

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

FILED
JESSE W. GRIDER, CLERK

JUN 6 1977

U. S. DISTRICT COURT
WEST'N DIST. KENTUCKY.

KENTUCKY ASSOCIATION FOR
RETARDED CITIZENS;

WARREN KENT BRUINGTON, by his
mother and next friend,
DOROTHY EZELLE;

CARLA ANN SMITH, by her
mother and next friend,
MARY JO SMITH;

RONNIE CHRISTIAN, by his
mother and next friend,
BETH CHRISTIAN;

JACQUELINE HODGES, by her
mother and next friend,
ROSE HODGES;

LOUIS RAY KING;

WILLIE T. NICHOLS, by his
mother and next friend,
GENEVEL BURKS

PLAINTIFFS

vs.

PETER CONN, Secretary,
Kentucky Department for
Human Resources;

WILLIAM P. McELWAIN,
Commissioner, Kentucky Bureau
for Health Services;

JACK C. LEWIS, Commissioner,
Kentucky Bureau for Social Services;

DIRECTOR, Kentucky Division for
Mental Health and Mental Retardation
Services;

RUSSELL McCLURE, Commissioner,
Kentucky Executive Department
for Finance and Administration;

ALPHONSO HERRERA,
Facility Director,
Excepticon-Outwood Campus;

EXCEPTICON, INC., A
Kentucky Corporation;

MAXINE PULLIAM,
Guardianship Officer, Kentucky
Department for Human Resources

DEFENDANTS

AMENDED COMPLAINT

CIVIL ACTION NO. C-77-0048P

(All defendants are sued individually
and in their official capacities)

AMENDED COMPLAINT

* * * * *

PRELIMINARY STATEMENT

1. This is a class action for declaratory and preliminary and permanent injunctive relief on behalf of the named Plaintiffs and all mentally retarded individuals who presently reside or may in the future reside at Outwood, an institution established for the custody, care, habilitation, education, training and treatment of mentally retarded individuals in the Commonwealth of Kentucky. Plaintiffs allege violation of their rights secured by the First, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and by laws of the United States and laws of the Commonwealth of Kentucky. Specifically, Defendants have failed to provide Plaintiffs and others similarly situated with constitutionally and statutorily mandated levels of habilitation. Furthermore, State and Federal statutes require that habilitation, treatment, care and services provided to Plaintiffs and their class should be designed to maximize the developmental potential of each individual and should be provided in a setting which is least restrictive of the individual's personal liberty. Every individual presently housed in Outwood has potential for development which is not presently met and can never be met at Outwood because of the size and geographic isolation of the facility. Defendants plan to construct a new facility at Outwood. In light of past violations of Plaintiffs' rights, and anticipated future violations which will arise because of difficulties endemic to the isolated location of Outwood, Plaintiffs seek to enjoin Defendants from construction of the new facility and to compel the provision of programs and facilities appropriate for each individual throughout the state.

JURISDICTION

2. Jurisdiction is conferred on this Court by 28 USC §1343 (3) and (4), which provides this Court original jurisdiction in all suits authorized by 42 USC §1983 to redress the deprivation, under color of state law, of any right, privilege or immunity secured by the United States Constitution. The injunctive and declaratory relief prayed for in this action is authorized by

28 USC §§ 2201 and 2202, Rule 57 of the Federal Rules of Civil Procedure, and 42 USC §1983. Jurisdiction of the State claims is conferred by means of the doctrine of pendent jurisdiction.

PLAINTIFFS

Plaintiff Bruington

3. Plaintiff Warren Kent Bruington is a twenty-seven year old severely mentally retarded resident of the Outwood facility. He has resided at Outwood continuously since 1959, when he was involuntarily committed by Order of the Jefferson County Circuit Court. He is a citizen of the United States and a resident of Jefferson County, Kentucky.

4. Plaintiff Bruington was declared incompetent in 1959, and the Kentucky Department for Human Resources was appointed his guardian. The interests of Mr. Bruington and the interests of the Department for Human Resources are adverse for purposes of this action. In light, thereof, this action is brought on behalf of Warren Kent Bruington by his mother and next friend, Dorothy Ezelle. Mrs. Ezelle presently resides at 801 Glen Haven Drive, Nashville, Tennessee. Dorothy Ezelle is a member of Kentucky Association for Retarded Citizens.

5. While at Outwood, Kent has been subjected to physical injury, and has on repeated occasions failed to receive prompt and proper medical treatment.

6. On repeated occasions, Kent has been subjected to punishment by a procedure termed "time out". "Time out", the chief form of "therapy" provided for behavior problems, consists of transferring the resident away from his usual surroundings and confining him in Hall Three without appropriate supervision. Hall Three is the ward on which males with greatest behavior problems reside. No additional modes of therapy for dealing with behavior problems are offered.

7. Adequate and proper care for Kent requires a smaller facility offering higher staff-patient ratios, with access to more comprehensive medical services, increased opportunities for therapy and other treatment, including normalization techniques directed at maximizing his potential. He has failed to receive such services at Outwood.

Plaintiff Smith

8. Plaintiff Carla Ann Smith is a twenty-year old resident of the Outwood facility. She is severely retarded as the result of brain damage. She has resided at Outwood continuously since 1965, when she was committed by her parents. She is a citizen of the United States and a resident of Jefferson County, Kentucky.

9. This action is brought on behalf of Carla Ann Smith by her mother and next friend, Mary Jo Smith, who resides at 7206 Gerber Street, Louisville, Kentucky. She is a proper person to prosecute this action as her daughter's representative. Mary Jo Smith is a member of the Kentucky Association for Retarded Citizens.

10. Carla's parents arrange for her to come home for approximately two weeks each summer. Her mother also tries to visit her at Outwood in the fall and spring. However, such visits to Outwood are extremely difficult and unsatisfactory due to the inaccessibility and geographic isolation of the Outwood facility.

11. The physical distance and geographic isolation which separates Carla from her parents, family and home community have created a persistent barrier to parent-child interaction, and have resulted in chronic deprivation of Carla's sense of familial relationships.

12. Carla's mother has observed that Carla has been denied use of personal belongings, particularly clothing, which have been given to her by her family. Because of this denial of access to and use of her own personal belongings, Carla has been effectively denied familiarity with personal belongings and the sense of routine necessary for development of self-worth and personal security.

13. Carla requires an appropriate residential program with more ready access to her family. Carla also requires adequate and appropriate structured programs of speech, recreational and other therapy which she has not received and continues not to receive at Outwood.

Plaintiff Christian

14. Plaintiff Ronnie Christian is a twenty-eight year old resident of the Outwood facility. He is severely retarded and suffers from cerebral palsy and seizures. He has resided at Outwood continuously since 1967, when

he was committed by his parents. He is a citizen of the United States and a resident of Jefferson County, Kentucky.

15. This action is brought on behalf of Ronnie Christian by his mother and next friend, Beth Christian, who resides at 1750 Deer Park Road, Louisville, Kentucky. She is a proper person to prosecute this action as her son's representative. Beth Christian is a member of the Kentucky Association for Retarded Citizens.

16. To his mother's knowledge, Ronnie has not and does not receive any habilitation, training or other services which would offer him a meaningful opportunity to develop his functional skills. With rare exception, Ronnie spends all of his time effectively unattended in the "day room" of his ward.

17. Ronnie's mother has observed deterioration in the physical condition of her son during the time he has resided at Outwood. She believes that Ronnie is being overmedicated, and that such medication is being administered to him without reference to a current and appropriate medical treatment plan prescribed by a qualified physician.

18. Ronnie's mother has at no time received notification of the need for medical treatment of her son, notification of the fact of medical treatment of her son, or of the reason for deterioration in his physical condition.

19. Ronnie has been routinely deprived of the use of clothing, radios, watches and other personal belongings given to him by his family. This deprivation has effectively denied Ronnie the familiarity with personal belongings and the sense of routine necessary for development of self-worth and personal security.

20. Ronnie receives monthly payments which derive from his father's condition of disability. These payments are routed directly to the Outwood facility. At least \$10.00 out of each such monthly payment is required to be used for Ronnie's personal use. Ronnie's mother has at no time received any accounting for this monthly personal allowance, nor is there any evidence that such money has been used for Ronnie's benefit.

21. Ronnie's parents arrange to have him visit their home in Jefferson County each year for one week at Christmas, and sometimes during the summer months. Ronnie's parents attempt to visit him at Outwood whenever they can. However, the inaccessibility of Outwood, the length of time required to visit Outwood, and the absence of suitable visitation facilities at Outwood make normalized family visitation impossible.

22. The physical distance and geographic isolation which separates Ronnie from his parents, family and home community have created a persistent barrier to parent-child interaction, and have resulted in chronic deprivation of Ronnie's sense of familial relationships.

23. Plaintiff's mother believes that placement at Outwood is unsuitable for Ronnie in that he requires placement closer to his parents' home so that they may visit, observe his care and treatment on a regular basis, and assure that his rights are protected. Ronnie also requires habilitation and other programmed services which he does not receive, and placement closer to the comprehensive medical facilities necessary for treatment of his condition.

Plaintiff Hodges

24. Plaintiff Jacqueline Hodges is a twenty-two year old deaf and mentally retarded individual who resided at Outwood from 1968 until December 1976, when her parents refused to return her to the institution. Plaintiff is a citizen of the United States and presently resides with her parents at 1318 Lydia Street, Louisville, Jefferson County, Kentucky.

25. This action is brought on behalf of Jacqueline Hodges by her mother and next friend, Rose Hodges, 1318 Lydia Street, Louisville, Kentucky. She is a proper person to prosecute this action on her daughter's behalf. Mrs. Rose Hodges is a member of the Kentucky Association for Retarded Citizens.

26. During her last two years at Outwood, Jacqueline received inadequate care and treatment, resulting in continuous and harmful loss of weight, and deterioration of her functional skills, general health, demeanor and personality.

27. During most of her stay at Outwood, Jacqueline was routinely confined in a hot, small, unfurnished "day room" with five other female patients. Except for a color television donated by parents, this room lacked ordinary furniture, toys, proper supervision or equipment for any activity.

28. During her stay at Outwood, Jacqueline received little or no habilitation, training or other programmed activity which would offer her a meaningful opportunity to develop her physical, social and other functional skills.

29. After repeated complaints by Jacqueline's mother to Outwood personnel that her daughter was receiving inappropriate care and treatment, the Plaintiff was discharged from Outwood in January, 1977.

30. Jacqueline presently resides with her parents. She requires residential placement outside the home with appropriate services which her parents cannot provide. Residential placement is not presently available within Kentucky for Jacqueline.

Plaintiff King

31. Plaintiff Louis Ray King is a moderately mentally retarded resident of the Outwood facility. He has resided at Outwood continuously since 1969, when he was committed by his parents. He is a citizen of the United States and a resident of Daviess County, Kentucky.

32. Louis is able to function effectively in a less restrictive setting than Outwood provides, such as a community-based facility with appropriate supervised living arrangements and other supportive services. He is unable to reside in the community without such services.

33. Since at least 1975, the Outwood staff has determined Outwood to be an inappropriate placement for Plaintiff King. Efforts by the Outwood staff to appropriately place him have been unsuccessful due to the failure of State Defendants to provide comprehensive community-based residential and habilitative facilities and other comprehensive services for mentally retarded and developmentally disabled individuals such as Plaintiff King.

Plaintiff Nichols

34. Plaintiff Willie T. Nichols is a twenty-six year old moderately retarded resident of Outwood. Plaintiff Nichols has been a resident of Outwood since he was thirteen years old. He is a citizen of the United States and a resident of Logan County, Kentucky.

35. This action is brought on behalf of Willie T. Nichols by his mother and next friend, Genevel Burks, who resides on Walnut Street, Adairville, Kentucky. She is the proper person to prosecute this action as her son's representative. Genevel Burks is a member of the Kentucky Association for Retarded Citizens.

36. Willie is able to function effectively in a less restrictive setting than Outwood provides, such as a community-based facility with appropriate supervised living arrangements and other supportive services. He is unable to reside in the community without such services.

37. The staff at Outwood has determined that continued placement of Plaintiff Nichols at Outwood is inappropriate and that Plaintiff Nichols should be placed in a less restrictive community-based setting. Efforts by the Outwood staff to appropriately place him have been unsuccessful due to the failure of the State Defendants to provide comprehensive community-based residential and habilitative facilities and other comprehensive services for mentally retarded and developmentally disabled individuals such as Plaintiff Nichols.

Plaintiff Kentucky Association for Retarded Citizens

38. The Kentucky Association for Retarded Citizens (hereafter KARC) is a non-profit organization composed of over 4,000 members in thirty-six local chapters throughout the Commonwealth of Kentucky. Membership consists of concerned citizens, including parents, relatives, and professionals. It is organized to advocate on behalf of the over 105,000 mentally retarded citizens of Kentucky. Activities include dissemination of information about State and Federal programs for the mentally retarded, intervention in public policy through inter-agency cooperation and development of model legislation, and consultation with member chapters. The purpose and nature of the KARC make it a proper party to vigorously represent the interests of the mentally retarded individuals presently housed at Outwood and of the mentally retarded citizens throughout the Commonwealth of Kentucky who are without access to the residential and habilitative facilities and other comprehensive services to which they are entitled.

39. KARC members suffer real and substantial harm as a direct result of Defendants' conduct, challenged herein. Specifically, the administration of the Outwood facility does not provide constitutionally and statutorily mandated levels of habilitation, treatment and care and opportunities for developmental potential for the children and next friends of KARC members.

40. The challenged conduct is the proximate cause of injury to KARC and its members. The relief sought, if granted, will in all likelihood result in substantial benefits to KARC, its members, and their children and next friends.

DEFENDANTS

41. Defendant PETER CONN is the current Secretary of the Kentucky Department for Human Resources (hereafter "DHR"). As DHR Secretary, Defendant Conn has overall responsibility for Kentucky institutions, including Outwood, that exist to provide care, education, training, treatment and services to mentally retarded persons.

42. Defendant WILLIAM P. McELWAIN is the Commissioner of the Bureau for Health Services in DHR. Defendant McElwain's Bureau has responsibility for conditions and programs in state facilities for the mentally retarded, including Outwood. Defendant McElwain and former DHR Secretary, C. Leslie Dawson, signed the Outwood service management agreement for DHR with Defendant, Excepticon, Inc.

43. Defendant JACK C. LEWIS is the Commissioner of the Bureau for Social Services, a unit within the Kentucky Department for Human Resources. Among other duties, Defendant Lewis has the responsibility for assisting residents of Outwood in finding living arrangements and receiving social services in appropriate settings less restrictive than Outwood. Defendant Lewis and other employees of the Bureau for Social Services have been for the most part unable to place Outwood residents in settings outside Outwood which are more appropriate and less restrictive.

44. This inability to place residents into appropriate facilities and to provide needed supportive services is primarily the result of the failure of State Defendants to provide adequate and appropriate community-based residential and habilitative facilities and other comprehensive services for the mentally retarded and developmentally disabled population of Kentucky.

45. Defendant THE DIRECTOR is Director of Kentucky's Division for Mental Health and Mental Retardation Services. This unit is a recently created division of the Bureau for Health Services within DHR. The director of this division has been given direct and immediate responsibility for all Kentucky mental health and mental retardation programs, including the programs at Outwood. To date, no person has been appointed to fill this position.

46. Defendant RUSSELL McCLURE is Commissioner of the Executive Department for Finance and Administration for the Commonwealth of Kentucky (hereafter "EDFA"). Defendant McClure is required by Kentucky law (KRS 45.360) to oversee and approve expenditure of state funds to purchase contract services for the various agencies of the Commonwealth of Kentucky. Defendant McClure approved the Outwood service management agreement for EDFA.

47. Defendant ALPHONSO HERRERA is Facility Director of the Outwood mental retardation facility at Dawson Springs, Kentucky. Defendant Herrera is an employee of Excepticon and the chief administrative officer directly responsible for insuring that Outwood delivers appropriate care, education, training, treatment and services to retarded persons who reside at Outwood.

48. Defendant EXCEPTICON, INC. (hereafter "Excepticon") is a Kentucky stock corporation that operates the Outwood mental retardation facility pursuant to a service management agreement signed between Excepticon, DHR, and EDFA. The president and registered agent of Excepticon is John W. Swann, Jr., whose address is 1733 Hatteras Drive, Lexington, Kentucky 40504. Since August 1, 1975, Excepticon has had direct responsibility for all programs and services at the Outwood facility.

49. Defendant MAXINE PULLIAM is Guardianship Officer within the Kentucky Department for Human Resources. In this capacity, Defendant Pulliam has become the payee for and receives government benefits on behalf of mentally retarded individuals in Kentucky, including some residents of Outwood. Defendant Pulliam is legal committee and guardian for many mentally retarded residents of Kentucky, including some Outwood residents. As guardian and committee for Outwood residents, Defendant Pulliam has a duty to account for all funds received on behalf of those residents and to insure that all funds are spent for the personal needs of the residents on whose behalf they are received.

50. All Defendants are sued individually and in their official capacities. In all activities and at all times relevant hereto, all Defendants acted under color of State law.

CLASS ALLEGATIONS

51. This action is brought on behalf of a class represented by Plaintiffs KARC, Bruington, Smith, Christian, King, Nichols, and Hodges. All Plaintiffs sue on behalf of themselves and all other mentally retarded persons who now or in the future may reside in Outwood and who do not and cannot receive appropriate habilitation, treatment and care at Outwood. This class needs a continuum of comprehensive community-based facilities and services which are not currently available at Outwood or elsewhere in Kentucky.

52. This class includes the numerous children and adults who presently reside or in the future may reside within Outwood and who are without parents, relatives or other familial ties or other natural persons who might assure that their rights are protected.

53. All Plaintiffs sue on behalf of themselves and all other mentally retarded persons within Kentucky who qualify for and are in need of habilitation, treatment and care but who have been denied their constitutionally and statutorily mandated level of habilitation, treatment and care because State Defendants have failed to provide adequate and appropriate facilities and other comprehensive services which meet applicable standards.

54. Plaintiffs and the Plaintiff class seek declaratory and injunctive relief to eliminate certain conditions at Outwood, to prohibit the construction of a new facility at Outwood, to compel the provision of residential and habilitative facilities and other comprehensive services necessary to assure the adequate and appropriate habilitation, treatment and care of Plaintiffs and the Plaintiff class within the community.

55. This is a proper action for class relief pursuant to Rule 23(a) and 23(b) (1) and 23(b) (2) of the Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable. There are substantial questions of law and fact common to the entire class. The claims of the Plaintiffs are typical of the claims of the class. The named Plaintiffs will fairly and adequately protect the interests of the class.

56. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants. The prosecution of separate actions would also create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

57. The Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

58. Questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

STATEMENT OF FACTS

The Outwood Facility

59. Outwood is a residential facility for the care, custody and treatment of mentally retarded individuals. It is located near Dawson Springs, Kentucky, a small town located in Christian County, Kentucky. Outwood presently houses approximately 279 mentally retarded persons. The residents range in levels of retardation from moderate to profound.

60. From 1922 to 1962, the buildings and site of the present Excepticon-Outwood Campus were a Veterans Administration tuberculosis hospital. In 1962, the Kentucky Department of Mental Health began operating the buildings as a residential facility for the mentally retarded. During this period, it was known as the Outwood State Hospital and School. Since its conversion to a center for mentally retarded persons, serious deficiencies in the building and other aspects of the physical plant have existed.

61. The 1974-1976 State budget was written on the assumption that Outwood would be closed; no funds were appropriated for its continued operation. The decision to close Outwood was necessitated by its obsolete physical plant and its geographic isolation, both of which rendered the hospital unsuitable for the proper care and treatment of mentally retarded individuals. Intense political pressure from Dawson Springs officials and from the employees of Outwood, fearful of the adverse economic impact of Outwood's closing, led State officials to maintain the facility under private management.

62. On or about July 2, 1975, DHR, EDFA, and Excepticon signed a service management agreement (hereinafter the "Agreement") which required Excepticon to take charge of care and treatment for mentally retarded persons at the Outwood facility. A copy of this Agreement is attached hereto and incorporated herein, by reference, as Plaintiffs' Exhibit "A". Excepticon has operated the Outwood facility under the authority of this Agreement since August 1, 1975.

63. As part of its contractual obligation, Excepticon agreed to "deliver to the Commonwealth of Kentucky alternate plans for the renovation and/or replacement of the present physical plant at Outwood." In a September 18, 1975 report to C. Leslie Dawson, former Secretary of DHR, John W. Swann, Jr.,

President of Excepticon, reported that renovation of the existing Outwood facility was impracticable, and that Excepticon was prepared to undertake construction of a new facility at Dawson Springs. A copy of this report is attached hereto as Plaintiffs' Exhibit "B" and incorporated herein by reference.

64. Defendant Conn has informed KARC that a new mental retardation facility will be constructed at Dawson Springs. See the letter from Defendant Conn to KARC, dated March 31, 1977. A copy of this letter is attached hereto as Plaintiffs' Exhibit "C" and is incorporated herein by reference.

65. Upon information and belief, Excepticon, in conjunction with DHR, is preparing to construct a new 300-bed facility at Outwood for residential care of the mentally retarded. Excepticon has taken numerous steps in furtherance of this goal, including, but not limited to, the submission to DHR of a competitive bid for award of the construction contract, investigation of potential methods for financing construction, negotiation of the contract with DHR and the application to the Regional Certificate of Need and Licensure Board for a certificate of need.

66. Upon information and belief, Excepticon will sign a contract with the State of Kentucky for the construction of a new facility at Dawson Springs within the next month.

How Residents Are Placed in Outwood

67. Residents arrive at Outwood through numerous channels. Some are committed by Court Orders. Some are committed by their parents during minority. Some are committed by their guardians or committees. In all cases, commitment cannot be considered volitional for the committed individual.

68. Plaintiffs and the Plaintiff class remain at Outwood or are threatened by the probability of confinement at Outwood or another inadequate facility. These circumstances exist because State Defendants have failed to provide adequate and appropriate residential and habilitative facilities and other comprehensive services for the mentally retarded which assure reasonable access to their home communities.

The Environment

69. The location of Outwood is remote and inaccessible by public transportation, which limits the ability of families and friends to maintain

frequent contacts with their relatives and former associates. The hardship is greatest for persons with limited means, but in all cases the sheer isolation of Outwood accelerates the decline of affectionate relationships, stripping from the individual those supports, both emotional and material, which are normally available in the community.

70. Outwood's isolation prohibits the use of community resources as an integrated part of a training program, to meet health needs, to provide employment and recreation, and as aids in the development of those diversified activities which other persons take for granted. Local resources are insufficient to absorb the social and other needs of Outwood's population.

71. The location of Outwood mitigates against and often prohibits effective staffing and programming. Since its inception, the facility has been unable to attract and retain skilled professional staff in numbers sufficient to provide adequate habilitation, care and treatment. Inadequate and underqualified staff exacerbate the physical shortcomings of the antiquated facility.

72. The geographic isolation and inaccessibility of Outwood erects an insurmountable physical barrier between residents and their parents, family and relatives. Most families face several hours of automobile driving in order to go to Outwood. Once there, they are confronted by a lack of suitable visitation facilities at Outwood, which make private, normalized family visitation impossible.

73. These factors combine to mitigate against consistent and necessary parent-child interactions. The result is the discouragement of parental interest and involvement, the stifling of the parent-child relationship, and the direct deprivation of the resident's sense of familial relationships and of shared affection with his family.

74. Because of the geographic isolation and inaccessibility of Outwood, the construction of a new facility at Outwood will serve only to perpetuate the conditions enumerated in paragraphs 59 through 73.

75. The furnishings of wards are devoid of warmth, individuality, or dignity. The living and sleeping areas are sparsely furnished and are without the lamps, sofas, rugs, comfortable chairs, pictures, magazines, toys and other age-appropriate furnishings associated with normal living. Plaintiffs are denied the developmental, sensory and intellectual stimulation, comfort and pleasure community residents obtain from the usual physical accoutrements in homes, schools, restaurants, workplaces, and recreational facilities.

76. The physical setting at Outwood does not allow privacy, individuality, or freedom of association to Plaintiffs. With few exceptions, residents generally sleep in large, unpartitioned rooms. They spend their days in large "day rooms" seated in identical chairs or on the bare floor. Plaintiffs are deprived of their freedom to choose or reject their associates and to determine when and in what way they relate to their friends.

77. With few exceptions, closets or chests for personal possessions are not available. Because of the shortage of staff and the lack of facilities for storage of personal items, the few belongings which Plaintiffs own are usually lost, stolen, or destroyed within a short period of time. These conditions deprive Plaintiffs of their dignity and identity, and also fail to help them develop the self-respect, consideration for others, and understanding of property relationships necessary to functioning in the community.

78. Toilet facilities are inadequate. Bathrooms frequently lack walls, partitions or curtains between toilets or doors on stalls. Many living areas have a definite stench of urine. Plaintiffs are deprived by these conditions of the right taken for granted by other citizens to exercise their bodily functions in privacy and to observe proper hygienic measures.

79. Personal clothing is routinely lost, and residents are frequently required to wear socially inappropriate or improperly fitting clothes and underclothes, and sometimes even to go entirely without necessary items of clothing.

80. In the vast majority of wards, soap, wash cloths, towels, paper towels, toilet paper, tooth brushes, and tooth paste are not readily accessible to residents. Residents do not learn to utilize hygienic supplies and to exercise self-care skills which are necessary for personal health and comfort, as well as for acceptance within the larger community.

Staff

81. Insufficient staffing has resulted, and continues to result, in actual physical harm to certain residents, a risk of harm to all residents, and stagnation or regression in the developmental potential and progress of all residents.

82. Due to insufficient staff in direct patient care, direct care staff, in the past, have made and continue to make excessive and inappropriate use of physical restraints, medication, and seclusion of residents. Residents have been injured while under unmonitored and inappropriate physical restraint. Risk of injury to other residents from the use of physical restraints and the shortage of direct care staff continues to exist at Outwood.

83. Outwood has had and continues to have insufficient housekeeping and maintenance staff as reflected by continued failure to repair damaged parts of the facility and by insufficient supervision of residents who are responsible for cleaning their own areas.

84. The facility at Outwood lacks sufficient qualified nursing staff to manage and control medications in an adequate manner. Insufficient staff are devoted to occupational therapy and physical therapy. The facility does not have a qualified staff psychologist and psychological services are unavailable or extremely limited at Outwood. Staffing is deficient in the areas of speech therapy and audiology. No full-time physician is part of Outwood's staff. Outwood lacks on its staff 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 Outwood's program, recording each resident's progress, and initiating periodic review of each individual plan of care for necessary modifications or adjustment.

Habilitation

85. The foregoing staff deficiencies have contributed to an inadequate program of or complete denial of habilitation, treatment and care for residents, inter alia, as follows:

- (a) Defendants have failed to provide an individualized habilitation plan for each resident of Outwood.
- (b) Defendants have failed to provide an individualized habilitation program for each resident of Outwood.
- (c) Defendants have failed to provide periodic review of the appropriateness and effectiveness of plan or program.
- (d) Adequate written health care plans for each resident have not been developed or implemented by a qualified nurse.
- (e) Psychological assessments of each resident have not been done on a regular basis.
- (f) Monthly reviews of each resident's treatment plan have not been conducted by an interdisciplinary program team to assess progress and suggest changes or modifications in each resident's treatment plan.

- (g) Defendants have failed to provide necessary services, including medical and dental treatment, nursing care, psychological services, personal care and protection, social work services, physical and occupational therapy, recreation and vocational and habilitative training.
- (h) Defendants have failed to provide for each resident an individualized post-institutionalization plan for placement.

86. All residents at Outwood could benefit from living arrangements and treatment and habilitative settings in facilities less restrictive than Outwood. Due to the failure of Defendants to establish a variety of alternative residential, habilitative and treatment facilities and other comprehensive community-based services, the resident population of Outwood is confined to a facility which is incapable of providing the level of habilitation, treatment and care to which it is entitled. These persons' developmental potential and level are being restricted or reduced by the failure of Defendants to conduct regular assessments of resident treatment and program plans, establish a variety of appropriate residential and habilitative settings for current residents, and transfer the residents to more appropriate, less restrictive settings.

CAUSES OF ACTION

COUNT I

87. The Defendants have not fulfilled their constitutional responsibility to provide the named Plaintiffs and the Plaintiff class with a humane living environment in Outwood. Specifically, by failing to provide Plaintiffs with minimally adequate habilitation and treatment designed to give each institutionalized Plaintiff a realistic opportunity to improve his or her condition, the Defendants have denied Plaintiffs and the Plaintiff class their rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

COUNT II

88. The Defendants have failed to provide Plaintiffs and the Plaintiff class with an adequate number of appropriate residential habilitation and treatment facilities wherein Plaintiffs could receive necessary services in the least restrictive environment possible, consistent with their individual treatment needs, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

COUNT III

89. Defendants have failed to provide Plaintiffs and the Plaintiff class with an environment which guarantees Plaintiffs' freedom from actual and threatened physical harm and from physical and psychological deterioration in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

COUNT IV

90. By confining those Plaintiffs and the Plaintiff class residing at Outwood in an environment more restrictive than is necessary for proper habilitation, Defendants have deprived them of the opportunity to speak, communicate, assemble and associate with other citizens of their choice, in violation of the First and Fourteenth Amendments to the United States Constitution.

COUNT V

91. The Defendants have failed to provide Plaintiffs and the Plaintiff class with their basic personal needs and have, therefore, deprived them of their right of privacy under the First, Ninth and Fourteenth Amendments.

COUNT VI

92. In refusing Plaintiffs and the Plaintiff class access in the community to generic services available to others in the community, such as recreation, transportation, employment counseling and placement, adult education, medical and dental care, child welfare services, foster care, homemaking services, day care and respite care, Defendants have denied Plaintiffs the equal protection of the laws secured to them by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

COUNT VII

93. Section 504 of the Rehabilitation Act of 1973, 29 USC §794, provides:

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

In denying retarded persons access to generic services in the community and in conditioning the availability of services to retarded persons upon the surrender of their liberty and their freedom to associate with family and friends, Defendants

have denied Plaintiffs and the Plaintiff class their rights guaranteed by §504.

COUNT VIII

94. The Developmentally Disabled Assistance and Bill of Rights Act, 42 USC §6010 et seq. requires, inter alia:

- (a) the right to treatment, services and habilitation for developmentally disabled individuals;
- (b) treatment and services in a setting least restrictive of an individual's liberty;
- (c) The assurance that institutions which receive public funds provide appropriate and sufficient medical and dental services, refrain from using physical restraints as punishment or as a substitute for treatment or habilitation, use physical restraints only in emergency situations, refrain from excessive use of chemical restraints, and refrain from the use of chemical restraints as punishment or as a substitute for habilitation. 42 USC §6010.

95. Defendants have, as the result of their actions alleged in paragraphs 59 through 86, violated Plaintiffs' and the Plaintiff class' rights secured by the Developmentally Disabled Assistance and Bill of Rights Act.

COUNT IX

96. Title XIX of the Social Security Act (hereafter the Medicaid Act) 42 USC §1396 et seq., was established to furnish, inter alia, "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care." 42 USC §1396(2). In furtherance of this goal, the Medicaid Act and applicable regulations state with particularity various services which must be provided to recipients housed in intermediate care facilities for the mentally retarded. The Medicaid Act and regulations also specify, inter alia:

Admission. . . 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. . . 45 CFR 249.12(a) (1) (A).

97. KRS 205.520 vests Defendant Conn with the sole authority to establish and administer a State program to provide medical assistance in compliance with the Medicaid Act. This grant of authority creates a corresponding duty, owed to recipients and to the Secretary of HEW, to guarantee that vendors of services under the Medicaid Act comply with applicable laws and regulations. Defendant Conn

has breached his duty to Plaintiffs and the Plaintiff class in that he has failed to assure Excepticon's compliance with the Medicaid Act and applicable regulations.

98. Defendant Excepticon, by its acceptance of Title XIX monies, has warranted to Plaintiffs and the Plaintiff class that it will provide services in compliance with applicable statutes and regulations. It has breached its warranty in that it has failed to provide treatment and services mandated by the Medicaid Act and applicable regulations.

COUNT X

99. The Kentucky Mental Retardation Hospitalization Act, KRS 202B.010 et seq. requires the DHR Secretary, Defendant Peter Conn, to adopt rules and regulations for the proper administration and enforcement of the Act. KRS 202B.060. These regulations shall encompass, inter alia:

- (a) the right of mentally retarded residents and their families to be adequately informed as to the individual treatment program of the resident;
- (b) the right of residents and their families to assist in planning of the treatment program of the resident;
- (c) the right of the release of residents to less restrictive alternative modes of treatment on convalescent status; and
- (d) provisions for alternative methods for involuntary hospitalization. KRS 202B.060.

Defendant Conn has recently proposed regulations, which include inter alia, the right to an individualized treatment plan, the right to assist in formulation of the treatment plan, the right to keep personal possessions, and restrictions on the use of seclusion.

100. The Kentucky Mental Retardation Hospitalization Act creates a duty on the part of Defendants herein, to assure that all mentally retarded residents at Outwood receive appropriate treatment, to assure the residents and their families are informed of the treatment program, and to insure the residents and their families have input into planning the treatment program.

101. Defendants have violated the rights of those Plaintiffs and the Plaintiff class who presently reside or did reside at Outwood, in that they have failed to provide Plaintiffs with meaningful programs and services designed to give them a realistic opportunity for maximization of potential within the institution and to learn those skills necessary for return to the community. They have

failed to provide the accoutrements necessary for the provision of meaningful habilitation and treatment. They have failed to inform Plaintiffs or their families of existing treatment plans and they have failed to give Plaintiffs or their families input into the formulation of those plans. The isolated location further mitigates against familial input in that distance precludes regular contact with family.

102. The Kentucky Mental Retardation Hospitalization Act creates a duty on the part of Defendant Conn to assure that less restrictive alternatives to confinement are available to those Plaintiffs who could reasonably benefit therefrom and to provide for less restrictive modes of habilitation and treatment. By failing to provide less restrictive alternatives to confinement and less restrictive modes of treatment, Defendant Conn has violated Plaintiffs' rights secured by the Kentucky Mental Retardation Hospitalization Act.

COUNT XI

103. The Kentucky State and Regional Mental Health Programs Act, KRS 210.005 et seq. provides, inter alia:

The Department for Human Resources shall:

- (1) Maintain, operate and assume program responsibility for all State institutions and facilities for mental retardation,
 - (2) Provide rehabilitation services for mentally retarded persons through educational and training programs;
 - (3) Provide medical and allied services to mentally retarded persons and their families;
 - (4) Encourage and assist communities to develop programs and facilities in the field of mental retardation;
 - (5) Sponsor or carry out research, or both, in the field of mental retardation;
 - (6) Assist other governmental and private agencies in the development of programs and services for mentally retarded persons and their families and for the prevention of mental retardation, and coordinate programs and services so developed.
- KRS 210.045.

104. Current theory and Kentucky State plans for the care and treatment of the mentally retarded posit the basic goal of normalization, a process by which the living conditions, appearance and activity of a retarded individual approximates as nearly as possible those found in the rest of society. The proposed facility at Outwood will retard the process of normalization in that it, by virtue of its size,

and for the reasons stated in paragraphs 59 through 86, is a more restrictive environment for the care and treatment of Plaintiffs and the Plaintiff class.

105. By planning for and taking further steps toward the construction of a new Outwood facility, Defendants have violated their duty to Plaintiffs and the Plaintiff class arising pursuant to the Kentucky State and Regional Mental Health Programs Act.

COUNT XII

106. The conditions, practices, and omissions mentioned in paragraphs 59 through 86 violate the contract rights of the Plaintiffs and other residents of Outwood in that all residents of Outwood are third party beneficiaries of the service management agreement between Excepticon, DHR, and EDFA.

107. The conditions, practices, and omissions mentioned in paragraphs 59 through 86 hereof violate the State and Federal statutory and constitutional rights of the Plaintiffs and other residents of Outwood (more fully articulated in paragraphs 87 through 105 hereof) in that the service management agreement for operation of Outwood explicitly and implicitly incorporates these rights as provisions of the service management agreement between Excepticon, DHR, and EDFA.

108. Defendants DHR and EDFA have violated the constitutional, statutory and contract rights of Plaintiffs and other residents of Outwood by entering into the service management agreement with Excepticon. Specifically, DHR, and EDFA have agreed that Excepticon shall provide adequate care and services for the residents of Outwood. DHR has failed to permit or insure an adequate level of care and services at Outwood (1) by failing to comply with DHR's constitutional, statutory and contractual duties concerning the condition of the physical facility at Outwood; (2) by failing to evaluate adequately Excepticon's performance of its duties under the agreement; and (3) by failing to insure that Excepticon performs its duties under the agreement.

109. Defendant Excepticon, as a result of its management practices, its failure to properly utilize financial resources in the best interests of the resident population, and its failure to deliver adequate and appropriate habilitation, treatment and care and other services to the Plaintiffs and other residents of Outwood has violated Federal and State statutory and constitutional and contractual rights of the Plaintiffs and the Plaintiff class.

COUNT XIII

110. Because of conditions endemic to the location of Outwood (more fully articulated in paragraphs 59 through 86), the proposed construction by Defendants of a new facility at Outwood will serve to perpetuate conditions which will constitute continuing, permanent and substantial violations of the constitutional and Federal and State statutory rights of the Plaintiffs and the Plaintiff class set forth in paragraphs 87 through 109 hereof.

WHEREFORE, Plaintiffs pray this Court:

(A) Issue an Order permitting this action to proceed as a class action;

(B) Declare that the level of habilitation, treatment and care presently afforded Plaintiffs does not meet constitutional or Federal and State statutory standards;

(C) Issue a preliminary and permanent injunction requiring Defendants to provide Plaintiffs with a humane living environment, habilitation, and the other services and treatment necessary to give each Plaintiff a meaningful opportunity to improve his or her condition;

(D) Issue a preliminary and permanent injunction requiring Defendants, within sixty (60) days, to provide a full assessment of the social, personal and adaptive development of each resident of Outwood for which this service has not been provided, through the use of a professionally accepted assessment tool by personnel trained in making such assessment;

(E) Issue a preliminary and permanent injunction requiring Defendants to prepare an individualized habilitation plan for each resident of Outwood who does not have a current plan. This plan shall be prepared by professionals, from the disciplines required by the needs of each person, the retarded person, and the person's guardian or representative. Each plan is to specify the extent to which the individual could benefit from a smaller, less restrictive intermediate care facility, whether the individual could benefit from a non-intermediate care placement and the services which must be available within his or her home community for the habilitation, care and treatment of that person in a less restrictive community setting;

(F) Issue a preliminary and permanent injunction requiring Defendants to record and process the data obtained from implementation of (D) and (E) so as to enable Defendants to report to the Court within one hundred ten (110) days, the services necessary for the care and habilitation of all Outwood residents within their home communities, by geographic area, and the program and staffing patterns required and their costs;

(G) Issue a preliminary and permanent injunction requiring Defendants, within thirty (30) days, to submit to Plaintiffs and to this Court for approval, a plan and schedule for completing the implementation of (D), (E), and (F);

(H) Issue a preliminary and permanent injunction prohibiting further admissions to Outwood;

(I) Declare that the construction of the proposed facility at Outwood will violate Plaintiffs' rights arising under the constitution and State and Federal laws, and issue a preliminary and permanent injunction prohibiting construction of the proposed Outwood facility;

(J) Issue a preliminary and permanent injunction prohibiting Defendants from appropriating or spending any money for future construction, completion or purchase of non-community-based facilities for the mentally retarded and developmentally disabled of Kentucky;

(K) Declare that community-based service programs are the constitutionally required least restrictive alternative for the habilitation, care and treatment of the mentally retarded and developmentally disabled of Kentucky;

(L) Establish a panel of experts to be agreed upon by the parties herein which shall evaluate the data concerning each Plaintiff and each member of the Plaintiff class and make recommendations to the Court for appropriate placement of each such Plaintiff;

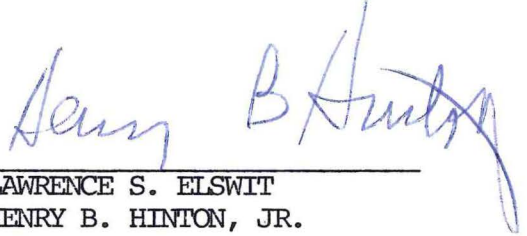
(M) Grant to Plaintiffs such other relief as may be necessary and proper to effectuate their rights to habilitation, care and treatment in the least restrictive setting within their home communities;

(N) Retain continuing jurisdiction over this case;

(O) Grant Plaintiffs' their cost and reasonable attorneys' fees; and

(P) Grant all other appropriate relief.

Respectfully submitted,



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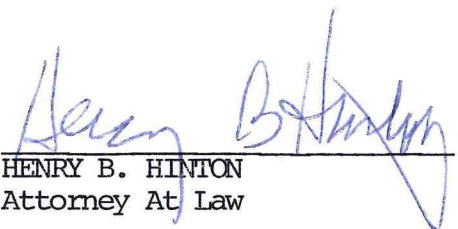
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ATTORNEYS FOR PLAINTIFFS

I hereby certify on the 2nd day of June, 1977, that a copy of the foregoing Amended Complaint was sent to all the Defendants in the aforementioned action.


HENRY B. HINTON
Attorney At Law