ORIGINAL

In the

Supreme Court of the United States

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Jack B. Kremens, etc., et al., Appellants, v. Kevin Bartley, et al., Appellees.	No. 75-1064

Washington, D. C.
December 1, 1976

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IN THE SUPREME COURT OF THE UNITED STATES

JACK B. KREMENS, etc., et al., Appellants,	:	
v.	:	No. 75-1064
KEVIN BARTLEY, et al., Appellees.	:	

Washington, D. C.,

Wednesday, December 1, 1976.

The above-entitled matter came on for argument at 10:37 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NORMAN J. WATKINS, ESQ., Deputy Attorney General of Pennsylvania, Department of Justice, Capitol Annex Building, Harrisburg, Pennsylvania 17120; on behalf of the Appellants.

BERNARD G. SEGAL, ESQ., Schnader, Harrison, Segal & Lewis, 1719 Packard Building, Philadelphia, Pennsylvania 19102; on behalf of the Supreme Court of Pennsylvania, as amicus curiae.

DAVID FERLEGER, ESQ., 2321 Sansom Street, Philadelphia, Pennsylvania 19103; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1064, Kremens against Bartley.

Mr. Watkins, you may proceed whenever you're ready.

ORAL ARGUMENT OF NORMAN J. WATKINS, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WATKINS: Mr. Chief Justice, may it please the Court:

With the Court's indulgence, I would like to initially note that I intend to submit the jurisdictional issues that I raise; however, I, of course, will answer any questions the Court may have. That includes the habeas corpus issue and the Eleventh Amendment issue. I intend to devote my entire argument time to the merits.

This suit --

QUESTION: You intend to discuss, the way you now have your argument planned, the question of the class that was before the Court?

MR. WATKINS: I had not intended to discuss that -- in connection with the mootness issue?

QUESTION: No. What I am interested in is this, and if you didn't plan to discuss it, certainly don't feel obliged to.

As I read the district court's opinion, at no time since the beginning of this litigation have any of the plain-

tiffs in the action been less than 13 years of age. And, as I read the district court's opinion, there are Pennsylvania regulations which provide for treatment of 13-year-olds in a much different manner than those under 13.

MR. WATKINS: That's correct. However, I believe that members of the class clearly are under the age of 13.

QUESTION: Well, but can a class -- named plantiffs, all of whom are over 13, represent a class which includes people under 13 if, in fact, the law treats one differently than the other?

MR. WATKINS: Well, I think it can in this case, Your Honor, because the court, when defining the class, also noted certain unmentioned individuals, but patient numbers. I believe some of those in the record were under the age of 13.

QUESTION: But there was no named individual?

MR. WATKINS: That's correct. That's correct.

This suit was commenced in 1972 when the five named plaintiffs challenged the admission, their admission to Haverford State Hospital, which was initiated under sections 402 and 403 of Pennsylvania's Mental Health Act, and allowed generally parents to admit their children upon the advice of a recommending psychiatrist or physician, whichever was appropriate.

The lawsuit basically challenged, under the due

process clause of the Fourteenth Amendment, the authority of their parents and their physican to commence and effectuate this admission without the full panoply of due process.

In Pennsylvania, under sections 402 and 403, a parent may admit his child, provided that medical recommendations are concurrent with that desire.

Shortly after the litigation was commenced, as Mr. Justice Rehnquistwas alluding to earlier, regulations were adopted by the defendants which greatly expanded the rights of children under the Mental Health and Mental Retardation Act. Generally those regulations -- and they are set out in full -- provide that a child over 13 is given elaborate notice and upon objection, either written or oral, may -- is automatically appointed counsel if he is unable to afford counsel, and is provided a full adversarial hearing within which to contest both the parental recommendation and the medical recommendation.

The notice which is provided the child and must be explained to the child is extremely detailed; provides the name of the physician who is recommending the commitment, and provides the name of the applicant, counsel, how to get ahold of counsel, and various other procedural protections.

Moreover, in Pennsylvania now, and shortly after the lawsuit, an admission of a child may not proceed on the basis of one medical recommendation alone. It must be independently

concurred in by a second medical recommendation.

Thus, it's understatement to say that in Pennsylvania there are certain legal impediments for a parent, who is intent on dumping a child in an institution.

The lower court viewed extensively both the statute and the regulations, and held that the -- that both together failed to meet constitutional muster. There was one judge dissenting, holding basically that the regulations, when viewed in the proper context of parent-child relationship involved in this case, did indeed meet constitutional muster.

For this Court, there are primarily two issues on the merits of this case.

First, does the liberty interest that's involved, the child's liberty interest, in the proper context, warrant further protection under the Constitution of this country? Is the statutory and regulatory --

QUESTION: Further in relation to what?

MR. WATKINS: In relation to --

QUESTION: The old procedures or the new ones?

MR. WATKINS: The new procedures and the old procedures, taken together. The statute and the regulation.

I think the record is very clear, Mr. Chief Justice, that the court and certainly the dissent exhaustively studied the regulations and considered them in its opinion.

It rejected -- as I recall the lower court's opinion,

they rejected the regulations primarily because, one, they did not apply to children under 13; and, two, they did not provide a time certain when the adversarial hearing would take place.

QUESTION: Of course now you have a new statute. Just last summer.

MR. WATKINS: There is a new statute that applies only to the mentally ill. And, as I have pointed out, that is approximately 20 percent of the plaintiff class.

QUESTION: The rest being mentally retarded?

MR. WATKINS: That's correct, Your Honor.

And the new statute changes in no way whatsoever the relationship of the child-parent and State, who is under 14. So, for all intents and purposes, a very small portion of the plaintiff class has been affected by the intervening legislation.

The question is, is this statutory and regulatory framework deficient? Are parents to be limited in the mental health area, where they certainly are not in the physical health area?

Surely, if I, as a parent, seek to admit my child for a serious physical ailment that may require total incarceration, an Rh-negative problem, or something, where I have no antibiotic or any ability to ward off diseases, surely, no one would contend that a hearing must precede that

recommendation. Yet --

QUESTION: Well, isn't there a question, Mr. Watkins, before you get to the question of what kind of a hearing you have, as to whether there's any State action here?

MR. WATKINS: Well, I --

QUESTION: Is it the State that's depriving anybody of any liberty?

MR. WATKINS: The question is -- I am approaching it, and I agree with you -- is whether or not there is a liberty interest involved at all here.

The conflict which the lower court failed to perceive -- and I believe this is what you're getting to, Mr. Justice Rehnquist -- the conflict is between the parent and child, not between the parent and State.

In effect, there may be no State action as compared to the Gault situation, where you've got a State coming into the family and taking the child.

However, it's clear that the State is treating the patients and the plaintiffs pursuant to State law, and the State is, in fact, holding the plaintiffs.

QUESTION: Well, is it that clear? What happens if a child runs away from one of these institutions? Certainly they don't issue a bench warrant, do they?

MR. WATKINS: Well, it's -- there are no set procedures, but that's possible. First, obviously, the parents

would be notified.

In fact -- well, it could run the gamut of calling the police.

QUESTION: Is there something in the record about this?

MR. WATKINS: I don't believe so, Your Honor. I don't believe so.

QUESTION: Is that any different from what it would be if the parents report a missing child and the police follow their procedures and go out and pick the person up and return him to the family? Is that about what's done with the institutional situation?

MR. WATKINS: That's correct. I think it would be -- it would certainly be an ad hoc procedure. I'm sure that in some counties, if a child ran away from the general hospital, the police are called, the parents are called, the police may well return the child to the hospital, especially if the child is in hospital garb, for instance.

QUESTION: In Pennsylvania, if the parents, with private physicians, take a child within this age category to a private hospital, private institution, is there State action?

MR. WATKINS: To a private institution?

QUESTION: Yes.

MR. WATKINS: In so far as the private institutions

are regulated by the Commonwealth of Pennsylvania, and must conform their activities -- that is, they must abide by the regulatory scheme that we've established. For instance, a private facility, such as the Devereaux School, under Pennsylvania law, must provide -- abide by the regulations that were promulgated.

Now, I am not going to stand here and say that that is the same as line authority. There is a great and vast difference. But they certainly must conform to State law, and the State has the power of lifting the license.

QUESTION: Well, let me -- I see, what does that mean, Devereaux has what? So many physicians, so many nurses, some such physical facilities; is that the --

MR. WATKINS: Well, there are certain qualitative regulations, but primarily I'm concerned with the procedures. They must follow the procedures that we establish for admission.

QUESTION: For admission, I see.

MR. WATKINS: They must foloow the procedures for admission.

QUESTION: Precisely as a public institution?

MR. WATKINS: That's correct. That's correct.

QUESTION: Mr. Watkins, are all of the institutions named in this case public institutions?

MR. WATKINS: No. There are institutions discussed in the record that are private institutions.

QUESTION: But are they named parties?

MR. WATKINS: I do not believe they are. Haverford State Hospital is a public institution.

QUESTION: So the named parties are public institutions?

MR. WATKINS: That's correct. That's correct.

QUESTION: Do you contend that the issues are any different with respect to a private placement as opposed to a public placement? That is, the nature of the institution.

MR. WATKINS: With respect to State action or with respect to the Constitution?

QUESTION: No, in any respect. Are the issues the same if the child is placed in Devereaux, as if he's placed in a State hospital?

MR. WATKINS: I think not. I think that I must back up and say that it's our contention, the Commonwealth contends that when it is a parental -- a joint decision between the parent and the doctor, the parent has the authority to admit anywhere, public or -- well, let me correct myself.

The constitutional issues certainly are the same. I would view them the same.

The problem with the lower court's decision, and the fundamental error that it made, was it, in some simplistic fashion, I think, applied this Court's rationale in Gault to a situation where Gault clearly did not apply.

Gault analyzed a conflict between the child, the parents and the State, which was imposing incarceration upon the child, without notice to the parents, yanking the child, if you will, from the family scene, into an institution.

There can be nothing that is more close to a criminal proceeding than that.

I don't want to get hung up on the criminal-civil label, that's not the critical thing here. What takes place in a delinquency proceeding is a finding of guilt. The question is: Did this occur? Is it illegal? And did the defendant do it? Or did the juvenile do it?

That's not at all the issue in a commitment proceeding, or an admission proceeding.

The critical findings are whether or not this child is indeed mentally ill, and whether or not, in the professional recommendation of the physicians, this child needs in-patient psychiatric or psychological care.

I fail to see where an intervening hearing is going to fail-safe that proceeding.

QUESTION: Well, why do you give it after the age of 14?

MR. WATKINS: That's a very good question.

It's our view that -- and I think the cases throughout the country clearly demonstrate this -- that adults, a competent adult has the right to reject medical treatment, be

it --

QUESTION: And in Pennsylvania is he adult at 14?

MR. WATKINS: Well, for purposes of the Mental Health Act, yes. Fourteen-year-olds and above are treated exactly as adults.

QUESTION: In what other way is he treated as an adult?

MR. WATKINS: In most other ways. In most other ways, --

QUESTION: Can he drive a car?

MR. WATKINS: No, he cannot. No, he cannot.

QUESTION: Can he drink liquor?

MR. WATKINS: No, he cannot, Mr. Justice Marshall.

QUESTION: Well, I mean, what -- I thought adults could do that.

You just make -- you just say for the purpose of putting him in an institution he's an adult.

MR. WATKINS: That's correct. That's the -- the Pennsylvania Legislature has decided that, and I think on sound expert opinion, that the age of 14 is about when an objection to certain types of treatment would be reliable. The record, in fact,contains testimony that 13, 14, that age is about when a child can determine his own destiny.

Now, unfortunately, and some, and many do disagree with the Pennsylvania Legislature, those children are not able

to drink, drive, vote.

But, be that as it may, in answer to your question, the determination at an involuntary proceeding, I submit, is not whether or not -- the judge isn't determining whether or not this patient needs care, the judge is determining: Is this patient able to reject that care? Does he know what he's doing when he rejects that care? If he does, that's his business.

Certainly no one can force me to have my broken leg fixed, if I don't wish to have it fixed.

That issue doesn't arise in a juvenile --

QUESTION: On the other hand, if you're dealing with either mentally ill people or mentally retarded people, even adults, there's some question about their ability to make decisions for themselves, isn't there?

MR. WATKINS: That's correct. Of course, that creates a presumption problem.

QUESTION: That's why courts appoint guardians ad litem in some of these situations, is it not?

MR. WATKINS: That's absolutely correct, Mr. Chief Justice.

QUESTION: Because they think the subject, whether adult or minor, is not capable of making the judgments necessarily alone.

MR. WATKINS: Absolutely correct.

However, in this case, what you've got is the lower court saying, We're going to presume that parents can't make this decision; we're going to presume that a strange lawyer, a public defender is better able to make this decision; we're going to presume that the advocacy process is better able to work out what is admittedly and concededly an extremely difficult family decision. This is a decision that many families have to go through.

The lower court's order is going to effectively raise an adversarial barrier that, I submit, is worthless in terms of its goal. Its goal is admittedly to prevent erroneous commitments.

However, the record in this case doesn't show one erroneous commitment. The court pointed to not one erroneous commitment. The court said that it may occur, and that parents may act against the best interests of their children.

Well, parents may act against the best interest of their children by sending them to a military academy. But that is not necessarily a basis upon which to impose an adversarial proceeding that requires parents deciding on long-term educational plans for the children, to appoint a lawyer for the child, let's flush this out in a court of law.

QUESTION: Or a choice of a private school as against a public school, or vice versa.

MR. WATKINS: Absolutely correct. Absolutely correct.

This case differs from what the lower court viewed, and I'll conclude with this remark, the lower court applied Gault in toto; just slapped the order of Gault right over this fact situation, totally ignoring the fact that the parents instituted these proceedings. The parents decided, "I want my child in an institution", along with medical recommendations. The court ignored that, and viewed it as if the State had come in and said to the parents, "Your child will be admitted".

QUESTION: That's why you say that the appropriate remedy is a case-by-case treatment, by way of a habeas corpus proceeding?

MR. WATKINS: Absolutely. Absolutely. Penneylvania clearly provides that.

QUESTION: But you can't generalize about such a sensitive problem as this, is that your point?

MR. WATKINS: Not only can't you, but you shouldn't. The lower court's decision is totally unwise in its breadth and scope.

For instance, it lumps mentally retarded and mentally ill together. There is a tremendous amount of question as to whether that was wise.

Thank you very much.

QUESTION: This case was decided under the Fourteenth

Amendment; right?

MR. WATKINS: Exclusively.

QUESTION: And you just pointed out that it was the -- everything that happened here was at the behest of the parents. I was wondering, where is the State action, because the Fourteenth Amendment, of course, applies only as against a State.

MR. WATKINS: Well, the parents could not have effectuated the commitment without the concurrence of the State.

QUESTION: Well, --

MR. WATKINS: In other words, it is the State facility, and it is the State law pursuant to which the State -- the parents are acting.

QUESTION: Well, is a parent's decision to send a child to a public school a State decision?

MR. WATKINS: No. Absolutely not. However, --

QUESTION: Then where is the State action?

MR. WATKINS: However, here you've got State psychiatrists examining the child and recommending the care.

QUESTION: Yes.

QUESTION: Well, they are State teachers, presumably, in a public school.

MR. WATKINS: Excuse me, Mr. Justice Rehnquist, I didn't --

QUESTION: In Justice Stewart's hypothesis of sending

a child to a public school, you've got State teachers, or County teachers. They may recommend that the kid go to that school. Why is that any different?

MR. WATKINS: Well, they may, and I assume -- possibly, if that were a part of the system. If, before you could put your child in a public school, let's say, you had to go to the school and the school had to say "We want your child", the "child needs us", that's a little more State action than the present system, which is: I'm living in this district, I'm going to send my child to that school.

QUESTION: Of course, in the public school, the child comes home.

MR. WATKINS: That's correct, Mr. Justice Marshall.

QUESTION: The question is, where is the State action? Did you raise this at all?

MR. WATKINS: This issue was not raised at the trial court level.

QUESTION: Or ever, until -- until I just asked the question.

MR. WATKINS: I believe that I recall, in one of the early colloquies -- I, unfortunately, did not try the case; but I believe one of the early colloquies between the court, there was some discussion of it.

The resolution, I think, was eminently correct. You've got State institutions, State psychiatrists recommending

the treatment. And in many cases, concededly, strongly recommended the treatment.

QUESTION: Mr. Watkins, before you sit down, you started by saying there were two issues you were going to talk about, one was whether there was an impact on liberty, as I understand it. I never did understand what the second issue was.

MR. WATKINS: The second issue is, assuming that there is an impact on liberty, was the lower court's order justified?

And, just briefly, there is a checklist which more fully --

QUESTION: In other words, was this the proper procedure and so on.

MR. WATKINS: That's right.

QUESTION: I understand.

MR. WATKINS: It's unwise in its breadth, it's unsound in its scope.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well.

I think Mr. Segal is going to continue with the -- Mr. Segal.

ORAL ARGUMENT OF BERNARD G. SEGAL, ESQ.,

ON BEHALF OF SUPREME COURT OF PENNSYLVANIA,

AS AMICUS CURIAE

MR. SEGAL: Mr. Chief Justice, and may it please the Court:

The Supreme Court of Pennsylvania begins the first year of its third century in an unprecedented role in appearing in this Court. It is the first time, and, to that extent, unique, and perhaps emphasizes the importance.

It appears here in its administrative role, under Article 5 of our new Constitution. I say "new", it was adopted in '68, and we're still getting accustomed to some parts of it, since it replaced a Constitution almost a century old.

Under the Constitution, the Supreme Court is completely responsible for and mandate -- and the Constitution mandates it to exercise supervisory and administrative authority over all the courts of Pennsylvania.

The Constitution is quite specific in listing almost everything, at least, that I, as the draftsman of that provision, could think of, that courts do; so that the Supreme Court would become, as indeed it is, the administrator of the courts of Pennsylvania. Under the Constitution it appoints an Administrator, and has done so, in the distinguished former Justice of our Supreme Court, who sits in this room.

But if the appearance of the Supreme Court in this

Court is unique, even more unique is the action of the district court in this case.

And I think I'm safe, at least to the extent that the research of my associates and I go, in saying that there is no case in which a lower court has conceded that there is no constitutional mandate upon it to call upon, to command the State courts to take action, and, nevertheless, did so. And did so in a drastic and completely absorbing manner.

The case proceeded through its entire trial, through the entire argument, without so much as a mention of the use of the courts. And even when it first appeared -- in our brief we said that it first appeared in the proposed order of the plaintiffs. That isn't correct; it appeared shortly before that, as a footnote in the opinion of the court. Without any comment by the court. The court just blandly said: Until the Legislature acts, we command -- didn't use those words -- until the Legislature acts, the State court system shall carry on.

They used the words "initially" and "until it creates an unbiased tribunal". In the final order, it says, "until the State Legislature creates an alternate neutral tribunal".

And, indeed, my friend, in his complaint, simply asks for a disinterested and impartial decision maker.

And then comes this footnote, and then comes the

order, as a complete surprise to anyone. There's this mandate to the courts, and there's no mandate to the Legislature; indeed, if there would have been an incentive on the Legislature to act, if, for example, they had followed the accustomed procedure, assuming they are right substantively, of simply saying: This is the mandate to the Commonwealth, and unless the Commonwealth acts, then all these people will be released.

The public clamor would have made the Legislature act. Today there can't be any clamor. The district court, in its wisdom, has said that this shall be saddled upon the State court system.

Now, it has been said that -- may I ask Your Honors, after my friend finished, he was asked questions by the Court; I had thought I had ten minutes. Am I to be --

MR. CHIEF JUSTICE BURGER: You will have ten minutes.

MR. SEGAL: Thank you.

Because I really think it's a very important matter to the Court.

The defendants, the Attorney General, in his exceptions to that order, made clear to the court his contention that this was outside the jurisdiction of the court.

Now, this Court has said in so many opinions -- I refer primarily to Younger v. Harris, where this Court really pulled together the philosophy, pointed out that comity

demands that the federal government would never interfere with State court systems unless under constitutional mandate, and even then with the greatest of reluctance.

Now, I just quote one sentence, the most important, "the notion of comity; that is a proper respect for State functions". And then the Court later says: "And a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

Now, I have said to Your Honors that this is unique. Why?

Here is a Court that concedes that there is no constitutional mandate that the courts take this up; indeed, it says: Until the Legislature creates a neutral administrative tribunal.

And, nevertheless, it mandates the courts. And,I may say, mandates them in such a way that if the courts take up this task, they can do nothing else for months ahead, as the telegram from the Chief Justice of Pennsylvania to this Court specifically said, in describing the overwhelming and disrupting of the judicial system of Pennsylvania, as he described it, which this would cause.

Nevertheless, drastic as it is on the courts of Pennsylvania, I suggest to Your Honors that it is a more drastic deviation, a more drastic disregard of the mandates

of this Court, of the preachings of this Court, almost from its very beginnings, at least from Chief Justice Marshall up to this Court, which has, on three different occasions, made clear that there will be no change in that rule.

Now, I might say to Your Honors that there is a very serious question, whether forgetting the interest of the court system of Pennsylvania, the district court didn't disregard the interest of the people whom it really intended to help. Whether the order wouldn't create more harm than help for these youngsters.

I may say, I happen to agree with Mr. Justice Rehnquist, that to talk about 13 and 14-year-olds doesn't represent the one and two-year-old any more than a 14-year-old child is represented by a 16-year-old child, if the question is "Can you drive?" When you can drive at 16. Or an 18-year-old child who can vote represents a 14-year-old child who can't vote. And so on. In States where 18 has become the voting age.

Now, my view is supported, and I believe this from the beginning, when we got the brief of the most distinguished people in America on the subject, the American Psychiatric Association, the American Society for Adolescent Psychiatry, the American Academy of Child Psychiatry, the American Association of Psychiatric Services for Children, all of them have said that this kind of adversary proceeding, far from

providing the ideal forum for such determination, has a very great potential for harm to many individuals. Particularly the younger individuals.

QUESTION: Is the judge given, the State judge under this mandate given any discretion about not requiring the child to be present?

MR. SEGAL: No, there's nothing said about that.

QUESTION: He's mandated to have the subject of the proceeding present in the courtroom?

MR. SEGAL: Yes. Now, there is a waiver of some provisions permitted, provided that counsel joins in it, but he must first get counsel. And these experts say, Your Honors, that an administrative model for a tribunal that reviews such matters may be the most effective, and it happens the American Psychiatric Association suggests a psychiatrist, a lawyer, and another mental health professional.

The Solicitor General of the United States has filed an amicus, in which he takes the same position, and suggests an independent board of psychiatrists or other professionals.

But I submit to Your Honors, and I don't draw on my own experience which, in this field, has been rather considerable with institutions, that I don't think you can find an honest disagreement on the part of the profession, or at least the group people in the profession.

Now, Your Honors, there are some points made by the

defendants, I believe they are answered; but we didn't seek to become a party, it seems to me crystal-clear that -- I see the white light is on, but I have two minutes according to my stopwatch -- the -- and I think your lights are out of kilter, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: They seem to be.

MR. SEGAL: The -- first they argue that the Supreme Court didn't ask to be a party. Well, for Heaven's sake, why would they ask to be a party, when the plaintiff in its complaint asked for an administrative tribunal, when the court never so much as mentioned the -- the district court -- that the courts would be involved, until the opinion came down? When the opinion came down, nothing happened until three months later. There was communication with -- almost three months -- with the Administrator's office.

Second, they say that the court never really had a chance to rule on this question. Well, that's not correct. Of course, because, as I said, the defendants' exception specifically raised it.

And, finally, they take the wholly unwarranted position -- now I quote -- "The Pennsylvania Supreme Court indicated it would provide the hearings contemplated in the proposed order."

What actually happened is, a legal assistant in the Administrator's office wrote a letter, in which he said the

courts would cooperate and provide for Special Masters.

Well, it so happens, first of all, that Special Masters would be invalid under the Constitution of Pennsylvania, if they were given decisional authority; and, second, when it came to the Supreme Court, they just dismissed it out of hand. And when you couldn't have Special Masters, the Administrator had a commitment from Judge Hewitt, that Judge Hewitt would call him and would discuss these matters with him.

Instead of that, Judge Hewitt called him one day and said, "My order is being entered today. I'm sorry, but I've got to enter it, so that the people can appeal, and I'm sending you my order." And the Administrator wrote to him, saying, "In view of that, we simply can't handle it in the courts of Pennsylvania."

And that's the whole story, Your Honors.

I suggest that the district court acted without precedent, it acted unwisely, it acted unnecessarily. Its own opinion shows that an administrative tribunal would have done -- and if I were the judge, what I would simply have said is: Assuming I was correct in the substance, that it's up to the Commonwealth of Pennsylvania to provide the hearings; and, if it doesn't, I would give what the results would have been.

I submit to Your Honors that, at least in this

respect, the order must be reversed.

Thank you.

QUESTION: Well, Mr. Segal, are you urging that the district court was wrong in saying that the procedures afforded were inadequate?

MR. SEGAL: I don't think it was -- Mr. Justice White, --

QUESTION: I mean as to the declaratory judgment aspect of the case. Was its due process holding wrong, or what?

MR. SEGAL: Well, it happens I think it's wrong, but I'm not arguing that point. But I say if it were right, Mr. Justice White, --

QUESTION: Well, I understand that, but what is your position -- what is the Supreme Court's position on the due process point?

MR. SEGAL: Well, I would hesitate to talk about that. I could only give my position, because it is a court, and it may come up to it in some other form.

QUESTION: Oh. Well, then, thank you.

MR. SEGAL: My own position, Mr. Justice White, is very clearly that the --

QUESTION: Oh, I understand. I think I understand it.

MR. SEGAL: Well, thank you.

MR. CHIEF JUSTICE BURGER: Mr. Ferleger.

ORAL ARGUMENT OF DAVID FERLEGER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. FERLEGER: Mr. Chief Justice, and may it please the Court:

The general issue in this case of whether the State may, upon parental application, institutionalize involuntarily and indeterminately juveniles in mental institutions is a very great one. And I think that the importance in implications of any ruling in this matter demand that the Court be aware of what is not before it, and how narrow the issues in this case actually are.

This case does not involve the issue of whether private facilities, which are truly private, even if they are mental health facilities, must have hearings before a child is committed.

Pennsylvania law, cited at page 5, footnote 1, of my opinion, makes it clear that under Pennsylvania law private facilities are required to use the provisions of the statutes that are involved here.

This case is unlike the Jackson vs. Metropolitan Electric case, where all you had was a general State regulation and no action by the State regarding requirements for hearings before electricity terminations.

This case does also not involve the standard of

commitment, whether you have to be dangerous or merely mentally ill to be committed. The Court made that very clear at footnote 4 of its opinion.

The case does not involve the self-incrimination issue. Can a potential mental patient be forced to testify against him or herself?

QUESTION: Mr. Ferleger, let me just interrupt a second. You say it does not involve the private placement question. But if, as you say, they are required by State law to follow the procedure which you say is inadequate, would they not be acting under color of State law in accepting a child?

MR. FERLEGER: Well, yes, --

QUESTION: Therefore, are we not necessarily -- if we decide it one way or the other, necessarily deciding the private question as well?

MR. FERLEGER: With regard to Pennsylvania as -- well, I do agree that private facilities in Pennsylvania are acting under color of State law. There are other States, though, --

QUESTION: So we are deciding that question in Pennsylvania in this case?

MR. FERLEGER: That's correct. There are other States, however, in which private institutions function just as any mental hospital -- any general hospital that is public --

that's private.

So that in some States private institutions, an affirmance in this case wouldnot affect those States at all.

QUESTION: When you say you agree that they are acting under color of State law, actually you contend that they are acting under color of State law, don't you? I mean, you wanted them embraced in the decree --

MR. FERLEGER: That's correct.

QUESTION: -- and the district court did.

MR. FERLEGER: Your Honor, the facilities that are covered by the Pennsylvania Mental Health statute, the word "facility" itself is defined in the Act as including private as well as public facilities. No person can enter any hospital, mental hospital in Pennsylvania except under the statutes that are challenged in this case.

QUESTION: And you contend that makes the action of the private facilities, when they follow the State law, State action?

MR. FERLGER: That is correct.

QUESTION: Well, I misunderstood. I thought your point simply was that as a matter of State law Pennsylvania requires that private facilities provide the same procedural procedures as do public facilities; and, therefore, any decision in this case respecting public facilities would, as a matter of State law, affect the private facilities in

Pennsylvania. It's not like -- it's not a matter of acting under color of State law, they are just simply bound by State law to behave the same way; isn't that it?

MR. FERLEGER: Mr. Justice Stewart, I would agree. I think that both are alternative grounds that end up with that same result.

QUESTION: But the only way a private organization can hold a person against his will is by virtue of State authority.

MR. FERLEGER: That's correct.

QUESTION: You cannot get out.

MR. FERLEGER: That's correct.

QUESTION: You're restrained by virtue of State law.

QUESTION: Not merely a requirement, but it's a protection for the private institution from a suit for false imprisonment or something like that.

MR. FERLGER: Yes.

Another issue that I submit is not involved in this case is whether a judicial hearing, as opposed to administrative hearing, is required. The lower court, contrary to Mr. Segal's suggestion, never reached that issue. The complaint which was filed four years ago, before the blossoming of mental health cases in the lower courts, did not request a judicial hearing, and the entire issue which is, in part, an equal protection issue, of whether a judicial hearing is

required as opposed to an administrative hearing was not specifically decided by the lower court.

Another issue that is not --

QUESTION: Well, again, it is decided until the Legislature acts. Paragraph 11 of the order says they've got to use the State court system.

MR. FERLEGER: That's correct. But that result, Mr. Justice Stevens, and it was discussed in the earlier argument, is one that was inevitable by the declaratory judgment that the lower court entered.

Once the declaratory judgment entered, the children could not be placed upon parental application. The only way that a child could get into a mental hospital involuntarily, except in an emergency, would be through a court action. The State courts, through the declaratory judgment, would have been holding all these hearings for new commitments, in any case. There was no additional burden that was placed upon the State courts once the declaratory judgment entered, and parents could not longer apply and have the State accept their children, the State courts would have been holding all these hearings for children in any case; and under Pennsylvania law, children would have had notice --

QUESTION: Well, the Legislature might provide a different hearing scheme.

MR. FERLEGER: That's correct. That's correct.

QUESTION: Or could there be a hearing scheme in -- just without legislation? Beside the courts?

MR. FERLEGER: There could not have been a hearing scheme, in my opinion, without legislation.

QUESTION: You mean, a mental health facility in Pennsylvania couldn't, itself, in responding to a judgment of a district court, institute an administrative hearing on its own, that would satisfy due process?

MR. FERLEGER: That would satisfy the opinion in this case?

QUESTION: Yes, except for the paragraph that -- except for the order that you hold it in the courts.

MR. FERLEGER: In my opinion, not, because with the declaratory judgment, the only provisions left for admission to mental hospitals were those under the statute and the regulations, and the Pennsylvania law is clear that otherwise any mental facility cannot admit anyone.

QUESTION: Well, that would have met with your original prayer, though.

MR. FERLEGER: Excuse me?

QUESTION: With your original prayer, that's all you asked for.

MR. FERLEGER: That's correct. But that issue is not presented by the briefs, or the facts in this case.

QUESTION: You agree with the State of Pennsylvania

that Referees could not be appointed by the State courts to perform the function mandated by their federal court?

MR. FERLEGER: The State courts could certainly appoint Masters or Referees to hold hearings. As a matter of fact, in Pennsylvania, under section 406, the court commitment law section of this Act, in 1971, after Dixon vs. Attorney General, it's a Pennsylvania mental health decision, the Supreme Court of Pennsylvania promulgated a specific rule allowing Common Pleas Courts, trial courts in Pennsylvania, to appoint Masters to hold mental health hearings.

When Dixon declared physician-certification commitment provision unconstitutional, there were 14,000 people in Pennsylvania mental hospitals who needed hearings, and who had to get reprocessed.

In this case there are about eight or nine thousand presently committed children who need hearings.

QUESTION: Must they be reprocessed even if they don't want to be reprocessed?

MR. FERLEGER: No. Your Honor, I wanted to reply to that, and to the question you asked Mr. Segal about presence of the person.

The lower court is very clear in its opinion, and repeats a number of times, that they do not expect a hearing, a full hearing to take place every time a child is committed. The lower court is very clear that the only things that cannot

be waived are notice and counsel.

However, a hearing can be waived, the right to cross-examine can be waived, the presence of person can either be waived by the child, if the child knows what he or she is doing, or the court can say -- and it is mentioned specifically in the decision -- that the child is too ill to attend the proceedings.

The children do not have to be taken to each of these hearings.

QUESTION: Well, the idea that anything can be waived is certainly nothing that this district court had to say, that's just generally accepted law, isn't it?

MR. FERLEGER: The generally accepted law, as I understand the law, is that in criminal cases, with the exception of an unruly, disruptive --

QUESTION: So long as it's knowing and expressed, you can waive anything, can't you?

MR. FERLEGER: That's correct.

QUESTION: How does a mentally ill 15-year-old child consummate a valid waiver? You said the lawyer can waive for that child?

MR. FERLEGER: I'll explain. According to the lower court's opinion, the procedure for waiver is this: If the court finds, or the unbiased tribunal finds, that the child is competent to make the waiver, with counsel there, then the

child can make the decision.

However, if the court finds that the child is not able to make the decision, the counsel that's been appointed by the court is permitted to make the waiver.

QUESTION: That might be quite a substantial hearing process, to make just that preliminary determination, might it not?

MR. FERLEGER: It could in some --

QUESTION: Psychiatric testimony?

MR. FERLEGER: It could in some cases, Mr. Chief Justice.

QUESTION: Testimony of the parents.

MR. FERLGER: But those questions are present, Mr. Chief Justice, when an adult is committed, when a 35-year-old severely retarded person is committed, when a husband attempts to commit a wife; those questions of competency to waive counsel or waive other procedural protections are all present in any mental hearing.

QUESTION: Well, do not the psychiatrists indicate that there may be a difference between the traumatic impact on young children, as against other mentally ill or emotionally disturbed people?

MR. FERLEGER: I believe that the record indicates very strongly otherwise, and the briefs of the American Orthopsychiatric Association, the American Psychological

Association, I think also indicate otherwise.

The experience in this kind of process --

QUESTION: By "otherwise", do you mean that there is no traumatic impact --

MR. FERLEGER: No, what I mean is --

QUESTION: -- on a 15-year-old child, to go through a hearing process?

MR. FERLEGER: What I mean is that the trauma is no greater than that on anyone who goes through mental commitment process, and what I mean is that whatever trauma there is, the trauma is less than being placed indeterminately in a mental institution, with no process at all.

QUESTION: May I ask this question? Are you defending the full range of procedural due process prescribed by the district court?

MR. FERLEGER: At this point, Mr. Justice Powell, -- and I was about to get to that -- I am not, because I don't believe that that question is before this Court.

The appellants, in their brief, did not discuss at all whether each and every one of the requirements the lower court required are, in their view, proper. The lower court's decision on whether parents have that power to commit kids without a hearing, --

QUESTION: If that is not before us, what do you perceive to be the central issue?

MR. FERLEGER: The central issue is whether some kind of hearing, hearing and counsel and notice, those very basic requirements, whether that is necessary before a child can be committed. Whether it's 72 hours or 48 hours or two weeks or a month, that is not before the Court. Whether the specifics of the waiver issue, that is not before the Court. All those issues are not before the Court at this time.

QUESTION: Is paragraph 11 before us, Mr. Ferleger?

MR. FERLEGER: Excuse me?

QUESTION: Paragraph 11, "Until the legislature establishes ... and orders an alternate neutral tribunal ... declared that the present facilities of the Commonwealth court system be used ..." Is that before us?

MR. FERLEGER: Mr. Justice Brennan, I don't believe it is, for a reason that I'll explain.

At page 8a in the appendix to my brief, the letter that Mr. Segal referred to, which --

QUESTION: Give me a minute, will you? We have so many briefs in this case.

MR. FERLEGER: It's a white -- it's the white brief.

QUESTION: Yes. What page again?

MR. FERLEGER: One of the white briefs, Mr. Justice.

QUESTION: Yes.

QUESTION: What page again?

MR. FERLEGER: At page 8a at the Appendix is the letter that Mr. Segal referred to as being from an administrative assistant.

This is part of a correspondence between the district court and the State Court Administrator. There was every attempt to be cooperative, and you'll note that the date of this letter, which begins at page 5a, is October 15th, a month and two days before the final order was entered.

And at page 8a, the Court Administrator told the three-judge federal court: "We are aware that perhaps five thousand hearings or more may have to be conducted within the next several months, and are preparing to shoulder that hearing responsibility with full cooperation to your Honorable Court."

On page 10a, the federal court responded, and in the third paragraph said: "I note that you state in your letter you are preparing to implement our opinion."

Now, the order -- and that paragraph that you referred to, Mr. Justice Brennan, was entered, with no intervening communication from the Pennsylvania courts. Pennsylvania courts had told the federal court --

QUESTION: After this correspondence?

MR. FERLEGER: That's right. After the -- after that correspondence, "We are preparing to implement your opinion", the order was entered, and the, after the order was

entered, the objections came, in a letter that's reproduced later. So --

QUESTION: Well, you've said several things that are not before us, in response to questions from my brothers Brennan and Powell, yet you're asking the Court to affirm the judgment of the district court across the board, are you not?

MR. FERLEGER: We are asking the Court to affirm the judgment across the board, with the caveat that the Court is not deciding the very detailed specifics of due process.

I think that this Court can say that the due process --

QUESTION: Well, how can we affirm the judgment of the district court, which contains detailed specifics of due process, without deciding that those are required by the Constitution?

MR. FERLEGER: Well, I think the reason is that the jurisdictional statement and the issue raised by the appellants in this case was not whether all those specifics apply, but whether the parent-State-child relationship allows a commitment without any kind of hearing at all.

QUESTION: Well, Question II in the Jurisdictional Statement is: whether or not the retroactive injunctive relief granted by the lower court is improper.

MR. FERLEGER: But that -- that --

QUESTION: That's a pretty general question.

MR. FERLEGER: I think that if you -- an examination of the arguments that are made with regard to that question are not with regard to the specifics, but with regard to the Preiser v. Rodriguez issue. That question did not involve --

QUESTION: You say that --

MR. FERLEGER: -- all the elements of the --

QUESTION: -- however far this question might reach, it should be interpreted by reading the briefs.

MR. FERLEGER: No, what I'm saying is that the issue that is presented by that question with regard to the retroactivity is only, in my reading of it, with regard to the Preiser v. Rodriguez issue and the retroactivity issue.

QUESTION: Mr. Ferleger, I understand --

QUESTION: Well, do you think the -- excuse me.

QUESTION: Go ahead.

QUESTION: Well, do you think the question is here, as to whether or not the Pennsylvania procedures comport with due process? Do you think that question is here?

MR. FERLEGER: Yes.

QUESTION: Where? In what question?

MR. FERLEGER: The question -- the first question, I believe it is.

QUESTION: The first question is whether parents may waive the constitutional rights of juveniles.

MR. FERLEGER: That's right.

QUESTION: But isn't it necessary, in answering that question, to decide what the constitutional rights of juveniles are?

MR. FERLEGER: Yes, but I think it is not necessary --maybe this will clarify it -- to go further than saying that a juvenile is entitled to some kind of hearing, and not -- I don't think it's necessary to go into everything that the hearing involves.

QUESTION: Well, then, I don't see how you can affirm the district court.

MR. FERLEGER: Well, one alternative would be to simply -- I think that this Court can state that the district court's requirements are a hearing, that it would be permissible under the Constitution without deciding whether or not the hourly requirements and the days and presence --

QUESTION: But the district court had no business imposing its standards on the State of Pennsylvania, unless they were mandated by the Constitution. It isn't just a question of discretion or reasonable choice.

MR. FERLEGER: Well, our position is, of course, that those are mandated by the Constitution. What I was explaining is --

QUESTION: And we would have to so hold, if we affirmed the judgment. Would we not?

MR. FERLEGER: I am not certain of that. I think that the Court can make it clear that, as in Jackson vs. Indiana, where the Court said that you can't commit the deaf-mute, retarded person for some indeterminate term until he becomes competent; the Court specifically said that no specific time requirements would be imposed.

QUESTION: But there we were reversing a judgment that said there were no requirements. That's different than affirming a judgment which says there are a number of requirements.

MR. FERLEGER: I see that there is a difference.

QUESTION: Well, what are you going to say, they have supervisory power over the courts of Pennsylvania, or something?

MR. FERLEGER: No, I don't. I don't believe --

QUESTION: Well, where do we get the authority?

MR. FERLEGER: The authority in the paragraph Mr. Justice Brennan referred to, to say that the courts should hold the hearings until the Legislature acts?

QUESTION: Yes. Yes.

MR. FERLEGER: I don't think that that issue is before the Court. If the issue --

QUESTION: Was it in the judgment?

MR. FERLEGER: If the --

QUESTION: Was it in the judgment?

MR. FERLEGER: Yes.

QUESTION: And is the judgment here?

MR. FERLEGER: Yes, the judgment is here.

QUESTION: For review?

MR. FERLEGER: Yes. But that was an issue --

QUESTION: But we can't review it?

MR. FERLEGER: That was an issue not decided by the lower court, because the lower court, at the time that that provision was entered, understood that the State courts were going to hold the hearings. And there was no issue or controversy about that.

QUESTION: Well, why didn't they say that? They didn't say that.

MR. FERLEGER: That's not in the opinion.

QUESTION: That's right. And it's not before us.

QUESTION: If we affirm this judgment, the State of Pennsylvania must do everything that is stipulated in the judgment, and the only way that I see of avoiding that would be to affirm it in part and strike down parts of it. Do you disagree with that?

MR. FERLEGER: I think that the Court could strike down or at least vacate for reconsideration certain parts of it, certainly.

QUESTION: But if the judgment below is attacked only on one or two points, this Court has no authority to vacate

any other parts of the judgment, I don't suppose. I mean, we're entitled to adjudicate only the questions that are raised here, aren't we?

MR. FERLEGER: I think that the question with regard to the commitment issue that -- procedures of commitment, the question raised by the jurisdictional statement is whether parents can give up children's rights; and in this case what we are asking for is what this Court has upheld in mental health cases since 1917, and what every court has upheld that has considered it, which is the basic right to a chance to tell your side of the story before you're put into a mental hospital.

And it's our position that the rights that the State grants parents to apply for institutionalization, and it's always the State facility that makes the decision about institutionalization, the parents cannot put any child into an institution unless the facility says they will accept the child; those rights cannot be upheld where a child is incarcerated for an indeterminate time, in the situation which is potentially very dangerous, and where there is great stigma and effect, adverse effect, on the child.

That involuntary, indeterminate kind of institutionalization, we feel brings this case within the Gault line of cases, as well as the mental health cases that this Court has decided. And we feel, further, that parents cannot be granted

the absolute right to make that decision.

As in the Danforth case, we submit that the rights of the parents, whatever those constitutional rights may be, cannot be such as to deprive the child of liberty in that kind of way. Those parental rights, whatever they may be, do not outweigh the child's right to counsel and a chance to tell his or her side of the story.

QUESTION: Mr. Ferleger, would you address the argument that one of the briefs makes, that the procedures that are specified will create an additional stigma to the institutionalization that does not now necessarily exist; and they are, to that extent, counterproductive?

MR. FERLEGER: Yes. One of our expert witnesses, Mr. Justice Stevens, said that he has never seen that having an attorney or a hearing adds to the stigma. What it stigmatizes, he said, is the fact of being a mental patient, the fact of being in a hospital.

There is, because of the admissions process, a declaration that you're mentally disabled, whether you go in by your parents or whether you go in through the court. The hospital still has to agree you're in need of mental care, in order to accept you.

So we feel that the stigma is the same.

The effects, as many ex-patients know, are the same, as well.

QUESTION: Did that expert say anything about the trauma of a 14-year-old --

MR. FERLEGER: Yes.

QUESTION: -- or a 13-year-old going through contested hearing of this kind?

MR. FERLEGER: Yes. The opinion of the experts was that, in fact, as the Court noted in Gault, the trauma -- excuse me, the hearing process can be very therapeutic; to whatever extent it is traumatic, it is no more traumatic than it is for adults who have the hearing, and whatever trauma there is is insignificant compared to the trauma of being locked up in a hospital with no chance to have some fair procedure to determine that.

QUESTION: Mr. Ferleger, assuming we reach the issue of what process is due, what do you think of the suggestion that an independent board of psychiatrists would be appropriate to make the independent decision which you suggest is necessary?

MR. FERLEGER: I think that an independent tribunal of some sort -- it's my own personal opinion -- might be appropriate and might withstand constitutional scrutiny if this Court should ever be faced with that issue.

I am not certain whether I agree that the board should be composed simply of psychiatrists. The courts have made it very clear that a deprivation of liberty in the mental

health area is not a medical decision, and is not the kind of thing that should be left simply to the medical profession.

QUESTION: You are not insisting on a judicial decision maker, are you?

MR. FERLEGER: My own feeling is that the Constitution, if it was ever presented, ought to require and would require such a hearing. But I am not --

QUESTION: Would or would not? Did you say would or would not?

MR. FERLEGER: Would. But I am not aware of any decision that has faced that question. Every other mental health decision in the country, in the federal courts as well as the State courts, requires a judicial hearing. There is the Saville vs. Treadway case in Tennessee, which, in some cases, allows an administrative process, following, I think, by appeal to a court.

Judge Gibbons, one of the members of the panel in one hearing in this case, raised as a possibility a tribunal that was administrative, followed by court appeal.

QUESTION: What's the authority of the United States Circuit or a district judge to get into that kind of specificity, as distinguished from saying the procedure you have is bad because it violates the Constitution?

MR. FERLEGER: Yes. I think that the courts have the power to specify some --

QUESTION: The federal courts?

MR. FERLEGER: Yes. -- some limits to the powers of the States in this regard. I think that the federal courts can say -- and there are some extreme ranges, of course -- can say that one year in a mental hospital without a hearing is not proper. I think the courts --

QUESTION: Well, they can't say it's not proper. They have to decide whether or not it violates the Constitution of the United States, or --

MR. FERLEGER: That's what I meant to say.

QUESTION: -- federal law.

MR. FERLEGER: That's what I meant.

And in order to set out the limits of the due process rights, I think the courts can order counsel, I think the courts can order certain kinds of notice. I think the courts can adopt, for example, the 72-hour provision in this case is consistent with the American Bar Association's provisions, it's consistent with the Juvenile Court laws in Pennsylvania, it's consistent with --

QUESTION: But none of those are constitutional standards, per se, are they?

MR. FERLEGER: No, they're not.

QUESTION: They are merely auditory suggestions by people who are interested in the subject matter, are they not?

MR. FERLEGER: That's correct. In --

QUESTION: But do you regard the opinion of the district court as requiring an attorney in every case?

MR. FERLEGER: Yes. The two things --

QUESTION: Have a constitutional requirement?

MR. FERLEGER: Yes. And notice and a hearing, and I think that those are the issues that this Court should reach.

It may be that, as in Gerstein vs. Pugh, this Court may choose to say that that the very detailed specifics, either were not properly considered or should be left to the States to experiment, in the wisdom of the States. And simply require the probable cause and the hearing and the counsel.

QUESTION: Well, do the States need the benediction of a federal court in order to engage in experimentation?

MR. FERLEGER: Not at all.

QUESTION: I suppose a court might observe -- a federal court might observe that that's the system of federalism, but they have no authority to tell them to experiment, have they?

MR. FERLEGER: Certainly not, Mr. Chief Justice.

QUESTION: May I ask you two questions before you sit down?

First, would you comment briefly on the argument that imposing the attorney requirement, particularly in the private sector, adds a significant element of cost, and the whole

business is so expense already that it may actually deter the number of children who need care who will actually be placed.

And, secondly, would you comment on the suggestion that the proper disposition now is to remand for consideration, in light of the new statute?

MR. FERLEGER: Certainly, Mr. Justice Stevens.

The final prehearing order in this case contains tables regarding the number of people committed to hospitals. The pages are a little obscure, but at 314 through 316 of the Appendix, indicates that the numbers of people committed each year to State institutions, which are those that are listed here, are not all that great on a yearly basis.

The number of people now in hospitals is very large. But the number of people who come in is not so great, in my opinion, that the cost of providing counsel or a hearing provides too great an administrative burden.

QUESTION: I'm not talking only about the cost in the public facilities, but the private as well. Do those figures relate to that? That's really probably not part of the record, is it?

MR. FERLEGER: Those figures don't discuss the number of people that came in, into the private facilities.

QUESTION: One of the arguments was that this -- inevitably the private placements will be governed by this, and the costs of the private placement will be affected by the

need to hire counsel in every case.

MR. FERLEGER: Well, it will be a public cost, the counsel for the child. Whether the --

QUESTION: Even if the parents are not indigent? Will it?

MR. FERLEGER: The court did not address that issue. Pennsylvania --

QUESTION: As I see it, the court is absolutely required, non-waivably, that counsel be provided, but that's going to be provided at the cost of the parents, unless they are indigent, isn't it?

MR. FERLEGER: Well, not necessarily for --

QUESTION: Well, why not?

MR. FERLEGER: For this reason: it is not clear that the law would require that parents pay for counsel for a child, in any of these cases, --

QUESTION: Well, he has to pay for his meals and his shelter, that's as a matter of State law, isn't it?

MR. FERLEGER: They do, but the question about whether counsel for a child in a possibly adverse situation should be paid by the parents is not clear. And also --

QUESTION: Well, that's the basis of it, isn't it? There may be an adversary relationship between child and parent in relation to a commitment.

MR. FERLEGER: Correct. Another --

QUESTION: Therefore the child should have independent counsel.

MR. FERLEGER: That's correct.

In Pennsylvania, and I believe, although I'm not certain, under the Legal Services --

QUESTION: It serves the needs of the child, and this Court held that it was a constitutional need of a child; then, I suppose, as a matter of State law, that the parents would be required to pay for the child's needs, wouldn't he? Wouldn't the father and mother?

MR. FERLEGER: I do not believe that that is expressed at all in Pennsylvania law. Also, Pennsylvania law specifically states that people in commitment proceedings shall be represented by public defenders, without specifying child or adult, and without defining the standards for indigency.

QUESTION: Public defenders generally are only available to the indigent, aren't they?

MR. FERLEGER: Yes.

QUESTION: Do you not see any risk at all that an overdose of due process might be just as dangerous as an overdose of insulin shock treatment on a mental patient?

MR. FERLEGER: Not when the due process involves procedures that go to the very essence of the fact-finding procedure. This Court has required that when facts need to be

found, as they do in the mental health area, that some due process needs to be required.

I do not see that a procedure that assures that people are not erroneously committed or committed when they could be in community care, I don't see that that procedure can harm someone in the way that an overdose of insulin shock can.

QUESTION: But, in any of these cases, did the court find that anybody had been wrongfully committed?

MR. FERLEGER: The court -- I'll answer your question, and then conclude. The court discussed in the opinion a number of cases where children were committed for simply running away from home, for colitis, for weight loss, for all kinds of physical problems, and where children were committed for stealing, for setting fires, those kinds of things, which require a fact-finding process; that they --

QUESTION: Those were hypothetical cases, were they not?

MR. FERLEGER: No. No.

QUESTION: No, but were they findings on evidence relating to particular members of this class?

MR. FERLEGER: They were findings on evidence that was submitted in response to interrogatories regarding the reasons for commitment of particular individuals. Those reasons, as stated by the hospitals themselves.

And the issue of whether -- did this child run away? Did this child set the fire? Did this child act in the crazy way that he's accused of? Is this retarded person going to benefit from being in an institution?

Those are questions that you need some forum to decide, not simply --

QUESTION: Were these named plaintiffs that you're describing, having been committed for runningaway or colitis?

MR. FERLEGER: The named plaintiffs, their facts are discussed in the brief -- one of the named plaintiffs' parents are divorced, her father in Florida, her mother in Pennsylvania. When she's with her father, she does fine, never in a mental hospital, never any behavioral problems; when she's with her mother, she gets into fights with her mother, and gets put into a hospital.

QUESTION: And the district court found that that should not have happened?

MR. FERLEGER: The district court did not discuss whether that should have happened or not. The district court noted that those were facts that should have been prevented in some kind of hearing for her.

QUESTION: Mr. Ferleger, you haven't had a chance to answer my second question.

MR. FERLEGER: I realize that.

QUESTION: Yes.

MR. FERLEGER: Can you repeat the question? I have trouble remembering --

[Laughter.]

QUESTION: The question is: What is your reaction to the suggestion that in view of the new statute, there be a remand?

MR. FERLEGER: Yes. I don't believe that the new statute is before this Court at all. The only statute that is before the Court is the Mental Health and Mental Retardation Act of 1966. The majority, the substantial portion of the class that is still in mental hospitals as of today are covered under that statute, the new statute is not at all before this Court.

This is unlike the Sauri vs. Steinberg?, where the major revisions in the law that affected the entire class. I don't think this Court needs to decide or discuss in any way the new statute, because the members of the class whom I represent are before the Court only with regard to the statute with regard to which we filed our complaint.

Thank you.

MR. CHIEF JUSTICE BURGER: Does the State have anything further?

You have about four minutes left.

REBUTTAL ARGUMENT OF NORMAN J. WATKINS, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WATKINS: Thank you, Mr. Chief Justice.

QUESTION: Mr. Watkins, may I just ask: the questions presented in your Jurisdictional Statement at page 9 don't seem to be the same questions presented in your brief at page 16.

MR. WATKINS: That's correct, Mr. Justice Brennan. However, I believe that the question covered, stated in the Jurisdictional Statement are sufficiently broad to cover the statements as they are framed in the brief on the merits.

QUESTION: You mean all three in the Jurisdictional Statement are suborned in the two at page 16 of your brief?

MR. WATKINS: Yes, Mr. Chief Justice -- or Mr. Justice Brennan.

QUESTION: I must say, I have a little trouble reading them that way.

QUESTION: Also, as I read your brief, you do not attack the prospective -- assuming that some hearing is necessary, assuming that he Pennsylvania procedures do not satisfy due process, I don't see anything in your brief that really attacks individually -- the prospective relief.

MR. WATKINS: I did not go to each of the elements in the order.

QUESTION: Well, your attack on the injunction, once

you get past the declaratory aspect of it, is only with respect to retrospective impact?

MR. WATKINS: That's correct, Mr. Justice White.

However, I agree with Mr. Justice Rehnquist that in this case, particularly, it's extremely difficult to separate the elements that were --

QUESTION: Well, I know, but your only point on the retroactive is that it violates the Eleventh Amendment, or that it's barred by Preiser.

MR. WATKINS: That's correct.

QUESTION: You don't say that the Court misread due process.

MR. WATKINS: Not with respect to the retroactive application.

QUESTION: I mean the individual, the individual -- or prospective, the prospective relief.

MR. WATKINS: Yes. It's our contention, I think the brief makes this entirely clear, that the present system in Pennsylvania meets the requirements.

QUESTION: I understand that.

MR. WATKINS: Therefore, I would -- as a necessary corollary to that position, anything over and above that must be erroneous.

QUESTION: Every item is erroneous.

MR. WATKINS: Anything over and above that is

erroneous, as a matter of constitutional law.

I would like to address the question of reasons for placement. This has been discussed in the briefs, and I discussed it a little more pointedly in my Reply Brief. There is no doubt that the administrators of these institutions, unfortunately for the litigators, filed documents which said "reasons for placement", and then had a cursory statement, truancy, or what-have-you.

But what the district court ignored, and what the plaintiff didn't bring to your attention just now is that in the most complete part of the record there are also medical diagnoses of the patients. Those were ignored in the opinion.

These diagnoses, and I don't purport to be able to analyze them, I think are clearly relevant to whether or not the child needed the care that was ultimately ordered. And I would just urge that the record most completely is reflected in the ten patient summaries, where you have, not only the quote "reason for placement", which is, for example, if I have a stomach-ache, and go to the doctor and the doctor ultimately ends up removing my gall bladder, obviously it's going to show in my admission note that I came in for a stomach-ache.

But it's not fair to conclude that surgery was performed on me for a stomach-ache. It was performed on me

because I had an infected, or what-have-you, gall bladder. Which would show up in the medical records.

Secondly, I agree with the Chief Justice, that an overdose of due process can be very dangerous, in fact it's lethal to one very valuable program in Pennsylvania, that's the program of respite care. This order entirely forecloses that program.

QUESTION: Program of what?

MR. WATKINS: Respite care.

QUESTION: Respite, yes.

MR. WATKINS: And that allows a parent of a severely retarded juvenile to place his clind in an institution for, say, four or five weeks a year, to allow the parent the necessary respite to go on. The ironic effect of this is going to possibly be total commitment of that juvenile, rather than the partial commitment that had heretofore been the case.

I would also like to address the point that Pennsylvania, the present rules in Pennsylvania allow for a Master. It's quite true that they do allow for a Master, but that Master, as I understand the rule, would have no decisional authority; and therefore, under this Court's order, a judge would have to be involved.

The experts in this case --

MR. CHIEF JUSTICE BURGER: Your time has expired now.

MR. WATKINS: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:46 o'clock, a.m., the case in the above-entitled matter was submitted.]

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