
MENTAL DISABILITY LAW REPORTER

VOLUME 7, NUMBER 6

NOVEMBER-DECEMBER 1983

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Cover *The Sleep of Reason Produces Monsters*, by Francisco Goya. Courtesy of the Philadelphia Museum of Art: SmithKline Corporation Collection. This image is part of an exhibit on mental illness titled *Images of Madness: Views of Mental Illness* produced by the Mental Health Association in Hinds County, Mississippi. For further information on how to obtain the exhibit, please see page 514 of this issue.

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1301, 1004, 1002, 907(a)

Supreme Court rehears *Pennhurst* arguments

On the first day of its new term, the U.S. Supreme Court heard a new round of arguments in the *Pennhurst* case, *see* 6 MDLR 71, to consider whether and to what degree federal courts may oversee state officials' treatment of institutionalized mentally retarded patients. The key issues addressed were the effects of the doctrines of comity and pendent jurisdiction on the deinstitutionalization relief ordered by the lower court. *Pennhurst State School and Hospital v. Halderman*, No. 81-2101, 52 U.S.L.W. 3084 (U.S. Sup. Ct. Oct. 3, 1983).

The Third Circuit held that Pennsylvania's mental health laws as interpreted by the state supreme court give mentally retarded persons the right to treatment in the least restrictive alternative environment. The panel found that these statutes provided adequate support for the federal district court's order which required the state to determine on a case-by-case basis the appropriateness of institutionalization or community living arrangements. The circuit court also ruled that the eleventh amendment permits the prospective injunctive relief ordered, even though it was based on constitutional or federal statutory claims. The district court's exercise of pendent jurisdiction over this state law claim was found to be permissible under the eleventh amendment as well because it involved federal claims.

Three legal questions, all concerning the authority of federal courts to fashion relief where the only violation is of state law, were considered: whether the eleventh amendment bars federal courts from ordering state officials to undertake costly and intrusive relief; whether the doctrine of comity prohibits a federal court from interfering in the management of state programs; and whether federal courts may properly maintain special masters and hearing masters to supervise decisions of state officials concerning the proper placement of retarded institutional residents.

H. Bartow Farr, III of Washington, D.C., arguing for the state defendants (petitioners), characterized this case as essentially a dispute between Pennsylvania citizens and the state on the management of a state institution for mentally retarded persons. He contended that federal interference in such purely state matters is barred both by the eleventh amendment and the principle of comity, which encourages courts of one jurisdiction to apply the laws and judicial decisions of another forum out of mutual respect.

Farr noted several separate but related questions involved in this case. It is a claim against the state itself, and not just against the named state officials, as can be seen by looking at the nature of the claim. The state's daily decisions on facilities, patients, services and programs are at issue, and the respondents want different decisions to be made, he explained.

The state may invoke eleventh amendment immunity against a pendent claim involving both state and federal claims that are tried together. Asked to define a state claim, counsel said it was where officials acted outside the scope of their authority under state law. In distinguishing officials' misinterpretation of authority from actions just outside their authority, Farr stated that this difference is determined by whether the suit can be brought in federal court.

Allen C. Warshaw of Harrisburg, Pennsylvania argued the comity question for the petitioners by explaining that this principle prohibits federal court interference except where absolutely necessary to protect federal rights. Warshaw contended that federal courts must defer to state law, and that there was no justification for federal involvement in this case. Counsel cited

the Third Circuit's "massive intrusion" into state programs by requiring habilitation plans for all 1,100 class members plus those persons on the waiting list, although he conceded that the order came after trial on a record created by expert testimony.

Warshaw argued that the order will have a negative impact on other persons in need of care; that Pennhurst is fully certified under federal standards; that state compliance requires that extensive professional time be spent on hearings, which interferes with these professional decisionmakers; and that for a federal court to issue such orders to enforce state law is improper.

Thomas K. Gilhool of Philadelphia, Pennsylvania, representing the class members, began by noting that the state legislature sets state policy, and that after the decision in *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982), 6 MDLR 223, conditions at Pennhurst are not in doubt. He also stated that the state remains free to change its policies, and that the defendant state officials acted without authority. Gilhool argued that the respondents would prefer a fourteenth amendment pendent jurisdiction position because this case does not turn on state law, and the fourteenth amendment argument resolves the eleventh amendment question.

Article III of the Constitution is the origin of the doctrine of pendent jurisdiction, and the decisions of this court demonstrate such jurisdiction in this case. Gilhool concluded that the fourteenth amendment should rule in this case, and that the federal court did not base its injunction on pendent jurisdiction, but rather solely on state law.

David Ferleger, also of Philadelphia, addressed the comity issue for the respondent class members by pointing out two principal themes of comity — nonintervention in state policy and sensitivity to such policies. He observed that the challenged institutional rules and procedures all predated the trial, and that the state legislature had appropriated funds to remove residents from Pennhurst. He agreed that state officials had the duty to find the least restrictive placements, and that they had acted outside the scope of their authority by failing to do so.

Ferleger explained that the experts had concluded that Pennhurst was not an adequate facility. Where state law is settled, federal abstention is not required and federal courts may follow state law. Federal deference to state law is necessary because state courts avoid making federal constitutional decisions. The irreparable injuries facing patients due to the abominable conditions at Pennhurst provided the reason for the federal court not to delay relief.

Counsel argued that comity principles apply in federal civil rights cases, but that abstention is not appropriate in such cases. Federal courts should use state law because it is no blow to federalism if the federal court's decision complies with state law. Federal courts should decide what state remedy should apply, but the federal judiciary's preference for a particular result should bow to state court and state legislative decisions.

Mr. Farr resumed his pendent jurisdiction arguments by challenging the respondent's view that all plaintiffs need do is to plead a not wholly insubstantial fourteenth amendment claim against state officials. However, he claimed that an Article III inquiry is not the full inquiry because the eleventh amendment must also be considered. The question of whether state officials were doing more than acting outside the scope of their authority is very different from what we have here, he contended. Simply because you have a pendent claim does not mean that the eleventh amendment question will not be examined, Farr concluded.