ORIGINAL

In the

Supreme Court of the United States

SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL.,	)	
Appellants,	)	
v.	)	No. 77-1715
INSTITUTIONALIZED JUVENILES IN PENNSYLVANIA INSTITUTIONS FOR THE MENTALLY ILL AND MENTALLY RETARDED, ET AL.,	)	
Appellees.	)	

Washington, D. C.
October 10, 1978

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Washington, D. C.
Tuesday, October 10, 1978

The above-entitled matter came on for argument at 11:11 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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, Pa. Department of Justice, Capitol Annex, Harrisburg, Pennsylvania 17120, on behalf of the Appellants.

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

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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 No. 77-1715, Secretary of Public Welfare of Pennsylvania against Institutionalized Juveniles.

Mr. Watkins, you may proceed.

ORAL ARGUMENT OF NORMAN J. WATKINS, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This is an appeal from a three-judge court determination that two of Pennsylvania's statutes, which provide that parents may voluntarily admit their children to mental health or mental retardation treatment in Pennsylvania facilities, are unconstitutional.

The statutes involved are, first, a 1966 Act that provides that parents of a mentally retarded child, under the age of eighteen, may apply for voluntary admission of that child for treatment. Upon acceptance and a determination that the child is, in fact, in need of mental retardation therapy, the child may then be admitted upon the application of the child.

The 1976 Act provides that parents of a mentally ill child, under the age of fourteen, upon the application of the parent and upon the determination of a psychiatrist or a physician of the need for treatment, may consent to the

voluntary treatment of that child.

Furthermore, under the 1966 Act, Pennsylvania promulgated regulations that require -- and this deals with the mentally retarded again -- that require not one, but two, independent medical determinations that the child is, in fact, retarded and requires the treatment which has been recommended.

The Plaintiffs in this case, and there are twelve of them nine of whom are mentally ill and three mentally retarded, all were admitted upon application of their parent or guardian or one standing in loco parentis. Eight were, in fact, admitted by their kparents and four were admitted by child care agencies, inasmuch as they were, for one reasons or another, wards of the state.

Each of these children -- and this is typical -- have had -- and the record shows this -- a minimum of three independent medical evaluations, indicating the need for the treatment which they were receiving. Furthermore, not one of these Appellees nor any members of the class involved -- strike that -- not one of these Appellees sought to terminate that treatment by way of any of the existing court procedures of which they may avail themselves from moment one after the admission.

Furthermore, as we stand here, some of the Appellees remain in the treatment setting and there are no proceedings

under way in state court to terminate that treatment. Nevertheless, the Plaintiffs brought this challenge primarily and exclusively on the Due Process Clause, asserting that prior to the effectuation of the admission the children had a right to counsel and the full panoply of due process.

The lower court, agreeing with the Plaintiffs, ordered essentially two hearings. First, what was called the probable cause hearing at which it would be determined if, in fact, there was probable cause in the courts or the tribunals of view to believe that the child was mentally ill or retarded and whether or not the medically recommended treatment was, in fact, advisable. Within two weeks of that hearing, assuming affirmative findings on both counts, the tribunal would convene a full adversary proceeding at which the findings required are whether, in fact, the child is mentally ill or retarded and whether, in fact, the treatment which has been medically recommended is approved by the court or tribunal.

QUESTION: You say or a tribunal. What is the alternative to a court?

MR. WATKINS: Well, initially,-- this case has been here before. Initially, the lower court required judicial hearings. This order was slightly amended to allow the state to provide an independent neutral tribunal. However, it should be noted that this tribunal must have the

authority to protect the child's rights which are specified rights to cross-examination, to present testimony and furthermore to approve a waiver of this significant constitutional right which the child has been given by the lower court's order.

QUESTION: Has the Pennsylvania Legislature created such a tribunal?

MR. WATKINS: Not at this time, Your Honor.

I would suggest, also, that the court's modification as to the tribunal -- and the requirement of counsel -- has been substituted by the requirement for a trained advocate. However, once again, this trained advocate must be able to vouchsafe the child's rights to cross-examine and confront witnesses, present testimony and, in fact, must be able to make the legal determination of whether or not the child should waive his rights to --

QUESTION: What is the source of these supplemental standards? Where did they come from?

MR. WATKINS: The lower court modified the original order that was here.

QUESTION: After the remand.

MR. WATKINS: After the remand. And those are the two significant modifications. However, as I relate in my brief, the practical effect of them is probably not very significant inasmuch as a lawyer and a judge are --

QUESTION: Where is the source of a trained advocate, if not the bar?

MR. WATKINS: As far as I am concerned, it would have to be the bar.

QUESTION: Did the district court --

MR. WATKINS: There was no elucidation on that point.

QUESTION: Normally, in the district court the source is the Fourteenth Amendment of the Constitution of the United States.

MR. WATKINS: Absolutely. The entire order is predicated upon that.

QUESTION: I didn't ask my question clearly enough. By source, I simply meant where is this pool of trained advocates?

MR. WATKINS: None exists presently, Mr. Justice Brennan, other than the bar. And, again, in order to waive this right, which the trained advocate would have the right to do, I would suspect that a lawyer would be required.

There are two threshold questions in this case as in the previous. First is, of course, whether or not these children in this context possess a liberty interest which is cognizable under the Fourteenth Amendment.

It is my position that the lower court in finding such a liberty interest made, essentially, four analytical errors. First, without any evidence whatsoever the lower court

presumed that in this context parents may be presumptively assumed to act contrary to the interest of their children. Moreover, the court presumed, without any evidence bearing this out that --

QUESTION: That doesn't really have anything to do with whether or not there is a deprivation of liberty, does it?

MR. WATKINS: I think to the extent that the lower court relied on this Court's analysis in In Re Gault, it certainly does, because clearly --

QUESTION: A voluntary commitment results in a deprivation of liberty, doesn't it? A voluntary commitment by an adult results in a deprivation of liberty.

MR. WATKINS: A voluntary or involuntary?

QUESTION: Voluntary.

MR. WATKINS: A deprivation of liberty, absolutely, but it is not of constitutional significance because --

QUESTION: But it does result in a deprivation of liberty.

MR. WATKINS: That's correct.

QUESTION: So, therefore, I would think this view of the district court which you are attacking has nothing to do with it, basically, or is irrelevant to the question of whether or not there is a deprivation of liberty.

MR. WATKINS: The point is that the lower court, by

relying on this Court's decision in In Re Gault, I think, this percieved the relationships at stake in this case. For example, the lower court would liken the relationship of a doctor, parent and child to the relationship of prosecutor and defendant. Obviously, when one looks at the relationship between prosecutor and defendant in the criminal context, there is a conflict of interest inherent in that relationship and it should be presented. That is not so in the relationship between a parent and child and between a doctor and patient. And the lower court's presumptions to this effect, on a barren record, should be overturned.

Finally, and it has been discussed at great length in the prior argument, the lower court's order ignores entirely the traditional role of the family in these decisions. Obviously, these are very difficult decisions. Nevertheless, it is just these types of decisions that we entrust to the family and entrust to the family in conjunction with a physician, in a medical context.

QUESTION: None of these things you have been talking about has anything to do with whether or not there is a deprivation of liberty, does it?

MR. WATKINS: I believe it does, Mr. Justice Stewart, in the sense that when a parent acts on behalf of his child he is normally presumed to act in the interest of his child.

QUESTION: Right. And when an adult acts on behalf of himself he is presumed to be acting on behalf of himself, --

MR. WATKINS: That's correct.

QUESTION: -- in his best interest. And when he voluntarily commits himself to a hospital there is a deprivation of liberty. Whatever else there may be, there is that.

MR. WATKINS: That's correct, but inasmuch as it is voluntary, no additional proceeding is required.

QUESTION: In other words, even if you are right in all your submissions on what you have just been telling us, there still remains a deprivation of liberty.

MR. WATKINS: That's correct, as a factual matter. The question which must first be addressed, though, is whether or not as a constitutional matter, when parents act on behalf of their children in this context --

QUESTION: Whether it is the equivalent of a voluntary admission, that's the point, isn't it?

MR. WATKINS: That's correct.

The analysis that we would urge upon this Court is, of course, the Court's analysis that was used in Matthews v. Eldridge, whether or not in Pennsylvania the children have been adequately protected throughout the process. In Pennsylvania, before a child can be admitted upon the application of his parent, there must be at least one, and most times two, medical determinations, independent, indicating

a need for treatment. Moreover, from the moment the admission begins, the child has the right to initiate judicial proceedings to test the validity of the treatment, to test the validity of the decision of the physicians and the parents and to test whether or not the entire procedure was constitutional, if you will.

Every issue that's presented in this case could well have been presented through habeas corpus proceedings in state court.

QUESTION: How does the child initiate that?

MR. WATKINS: The child may initiate that in a number of ways. Obviously, the child can initiate it himself if competent enough to do so and of sufficient maturity. The child may also do so through a friend, through a next friend, through -- it is not institutionalized by way of statute that the child is automatically appointed an advocate. He is --.

QUESTION: Mr. Watkins, has Pennsylvania held that the child may do so over the objection of his parents?

MR. WATKINS: The Pennsylvania law is very clear that any person --

QUESTION: Has the court ever held that he may do so over the objection of his parents?

MR. WATKINS: I am not aware of any decisions on that point, but I think the statute is so clear that it would not --

QUESTION: If the parent can waive all the child's rights, why couldn't the parent waive the right to bring this proceeding?

MR. WATKINS: Because, as I say, in contradistinction to the statute which provides that a parent may apply for admission, the statute, regarding habeas corpus, indicates very clearly that any person who is institutionalized or in a facility may challenge the basis.

QUESTION: Yes, but a child, under ordinary -- quite apart from this particular context or setting -- Generally in Pennsylvania a parent speaks for his child, doesn't he?

MR. WATKINS: That is correct.

QUESTION: Wouldn't that also, presumably, be true in this context?

MR. WATKINS: I would assume that if a child initiates such a proceeding the parent's voice would be given heavy credence by the court, but I don't think --

QUESTION: Can a ten year-old child bring a lawsuit in Pennsylvania in his own name?

MR. WATKINS: Not normally, but he may do so through a next friend.

QUESTION: Through a next friend.

MR. WATKINS: That's correct, or a guardian.

QUESTION: The guardian, in the absence of an order to the contrary, is the parent; isn't that correct?

MR. WATKINS: Normally. However, that need not necessarily be true. A guardian other than the parent can be appointed. That was done in this case, for example.

QUESTION: How would a ten year-old child go about getting a guardian?

MR. WATKINS: Apply to the court, Your Honor.

QUESTION: How would a ten year-old child apply to a court?

MR. WATKINS: In the context of habeas corpus, I assume --

QUESTION: I said, how would a child, ten year-old child go about applying to a court? Wouldn't you first have to know where the court was?

MR. WATKINS: Well, the only thing I can suggest is that they would do so the same way they have done here and that is by happenstance be put in touch with counsel.

QUESTION: The question was asked earlier: How many other cases have you had like this one?

MR. WATKINS: In Pennsylvania? None that I am aware of.

QUESTION: In the world.

MR. WATKINS: None that I am aware of, other than the proceeding one, Mr. Justice Marshall.

QUESTION: All right. I mean a ten year-old child doesn't know about legal proceedings. Does a ten year-old

child know what a writ of habeas corpus is?

MR. WATKINS: That's correct, but I think the point that the proceedings exist is that if, in fact, it is suspected that the child is being treated when he does not need to be treated anyone can initiate the proceedings. It needn't be the child.

QUESTION: But did the child know whether he was being treated properly or not, the ten year-old?

MR. WATKINS: Presumably not, but the point is someone else may, the child's friend, the child's --

QUESTION: Wouldn't most of the child's friends be ten year-olds, and no smarter than he is?

MR. WATKINS: In this case, Your Honor, the child's next friend was a very competent advocate, and I would assume that that situation could exist elsewhere.

QUESTION: Well, how many other cases has that beautiful advocate filed in Pennsylvania?

MR. WATKINS: There is a very active advocacy program in Pennsylvania. I am not certain of the numbers. I am not certain that there are any.

QUESTION: How many cases like this have been filed?

MR. WATKINS: In Pennsylvania courts, I am --

QUESTION: In the world.

MR. WATKINS: In Pennsylvania courts, I know that there have been cases on behalf of juveniles, numbers of them.

QUESTION: How many?

MR. WATKINS: I can't quote you numbers, Mr. Justice Marshall. Admittedly, it is difficult, but just as a child --

QUESTION: Why doesn't the argument hold that when any case comes up here involving incarceration without due process to say you can remedy that by ignorance? You don't want us to establish that principle, do you?

MR. WATKINS: In this case, I would not --

QUESTION: You don't want to say to the state you can put anybody in jail if he allows them to file a writ of habeas corpus?

MR. WATKINS: Absolutely not.

QUESTION: I hope not.

MR. WATKINS: The purposes of that confinement are manifestly different, however, from the confinement in this case. And I should point out that the confinement which has been attacked and adjoined in this case -- the treatment runs the gamut not only from institutions but all the way down to group homes and small family-like settings. So that many of the arguments which may or may not exist, indicating that there need be safeguards against such treatment, really do not apply with respect to this Court's order.

I would also urge that one of the primary reasons that we place importance on these procedures is to minimize the child's admitted interest in not being erroneously

admitted to a mental health or mental retardation facility.

I would suggest that the record in this case, as well as Pennsylvania statutes, indicate very clearly that rigorous safeguards are in place to assure that, in fact, this medical determination of the need for treatment is appropriate and that the admission and the treatment undertaken is appropriate. It is important to note that in Pennsylvania there are required, by law, periodic reviews of the child's treatment program, so that if it turns up that the child no longer needs treatment, by law, the child must be discharged from treatment.

QUESTION: Are all these same procedures equally applicable to adults who have voluntarily committed themselves?

MR. WATKINS: Yes, Mr. Justice Stewart.

QUESTION: Pennsylvania equates the two?

MR. WATKINS: Pennsylvania equates the two with respect to treatment, not with respect to the process for admission, other than equating an act of a parent for the act of a child. That's --

QUESTION: With that exception, it equates -- voluntary commitments are voluntary commitments.

MR. WATKINS: That's correct.

QUESTION: For an adult, they are done on behalf of himself or herself, for a child they are done on behalf

of that child by his or her parent.

MR. WATKINS: That is correct.

QUESTION: Beyond that, they are precisely identical; is that right?

MR. WATKINS: Absolutely.

One of the central arguments to the Plaintiffs' case in this case is that we should mistrust the diagnoses of professionals in the field of psychiatry and in the field of mental retardation.

QUESTION: In Pennsylvania, will the Pennsylvania state institutions take children who need treatment but could be treated at home?

MR. WATKINS: In Pennsylvania, the law with respect to the mentally ill is very specific that they must be provided the least restrictive setting where treatment may be afforded. The law is not that clear with respect to the mentally retarded. That is the older statute. However, it is the policy of --

QUESTION: The parents can't get the state just to warehouse their children?

MR. WATKINS: Absolutely not. Not only because of the legal mandate, but the state has an interest in keeping the rolls of its facilities down. It is expensive to provide treatment, and Pennsylvania, like every other state, has a scarcity of resources. It simply is not easy

to gain access to these facilities.

QUESTION: You make that same statement in your brief, "like every other state." Would it shock you if I said I know of states where there is overflow capacity, unused capacity in state mental institutions, since the advent of the tranquilizer? What's the matter with Pennsylvania?

MR. WATKINS: Pennsylvania, Mr. Justice Blackmun, is making a strong effort at lowering the population of its facilities and has done a great deal toward that. The fact of the matter is that resources are not being placed in institutions, but rather diverted to community resources. It is a long and arduous task, but at present time, with that effort in mind, it simply is very difficult to gain admission to a facility in Pennsylvania.

QUESTION: Well, I am merely saying that I question the accuracy of your statement, because I know states where there is surplus room in state institutions.

MR. WATKINS: I may have taken liberty. I know that it is generally referred to in studies as a common national problem, the overuse and overutilization and understaffing of facilities throughout the country. However, there may be states in far better shape than Pennsylvania in that respect.

The point that I was making is that the lower

court's finding, and central to the Plaintiff's case, I think, is a presumptive mistrust of medical determinations in this area. And I suppose that the mistrust springs, in large part, from the nature of the treatment that often follows a medical determination in this area.

I would suggest, first and foremost, that the evidence in this record does not indicate that any of the medical evaluations and recommendations for treatment were, in fact, erroneous, were, in fact, inadvisable. I would further suggest that the court made no findings to that effect, and I would suggest that if, indeed, it is difficult for psychiatrists and psychologists to make these difficult determinations, it probably would beequally as difficult for lawyers and judges to do so who are completely untrained in the field.

It is this lack of merit for the adversary proceedings that is most troubling. We are going to inject into the diagnostic process a procedure which, at best, is going to prove to probably ratify any unchecked medical opinions that are offered at the trial. And, if not, it is going to prove as a debating ground for professionals in the field, and I question whether or not the tribunal would be qualified to determine the final result accurately.

It is important to note that in Pennsylvania if there is disagreement with respect to the retarded, if there

is disagreement between professionals as to the admission, the admission simply does not take place and may not take place.

QUESTION: Mr. Watkins, I think we were told that in Georgia if the institution determines that the child could better be treated at home, but the parents say, "No, we simply can't take care of the child at home," then the institution would take the child.

Are you telling us that in Pennsylvania in that situation the institution could say no, the parents must take the child back?

MR. WATKINS: With respect to a mentally ill child, yes. The institution must say no. If treatment --

QUESTION: If it says no, then the parents must take the child; is that it?

MR. WATKINS: Provided that the professionals do not determine that that would endanger the child.

QUESTION: Well, the hypothetical in the Georgia case was that the institution said that the child would be better off at home, but the parent refused to have the child at home, saying, "No, too disturbung. We simply could not get on." So the child in that circumstance the institution would take. That is not the case in Pennsylvania?

MR. WATKINS: With respect to the mentally ill, that is true.

QUESTION: How about as to the retarded?

MR. WATKINS: That is not the case, as far as I know. The determination must be made by the institution, independently of any recommendations that come to it, that the child is, in fact, retarded and, in fact, needs the treatment at that facility. So that, absent those findings by the state, there could be no admission.

QUESTION: You were going to describe the situation as to the retarded now. What about that?

MR. WATKINS: In Pennsylvania, the mentally retarded may not be admitted to any state or private facility without two independent determinations that that admission is required. Furthermore, children thirteen years of age and older, under the regulations are provided -- if they object in any way, orally or in writing, to the continuation of the treatment -- they are automatically provided counsel and automatically provided what amounts to an involuntary commitment proceeding. That's for children thirteen and over. Children under thirteen, it is presumed that they cannot competently object, a presumption which, I might add, carries throughout medicine in Pennsylvania. Children under the age of eighteen in Pennsylvania, unless they are married or are pregnant or are seeking pregnancy services, simply may not consent to or withdraw from treatment, absent parental consent. Thus, the program with respect to mental illnesses is very

similar.

QUESTION: Could I ask you a question about the procedure. Maybe it is clear from the record, but -- The individuals who make the determination that the child is in need of care or treatment -- I forget the exact statutory language -- and also the people who make the annual review under the statute, are they full-time staff members or are they some part-time people who are also in private practice?

MR. WATKINS: In both cases, they would be full-time staff.

QUESTION: They would be full-time employees of the state?

MR. WATKINS: There may be exceptions to that, but the statute and regulations require with respect to the retarded that the staff at the facility determine. And, although there are some part-time medical staff at these facilities, there are -- in every facility, there is a body of full-time medical staff.

QUESTION: Do we know how many of those people have to be doctors, M.D.'s?

MR. WATKINS: In the case of the retarded, there has to be a determination by either a physician or a psychologists who is trained in the area of mental retardation. With respect to the mentally ill, it must be a medical determination.

QUESTION: When you say "doctors," do you mean just a doctor, you don't mean a psychiatrist? He just has to be a doctor?

MR. WATKINS: With respect to the mentally retarded, that's correct.

QUESTION: He doesn't have to be more than just a doctor. Could an obstetrician do it?

MR. WATKINS: An obstetrician, presumably, if that physician felt competent to make this medical diagnosis and he was licensed to do so, he could make the diagnosis and it would be -- Unless the medical people in our facility disagreed, that recommendation would be given credence, yes.

QUESTION: Does this judgment that is under review here affect the institutionalization in private facilities?

MR. WATKINS: Absolutely.

QUESTION: Are you making the same argument with respect to them or a different argument?

MR. WATKINS: The same arguments, plus the assertion that I made in my brief that with respect to admissions to private facilities there simply is no state action. State employees are not involved; state employees don't provide the examinations; state employees, in fact, play no part in the admission process and, in fact, the state receives no notice, necessarily, of these admissions. The only contact the state has, with respect to these -- and there are

probably over 350 private facilities involved -- the only contact that it would have is the fact that the legislature has provided the rules under which they are supposed to provide these admissions.

QUESTION: How did the district court deal with that argument on state action?

MR. WATKINS: The district court, in my view, dealt with it incorrectly --

QUESTION: How did it deal with it?

MR. WATKINS: It simply found that because the admissions were obtained pursuant to state law, then the state was involved. I suggest that that is not the test that this Court has set down in cases such as Flagg Brothers and Metropolitan Edison and similar cases.

So that, what we have involved here, so we are entirely clear, are not only the mentally ill but the mentally retarded, and not only state institutions but private as well, and not only institutions but group homes and community based treatment facilities, as well.

Any time any parent seeks in-patient psychiatric or mental retardation habilitation services for his child in Pennsylvania there must be a full panoply of due process unless those procedures are waived.

QUESTION: Was this judgment on remand before or after the Flagg Brothers case? Do you know that case?

MR. WATKINS: I don't know. I can't put the dates together at this particular moment, although it clearly was after Metropolitan Edison. I think the judgment runs afoul of the test in that case as well, or certainly the Court's teachings in that case.

QUESTION: To what extent does the State of Pennsylvania regulate the private institutions? Do they just license them? Do they inspect them?

MR. WATKINS: There may be limited inspection -- none that I am aware of and none that has been brought before the Court -- there is nothing in the record on this. As far as the law provides, it is merely a licensure or approval of the facilities to dispense service.

QUESTION: Does the state regulate staffing?

MR. WATKINS: Absolutely not, Mr.Justice Brennan.

QUESTION: Do they forbid institutionalization in private hospitals unless these procedures are satisfied?

MR. WATKINS: That is the state law. There is no regulatory body to approve each admission or to see that, in fact, it is followed. One presumes that these facilities are following state law. The fact of the matter in Pennsylvania and involved in this case are a number of facilities that bear no relationship whatsoever to what we normally have in mind when we talk about mental institutions, facilities that may, indeed, be private schools, or the like, that have

been, because of some special cadre of professionals that they employ, have been approved by the state to provide these services when necessary.

The fact of the matter is that the lower court's order would require treatment of all of those children as prospective mental patients. I think this clearly is going to be injurious to the children. It is certainly not going to be conducive to the serious undertakings that are taking place in those facilities.

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:

I would like to begin by correcting a number of errors in Mr. Watkins' presentation.

First, the Habeas Corpus statute in Pennsylvania, page 6 of his brief, indicates that the courts have jurisdiction over habeas cases only when the person has been committed by a court, not -- or by a two-doctor medical certificate -- but that statute has been declared unconstitutional.

If a child could get into court under habeas, I believe the statute would require the court to reject that

petition.

Secondly --

QUESTION: Do you mean Pennsylvania doesn't provide habeas relief for confinement, generally?

MR. FERLEGER: The Habeas Corpus statute with regard to mental patients -- at pages 5 and 6 of Mr. Watkins' brief -- and that gives jurisdiction and venue on the several courts of the Commonwealth for petitions, and Sections 1, 2 and 3 indicate that it has to be a place where a court has ordered the commitment.

For the mentally retarded, I want to note that, as Mr. Justice Marshall raised, the state regulations permit the retarded to be committed --

QUESTION: Mr. Ferleger, before you leave the first point, why isn't the language of Subparagraph (a), quoted on page 5, broad enough to cover a child's petition? Subparagraph (b) just talks about the grounds he may allege. I don't think (b) is exclusive.

MR. FERLEGER: No, (b) is not at all exclusive. I was talking about (c), which is the jurisdictional section, Mr. Justice Stevens.

QUESTION: Oh, I see, but the language of (a) would seem to cover any child.

MR. FERLEGER: The language of (a) is more general, but when you get to (c) which is where courts have jurisdiction,

I believe that would exclude juveniles.

QUESTION: If a child was found in an institution and the parents didn't know where the child was and found the child in an institution in Pennsylvania, there is no way the parents could get that child?

MR. FERLEGER: If the parents did not know where the child was?

QUESTION: If they didn't know and then they eventually did find out that the child is in Institution A. Is there no way that the parent could get that child out of there? Is there no procedure in Pennsylvania for that?

MR. FERLEGER: There aren't so far as I know. I think that --

QUESTION: I just don't believe that.

MR. FERLEGER: I think that a parent might be able to file some sort of a mandamus or other --

QUESTION: Some sort of habeas --

MR. FERLEGER: Right.

QUESTION: Mr. Ferleger, I just don't mean to pursue it, but you started your argument on this point and the jurisdiction restrictions in (c) relate to petitions filed under Subsection (b), both of them. I was asking you about one filed under Subsection (a), and there is nothing in (c) to limit the venue or jurisdiction of such a petition.

MR. FERLEGER: I read the separate sections of the

statute as the one section of the Mental Health Law that they are. No jurisdiction is conferred on any court for any kind of voluntary --

QUESTION: You are saying, then, that there is no jurisdiction in any court to bring a proceeding pursuant to Subparagraph (b). That seems highly unlikely.

MR. FERLEGER: So far as I know, and I don't believe there is any --

QUESTION: There is no court that holds that that is the way to read Subsection (a), is there, no decision?

MR. FERLEGER: No, none.

For the mentally retarded the recommendation for commitment can be made by any psychologist, any physician, by any pediatrician, regardless of the knowledge of that person or the needs of the mentally retarded.

For the mentally ill, there is no requirement in the commitment statute that there be any referral, any outside examination, any separate examination by anyone except the institution psychiatrist.

Mr. Watkins is incorrect that the district court or the Plaintiffs have presumed anything about parents, children, the conflicts between parents and children or between institutions and children.

The district court found, as a matter of fact, that conflicts frequently arise with regard to mental

institutionalization of children. The district court found, as a fact, that parents often institutionalize their children for reasons that are unrelated to the needs of those children. The district court also found as a fact that the institutions and their staffs have --

QUESTION: What was the evidence on which the conclusion that many parents warehouse their children -- what was the evidence of that?

MR. FERLEGER: With regard to the mentally retarded after remand, only one expert testified for the Plaintiffs. The Defendants put on absolutely no testimony or evidence regarding the retarded.

QUESTION: And what was that testimony?

MR. FERLEGER: That testimony was that whether or not children find themselves in mental institutions is circumstantial, that parents are subjected to great community pressures.

QUESTION: This was in Pennsylvania?

MR. FERLEGER: Yes.

The expert was familiar with Pennsylvania facilities --

QUESTION: Where did he come from?

MR. FERLEGER: It was Linda Glenn who is the Commissioner of Mental Retardation for the State of Massachusetts.

QUESTION: She came from Massachusetts?

MR. FERLEGER: That's right and she had toured institutions and facilities in Pennsylvania and is familiar with conditions in those facilities.

QUESTION: We are not talking about the conditions in the facilities. We are talking about how the children got there, whether or not they got there improperly; isn't that right?

MR. FERLEGER: That's correct.

QUESTION: How would she know that?

MR. FERLEGER: How would she know?

QUESTION: Yes.

MR. FERLEGER: Linda Glenn is an expert and was stipulated to be an expert on retardation --

QUESTION: You could be an expert on retardation, per se, but how does that give you a basis for an opinion that most or a great many parents do what she said?

MR. FERLEGER: The district court found that parents often institutionalize their children for a variety of reasons. She --

QUESTION: I am going to get the expert first. How does the expert know?

MR. FERLEGER: She knows, I believe, from her experience working with retarded persons, working with families of the retarded and being aware of the need of those

families for assistance. For example, Exhibit 1 of the Defendant, an application for commitment to an institution, lists thirty-one community services and asks whether the parent knew or didn't know that they existed, which ones had been used.

The mother of Gina S. wrote, "I don't know anything about these services." Parents, as well as the children, need some process, some system for dealing with their own emotional conflicts, their own lack of knowledge of alternatives to institutionaliation.

QUESTION: Were those thirty-one services available to children only or children and adults?

MR. FERLEGER: Children and adults both.

QUESTION: Do you suppose adults who voluntarily commit themselves to mental institutions know about all those alternative services available before they do so?

MR. FERLEGER: They may often not know. They have the opportunity, however, to make decisions on their own about their own rights and what rights they want to waive or give up.

QUESTION: Well, children have the opportunity --

MR. FERLEGER: Children do not, in this situation, because there is no one with no conflict of interest to help protect them.

QUESTION: Does Pennsylvania have procedures for

determination that a parent is unfit or incompetent as a parent because of neglect of his child or mistreatment of his child?

MR. FERLEGER: There are neglect and dependency laws in Pennsylvania.

QUESTION: So there are plenty of procedures if there -- to find a parent unfit as a parent and to certify that a parent is unfit. And if that happens somebody else replaces the parent in that parent's place, in loco parentis.

MR. FERLEGER: Yes, that is correct.

In regard to the commitment of children, mentally retarded or mentally ill, it's the feeling of the experts, with regard to both classes, that a process by which the child has an advocate and all the facts and considerations can be aired, that that process, just like the abortion process, perhaps, in Bellotti v. Baird, that process is what is most likely to lead to the best resolution of the problems of the child.

QUESTION: Unlike Bellotti v. Baird, or the other case, we are not dealing here with a parent's veto of a child's wish to have medical treatment, are we?

MR. FERLEGER: We are dealing with the parent's veto of the child's constitutionally protected interest and liberty. And that is why it is similar, in my view, to the Danforth situation.

QUESTION: In Danforth, you had a child who wanted to have medical procedures, and the question was whether the parent could veto it. Here you don't have the child wanting to be admitted to the hospital, do you, and with the parent vetoing it?

MR. FERLEGER: The similarity is that in Danforth what the parent was vetoing was the child's assertion of a constitutional right. In the mental health area --

QUESTION: Which has been recognized in Roe and Doe. Now, is there a constitutional right not to have medical treatment?

MR. FERLEGER: No, but there is a constitutional right to liberty implicated in mental institutionalization, as the court found in O'Connor v. Donaldson.

The constitutional right here is the right to liberty and to be free from the inherent deprivations of liberty in institutionalization.

QUESTION: That is not necessarily just confined to mental institutions, that could be in a hospital where you are placed for treatment of a physical medicine problem; could it not?

MR. FERLEGER: To respond to that, Mr. Justice Rehnquist, I may have some difference with Mr. Cromerty with regard to the coerciveness factor. I don't believe that that is the determinant factor here.

As the district court found, page 1077 in the Appendix to their opinion, what we have here is not only the stigma of mental illness, not only the chance of error, not only the greater potential for long-term loss of liberty, but we also have the conflict or divergence of interest between the parents and the child that is not present when there are other medical treatments going on. We also have the need here to consider a vast variety of non-medical considerations.

QUESTION: Let me interrupt you for a moment. If your critical element is the potential conflict of interest and that's what distinguishes it from physical treatment, why shouldn't the factual inquiry that you have proposed and that the lower court said was required by the Constitution, be limited to the issue of whether or not there is, in fact, a conflict of interest between the parents and the children, rather than these elaborate findings as to whether the child is or is not mentally treatable, and that sort of thing?

MR. FERLEGER: I think that the process ordered by the lower court will result to a large extent in that inquiry because --

QUESTION: But what I am asking you is why shouldn't it be limited to that inquiry, not whether it should result in that inquiry inter alia.

MR. FERLEGER: The full hearing that the lower court

described, the right to confrontation and presence of person unless waived, those rights, even the right to counsel, would not come into play unless the advocate for the child, this independent party who could look at that issue, decided not to waive the hearing, or unless the --

QUESTION: Generally, an advocate doesn't make a decision. An advocate is an advocate and it is a neutral decision-maker who makes a decision.

MR. FERLEGER: In our case, the mutual decision-maker would have to accept or reject the waiver. What the court found is that because of the potentially and the factually found divergences of interest between the parents and the children, you need to put somebody else in the place of the parent for the purpose of deciding that waiver issue.

QUESTION: Why, unless or until you found there is a conflict of interest ---

MR. FERLEGER: The court found out, as a matter of fact, and there is no challenge by the Defendants, that that fact is clearly erroneous.

QUESTION: What fact is clearly erroneous?

MR. FERLEGER: That parents often commit children for reasons unrelated to the needs of the children.

QUESTION: But if a parent does that he is an unfit parent, isn't he?

MR. FERLEGER: Not necessarily. He may be a parent

who is unaware of alternatives. He may be a parent who is pressured by neighbors or community into committing the child.

QUESTION: If a parent is pressured by neighbors or community into beating his child, he is an unfit parent, whatever the motivation comes from, isn't he?

MR. FERLEGER: Not necessarily. I think that there are --

QUESTION: Wouldn't he be removed if you could show to the proper fact-finder in Pennsylvania, the juvenile court, or whatever, that a parent habitually mistreated and beat his child? Wouldn't that be grounds for findinghim a neglectful parent?

MR. FERLEGER: Yes, it would. If the problem was pressures outside, unrelated --

QUESTION: Wherever the pressures came from.

MR. FERLEGER: There might be situations where the parent would need the help, would need the knowledge, would need the assistance of experts in order to deal with those problems.

QUESTION: Isn't there another alternative, that the parent might just be uninformed and confused, not evil in any sense?

MR. FERLEGER: Definitely, Mr. Chief Justice.

What the experts found in our case and what the court

found as a fact is that the process that was mandated can help parents deal with those sorts of issues. The process would not harm treatment for the child. The court found, as a matter of fact, that there would be --

QUESTION: Since there is so much talk about less restrictive measures, aren't there less restrictive measures to inform the parents about these things than holding a full-scale hearing, such as counseling by the state's family guidance counselors?

MR. FERLEGER: The district court does not require that a full hearing be held in any case. The district court says a number of times that they expect that hearings won't be required in most cases, because in many cases there will be agreement between the parent and the child, if the child needs to go into the hospital. In many cases, especially once an advocate gets involved for the child, things will be worked out so that there is no need to insist on a hearing.

QUESTION: What's the advocate's function here, under your theory? Is his function to help the doctors decide what's best -- the doctors and the parents decide what's best for the child -- or is his function to keep the child out of confinement at all costs?

MR. FERLEGER: I don't believe the advocate function is to keep the child out of confinement at all costs.

QUESTION: That's normally the function of an

advocate, isn't it, when he is confronted with a confinement problem?

MR. FERLEGER: That is often the function of an advocate. I don't know if that is --

QUESTION: In criminal prosecution, that's his only function, isn't it?

MR. FERLEGER: Yes. Having represented children and adults in commitment hearings, what you often find is a situation where it is clear that some kind of help needs to be imposed. At that point, I believe the function of the advocate is to try to work out the best --

QUESTION: So, now the advocate is slipping into the position of the medical adviser, isn't he?

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

QUESTION: He is helping to decide, you said.

MR. FERLEGER: The reason is a very important one, that the advocate is not becoming a medical officer. Medical officers are not presumptively mistrusted in my view and in district court's view. In a commitment to a mental hospital, there are important non-medical considerations that have to be taken into account. The recommendation of a psychiatrist, even if accompanied by the kind of detailed report that was required in Specht v. Patterson, does not take care of the social interests, consideration of the school, the community, the child's friends, the child's relatives, all the kind of

background that is non-medical that must be considered, that the Court held must be considered in Gagnon in the parole or probationer revocation.

The doctor can make a recommendation for the medical factors, psychologists, perhaps, for the retarded, because a doctor is not required in retardation because it is not a medical problem, but the doctor cannot make the kinds of social judgments about depriving a person of liberty.

In my view and in the tradition of American law and Pennsylvania law, in particular, commitments to mental hospitals are very different from other kinds of medically recommended treatment.

QUESTION: How long, historically, have there been state mental hospitals?

MR. FERLEGER: The earliest institution, I believe, was built in 1751 in the United States, but there were very few until the mid-1800's. As they came into being, the courts in Pennsylvania, as I indicate in my brief, made it very clear that whether it is commitment to a private or a public institution a guardian does not have that power. In a number of early cases, people who had been appointing guardians of mentally ill or mentally retarded individuals attempted to commit their wards to a mental hospital and the court said, "You cannot do that. The power of a guardian does not extend to confinement in an institution."

QUESTION: I suppose before there were mental hospitals the power of a guardian to lock somebody up in an attic wasn't questioned because that didn't involve any action by the state and, therefore, didn't implicate the Constitution.

MR. FERLEGER: Actually, the first commitment in 1676, which occurred in Pennsylvania, the first commitment in the record that I know of, involved a father petitioning Colonial Court in Pennsylvania for the commitment of his son, and the court ordered that a blockhouse be built and that his son be confined in that blockhouse.

In Pennsylvania, it wasn't until 1966, when the statute challenged in this case was passed that parents had the right to indefinitely commit their children to mental institutions.

QUESTION: Will you say that again.

MR. FERLEGER: Certainly. Not until 1966, when the statute, challenged before and today in this case, was passed, did parents have the power to indefinitely sign their children into mental institutions.

QUESTION: In Pennsylvania.

MR. FERLEGER: In Pennsylvania.

Pennsylvania, from the beginning, treated mental commitment as far different from any other kind --

QUESTION: And prior to 1966, what was the

procedure for the so-called voluntary admission of somebody who had not reached adulthood?

MR. FERLEGER: For the mentally retarded, sworn affidavits were required and there was an application procedure that required doctors to submit something to a magistrate or a judge for the mentally ill, back a while ago. The procedure has changed over the years.

The first hint of the voluntary commitment by parents came in 1961, when the Legislature allowed parents to sign their children in for up to 30 days, after which a court commitment was required. There has always been, in Pennsylvania, a balancing between the individual's interests and the parents' interests, with the parent only getting this awesome power not more than twelve years ago.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock.

(Whereupon, at 12:00 o'clock, the Court recessed to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:02)

MR. CHIEF JUSTICE BURGER: You may continue, Counsel.

ORAL ARGUMENT OF DAVID FERLEGER, ESQ., (Resumed)

ON BEHALF OF THE APPELLEES

MR. FERLEGER: May it please the Court:

I would like to speak to two issues that came up earlier, then refer briefly to several other issues that I believe are important.

First, the general issue in this case is how to protect children, people who are likely to not be able to protect themselves, when their parents may be unable, either by inclination or by information -- or lack of information -- to protect them.

It is my view that the procedures ordered by the lower court are a process for determining whether the parents' interest, the parents' decision, coincides with what the needs of the children are.

So, in effect, we do have a process by which that determination, weeding out the proper decisions by parents from the improper decisions, a process by which that can be done.

QUESTION: You haven't talked yet, Counsel, about whether the net effect, the ultimate effect, of this might

be more damaging to children, to take them through this gauntlet of an adversary proceeding, in which the very procedure itself puts them in opposition to their parents. Of course, with a serious emotional condition, they may already be in that posture. The question is what evidence is there here, if any, in the record about whether that would be a good thing for the children?

MR. FERLEGER: The district court found as a fact, in its opinion at page 1081, 1082 --

QUESTION: What's the evidence? I know what the finding was. I wanted to know what the evidence is to support that finding or whether that is just conjecture on the part of the court.

MR. FERLEGER: It is not conjecture on the part of the court. It is based on the testimony of eight psychiatrists, four for each side, in the first case, and the testimony on the retarded, uncontradicted, of Commissioner Glenn, that a hearing would not be traumatizing, that there would be little trauma, if at all, and if there would be any trauma, of course, the presence at the hearing can be waived, the tribunal can approve a waiver of that presence.

QUESTION: The presence of the child at the hearing.

MR. FERLEGER: That's correct.

QUESTION: But in this context is the child -- What capacity has the child got to evaluate whether he or she

should take part in this affair or should not?

MR. FERLEGER: If the child is able, the decision would be the child's. If the child is unable, within the confines of the cannons of ethics, as Mr. Cromerty? referred to, the waiver would be made by the counsel or advocate with the approval of the tribuna.

The other question, Mr. Chief Justice, you raised earlier on the role of counsel in these hearings. Over the lunch break we read the opinion of the lower court, and the lower court opinion makes it very clear in Footnote 47, page 1079, that the advocate has to protect the child's interests, rather than the all-or-nothing get the child out of the institution. The function of the advocate, according to the lower court, is to advance the child's best interests.

QUESTION: It is the potential for deprivation of liberty that calls into existence the right to have an advocate in the first place; isn't it?

MR. FERLEGER: Yes, it is. The experts indicate -- and I believe the record is clear -- that when you are thinking about institutionalizing someone you end up weighing the risks and the harms that are inherent in every institutionalization, against the potential benefits. And the advocate would have the responsibility for advocating whatever the best interests of the child would be.

QUESTION: Is that all that much different than a

lawyer for a defendant in a criminal case advising the client to plead guilty?

MR. FERLEGER: I think a lawyer in certain criminal cases probably has the obligation to advise the client to plead guilty or not. However, in the criminal area, I think that there is more of an obligation to avoid the criminal sanctions than the lower court put on the advocate here. The responsibilities placed on the advocate here -- I think the fact that the lower court isn't requiring counsel, indicates that it is more of a best interest test, rather than a looking one way advocacy kind of thing.

QUESTION: Now, when you get to this point in this kind of an enterprise, you will have decided that the parents are not to make the decision. That's a given factor here, isn't it, that the parents are not to make this decision unilaterally?

MR. FERLEGER: Not unilaterally.

QUESTION: Having taken the parents out of the decision-making process, then some doctors have presumably advised certain treatment and certain procedures and to go to a hearing -- We are taking them out, at least temporarily, taking them out until it has been subjected to an adversary proceeding or inquiry.

MR. FERLEGER: No, we are not taking the parents out, we are not taking the doctors out. We are bringing them

together.

QUESTION: Their decision isn't going to control. The decision of the parents is out. I don't mean the physical presence, obviously. The parents are not going to be able to decide this. Now, then, the doctors who have been counseling the family, they aren't going to be able to decide it alone. Now, you appoint an advocate and you say the advocate looks the whole situation over and then he decides what's best for the children. Isn't that making the advocate virtually the judge in many aspects?

MR. FERLEGER: The case would be presented to the mutual tribunal, which would have to approve any waiver of the hearing. That could be if everyone agreed, if the child, parents, doctors, advocate all agreed that it was best for the child to be institutionalized there wouldn't be any need for any full kind of hearing at all.

QUESTION: Aren't you giving the advocate here a greater role than you are giving either the parents or the medical adviser?

MR. FERLEGER: No, because the unbiased tribunal has to confirm any waiver of any rights.

QUESTION: Is the unbiased tribunal necessarily a judicial one?

MR. FERLEGER: No, not at all. The lower court made it very clear that it was not determining what sort of

tribunal it has to be, simply neutral and unbiased.

QUESTION: Is there a right of appeal?

MR. FERLEGER: The lower court did not discuss any right of appeal.

QUESTION: What's your opinion as to the constitutional requirement of an appeal?

MR. FERLEGER: The state, when the court asked it to give its views on what kind of hearing would be required, suggests that an administrative hearing, subject to appeal through the administrative and then court process that we have in Pennsylvania.

QUESTION: Do you agree with that?

MR. FERLEGER: I think that would be constitutionally sufficient, yes.

QUESTION: Do you think it would be constitutionally required?

MR. FERLEGER: To have an appeal --

QUESTION: An appeal as well as your initial hearing.

MR. FERLEGER: No, I don't think it would.

Two other points. First, the district court's opinion is very clear, as is its order in the record in the case, that this case only involves commitment to institutions, not to group homes, not to community care. It came up in the May 10, '73, hearing, it came up in our motion for a class

action which said "facilities" means institutions for residential treatment. It came up in the court's order specifying that only evidence relating to institutional confinement was admissible and it is absolutely clear we are only talking about in-patient institutions for residential care.

QUESTION: I take it you do agree that the advocate becomes, in this setting, a very important factor.

MR. FERLEGER: Yes, and I think that the responsibilities of the advocate is spelled out in the district court's opinion, along with the waiver provisions and the neutral tribunal's oversight of the whole process.

QUESTION: Is there anything in these standards to assure that he knows something about the subject?

MR. FERLEGER: Yes, the court requires -- The court says it may be sufficient to appoint a guardian trained in the mental health field who would advocate the child's interests or alternatively have the power to retain a lawyer to do so.

That way, you have the best of both worlds. You have a lawyer available if it is necessary. You have a trained mental health advocate for the situations where you don't need to get lawyers involved.

QUESTION: So the advocate then is a different fellow from this trained mental health person?

MR. FERLEGER: The advocate is the trained mental

health person.

QUESTION: You have lost me. You have just been describing two people. You said a trained mental health person and a lawyer.

MR. FERLEGER: That's right. The court said it may not always be necessary to appoint a lawyer, that it might be sufficient, if the state came up with a procedure, to appoint a guardian, a person trained in the mental health field who could advocate for the child's rights or, alternatively, have the power to make the decision. He would not make the decision on commitment that would be made by the --

QUESTION: The advocate would decide whether or not a lawyer was necessary.

MR. FERLEGER: Yes. The lower court retreated from its earlier position that counsel was required in every case.

It is not correct that three examinations were made for each Plaintiff.

QUESTION: May I ask what folks in the mental health field are trained specially in advocacy?

MR. FERLEGER: The Federal law, under the Developmental Disabilities Act, requires every state to have a protection and advocacy system for the retarded. For the mentally ill, many states, such as New Jersey which filed an amicus brief here, New York has Mental Health Information

Service. There are many legal and non-legal advocacy groups existing in the country,mental health associations, national associations for retarded citizens --

QUESTION: My question really was: How do those in the mental health field get special training in advocacy? Who gives them that?

MR. FERLEGER: I, myself, have participated on faculty -- various continuing education kinds of proceedings to help teach people how to be advocates, in terms of the legal rights of the patients.

QUESTION: Is that widespread, that practice?

MR. FERLEGER: In my view it is. I find myself participating --

QUESTION: What was the basis for the congressional decision to require states to have an advocacy system?

MR. FERLEGER: The basis for that -- and I think there are findings preparatory to the statute --

QUESTION: Are those citations in your brief?

MR. FERLEGER: No, they are not at all. The Developmantal Disabilities Act -- I can't remember the exact section which describes the need for people in institutions to receive proper treatment, the least restrictive treatment and protection of their rights.

QUESTION: Are these just with respect to retarded children who are the wards of the state?

MR. FERLEGER: No. Every retarded person, whether institutionalized or not, in a state. A condition of receiving any Developmental Disability funds, and nearly all states do --

QUESTION: Limited to retarded children?

MR. FERLEGER: Limited to retarded and other developmentally disabled children and adults.

QUESTION: This Federal system wouldn't prevent Pennsylvania from implementing the system that is here under attack.

MR. FERLEGER: No, not at all, but it would permit Pennsylvania to use the so-called P&A system, protection and advocate system, to protect the rights of these children.

QUESTION: Is this person a sort of ombudsman for the retarded?

MR. FERLEGER: It requires, as I understand it, more individual based advocacy. It is not an ombudsman for the whole state, one person. There is a staff, there is a system of using and training volunteers as well as professionals to provide independent legal advocacy. The Federal statute requires that the state mechanism have the means to institute legal action, as well as simply to be an ombudsman.

QUESTION: Mr. Ferleger, before you sit down, just roughly how many of these applications for commitment are there in -- for a year, or something like that? How big a

problem are we talking about administratively?

MR. FERLEGER: In Pennsylvania?

QUESTION: Yes.

MR. FERLEGER: In Pennsylvania, as I recall the record below on the mentally ill, when we had it from zero to eighteen, there were, during the year, three or four hundred commitments in the whole State of Pennsylvania of children from zero to eighteen. Nationally, 60% of commitments of children are children from fifteen to seventeen. So that, we are probably talking about a rate of relatively few commitments. For the retarded, many institutions in Pennsylvania no longer accept new commitments. The institution where Plaintiff George S. is has not accepted any commitment since 1971, except under a court order. As Mr. Watkins indicated, states are retreating more and more from the use of institutions.

QUESTION: I am trying to figure out how many such people would be required to do the -- I assume they probably develop a list of a dozen or so --

MR. FERLEGER: I think that local public defenders and legal services offices, many of which have specialized mental health attorneys, can easily do the job.

QUESTION: What are the states doing with the mentally retarded? What is it, Pennsylvania hasn't accepted any since 1971?

MR. FERLEGER: One institution, the Pennhurst institution, where Plaintiff George S. is confined, as a matter of their own policy, has accepted no voluntary commitments since 1971.

Linda Glenn testified that in Massachusetts --

QUESTION: What is Pennsylvania doing with them, saying, "No, we will not accept them"?

MR. FERLEGER: The issue is what their needs are and Pennsylvania is attempting to provide non-institutional community services. Because the question is not simply if you are mentally ill you go into a hospital. If you are mentally retarded you do. The question is what you need; and is that an institution?

QUESTION: But the state is accepting them for treatment. It is just a question of where they do it.

MR. FERLEGER: That's right. I didn't make that clear enough.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Watkins, you have two minutes left.

REBUTTAL ORAL ARGUMENT OF NORMAN J. WATKINS, ESQ.,
ON BEHALF OF THE APPELLANTS

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

I have but four points to make.

First, in response to two questions, I believe delivered by Mr. Justice White. This Court's opinion in Flagg Brothers was decided May 15th, and the opinion of the lower court was rendered on May 25th.

QUESTION: Do you know whether Flagg Brothers was brought to their attention?

MR. WATKINS: Unfortunately, my brief was filed well before this Court's decision in Flagg Brothers, and I don't recall whether or not my opponent brought it to the Court's attention.

QUESTION: What do you think about Flagg Brothers?

MR. WATKINS: I think Flagg Brothers, with respect to private license facilities, indicates that there is no state action involved.

QUESTION: In this case?

MR. WATKINS: In this case.

QUESTION: Do you think the district court was wrong?

MR. WATKINS: That's correct.

Secondly, I believe, Mr. Justice White, you inquired as to whether or not Pennsylvania inspects these private facilities. Pennsylvania Law requires at 62 P.S. 911 that an inspection be conducted at least annually, as to the conditions in the facility.

The third point I wish to make is a clarification

of a question addressed by Mr. Chief Justice Burger on whether or not any -- what the condition of Commissioner Glenn's testimony or conclusions was with respect to the erroneous admissions of children in Pennsylvania.

The fact of the matter is that not one of the experts that testified in this case examined any of the children involved in this case, and the record reflects this very clearly. For example, I cite 495A of the Appendix, where Dr. Finer candidly admits that he was not familiar with any of the conditions in Pennsylvania. 635A, Dr. Messenger admits that the only thing that he was familiar with at the time of his testimony was that which was provided by counsel dealing with the legal process involved, and, finally 1030A, where Commissioner Glenn indicated that her only familiarity was with the regulations that was provided to her prior to her testimony.

Finally, I would only submit that the coverage of the lower court's order with respect to community based facilities is clearly addressed in my Reply Brief, the green covered brief, and I defer to that.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:19 o'clock, p.m., the case was submitted.)