MEMORANDUM

TO: Experts, Supporters of Homeward Bound, and Friends

FROM: Frank Laski, Timothy Cook, and Judith Gran, PILCOP; Louis and Patricia Bullock, Bullock & Bullock

DATE: July 25, 1987

RE: Victory in Homeward Bound v. The Hissom Memorial Center

The Honorable James O. Ellison of the U.S. District Court for the Northern District of Oklahoma has issued his long-awaited opinion and order in Homeward Bound v. The Hissom Memorial Center. On July 24, 1987, Judge Ellison delivered the lengthy opinion in open court. A copy is enclosed.

The Court's decision is an unqualified victory for the plaintiff class and for Homeward Bound - ARC, the organization of Hissom Memorial Center parents that brought the action. Judge Ellison found that conditions at Hissom violated fundamental statutory and constitutional rights of the plaintiffs, and ordered defendants to implement as a remedy a comprehensive plan to serve class members in the community..

The Order provides that all 450 current residents of Hissom will be placed in the community over a four-year period, beginning with 75 persons in the first year and 125 a year thereafter. During each year, persons with all levels of need, including those with multiple handicaps .serious medical needs and challenging behavior, will be placed with appropriate services and supports. Admissions to Hissom and capital construction at the institution will cease. Defendants are to identify all class members not presently at Hissom and to develop a plan to serve those individuals. This latter group (estimated at about 1,500 persons) includes former Hissom residents now living in nursing homes and large private institutions, and former residents living at home without services.

Judge Ellison's findings of fact on conditions at Hissom recite a litany familiar to all of us: regression, deterioration, denial of adequate food, clothing and medical care, lack of necessary habilitative programs and therapies, dangerous feeding practices, lack of adequate sanitation, frequent injury and abuse, and the pervasive harm of segregation. His decision parallels the holdings of all other federal courts that have ruled upon the conditions imposed upon retarded persons in large, isolated institutions.

However, the Court's opinion and order are remarkable in several respects. The Court's Order, a Court Plan and Order of Deinstitutionalization is an extraordinary document not so much for the scope of the remedies it contemplates but for its incorporation of practical, workable approaches to providing effective services to retarded persons in the community. The Plan was drafted by the Court in intensive discussion with experts named by each of the three parties in the case: Lynn Rucker for plaintiffs, defendant Jean Cooper for Oklahoma Department of Human Services defendants, David Feldman for the Hissom parent intervenors, and a mutually agreed-upon financial expert, Jack Noble. The experts met with the Court for two full weeks of discussion and drafting.

The result is an order based solidly in the values, knowledge and technology of the 1980's in providing effective services to persons with retardation. The plan includes:

* Family care, specialized foster care, and supervised homes and apartments as the preferred residential service models, with the traditional small group home considered a "backup" for class members for whom a better option cannot be developed;

* Individual program planning defined as the development of services to an individual in his home rather than placement into a "facility," "slot," or "bed," with class members living wherever possible in homes they purchase or rent themselves;

* Employment services as the preferred day program model, including vocational program models of proven effectiveness in serving persons with severe handicaps;

* Independent case management and case manager; client ratios of 1:10;

* A comprehensive system of monitoring and safeguards involving families, consumers, self-advocacy organizations and ordinary citizens.

No class member will be placed in a home with more than six residents. The great majority of class members will live in homes with three or fewer retarded residents.

Another feature of the Court's order is the provision for an "escalating monitor." Initially, a Court Representative will be appointed to assist the Court in reviewing reports on defendants' implementation. In the event that this proves insufficient to assure compliance with the Court's order, more detailed monitoring will be required including review of specific inter-disciplinary team assessments against placements to assure that class members' needs are being met. Should that level of monitoring in turn prove insufficient, the Court would in effect place defendants' programs for class members in receivership. The Order itself will become effective until September, 1987, thus giving defendants an opportunity to comply voluntarily.

The Court's legal conclusions set a new course for deinstitutionalization litigation in the coming years. Like Judge Broderick in his 1977 decision in Halderman v. Pennhurst, Judge Ellison decided several statutory and constitutional counts in favor of the plaintiffs. Significant, however, is the Homeward Bound Court's reliance on Title XIX of the Social Security Act, a statute hitherto little-used in deinstitutionalization cases. Among many other Title XIX violations, the Court found that defendants had violated their duty to provide active treatment to class members and to engage in exit planning for class members whose needs could be met outside the institution.

The Court also found violations of Section 504 of the Rehabilitation Act in defendants' failure to provide services to class members except in segregated settings, and their discriminatory denial of habilitative services to class members with severe handicaps. On the plaintiffs' constitutional claims, the Court found pervasive denial to class members of the rights recognized by the Supreme Court in Youngberg v. Romeo.

The Court made factual findings that the State of Oklahoma had intentionally segregated retarded people in institutions "for the welfare of the community," because of prejudice and stereotype, and that the state had actively encouraged communities to send their retarded citizens to state institutions. Based on those findings and on the U.S. Supreme Court's 1985 decision in City of Cleburne Living Center, the Court held that defendants had violated plaintiffs' rights under the Equal Protection Clause by "establishing, encouraging, subsidizing, and sanctioning programs and practices that have excluded, separated and segregated retarded persons from the rest of society without any rational basis." Findings of Fact and Conclusions of Law at 47.

Finally, although the Order mandates individual assessment prior to each placement in the community, the Court nevertheless concluded that all Hissom residents must be placed in the community. This conclusion was based squarely on the evidence presented at trial rather than abstract concepts of the "least restrictive alternative." During six weeks of trial, defendants were unable to show that any class member benefitted from being at Hissom rather than in the community. The Court noted the holding of the Court of Appeals for the Third Circuit in Halderman v. Pennhurst, in 1979, that resort to institutionalization might be permissible for some persons. Nevertheless, the Homeward Bound court concluded that the evidence before it in this case could not support or justify resort to the institution for any member of the class. "This trial Court, sitting in Oklahoma in 1987, upon consideration of the overwhelming evidence . . . must conclude that constitutional federal and statutory requirements now dictate removal of the institution as a choice of living environment for such individuals."

To all of you whose testimony in Judge Ellison's court, and whose help, hard work and support contributed to that "overwhelming evidence," thank you.

JAG/FJL:ecr

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

HOMEWARD BOUND, INC., et al.,

Plaintiffs,

vs.

HISSOM MEMORIAL CENTER, et al.,

Defendants.

No. 85-C-437-E

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, upon conclusion of all of the evidence in the case, and in consideration of the testimony of the witnesses called, documentary evidence submitted, the briefs and arguments of counsel, does enter these findings of fact and conclusions of law.

FINDINGS OF FACT

I. Plaintiffs:

The Court will first address its factual findings in- regard to the Plaintiffs and then will address the balance of the certified class.-

Most of the referrals to Hissom have been brought about by factors of family adjustment and lack of community services. Historically when parents have requested assistance from the Department of Human Services they discovered that services for

the mentally retarded were only at Hissom.

A. **Bridget Becker.** Plaintiff Bridget Becker is a fourteen year old girl who is multiply handicapped. She is retarded, legally blind, deaf and suffers from cerebral palsy and epilepsy. Bridget now resides in building no. 15 at Hissom. Before she came to Hissom, Bridget lived at home where she enjoyed all family activities, attended public school and used recreational opportunities in the community. The time came when her parents were not able to care for her at home and sought a community living arrangement but were advised that the only alternative was Hissom, a segregated facility.

Bridget shares building no. 15 with thirty-one other retarded girls. Most of her time is spent in idleness sitting with other residents in a large day room. She does not receive appropriate habilitative services such as training in self care skills. She has little interaction with people who are not handicapped. The environment of building no. 15 is an institutionalized one.

Bridget has behavior problems resulting in self abusive actions such as banging her head against the walls.

She has physical disabilities which limit movements of her legs and her right arm. She has not received adequate physical therapy, occupational therapy and

adaptive equipment; the failure to provide these supported services has resulted in unnecessary restraints on her movement and liberty. She has not been provided appropriate speech or communication services although she has been diagnosed as deaf.

Bridget has experienced severe regression since her admission to Hissom. She is no longer expressive and rarely smiles. Her foot has become more malformed since she has been at Hissom.

B. John Douglas Berry. Plaintiff John Douglas Berry is **sixteen** years old. Doug lives in building no. 18 at Hissom. He has moderate to severe retardation, visual, skeletal and motor impairments, and is non-verbal.

He lived at home until he was thirteen at which **time** his behavior problems became too difficult for his parents to manage. The parents looked for appropriate programs in Oklahoma and found none. They agreed to placement at Hissom which they considered their only option. Doug was originally placed in building no. 13 which he shared with severely retarded lower functioning children because his level of retardation was improperly assessed. When the mistake was discovered he was moved to another building but was moved back to building no. 13 for administrative reasons. In this environment he was repeatedly injured suffering deep bites, contusions and bruises. Doug has become aggressive to other children; he ha3 learned to fight but is still receiving

injuries from the larger stronger boys.

He has regressed in communication skills. When he entered Hissom he was able to communicate by signing. The staff assigned to Doug's building are unable to read signs and as a result he has been discouraged from communicating. At the time of his admission to Hissom there was an individualized active treatment plan agreed to between the staff and Doug's parents; this plan has not been followed in any consistent manner.

C. Michael Brasier: Plaintiff Michael Brasier is eighteen years old. Michael lives in building no. 12. Michael has little residual hearing and can see only peripherally.

Because his parents were unable to receive any home support services the Brasiers requested the Defendant to provide community living arrangement and services for Michael. The only option available was Hissom.

Michael has developed severe behavior problems at Hissom. These include fits of screaming, fighting and insomnia. There has been no programming provided to correct these behavior problems.

Michael has suffered abuse and injury. These include bruises, bites on his arms, hands and back. He has been put under restraints on several occasions without his parents knowledge causing bruises on his arm.

Most of his time is spent in idleness. He had

substantial sign language skills before being admitted to Hissom but these skills have now been lost. He is receiving no real active treatment.

D. Deminkyn Martin. Plaintiff Deminkyn Martin lives in building no. 13 at Hissom; he is fourteen years old, severely retarded, has a speech impairment, behavior problems and engages in self abuse. He was first placed in the home of Mary Ann Becker as a foster child.

When he was six years old he began displaying increased behavior problems. The State then placed Derainkyn in the segregated facility at Hissom where he has been for eight years.

He is congregated with fifteen other retarded boys in a noisy day room with little or no planned activities.

He has demonstrated his behavior problems by frequent tantrums and self abuse, which includes banging his head and fists. He has received injuries by crashing his head through a glass window. He has not received a structured habilitative program plan to assist his behavior problems.

E. Julie Paulson: Plaintiff Julie Paulson is a retarded child who resides at Hissom. Julie's parents cared for her at home until she was seven at which time she was placed in a private residential school when the state refused to provide respite care. Her parents found that they could no longer afford the private residential

school and the only option given them was the segregated one at Hissom.

She needs year-round therapy in an integrated environment; however she receives little active programming during the summer months.

Julie has experienced regression at Hissom both in her personal hygiene and in her speech. She has not been provided with the speech therapy she needs. F. Susan Thompson: Plaintiff Susan Thompson is an eighteen year old who lived at Hissom for two years from February, 1984 to February, 1986. She has a chromosome disorder and neurological damage. She is non-verbal and unable to walk and is labeled severely and profoundly retarded. When she was five and one-half years old before entering Hissom she used sign language and a Blissymbol board to communicate. She was capable of undressing herself and partly dressing herself. She could eat with a spoon, brush her teeth and was partly toilet trained.

When Susan lived at home she joined her mother in all sorts of activities in the community. She was friendly, outgoing, well-mannered and happy. She had a wheelchair and loved wheelchair dancing. She engaged in many activities that any normal child would engage in.

Her mother, Barbara Thompson, is a church secretary in Broken Arrow, Oklahoma and a single parent. Because of her own advancing age, ill health and concern about

her capacity to care for Susan she admitted her to Hissom. Ms. Thompson visited her daughter regularly-after she was admitted to Hissom and took her home every week-end and every holiday. A good portion of Susan's time at Hissom was spent sitting idle in the day room. She was denied opportunity to practice the skills she had when she entered the institution and as a result Susan regressed. During the time she was at Hissom Susan lost the ability to communicate with signs and the symbol board. She lost social skills, became withdrawn and slumped in her wheelchair and began to engage in self-stimulatory activity such as scratching her back until it became infected. Because of lack of physical therapy her body became stiff and unresponsive and she developed circulatory problems from being idle in a wheelchair so often.

Susan's mother placed her at Hissom only because no home and community based services were available and in July, 1985 when the Region II case management outpost opened she discussed with Defendants the services she would need to bring Susan home. Eventually Susan was assigned an in-home habilitation aide and Mrs. Thompson was able to bring her home in February, 1986.

The aides assigned by the State to Susan had little understanding of habilitation and little practical knowledge of how to care for a person with Susan's physical handicaps. Mrs. Thompson has asked the

Defendants to provide a group home for Susie without result.

II. Plaintiff Homeward Bound:

Plaintiff Homeward Bound, Inc. is a non-profit corporation incorporated under the laws of the State of Oklahoma. Its members include parents, relatives, guardians and friends of people residing at Hissom and of people in jeopardy of being segregated there by the State. The members of Homeward Bound have been attempting to obtain affective community based services for their children since 1977. By its actions Homeward Bound has sought to require Defendants to provide integrated services in the community for the retarded citizens of Oklahoma.

III. Plaintiff Class:

The Plaintiff Class consists of "All persons who at the time of the filing of the complaint in this action were at Hissom and all persons who became clients of Hissom during the pendancy of this action; retarded persons residing at home who have been clients of Hissom within the past five (5) years and who may be returned to Hissom; and persons who have been transferred to skilled nursing facilities or intermediate care facilities, yet remain Defendant's responsibility." Approximately 450 members of the Plaintiff Class currently reside at Hissom.

IV. Other Individual Class Members:

A. **Phillip Neighbors:** Phillip Neighbors is a severely-retarded nineteen year old male. He has lived at Hissom since he was twelve years old.

An employee used inordinate and excessive force in moving Phillip to the bathroom which resulted in a deep three inch cut in his scrotum.

Phillip Neighbors had developed skills before entering Hissom. He was pretty well poddy trained, could feed himself with a spoon, enjoyed people and swimming. He possessed some knowledge of sign language.

Phillip has been at Hissom seven years during which time he has regressed to where he has lost his toilet training. He is frightened of the bathroom and of taking a bath. He is afraid of going to bed at night. No group homes have been made available to Phillip nor have any options for foster care been made available. B. **Scott Maxey:** Scott Maxey is a thirteen year old boy who lived at Hissom between January, 1980 and May, 1985. He has severe microcephaly and a multiple seizure disorder.

Scott lived in building no. 21-B while at Hissom, where his development regressed. He lost his progress toward toilet training and was placed in diapers. His \ mother testified that staff at Hissom refused to follow

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B. Scott Maxey: Scott Maxey is a thirteen year old boy who lived at Hissom between January, 1980 and May, 1985. He has severe microcephaly and a multiple seizure disorder.

Scott lived in building no. 21-3 while at Hissom. where his development regressed. He lost his progress toward toilet training and was placed in diapers. His mother testified that staff at Hissom refused to follow

the medical orders of his neurosurgeon which endangered his life. During visitation she found him "tied to a wheelchair, slumped over, his feet ... turning blue."

There has been little programming for Scott at Hissom. His IQ dropped from 50 to 14 from the time he entered Hissom until he left.

C. **Donald Cole:** Donald Cole is a twenty year old male who is profoundly retarded, blind, quadriplegic and who has cerebral palsy. At Hissom he lives on Unit 2 North, an area where the "multi-handicapped" are segregated. He shares space with approximately forty others which is in a large rectangular shaped room with steel heavy metal cribs on either side and a "program area" in the middle. It is a bare, sterile environment.

The residents of 2 North lie on the mats or in their beds or are strapped into wheelchairs. Donald and others in the multi-handicapped units are given the least amount of active programming at Hissom. Donald has suffered severe physical regression because of lack of proper positioning. His orthopedic reports indicate that at the age of 11. Donald was ambulatory with the assistance of braces; by 1983 when he was 16 he had lost completely the ability to ambulate. By 1978 he had begun to develop scoliosis; because his spine is curved to one side his pelvis is not level. He received surgery which helped level his pelvis but because staff did not position him properly that deformity is bound to

recur.

V. Defendant Department of Human Services

Defendant Department of Human Services has responsibility for the care and treatment of retarded persons as well as the administration and operation of Hissom and other state facilities. It is responsible for the care, support and training of persons with retardation and for contracting with private agencies to provide residential and other services to retarded persons in the community.

This Defendant has the statutory duty to insure that all residents at Hissom are given humane care and treatment; that they receive no severe physical or emotional punishment; and that the rules and discipline at Hissom are designed to promote their well being. The Department is further charged by statute with insuring that the testing, diagnosis, care and treatment of residents is in accordance with the high standards accepted in private and public practice. The Department is responsible for seeing that adequate records are kept for each retarded child at Hissom and that the child's abilities and potential are assessed annually, and that children discharged from Hissom are placed in appropriate facilities.

The Defendant has the authority to enter into agreements with a county or a non-profit public or private agency for the operation of a Community Mental Retardation Complex where services for retarded persons may be provided.

The Department is responsible for enforcement of the provisions of Title XIX of the Social Security Act in Oklahoma. This Act requires independent review of the needs of persons placed in intermediate care facilities for the mentally retarded to insure that inappropriate placements are not made and further to identify such persons who may be inappropriately placed in such facilities. The Act also requires that an intermediate care facility be operated in conformity with a set of standards to be eligible for federal financial participation or reimbursement.

The Department does not exist only to operate institutions. It exists also to establish community based programs. Dr. Jean Cooper, the head of the Department's Division of Developmental Disabilities, has stated:

> "The most fundamental value guiding program development for services to the mentally retarded is that all mentally retarded . citizens deserve safe, healthy, positive, caring, learning centered programs and services and that these programs and services should be available in the least restrictive, most normalized and appropriate environment to meet each individual's identified needs."

Robert Fulton is Director of the Department of Human Services and as such is responsible for insuring that Hissom and other facilities for the retarded are operated in compliance with the policies and procedures of the Department. He is responsible for evaluating the professional and administrative activities at Hissom, reviewing them, for preparing and submitting to the legislature budget requests to enable Hissom to carry out its functions. He is responsible for approving the admissions for retarded persons to institutions within the Department. He is

responsible for designing appropriate facilities for retarded people and for transferring residents of an institution when that person's welfare can more effectively be provided at another facility. The Director is also responsible for long-range planning concerning the care and treatment of retarded persons. He is also responsible for the provision of vocational rehabilitative services to handicapped Oklahomans.

Defendant Jean Cooper is the Assistant Director for Developmental Disability Services of the Oklahoma Department of Human Services. As such she has responsibility for planning, program development and evaluation of mental retardation services within the Department of Human Services.

Defendant James West is the Assistant Director for Rehabilitative Services of the Oklahoma Department of Human Services and as such has responsibility for insuring that severely handicapped Oklahomans, which include the residents of Hissom, receive vocational rehabilitation services to prepare such individuals for gainful employment to the extent of their capabilities.

Defendant Julia Teska is the Superintendent of Hissom Memorial Center. She has responsibility for the operation and administration of all phases of Hissom Memorial Center. She has responsibility for the custody, care, control of all persons admitted to Hissom. The Superintendent is responsible for ensuring the humane management of Hissom; for enforcing its governing rules and regulations; for insuring adequate staff training; and for reporting abuse of residents to the local

authorities. She is also responsible for admission of individuals to Hissom with the approval of the Director of the Department of Human Services; for discharge of residents; and for recommendations concerning a resident's transfer to another facility. She also has responsibility for notifying relatives of persons who have escaped from the institution.

VI. Intervenors' Sons and Daughters at Hissom

A. **Jacqueline Kay Braden:** Jacqueline (Jackie) Braden is an eleven year old profoundly retarded child who resides in the Special Care Unit at Hissom. Intervenors Bill and Betty Braden are her parents. The Bradens are from Woodlawn, Texas.

During her first year of life because of aspiration pneumonia Jackie had a gastrostomy tube inserted in her stomach. The evidence shows that Jackie can eat solid foods well and is able to take liquids by mouth. In spite of this staff at Hissom have continued the use of the gastrostomy tube.

Jackie is able to walk with assistance. She uses a walker for ambulation during physical therapy but she is not allowed to use the walker in her living unit and staff had failed to assist her walking.

The evidence reflects that on one occasion Jackie's gastrostomy tube had not been secured to her clothing properly and that it had slipped and about one foot of

it worked its way into Jackie's abdomen.

B. Martha Ann Eibeck: Martha Ann Eibeck is the daughter of intervenors John and Loretta Eibeck of Tulsa. Martha is sixteen years old and profoundly retarded. She lives in Unit 1 North, one of the areas at Hissom set aside for "multi-handicapped" people. She is non-verbal and non-ambulatory. She has severe spasticity and scoliosis and has been denied physical therapy because of insufficient staff. As a result of lack of physical therapy her right hip has become dislocated. When she lived at home her parents fed her normally. After she entered Hissom, however, a nasogastric tube was inserted so that she could be fed more quickly for staff convenience. This tube frequently becomes dislodged which results in Martha having nasal trauma and vomiting.

C. Kimberly Randall: Kimberly is the only child of intervenors Terry and Phyllis Randall. She is twenty years old, profoundly retarded, non-verbal and non-ambulatory.

The evidence shows that although Kimberly's parents do live in Tulsa they seldom visit or inquire about ....

D. Charles Orton: Charles Orton is twenty-six years old, profoundly retarded and has severe cerebral palsy. He is the son of intervenors Carl and Mary Orton. Charles was admitted to Hissom when he was four years old and now lives in Building II North.

Charles used to eat orally with a nasogastric tube used only for occasional fluid intake. At this time Charles is fed through a gastrostomy tube.

A consulting gastroenterologist reported in 1983 that Charles appeared "malnourished" and that he showed evidence of dental cavities and poor oral hygiene.

E. **Amy Rhoden:** Amy is nineteen years old and is moderately retarded. Intervenors Jane and Harvis Rhoden are her adoptive parents. She was admitted to Hissom at the age of 12 "until the community special education program becomes better established when Amy could return to the community."

F. **David Maule:** David is sixteen years old, profoundly retarded, non-ambulatory and was admitted to Hissom when he was six years old. David currently lives in Building II North. David's parents are intervenors Donald and Mary Maule. The evidence shows that Mr. and Mrs. Maule seldom visit David and their involvement with him is minimal.

G. **Alan Ray Best:** Alan is twenty-five years old, profoundly retarded, non-ambulatory, non-verbal and has arrested hydrocephaly. He was admitted to Hissom when he was five years old and now lives in Unit I South.

In 1966 he was enrolled in a physical therapy program. His therapist was hopeful that ambulation would be obtained and he benefited from physical therapy. He learned to assume a side sitting position

and made gains in motor development. However his program was discontinued in January, 1968 when it was felt he had reached his maximum motor development.

Alan began to deteriorate physically after physical therapy was discontinued. A 1973 report shows that his musculoskeletal deformities have increased with development of his scoliosis and that he did not sit as well in his wheelchair as previously. All the gains that Alan had made from physical therapy had been lost by 1975. Later reports chart regression in physical status and motor ability. During these later years Alan was not recommended to physical therapy "due to further regression and. poor prognosis".

Hissom staff by 1984 again acknowledged that he needed physical therapy, but no therapy was provided due to lack of physical therapy staff.

Alan has also regressed in areas of social and cognitive skills. His records reflect that Alan experienced a decline in physical and mental functions since his admission to the institution. The evidence shows that Alan's parents are aware of the deterioration that he has experienced. They oppose community placement for Alan and want him to remain at Hissom. H. **James Ray Janzen:** James Janzen is a forty-three year old man who has been labeled profoundly retarded. James

lives in Building No. 18 at Hissom. His parents are the

intervenors Mr. and Mrs. Rudie Janzen who live in

Bartlesville, Oklahoma and visit James about once a month. James was admitted as a child to Defendants' Enid institution and was transferred to Hissom in 1964. In 1968 he was transferred from Hissom to a nursing home and was readmitted to Hissom in 1971.

When he was a child James could talk and make short sentences. However by 1966 he no longer spoke. James reached the age of 21 and Defendants recommended to his parents that he be transferred to a nursing home because of the severity of his retardation. The parents were told that schooling was of little value to him and that he could not profit from speech therapy. James was placed at the Hayes Nursing Home in Nowata, Oklahoma. James lost all the skills he had except that of self-feeding. At the nursing home he was sedated with Thorazine, Librium and Valium. At Hayes he withdrew to the point of refusing to wear clothes or sit in a chair or bed preferring to assume a squatting position most of the time. He has never regained the ability to talk.

I. **Charles Baldridge:** Charles (Chuckie) Baldridge is 18 years old, moderately retarded, and lives in Building No. 20. Chuckie has appeared on the television show "Dallas" where he played a child with Down Syndrome. He has become something of a celebrity at Hissom.

J. **Larry Anderson:** Larry Anderson is 26 years old and has lived at Hissom since he was He is the son of

intervenor Diana Lambert. His IQ has dropped from 35 to 21 since he has been at Hissom. From the evidence it is clear that Mrs. Lambert feels that Larry has lived so long at Hissom that he would have a difficult time adjusting to any other location.

VII. The Segregation of Retarded People in Oklahoma

The unhappy history of the official treatment of retarded people by governmental entities has been one of segregation and discrimination.

The Oklahoma statute authorizing the institutionalization of retarded people for the "welfare of the community" is part of that history. The evidence shows that historically prejudice was one of the reasons institutions for retarded were crested. Sadly, the evidence reflects that our retarded citizens have been put in institutions to be put away from society.

Oklahoma, together with ether states built retardation institutions with public funds in faraway places, hired staff, and then pressured people to put their retarded children there for the welfare cf the community. Testimony in this case has shown that Hissom was built for a different time, for different needs. for different priorities, and for different perceptions.

H. Community Prejudice Against Retarded People Continues Today.

Testimony revealed that one of the reasons for the lack of understanding of the needs of retarded people and the lack of services for them in the community is that the state historically has actively encouraged communities to send their retarded citizens to state institutions. One problem in generating community support is the fact that the people in the communities have been brought up in a non-handicapped society because handicapped people were put away.

VIII. Segregation at Hissom Has Harmed Members of the Class

A. Unnecessary Use of Restraints. Hissom, because of its institutional nature, has established schedules for clients for all activities in a regimented fashion.

Residents are awakened at a specific hour, bathed at a specific time when the staff says they can bathe, eat according to the needs of the institution with no choice in foods. People are provided with few choices in the work that they do. Often they are put to work without pay, doing tasks that should be performed by staff. The residents are not allowed to attend many recreational opportunities in the community. Community activities simply do not exist for most of the people at Hissom. Although current

practices are an improvement over past practices, Hissom staff continues to subject people to unnecessary restraint. Such practices as strapping people into wheelchairs just to restrain them are still utilized. Many residents who know how to walk or who could be taught to walk are tied to keep them in a wheelchair in order to make them easier to take care of.

Many residents who are ambulatory are strapped or tied into wheelchairs. Residents are also given unnecessary chemical restraints.

B. Essential Physical Therapy and Occupational Therapy Is Denied to Members of the Class at Hissom.

Expert testimony in this case has unquestionably established that for developmentally disabled persons abnormal movement patterns and abnormal posture patterns create risks to health including osteoporosis, decline in respiratory capacity, pneumonia, kidney stones, urinary tract infections, and other medical problems. Failure of adequate physical therapy results in immobility which also causes sensory deprivation.¦ When a severely physically handicapped person is left to lie alone for long periods of time he becomes desensitized to stimulation and therefore cannot initiate interaction with another. As a result, his cognitive ability decreases.

Deformity and its resultant health risk can occur throughout life, although young children are more susceptible to deformity.

Unit 1 is the multi-handicapped unit. Residents of this unit are those who most need physical therapy. These people have fewest options for movement and who will progress most rapidly in their deformities if left unattended. At the time testimony was presented in this case all 162 residents of the multi-handicapped unit needed physical therapy, but only 61 were receiving it.

Many residents are denied the equipment they need to be able- to walk. Using a walker is a supervised hands-on activity and with the current staff ratio it apparently is not feasible to take the time to ambulate the clients.

The Court is aware that the State has during the pendancy of this action brought into Hissom Theraupedic Concepts, Inc. and its expertise has been addressed to client habilitation at Hissom. However, an effective physical therapy program has not yet been initiated nor have clients received well focused habilitations plans implemented by properly trained staff. Unfortunately the latest report received by the Court conducted in June of 1987 by Theraupedic Concepts, Inc. reflects that many residents spend the majority of their time engaged in non-purposeful or counterproductive behavior.

C. Members of the Class at Hissom are Subjected to Improper Positioning.

Expert testimony in this case shows that the lack of proper positioning at Hissom constitutes an emergency. Residents of the multi-handicapped units and the Special Care Unit are not being positioned to prevent contractures from happening or from worsening. The evidence shows that once contractures are developed they become irreversible. Testimony has shown that many of the deformities in Hissom residents could have been totally prevented with proper care.

In addition to improper positioning in wheelchairs residents of Hissom were also positioned improperly in bed.

All residents using wheelchairs should have shoes and a footrest. If they do not they develop toe and ankle deformities and other deformities throughout the body. Experts have testified that only a small minority of the residents surveyed were supplied with shoes and the use of footrests was inconsistent. There was abundant evidence of improper positioning for feeding which runs risks for aspiration and loss of life. The evidence demonstrates that Hissom staff needs basic training in anti-spasticity positioning and relaxation techniques, for proper wheelchair positioning, and for moving people into feeding or bathing positions. These

positioning needs cannot be met without the Defendant providing adequate habilitative programming for the residents. . . . . .

D. Members of the Class at Hissom Have Been Subjected to Inadequate Medical Care.

Hissom residents have been subjected to outbreaks of shigella, salmonella, influenza, hepatitus, lice, rashes and gonorrhea.

The medical recordkeeping has been grossly inadequate. It is difficult to determine from medical records why any particular medical intervention has been undertaken. The residents have gastrostomy and nasogastric tubes for no apparent reasons; these have been used on residents who could swallow without difficulty. The records are not problem oriented - but source oriented, thus requiring a reading of the entire chart before one can make intelligent assumptions as to the management and care of a resident. Good documentation is an essential part of a quality system of health care delivery. Hissom often relies on outside medical consultants who have a particularly difficult time in trying to locate information in the records.

One of the Court's medical experts testified that the medical records cannot be relied upon to accurately report the patient's medical regiment. The medical records system at Hissom is totally unacceptable.

Partly as a result of the state of medical

recordkeeping people have been fed through tubes unnecessarily for long periods of time. One resident placed on oral feedings only as a result of the Court expert ordering it had previously been fed through a nasogastric tube for two years for no documented reason. The expert testified that he:

> "had some difficulty in ascertaining in each case the reasons that that tube was put down in the first place . . . those tubes had been in there for a much too long a period of time ... It was not well documented in the charts at the time the tubes were placed. Some of them, in fact, it was difficult to find out how long they had had a nasogastric tube."

The process for review of deaths at Hissom is deficient in that it permits those who participated in the treatment of the decedent to pass judgment upon their own actions without the involvement of an independent review.

From all of the evidence presented it is apparent that there is no standard health care program of treatment and prevention at Hissom.

E. Members of the Glass at Hissom Have Not Been Provided Adequate Clothing.

Personal clothing is often lost and persons at the institution are frequently required to wear improperly fitting, unseasonable and dirty clothing. Residents are denied the right to choose from a decent selection of appropriate clean, fitting seasonable personal clothing and to present an appearance similar to other

citizens.

F. Members of the Class at Hissom Have Been Subjected to Numerous Harmful and Unsanitary Environmental Conditions.

Mr. Sam Hoover, Plaintiff's sanitation expert with 35 years of experience as a professional sanitarian, most of which was as a commissioned officer with the U. S. Public Health Service, testified as to environmental and sanitation conditions at Hissom.

Numerous polyurethane mattresses were discovered at Hissom. Poisonous hydrogen cyanide is produced when that substance catches fire. Mr. Hoover testified that polyurethane has been almost totally discredited from institutional use because of multiple deaths in nursing homes, penal institutions and others. Defendant has taken steps to replace these mattresses during the pendancy of this action.

As a result of Mr. Hoover's inspection many materials that were to be kept sterile were found to be stored improperly subjecting them to the possibility of contamination. An example is tracheotomy tubes. Numerous deficiencies were discovered in the kitchen area which could give rise to contamination of food with resultant disease.

.. Procedures at the laundry created potential for crossover contamination. Air handling systems for several of the living

units were found to be compromised because screening vents were located with a tremendous amount of dust, lint and soil. These conditions were found in rooms that housed residents who were using respirators and who had tracheotomies. This condition created an imminent hazard for these residents.

Many of the sanitation problems discovered by Mr. Hoover are more difficult to avoid in an institutional setting than in a family setting.

G. Members of the Class at Hissom are Frequently Injured.

Evidence presented during the course of the trial indicates that accidents and abuse are prevalent at Hissom. Former Hissom Ombudsman Donovan testified to serious injuries that were never reported.

According to him no one can spend any significant amount of time at Hissom without suffering risk of serious injury.

H. Members of the Class at Hissom Frequently Have Been Subjected to Abuse,

The evidence reflects a great deal of fighting, sometimes between staff and clients, at other times among clients. A great deal of the violence at the institution is caused by people confined there being forced to reside in close proximity to people not of their own choosing. Violence between residents is common at Hissom.

I. Members of the Class at Hissom Have Been Deprived of Privacy.

The DHS' 1983 plan of correction stated that hosing down had been eliminated and that bathing residents en masse had been replaced by bathing clients individually. It further represented they are not disrobed before being taken to bathe. However, Mrs. Becker testified that these practices still occur in the multi-handicapped units. There is additional testimony from Plaintiffs indicating that the girls are still lined up naked to use the showers which has resulted in embarassment to the children.

J. Members of the Class at Hissom Have Mot Been Provided Adequate Programming.

1. Staff Are Poorly Trained and Inadequate in Number

The evidence shows that Hissom requires substantial numbers of additional professional staff to begin to provide the programming and therapies required by the residents. Although Hissom staff have been assigned to individual living buildings pursuant to a unit system developed in 1985, they frequently "float" to different units with residents they do not know.

Qualified professionals are forced to give priority to the needs of the institution over the

needs of the people. Psychologists spend most of their time doing paper-work projects. One psychologist testified that she preferred to work directly with the people rather than do paperwork, but resigned from Hissom because its paperwork requirement did not permit her to meet minimal standards for the provision of services according to the ethics of her profession.

2. The evidence shows that assessments often have failed to identify major needs of the client. Past assessment procedures have not tailor made a program for an individual client but have often simply addressed problems for multiple clients.

3. Persons who are segregated at Hissom are deprived of equipment and services necessary to enable them to communicate. Often the staff at Hissom ignore audiology, opthamology and speech evaluations. In order to progress, residents must improve their skills. They can improve their skills only if direct care staff assists them in communicating through signs or Blissymbol boards or other means of communication.

4. Active programming for the people segregated at Hissom is meager or nonexistent. All parties agree

that the residents at Hissom would benefit from appropriate training and active treatment. However, for many of the residents, active daily programming is at most three to three and one-half hours and far less for many others. People with severe handicaps are left alone; there is just nothing for them to do. The evidence shows that residents engage in meaningless, repetitive, self-stimulatory activity to fill their time. The testimony clearly shows that the development of programs for most Hissom residents who need them is still in the data-gathering stage.

There was evidence that numerous residents were taken on bus rides to nowhere.

The Court's expert, Stephen J. Adelson, M.D., described the program called "multi-skill development" as merely "standing around, or in modern-day adolescent terras, hanging out. Nothing useful seems to occur during that time as far as I could see ...The term multi-skill development is given to a very large proportion of the class time when absolutely nothing occurs."

It is clear that idleness leads inevitably to physical and mental deterioration. When handicapped people do not learn to do things, their bodies do not work well, and they are deprived not only physically but they are deprived in a sensory

way and they suffer relationship deprivation, social deprivation and intellectual deprivation.

Plaintiff's expert Lynn Rucker testified that . "What you're basically attending to here is input/output feeding and toileting. ... The focus is on the body as a functional object, that is, you feed it and you clean up after it. And otherwise nothing is happening."

When needed programming is not received people at Hissom not only stop developing but may also regress, and evidence shows that that process is not automatically reversible.

The evidence shows that educational and training programs at Hissom do not honor the learning characteristics of the severely handicapped. Experts testifying at the trial established that educational programs for severely handicapped persons should teach functional skills; they should teach handicapped people to do things for themselves. ..... At Hissom there is little learned in the way of functional skills. There is very little adaptive equipment and programs are segmented and uncoordinated.

K. Members of the Class at Hissom have Not Received Meaningful Vocational Rehabilitation Services.

Evidence shows that many Hissom residents could ' engage in real jobs and that their exclusion from vocational rehabilitation services is a serious problem. The Defendant's Division of Vocational Rehabilitation has failed to provide any meaningful services for Hissom residents even though it is clearly needed.

L. Many Class Members at Hissom Experience Regression.

All people, including retarded people, learn throughout their lives, but they may be more open to receive more information at a more rapid rate during their formative years. By limiting Hissom residents to only other retarded people they are limited to what can be learned from the people they are observing. . In the segregated setting of Hissom the residents learn appropriate behavior at a diminished rate and learn a great deal of inappropriate behavior. Retarded people like all other people need consistent involvement with others who will relate to them on a human emotional level. In order to prevent regression people at Hissom need immediate attention which they are not now receiving.

M. Hissom Class Members Are Unnecessarily Segregated.

The evidence establishes that people at Hissom are rarely permitted to leave the grounds of the

institution. There are three students who received part of their active programming at a community school. All other •Hissom residents receive their programming in segregated settings.

People are harmed educationally if they are kept in an unnecessarily segregated environment. Segregation is harmful to retarded persons; it leads to reduced learning, reduced freedom and reduced growth.

N. Class Members Have Not Been Provided with Independent Professional Reviews Of Programming.

There has been a failure of independent professional review. Expert testimony shows that there are many people at Hissom who are inappropriate for that level of care and who are being harmed by their continued stay. Independent professional reviews would prevent such a situation.

0. Discrimination is Practiced at Hissom on the Basis of Severity of Handicap.

Evidence establishes that over 70% of the people at Hissom are severely or profoundly retarded. Numerous others have severe physical handicaps and severe behavior problems. As of August 1985 the Defendant acknowledged that it had failed to even consider providing community homes and programs for the severely handicapped people at Hissom. The Defendants, by

failing to plan for the most severely handicapped, guarantee that these children will continue to be admitted to Hissom because there are no alternatives being created in the community. This prevents this class of people at Hissom from going into the community and will insure that children living in the community if they are unable to continue to live at home will go to Hissom because there are no alternatives. People at Hissom are assigned to living units according to the severity of their handicaps. In the past there has been a policy of denying therapy to the most severely handicapped, which has resulted in severe and permanent contractures and deformities.

IX. Institutional Care Makes the Conditions at Hissom Inevitable.

Dr. Adelson, the Court's expert, testified that "Hissom does not provide services for the retarded which enable the retarded to develop to their full potential. All institutions stifle that development." He stated further "the general environment is unresponsive. It can't individualize to the degree needed."

The very nature of the institution, the size, the numbers of staff and residents, the volume of people in one room makes it difficult to supervise, staff or clients. It is difficult to coordinate professional services provided at Hissom. Testimony shows that the consistency of staff which can exist in smaller settings is important in learning and therapy for retarded

people. A person who has known the client for a long time and has been able to establish an emotional bond with him gets to know him and can elicit things that another person cannot. In an institution consistency of staff attention is extremely difficult to obtain. This consistency is essentially critical for the severely handicapped whose communication is non-verbal.

X. Alternatives Provided by Defendants.

A. Nursing Homes.

It was the Department's policy in the past to move residents of state retardation institutions to general nursing homes when they reached adulthood. Some 1,100 of our retarded citizens currently live in nursing homes or general intermediate care facilities. They receive no developmental services.

Current regulations . forbid the placement of retarded persons in nursing homes unless the home is able to meet that retarded person's developmental needs. Any failure to comply with the rule could jeopardize federal reimbursement for the facility. Any failure could also affect the approved status of a state's Title XIX plan. Testimony shows that if Title XIX payments were disallowed for retarded persons in Oklahoma's ICFs who are not receiving developmental services, Oklahoma could lose $40 million dollars in federal funds over the next five years.

B. Large ICFs/MRs.

Some 1,600 retarded Oklahomans live in 16 large Intermediate Care Facilities for the Mentally Retarded (ICFs/MR). Most of these facilities were built as general nursing homes and in 1985-86 were certified as ICFs/MR by the Department of Human Services.

Because of the number served, these private ICFs/MR are small institutions with many of the problems of large institutions. The evidence shows that no one who could live in a foster home or group home should be kept in this type of facility. It is clear that the placement of Hissom residents in large ICFs/MRs would not be appropriate.

C. Large Group Homes for Adults who are Mildly or Moderately Retarded.

Oklahoma has 68 large group homes serving approximately 560 mildly and moderately retarded adults. These homes average nine to ten residents supervised by one staff member. At the time of trial, these homes were funded at a reimbursement rate of $21.93 per day; this rate covers the cost of supervision, food, shelter and transportation. All such **group** homes have been funded exclusively with state money. There are available funds under Title XIX waiver to cover costs of staffing and support services for the mentally retarded; however Oklahoma has not applied for such funds.

D. Waiver to use Title XIX Funds.

Oklahoma in 1984 made application to the Federal Health Care Financing Administration for a waiver to use Title XIX funds for home and community based services. This application received approval in January, 1986. Oklahoma officials made a choice not to apply for funds to develop a program of community residential services although this option was available to them. Oklahoma did not option to apply for Title XIX funds under the waiver for the purpose of placing Hissom residents into the community.

The evidence reflects that the State has not effectively delivered the services funded under the waiver. In July 1985 the Region II outpost was established. Its functions include case management, evaluation, information and referral, recruits providers and recommends eligibility for waivered services to the Department of Human Services. Region II serves the Hissom area, that is Tulsa and the surrounding 18 counties. Region II has not demonstrated an ability to respond to the needs of families with retarded children.

XI. The Continued Segregation of Severely Handicapped People from the Community.

The evidence is clear that the Department of Human Services has never followed the recommendation of the Sullivan Report commissioned by it in 1983 which recommended a balanced deinstitutionalization strategy. Oklahoma's institutional population has been exclusively a reduction in

the number of mildly and moderately retarded people.

The Department has done very little to begin to create group homes for severely handicapped residents of Hissom. There have been no model programs developed to demonstrate technology of serving severely handicapped persons in the community. No contracts have been signed with providers to develop group homes for the severely handicapped. In addition, there has been no planning by the Department for in-service training programs in developmental disabilities for community professionals such as physicians, nurses and physical therapists.

The Department has expended massive effort on its institutions during the last several years but its efforts to establish services in the community have been minimal. Evidence presented by Defendant's expert David Braddock reflects that Oklahoma ranks last among the states by percentage of personal income spent on community services. In the year 1986, of its budget for mental retardation, 97% was spent on institutional care; very little of the remaining *3%* was spent on community services for the severely and profoundly retarded and multi-handicapped.

XII. Placement in Homes, Foster Homes or Small Family Type Homes is Necessary to Prevent and Remedy the Harm Experienced by People Who Have Been Segregated at Hissom.

Dr. Steven J. Adelson, M.D., independent expert appointed by the Court, in his report to the Court of November 3, 1986 stated: "There is no question in my mind that all of the

individuals at Hissom could be cared for, medically as well as socially, more effectively in a small home or foster home. ... Living in the community, with professional services provided in the community instead of the institution, makes an incredible difference."

The evidence is overwhelming that small is better. It is also clear that the first choice for children would be their own home where parents could receive the necessary support services heretofore denied to them. If that were not possible a foster home would be the next choice because in this environment the child could experience the love and affection of a normal environment. As an alternative a small family size group home in the community allows a development of potential which is denied by the very nature of institutional care. Former Hissom resident Dennis Gray now living in a community home described the advantage to him of moving into the community.

> "It has done a whole lot for me ... I improved a lot ... ray whole life has changed a lot. I've got a lot more freedom to myself, I can do what I want to ... My life has all changed since I have been out in the community, all the way round it changed. ... I can see people I want to see, my friends, like that. At Hissom you couldn't do that ... I got a job, it pays good money. ... I got a lot of friends in the community I go talk to sometimes if I -have a problem and I see them right away if I need to talk to them. ... I hope to get married someday. I hope to get me a better job making better money, a place of my own where I can be on my own, more independent living. I hope to get a lot more friends in the future out in the community, a lot more friends than I've got now, more friends."

The evidence shows that the State's attempt to create a specialized segregated center for the purpose of clustering

quality services does not work.

The Pennhurst Longitudinal Study: Combined Report of Five Years of Research an Analysis, Executive Summary was received in evidence during the trial. This study clearly shows that residents of Pennsylvania's Pennhurst Institution, when moved into the community were better off in every way measured.

This study found that former Pennhurst residents who had been labeled "profoundly retarded" gained the most in adaptive behavior when moved into small community homes . . . about 25% on a standardized scale." The author commented:

> "For many years I have heard a lot of reasons why people need to remain in a large congregate care facility . . . But this is one, people being low functioning, that I just have to question now scientifically. It no longer seems valid to me. The people who have benefited the most are those who are labeled profound."

The study shows that more services were rendered to those who moved to he community. There were more day programs than they had received at Pennhurst. In the community they received ten hours a day of active developmentally oriented programs compared to 5.8 hours in the institution. However, the cost of the community programs was less than the cost of the institutional programs.

The totality of expert opinion received in evidence confirms that retarded persons gain skills when they leave the institution for the community and those labeled profoundly retarded are the ones who gain the most.

XIII. Very Few, If Any, People at Hissom Could Not be Served in the Community.

A. Experience in other states.

Expert testimony reflects that in the long run there is no need for institutions and better alternatives can be provided in the community. Facilities to serve as a safety net for emergency placement either exist already in the community or can easily be created for those occasions when they might be needed. Expert testimony shows that other states use specialized crisis management teams to deal with problems which the retarded may have in community residences and that this procedure is clearly preferable to placing the person back in the institution. The institution is not needed as a location for placements that have "failed".

The state of New York provides community services for individuals having as many multiple handicaps as the individuals at Hissom.

Arkansas serves people who are profoundly retarded and without verbal skills in family-like settings in the community. These community homes are integrated into neighborhoods and residents go to educational and treatment programs during the week and spend their week-end time as normal people do.

The state of Michigan has created a wide range of

options for retarded people.

California has established thousands of community homes for all levels of handicapped people, although they have retained some institutions.

Nebraska's Region V has a total population approximately the same as Tulsa and serves 608 retarded people in a wide variety of community services which include respite care, foster homes, group homes and vocational services. In this Region retarded persons with a variety of handicaps live in small family-size group homes and foster homes. Among these people are those with complex medical needs such as gastrostomy feeding, shallow suctioning, severe seizure disorders and tracheotomies.

B. The Defendants recognize the need for community placement.

The Bellmon Report, published in 1983 was written by former Senator (now Governor) Henry Bellmon and Robert Fulton. In it the Department committed itself to the goal of "helping all of the people it serves to live as normally as possible."

> For all those helped by DHS, ... the DHS goal should be to do all it can to help make community and family living possible. Only when the family and the community settings are unable to provide proper care or support should institutionalization be considered. This policy is now mandated by law in the area of juvenile services. It is both the humane and common sense policy to apply in all parts of DHS operations.

The DHS service system presently

> overemphasizes the institutional side. It is underdeveloped at the community level. A substantial redeployment of resources over the next few years is essential.

Unfortunately, the evidence reflects that this policy has not been carried out by the Defendants, and there is no likelihood of it being carried out without the Court's intervention.

CONCLUSIONS OF LAW

The Court, upon consideration of its Findings of Fact has determined that the Defendants have violated the rights of Plaintiffs in the class as secured by federal statutes and certain provisions of the United States Constitution.

I. **Violations of Title XIX of the Social Security Act, 42 U.S.C. SS1396, 1396a and Regulations Promulgated Thereunder, 42 C.F.R. §435.1009; 42 C.F.R. Subpart3 E, G.**

The evidence before the Court demonstrates that the following violations of Title XIX and the regulations promulgated thereunder have occurred:

A. Violation of 42 C.F.R. § 435.1009, §442.463(d) in that they have failed to provide adequate amounts of active treatment, training, and habilitative services, year-round, and instead have subjected Plaintiffs and the Class to ubiquitous idleness.

B. Violation of 42 C.F.R. §442.454 in that the Defendants

have failed to provide Plaintiffs and the class "professional and special programs and services ... based upon their needs."

C. Violation of 42 C.F.R. §435.1009(b) in that the Defendants have failed to provide adequate active treatment, training, and habilitative services that provide Plaintiff and the class functional skills, "to help the individual function at the greatest physical, intellectual, social, or vocational level he can presently or potentially achieve."

D. Violation of 42 C.F.R. §442.472 in that the Defendants have failed to provide Plaintiffs and the class with systematic training to develop appropriate eating skills and have failed to train direct-care staff in proper feeding techniques and failed to insure they eat in an upright position.

E. Violation of 42 C.F.R. §442.463(a) in that the Defendants deprived Plaintiffs and the class of training and habilitative services on the basis of their degree of retardation.

F. Violation of 42 C.F.R. §442.463(a) in that the Defendants have deprived Plaintiffs and the class of training and habilitative services on the basis of their ages and their accompanying physical disabilities or handicaps.

G. Violation of 42 C.F.R. §442.486-.488 in that the Defendants have failed to provide adequate physical

therapy and occupational therapy to Plaintiffs and the class.

H. Violation of 42 C.F.R. §442.496-.498 in that the Defendants have failed to provide adequate speech pathology and audiology services to Plaintiffs and the

I. Violation of 42 C.F.R. §442.404(2), 442.450(a)(2) in that the Defendants have failed to provide Plaintiffs and the class individual privacy including toilets, bathtubs, and showers.

J. Violation of 42 C.F.R. §442.433(c) in that the Defendants have failed to insure that living unit staff from all shifts participate in the planning, initiation, coordination, implementation, follow through, monitoring, and evaluation of Plaintiffs and the class.

K. Violation of 42 C.F.R. §§442.487 and 442.489 in that the Defendants have failed to perform adequate individual interdisciplinary assessments of Plaintiffs and the class.

L. Violation of 42 C.F.R. §442.404(f) in that the Defendants have allowed Plaintiffs and the class to be subject to physical abuse.

M. Violation of 42 C.F.R. §442.404(j) in that the Defendants have failed to permit participation by Plaintiffs and the class in community activities.

N. Violation of 42 C.F.R. §435.1009(d) in that the Defendants have failed to develop discharge plans for

non-institutional settings for Plaintiffs and the class who do not need institutional settings.

II. Violations of Constitutional Rights

A. Equal Protection Clause Violations:

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. Thus, all persons similarly situated must be treated alike, and any legislation or practice of the State which classifies some persons differently than others must be rationally related to a legitimate state interest. City of Cleburne, Texas v. Cleburne Living Center, _____ U.S. _____, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985); Schweiker v. Wilson, 450 U.S. 221, 901 S. Ct. 1074, 67 L.Ed.2d 186 (1981).

Segregation is a component of discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873 (1954). Legislation which segregates mentally retarded persons from the community runs afoul of the Equal Protection Clause if the segregation is not rationally related to a legitimate state interest. City of Cleburne, Texas v. Cleburne Living Center, supra.

Here, the evidence before the Court indicates that

Defendants have violated the rights of the Plaintiffs and the class secured by the Equal Protection Clause by-establishing, encouraging, subsidizing, and sanctioning programs and practices that have excluded, separated and segregated retarded persons from the rest of society without any rational basis.

B. Due Process Clause Violations:

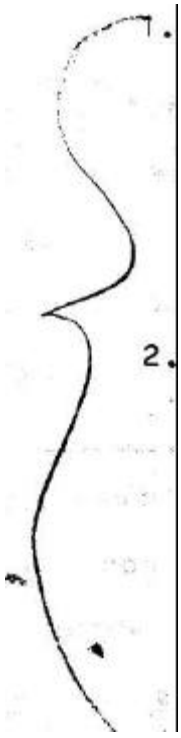
The Due Process Clause of the Fourteenth Amendment protects an individual against deprivation of life, liberty, and property by state action. A person who is committed to the custody of the State has liberty interests protected by the Due Process Clause in receiving adequate food, shelter, clothing, and medical treatment. Youngberg v. Romeo, 457 U.S. 315, 102 S. Ct. 2452, 73 L.Ed.2d 28 (1982).

The person also has a liberty interest in safe living conditions and freedom from unnecessary bodily restraint. Youngberg v. Romeo, supra. Retarded persons, as well as normal citizens, are protected by the Due Process Clause. Youngberg v. Romeo, supra; Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2nd Cir. 1984). Freedom from bodily restraint includes the right to be free from confinement in an institution where such confinement is shown on a factual basis to be unnecessary. Youngberg v. Romeo,

supra. . . . . .

Furthermore, the liberty interest in personal safety and freedom from restraint includes a right to training reasonably necessary to insure the person's safety and to facilitate his ability to function free from bodily restraints. Youngberg v. Romeo, supra. The training required by the Due Process Clause includes training which enables a person to maintain minimum self-care skills such as feeding, bathing, dressing, self control, and toilet training. Association for Retarded Citizens of North Dakota v. Olson, 561 F.Supp. 473 (D.N.D. 1982), aff'd 713 F.2d 1384 (8th Cir. 1983).

Under the evidence presented to the Court the Defendants have denied the rights of Plaintiffs and the class to the liberty interests under the Due Process Clause.



Plaintiffs and members of the class have sustained harm and injury in the institutional setting which include abuse, injuries from accidents and neglect, improper positioning, regression, and other harms arising from segregation and confinement. Plaintiffs and members of the class have been denied adequate food, clothing, medical care and shelter. The types and service of food have been inadequate. More importantly class members have been unnecessarily fed through feeding tubes and have been placed in improper feeding positions.

3. The facilities at Hissom are the most isolated and restricted setting in which a person can live. Residents must conform to the schedule of the institution. They are without privacy, sleeping in large wards and spending their days together in day rooms and eating in large groups. At Hissom members of the class in wheelchairs are tied in their chairs for long periods of time for the convenience of the staff.

4. Substantial numbers of Hissom residents have suffered loss or reduction in skills and loss of physical movement due to neglect.

III. **The Right to Effective and Integrated Services Under § 504 of the Rehabilitation Act of 1973.**

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 provides that no otherwise qualified handicapped individual ... 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. Regulations promulgated pursuant to this statute are located at 45 C.F.R. §84.1-84.54.*

Section 504 recognizes the parallels between discrimination suffered by our handicapped citizens and other minority groups.

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* Because the Court concluded that Section 504 provides a basis for this Court's ruling the Court does not address herein a second possible federal statutory basis, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6063. .

This discrimination is manifested through their segregation from the rest of society. Legislative history concerning §504 demonstrates that Congress sought to combat the problem of isolation from the community entailed by institutionalization. Halderman v. Pennhurst State School and Hospital, 612 F.2d 84 (3rd Cir. 1979) at 108 and note 30; Garrity v. Gallen, 522 F.Supp. 171 (D. N.H. 1981). Section 504 prohibits unnecessarily segregated services for retarded persons. Association of Retarded Citizens of North Dakota v. Olsen, supra at 493. The evidence before the Court indicates as follows:

A. Plaintiffs and the class have not been provided by the Defendants with federally assisted services that are effective and meaningful and that are delivered in less separate, more integrated settings.

B. Plaintiffs and the class have been denied by the Defendants of the benefits of federally assisted training, habilitation, and other programs on the basis of the severity of their retardation or other handicaps.

C. Federally assisted retardation services for severely retarded people and for retarded people with physical or behavior disabilities have been provided by the Defendants only in segregated settings.

D. Severely handicapped residents of Hissom have not received vocational rehabilitation services on a priority basis in order to prepare them for and assist them in gaining gainful employment to the extent of their capabilities.

This underdevelopment of a community services system by the Defendants constitutes a continuation of the original and continuing discrimination practiced by the State against retarded people; the affirmative development of community services is necessary to remedy this effect. 45 C.F.R. §84.6(a) provides:

> §84.6 Remedial actin, voluntary action, and self-evaluation.
>
> (a) Remedial action. (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination..
>
> (2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.
>
> (3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

Thus, Section 504, as amplified by the regulation, requires both the change of policies or practices that do not meet the section's requirement, and also requires the taking of "appropriate remedial steps to eliminate the affects of any discrimination that resulted from adherence to these policies and practices." 45 C.F.R. §84.6. This regulation has the force of law so long as it is "reasonably related to the purposes of the enabling legislation". Mourning v. Family Publication Service, Inc., 411 U.S. 356, 93 S. Ct. 1652, 36 L.Ed. 318 (1973).

SUMMARY

The Court is aware of the concern of the Third Circuit in Pennhurst, supra for the evaluation of discrete needs of individual residents when it remanded the case to the trial court for individual determination as to the appropriateness of a community placement for each resident.

This Court's plan, however, requires individual assessment and certification of the appropriateness and quality of the new environment before a transfer can be made.

The Third Circuit held in Pennhurst, supra, that the constitution does not preclude resort to institutionalization of patients for whom life in an institution has been found to be the least restrictive environment in which they can survive. However, in 1979 that court recognized:

> Of course, deinstitutionalization is the favored approach to habilitation. The federal statutory material makes that clear and we acknowledge that constitutional law

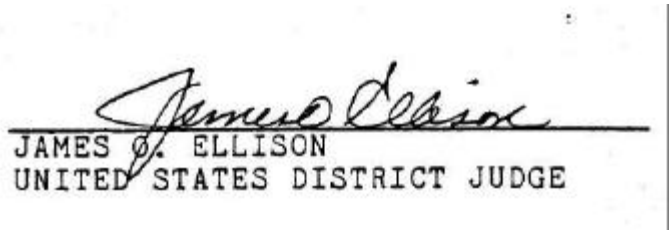
> developments incline in that direction as well. Thus, on remand, the court or the Master should engage a presumption in favor of placing individuals in CLAs. But the special needs and desires of individual patients must not be neglected in the process.

Pennhurst, supra, at 115.

This trial Court, sitting in Oklahoma in 1987, upon consideration of the overwhelming evidence that the institution cannot be the least restrictive environment for any retarded person in the class, must conclude that constitutional and federal statutory requirements now dictate removal of the institution as a choice of living environment for such individuals.

Upon consideration of all of the evidence and upon application of the principles of law discussed herein in order to remedy the intentional and unconstitutional discrimination inflicted upon retarded people by the official actions of 'the State of Oklahoma, this Court will supplement these Findings of Fact and Conclusions of Law with its Plan and Order of Deinstitutionalization.

ORDERED this 24th day of July, 1987.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE