

Landsberg

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TERRI LEE HALDERMAN, et al.,

Plaintiffs-Appellees

UNITED STATES OF AMERICA

and

PENNSYLVANIA ASSOCIATION FOR
RETARDED CITIZENS, et al.,

Plaintiffs-Intervenor-Appellees

v.

PENNHURST STATE SCHOOL AND HOSPITAL, 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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BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

1. Whether plaintiffs' constitutional and/or statutory rights were violated by the conditions at Pennhurst and the failure to place plaintiffs on the basis of an individualized reasoned professional treatment judgment.
2. Whether the relief this en banc court previously ordered is proper in light of the violations of federal and state law.
3. Whether the record supports relief under the state plan requirements of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6063.

STATEMENT

A. The district court proceedings

This class action was commenced on May 30, 1974 by Terri Lee Halderman, a minor retarded resident of Pennhurst State School and Hospital, against that institution and various state officials responsible for operating it and for providing mentally retarded persons who are in state custody with a residential habilitative placement. Subsequently, the United States and the Pennsylvania Association for Retarded Citizens (PARC) intervened as plaintiff-intervenors. All plaintiffs alleged that the lack of proper habilitative care for persons confined at Pennhurst violated the Fourteenth Amendment. Subsequently, PARC alleged violations of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000 et seq. (DD Act), and Halderman and PARC claimed that Section 504 of the Rehabilitation Act, 29 U.S.C. 794, was also violated.

After trial, the district court, 446 F. Supp. 1295, held that plaintiffs' rights under the Fourteenth Amendment, state statutes and Section 504 of the Rehabilitation Act were being violated. The court found that Pennhurst was unsafe, inhumane and inadequate to serve its intended habilitative purpose and that the state of Pennsylvania had embraced the concept of providing habilitative services for mentally retarded persons in as "normal" an environment as is possible, i.e., in a non-institutional setting.

After further proceedings on relief, the court ordered that plans be developed for transferring all residents of Pennhurst to community living arrangements as soon as feasible, and in the interim, for improving the safety of Pennhurst residents. A special master was appointed to monitor the planning and execution of the court's orders.

B. Appellate proceedings

All defendants appealed to this court. On December 13, 1979, this court, sitting en banc, affirmed in most respects and remanded the case for further proceedings. 612 F.2d 84. However, the court disapproved those portions of the district court's order directing the eventual closing of Pennhurst. The affirmance was based on Pennsylvania law and on Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6010. Three judges, in dissent, agreed that conditions at Pennhurst violated statutory and constitutional rights, but disagreed with the portion of the majority "opinion mandating a general right to individualized treatment in the least restrictive environment." 612 F.2d at 117.

All defendants, and the Pennhurst Parents-Staff Association, which intervened, successfully petitioned for certiorari.

On April 20, 1981, the Supreme Court reversed and remanded, holding that 42 U.S.C. 6010 created no rights or duties. The Court remanded to consider the issues not reached in this court's en banc opinion, including whether plaintiffs were entitled to relief under the state plan requirements of the DD Act, 42 U.S.C.

6063. It also remanded for reconsideration of the holdings on state law. In view of the remand, the Supreme Court did not rule on the issues raised relating to the relief.

Following this Court's judgment of December 13, 1979, the district court modified its original orders to require the individual determinations required by this Court's mandate and established a procedure for reviewing those determinations. This relief is now in effect.

C. Facts

As the Supreme Court noted, 49 U.S.L.W. 4363, 4364-4365 (U.S. April 20, 1981), the district court's findings of fact regarding conditions at Pennhurst "are undisputed: Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but inadequate for the 'habilitation' of the retarded. Indeed, the court found that the physical, intellectual and emotional skills of some residents have deteriorated at Pennhurst."

✓ 1. Conditions at Pennhurst

The Commonwealth of Pennsylvania owns and operates Pennhurst for the purpose of providing care, education and training to its residents. It is a self-contained unit, and its residents do not participate to the degree each is able in normal community life outside of the institution, Halderman v. Pennhurst, 446 F. Supp. 1295, 1302, 1303, 1311-1312 (E.D. Pa. 1978).^{1/} About half of the

^{1/} 446 F. Supp. references are to the findings in the District Court opinion. "Tr." references are to the transcript of the trial.

residents of Pennhurst were committed there by court order and half were placed there by a parent or other guardian (446 F. Supp. at 1302). Those who are over eighteen and who indicate a desire to leave are kept there by court order if the Pennhurst staff ascertains that they are not "ready to go into the community" or if there is no available placement for them in the community (id. at 1310). The residents are not mentally or emotionally ill, and are not a danger to society (id. at 1313). The average Pennhurst resident has spent 21 years there and is 36 years old.^{2/}

While at Pennhurst, the residents regress, both intellectually and behaviorally; instead of learning self-care skills, they lose them.^{3/} Maladaptive behavior^{4/} and regression result from over-crowded wards, lack of privacy, lack of training programs, and an oppressive environment (id. at 1303-1305, 1308-1309). The district court also found all those conditions

^{2/} Forty-three percent of the residents had no contact with their families within three years of the trial (446 F. Supp. at 1302).

^{3/} Terri Lee Halderman lost her ability to speak (446 F. Supp. at 1309). Linda Taub, who is blind in addition to being retarded, spent her time sitting and rocking; she was strapped to a wheel chair, though she is able to walk, so the staff "would know exactly were Linda was." Nancy Beth Bowman developed maladaptive behavior -- biting and pushing (id. at 1309-1310).

^{4/} Maladaptive behavior includes rhythmic motions such as rocking, as well as self injury or severe aggression. This behavior is associated with lack of stimulation and boredom (Tr. 1-96 to 1-98, 5-112). Moreover, exclusive association with others who engage in deviant behavior encourages maladaptive behavior (Tr. 1-151, 2-59, 5-91 to 5-92, 5-113).

to be typical at Pennhurst. See U.S. Ex. 48, photos 1-10, 15-17, 19, 21, 23, 24, 26-33, 40-44, 50, 52-56, 97-108.^{5/}

The district court also found that the residents at Pennhurst are harmed physically (446 F. Supp. at 1308-1309).^{6/}

Many physical injuries are the product of staff neglect and abuse.^{7/} In addition, the void left by the lack of proper habilitation is filled by extreme use of physical and chemical restraints and seclusion (id. at 1303-1308).^{8/} Physical restraints and seclu-

^{5/} There is often excrement and urine on ward floors. Infectious diseases are common (446 F. Supp. at 1308). Obnoxious odors and excessive noise are prevalent. The noise level is frequently so high that many residents stop speaking. Meals are eaten in large groups without adequate staff supervision where residents may steal food from each other, so some do not get enough to eat (ibid.). U.S. Ex. 48, photos 34, 36, 37.

^{6/} Plaintiff Terri Lee Halderman, a resident for eleven years, suffered lost teeth, fractured fingers and toes, and numerous lacerations (446 F. Supp. at 1309). Plaintiffs DiNolfi (a resident for 34 years), Robert and Theresa Sobetsky (residents since 1971), Hight (a resident for two and one-half weeks), Sorotos (a resident for seven years), Larry and Kenny Taylor (residents for 14 years), Bowman and Taub all received physical injuries, including one resulting in loss of an eye, bruises, bites, scratches, welts, and injuries causing lost teeth (id. at 1309-1310).

During the single month of January 1977 there were 25 major and 833 minor injuries reported (id. at 1308-1309).

^{7/} Staff neglect has even resulted in deaths (446 F. Supp. at 1308-1309).

^{8/} One resident was physically restrained for 651 hours in June 1976, 720 hours in August 1976, 674 hours in September 1976, and 647 hours in October 1976 (446 F. Supp. at 1307).

sion not only have caused physical injuries, but they also prevent residents from learning and using self-care skills (446 F. Supp. at 1307, 1310).^{9/}

The "extraordinarily high" (id. at 1307) administration of drugs at Pennhurst is also harmful. It not only causes hazardous side effects, e.g., hypersensitivity to sunlight, inability to maintain balance and gait, inflammation, bleeding and growth of gum tissue; it also impedes the habilitation of Pennhurst residents when used as a control device (id. at 1307-1308).^{10/}

In sum, the district court found that Pennhurst provides "confinement and isolation, the antithesis of habilitation" (id. at 1318). Its atmosphere is not conducive to the "normalization which is so vital to the retarded if they are to be given the opportunity to acquire, maintain and improve their life skills" (ibid.).

2. Pennsylvania's program for mental retardation

Pennsylvania's objective in maintaining a mental retardation program is to provide services that will help mentally retarded persons learn and develop (id. at 1311, 1313-1314). The Pennsylvania Department of Welfare, which operates Pennhurst

^{9/} The seclusion rooms at Pennhurst have hard surfaces, exposed radiators and other dangerous features (446 F. Supp. at 1306 n. 34; see U.S. Ex. 48 photos 97, 98, 100, 101). Seclusion is often used as a substitute for staff attention (id. at 1306).

^{10/} Larry Taylor was given unnecessary medication that caused him to fall asleep in school (446 F. Supp. at 1310).

(id. at 1302, 1313-1314) has overall responsibility for assuring "the availability and equitable provision of adequate * * * mental retardation services for all persons who need them."

Pa. Stat. Ann. tit. 50, § 4201(1) (Purdon). County officials in Pennsylvania are responsible for identifying mentally retarded persons in need of services. Through their "base service units," they determine the setting in which individuals will receive these services. (446 F. Supp. at 1312-1313); see Pa. Stat. Ann. tit. 50, § 4302 (Purdon)). Although State policy strongly favors habilitation of retarded individuals within their communities, the defendant county officials have failed substantially to provide the necessary services and living arrangements to provide Pennhurst residents with the benefit of these services (446 F. Supp. at 1311-1313).

The Department of Welfare receives funding requests from the counties, reviews them and incorporates them into the appropriation requests for mental health and mental retardation services. The funds are then made available to the counties through the Department of Welfare (Rice Dep. 77-86, 89-92, 95-97). Funds available under federal law for mental retardation services are paid to the Department of Welfare, which includes these funds in its spending allocations. For example, the federal funds paid to Pennsylvania under the DD Act are included in the state budget for mental retardation services, and are distributed by the state to the counties through the Department of Welfare

(Rice Dep. 121A-125A, 136A, 138A-140A). Similarly, part of Pennsylvania's "Medicaid" funds (42 U.S.C. 1396d) are used to fund Pennhurst (Rice Dep. 126-127).^{11/}

3. Alternative habilitative settings in Pennsylvania

The placement which Pennsylvania has adopted for the care and training of mentally retarded persons range from confinement in a large institution such as Pennhurst at one extreme to various types of community living arrangements.^{12/} Pennsylvania now follows a policy of preferring community living arrangements. (446 F. Supp. at 1311-1312). The district court found that policy was based on two considerations: First, it gives effect to the principle

^{11/} Defendants assert that all beds at Pennhurst have now been "certified" for receipt of Medicaid funds compared to 40% of those beds at trial time. With the slight reduction in population (apparently to 920 (Def. Br. 10 n.9)), this would mean that Medicaid subsidization of Pennhurst has approximately doubled from what it was at trial. For fiscal 1976, the subsidy was \$5,870,000 (Tr. 26-14). It appears that defendants achieved this certification by waiving certain requirements. Letter, Eileen M. Schoen to Elmer McSurdy, August 14, 1981, at 2 (attached to Def. Application For Stay Pending Appeal, August 17, 1981). In addition, defendants have taken steps since trial to use Medicaid funds to support community mental health services (No. 81-1232, App. 25-26, 28).

^{12/} In community living arrangements, retarded persons live in appropriately structured environments in family-type dwellings in residential neighborhoods. They participate in the life of the community to the extent that they are able to do so; for example, they may attend educational programs in local schools and churches, work at suitable jobs, enjoy community recreation facilities, or shop in community stores (Tr. 5-141 to 5-142, 5-160 to 5-161, 6-7 to 6-10, 6-29 to 6-31, 6-170 to 6-172, 6-173 to 6-174, 6-176 to 6-177, 7-69 to 7-70, 8-4 to 8-44, 8-47, 8-51 to 8-52, 10-66 to 10-108, 10-104 to 10-174, 11-38 to 11-52, 11-62 to 11-78, 11-80, 11-81, 11-109). Pennsylvania has adopted eight types of community living arrangements, ranging from developmental maximization units to family relief (PARC Ex. 63).

of "normalization" that Pennsylvania authorities espouse--namely, that the retarded person should be treated as much like the non-retarded person as possible (ibid.)^{13/}. Second, the costs of providing habilitative services in the community are markedly lower than the cost of maintaining persons in Pennhurst (446 F. Supp. at 1312).

The services required to habilitate mentally retarded persons locally exist in the five counties from which Pennhurst draws its residents. Persons of all levels of retardation reside in various living arrangements in these counties and receive the services they need (id. at 1311-1312). Moreover, in 1970, the Pennsylvania legislature appropriated \$21 million for planning, designing and constructing additional community facilities to enable 900 Pennhurst residents to be transferred to the community. By trial time in 1977, however, only 37 Pennhurst residents had been transferred to new facilities, and more than \$18 million of the appropriation remained unspent (id. at 1311-1312)^{14/}.

^{13/} The district court agreed that this principle was a proper one, crediting evidence that the "smaller the living unit on which the retarded individual lived, the higher the level of behavioral functioning shown by the individual" (446 F. Supp. at 1311), and that "once removed from depressing, restrictive routines, the retarded have been able to accomplish a great deal" (ibid.).

^{14/} At trial time, defendants planned to spend \$1,028,327 at Pennhurst to correct Safety Code violations, and \$2,367,500 to meet medical care standards. 446 F. Supp. at 1302 n. 14.

ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

The undisputed findings of the district court reveal inhumane and anti-habilitative conditions at Pennhurst which cause its residents to deteriorate. Pennhurst thus fulfills neither of the possible purposes of confining persons there: protection from harm or habilitation. Although Pennsylvania provides a wide range of placements designed to fit the individual habilitation needs of a corresponding range of retarded persons, residents of Pennhurst have been denied individualized professional treatment plans which would otherwise result in less restrictive placements.

Appellants ignore these uncontested facts and instead attempt to recast the issues in this case as involving abstract issues: the right to confinement in the least restrictive alternative and state obligation to create a system of community based facilities. However, the requirement to consider less restrictive placements than Pennhurst is firmly grounded in the violations found there, and the relief conforms to Pennsylvania's existing system of community facilities and its existing policy favoring placement in them.

The original district court opinion found that plaintiffs' rights had been violated because of the conditions at Pennhurst and because an institution in the nature of Pennhurst could not provide the minimum habilitation which plaintiffs need to

reach their developmental potential; in short, Pennhurst was found to be harmful. The district court found further that Pennhurst could not be so improved that the rights of all residents would be protected and, therefore, ordered that the residents of Pennhurst be removed and put into the Community Living Arrangements which Pennsylvania was establishing.

As we argued in our original brief in this Court, a state may not infringe fundamental liberties of human beings to serve some state purpose if there are clear alternatives which will serve that state purpose equally well and which would not infringe those liberties or would not infringe them to the same extent. Shelton v. Tucker, 364 U.S. 479 (1960); Dunn v. Blumstein, 405 U.S. 330 (1972); O'Connor v. Donaldson, 422 U.S. 563 (1975). Assessment of state needs and infringements of protected interests often involves a balancing of the strength and importance of the competing interests. Bates v. City of Little Rock, 361 U.S. 516 (1960); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Mathews v. Eldridge, 424 U.S. 319 (1976).

In light of the violations, the district court properly required transfer of those residents who would benefit from community living arrangements. It also properly required improvements to conditions at Pennhurst. However, this Court has disapproved the requirement that Pennhurst be closed, because it believed that, assuming there is a right to be habilitated in the least restrictive environment consistent with individual

needs, "[w]hatever the Constitution requires by way of least restrictive alternative, it does not preclude resort to institutionalization of patients for whom life in an institution has been found to be the least restrictive environment in which they can survive." 612 F.2d at 115. The Pennsylvania Supreme Court has made it clear that state law requires, as a matter of substantive rights, that the proper habilitative placement must be provided, and that the placement must be as unrestrictive as the needs of an individual will permit. In re Schmidt, 429 A.2d 631 (Pa. 1981) In this sense, Pennsylvania has legislatively adopted a policy of providing services to mentally retarded persons in the "least restrictive alternative."^{15/}

The relief now in effect essentially requires individual judgments regarding the proper habilitative placement. Moreover, it will result not only in proper habilitative placements, but in improved living conditions in Pennhurst and improved quality of care by reducing staff-resident ratios for those who must remain there.

While the adequacy of services and the living conditions at Pennhurst are certainly factors to be taken into account in making the individual professional judgments which the law requires, two reasons show that this Court should not base its

^{15/} There is no Eleventh Amendment issue here (see Def. Br. 42). The federal claim has merit and is a fortiori substantial. Jurisdiction over the case is not based solely on the state law claim. Rather, that claim is pendant to the federal claim. See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

decision on defendants' extra-record assertion of post-judgment changes in the facts: First, regardless of improvements to Pennhurst, due process simply will not permit institutionalization of a person who does not require institutionalization under state law standards. Second, defendants, in essence, seek relief from judgment on appeal without first making their case in the district court. If there are changes so substantial that they would justify relief from judgment, defendants should make appropriate motions in the district court and obtain new fact findings.

This brief also concludes that the DD Act issues should be remanded to the district court for proper fact findings and initial legal conclusions if the case is not disposed of by decisions on the other issues. We also adhere to our previous arguments that Section 504 of the Rehabilitation Act was violated.

I

DEFENDANTS HAVE VIOLATED PLAINTIFFS' SUBSTANTIVE
AND PROCEDURAL DUE PROCESS RIGHTS AND THEIR STATE
LAW RIGHT TO A PROPER HABILITATIVE ENVIRONMENT

- A. Plaintiffs' due process right to be free from
physical harm inflicted by the conditions of
state confinement

Institutional conditions at Pennhurst infringe fundamental personal freedoms. Physical restraints, drugs, seclusion rooms, and enforced idleness have no "treatment" or "habilitative" justification as they are used at Pennhurst. Where these infringements are deliberate, their purpose is to serve some purely institutional need, not the needs of the residents. Where the

conditions, such as the unhealthy environment, the lack of programming, the lack of trained staff, or the lack of protection from physical injuries result from inaction, they do not serve even an institutional need, let alone advance the paramount state purpose of providing care and habilitation to the residents. The findings amply demonstrate that this is another case where "harm can result not only from neglect but from conditions which cause regression or which prevent development of an individual's capabilities." New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 718 (E.D. N.Y. 1975).

Infringements such as these transgress the most fundamental freedom protected by the Due Process Clause. Quite apart from institutionalization, all persons subject to the Constitution have a right against arbitrary and purposeless physical harm inflicted by state agents. Ingraham v. Wright, 430 U.S. 651 (1977); Screws v. United States, 325 U.S. 91 (1945); Basista v. Weir, 340 F.2d 74, 81-82 (3d Cir. 1965). Nor may state agents permit others under their control to inflict physical harm which they may not inflict themselves. Withers v. Levine, 615 F.2d 158 (4th Cir.), cert. denied, 49 U.S.L.W. 3247 (U.S. Oct. 6, 1980); Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973); Byrd v. Brishke, 466 F.2d 6, 10-11 (7th Cir. 1972); cf. Downie v. Powers, 193 F.2d 760 (10th Cir. 1951); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

Persons civilly committed to state custody have a due process right to be free from these types of bodily infringements. See Halderman v. Pennhurst State School and Hospital, 612 F.2d 84, 117 (3d Cir. 1979), Seitz, C.J. dissenting. ("Understaffing, filth, violence, enforced inactivity, and other horrors make Pennhurst, in the opinion of one well-traveled expert, one of the worst institutions of its kind in the world. Under these circumstances the federal courts have a right and a duty to intervene and to secure for Pennhurst's residents, at the very least, adequate living conditions.") See also Bell v. Wolfish, 441 U.S. 520 (1979); cf., Rhodes v. Chapman, 49 U.S.L.W. 4677, 4679 (U.S. June 15, 1981), Brennan, J., concurring at 4683-4684.

Defendants no longer question their duty to correct the conditions at Pennhurst which violate this fundamental right to freedom from oppressive conditions. They only assert that, under pressure of existing court orders, living conditions have improved. Defendants' acquiescence in this relief does not negate the correctness of the finding of a constitutional violation, nor does it remove the violation from the case as a basis for relief. These violations support both the relief (see, infra, pp. 28-29) and pendant jurisdiction over the state law claim (see, infra, pp. 18, 23-24) of a right to adequate habilitative services. Hagans v. Lavine, 415 U.S. 528, 545-550 (1974).

- B. The due process right that the nature of confinement bear some reasonable relationship to the purpose for which the individual is committed

Although no party has challenged the justification for confinement of plaintiffs to state custody, or challenged the pre-commitment procedures, defendants have not adequately protected plaintiffs' rights. Plaintiffs' post-commitment rights arise from two sources.

1. Independent federal liberty interest

Whether the purpose of confinement is to protect the mentally retarded individual from danger to self or to provide needed treatment, see Jackson v. Indiana, 406 U.S. 715, 737 (1972); O'Connor v. Donaldson, 422 U.S. 563, 574 n. 9 (1975); Halderman v. Pennhurst State School and Hospital, supra, 612 F.2d at 124-125, Seitz, C.J., dissenting, the conditions at Pennhurst bear no reasonable relation to the purpose of confinement. For not only is it undisputed that conditions at Pennhurst are "inadequate for the 'habilitation' of the retarded," Pennhurst State School and Hospital v. Halderman, 49 U.S.L.W. 4363, 4365 (U.S. April 20, 1981), but "the physical, intellectual and emotional skills of some residents have deteriorated at Pennhurst," ibid.^{16/} The lack of habilitation affirmatively harms residents of Pennhurst and is thus inconsistent with either possible purpose of confine-

^{16/} "There is a technical difference between 'treatment,' which applies to curable mental illness, and 'habilitation,' which consists of education and training for those, such as the mentally retarded, who are not ill." Id. at n. 2

ment. This lack of reasonable relationship between the nature and the purpose of confinement violates the Due Process Clause of the Fourteenth Amendment. Jackson v. Indiana, supra.

"Liberty" as used in the Due Process Clause means, at the least, the right to remain free of state control. To deprive someone of this liberty, the state must follow procedures sufficient to minimize the risk of an erroneous deprivation. Mathews v. Eldridge, 424 U.S. 319 (1976). But Pennhurst not only denies plaintiffs freedom from bodily harm and freedom from restraint, but it also denies them the care and "habilitation" which is supposed to justify restraint. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

2. State-created liberty interest

The due process violation is buttressed by state statutes which create a post-commitment liberty interest in the form of an entitlement to care and "treatment." Those who are at Pennhurst through court commitment were committed there under a statute (Pa. Stat. Ann. tit. 50, § 4406(b) (Purdon)) which states:

If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and treatment. (Emphasis added.)

In addition, all mentally defective persons in state custody, whether in that status through court commitment or otherwise, are entitled to (Pa. Stat. Ann. tit. 50, § 4201 (Purdon))

the availability and equitable provision
of adequate mental retardation services * * *.

These statutes create a liberty interest under the Due Process Clause to receive the care and treatment that the statutes establish as the duty of the defendants to provide. Vitek v. Jones, 445 U.S. 480 (1980); Wolff v. McDonnell, 418 U.S. 539 (1974).^{17/}

3. Procedural due process

The state statutes lead to a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972); Baxstrom v. Herold, 383 U.S. 107, 113 (1966). The right to receive proper care and training while in state custody is clearly as important to plaintiffs' lives as a drivers license, Bell v. Burson, 402 U.S. 535, 539 (1971); personal chattels, Fuentes v. Shevin, 407 U.S. 67 (1972); or a prisoner's "good time," Wolff v. McDonnell, supra. Yet, none of these may be taken without a pre-deprivation

^{17/} Vitek and Wolff refer, of course, to state statutes which "create liberty interests that are entitled to the procedural protections of the Due Process Clause." Vitek, supra, 445 U.S. at 488. It is not necessary to determine here whether state statutes may create substantive due process rights, since the defendants have denied habilitation without even making a reasoned judgment following a due process hearing. Nonetheless, it seems likely that the state statute creates substantive as well as procedural federal constitutional rights.

hearing. Nor may states negligently take away even the most insignificant "property" without at least a post-deprivation proceeding for recompense. Parratt v. Taylor, 49 U.S.L.W. 4509 (U.S. May 18, 1981).

Neither the Due Process Clause nor the state statute contemplate that procedural regularity may end when the decision is made to take mentally retarded persons into state custody. Vitek v. Jones, supra. In Parham v. J.R., 442 U.S. 584 (1979), the Supreme Court held that even persons who are "voluntarily" in state custody for the purpose of treatment for mental defects are entitled to neutral professional evaluations of their conditions to determine their need for institutionalization. This procedure, the Court held, was sufficient to protect the very fundamental right to freedom from unwarranted confinement.

Here, the district court found that not only were the Pennhurst facilities inadequate to provide habilitation because of their austerity and lack of programs, but that defendants have totally failed to make the most basic professional decisions for Pennhurst residents.^{18/}

^{18/} See 446 F. Supp. 1305 and n. 29: "Not only is the programming at Pennhurst inadequate to meet professional standards * * * but so are the evaluations performed on the residents to determine what is required to adequately habilitate the individuals. None of the residents at Pennhurst had a full multi-discipline assessment as of January, 1977 * * *. Twenty and six-tenths percent of the residents have not received a limited multi-discipline assessment since January, 1975 * * *." 446 F. Supp. 1306.

These professional decisions are essential if plaintiffs' rights to freedom from unnecessary restrictions and to receive the adequate habilitative services contemplated by the statutes are to be respected. Due process requires, at a minimum, that plaintiffs not be held at Pennhurst and simply ignored without any professional judgments made about their continuing needs. While Parham, supra, 442 U.S. at 617, left open the scope of post-admission reviews that due process requires, it made clear that the Constitution requires some professional post-custody procedures. It will not permit the abdication of professional responsibility which this record demonstrates.

- C. The right to individual professional treatment decisions concerning the proper habilitative placement
- 1. Federal right to a less restrictive placement than Pennhurst

The district court found that institutionalization in a large congregate isolated facility such as Pennhurst is not the only alternative for care and habilitation of retarded persons in Pennsylvania. At the time of trial, the Community Living Arrangements were more home-like, i.e., more consistent with the "normalization" principle than Pennhurst; contrasted sharply in environmental quality with Pennhurst; and had a record of providing "habilitation" for retarded persons which Pennhurst did not have. Because of this factual record, the likelihood was that

plaintiffs' rights to be free from harm would be better respected in one of the available alternative habilitation facilities than in Pennhurst.^{19/} The record also demonstrates that where a retarded person is placed, i.e., Pennhurst or a CLA, affects his or her "habilitation." A sound professional judgment about the care and training a mentally retarded person should have, therefore, necessarily requires a decision about the environment where he or she should be placed. Wyatt v. Stickney, supra.

Under the reasoning of Jackson v. Indiana, supra, a state with a range of possible involuntary placements must have a rational basis for placing a person in a setting which restricts liberty more severely than alternative placements. At this stage of the case, there is no need to decide what due process may require to insure the efficacy of individual placement decisions.^{20/} All the court need hold is that due process requires at a minimum a Parham-like decision about each Pennhurst resident, or potential

^{19/} Defendants do not assert that changes have occurred to the efficacy and living conditions in the CLA's, but assert that conditions at Pennhurst have improved. If so, this may affect the outcome of some placement decisions. It should not avoid the requirement that a placement judgment be made for each person at Pennhurst.

^{20/} In Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), this Court recognized a generalized right to placement in the least restrictive alternative. While Romeo may be controlling here, we argue for affirmance on other grounds in light of the pending Supreme Court review of Romeo.

resident, concerning his or her proper placement.^{21/} Adherence to state law by defendants in making placement decisions is adequate substantive protection.

2. State right to a less restrictive placement than Pennhurst

This Court previously held, 612 F.2d at 102, that state law provides "that to the extent Pennsylvania maintains facilities for the mentally handicapped, those facilities must provide adequate treatment or habilitation." This holding was not reversed by the Supreme Court. Nothing has occurred since the court's previous opinion to cast doubt on the court's holding that Pa. Stat. Ann. tit. 50, § 4201 sets a quality minimum within Pennsylvania retardation facilities and programs.

However, the Pennsylvania Supreme Court has since ruled that the Mental Health and Mental Retardation Act of 1966, id. at §§ 4101-4704 is directed at more than institutional quality. In re Schmidt, 429 A.2d 631 (Pa. 1981). That court held that the state defendants must provide a mentally retarded individual

^{21/} State statutes also provide for re-evaluation following commitment. Defendants may transfer any mentally disabled person from one state facility to another and from a state facility to a local facility. Pa. Stat. Ann. tit. 50, § 4416. Transfers to local facilities may be "for diagnosis, care, treatment, or aftercare, or for any other purpose whenever the best interests of such mentally disabled person require such transfer." Id. at (C). Persons committed through court order for an indefinite period "may be detained until care or treatment is no longer necessary." Pa. Stat. Ann. tit. 50, § 4418. See also § 4420. "Discharge by department."

with an environment sufficiently structured to meet his needs even though such a placement did not then exist. In so holding, the court explained, id. at 636, that

the legislative scheme was designed to require the county to provide those supportive services where they would eliminate the necessity of institutionalization, even where those services would be required on a long term basis.

* * * The concept of normalization envisions that the mentally retarded person and his or her family shall have the right to live a life as close as possible to that which is typical for the general population. Consistent with this concept is the requirement that the least restriction consistent with adequate treatment and required care shall be employed.

If, however, the "concept of normalization is not a consideration" and "institutionalization can neither be prevented nor minimized," the state defendants must provide an adequate structured placement. Id. at 637.

The county defendants must make placement decisions about those for whose care they are responsible. Their authority "to establish additional services and programs 'designed to prevent * * * the necessity of admitting or committing the mentally disabled to a facility' was intended to be utilized by the counties to minimize the necessity of institutionalization. It was more than a mere grant of power to be used at the county's option." Ibid.

Thus, state law requires: first, that a decision be made about whether institutionalization of a mentally retarded person can be avoided; second, if institutionalization cannot be avoided, that the state provide the needed structured services; third, if a person can be treated in the community, that the counties^{22/} provide the needed services there.

D. The violation of Section 504

Residents of Pennhurst have been removed from the community, solely because of their handicap, and without regard to whether they are "otherwise qualified" to participate in other federally funded programs or activities through more appropriate placement^{23/} in alternative available facilities in the state. As we have

^{22/} Defendants assume that if this Court holds in their favor on each federal constitutional and statutory ground on the limited challenge to the relief which they make, the suit then becomes one based "solely on state law" and the court must rule in their favor on the state law issue on Eleventh Amendment jurisdictional grounds. The flaw in this argument is that the Eleventh Amendment issue should never be reached. If a federal claim is "substantial," the case is not based solely on state law in a jurisdictional sense regardless of the ultimate merits of that claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Under the order of decision prescribed by Hagans v. Lavine, 415 U.S. 528, 545-550 (1974), the Court should, assuming substantiality of the federal claim, decide the state law issue first. If that disposes of the case, the "merits" of the federal constitutional claim should not be reached. The discussion, supra, pp. 16 to 21, shows that the federal claim is not only substantial, but a basis for relief here.

^{23/} The dissenting opinion in the prior en banc review of this case states that "the United States * * * concedes that the record fails to demonstrate that any programs using such funds were available to anyone in the five-county area served by Pennhurst." 612 F.2d at 121 (Seitz, C.J.). However, our prior

previously pointed out (Brief for the United States, pp. 36-45) such unconsidered placement decisions on treatment violate Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.^{24/} At a minimum, Section 504 compels the state to determine that the person committed to an institution on account of handicap is not "otherwise qualified" to participate in some other available federally assisted program or activity providing more appropriate care and treatment. In the context of this case, this means that before determining that a handicapped individual should be placed in one federally assisted program rather than another the state must make an individualized judgment, based on reasoned professional advice. (Brief for the United States, pp. 40-42).^{25/}

23/ (continued)

brief detailed at pp. 36-37 some of the federal funds which flow to Pennsylvania. At oral argument before the en banc court Mr. Days, arguing for the United States, did note that at that time Pennsylvania had not sought Title 19 (Medicaid) funds for community-living arrangements. (Tr. of Oral Reargument, Sept. 6, 1979 at 77). However, this statement did not address other programs or other sources of funding. Moreover, the record on appeal No. 81-1232, App. 25-26, 28, relating to contempt, suggests that some community living arrangements are now classified as Intermediate Care Facilities for the Mentally Retarded and receiving funding under some title of the Social Security Act, just as the dissent noted was being done in Michigan, Minnesota, Nebraska and Oklahoma. 612 F.2d at 121.

24/ It is now settled in this Circuit that there is a private right of action to enforce Section 504. Doe v. Colautti, 592 F.2d 704, 708 n. 8 (3d Cir. 1979).

25/ A handicapped person's right under Section 504 to an individualized determination whether he is "otherwise qualified" to participate in a program funded by the Developmentally Disabled Assistance and Bill of Rights Act is consistent with by the requirement in 42 U.S.C. 6011 that persons receiving services funded by that Act must have an habilitation plan.

Thus, Section 504 supports the district court's holding that the rights of plaintiff class members were being denied.^{26/}

The issue here is not whether Section 504 would require Pennsylvania to create or expand a system of community facilities. Nor does the United States here urge any such interpretation of the statute. Indeed, Southeastern Community College v. Davis, 442 U.S. 397 (1979), suggests that Section 504 does not create such an obligation. But in this case, Pennsylvania already maintains such a system. In such circumstances, Pennsylvania violates Section 504 by indiscriminately subjecting handicapped persons to Pennhurst without first making an individual reasoned professional judgment as to the appropriate placement for each such person among all available alternatives.

II

THE RELIEF THE EN BANC COURT
PREVIOUSLY APPROVED IS PROPER
IN LIGHT OF THE VIOLATION AND
STATE LAW

As a result of the Court's previous judgment and mandate, the relief in effect is not the same as that originally entered by the district court. In place of an order to remove all Pennhurst

^{26/} This holding depends on the court's finding that the discrimination occurred in federally assisted programs or activities. It is probable that in the intervening years the value and extent of such funding and of the recipients have changed. In addition, the opinions in this case in the Supreme Court suggest that if relief were based solely on the receipt of federal funds the State should have the alternative of foregoing further funding rather than being subjected to a detailed regulatory injunction. Thus, if the Section 504 issue is reached, a remand to explore those issues may be appropriate. However, the relief should be upheld on the other bases discussed in this brief.

residents to Community Living Arrangement, is an order which requires defendants to form individual program plans for each resident of Pennhurst which contains a judgment about whether that resident can benefit from placement in the community. This plan is drawn by a team of professionals and the parent or guardian of the resident. It includes a designation of a proposed residential placement. If there is objection to the proposed residential placement, a hearing is conducted before a Hearing Master who decides whether the proposed placement will be beneficial to the resident.

As a result of a stay obtained by the Parents-Staff Association from the Supreme Court while the case was pending there, the Hearing Master must determine, as to each proposed move from Pennhurst to a community residential setting, whether that move is "voluntary" on the part of the resident. Although the stay, by its terms, expired when the case was remanded here, the district court has continued this procedure.

This relief is well suited to remedy the violation of plaintiffs rights shown by the record. First, it provides the kind of professional decisions which must be made to justify holding a person in state custody and to provide the adequate treatment mandated by state law.

Second, the potential for a hearing on the needs of an individual not only protects residents from harmful living conditions, but effectively reduces the Pennhurst population, thereby

helping to eliminate staffing shortages and calling attention to individual needs for protective care.^{27/}

Third, the relief supports the state statute's "commit[ment] * * * to a rejection of the former view that indiscriminate institutionalization was the panacea for the resolution of the problems presented by citizens who were not self-sufficient because of mental retardation." In re Schmidt, supra, 429 A.2d at 633-634. The testimony of the officials responsible for Pennhurst is to similar effect. See, e.g., Youngberg Dep. at 102.

The district court has determined that the Masters are necessary to assist it in supervising these procedures. This is fully in accord with the remand from this Court "for individual determinations by the court, or by the Special Master, as to the appropriateness of an improved Pennhurst." 612 F.2d at 114. Contrary to appellants' arguments (Br. 63) the Supreme Court has not determined otherwise. At most, the Court held that relief under the DD Act should not include a judgment by a federal court about which persons should stay in Pennhurst and which should be removed.

The district court, however, was obliged to fashion a remedy for substantive and procedural violations of due process. While the Due Process Clause theoretically gives defendants the

^{27/} According to defendants (Br. 10 n.9), the improvement in staff to resident ratio since the time of trial has occurred almost entirely by reduction in resident populations. Defendants state that at the time of trial there were 1500 staff for 1230 residents and there are now 1550 staff for 920 residents.

option to correct the violations or forego institutionalization of mentally disabled persons, that option is hardly available under a state statute which provides that defendants have a duty to "assure * * * the availability and equitable provision of" habilitative services for mentally retarded persons. Thus, it is entirely appropriate for the district court to levy mandatory requirements on defendants and to enlist the aid necessary to remain informed that there is continuing adherence to those measures which will remedy the violations. See 612 F.2d at 111-112 and authorities cited there.

Nor does this relief entail the district court making individual judgments itself. State professionals must make, and are making under the district court order, the judgments that due process requires.

III

THE RECORD IS INSUFFICIENT TO
SUPPORT A JUDGMENT FOR THE
PLAINTIFFS UNDER THE STATE PLAN
REQUIREMENTS OF THE DEVELOPMENTALLY
DISABLED ASSISTANCE AND BILL OF
RIGHTS ACT

The Supreme Court remand calls for consideration whether the state plan requirements of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6063, provide judicially enforceable rights. Several considerations suggest that the appropriate disposition of this question is to remand to the district court.

First, the court's ruling on the other issues in the case may render it unnecessary to address the complex questions the Supreme Court has asked regarding whether the judgment may be upheld under the state plan requirements of the Act. Moreover, although the Supreme Court requires identification of the "programs assisted" under the DD Act, 49 U.S.L.W. 4370, the record does not contain the state plan, which must describe such programs assisted. 42 U.S.C. 6063(b)(2)(A),(B). Indeed, the district court did not address the question of liability under the state plan requirements, and the same considerations which prompted a remand to this court suggest a further remand to the district court. See, e.g., Bolden v. City of Mobile, 626 F.2d 1324 (5th Cir. 1980); Metropolitan Housing Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1008 (7th Cir. 1980).

Finally, should it be necessary to rely on Sections 6011 and 6063(b)(5)(C) (Supp. II 1978), the district court is in the best position to hear the parties' evidence and arguments and to deal initially with other questions raised by the Supreme Court, such as whether the assurances provided by the state plan are adequate, 49 U.S.L.W. 4370, "whether the express remedy contained in this Act is exclusive" (ibid.), and what the appropriate remedy would be for violation of the state plan requirements. 49 U.S.L.W. 4370-4071.

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CONCLUSION

For the foregoing reasons, the relief now in effect
should be affirmed.

Respectfully submitted

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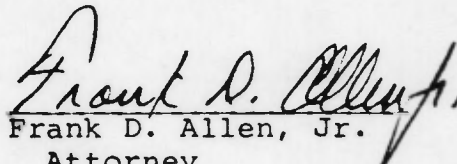
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