and the placement of each Pennhurst resident in such a setting which meets the individuals' specific habilitation needs. Defendant Superintendent Youngberg testified (Tr. 22-171 to 22-172):

Q. As a professional, do you think it would be to the advantage and benefit of the retarded population . . . to be serviced in a community setting or serviced in an institutional setting?

* * *

A. . . . [Y]es, to the community

* * *

As to the future, we would like to anticipate the day when Pennhurst would not need to exist, that the needs of all citizens with retarded behavior could be met within the community setting. As I said a number

^{15/} Tr. 1-183 (Roos), 2-124 (Clements), 6-182 (Settle), 7-68 (Dybwad), 5-161 to 5-62 (Girardeau), 6-35 (Glenn), 4-80 (Lancaster - Gage), 13-140 (Hersh), 14-21 (Walker), 14-73 (Thurman). Drs. Hersh, Walker and Thurman, three experts originally retained by defendants, testified on behalf of plaintiff-intervenor PARC.

of times, it is not mental retardation per se that requires the institution. It is just the lack of alternative resources. . . .

I often say that it is not a matter of our people getting ready to return. It is a matter of the community getting ready to take their people back.

(See Dep. Youngberg 102. See also Tr. 22-77; Dep. Foster 63; and Dep. Rice 180-81; Tr. 26-22).

While the various states have chosen to operate community-based mental retardation programs in diverse forms and under different nomenclatures, the principles and goals of the continuum of necessary services, including those of Pennsylvania, are essentially the same. The needs of mentally retarded individuals for a life in a community setting are not unlike those of any person, i.e., shelter, educational and vocational opportunities, and leisure time activities (App. V. III 22-26, 362-371).

The full range of services necessary to meet the needs of mentally retarded persons is available in the various communities in the five county area surrounding Pennhurst (App. V. III 405-413). Such programs and facilities have the capacity to expand (App. V. III 414). Such programs and facilities provide quality services which adequately meet the habilitative and treatment needs of retarded persons, including a few former Pennhurst residents (App. V. III 415).

The continuum of necessary services includes early intervention and infant stimulation programs; nursery and pre-school programs; special education programming integrated into elementary and high school curricula; pre-vocational and vocational training; and leisure time activities (App. V. III 362-369). The necessary

continuum of services was described extensively at trial through oral testimony and photographs.^{16/}

The testimony of three former residents of Pennhurst offers concrete examples of the progress and development of skills typically shown by individuals returning to the community. Robert Troester now lives in a group home and works at the Ivyland Workshop in Doylestown, Pennsylvania (Tr. 8-16). Robert Hill lives in a group home and is now employed five days a week at a restaurant (Tr. 8-29). Herman Vaughn, a resident at Pennhurst for 13 years, now lives in a group home and is employed at a department store (Tr. 8-40). A project director for a corporation which provides community living arrangements, Russell Kulp, testified that many former Pennhurst residents had made significant gains since placement in the community and cited, as an example, a young man who, after 17 years at Pennhurst, progressed through the community programs to competitive employment, independent living and attending night school classes (Tr. 11-80). These examples of growth and development of social and employment skills are typical of former residents of Pennhurst who return to the community (Tr. 10-74, 10-75, 10-87, 10-110, 10-166 to 10-67, 11-72 to 11-73, 11-80 to 11-81).

Community based treatment and habilitation implies living in the community. Just as there should be a continuum of educa-

^{16/} For testimony re: early intervention and infant stimulation programs, see, App. V. III 341; Tr. 10-45, 65, 11-32, photo 89; nursery and pre-school programs, App. V. III 365-367; Tr. 10-60, 11-31; public school programs, App. V. III 471; Tr. 5-161, pre-vocational and vocational training, App. V. III 472-474; Tr. 5-142, 6-14; employment opportunities, App. V. III 359, 419-422, 672, Tr. 11-43-44, photos 57, 58, 93.

tional and vocational services and programs, a continuum of residential alternatives should also be available to mentally retarded persons. Such community living arrangements may include, inter alia, the parental home; subsidized relative's home; specialized foster care homes; group homes; supervised apartment clusters; and wholly independent living (App. V. III 186-187, 373-375; Tr. 6-18-20). Quality community living arrangements exist in the Southeastern region of Pennsylvania. Linda Glenn, designer of the PASS evaluation system used to evaluate community residential programs in Pennsylvania, testified (App. V. III 485):

Pennsylvania has had ... five or six years, developing community service and it is very good ... [T]hey monitor quality ... very extensively based on the same principles [of] ... normalization.

The people in these residential programs were certainly leading a full life. They were involved in all kinds of community activities. They had access to adult basic education when they wanted it. They would decide for themselves ... about the type of activities, the jobs they had, the way they interfaced with the community.

Community living arrangements offer habilitative care and treatment in normalized settings. ^{17/}

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the extent to which agents of the state may infringe upon fundamental liberties of the plaintiff class--mentally retarded persons who reside in The Pennhurst State School and Hospital

^{17/} Photographs in App. V. III depict some of the residences visited by experts Glenn, Seattle and Girardeau. Apartments and group residences, in Victorianera houses and modern ranch homes, are represented in these photographs. Photographs of community living arrangements are numbers 59-60, 69-85, and 90-92.

or who may reside there in the future. Confinement at Pennhurst is a debilitating experience which results, for many residents, in intellectual, physical and emotional regression, threat of physical harm and the deprivation of opportunities to form relationships with other persons, and to learn and develop in as close to "normal" as each individual is capable.

This brief urges that the treatment of the plaintiff class revealed by the record in this case violates federal law in, at least, three ways.

First, it is urged, in Part I, that Section 504 of the Rehabilitation Act of 1973 is being violated by the subjection of mentally retarded persons to conditions at Pennhurst. Services there, measured by the standards established by regulations issued to enforce that Act, are patently unequal to services provided by the state in the various communities, and they are unnecessarily separate from those services.

Second, under a similar analysis, confinement at Pennhurst, violates the Equal Protection Clause of the Fourteenth Amendment. Because the discrimination inherent in confining a class of persons to an institution affects well-recognized "fundamental liberties," such discrimination, if it is to stand, must be justified by a compelling need on the part of the state. In view of the acceptance by the state of the principle that their purpose can be better served by more effectual and more economical community mental retardation delivery systems, no compelling need is present here.

The nature and extent of the fundamental liberties which are infringed by a stay at Pennhurst are discussed in Part III. In addition to the liberty interests inherent in freedom from confinement,

this case implicates the interests in freedom from institutional conditions which fall below those guaranteed to persons held in state custody. The Due Process clause of the Fourteenth Amendment requires that the private interests at stake and the state interests in maintaining the infringement of liberties be balanced, and where "fundamental" liberties are involved, the state's interest, as with Equal Protection standards, must be "compelling" to continue the infringement. Where there are available to the state less drastic, or less restrictive means to accomplish their purpose, such a compelling interest cannot be shown. In Part III, it is urged that the objections raised by the defendants to the relief ordered by the district court do not justify reversal or modification of the injunctive order.

ARGUMENT

I

DEFENDANTS ARE DISCRIMINATING AGAINST THE PLAINTIFFS
IN VIOLATION OF SECTION 504 OF THE REHABILITATION ACT
OF 1973

Federal courts must decide cases on statutory grounds if that avoids reaching constitutional issues, Ashwander v. TVA, 297 U.S. 288, 346-348 (1936), and we believe that a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. V) 794, has occurred which supports the relief ordered by the district court.

Section 504 states:

No otherwise qualified handicapped individual in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

A. Section 504 Provides A Right Of
Action To The Plaintiff Class

In Cort v. Ash, 422 U.S. 66, 78 (1975), the Supreme Court set down the tests for determining whether a private right of action exists under a particular statute:

First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" ... that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? ... Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? ... And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? (Emphasis in original; citations omitted.)

All three circuits which have considered whether Section 504 creates a private remedy have held that it does. United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Authority, 548 F.2d 1277 (7th Cir. 1977).

1. The plaintiff class--mentally retarded individuals¹⁸--is certainly within the class "for whose especial benefit the statute was enacted." They are "handicapped" within the meaning of the statute,^{18/} and regulations implementing the statute explicitly designate "mentally retarded" persons as being within the statute's

^{18/} They have a "mental impairment which substantially limits ... major life activities" and they are "regarded as having such an impairment." 29 U.S.C. (Supp. V) 706(6).

19/
protection.

More importantly, however, Senator Humphrey, in introducing a bill which embodied the principles later enacted in Section 504 made reference to the need for protection of the very kind of persons who are plaintiffs in this case.

The time has come when we can no longer tolerate the invisibility of the handicapped in America. * * * I am calling for public attention to three-fourths of the Nation's institutionalized mentally retarded, who live in public and private residential facilities which are more than 50 years old, functionally inadequate, and designed simply to isolate these persons from society. [20/]

19/ 45 C.F.R. 84.3(j)(2)(i)(B).

20/ 118 Cong. Rec. 525 (1972). Senator Humphrey's bill, S. 3044, 92d Cong. 2d Sess., was to amend Title VI of the Civil Rights Act of 1964 so as to put handicap on a par with race, color and national origin. The bill would have made Section 601 of the 1964 act read, in pertinent part:

No person in the United States shall, on the ground of . . . physical or mental handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance unless lack of such physical or mental handicap is a bona fide qualification reasonably necessary to the normal operation of such program or activity.

See 118 Cong. Rec. 526 and 42 U.S.C. 2000d. A definition of handicap was proposed which would have included mental retardation. Wording similar to present Section 504 was added to H.R. 8395, 92d Cong. 2d Sess., by the Senate as Section 604, 118 Cong. Rec. 32302, and Senator Humphrey noted (id. at 32310):

I am deeply gratified at the inclusion of these provisions, which carry through the intent of [the] original bills which I introduced jointly with the Senator from Illinois (Mr. Percy), earlier this year, S. 3044 * * *. The time has come to firmly establish the right of these Americans to dignity and self-respect as equal and contributing members of society, and to end the virtual isolation of millions of children and adults from society.

(Continued)

Although the statute was enacted pursuant to Congress' spending power (cf. Lau v. Nichols, 414 U.S. 563 (1974)), the statute is more than a means to control money. Previous measures introduced to accomplish the purpose of Section 504 represented "an effort to provide . . . equal opportunity for the handicapped of our Nation."^{21/}

2. The legislative history shows a purpose to create a private right of action. In considering the 1974 amendments to the Rehabilitation Act, the Senate Committee reported that Section 504--

was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 ... and section 901 of the Education Amendments of 1972 * * *.

The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts * * *. * * * This approach to implementation of section 504 ... would insure . . . administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. [22/]

^{20/} (Footnote continued from previous page)
H.R. 8395 was enacted (id. at 32317), but vetoed (118 Cong. Rec. 37203-37204). The present wording of Section 504 was then included as Section 705 of S. 7, 93d Cong. 1st Sess. (1973) also passed, 119 Cong. Rec. 5915, 7154, 8008), but vetoed (119 Cong. Rec. 9597-9598). Congress then produced the present Act which was a compromise with the Administration, settling differences unrelated to Section 504, preserving the same wording as was in the vetoed bills. 119 Cong. Rec. 16676, 18127 (1973). In supporting the final product, Representative Vanik said: "[I]t pleases me that the adoption of my proposals to protect the rights of handicapped people in employment, and in the issuance of Federal grants, have been incorporated into this compromise bill." 119 Cong. Rec. 18137.

^{21/} 117 Cong. Rec. 45974 (Dec. 9, 1971).

^{22/} S. Rep. Nos. 93-1139 and 93-1297, 93d Cong., 2d Sess. 24-25 and 39-40 (1974), quoted at greater length in Lloyd v. Regional Transp. Authority, supra, 548 F.2d at 1285-1286.

It is thus clear that Congress believed that the enactment of the statute as written, would provide for both administrative remedies and a private right of action since that had been the practice adopted for Title VI. In January of the year the report was issued, the Supreme Court had decided Lau v. Nichols, supra, which involved a private action under Title VI, and several lower courts had held, prior to the report, that a private right of action had been created for enforcement of Title VI rights. See, e.g., Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967), certiorari denied, 388 U.S. 911; Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967).^{23/}

Defendants suggest that Lloyd v. Regional Transp. Authority, supra, is not controlling because that opinion, 548 F.2d at 1286, in. 29, called "premature" the question of whether the private right would continue after "consolidated procedural enforcement regulation are issued to implement Section 504." The Department of Health, Education and Welfare, the agency having responsibility for establishing standards for "handicapped individuals" and for determining what are "discriminatory practices" as well as coordinating the implementation of Section 504 by all federal

^{23/} In the Supreme Court's latest opinion involving Title VI, Regents of the University of California v. Bakke, 46 U.S.L.W. 4896 (June 28, 1978), four justices (Powell, Brennan, Marshall and Blackmun) assumed for purposes of the case that a private right of action existed (id., at 4900); opinion of Brennan, White, Marshall and Blackmun, (id., at 4912); one justice believed that no right of action existed, see opinion of White, (id., at 4925-4927); the four justices (Stevens, the Chief Justice, Stewart and Rehnquist) who joined Powell to make a majority in the judgment of the Court held that affirmance of the court below was required unless the "language [of the statute] misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted" (id., at 4934).

agencies,^{24/} issued regulations on May 4, 1977.^{25/} These regulations address a number of substantive matters in detail,^{26/} but the procedural regulation simply states:

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part.[^{27/}]

HEW, adopted this procedure, it explained, until ". . . such time as they are superseded by . . . consolidated procedural regulations applicable to all . . . civil rights statutes and executive orders administered by the Department" 45 C.F.R. Part 84, App. A., p. 391. This is in accord with the 1974 Senate Report addressing the parallel with Title VI.^{28/} As with Title VI, the existence of an administrative procedure to terminate federal financial assistance to a recipient,^{29/} is neither inconsistent with a class action for injunctive relief, see Lloyd v. Regional Transp. Authority, supra, 548 F.2d at 1287, nor would it provide adequate pre-suit administrative relief, depending, as it does, on federal discretion for its exercise and on federal conciliation

^{24/} See Executive Order No. 11914, 41 Fed. Reg. 17871.

^{25/} 42 Fed. Reg. 22677; 45 C.F.R. 84.1 et seq.

^{26/} E.g., "Discrimination prohibited, id., at 84.4; "Remedial action, voluntary action, and self-evaluation," id., at 84.6; "Definitions," id., at 84.3.

^{27/} Id., at 84.6. In its explanatory comment on the regulation, HEW said: "Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under Section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) . . .; cf. Lau v. Nichols, supra" (other citations omitted). 45 C.F.R. Part 84, App. A, p. 378.

^{28/} See pp. 32, supra.

^{29/} 45 C.F.R. 80.6-80.10 and Part 81.

^{30/}
efforts.

3. To imply a private right of action under Section 504 would be consistent with and would promote one of the underlying purposes of the Act. Private suits by persons acting as "private attorneys general" are an invaluable supplement to government civil rights enforcement and help to vindicate the nondiscrimination policies to which Congress afforded a high priority. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968).

In view of the large number of recipients of federal financial assistance who are covered by the nondiscrimination provision of Section 504, "the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the [federal government]." Allen v. State Board of Elections, 393 U.S. 544, 556 (1969). See also Drennon v. Philadelphia General Hospital, 428 F. Supp. 809, 815 (E.D. Pa. 1977).

4. Finally, this case is not one "traditionally relegated to state law." Congress intended to deal with discrimination against the handicapped on a national basis. Lloyd v. Regional Transp. Authority supra, 548 F.2d at 1286-1287. In addition, it is entirely inappropriate to leave to state law, the vindication of rights secured by federal law which are made conditions of receiving federal funds.

^{30/} See 45 C.F.R. 80.7(d). Formal administrative proceedings take place only if HEW proceeds with fund termination. Thus, if a complaint is not acted upon, or the complaint does not have merit in the view of a "responsible official," there are no administrative procedures available to supplant a judicial remedy. Fund termination proceedings do not protect individual plaintiffs since beyond making complaints, they have no standing in the process, nor would they be afforded a postiori review.

Thus, this action satisfies all the tests of Cort v. Ash, supra, and this Court should hold that plaintiffs have a right of action under Section 504.

B. Defendants Are Violating Section 504

Section 504 prohibits handicapped persons from being "excluded from the participation in, ... denied the benefits of, or ... subjected to discrimination under" programs receiving federal financial assistance^{31/} "solely by reason of his handicap"

1. The federally funded program

Defendant county officials receive, through the state defendants, federal service grants under Title XX of the Social Security Act^{32/} which are used in mental retardation programs. The state Department of Public Welfare supervises the county defendants, and operates Pennhurst where many of the retarded persons are placed at county initiative. Title XX funds are, in part, for "preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive care," and pay for up to 75% of the costs of a variety of community social services.^{33/}

In addition, federal Medicaid funds^{34/} are paid to health care providers by the defendant Department of Public Welfare in

^{31/} Federal financial assistance includes grants, loans, contracts, or any other arrangement by which assistance is made available to a program or activity. 45 C.F.R. 84.3(h).

^{32/} App. V.III 1202, 1213. See 42 U.S.C. (Supp. V) 1397 et seq. The state apparently paid \$13.8 million to various counties for 1975-76 (App. V. II 290).

^{33/} 42 U.S.C. (Supp. V) 1397a

^{34/} 42 U.S.C. (Supp. V) 1396 et seq. Sometimes called "Title 19" funds for Title XIX of the Social Security Act, as amended.

accordance with a state plan.^{35/} Medicaid payments are made for the care of 55% of the residents at Pennhurst,^{36/} and are included in the Pennhurst budget.^{37/}

The Department of Public Welfare has also received grants which it has furnished to various counties, such as, Developmental Disabilities,^{38/} and Public Health Service^{39/} grants, and the Department of Public Welfare receives funds through the Department of Education which is furnished to the counties under the Education for all Handicapped Children Act.^{40/}

2. The discrimination

In using the word "discrimination" in Section 504, Congress was, no doubt, aware that the term had been employed frequently in application of the Equal Protection Clause of the Fourteenth Amendment. The similarity of the language of Section 504 to that used in 35/ 42 U.S.C. (Supp.V) 1396a.

36/ App. V. III 1182

37/ Tr. 26-13. For fiscal 1975-76, federal payments to Pennhurst were \$5,870,000 (Tr. 26-14). Medicaid funds are intended for a variety of medical services, but one of the purposes for which these funds may be used is for care in "intermediate care facilities," 42 U.S.C. (Supp. V) 1396d, such as Pennhurst. If Pennhurst residents were in community living arrangements, Medicaid payments would pay only for those services normally thought of as "medical." Id., at 1396d(a)(15), (c) and (d). However, if the residents of Pennhurst were in community living arrangements housing under sixteen persons, they could receive \$210.10 per month in federally supported Supplementary Security Income (SSI) which could defray the costs of room and board (Tr. 27-89 to 27-90). See 42 U.S.C. (Supp. V) 1382 et seq. While in Pennhurst, residents receive \$25.00 per month in SSI (Tr. 27-88).

38/ 42 U.S.C. (Supp. V) 6010 et seq. The various counties received \$661,705 in 1975-76. App. V. II 292.

39/ App. V. III 1214; App. V. II 292.

40/ App. V. II 292; App. V. III 1218-1220; see 20 U.S.C. 1401 et seq.

Section 601 of the Civil Rights Act of 1964, as well as the parallel^{41/} with that section noted in legislative history^{41/} indicates an intent to give heightened protection from discrimination to handicapped persons. On its face, however, section 504 has some distinguishing characteristics from prohibitions on racial and gender-based discrimination. It does not protect persons who do not have a handicap; rather, it provides broadly worded protection for a special class of persons, and the term, "solely by reason of handicap" has no parallel in Title VI.

"Discrimination" as used in the context of claimed unequal treatment has long been understood to mean singling out a person, or persons, to their disadvantage without a reasonable basis for doing so judged sufficient under standards appropriate to the classification. Hernandez v. Texas, 347 U.S. 475 (1954); McGowan v. Maryland, 366 U.S. 420 (1961). Some classifications, such as age, will be sustained under constitutional analysis if the disparate treatment is rationally related to any legitimate governmental objective. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). Where the classification, or the disparate treatment, has been a "suspect" one, or infringe upon "fundamental" rights, however, that classification has received the most exacting judicial scrutiny, and states must demonstrate a "compelling" interest to sustain it. Strauder v. West Virginia, 100 U.S. 303 (1880); Regents of the University of California v. Bakke, supra, 47 U.S.L.W. at 4904; Cf. San Antonio School District v. Rodriguez, 411 U.S. 1, 28-29 (1973).

^{41/} See pp. 31, 32, supra.

When Congress selected the language which it used in Section 504, and likened it to the prohibition on racial discrimination found in Title VI of the Civil Rights Act of 1964, it clearly intended that disparate treatment of handicapped persons is to be judged by a standard which requires more governmental justification than is required under the traditional "rational basis" test. To supply standards, Congress intended that regulations be promulgated.^{42/} In Lau v. Nichols, 414 U.S. 563, 568 (1974), the Supreme Court applied regulations within the scope of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) issued to enforce that statute.^{43/} The Department of Health, Education and Welfare, the agency responsible not only for disbursing the federal funds in this case, but for coordinating the enforcement of Section 504 generally,^{44/} has published regulations which provide substantial authority to conclude that discrimination prohibited by section 504 has occurred in this case.^{45/}

^{42/} "[Although the Section 504] does not specifically require the issuance of regulations or expressly provide for enforcement procedures ... it is clearly mandatory in form, and such regulations, and enforcement are intended." S. Rep. No. 93-1297, supra.

^{43/} Concurring, Justice Stewart, joined by the Chief Justice and Justice Blackmun, said such regulations were entitled to "great weight." 414 U.S. 571.

^{44/} See Executive Order No. 11914, 41 Fed. Reg. 17871.

^{45/} It might be argued in some handicap discrimination cases, a standard like that used for gender discrimination, see, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190, 197 (1976) (classification must be "substantially related to the achievement of [important governmental] objectives"), should be used. To use such a standard in this case, which involves "fundamental liberties," would mean that the state would have a lesser burden under the statute than under the constitution. Analogy to gender based classifications helps the plaintiff in this case,

(Continued)

Defendants, through a combination of actions, have set apart a group of handicapped persons in a setting which subjects them to harmful, dangerous and inhumane conditions, have restricted their liberties and have denied them the benefits of community education, care and associations under programs financed, in part, with federal funds.

The services provided for Pennhurst residents are unnecessarily separate both from the community and from community mental retardation services which the district court found were more conducive to "normalization," a principle which defendants have accepted (App. 275).

In explanation of its final regulations, HEW said:

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriated [sic.] to the person's needs" is intended to reinforce this general concept. [46/]

Defendants are not providing Pennhurst residents with an "equal opportunity ... in the most integrated setting appropriate to

45/ (Footnote continued from previous page) however, since they have been struck down under an equal protection theory when supported by "archaic and overbroad" generalizations about sex differences. Weinberger v. Wisenfeld, 420 U.S. 636, 643 (1975). Similarly, Pennhurst is a relic of archaic attitudes about the need to simply separate the mentally retarded from society (App. V. II 180, 181; App. V. III 7, 8, 11).

46/ 45 C.F.R., Part 84, App. A, p. 377. The regulation section discussed there reads: "[A]ids, benefits, and services, to be equally effective, are not required to produce the identical results or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefits, or to reach the same level of achievement, in the most integrated setting appropriate to the persons needs. 45 C.F.R. 84.4(b)(2).

[their] needs." The record reveals conditions that would not be tolerable even in prisons; non-retarded persons and retarded persons in community facilities are not subjected to such conditions under the Medicaid, SSI, or other federal programs. The residents are separated from the rest of society to their detriment, and they are separated from effective programs in which other mentally retarded persons are receiving community services. The district court found that Pennhurst residents not only do not progress in their learning, but they suffer physical deterioration and intellectual and behavioral regression (App. 268-269), in part, because of the "separateness" of Pennhurst (App. 274-275).^{47/} The district court also found that Pennhurst was inappropriate and inadequate for habilitation of the retarded (App. 256). Repeatedly, the record establishes that Pennhurst does not meet "minimal professional standards" applicable to such institutions.^{48/}

In contrast, mentally retarded persons served in the federally funded community programs are afforded "normalization" (App. 275), the essential aspect of habilitative care lacking at Pennhurst. For some, this even includes opportunities for employment (App. 277).

The regulations under Section 504, 45 C.F.R. 84.4(b), further require:

- (1) A recipient, [49/] in providing any aid, benefit, or service, may not . . . , on the

^{47/} The district court was properly impressed with the progress of one former Pennhurst resident who managed to get into a community living arrangement and "learned more in the last 3 1/2 years . . . than in 38 years . . . in Pennhurst" (App. 275 n. 47).

^{48/} See "Evidence," supra, pp. 15, 17, 19, 20, 21, 23.

basis of handicap:

* * * * *

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others.

The base service units, for whom the county defendants are responsible,^{50/} have caused many mentally retarded persons to be placed in Pennhurst. The defendant state officials supervise the county defendants and operate Pennhurst. All are denying handicapped persons the benefit of community services, which the district court found to afford far greater opportunities for learning than could ever be realized at Pennhurst (App. 274-277). Pennhurst is neither as equally effective nor does it afford the same opportunity as the community programs.^{51/}

^{49/} "Recipient" includes defendants. See 45 C.F.R. 84.3(f).

^{50/} App. V. III 1074, 1095, 1116, 1140.

^{51/} See note 20, *supra*. In addition to those references, see 118 Cong. Rec. 526 (1972) (remarks of Senator Percy); 118 Cong. Rec. 9500 (additional remarks of Senator Humphrey); 117 Cong. Rec. 45974-45975 (1971) (remarks of Representative Vanik, "we still have the snake-pit mental institutions--institutions for confinement without treatment, where brutality and unexplained deaths are common").

The statutory and regulatory commands of equal treatment mandate more than refraining from active mistreatment. The standard by which defendants' actions are measured is established by the regulations describing discrimination, and which establish that violations result from actions which have the "purpose or effect" of discrimination. 45 C.F.R. 84.4(b)(4).

Defendants argue that the legislative history does not support application of Section 504 to this case. Because section 504 was attached to other more controversial provisions, references to nondiscrimination in the debates are infrequent. However, of all the possible specific kinds of problems encountered by handicapped persons which could have been discussed, the debates mentioned, on several occasions, those of institutionalized persons.

In the discussion which preceded passage of H.R. 8395^{52/} in the Senate where the nondiscrimination provision was added, Senator Javits said (118 Cong. Rec. 32305):

I am particularly pleased with the clear emphasis in the bill on beginning to do more for the severely disabled. For some time I have been particularly concerned about the situation of the handicapped, including the mentally retarded. We must find ways to remove as many as possible from the institutions and to help them qualify for suitable work and living within our communities. I hope--and expect--that the rehabilitation programs will be stimulated to take an even more active role in this endeavor along with other community agencies and institutions.

The application of the term "discrimination" as used in Section 504 to this case is consistent with the will of Congress. On at

^{52/} See note 20, supra.

least two occasions since the enactment of Section 504 and the explanatory committee report of 1974, Congress has enacted statutes which express a policy against institutions operated the way Pennhurst is operated.^{53/} One enactment, authorizing federal funds to help provide community treatment facilities for mentally retarded persons, expressly includes a reference to the right of developmentally disabled persons to--

appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.[^{54/}]

Congress also asserted:

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that--

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet . . . minimum standards [set out in the statute.^{55/}]

^{53/} Pub. L. 93-647, 88 Stat. 2337, added Title XX to the Social Security Act on Jan. 4, 1975, discussed, supra, at p. 36; Pub. L. 94-103, 89 Stat. 502 (42 U.S.C. (Supp. V) 6010) "Congressional Findings respecting rights of the developmentally disabled," October 4, 1975.

^{54/} 42 U.S.C. (Supp. V) 6010.

^{55/} Ibid. PARC included a claim under this section in its amended complaint (App. 181-182). However, the district court did not decide this claim. Commonwealth defendants have received funds under this statute, and the funds have been passed to counties (App. V. III 1216-1218; App. V. II 292),
(Continued)

Speaking on behalf of this measure, 121 Cong. Rec. S16549 (daily ed. Sept. 23, 1975), Senator Javits said:

I am particularly pleased that the conferees have included [the rights section] which I originally introduced ... in response to the tragic situation of institutionalized mentally retarded patients across the Nation.

The conference report, 121 Cong. Rec. H8712-H8724 (daily ed. Sept. 15, 1975), which preceded passage of this act said:

These rights are generally included in the conference substitute in recognition by the conferees that the developmentally disabled, particularly those who have the misfortune to require institutionalization, have a right to receive appropriate treatment for the conditions for which they are institutionalized, and that this right should be protected and assured by the Congress and the courts.

Where the Congressional intent expressed is to broadly protect handicapped persons, and the discrimination is well within the Congressionally authorized regulations, the question is not--as defendants would state it--whether Congress has declared that all institutions for the mentally retarded should be closed forthwith, but whether Congress intended to allow federal funds to subsidize conditions such as those at Pennhurst, especially where the institutionalization results in separation of mentally retarded persons for no permissible reason. In our view, that is "discrimination," and a violation of Section 504 if it is supported by federal funds. It is also a violation of that statute where that institutionalization is not as "effective as . . .," and does not "afford . . . an opportunity . . . equal to that afforded others."

55/ (Footnote continued from previous page)
but the record is not clear that the funds have gone to the counties involved in this case. In any event, the declaration of rights appears not to be limited to programs receiving Developmental Disabilities grants since it speaks of broad obligations on the part of federal and state governments and requires "all programs" to meet certain standards. 42 U.S.C. (Supp. V) 6010(3) and (4).

II

THE DISCRIMINATION AGAINST PLAINTIFFS VIOLATES
THE EQUAL PROTECTION CLAUSE

Under the constitutional standard for discrimination, confining mentally retarded persons in Pennhurst affects fundamental liberties.^{56/} It amounts to confinement for status, Robinson v. California, 370 U.S. 660 (1962), and it is not supported by compelling reasons. Moreover, to confine persons to "provide... mental retardation services...", 50 Penn. Stat. 4202, and then to confine them in Pennhurst where meaningful services are impossible is not rational. This lack of either rationality or compelling need is underscored by the district court's finding that all Pennhurst residents can be served, and could better be served, in community programs (App. 256-260, 274-275).

The apportionment of scarce resources does not require some persons to be treated in Pennhurst and some to be treated in the community. Rather, defendants are simply providing ineffectual confinement to Pennhurst residents at great expense to both the state and federal governments, while care, education and training, greater freedom and opportunity, and freedom from confinement are provided to other mentally retarded persons at a lesser per capita expense.

Deferral to legislative choices, see, e.g., Dandridge v. Williams, 397 U.S. 471 (1970); New Orleans v. Dukes, 427 U.S. 297, 303 (1976), does not include deferral to the failure of defendants to execute their own state policy choices in favor of community care

^{56/} In Part III, *infra*, "fundamental liberties" at stake in this case are discussed in more detail in connection with the Due Process claim.

for the mentally retarded when their action affects fundamental rights.

Nor is this a case where equal treatment somehow implicates a drain on scarce resources. Defendants' arguments to this effect simply do not acknowledge the district court finding that the cost of providing services to the mentally retarded in the communities is less than doing so in institutions (App. 277), and without the enormous expense of operating Pennhurst, more than adequate funds would be available (App. V. III 1259-1260).

III

PLAINTIFFS ARE DEPRIVED OF THEIR LIBERTY WITHOUT DUE PROCESS OF LAW AT PENNHURST

The district court held that plaintiffs have, under the Due Process Clause, a right "to treatment" as a consequence of their having been "committed" to Pennhurst in order to be provided with services necessary to mentally retarded persons. In so doing, the court adopted the reasoning of several district courts, e.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (1972), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974), aff'd and vacated in part 550 F.2d 1122 (8th Cir. 1977); Gary W. v. State of Louisiana, 437 F. Supp. 1209, 1219 (E.D. La. 1976); Davis v. Watkins, 384 F. Supp. 1196, 1206 (N.D. Ohio 1974).^{57/} The rationale

^{57/} The courts of appeals have been receptive to the theory. The Fifth Circuit held in Donaldson v. O'Connor, 493 F. 2d 507, 521 (1974), that such a right exists. The Supreme Court vacated this opinion, O'Connor v. Donaldson, 422 U.S. 563 (1975), and declined

(Continued)

which is subsumed in the catch phrase, "right to treatment," is that the confinement of plaintiffs at Pennhurst infringes on the well-established liberty interests of plaintiffs and that the state can have no purpose in such an infringement except to provide the training and care needed by plaintiffs. Having fully deprived plaintiffs of the liberty interests at stake, state officials then incur the duty to give, and the plaintiffs the right to receive, the care and training which their condition requires. As applied here, the district court concluded, plaintiffs also have a right to be in the least restrictive circumstances consistent with the purpose of the commitment (App. 292-293). Applying these principles to plaintiffs, the court said that Pennhurst "should be regarded as a monumental example of unconstitutionality with respect to the habilitation of the retarded" (App. 295).

The rights and duties at issue here have both procedural and substantive aspects. In Gary W., supra, 437 F. Supp. at 1216, the court reasoned:

57/ (Footnote continued from previous page)
to rule on the theory. In the interim, Wyatt v. Stickney, supra, was affirmed and Burnham v. Department of Public Health of Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972), was reversed, 503 F.2d 1319 and Wyatt v. Aderholt, supra, (5th Cir. 1947), based on Donaldson. The Supreme Court denied certiorari in Burnham, 422 U.S. 1057, four days after vacating Donaldson.

The Eighth Circuit, in Welsch v. Likins, supra, 550 F.2d at 1132, accepted the district court holding. This Circuit reversed a dismissal of a "right to treatment" complaint, Scott v. Plante, 532 F.2d 939 (1976), declining to examine the theory in the absence of a full record. The District of Columbia Circuit has found a statutory right to treatment, but has suggested that absent the statute, serious Due Process problems would result in confinement of mentally ill persons, even dangerous ones, without treatment. Rouse v. Cameron, 373 F.2d 451 (1966). No court of appeals' opinion has held that the theory is without foundation.

Long-term detention of an individual is ordinarily a denial of due process except when he has been proved, in a proceeding subject to the rigorous constitutional limitations of the due process clause and the Bill of Rights, to have committed a specific act defined as an offense against the state, and for which incarceration is permitted for a fixed term only. If an individual, adult or child, healthy or ill, is confined by the government for some reason other than his commission of a criminal offense, the state must provide some benefit to the individual in return for the deprivation of his liberty.

Thus, the treatment afforded a person when he is detained may be viewed as a continuation of the procedures under which he is committed. To test the sufficiency of procedural standards, the Supreme Court, Mathews v. Eldridge, 424 U.S. 319, 335 (1976), has stated:

[T]he specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., Goldberg v. Kelly, [397 U.S. 254], at 263-271.

The liberty which receives substantive protection under the Due Process Clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe v.

v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), quoted in Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion), 543 (dissent). Clearly, the nature of the liberty interests determine the extent of protection they should receive from state interference. If the liberty is regarded as fundamental, "the usual judicial deference [to state discretion] is inappropriate." Moore v. City of East Cleveland, supra 431 U.S. at 499.

A. The Liberties at Stake

The plaintiffs' liberty interests in this case are ranked high in our constitutional system. The residents of Pennhurst are totally in the control of state agents. Commitment to state custody for any purpose results in "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). Such commitment affects fundamental rights. Baxstrom v. Herold, 383 U.S. 107, 113 (1966).

The Commonwealth (Br. 27), asserted:

A majority of the residents are voluntarily placed [at Pennhurst] for treatment.

The district court more accurately stated the facts (App. 252):

Approximately half of the residents of Pennhurst have been admitted upon application of their parents or guardians, while the other half have been committed by a court. The average resident age is 36, and the average stay at the institution is 21 years.

And (App. 273):

. . . 21 of the 45 living units are locked Those individuals over the age of 18 who have been "voluntarily" admitted to Pennhurst are theoretically free to leave the institution at any time. . . . Those admitted on the petition of their parents are informed by thier caseworker when they reach the age of 18 that they do not have to remain at Pennhurst. If the residents state that they wish to leave

the institution and the staff determines that there is no place for them in the community, or believes that the individuals are not ready to go into the community, the staff will petition the courts to have the individual committed to the institution by a court. . . . those residents who either do not understand these alternatives, or are physically unable to indicate that they wish to leave Pennhurst, will be deemed to have consented to . . . continued placement. . . . As a practical matter, Pennhurst was and is [the] only alternative.

"Voluntariness" on the part of a parent or guardian, of course, hardly represents a voluntary stay on the part of a resident. Cf. Gary W. v. State of Louisiana, supra, 437 F. Supp. ^{58/} at 1217.

Without challenging the district court findings directly, the remainder of the first paragraph (Commonwealth Br. 27), describes a situation considerably at odds with the district court findings about care and training at Pennhurst. Without again repeating the facts, see "Evidence," supra, we suggest the district court was correct when it found "agreement that Pennhurst as an institution is inappropriate and inadequate for the habilitation of the retarded" (App. 256).

The true dimensions of the curtailment of liberty at Pennhurst, whether curtailment is viewed as "procedural" or "substantive" are apparent from consideration of the typical stay there. The "average" stay at Pennhurst, 21 years, is beyond the average prison sentence. Some residents have been

^{58/} The extent to which a minor must be given a voice in institutional placement independent of a parent or guardian in Pennsylvania is the subject of a pending appeal in the Supreme Court. Secretary of Public Welfare v. Institutionalized Juveniles, No. 77-1715, probable jurisdiction noted, 46 U.S.L.W. 3779.

there most of their lives. None leave until alternative arrangements for care are made--an unlikely prospect for most according to the district court findings (App. 278-279).

The qualitative demension implicates a number of substantive liberty interests which have received protection in some contexts independent of the right to be at large. The oppressive condition and the absence of effective supervision and training inherently restrict the freedom to acquire knowledge. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925). The separate and isolated nature of Pennhurst restricts the freedom to join in associations, NAACP v. Alabama, 357 U.S. 449, 462 (1958); NAACP v. Button, 371 U.S. 415, 430-431 (1963); and the freedom to establish private family relationships, Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Moore v. City of East Cleveland, supra. Physical conditions, and lack of staff supervision, chemical and physical restraints and isolation rooms impinge upon the freedom to be secure in one's person, while in state custody, Screws v. United States, 325 U.S. 91 (1945). Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974); United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).

The district court found that Pennhurst residents are subjected to cruel and unusual punishment in violation of the Eighth Amendment at Pennhurst. Although there is ample reason to apply the Eighth Amendment to institutions such as Pennhurst, it is sufficient for purposes of this case to use that rationale which this Court has followed in cases involving pretrial detainees, e.g., Hampton v. Holmesburg Prison Officials, 546 F.2d 1077, 1079-1080 (3d Cir. 1976) which, while not applying the Eighth

Amendment, as such, use Eighth Amendment standards for convicts to define minimum liberty interests of such nonconvicts. See also Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Duran v. Elrod, 542 F.2d 998 (7th Cir. 1976).

If the residents of Pennhurst had been convicted of crimes and sentenced to Pennhurst, this record would require a holding that both the totality of the conditions and a number of aspects of conditions there violate the prohibition of the Eighth Amendment against cruel and unusual punishment. The Supreme Court has defined the scope of the prohibition (Estelle v. Gamble, 429 U.S. 97, 102-103 (1976)) to be--

More than physically barbarous punishments. (Citations omitted.) The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .," against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society," * * * or which "involve the unnecessary and wanton infliction of pain" (citations omitted).

Applying these standards, federal courts have found a variety of debilitating conditions and events in prisons to violate the Eighth Amendment. Cases involving denials of medical care, the subject of Estelle v. Gamble, *supra*, are most helpful, since "care" and "habilitation" are Pennhurst's *raison d'etre*. See Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974) (doctor choosing the "easier and less efficacious treatment" for a prisoner); Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977) (medical care required by Estelle, *supra*, includes psychiatric treatment if needed to qualify for parole); Finney v. Arkansas Board of Correction, 505 F.2d 194, 202 (8th Cir. 1974) (lack of sufficient personnel to provide

adequate medical care); McCray v. Burrell, 516 F.2d 357, 368 (4th Cir. 1975) (psychiatric care required when violent prisoner is placed in isolation for protection of himself and to maintain order); Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), certiorari denied, 421 U.S. 948 (1975); Barnes v. Virgin Islands, 415 F. Supp. 1218, 1227-1228 (D. V.I. 1976) (medical care includes preventive medicine and mental as well as physical health care).

Similarly, adverse living conditions and overcrowding in prisons have conflicted with the Eighth Amendment. Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977) (overcrowding--prisoners entitled to an environment which does not result in his degeneration or which threatens his mental and physical well being); Finney v. Arkansas Board of Correction, supra, 505 F.2d at 201 (overcrowding and prisoners' safety from each other); Woodhouse v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (freedom from constant threat of violence from other inmates); Craig v. Hocker, 405 F. Supp. 656, 677 (D. Nev. 1975) (insufficient clothing and lack of facilities for personal hygiene); Martinez Rodriguez v. Jimenez, 409 F. Supp. 582 (D. P.R. 1976) (inter alia, lack of proper classification of prisoners and inadequate sleeping facilities); Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (overcrowding, lack of security, fire and safety hazards).

As the description of Pennhurst life, pp. 14-13, supra, illustrates, each of these conditions has an analogue at Pennhurst. Moreover, some federal courts have applied the Eighth Amendment to conditions in state-operated institutions where persons are confined for other than penalogical reasons. Romeo v. Younberg, No. 76-3429 (E.D. Pa. June 6, 1977); Welsch v. Likins, 373 F. Supp. 487, 502-503 (D. Minn.

1974), aff'd and remanded in part, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 764 (E.D. N.Y. 1973). The rationale for application of the Eighth Amendment to such confinement arises from treatment of confinement as "punishment". Robinson v. California, supra.

There can be no doubt that Eighth Amendment standards are relevant to Pennhurst. In Ingraham v. Wright, 430 U.S. 651 (1977), on which the Supreme Court, in distinguishing children in public schools from prisoners for Eighth Amendment purposes, relied on the "harsh facts of criminal conviction and incarceration," which "deprives [the prisoner] of the freedom 'to be with family and friends and to form the other enduring attachments of normal life....'" Id. at 669.

Pennhurst, unlike the public school of Ingraham, is not an open institution. Indeed, it is, to the persons who reside there, a prison. Its residents are not free to leave. When they try to leave the institution, they are returned to the facility by institutional personnel or the police. Some residents are subjected to seclusion or solitary confinement. Its residents are within the 24-hour custody and control of institutional keepers upon whom they must depend for the sustenance of life and the enjoyment of every freedom. Cf. Estelle v. Gamble, supra, 429 U.S. at 103. Many have been institutionalized over long periods of time and have lost all contact with their families and the community and, as such, have no person other than institutional personnel upon whom to depend for assistance and help. Morales v. Turman, 383 F. Supp. 53, 123 (E.D. Tex. 1976), vacated and remanded,

562 F.2d 993 (5th Cir. 1977) teaches:

[I]solated institutions often construct unreal worlds that are very real to the needs of the institution but are very unreal to the needs of a person functioning in our society.

As handicapped individuals, the institutionalized mentally retarded are among all our citizens the least able to come forward to seek redress of individual grievances.

It is under these circumstances that openness cannot be effectively maintained and where common law restraints are inadequate to protect confined persons from conditions which result in death, physical injury, psychological harm and lack of care and training. The rationale of Newman v. Alabama, supra, and Estelle v. Gamble, supra, applies here--where persons are entrusted to the care of the state under conditions where they are confined 24 hours per day, they cannot be deliberately denied that degree of care which they need.

Although convicts have no constitutional right to rehabilitation or treatment, the Supreme Court has found penal conditions to violate the Eighth Amendment where they are "so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976). Because many Pennhurst conditions are totally lacking in rehabilitative purpose, that rationale also applies. One such practice is the inadequate control, administration and review of drug therapy. Drug usages such as those found at Pennhurst which are not shown to be associated with training or medical treatment have been held to violate the Eighth Amendment. Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973).

Similarly, the use of seclusion and restraints in lieu of care and training, the use of "P.R.N." orders for chemical restraints, and the failure to remove residents from seclusion and restraint at the earliest possible time constitute cruel and unusual punishment. Welsch v. Likins, supra; Pena v. New York State Division for Youth, 419 F. Supp. 203 (S.D. N.Y. 1976).

Summarily stated, confinement of the plaintiff class in Pennhurst "involve[s] the unnessary and wanton infliction of pain" Estelle v. Gamble, supra, 429 U.S. at 103, quoting Gregg v. Georgia, supra, 428 U.S. at 173 (1976), ". . . results in their degeneration [and] threatens [their] mental and physical well being." Battle v. Anderson, supra, 564 F.2d at 403.

B. The State Purpose

All this is not to say that the state may not restrict some freedoms under some circumstances for some purposes. It is to say that plaintiffs are deprived of their liberties by confinement at Pennhurst, and the state should have a compelling need to restrict the freedom that it does in the manner that it does. Cf. Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). The usual rule applied where fundamental liberties are at stake is to strike down the state actions if there are less drastic or less restrictive means which can be used to accomplish the state purposes. Shelton v. Tucker, 364 U.S. 479, 488 (1960); Kusper v. Pontikes, 414 U.S. 51, 59 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

Undoubtedly, the state has a substantial interest in the care and training of mentally retarded persons in the same way that it has a substantial interest in the education

of the young. Meyer v. Nebraska, surpa; Pierce v. Society of Sisters, supra. The state has no interest, however, in the confinement, or institutionalization, per se, however, of the plaintiff class. Plaintiffs are not dangerous, they have committed no crimes, they have no communicable diseases, and, as a class, they do not require the kind of control only a large confining institution can give.^{59/} Mentally retarded persons are sent to, and retained at, Pennhurst simply because it exists, and the state has not made room in alternative settings.^{60/}

Continuing the compulsory education analogy, defendants cannot require that learning take place in a particular environment when fundamental liberties are infringed by that requirement. Pierce v. Society of Sisters, supra. This is particularly true when the state may accomplish its purposes in more practical and feasible ways which are not so restrictive of fundamental liberties and which would provide, according to

^{59/} It may be, as described by the district court, (App. 242), that there are some mentally retarded persons who are also mentally ill, perhaps to the extent that constant or intensive therapy is required in an appropriate psychiatric facility. Ascertaining the needs of persons at Pennhurst is part of the function of the individualized treatment plans ordered by the district court (App. 343). Whatever the individual characteristics of the population of Pennhurst, however, they get neither the plans (App. 260), nor the treatment they need, and no person was identified in the record as someone requiring institutionalization.

^{60/} The suggestion of the Philadelphia defendants (Br. 33), that some purpose other than habilitation could justify institutional confinement is in the record. The less ambitious purposes suggested as possible reasons for confinement of mentally disabled persons in the concurring opinion in O'Connor v. Donaldson, 422 U.S. 563, 581-583 (1975) simply are not present here. If they were, the reasoning would not change. For example, if the state sought only to provide subsistence, it could be provided in places less stultifying than Pennhurst.

the unchallenged district court findings, more humane and more effective results. Defendants apparently do not disagree that community living arrangements are more efficacious.

The Supreme Court, in Jackson v. Indiana, 406 U.S. 715, 738 (1972) held:

At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

This holding, in a procedural case, has been cited in a substantive context. Feeley v. Sampson, 570 F.2d 364, 369 (1st Cir. 1978). The holding in Jackson is peculiarly applicable to this case. The court held that the state could not use a procedure to confine a mentally defective person which used a standard which made it extremely unlikely that he would ever be released when there were other applicable procedures which incorporated a more realistic promise of release. See also Baxstrom v. Herold, supra. The inferior services, treatment and conditions at Pennhurst bear a direct relationship to the likelihood of release because of the lack of opportunity for habilitation. By way of contrast, not only is habilitation more likely in the community programs, but those programs represent considerably less restrictions on "liberty". There is no "compelling interest" demonstrated in this record to continue to maintain Pennhurst indefinitely.

Courts have not hesitated to require orderly alterations of institutional conditions where necessary to effect constitutional protections. Rhem v. Malcolm, supra, 507 F.2d at 340; Costello v. Wainwright, 525 F.2d 1239 (5th Cir. 1976); Battle v.

Anderson, supra; Wolfish v. Levi, 573 F.2d 118 (2d Cir. 1978), cert. pending; Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977).

"[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." Bell v. Hood, 327 U.S. 678, 684 (1946). Here, the Due Process Clause requires an alteration in plaintiffs' state-controlled environment which will remove the unnecessary restrictions on their liberty interests and give them a realistic opportunity for habilitation.

IV

THE DISTRICT COURT PROPERLY APPLIED EQUITABLE PRINCIPLES IN GRANTING RELIEF

Faced with the massive violations of the rights of the plaintiff class at Pennhurst, the district court was required to enter some appropriate relief. The propriety of the order, under this Court's rule in Evans v. Buchanan, 555 F.2d 373, 380 (1977), should be measured by this test:

Formulating a realistic, practical, and effective remedy is a job peculiarly within the province of the trial court, whose position gives it a quantum advantage over an appellate court in weighing the "practicalities of the situation". It is primarily for this reason that we defer to the trial court's exercise of remedial discretion when it has applied proper legal precepts and remained within determined legal boundaries. * * * [G]iven the nature of the judicial system . . . this court is required to follow a narrow compass.

Several factors led the district court to enter the relief that it did. First, since the district court found that there were numerous aspects of the Pennhurst environment as well as the totality of that environment which infringed the rights of plaintiffs, ample precedent would have permitted a far-reaching order requiring considerable changes in the nature of Pennhurst itself, e.g., Wolfish v. Levi, supra; Newman v. Alabama, supra; as well as the removal of Pennhurst residents to other facilities. Rhem v. Malcolm, supra; Battle v. Anderson, supra; Costello v. Wainwright, supra. This would, of course, require extensive expenditures on the part of the state, and an indefinite supervision of the district court over the affairs of Pennhurst. See G. Frug, The Judicial Power of the Purse, 126 U. Pa. L. Rev. 715 (1978).

The other alternative was to require that the plaintiff class be removed in an orderly fashion from Pennhurst. Consideration which supported this course were:

1. It was demonstrated that more effective and unobjectionable alternatives could be devised.
2. The state was already committed to expansion of the alternative programs.
3. After the transition had been made, the care and training of the class would be less expensive than care at Pennhurst.
4. Because community living arrangements are inherently less restrictive, there would be less likelihood for a need for indefinite supervision by the district court.

The district court's order is considerably less intrusive into state affairs than Commonwealth defendants assert. The

district court followed a procedure quite like that recommended by Detainees of the Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 399 (2d Cir. 1975). First, the parties were given an opportunity to negotiate a plan for the correction of the conditions which offended the rights of the plaintiff. The negotiation failing, plaintiffs and Commonwealth defendants submitted proposed orders to the court (App. 308, 334). The county defendants submitted no proposal. The state's plan was to either remove 169 Pennhurst residents by June 30, 1978, or to file a report explaining why it was not done. No proposal was made for improvement in the environment of the remaining residents of Pennhurst beyond physical improvements in the plant and reduction in the use of physical and chemical restraints, and seclusion rooms.

The district court was justified in finding that defendants plan would not substantially alter the conditions which infringed plaintiffs rights.

None of the defendants more specific objections to the district court's relief, as we show below, require reversal or modification of the order.

A. The appointment of a Special Master is Warranted

The district court's order of March 17, 1978, contemplates the appointment of a Special Master to plan, organize, direct, supervise, and monitor the implementation of its order, pursuant to Rule 53, Federal Rules of Civil Procedure, and "in the exercise of the Court's equitable powers." The district court viewed execution of the order as "impossible without the appoint-

ment of a Special Master" (App. 343).^{61/}

At this point, the Master's duty is essentially a planning function. He is charged with the task of drawing a number of plans to effectuate the court's order. These plans include (App. 344-346):

1. A plan specifying the quantity and type of community living arrangements and other community resources necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive setting. . . . ,
2. A report specifying necessary resources and procedures to insure individual evaluations of residents for individual exit and community program plans ,
3. A plan to insure sufficient staff to conduct such evaluations and assist in the expansion of necessary community based programs and facilities ,
4. A plan to inform class members and their parents and relations of the status of the implementation of the order and how the order and its plans affect them,
5. A plan to provide employment alternatives to Pennhurst employees, and
6. a plan to address deficiencies at Pennhurst which endanger resident health and safety.

After formulation, each plan will be submitted to the district court. After a hearing at which all parties may be heard, the court may adopt, reject or modify the plans. Following adoption, they are to be implemented. The Special Master is then charged with the responsibility of monitoring the implementation

^{61/} The court has appointed Dr. Robert Audette to be the Special Master and, by Order of July 27, 1978, set up an administrative structure and provisions for initial funding by which the Special Master may commence his duties.

of the plans by defendants. At all times the Special Master remains accountable to and responsible to the court, and defendant officials are in no way supplanted by the master. The master cannot require anything of them except information.

It has been held, Hart v. Community Sch. Bd. of Brooklyn, N.Y. Sch., D. #21, 383 F. Supp. 699, 766-767 (E.D. N.Y. 1974), that:

Rule 53's requirement that the case referred to a master be "exceptional" is more than satisfied when a court is faced with a polycentric problem that cannot easily be resolved through a traditional courtroom bound adjudicative process. * * * A skilled master, with expertise . . . is crucial if a just and workable remedy is to be devised.

In complex litigation courts have commonly requested masters with expertise in the relevant subject matter to assist in fashioning a remedy. See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 306 F. Supp. 1291, 1313 (M.D. N.C. 1969); Keyes v. School District No. 1, Denver, Colorado, 380 F. Supp. 673, 684 (D. Colo. 1974); Hart v. Community Sch. Bd. of Brooklyn, N.Y. Sch. D. #21, *supra*, 383 F. Supp. at 758-769; Bradley v. Milliken, 402 F. Supp. 1096, 1104 (E.D. Mich. 1975); Morgan v. Kerrigan, 401 F. Supp. 216, 227 (D. Mass. 1975). In litigation of this nature, the utilization of Masters in various circumstances is not exceptional. Davis v. Watkins, *supra*; Mills v. Bd. of Educ., 384 F. Supp. 866 (D. D.C. 1972); Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

In addition to the need for expert advice, appointment of a master is warranted by defendants' inability to remedy the adverse conditions at Pennhurst. After the failure of defendants to present a promising plan, the district court stated (App. 341):

[T]he Commonwealth defendants agreed that the retarded should be removed from Pennhurst and readily admitted that the only reason that the litigation was necessary was because they wished to accomplish the closing of Pennhurst as a residence for the retarded pursuant to their own schedule which was vague and indefinite.

The record reflects that the defendants' previous efforts have failed of implementation. The district court found (App. 276-277):

In November, 1970, Act 256 was signed by the Governor of Pennsylvania. This legislation appropriated twenty-one million dollars for the purpose of planning, designing and constructing community facilities which would enable 900 Pennhurst residents to be transferred to the community. In 1971, the McDonald report was prepared at a cost of \$68,000. It detailed the programs and services needed to support the 900 Pennhurst residents in the community and provided a blueprint for the implementation of the Act. Though seven years have passed since the Act was signed, few of the facilities have become operational. . . . Over eighteen million dollars of these funds remain unspent but is allocated to build these facilities. . . . As of April 25, 1977, however, only 37 residents have directly benefitted from the Act.

The district court was amply justified in finding that a special master is necessary to plan and monitor implementation of relief.

B. The Relief Is Not Vague

Commonwealth defendants point to four paragraphs of the injunctive order which they allege are vague. These paragraphs namely, paragraphs 1, 2, 12, 14, are all matters which are to be addressed in plans to be drawn by the Special Master, e.g., paragraph 1 which enjoins defendants to provide suitable community living arrangements together with such

community services as are necessary to provide class members with minimally adequate habilitation is the subject of most of the plans the Special Master is directed to draw and submit to the court for its approval. The paragraph simply states the basic relief required, and more specific standards and guidelines will obviously be enunciated in plans to be drawn by the Special Master. Upon approval by the court, they will provide more than enough guidance to the Commonwealth.

1. Commonwealth defendants' argument, that the Department of General Services (D.G.S.) is a necessary party in order that Commonwealth and County defendants may "implement with dispatch Act 256 of the 1970 Pennsylvania General Assembly" upon a schedule to be set by the court, is without merit. Defendants have responsibility for operation of the mental retardation delivery system in Pennsylvania. They plan what is to be built. It is doubtful that D.G.S. will be uncooperative in letting the contracts required by defendants; if they are, they can be added as parties.

2. Paragraph 3 of the order regarding monitoring requires defendants to insure that the mentally retarded persons under their care, custody, or control obtain adequate services by enjoining them from failing "to provide all" necessary and proper monitoring mechanisms (App. 343). This provision is intended, of course, to insure that there is a method or mechanism available to detect inadequacies in the care and treatment of a class member in a community program. As such, it requires that defendants scrutinize services provided and the quality of service provided to the retarded. No where does it

require that defendants exercise control or supervisory powers over "general community services, such as medical and dental care" (Commonwealth Br. 58). The injunction requires defendants to carefully monitor and review periodically the retarded persons themselves to ascertain if they are receiving the care that they need. This aspect of the monitoring process, about which there can be little disagreement, may provide the best indication of whether particular retarded persons are receiving adequate services.

C. The Scope of the Remedy Does Not Exceed the Violation Found

The Commonwealth defendants attack the order as providing relief for violations not found by the district court. On the contrary, each provision of the district court's order is carefully tailored to "correct the condition that offends the Constitution." Milliken v. Bradley, 418 U.S. 717, 738 (1974).

1. Professional standards recognize that individualized program plans should be reviewed at least annually by an interdisciplinary team of professional persons to reevaluate programs of individual residents with a view to revising such plans and planning for the provision of necessary programming for the following year. At such reviews, the program of care and training of residents is reviewed and discussed by professionals who are providing a services. To the extent possible, parental involvement in such a planning process is recognized to be essential to the planning process. It provides relevant information and assists in maintaining parental interest. It strengthens the inclusion of the retarded person in the family. Manifestly, the order does not provide "procedural rights" and eventual

"judicial review".

2. Commonwealth defendants argue that the order's incorporation of Pennsylvania regulations concerning the use of physical restraints is improper because the regulations, not in effect at time of trial, could not have been shown to have been violated. Not complying with the regulations, of course, is not the relevant violation. The violations were the unconstitutional use of physical restraints. Compliance with the lately devised regulation is one remedy which should be an unintrusive method of correcting those conditions in the future.^{62/} The objection to this portion of the order is particularly curious since it was a part of the Commonwealth's proposal (compare App. 336, para. 5 with App. 348, para. 13).

3. Effective monitoring of services and the individual needs of mentally retarded persons is necessary to insuring that any system of services, including community-based mental retardation services, provides adequate care. The district court has ordered that the plan for necessary community monitoring services include the provision of "friend--advocates to assist in the protection of the rights of each member of the plaintiff class." The requirement is grounded on the need to protect the oftviolated rights of the class on an individual basis, not in 42 U.S.C. 6012 as defendants suggest. Because that statute makes such a system a requirement of some federal grants does not bar an order requiring the same thing as a remedy to protect against future violations of the rights

^{62/} Commonwealth defendants allege that this injunction prohibits them from efforts to "improve and refine these regulations." If such defendants wish to make the requirements for use of physical restraints more stringent, defendants may move the court for a modification of the order. Undoubtedly, there would be no objection.

in issue.

4. Commonwealth appellants suggest that the requirement that the Master's plan include provisions regarding opportunities for alternative employment for Pennhurst residents guarantees an "absolute right to public employment" (Br. 55). Clearly, it does not provide such a right.

D. The Order Does Not Violate the
Eleventh Amendment

The Eleventh Amendment does not require that prospective injunctions against state officials be free from ancillary costs to a state. Edelman v. Jordan, 415 U.S. 651 (1974). There is simply nothing in the relief required in this case that requires defendants to compensate plaintiffs for past violations of their rights. Cf. Fanty v. Comm. of Pa. Department of Public Welfare, 551 F.2d 2 (3d Cir. 1977). Indeed, they are not required to compensate plaintiffs in a monetary sense at all. They are required to modify a system for delivery of mental retardation services so that plaintiffs' liberties will be less infringed in the future, or assuming the order is upheld under Section 504, to meet their duty as recipients of federal funds.

Nor is the relief barred simply because the ancillary costs are large. Milliken v. Bradley, 433 U.S. 267, 289 (1977), cited by Commonwealth defendants (Br. 65), approved a prospective remedy which would cost the State of Michigan nearly \$6 million in a school desegregation case.^{63/}

^{63/} In any event, as previously mentioned, the ultimate substitution of community services for Pennhurst will cost the state less in operating costs.

Moreover, the restructuring of a school system, which defendants concede is prospective, could not be more analogous to the alteration of a mental retardation service delivery system even if the alteration could be regarded as compensating for past infringements as was the remedy in Milliken.

V

THE TRIAL JUDGE PROPERLY EXERCISED DISCRETION TO
ALLOW THE UNITED STATES TO INTERVENE IN THE CASE

In their Challenge to the presence of the United States in this case, Commonwealth defendants rely almost exclusively on United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977), a case which held that without explicit statutory authority the United States could not initiate litigation to protect the constitutional rights of mentally retarded persons confined to an institution. Neither is there explicit statutory authority for the intervention by the Executive Branch of the United States Government in this case. Because of this, it is important to identify clearly the rationale for the Solomon court's frustration of executive acts, despite well settled principles of law recognizing the authority of the United States to initiate lawsuits to protect established public or governmental interests. See, e.g., United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); United States v. American Bell Telephone Co., 128 U.S. 315 (1888); In re Debs, 158 U.S. 564 (1895); Kern River Co. v. United States, 257 U.S. 147 (1921); United States v. Arlington County, Comm. of Va., 326 F.2d 929 (4th Cir. 1964).

The Solomon court, after reviewing the authorities upholding suits by the United States not authorized by statute,

concluded that the principles described in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), required it to conclude that the "separation of powers" doctrine forbade the exercise of the authority to initiate lawsuits in the "civil rights" area without explicit authorization by Congress. United States v. Solomon, supra, 563 F.2d at 1128-1129. In this regard, the Fourth Circuit panel seemed impressed with the rejection by Congress of measures to grant broad authority to the Attorney General to file civil rights suits at the same time that it was granting suit authority in specific kinds of civil rights cases.

None of these considerations are present here. A suit initiated and pressed solely by the federal executive without congressional authorization is considerably different from a suit initiated by the injured parties, clearly authorized by statute, in which the trial court permits the federal executive to participate. In the former, judicial power would be brought to bear against defendant state officials in a context not explicitly mandated by Congress. In the latter, the judicial power does have such a mandate in the form of statutes authorizing suits against state officials (42 U.S.C. 1983) and against recipients of federal funds (Section 504). No factors bearing on the "equilibrium established by our constitutional system," United States v. Solomon, supra, at 1129, quoting Youngstown (concurring opinion), are present. At least two factors afford sufficient imprimatur on executive action here to relieve any suspicion that the executive is acting only ". . . upon his own independent power. . ." or upon ". . . his

own constitutional powers, minus any powers of Congress. . ."

Youngstown Sheet & Tube Co. v. Sawyer, supra, 343 U.S. at 637.

First, since the Solomon decision, congressional action has significantly reduced the weight to be given the action of previous Congresses in rejecting the broad civil rights suit authority relied upon by the Fourth Circuit panel.^{64/} On July 28, 1978, the House of Representatives passed H.R. 9400, 95th Cong., 2d Sess., a bill which would provide explicit statutory authority for the Attorney General to bring suits such as this one. 124 Cong. Rec. H7489-H7490 (daily ed.). The Senate has not yet acted.

Second, in permitting the United States to intervene, the district court was acting well within Rule 24, Federal Rules of Civil Procedure.^{65/} Rule 24(a)(2) provides for intervention of right---

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest * * *.

^{64/} We adhere to the view we expressed in the Solomon case that congressional rejection of provisions which would authorize suits for any type of Fourteenth Amendment violation, see United States v. Solomon, supra, 563 F.2d at 1125, n. 4, is not rejection of authority to bring suits for relief of conditions in institutions in which the United States has significant interests. Cf. United States v. California, 332 U.S. 19 (1947).

^{65/} The district court order allowing intervention did not specify whether intervention was allowed under Rule 24(a) or (b). The action should be sustained if it is sustainable under either provision. Reversal of the district court's discretion under Rule 24(b) requires a showing of "clear abuse." Allen Calculators, Inc. v. Nat'l Cash Register Co., 322 U.S. 137, 142 (1944).

Rule 24(b)(2) permits the district court to allow intervention--

when an applicant's claim or defense and the main action have a question of law or fact in common.

Rule 24(b) further provides:

When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

The development of intervention law in the federal system has been increasingly favorable to intervention. See D. Shapiro, Some Thoughts on Intervention Before Courts, Agencies, And Arbitrators, 81 Harv. L. Rev. 721 (1968). The special provision in Rule 24(b) for governmental intervention was added to avoid an "exclusionary construction" of Rule 24(b) and to allow the trial court to consider "the governmental application with a fresh and more hospitable approach." Nuesse v. Camp, 385 F.2d 695, 705 (D.C. Cir. 1967). In that case, and in others, see, e.g., SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459 (1940); O'Keefe v. New York City Board of Education, 246 F. Supp. 978, 980-981 (S.D. N.Y. 1965), courts have allowed intervention by government agencies where the case affected a subject matter in the public interest and the agency has an "interest" in that matter even though a "claim or defense" in the usual sense on the part of the agency was not identified. See also

3B Moore's Federal Practice ¶24.10 [2] (2d ed.).^{66/}

Here, the United States has an important interest in the protection of the rights of the institutionalized mentally retarded persons on whose behalf the suit was brought--an interest recognized by the Solomon court.^{67/}

First, as discussed, in Part I, supra, , extensive federal legislation has been enacted to protect the rights and well being of mentally retarded persons, and HEW has been given important responsibilities with respect to those statutes. One of those statutes recognizes the federal government's "obligation to assure that public funds are not provided to any institutional program. . . that . . . does not provide treatment, services, and habilitation appropriate to the needs of [mentally retarded persons]." 42 U.S.C. 6010 (3); see pp. 44-45, supra.

Second, this suit was brought under 42 U.S.C. 1983 and 1985, statutes which are in pari materia to broadly worded criminal statutes, 18 U.S.C. 241 and 242. Baldwin v. Morgan, 251 F.2d 780, ^{66/} One district court, in a suit almost identical to this, held that it is "clear that the court in its discretion could properly permit the United States to intervene . . . notwithstanding the possibility that it could not have initiated the lawsuit." Horacek & United States v. Exon, C.A. No. 72-L-299 (D. Neb., Jan. 23, 1977).

^{67/} "We have no doubt that the United States has an interest, in the generic sense, in the subject matter of the suit, and that it has an interest, in the generic sense, in seeing that the various funds which it pays to Rosewood are properly expended. We note that the suit is not one against the State of Maryland to enforce the condition of a grant or for breach of a contract pursuant to which a grant was made. Where we differ from the government's conception of the issue before us is that we view the case as one of a question of authority and not simply of interest." United States v. Solomon, supra, 563 F.2d at 1125-1126.

789 (5th Cir. 1958). In discussing a similar intervention, Judge Tuttle, In re Estelle, 516 F.2d 480, 486-487 (5th Cir. 1975), certiorari denied, 426 U.S. 925 (1976) urged:

The effect of overlapping coverage of these statutes is to grant power if not to place a duty on the United States to prosecute, with the criminal sanction, the same deprivations of rights of which [inmates who brought a civil action] complain * * *. However, it is extremely doubtful that criminal penalties would be effective * * *. The complaints allege widespread, systemic and systematic deprivation of civil rights * * *. The criminal sanction is singularly inappropriate in these instances, because it reaches only . . . individuals attached to the facility and not the root of the deprivation--the facility itself. * * * I decline, as the Supreme Court did in United States v. Republic Steel Corp. 362 U.S. 482, 492 . . . [1960] to impute "to Congress a futility inconsistent with the great design of this legislation." Instead, I believe that where "criminal liability [is] inadequate to ensure the full effectiveness of the statute which Congress had intended," Wyandotte Co. v. United States, 389 U.S. 191, 202 . . . [1967], the United States may seek a civil "remedy that ensures the full effectiveness of the Act." Id., 389 U.S. at 204 * * *.

Third, the Department of Justice was directed by a President to take appropriate legal action to strengthen the rights of mentally retarded persons. See 7 Weekly Comp. of Pres. Doc., No. 47, p. 1530, Nov. 22, 1971. See also Executive Order No. 11776, 39 Fed. Reg. 11865, concerning mental retardation generally. A litigation program has been established in this area and a description of it is reported to Congress annually. Annual Reports of the Attorney General: 1974, p. 7374; 1975, pp. 85-86; 1976, pp. 111-112; 1977, pp. 161-162. There is no better means to carry out this duty than to participate

in suits such as this one.^{68/}

Fourth, as noted, Part I B1, supra, large amounts of federal funds have flowed to Pennsylvania's mental retardation program. Had the United States chosen to do so, it could have brought suit under the facts as alleged in the complaint, or as found by the district court, to enforce conditions attached to those grants through regulations issued by the Secretary of

^{69/} HEW. Such authority is well established. United States v. Frazer, 297 F. Supp. 319 (M.D. Ala. 1968), 317 F. Supp. 1079 (1970); United States v. Solomon, supra, 563 F.2d at 1129 (concurring opinion); United States v. County School Bd., Prince George County, Va., 221 F. Supp. 93 (E.D. Va. 1963); United States v. Rock Island Centennial Bridge Comm., 230 F. Supp. 654 (S.D. Ill. 1964), aff'd, 346 F.2d 361 (7th Cir. 1965). The existence of such an

^{68/} District courts have permitted intervention in all but one case of this nature where the United States has sought intervention. Evans v. Washington, C.A. No. 76-0293 (D. D.C. Jan. 28, 1977); Horacek v. Exon, supra; Gary W. v. Stewart, C.A. No. 74-2412-C (E.D. La. April 9, 1975); North Carolina Ass'n for Retarded Children v. North Carolina, C.A. No. 3050 (E.D. N.C. Jan. 17, 1974); Rone v. Fireman, C.A. No. 75-355A (N.D. Ohio May 25, 1976); Stamus v. Leonhardt, C.A. No. 73-126-2 (S.D. Iowa Feb. 21, 1975). The lone exception is Alexander v. Hall, C.A. No. 72-209 (D. S.C., June 14, 1978), in which intervention was revoked following Solomon after it had previously been granted under the rationale that the United States could have initiated a separate suit. Alexander v. Hall, 64 F.R.D. 152, 157 (D. S.C. 1974).

^{69/} At the time intervention was granted, only constitutional claims had been raised (App. 26-47). However, the subsequently raised Section 504 claim is identical on these facts to the constitutional claims and when brought into the case supplied even more interest for the United States to be in the case, by bringing the case squarely within the second sentence of Rule 24(b).

independent claim, at least, gives the district court discretion to allow the United States to intervene in an existing case seeking the relief which would be included in that sought by original plaintiffs.

For all of these reasons, Commonwealth defendants are in error when they assert (Br. 47), that "the United States has no legally cognizable stake in the operation of Pennhurst Center." All of these duties and responsibilities assigned to the federal executive give rise to substantial "interests" which meet the requirements of permissive intervention under Rule 24(b). They may well provide a basis for intervention of right under Rule 24(a) in view of the extensive public interests in the case. Donaldson v. United States, 400 U.S. 517, 531 (1971); Nuesse v. Camp, supra.

The district court did not abuse its discretion in granting the United States' motion to intervene.

CONCLUSION

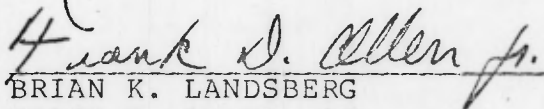
For these reasons, the United States urges that the judgment and order of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 1978, I served copies of the foregoing Brief for the United States on the attorney of record listed below by first class mail postage paid.

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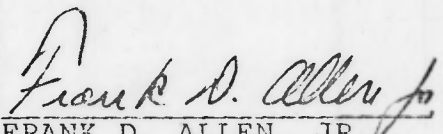
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