IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2184

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DR. NEIL SOLOMON, et al.,

Defendants-Appellees

On Appeal from the United States District
for the District of Maryland

BRIEF FOR THE UNITED STATES

FILED
[illegible] 1976
U.S. COURT OF APPEALS
FOURTH CIRCUIT

JERVIS FINNEY
United States Attorney

J. STANLEY POTTINGER
Assistant Attorney General

BRIAN K. LANDSBERG
FRANK D. ALLEN, JR.
Attorneys
Department of Justice
Washington, D.C. 20530

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT 2

A. Procedural History 2

B. Factual Allegations 3

INTRODUCTION AND SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. THE ATTORNEY GENERAL MAY FILE AND PROSECUTE CIVIL ACTIONS IN THE COURTS IN FURTHERANCE OF THE INTERESTS OF THE UNITED STATES GOVERNMENT 9

II. THE INTEREST OF THE GOVERNMENT IN THE EXECUTION OF CONGRESSIONALLY ENACTED PROGRAMS FOR THE PROTECTION OF MENTALLY RETARDED CITIZENS AND IN SECURING THEIR CONSTITUTIONAL RIGHTS IS SUFFICIENT TO MAINTAIN THIS LITIGATION........ 16

A. The government has an interest in execution of Congressionally enacted policies and programs to aid mentally retarded citizens 16

B. The United States has an interest in the constitutional integrity of its spending programs 25

C. The government has an interest in vindication of systematic and institutionalized deprivation of Thirteenth and Fourteenth Amendment rights which affect the public at large 28

CONCLUSION 36

ADDENDUM A

Relevant Statutes A-1

ADDENDUM B

Regulations of the Department of Health, Education and Welfare Relating to Standards for Intermediate Care Facilities A-2

TABLE OF AUTHORITIES

Cases	Pages
Baldwin v. Morgan, 251 F.2d 780 (C.A. 5, 1958	31
Cotton v. United States, 52 U.S. (11 How.) 229 (1850)	11, 28
Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio, 1974)	17
Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818)	11, 28
Frontiero v. Richardson, 411 U.S. 677 (1973)	29
Griffin v. United States, 168 F.2d 457 (C.A. 8, 1948)	28
Heckman v. United States, 224 U.S. 413 (1911)	25
In Re Debs, 158 U.S. 564 (1895)	12, 13, 33
In Re Estelle, 516 F.2d 480, (C.A. 5, 1976), cert. denied, 44 Law Week 5700, 3701	32
In Re Neagle, 135 U.S. 1 (1890)	30
Kern River Co. v. United States, 257 U.S. 147 (1921)	11
King v. Smith, 392 U.S. 309 (1968)	29
Morales v. Turman, 364 F. Supp. 166, 383 F. Supp. 53 (E.D. Tex. 1973, 1974) rev'd on other grounds, 535 F.2d 864	17
NYSARC & Parisi v. Carey, 393 F. Supp. 715 (E.D. N.Y. 1975)	15

Cases	Pages
Sanitary District of Chicago v. United States, 266 U.S. 405 (1925)	12, 21
United States v. Arlington County, 362 F.2d 929 (C.A. 4 1964)	12, 21
United States v. Bell Telephone Co., 128 U.S. 315 (1888)	11, 28
United States v. Brand Jewelers, 318 F. Supp. 1293 (S.D. N.Y. 1970)	33
United States v. Brittain, 319 F. Supp. 1058 (N.D. Ala., 1970)	12
United States v. California, 332 U.S. 19 (1947)	30, 35
United States v. City of Glen Cove, 322 F. Supp. 149, (E.D. N.Y. 1971) aff'd, 450 F.2d 884	12
United States v. City of Montgomery, 201 F. Supp. 590 (M.D. Ala., 1962)	12
United States v. City of Shreveport, 210 F. Supp. 36 (W.D. La., 1962)	12
United States v. Cox, 342 F.2d 167 (C.A. 5, 1965)	35
United States v. Frazier, 297 F. Supp. 319 (M.D. Ala., 1968) supplementary opinion, 317 F. Supp. 1079	28
United States v. Harrison Co., 399 F.2d 485 (C.A. 1968)	28
United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145 (D. Vt. 1972)	21
United States v. Lassiter, 230 F. Supp. 20 (W.D. La., 1962) aff'd 371 U.S. 10	12

Cases | Pages

United States v. Marchetti, 466 F.2d 1309 (C.A. 4 1972) 12

United States v. New York Times, 328 F. Supp. 324 (S.D. N.Y. 1971) rev'd on other grounds, 444 F.2d 544, rev'd 403 U.S. 713 12

United States v. Original Knights of the Klu Klux Klan, 250 F. Supp. 330 (E.D. Pa. 1975) 28-29

United States v. Pennsylvania, 394 F. Supp. 26 (M.D. Pa., 1975) 28

United States v. Republic Steel Corp., 362 U.S. 482 (1960) 12, 21, 32

United States v. Rock Island Centennial Bridge Commission, 230 F. Supp. 654 (S.D. Ill. 1964), aff'd 346 F.2d 361 21

United States v. San Francisco, 310 U.S. 16 (1940) 29

United States v. San Jacinto Tin Co., 125 U.S. 273 (1887) 11-12, 16, 28

United States v. Screws, 325 U.S. 91, (1945) 32

United States v. Shanks, 384 F.2d 721 (C.A. 10 1967) 28

United States v. Stevenson, 215 U.S. 190 (1909) 25, 35

United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831) 11, 28

United States v. United States Fidelity and Guaranty Co., 106 F.2d 804 (C.A. 10, 1939) rev'd on other grounds 309 U.S. 506 29

Cases	Pages
United States v. Wittek, 337 U.S. 346 (1948)	25
Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974)	17
Wheller v. Glass, 473 F.2d 983 (C.A. 7, 1973)	17
Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967)	12, 21, 32
Wyatt v. Aderholt, 503 F.2d 1305 (C.A. 5, 1974)	9, 17
Wyatt v. Stickney, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1971-2) aff'd sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (C.A. 5, 1974)	17, 28

Constitution

Eighth Amendment	2, 4
Thirteenth Amendment	2, 4, 8, 30, 31
Fourteenth Amendment	2, 4, 8, 16, 30, 31, 33
Article I, Section 8, Cl. 3	33
Article II, Section 3	29

Statutes

Civil Rights Acts of 1957, 1960, 1964 and 1968	31
Disabilities Services and Facilities Construction Act, P.L. 88-164, 77 Stat. 284, 42 U.S.C. 2661-2697	20
Developmentally Disabled Assitance and Bill of Rights Act, 42 U.S.C. 6001-6081	20
Public Law 94-102, Section 201	19
Public Law 94-121, Title II	24
Public Law 94-322, Title II	24

Statutes | Pages

7 U.S.C. 1431 20

18 U.S.C. 241 & 242 31

18 U.S.C. 245 & 246 31

18 U.S.C. 516, 518(b) and 519 10

20 U.S.C. 1401 20

42 U.S.C. 1302 26

42 U.S.C. 1396(c) & (d) 26

42 U.S.C. 1761 20

42 U.S.C. 1971, *et. seq.*, 2000 *et seq.* 3601-3631 31

42 U.S.C. 1981-1986 31

42 U.S.C. 1983 31

42 U.S.C. 1985 . . . . 31, 34

42 U.S.C. 6010, 89 Stat. 502 18

45 C.F.R. §249.12 . . . . 20, 26

45 C.F.R. §249.13 20

Annotated Code of Maryland,

Art. 41, §§319-338 34

Art. 59A, §§1-17 9

Revised Statutes §§ 1977-1981 31

Other

Executive Order No. 11776, Mar. 28, 1974, 39 F.R. 11865 21

121 Cong. Rec. S16548-9 (daily ed., September 23, 1975) 18

H.R. 12008 Referred to Committee on Judiciary, 122 Cong. Rec. H. 1210 (daily ed. February 19, 1976) 23

Other	Pages
H. Report No. 94-318, 94th Cong., 1st Sess.	24
H. Report No. 94-1226, 94th Cong., 2d Sess.	24
House Conference Report No. 94-473 1975, U.S. Code Cong. & Admin. News	19
S. Report No. 94-328, 94th Cong., 1st Sess.	24
S. Report No. 94-964, 94th Cong., 2d Sess.	24
Joint Hearings before the Subcommittee on Long-Term Care and the Subcommittee on Health of the Elderly of the Special Committee on Aging, United States Senate, September 29, 1975	24
Title XIX, Social Security Act, as amended by P.L. 92-223, 42 U.S.C. 1396d (c) & (d)	20
C.A. Wright, Federal Courts 68 (2d Ed. 1976, Ch. 3, §22)	15
Annual Report of the Attorney General, 1974 & 1975	22

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 76-2184

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

DR. NEIL SOLOMON, et al.

Defendants-Appellees

On Appeal from the United States District Court for the District of Maryland

---

BRIEF FOR THE UNITED STATES

QUESTIONS PRESENTED

The issue presented by this appeal in its broadest terms is whether the district court erred in its pre-trial dismissal of a complaint brought by the Attorney General on behalf of the United States for injunctive relief against an alleged pattern and practice of continuing deprivations of basic constitutional rights of mentally retarded citizens confined in a Maryland state hospital. This issue can be divided into two parts:

(1) Whether the Attorney General has the authority to bring suit to represent the interests of the United States without a statutory authorization in specific terms, and

(2) Whether the United States has any interests in this case sufficient to give it standing to sue.

STATEMENT

A. Procedural History

This action was brought on February 21, 1974, by the United States government, acting through the Attorney General of the United States, against three officials of the State of Maryland who are responsible for the operation of the Rosewood State Hospital, a hospital where mentally retarded citizens are confined for the purpose of habilitative treatment (App. 2-8). The complaint alleges that no such treatment is, in fact, provided and that the circumstances and conditions of the confinement of mentally retarded persons are such that they are denied basic rights assured to them by the Eighth, Thirteenth and Fourteenth Amendments to the Constitution of the United States. No answer to the complaint was filed. Discovery took place from June 27, 1974, through May 20, 1976 (R. 15-392). On April 27, 1976, defendants moved to dismiss

the complaint claiming that the United States had no authority to maintain this action (App. 9-10). On July 8, 1976, the district court entered an opinion and order dismissing the complaint (App. 11-40), and judgment was entered accordingly (App. 41). On September 3, 1976, the United States appealed to this court from the district court's dismissal (App. 42).

B. Factual Allegations

There has been no trial on the merits or other evidentiary hearing in this case, and a motion of the United States seeking to present evidence in support of its opposition to the defendants' motion to dismiss was denied (R. 441). However, the facts which the government contends justify its standing to prosecute this action, and which could be proved at trial are contained in the allegations of the complaint and in the materials assembled in the discovery process.

Rosewood State Hospital, located at Owings Mill, Maryland was established and is operated by officials of the State of Maryland for the purpose of providing treatment and habilitative care to mentally retarded persons. At the time the complaint was filed there were approximately 2400 persons housed at Rosewood. The complaint alleges that mentally retarded

persons can be and are involuntarily committed to and confined in Rosewood State Hospital. It is alleged that defendants, who have the responsibility for the operation of Rosewood, have failed to provide the treatment and habilitative care to residents which is the sole purpose for confinement of persons to Rosewood. (App. 5) The complaint alleges that this failure falls so far below what is minimally adequate for such confined individuals that the rights of those individuals under the Eighth, Thirteenth and Fourteenth Amendments are infringed. **(App.7)** The complaint alleges that defendants have failed to provide humane living conditions by:

(a) Failing or refusing to recruit, employ, and train direct care personnel in sufficient numbers to supervise the daily life activities of Rosewood residents, provide proper custodial care, and prevent such residents from inflicting physical harm upon themselves or others;

(b) Failing or refusing to inculcate in Rosewood residents behavioral and social skills sufficient to enable such residents to restrain themselves from antisocial or dangerous conduct, and to care for their own personal and hygienic needs;

(c) Authorizing, permitting, or failing or refusing to prevent the seclusion of Rosewood residents in locked rooms or cells for extended periods of time;

(d) Failing or refusing to provide Rosewood residents with living or sleeping space sufficient to insure protection from physical harm at the hands of others and a modicum of privacy and human dignity; and

(e) Failing or refusing to provide Rosewood residents with clean, odor-free, safe, and sanitary living and sleeping areas, and failing or refusing to maintain sanitary and minimally adequate kitchen and laundry facilities. (App.5-6)

The complaint also makes reference to the interest of the United States in halting the described practices as evidenced by a Presidential statement and federal statutes providing for the care and treatment of the mentally retarded. (App. 7) Most of these statutes provide for federal funds to be made available for the care and treatment of the mentally retarded, and the record contains a submission made to the district court indicating the amount and governmental source of federal funds made available to Rosewood immediately before and after the filing of the complaint:

Fiscal Year	Health, Education and Welfare	Champus[1/]	Agriculture
1975	5,610,936.00	12,732.87	6,933.09
1974	4,098,710.00	77,814.61	29,671.34
1973	4,224,182.00	30,289.72	41,376.94

(R., Unnumbered Jacket, Memorandum in Opposition to Defendants' Motion to Dismiss, Addendum B).

In addition, it is submitted that significant sums of money have been provided to a variety of programs for the care and training of the mentally retarded, generally. (R., Unnumbered Jacket, Supplemental Submission of the United States in Support of Opposition to Motion to Dismiss, Tab C.)

Finally, it is alleged that the practices, unless enjoined will continue in derogation of national policy. (App. 7-8)

Details of the conditions under which Rosewood residents are required to live have been gathered through discovery and these details were summarized in submissions to the district court in opposition to motion to dismiss. (R., Unnumbered Jacket, Memorandum in Opposition to Motion to Dismiss, Addendum A) Based upon this, it appears that, at trial, numerous

---

1/ A program operated through the Department of Defense to reimburse mental health facilities which undertake to provide habilitative treatment for military dependents entitled to military health care.

examples of the constitutional deficiency of Rosewood could be proved, e.g. excessive use of behavior drugs solely for control, overpopulation and understaffing, lack of psychiatric treatment and therapy, idleness, unsanitary conditions, arbitrary confinements, infectious diseases, and physical injury and deaths resulting from a combination of conditions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff contends that where the authority of the Attorney General, or the standing of the United States, to bring a civil action without specific statutory authorization is called into question, the case should be controlled by the application of two legal principles:

(1) That the Attorney General is the appropriate official to represent the United States in the courts, and to bring action on behalf of the United States; and (2) That the Attorney General may bring civil actions on behalf of the United States if there are sufficient "interests" to give the government standing. These are the controlling principles found in numerous judicial opinions.

In Part I of this brief, it is argued that the Attorney General has authority to bring this civil action if the United States has sufficient interest to vindicate, and that it was erroneous for the district court to treat the issue as one involving the reaches

of executive power. Clearly, if suit may be brought, the executive is the branch of government to bring such suit. Whether suit may be brought depends upon the standing of the government which, in turn, depends upon whether there is a governmental "interest" at stake.

Part II contains a description of those interests which the United States has in this case which give it standing to sue for injunctive relief. These interests lie in the execution of a policy and program enacted by Congress providing for the care and treatment of mentally retarded persons and in the protection of their rights, in the constitutional integrity of federal spending programs to which conditions regarding treatment of the beneficiaries of those programs have been attached by Congress and in the removal of systematic and institutionalized deprivations of Thirteenth and Fourteenth Amendment rights which "affect the public at large".

Because the district court did not give appropriate weight to those "interests", it erred in dismissing the complaint, and should be reversed.

ARGUMENT

I. THE ATTORNEY GENERAL MAY FILE AND PROSECUTE CIVIL ACTIONS IN THE COURTS IN FURTHERANCE OF THE INTERESTS OF THE UNITED STATES GOVERNMENT

This action was brought by the United States, acting through the Attorney General, against officials responsible for operating Rosewood Hospital, a facility of the State of Maryland for the training and habilitation of mentally retarded persons, many of whom are involuntarily confined there.2/ There is ample authority that the constitutional rights of the mentally retarded which are cited in the complaint may be appropriately protected by actions in federal court for injunctive relief. Wyatt v. Aderholt, 503 F.2d 1305, 1316 (C.A. 5 1974). This proposition was not challenged by the defendants in their motion to dismiss, and the district

---

2/ See Annotated Code of Maryland, Art. 59A, §§1-17.

court, in dismissing the complaint, acknowledged as much (App. 13). The district court held, however, that the executive branch of the federal government has no authority to institute this action.

Unquestionably, under 18 U.S.C. 516-519[3], the Attorney General is the appropriate officer to bring suit on behalf of the federal government and to represent the government in litigation where the government has an "interest". Section 516 reserves to the Attorney General the authority to conduct, or to supervise the conducting of, litigation in which the United States has an interest. Section 518(b) gives the Attorney General the authority to either personally conduct, or to direct other officers of the Department of Justice to conduct and argue cases in which the United States is interested. Section 519 gives the Attorney General the authority to supervise all litigation in which the United States is a party. We have no disagreement with the district court's statement that these statutes do not say anything about what litigation the government may have an "interest" in. (App. 15-16) They do, however, provide congressional support for the long recognized view that the Attorney General has the authority to

3/ Statutes relevant to this case are reproduced in an addendum to this brief.

institute litigation when the United States has an "interest" at stake. Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818); United States v. Tingey, 30 U.S. (5 Pet.) 115 (1831); Cotton v. United States, 52 U.S. (11 How.) 229 (1850)

It seems equally clear that, if the United States has a judicially cognizable governmental or pecuniary interest, the Attorney General needs no statute specifically authorizing him to prosecute this civil action.

> In the absence of some legislative direction to the contrary..., the general authority of the Attorney General in respect of those pleas of the United States and the litigation which is necessary to establish and safeguard its rights affords ample warrant for the institution and prosecution by him of a suit such as this. Kern River Co. v. United States, 257 U.S. 147, 155 (1921)

The Kern River Co. case was one where a sufficient interest on the part of the government was found in the allocation of rights of way across public lands. Interests sufficient for the government to initiate and maintain litigation without specific statutory authority have been present in a variety of matters of a governmental nature.4/

4/ E.g., suits to revoke a fraudulantly obtained patent, United States v. Bell Telephone Co., 128 U.S. 315 (1888); to cancel a federal land patent, United States v. San Jacinto Tin Co., (Footnote continued on page 12.

This court has recognized that there are numerous governmental interests which may be advanced through litigation by the United States without statutory authorization to do so. United States v. Arlington County, 362 F.2d 929, 932 (C.A. 4 1964). See also United States v. Marchetti, 466 F.2d 1309, 1313 (C.A. 4 1972). In upholding the standing of the United States to prosecute an action for an injunction to further the tax policies of the Soldiers and Sailors Relief Act, this court cited the test often used to ascertain whether the government has sufficient interest to maintain non-statutory litigation.

4/ (Footnote continued from proceeding page) 125 U.S. 273, 278-285 (1887) ; to remove obstructions from interstate commerce, In Re Debs, 158 U.S. 564, 584-85 (1895); Sanitary District of Chicago v. United States, 266 U.S. 405, 426 (1925); United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960); Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201 (1967); to remove racial barriers in facilities serving interstate transportation, United States v. City of Shreveport, 210 F. Supp. 36, 37 (W.D. La. 1962); United States v. Lassiter, 230 F. Supp. 20, 28 (W.D. La. 1962) aff'd. 371 U.S. 10; United States v. City of Montgomery, 201 F. Supp. 590, 594 (M.D. Ala. 1962); to effect provisions of consular agreements, United States v. City of Glen Cove, 322 F. Supp. 149, 152 (E.D. N.Y. 1971) aff'd, 450 F.2d 884; to enjoin enforcement of an anti-miscegenation statute, United States v. Brittain, 319 F. Supp. 1058, 1060 (N.D. Ala. 1970); to enjoin publication of classified material, United States v. New York Times, 328 F. Supp. 324, 327-8 (S.D. N.Y. 1971) rev'd on other grounds, 444 F.2d 544, rev'd. 403 U.S. 713.

> Every government, entrusted by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for proper assistance in the exercise of the one and the discharge of the other, and it is not sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interests of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court. In Re Debs, 158 U.S. 564, 584 (1895) quoted at 362 F.2d 932.

The district court, in this case, recognized that there are instances where the United States, acting through the Attorney General, may bring suit without specific statutory authority, and even recognized that there is statutory authority in the Attorney General to represent the "interests" of the United States in the Courts. (App. 16) The district court did not, however, analyze whether there are any protectable interests of the United States present in this case, and it failed to apply the principles found in the case law for testing whether a judicially cognizable interest exists.

Instead, the district court viewed the issue as one of executive power, and read the existing authorities as recognizing a power in the executive branch to bring suit in case of an "emergency public nuisance" or in "dire emergencies."

(App. 20, 24, 40) But not one case cited in the district court opinion rested its holding on such a rationale5/

In Part II, infra, the three aspects of this case which, in combination, give rise to a litigable interest on the part of the United States, left undiscussed by the district court, are described. Summarily stated, they are: (1) the statutory enactments of Congress, applicable to Rosewood, which establish the national policy regarding the protection of the rights of the mentally retarded administratively and through the courts; (2) the federal tax funds which have been spent in programs for the mentally retarded generally, and which have been spent at Rosewood, the receipt of which is conditioned upon providing certain standards of treatment; and (3) the interest of the federal government, recognized by Congress, to vindicate systematic deprivations of rights secured by the Thirteenth and Fourteenth Admendments to the United States Constitution.

5/ The district court cited the Federalist Papers for the point that the federal government has no powers not given it by the Constitution (App. 14), a principle beyond dispute, but those works, which spoke of a strong and independent executive, see Federalist, Nos. 48, 73, 78, are also relevant to a discussion of executive power, a central theme of the district court opinion.

It is axomatic, of course, that where Congress has enacted statutes which describe the scope of permissible litigation on behalf of the government, those statutes control whether any given suit will lie. In this case, however, there is no such statute. Nor, as we contend in Part II, is there any action by Congress which is inconsistent with the position which the government takes in this case. Where this state of statutory law obtains, the appropriate inquiry, in deciding whether the Attorney General may bring suit, is to decide whether the government has any substantial interest to advance.6/ If there is such an interest, then there is no doubt that under the statutes and the case law, the Attorney General, and only the Attorney General, may bring suit on behalf of the United States. If not, then no element of the government may bring suit. It is of little assistance to dwell on the difference between Congressional and executive power when there is no conflict between them presented.

Nor is there a reason to raise the spectre of unlimited

6/ "The government can sue even if there is no specific authorization. In such cases, however, it must have some interest to be vindicated sufficient to give it standing." C.A. Wright, Federal Courts 68 (2d Ed. 1976 ch. 3, §22.)

executive power, as did the district court (App. 15).7/ The authority to bring suit can be no greater than the interests of the government. These interests are usually defined by legislation, and always limited to those interests recognized by the courts. This case is not a testing of the limits, but is, as will be seen below, an attempt to vindicate interests recognized by precedent.

II. THE INTEREST OF THE GOVERNMENT IN THE EXECUTION OF CONGRESSIONALLY ENACTED PROGRAMS FOR THE PROTECTION OF THE MENTALLY RETARDED CITIZENS AND IN SECURING THEIR CONSTITUTIONAL RIGHTS IS SUFFICIENT TO MAINTAIN THIS LITIGATION

A. The government has an interest in execution of Congressionally enacted policies and programs to aid mentally retarded citizens.

Over the last decade, the condition of mentally retarded citizens has received the attention of all three branches of government. Courts have perceived a "right to treatment" secured by the due process clause of the Fourteenth Amendment, at least where mentally retarded persons are involuntarily

---

7/ "...the fact that the exercise of power may be abused is no sufficient reason for denying its existance....", United States v. San Jacinto Tin Co., supra at 284.

confined, as they are at Rosewood.8/ The United States participated in most of this litigation, and is participating in similar pending actions. In NYSARC & Parisi v. Carey, 393 F. Supp. 715 (E.D. N.Y. 1975), the court noted:

> During the three-year course of this litigation, the fate of the mentally impaired members of our society has passed from an arcane concern to a major issue both of constitutional rights and social policy. The proposed consent judgment resolving this litigation is partly a fruit of that process. 393 F. Supp. at 716.

The condition of the mentally retarded at Willowbrook State Hospital, the subject of the NYSARC case, led Congress to enact the Bill of Rights for the mentally retarded. In support of this provision Senator Javits said:

> ...I thank [the Senators] for their outstanding cooperation in a matter in respect of this bill which has been a burning issue to me ever since the terrible disclosures at Willowbrook School, Staten Island, N.Y. uncovered the inhumanity of man to man and yet another example of how retarded children were treated.

8/ See, e.g., Wyatt v. Stickney, 325 F. Supp. 781, 334 F. Supp. 1341, 344 F. Supp. 373, 344 F. Supp. 387, (M.D. Ala. 1971-2) aff'd sub. nom. Wyatt v. Aderholt, 503 F.2d 1305 (C.A. 5 1974); NYSARC & Parisi v. Carey, 393 F. Supp. 715 (E.D. N.Y. 1975); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974). See also Morales v. Turman, 364 F. Supp. 166, 383 F. Supp. 53 (E.D. Tex. 1973, 1974) rev'd. on other grounds, 535 F.2d 864; Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Wheeler v. Glass 473 F.2d 983 (C.A. 7 1973) involving rights of other categories of institutionalized persons.

....

> I am particularly pleased that the conferees have included as Title II essentially the "Bill of Rights for the Mentally Retarded" which I originally introduced on June 28, 1972, in response to the tragic situation of institutionalized mentally retarded patients across the Nation.9/

This statute, enacted as Section 201 of Public Law 94-102, 89 Stat. 502, (42 U.S.C. 6010), provides:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right 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.
>
> (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 the following minimum standards:

9/ 121 Cong. Rec. S 16548-9 (Daily Edition), September 23, 1975.

There then follows a recitation of standards relating to, inter alia, diet, medical and dental care, use of physical restraints and use of chemical restraints. The statute then provides that programs for persons with developmental disabilities should assure "that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights."

The conference report which recommended this legislation to Congress leaves no doubt that enforcement of these rights should be carried out through litigation such as this.

> 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. (emphasis added) House Conference Report No. 94-473, 1975 U.S. Code Cong. & Admin. News, p. 961.

This legislation is not, of course, the first entry of Congress into the field of mental retardation. There have been numerous legislative acts by which Congress has established a national policy directed toward the protection and improvement of the mentally retarded. The Developmental

Disabilities Services and Facilities Construction Act, P.L. 88-164, 77 Stat. 284, 42 U.S.C. 2661-2697, much of which was modified and absorbed into the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6001-6081, provided funds for a variety of mental retardation improvement purposes. Other acts have provided for surplus food for various institutions including hospitals for mentally disabled persons,[10] for school lunch programs for institutionalized children,[11] and for education of handicapped children.[12] Medicare and Medicaid programs were expanded in 1972 to provide funds for persons in institutions for the mentally retarded.[13] These grant programs, particularly the Medicaid amendments, are expressions of Congressional concerns for the treatment of the mentally retarded and regulations issued pursuant to this legislation establish standards relating to treatment for the beneficiaries of the funds.[14]

10/ 7 U.S.C. 1431.

11/ 42 U.S.C. 1761.

12/ 20 U.S.C. 1401.

13/ Title XIX, Social Security Act, as amended by P.L. 92-223, 42 U.S.C. 1396d (c) & (d).

14/ 45 C.F.R. §§249.12, 249.13.

This suit to secure the constitutional right of the institutionalized mentally retarded to treatment is a suit in execution of a policy and program of the federal government which the law clearly permits the government to bring. Arlington County, supra. See also United States v. Rock Island Centennial Bridge Commission, 230 F. Supp. 654 (S.D. Ill. 1964), aff'd 346 F.2d 361; United States v. Ira S. Bushey & Sons, Inc., 346 F. Supp. 145, 149 (D. Vt. 1972).

The existence of a national policy established through legislation has been a significant part of cases where interests were found sufficient to maintain non-statutory government suits. The suits brought in Sanitary District, Republic Steel and Wyandotte Transportation Co. were all for the purpose of executing the policy of the Rivers and Harbors Act. The Rock Island Centennial Bridge case was brought to enforce conditions attached to legislative permission to build a bridge across the Mississippi river. In Ira S. Bushey & Sons, Inc., federal interest was found in the combination of executive statements, congressional legislation and administrative agency regulations. 15/

15/ For executive statements relative to this case, see Executive Order No. 11776, Mar. 28, 1974, 39 F.R. 11865 which recites "the need to assure those who are retarded their full status as citizens under the law" and President's Statement on Mental Retardation, November 16, 1971. Weekly Compilation of Presidential Documents, Vol. 7, No. 47, p. 1530, Nov. 22, 1971.

The referenced enactments alone should provide sufficient national interest to afford standing to the government in the federal courts. However, legislation directed toward providing for the training and habilitation of mentally retarded persons is not the whole of Congressional action. Annually, executive departments, including the Department of Justice, seek appropriations for the execution of their responsibilities. The Department of Justice has reported to Congress on its litigation program to secure the rights of mentally retarded persons[16], and asked for funds to continue that program. The

---

16/ The Annual Report of the Attorney General, 1974, p. 73-74, describes the department's activities in this field. "The major problems concern the denial of constitutional rights... to be free from cruel and unusual punishment and to be accorded the fundamental protections of due process. There are, however, no statutes giving the Attorney General authority to bring suit in this area,..." This case is mentioned as the first brought "under the nonstatutory jurisdiction of the United States on behalf of institutionalized persons."

The Annual Report of the Attorney General, 1975, pp. 85-86, also mentions this case and a similar one in Montana, and says: "...there is no Federal statutory authority for the Department to initiate such suits; however, proposed legislation for this purpose is under consideration."

Senate report entitled State, Justice, Commerce, the Judiciary and Related Agencies, Appropriations for Fiscal Year 1977, Senate Hearings, Part 1-Justifications, Department of State, Department of Justice, describes at p. 596 the program of the Civil Rights Division's Special Litigation Section as encompassing "the responsibility to protect the constitutional rights of children and of mentally and physically handicapped persons voluntarily and involuntarily confined in state and local governmentally operated or supported...mental retardation habitation (sic) facilities...." The chart at p. 595 shows 13 positions at a cost of $269,000 devoted to that section, and the chart at p. 601 shows that the section was involved in 11 cases with 113 defendants.17/ Thus, Congress has appropriated money for the purpose of continuing the litigation program pursuant to which this suit was brought.18/

17/ At this writing, the number has increased to 20, including this one: two with the government as sole plaintiff, twelve with the government as plaintiff-intervenor and ten with the government as amicus curiae.

18/ Legislation was submitted to Congress by the Attorney General which would authorize suits by the Attorney General where there is a "pattern or practice" of deprivation of constitutional rights of persons confined in any state institution like Rosewood. See H.R. 12008, Referred to Committee on the Judiciary, 122 Cong. Rec. H 1210, (daily ed., Feb. 19, 1976). The authorization which that legislation would grant would include suits such as this, but showing of interest such as is present in this case would be unnecessary.

On September 29, 1975, a representative of the Department of Justice testified before subcommittees of the Special Committee on Aging of the Senate about the activities of the Department, including this case, with regard to litigation to protect the mentally retarded and the mentally ill.[19]

Throughout the appropriation process, there has been nothing which has indicated Congressional disapproval of litigation efforts such as this suit.[20] It is a reasonable inference that

19/ Joint Hearing before the Subcommittee on Long-Term Care and the Subcommittee on Health of the Elderly of the Special Committee on Aging, United States Senate, September 29, 1975, pp. 48-52. At the end of that statement, Senator Moss, presiding, stated: "Thank you very much for that statement, and we are pleased that the Civil Rights Division is engaged in litigation of these matters. The mentally ill, of course, are entitled to care." p. 52

20/ See Appropriations Acts, P.L. 94-121, Title II and P.L. 94-362, Title II; House Report No. 94-318, 94th Cong., 1st Sess., p. 14; Senate Report No. 94-328, 94th Cong., 1st Sess., pp. 16-17; House Report No. 94-1226, 94th Cong., 2d Sess., p. 16; Senate Report No. 94-964, 94th Cong., 2d Sess., p. 16. The simplest method by which Congress could end this litigation program is through the exercise of its "power of the purse" by which it could provide that no appropriations could be spent to conduct litigation such as this.

granting appropriations with no restrictions as to use indicates Congressional endorsement of litigation such as this. See Heckman v. United States, 224 U.S. 413, 443 (1911).

This record rebuts the conclusion, reached by the district court, (App. 34) that Congress intended the Secretary of Health, Education and Welfare to be the sole enforcer of the rights of mentally retarded persons to the exclusion of the courts and the Attorney General. In any event, the normal rule of construction is that where Congress intends an executive remedy to be exclusive in derogation of other existing remedies, it must say so explicitly, United States v. Wittek, 337 U.S. 346, 359-60 (1948) United States v. Stevenson, 215 U.S. 190, 198, (1909). This, Congress has not done, but it has made manifest the government's law enforcement interest in the subject matter of this suit.

B. The United States has an interest in the constitutional integrity of its spending programs.

In one sense, it is a misnomer to call this a non-statutory suit. As established in the preceding section, there are numerous statutes establishing a federal policy of protecting the mentally retarded. The most direct means Congress has adopted to carry out this policy is through the provision of federal

funds for the purpose of providing treatment through state authorities. These funds have conditions attached which relate to the standards for treatment which must be provided. The complaint in this case, which makes allegations of conditions at Rosewood far below any acceptable standards for treatment of the mentally retarded, also recites the government's interest as reflected in the Medicaid program as it applies to Rosewood residents. 42 U.S.C. 1396d (c) & (d). Submissions to the district court reflect that Rosewood has received over 13 million dollars over the last three years from the Department of Health, Education and Welfare through the Medicaid program. Statutes provide that funds such as this may be expended if the primary purpose of the institution in question is "to provide health or rehabilitative services," it meets standards "prescribed by the Secretary [of Health, Education and Welfare]" and the individuals for whom payment is sought are "receiving active treatment." 42 U.S.C. 1396d (d).

Pursuant to this statute, and the authority conferred by 42 U.S.C. 1302, the Secretary has prescribed "Standards for Intermediate Care Facilities." 45 C.F.R. §249.12. These standards include requirements that institutions such as

Rosewood maintain sufficient staff to carry out the policies, responsibilities and programs of the facility; that written policies provide, inter alia, for the rights of residents and prohibit their mistreatment and abuse; that the facility be in conformity with Federal, State and local laws pertaining to health and safety; that there be regulation of physical restraints, chemical restraints, living space, medication and diet; and that they provide necessary training in living and self-help skills, physical and occupational therapy, psychological services, speech pathology and audiology and other services appropriate to such institutions.

The complaint in this case makes allegations of insufficient staff, lack of psychiatric and social services, inhumane, unsanitary and crowded living conditions and a general lack of adequate treatment. If the allegations are true, the conditions at Rosewood violate both the regulations and the Medicaid statutes, as well as the constitution. This suit, of course, is one to enforce constitutional standards. But where the statutory standards require adequate treatment, and so does the Constitution, the interest of the government in enforcing those standards is clear. The regulations may require more than due

process considerations; they are, however, instructive as to minimal requirements as viewed by those with expertise respecting the needs of the mentally retarded.[21]

The interest of the government in enforcing conditions attached to its grants has been repeatedly recognized as being sufficient to maintain suit without statutory authority. United States v. Frazier, 297 F. Supp. 319, 323 (M.D. Ala. 1968) supplementary opinion, 317 F. Supp. 1079; Griffin v. United States, 168 F.2d 457, 459 (C.A. 8 1948); United States v. Harrison Co., 399 F.2d 485, 491 (C.A. 5 1968); United States v. Shanks, 384 F.2d 721, 723 (C.A. 10 1967).[22] Such an interest is not significantly different from the long established right of the government to sue to protect its proprietary interests. Tingey, Cotton, Dugan, supra, nor from the established right of the government to sue to protect the integrity of governmental functions; such as the patent system, Bell Telephone, supra; a land grant, San Jacinto Tin Co., supra; the court system, United States v. Original Knights of

21/ See order in Wyatt v. Stickney, supra, 344 F. Supp. 379-386.

22/ Suit has been brought to enforce the provisions of the regulations under the same statute at issue here. United States v. Pennsylvania, 394 F. Supp. 26 (M.D. Pa. 1975).

the Ku Klux Klan, 250 F. Supp. 330, 335-6 (E.D. Pa. 1975) 3-judge court, 1965) or the property interest of the Indian tribes, United States v. United States Fidelity and Guaranty Co., 106 F.2d 804, 807 (C.A. 10 1939) rev'd on other grounds, 309 U.S. 506. Here, the interest of the government is in the integrity of its grant programs. The federal government is financing an institution which, under the complaint, is abridging the constitutional rights of the persons confined to that institution. The government's duty to obey constitutional commands, if nothing else, Frontiero v. Richardson, 411 U.S. 677 (1973), gives rise to more than sufficient interest to maintain this litigation.

It would be incongruous to say that the Congress has the authority to require that adequate treatment for the mentally retarded be a condition of receiving federal funds, as it clearly does, King v. Smith, 392 U.S. 309 (1968); United States v. San Francisco, 310 U.S. 16 (1940), but that the executive branch is limited in the performance of its duty to "take care that the laws be faithfully executed," 23/ to the inflexible,

---

23/ United States Constitution, Article II, Section 3.

but statutorily authorized measure of terminating the flow of funds[24] intended to secure the rights of the mentally retarded. Such a limitation of power has never been presumed, In Re Neagle, 135 U.S. 1, 63-66 (1890), and if Congress intended to take away from the government standing to file suit in courts, it cannot do so by simply failing to grant authority. United States v. California, 332 U.S. 19, 27-28 (1947).

The government, therefore, contends that it has sufficient interest to sue not only to enforce statutorily defined policies and conditions attached to the award of federal grants, but also to insure the constitutional integrity of grants.

C. The government has an interest in vindication of systematic and institutionalized deprivation of Thirteenth and Fourteenth Amendment rights which affect the public at large.

Finally, but perhaps most importantly, the United States has an interest in the vindication of systematic deprivations of rights secured by the Thirteenth and Fourteenth Amendments

---

24/ See district court opinion (App. 34-35).

to the Constitution of the United States. Congress has acted in substantial and detailed terms over the last two decades to enforce these Amendments.[25] But the most broadly worded legislation was the legislation of the 1860's and 1870's, the important parts of which survive as R.S. §§1977-1981[26] and 18 U.S.C. 241 and 242. These statutes recognized the importance which both civil and criminal litigation plays in developing and vindicating the rights declared by the Thirteenth and Fourteenth Amendments, and most of the judicial interpretation of these Amendments has been in cases brought pursuant to these statutes.

The executive branch of the government has the responsibility to bring criminal prosecutions under 18 U.S.C. 241 and 242 where appropriate. These are broadly worded, and are in _pari materia_ to 42 U.S.C. 1983 and 1985 which provide for civil action to redress the same conduct made criminal under Section 241 and 242. _Baldwin_ v. _Morgan_ 251 F.2d 780, 789 (C.A. 5 1958).

25/ See, e.g. Civil Rights Acts of 1957, 1960, 1964, 1968 42 U.S.C. 1971 et seq., 2000 et seq., 3601-3631; 18 U.S.C. 245, 246.

26/ 42 U.S.C. 1981-1986.

However, the government would have a burden of proof on the "intent" element of the offense under the criminal statutes which it would very likely not meet as to much of the conduct involved in this case, United States v. Screws , 325 U.S. 91, 106 (1945). Moreover, even if some of the conduct could be addressed criminally, the institutional nature of the wrongs alleged make criminal prosecution ineffectual. In Re Estelle, 516 F.2d 480, 486-87 (C.A. 5 1976), cert. denied, 44 Law Week 5700, 3701,Rehnquist, J., dissenting.

> The effect of overlapping coverage of statutes is to grant power, if not to place a duty on the United States to prosecute, with criminal sanctions, 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 complaint alleges widespread, systemic and systematic deprivations 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 deprivations-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, we agree that where criminal liability "[is] inadequate to ensure the full effectiveness of the statute which Congress 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."

In United States v. Brand Jewelers, 318 F. Supp. 1293, 1300 (S.D. N.Y. 1970), the court saw "no acceptable basis in principle" for distinguishing between suits to remove obstructions from interstate commerce and suits to enjoin widespread deprivations of the Fourteenth Amendment. We see no distinction either. In both cases, the Constitution grants power to Congress to legislate 27/ In both cases, Congress has legislated. The interest of the government cannot be less or more in one area then in another. Both are established by the Constitution as of national concern.

This is not to say that the government has an interest in every violation of any individual's constitutional rights which it may redress through civil litigation. 28/ Clearly, it is not the function of government initiated litigation to enforce the rights of one individual against another, but it is the business of government to redress wrongs which "affect the public at large," Debs, supra at 586; San Jacinto Tin Co., supra at 285-6.

27/ U.S. Constitution, Article I, Section 8, cl. 3; Amendment 14, Section 5.

28/ The district court construed this suit as such a claim, and if it were such, we would agree with the result in the district court.

The aspects of the wrongs alleged to be occurring at Rosewood which "affect the public at large" are overwhelming: the wrongs are being perpetrated by a publicly financed institution - both federal and state funds; the wrongs affect over 2400 individuals; the wrongs have the potential for affecting anyone who may be confined at Rosewood;[29] and Congress has manifested the highest interest in the problem of the institutionalized mentally retarded.

The district court placed reliance on the rejection by Congress of a proposed amendment to 42 U.S.C. 1985 which would have given the Attorney General general authority to bring suits to enjoin deprivations of the Thirteenth and Fourteenth Amendments rights of any individual. (App. 26-27) But the Attorney General does not assert in this case such a sweeping power. Rather, what is asserted is that the government has an interest to vindicate in court. That Congress failed to grant a power that the Attorney General never had does not mean that Congress intended to take away a power that the Attorney General always had - the power to file suits to further

---

29/ Including persons who may not be residents of Maryland - Annotated Code of Maryland, Art. 41, §§319-338.

the government's interests. United States v. California, supra; United States v. Stevenson, supra.

To say, as did the district court, that, under these circumstances, the Attorney General, the "hand of the President in taking care that the laws...be faithfully executed,"[30] may do nothing through the courts to redress the illegal conditions existing at Rosewood is to deny the law enforcement authority that Congress vested in that office. To say that the federal government has no justiciable "interest" in the wrongs taking place at Rosewood is to ignore their nature and the expressed will of Congress.

30/ United States v. Cox, 342 F.2d 167, 191 (C.A. 5 1965).

CONCLUSION

For the reasons stated herein, plaintiff, the United States, submits that the judgment of the district court should be reversed with directions to reinstate the complaint.

Respectfully submitted,

J. STANLEY POTTINGER
Assistant Attorney General

JERVIS FINNEY
United States Attorney

Frank D. Allen Jr.

BRIAN K. LANDSBERG
FRANK D. ALLEN, JR.
LOUIS M. THRASHER
Attorneys
Department of Justice
Washington, D.C. 20530

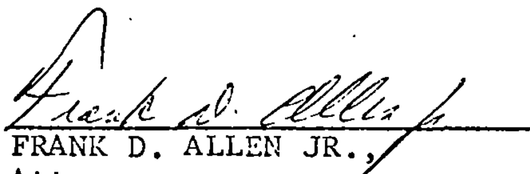
CERTIFICATE OF SERVICE

I hereby certify that on December 1, 1976, I served copies of the foregoing brief for the United States by first class mail postage pre-paid on the counsel listed below.

Paul Walter, Esq.
Stephen Sfekas, Esq.
Judith K. Sykes, Esq.
Assistant Attorneys General
201 W. Preston Street
Baltimore, Maryland 21201

Patricia M. Wald, Esq.
Director of Litigation
Mental Health Law Project
Suite 330, 1220 19th Street, N.W.
Washington, D.C. 20036

John R. Hill, Esq.
Attorney General of Texas
Thomas W. Choate, Esq.
Special Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas



FRANK D. ALLEN JR.,
Attorney
United States Department of Justice

ADDENDUM A

Relevant Statutes

TITLE 42, UNITED STATES CODE, SECTION 6010

§ 6010. Congressional findings respecting rights of the developmentally disabled

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right 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.

(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 the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related, habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed.Reg. pt. II), as appropriate when taking into account the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.

Pub.L. 88–164, Title I, § 111, as added Pub.L. 94–103, Title II, § 201, Oct. 4, 1975, 89 Stat. 502.

TITLE 42, UNITED STATES CODE, SECTION 1396d (c) and (d)

Intermediate care facility

(c) For purposes of this subchapter the term "intermediate care facility" means an institution which (1) is licensed under State law

610

to provide, on a regular basis, health-related care and services to individuals who do not require the degree of care and treatment which a hospital or skilled nursing facility is designed to provide, but who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities, (2) meets such standards prescribed by the Secretary as he finds appropriate for the proper provision of such care, and (3) meets such standards of safety and sanitation as are established under regulation of the Secretary in addition to those applicable to nursing homes under State law. The term "intermediate care facility" also includes any skilled nursing facility or hospital which meets the requirements of the preceding sentence. The term "intermediate care facility" also includes a Christian Science sanatorium operated, or listed and certified, by the First Church of Christ, Scientist, Boston, Massachusetts, but only with respect to institutional services deemed appropriate by the State. The term "intermediate care facility" also includes any institution which is located in a State on an Indian reservation and is certified by the Secretary as meeting the requirements of clauses (2) and (3) of this subsection and providing the care and services required under clauses [1](1). With respect to services furnished to individuals under age 65, the term "intermediate care facility" shall not include, except as provided in subsection (d) of this section, any public institution or distinct part thereof for mental diseases or mental defects.

Intermediate care facility services

(d) The term "intermediate care facility services" may include services in a public institution (or distinct part thereof) for the mentally retarded or persons with related conditions if—

(1) the primary purpose of such institution (or distinct part thereof) is to provide health or rehabilitative services for mentally retarded individuals and which meet such standards as may be prescribed by the Secretary;

(2) the mentally retarded individual with respect to whom a request for payment is made under a plan approved under this subchapter is receiving active treatment under such a program; and

(3) the State or political subdivision responsible for the operation of such institution has agreed that the non-Federal expenditures in any calendar quarter prior to January 1, 1975, with respect to services furnished to patients in such institution (or distinct part thereof) in the State will not, because of payments made under this subchapter, be reduced below the average amount expended for such services in such institution in the four quarters immediately preceding the quarter in

611

which the State in which such institution is located elected to make such services available under its plan approved under this subchapter.

TITLE 28, UNITED STATES CODE, SECTIONS 516-519

§ 516. Conduct of litigation reserved to Department of Justice.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General. (Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
----	5 U.S.C. 306	R.S. § 361. Sept. 3, 1954, ch. 1253, § 11, 68 Stat. 1229.

The section is revised to express the effect of the law. As agency heads have long employed, with the approval of Congress, attorneys to advise them in the conduct of their official duties, the first 56 words of R.S. § 361 and of former section 306 of title 5 are omitted as obsolete.

The section concentrates the authority for the conduct of litigation in the Department of Justice. The words "Except as otherwise authorized by law," are added to provide for existing and future exceptions (e.g., section 1037 of title 10). The words "an agency" are added for clarity and to align this section with section 519 which is of similar import. The words "as such officer" are omitted as unnecessary since it is implied that the officer is a party in his official capacity as an officer.

So much as prohibits the employment of counsel, other than in the Department of Justice, to conduct litigation is omitted as covered by R.S. § 365, which is codified in section 3106 of title 5, United States Code.

§ 517. Interests of United States in pending suits.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States. (Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
----	5 U.S.C. 316	R.S. § 367.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 20 sections 744, 993, 1082; title 42 section 3211.

§ 518. Conduct and argument of cases.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so. (Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 613.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
----	5 U.S.C. 309	R.S. § 359.

The words "and writs of error" are omitted on authority of the Act of Jan. 31, 1928, ch. 14 § 1, 45 Stat. 54. The word "considers" is substituted for "deems".

§ 519. Supervision of litigation.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties. (Added Pub. L. 89–554, § 4(c), Sept. 6, 1966, 80 Stat. 614.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
----	28 U.S.C. 507(b)	[None]

The words "Except as otherwise authorized by law," are added to provide for existing and future exceptions (e.g., section 1037 of title 10).

The words "or officer" are added for clarity and to align this section with section 516 which is of similar import.

The words "special attorneys appointed under section 543" are substituted for "attorneys appointed under section 503" to reflect the revision of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 20 in section 744.

ADDENDUM B

Regulations of the Department of Health, Education and Welfare Relating to Standards for Intermediate Care Facilities

agency, if any, are consulted in advance of the transfer or discharge of any resident, and casework services or other means are utilized to assure that adequate arrangements exist for meeting his needs through other resources; and

(2) In the case of institutions for the mentally retarded or persons with related conditions, policies define the uses of physical restraints, the staff members who must authorize their use, and a mechanism for monitoring and controlling their use;

(B) Set forth the rights of residents and prohibit their mistreatment or abuse;

(C) Provide for the registration and disposition of complaints without threat of discharge or other reprisal against resident.

(iii) A written account, available to residents and their families, is maintained on a current basis for each resident with written receipts for all personal possessions and funds received by or deposited with the facility and for all disbursements made to or on behalf of the resident;

(iv) The facility has a written and regularly rehearsed plan for staff and residents to be followed in case of fire, explosion or other emergency;

(v) There are written procedures for personnel to follow in an emergency, including care of the resident, notification of the attending physician and other persons responsible for the resident, arrangements for transportation, for hospitalization, or other appropriate services;

(vi) There is an orientation program for all new employees that includes review of all facility policies. An inservice education program is planned and conducted for the development and improvement of skills of all the facility's personnel. Records are maintained which indicate the content of, and participation in, all such orientation and staff development programs;

(vii) The facility is in conformity with Federal, State, and local laws, codes, and regulations pertaining to health and safety, including procurement, dispensing, administration, safeguarding and disposal of medications and controlled substances; building, construction, maintenance and equipment standards; sanitation; communicable and reportable diseases; and post-mortem procedures.

(2) Has in effect a transfer agreement with one or more hospitals sufficiently

§ 249.12 Standards for intermediate care facilities.

(a) The standards for an intermediate care facility (as defined in § 249.10(b)(15) of this part) which are specified by the Secretary pursuant to section 1905 (c) and (d) of the Social Security Act and are applicable to all intermediate care facilities are as follows. The facility:

(1) Maintains methods of administrative management which assure that:

(i) There are on duty during all hours of each day staff sufficient in numbers and qualifications to carry out the policies, responsibilites, and programs of the facility. The numbers and categories of personnel are determined by the number of residents and their particular needs in accordance with guidelines issued by the Social and Rehabilitation Service;

(ii) There are written policies and procedures available to staff, residents and the public which:

(A) Govern all areas of service provided by the facility:

(*1*) Admission, transfer, and discharge of residents policies shall assure that:

(*i*) Only those persons are accepted whose needs can be met by the facility directly or in cooperation with community resources or other providers of care with which it is affiliated or has contracts;

(*ii*) As changes occur in their physical or mental condition, necessitating service or care which cannot be adequately provided by the facility, residents are transferred promptly to hospitals, skilled nursing facilities, or other appropriate facilities; and

(*iii*) Except in the case of an emergency, the resident, his next of kin, attending physician, and the responsible

close to the facility to make feasible the transfer between them of residents and their records, which provide the basis for effective working arrangements under which inpatient hospital care or other hospital services are available promptly to the facility's residents when needed. Any facility which does not have such an agreement in effect but which is found by the survey agency to have attempted in good faith to enter into such an agreement with a hospital shall be considered to have such an agreement in effect if and for so long as the survey agency finds that to do so is in the public interest and essential to assuring intermediate care facility services for eligible persons in the community.

(3) Maintains effective arrangements

(i) For required institutional services through a written agreement with an outside resource in those instances where the facility does not employ a qualified professional person to render a required service. The responsibilities, functions, and objectives and the terms of agreement with each such resource are delineated in writing and signed by the administrator or authorized representative and the resource;

(ii) Through which medical and remedial services required by the resident but not regularly provided within the facility can be obtained promptly when needed.

(4) Maintains an organized resident record system which assures that:

(i) There is available to professional and other staff directly involved with the resident and to appropriate representatives of the State agency a record for each resident which includes as a minimum:

(A) Identification information and admission data including past resident medical and social history;

(B) Copies of initial and periodic examinations, evaluations, and progress notes including all plans of care and any modifications thereto, and discharge summaries;

(C) An overall plan of care setting forth goals to be accomplished, prescribing an integrated program of individually designed activities, therapies, and treatments necessary to achieve such goals, and indicating which professional service or individual is responsible for each element of care or service prescribed in the plan;

(D) Entries describing treatments and services rendered and medications administered;

(E) All symptoms and other indications of illness or injury including the date, time, and action taken regarding each; and

(F) In the case of institutions for the mentally retarded or persons with related conditions, the resident's legal status, developmental history, a copy of the post-institutionalization plan of care and a signed order for any physical restraints including justification and duration of application;

(ii) Records are adequately safeguarded against destruction, loss, or unauthorized use; and

(iii) Records are retained for a minimum of 3 years following a resident's discharge.

(5) Meets such provisions of the Life Safety Code of the National Fire Protection Association (21st Edition, 1967) as are applicable to institutional occupancies; except that:

(i) For facilities of 15 beds or less, the State survey agency may apply the Lodging or Rooming Houses section of the residential occupancy requirements of the Code for institutions for the mentally retarded or persons with related conditions and intermediate care facilities primarily engaged in the treatment of alcoholism and drug abuse, all of whose residents are currently certified by a physician or in the case of an institution for the mentally retarded or persons with related conditions by a physician or psychologist as defined in paragraph (c)(3)(i) of this section, as:

(A) Ambulatory;

(B) Engaged in active programs for rehabilitation which are designed to and can reasonably be expected to lead to independent living, or in the case of an institution for the mentally retarded or persons with related conditions, receiving active treatment; and

(C) Capable of following directions and taking appropriate action for self-preservation under emergency conditions;

(ii) In accordance with criteria issued by the Secretary, the State survey agency may waive the application to any such facility of specific provisions of such Code, for such periods as it deems appropriate, which provisions if rigidly applied would result in unreasonable hardship upon a facility, but only if such

waiver will not adversely affect the health and safety of the residents; and

(iii) The Life Safety Code shall not apply in any State if the Secretary makes a finding that in such State there is in effect a fire and safety code, imposed by State law, which adequately protects residents in intermediate care facilities.

Where waivers permit the participation of an existing facility of two or more stories which is not of at least 2-hour fire resistive construction, blind, nonambulatory or physically handicapped residents are not housed above the street level floor unless the facility is of 1-hour protected non-combustible construction (as defined in National Fire Protection Association Standard #220), fully sprinklered 1-hour protected ordinary construction or fully sprinklered 1-hour protected wood frame construction.

(6) Maintains conditions relating to environment and sanitation as set forth below:

(i) Resident living areas are designed and equipped for the comfort and privacy of the resident. Each room is equipped with or conveniently located near adequate toilet and bathing facilities appropriate in number, size, and design to meet the needs of residents. Each room is at or above grade level and each resident room contains a suitable bed, closet space which provides security and privacy for clothing and personal belongings, and other appropriate furniture;

(A) Resident bedrooms have no more than 4 beds. Single resident rooms measure at least 100 square feet, and multi-resident rooms [illegible] um of 80 square feet pe[illegible] agency may waive in e[illegible], for such periods as deemed appropriate, provisions which, if rigidly enforced, would result in unreasonable hardship upon the facility but only if such waiver is in accordance with the particular needs of the residents and will not adversely affect their health and safety. Each room is equipped with a resident call system; or

(B) In the case of institutions for the mentally retarded or persons with related conditions, the number of residents in multi-resident bedrooms does not exceed 12 persons. Single resident rooms measure 100 square feet, and multi-resident rooms provide a minimum of 80 square feet per bed. The survey agency may waive in existing buildings, for such periods as deemed appropriate, provisions which, if rigidly enforced, would result in unreasonable hardship upon the institution but only if such waiver is in accordance with the particular needs of the residents and will not adversely affect their health and safety; and

(ii) The facility has available at all times a quantity of linen essential for proper care and comfort of residents. Each bed is equipped with clean linen;

(iii) An adequate supply of hot water for resident use is available at all times. Temperature of hot water at plumbing fixtures used by residents is automatically regulated by control valves;

(iv) Except in the case of an institution for the mentally retarded or persons with related conditions, corridors used by residents are equipped with firmly secured handrails;

(v) Provision is made for isolating residents with infectious diseases;

(vi) Areas utilized to provide therapy services are of sufficient size and appropriate design to accommodate necessary equipment, conduct examinations, and provide treatment;

(vii) The facility provides one or more areas for resident dining, diversional, and social activities; and areas used for corridor traffic shall not be considered as areas for dining, diversional or social activities;

(viii) If a multipurpose room is used for dining and diversional and social activities, there is sufficient space to accommodate all activities and prevent their interference with each other;

(ix) The facility is accessible to and functional for residents, personnel, and the public. All necessary accommodations are made to meet the needs of persons with semi-ambulatory disabilities, sight and hearing disabilities, disabilities of coordination, as well as other disabilities in accordance with the American National Standards Institute (ANSI) Standard No. A117.1 (1961) American Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped. The survey agency may waive in existing buildings, for such periods as deemed appropriate, specific provisions of ANSI Standard No. A117.1 (1961) which, if rigidly enforced, would result in unreasonable hardship upon the facility, but only if such waiver will not adversely affect the health and safety of residents. For purposes of ANSI Standard No. A117.1 (1961), "existing buildings" are defined as those facilities or parts thereof whose construction plans

are approved and stamped by the appropriate State agency responsible therefor before the date these regulations become effective.

(7) Provides or arranges menus and meal service so that:

(i) At least three meals or their equivalent are served daily, at regular times with not more than 14 hours between a substantial evening meal and breakfast;

(ii) A designated staff member suited by training or experience in food management or nutrition is responsible for planning and supervision of menus and meal service;

(iii) If the facility accepts or retains individuals in need of medically prescribed special diets, the menus for such diets are planned by a professionally qualified dietitian, or are reviewed and approved by the attending physician, and the facility provides supervision of the preparation and serving of the meals and their acceptance by the resident;

(iv) Menus are planned and followed to meet nutritional needs of residents, in accordance with physicians' orders and to the extent medically possible, in accordance with the recommended dietary allowances of the Food and Nutrition Board of the National Research Council, National Academy of Sciences;

(v) Records of menus as actually served are retained for 30 days;

(vi) All food is procured, stored, prepared, distributed, and served under sanitary conditions; and

(vii) Individuals needing special equipment, implements, or utensils to assist them when eating have such items provided.

(8) Implements methods and procedures relating to drugs and biologicals which assure that:

(i) If the facility does not employ a licensed pharmacist, it has formal arrangements with a licensed pharmacist to provide consultation on methods and procedures for ordering, storage, administration and disposal and recordkeeping of drugs and biologicals;

(ii) Medications administered to a resident are ordered either in writing or orally by the resident's attending or staff physician. Physician's oral orders for prescription drugs are given only to a licensed nurse, pharmacist, or physician. All oral orders for medication are immediately recorded and signed by the person receiving them and are countersigned by the attending physician in a manner consistent with good medical practice;

(iii) Medications not specifically limited as to time or number of doses when ordered are controlled by automatic stop orders or other methods in accordance with written policies and the attending physician is notified;

(iv) Self-administration of medication is allowed only with permission of the resident's attending physician;

(v) A registered nurse reviews monthly each resident's medications and notifies the physician when changes are appropriate. Medications are reviewed quarterly by the staff physician; and

(vi) All personnel administering medications must have completed a State-approved training program in medication administration.

(9) Provides health services which assure that each resident receives treatments, medications, diet, and other health services as prescribed and planned, all hours of each day, in accordance with the following:

(i) Immediate supervision of the facility's health services on all days of each week is by a registered nurse or licensed practical (or vocational) nurse employed full-time on the day shift in the intermediate care facility and who is currently licensed to practice in the State: *Provided*, That:

(A) In the case of facilities where a licensed practical (or vocational) nurse serves as the supervisor of health services, consultation is provided by a registered nurse, through formal contract, at regular intervals, but not less than 4 hours weekly;

(B) By January 1975, licensed practical (or vocational) nurses serving as health services supervisors have training that includes either graduation from a State approved school of practical nursing or education and other training that is considered by the State authority responsible for licensing of practical nurses to provide a background that is equivalent to graduation from a State approved school of practical nursing, or have successfully completed the Public Health Service examination for waivered licensed practical (vocational) nurses; and

(C) Other categories of licensed personnel with special training in the care of residents may serve as charge nurse: *Provided*, That such person is licensed by the State in such category following com-

pletion of a course of training which includes at least the number of classroom and practice hours in all of the nursing subjects included in the program of a State approved school of practical (or vocational) nursing as evidenced by a report to the single State agency by the agency or agencies of the State responsible for the licensure of such personnel comparing the courses in the respective curricula; and

(ii) Responsible staff members are on duty and awake at all times to assure prompt, appropriate action in cases of injury, illness, fire or other emergencies;

(iii) In the case of an institution for the mentally retarded or persons with related conditions, with 15 beds or fewer which has only residents certified by a physician as not in need of professional nursing services, paragraph (a)(9)(i) and (ii) of this section may be met if the institution arranges through formal contract for the services of a registered nurse or public health nurse to visit as required for the care of minor illnesses, injuries, or emergencies, and consultation on the health aspects of the individual plan of care; and if a responsible staff member is on duty at all times who is immediately accessible, to whom residents can report injuries, symptoms of illness, and emergencies;

(iv) A written health care plan is developed and implemented by appropriate staff for each resident in accordance with instructions of the attending or staff physician. The plan is reviewed and revised as needed, but not less often than quarterly;

(v) Nursing services are provided in accordance with the needs of the residents and, in the case of a facility other than an institution for the mentally retarded or persons with related conditions, restorative nursing care is provided to each resident to achieve and maintain the highest possible degree of function, self-care and independence.

(b) In addition, for intermediate care facilities other than institutions for the mentally retarded or persons with related conditions, the following standards specified pursuant to section 1905(c) of the Social Security Act shall apply.

(1) The facility is administered by a person licensed in the State as a nursing home administrator or, in the case of a hospital qualifying as an intermediate care facility, by the hospital administrator, with the necessary authority and responsibility for management of the facility and implementation of administrative policies.

(2) The administrator or an individual on the professional staff of the facility is designated as resident services director and is assigned responsibility for the coordination and monitoring of the residents' overall plans of care.

(3) The facility provides, according to the needs of each resident, specialized rehabilitative and supportive services either directly or through arrangements with qualified outside resources, which are designed to preserve and improve abilities for independent function, prevent insofar as possible progressive disabilities, and restore maximum function, and which are:

(i) Provided under a written plan of care, developed in consultation with the attending physician and if necessary, an appropriate therapist. The plan is based on the attending physician's orders and an assessment of the resident's needs. The resident's progress is reviewed regularly, and the plan is altered or revised as necessary;

(ii) Provided in accordance with accepted professional practices by qualified therapists or by qualified assistants as defined in 20 CFR 405.1101(m), (n), (q), (r), and (t) or other supportive personnel under appropriate supervision.

(4) The facility provides or arranges for social services as needed by the resident, designed to promote preservation of the resident's physical and mental health.

(i) A designated staff member suited by training or experience is responsible for arranging for social services and for the integration of social services with other elements of the plan of care.

(ii) A plan for such care is recorded in the resident's record and is periodically evaluated in conjunction with the resident's total plan of care.

(5) The facility provides an activities program designed to encourage restoration to self-care and maintenance of normal activity which assures that:

(i) A staff member qualified by experience or training in directing group activity is responsible for the direction and supervision of the activities program;

(ii) A plan for independent and group activities is developed for each resident in accordance with his needs and interests;

(iii) The plan is incorporated in his overall plan of care and is reviewed with the resident's participation at least quarterly and altered as needed;

(iv) Adequate recreation areas are provided with sufficient equipment and materials available to support independent and group activities; and

(6) The facility maintains policies and procedures to assure that each resident's health care is under the continuing supervision of a physician who sees the resident as needed and in no case less often than every 60 days, unless justified otherwise and documented by the attending physician.

(c) In addition, for institutions for the mentally retarded or persons with related conditions the following standards specified pursuant to section 1905(d) of the Social Security Act shall apply.

(1) Residents are admitted when it has been determined in accordance with § 249.10(d)(1)(v)(c) that the resident is in need of the care and services provided by the institution.

(2) The institution is administered by a person licensed in the State as a nursing home administrator or by a Qualified Mental Retardation Professional who meets the requirements set forth in subparagraph (3) of this paragraph however, in the case of an institution licensed as a nursing home, by a person licensed in the State as a nursing home administrator, or, in the case of a hospital qualifying as an institution for the mentally retarded or persons with related conditions, by the hospital administrator. The administrator has the necessary authority and responsibility for management of the institution and implementation of administrative policies.

(3) The institution provides for a Qualified Mental Retardation Professional who is responsible for supervising the implementation of each resident's individual plan of care, integrating the various aspects of the institution's program, recording each resident's progress and initiating periodic review of each individual plan of care for necessary modifications or adjustments. The term "Qualified Mental Retardation Professional" means:

(i) A

ter's degree from an accredited program and with specialized training or 1 year of experience in treating the mentally retarded;

(ii) A physician licensed under State law to practice medicine or osteopathy and with specialized training or 1 year of experience in treating the mentally retarded;

(iii) An educator with a degree in education from an accredited program and with specialized training or 1 year of experience in working with the mentally retarded;

(iv) A social worker with a bachelor's degree in social work from an accredited program, or a bachelor's degree in a field other than social work and at least three years social work experience under the supervision of a qualified social worker, and with specialized training or 1 year of experience in working with the mentally retarded;

(v) A physical or occupational therapist as defined in 20 CFR 405.1101(m) or (q) and who has specialized training or 1 year of experience in treating the mentally retarded;

(vi) A speech pathologist or audiologist as defined in 20 CFR 405.1101(t) and who has specialized training or 1 year of experience in treating the mentally retarded;

(vii) A registered nurse who has specialized training or 1 year of experience in treating the mentally retarded;

(viii) A therapeutic recreation specialist who is a graduate of an accredited program and where applicable, is licensed or registered in the State, and who has specialized training or 1 year of experience in working with the mentally retarded.

(4) The institution provides all necessary resident living services, training, and guidance in the activities of daily living, and development of self-help skills for independence, and, as needed by the individual resident, provides directly or through arrangements the following:

(i) Dental services to provide evaluation, diagnosis, treatment and annual review, including care for dental emergencies, administered by or under the supervision of a dentist licensed in the State to practice dentistry or dental surgery;

(ii) Physical and occupational therapy services for purposes of initiating, monitoring and followup of individualized treatment programs rendered by or under the supervision of a physician with special training or experience in the specialty or a physical therapist or an occupational therapist as defined in 20 CFR 405.1101(m) or (q);

(iii) Psychological services including participation in the evaluation and periodic reviews, individual treatment, and consultation and training services to program staff, rendered by a psychologist with a master's degree from an accredited program;

(iv) Social services available to all residents as appropriate, including evaluation and counseling, with referral to, and use of, other community resources as appropriate, participation in periodic reviews and planning for community placement, discharge and followup services;

(v) Speech pathology and audiology services to maximize the communication skills of residents for purposes of initiation, monitoring and followup of individualized treatment programs under the direction of a physician with special training or experience in the specialty or a therapist as defined in 20 CFR 405.-1101(t);

(vi) Organized recreational activities for residents consistent with their needs and capabilities, including provision of adequate recreation areas, equipment and materials to support independent and organized activities; and

(vii) Physician services including a complete physical examination at least annually and formal arrangements to provide for medical emergencies on a 24-hour, 7-days-a-week-basis.

(5) The institution has a direct care staff which conducts a resident living program designed to provide training in activities of daily living and development of self-help and social skills, and to carry out the recommendations and plans for treatment of each resident under the supervision of a person (or persons) whose training and experience is appropriate for the program and who is qualified to supervise and direct activities of daily living and

(6) No later than three years after the effective date of these regulations the institution meets the standards specified in § 249.13. For institutions determined to meet the standards specified in § 249.13, the following sections of paragraphs (a) and (c) of this section do not apply: (a)(1)(i), (ii), (iv), (v) and (vi); (a)(4); (a)(6)(i)(B), (iii), (v), (vi), (vii), and (viii); (a)(7); (a)(8); (c)(4); and (c)(5).

[39 FR 2223, Jan. 17, 1974; 39 FR 8918, Mar. 7, 1974]

§ 249.13 Standards for intermediate care facility services in institutions for the mentally retarded or persons with related conditions.

Effective not later than 3 years after the effective date of these regulations the standards for intermediate care facility services (as defined in § 249.10(b)(15)) in an institution for the mentally retarded or persons with related conditions which are specified by the Secretary pursuant to section 1905(c) and (d) of the Social Security Act and referred to in § 249.12(c)(6), are specified in this section. At such time as an institution is deemed to meet the standards contained in this section, such institution will no longer be required to meet the following provisions of § 249.12: (a)(1)(i), (ii), (iv), (v) and (vi); (a)(4); (a)(6)(i)(B), (iii), (v), (vi), (vii) and (viii); (a)(7); (a)(8); (c)(4); and (c)(5).

(a) *Administrative policies and practices*—(1) *General policies and practices.* (i) The facility shall have a written outline of the philosophy, objectives, and goals it is striving to achieve, that is available for distribution to staff, consumer representatives, and the interested public, and that shall include but need not be limited to:

(A) Its role in the State comprehensive program for the mentally retarded;

(B) Its goals for its residents; and

(C) Its concept of its relationship to the parents of its residents, or to their surrogates.

(ii) The facility shall have a written statement of policies and procedures concerning the rights of residents that assure the civil rights of all residents.

(iii) The facility shall have a written statement of policies and procedures that protect the financial interests of residents and when large sums accrue to the resident, provide for counseling of the resident concerning their use, and for appropriate protection of such funds. These policies shall permit normalized and normalizing possession and use of money by residents for work payment and property administration as, for example, in performing cash and check transactions and in buying clothes and other items.

(iv) Policies and procedures in the major operating units of the facility shall be described in manuals that are current, relevant, available, and followed.