



MR-TN-003-006

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

VS.

STATE OF TENNESSEE, ET AL.,  
Defendants.

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NO. 92-2062-M1/A

OPINION OF THE COURT

NOVEMBER 22, 1993

*Laconia - 1/31/91*

*class action suit  
to improve service*

*Southbury*

*U.S. Justice Dept. opinion said that  
case at Southbury did not meet  
proctor, standards and called it a  
"very, do your face". See newspaper  
article*

BRENDA PARKER  
OFFICIAL REPORTER  
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1 THE COURT: As each of you knows, I'm usually  
2 accustomed to being very much on time and today I apologize  
3 for being somewhat longer. However, the importance of this  
4 case and the necessity of being comfortable with those  
5 comments that I intend to make to you today require that I  
6 take some additional time. I'm going to go through some  
7 comments in this case and it will take me a little time to  
8 do that. I also want to make it clear and it will be clear  
9 from my written comments that the defendant in this case, of  
10 course, is the State of Tennessee. I point that out because  
11 obviously, sometimes it is necessary for me to make comments  
12 which seem to be directed at individuals. Now, that is  
13 because no institution, whether it is the state or the  
14 federal government, can act through anyone other than those  
15 people who work for that entity. But it is, of course, the  
16 State of Tennessee that has the responsibilities in this  
17 case and it is as to the State of Tennessee and as to the  
18 United States that I direct my comments.

19 I also point out that in this case, the rights of  
20 those individuals who are being litigated are the rights of  
21 individuals whose condition precludes them often from making  
22 their own complaint. Often they are individuals who, while  
23 they enjoy all of the constitutional rights of every citizen  
24 of this country, are because of physical or mental  
25 disability unable to articulate their own claim. While that

1 does not give them special rights, it points out the problem  
2 that each of us must recognize, and that is that often it is  
3 the circumstantial evidence which has great weight in these  
4 cases. We are generally unable to hear from those  
5 individuals who would in many cases be the ones to  
6 articulate the claim.

7 Ladies and gentlemen, it is important that each of  
8 you recognizes that this is a court of law and a nation of  
9 laws, that the settlement of disputes between people through  
10 a lawsuit is a strong and necessary foundation upon which  
11 our civilization rests. It is proper under our system of  
12 justice when there is a dispute between parties regarding  
13 the application of the law that those parties resolve their  
14 case in court. It is the responsibility of the federal  
15 district courts to hear those claims and specifically to  
16 hear those claims arising under the Constitution and laws of  
17 the United States and to render a prompt decision regarding  
18 the application of the law to the facts as established by  
19 the record during the trial.

20 In making that decision, the law requires that the  
21 Court not be influenced by sympathy, bias, prejudice or  
22 passion. This is a case in which there has been much  
23 testimony, much testimony which might be very sympathetic  
24 for one side or the other, but the Court must make its  
25 decision not based on a sympathetic reaction, but on the

1 objective facts as established on the record.

2           Additionally, the Court must consider, of course,  
3 all of the applicable law and not a single principle in  
4 reaching its conclusion. The Court may not disregard a  
5 portion of the law and make its decision only on a single  
6 law, but must regard all of the law and each law in light of  
7 all of the other applicable laws. The United States, in  
8 accordance with the authority granted by the Congress, under  
9 the Civil Rights of Institutionalized Persons Act, which is  
10 sometimes referred to as CRIPA, is the plaintiff in this  
11 case. While the United States appears as a frequent  
12 litigant in federal district courts, it is entitled to no  
13 special consideration and appears before the Court as any  
14 other litigant.

15           The burden placed on the United States is no  
16 different from the burden placed on other litigants before  
17 the Court in similar cases. And if the United States fails  
18 to satisfy any portion of that burden by the standard placed  
19 upon it by the law, it cannot prevail on that claim or  
20 claims.

21           In this case, the State of Tennessee and several  
22 individuals named in their official capacity as employees of  
23 the State of Tennessee are defendants in this case. When a  
24 suit is brought against employees of a state or a county or  
25 other political subdivision in their official capacity, the

1 governmental entity with whom they are employed is, for all  
2 practical purposes, the actual party in the case. The State  
3 of Tennessee, merely because it is a state, is not entitled  
4 to special consideration in this case. Just as the United  
5 States, the State of Tennessee, as with every other  
6 litigant, is entitled to no preferential treatment under the  
7 laws in this case.

8           As I previously noted, the United States has  
9 brought this case pursuant to the Civil Rights of  
10 Institutionalized Persons Act and asserts that the State of  
11 Tennessee in its operation of the Arlington Development  
12 Center has failed to comply with those laws protecting the  
13 civil rights of disabled individuals and has failed to  
14 provide to those individuals educational opportunities as  
15 required under the Individuals with Disabilities Education  
16 Act. The United States more specifically claims that the  
17 defendants have failed to provide adequate food, medical  
18 care, reasonable safety and training, freedom from  
19 unreasonable restraints and adequate psychological and  
20 psychiatric services as required under the Fourteenth  
21 Amendment of the United States Constitution and has failed  
22 to provide Arlington residents under the age of 22 with the  
23 educational services required by IDEA.

24           The State of Tennessee, the governor of the State  
25 of Tennessee, the director of the Department of Mental

1 Health and Mental Retardation and the superintendent of the  
2 Arlington Development Center are the defendants in this  
3 case. All of the individuals named in this case, as I have  
4 indicated, are named in their official capacities.

5           The defendants contend that their operation of the  
6 Arlington Development Center has not fallen so far below the  
7 standard of acceptable care for individuals with mental  
8 retardation as to constitute a violation of those  
9 individuals' civil rights. The defendants further contend  
10 that the educational opportunities provided to the residents  
11 of Arlington Development Center below the age of 22 are in  
12 compliance with the Individuals with Disabilities Education  
13 Act.

14           I will explain to you somewhat the procedure that  
15 the Court goes through in deciding a case of this nature or  
16 for that matter, any case. The Court in this case, and I  
17 refer to the Court, because it sounds funny to say me all  
18 the time, but I have to act as the Court in this case. Now,  
19 when a person acts as the Court or the judge, you no longer  
20 act as an individual. Your individual beliefs or  
21 perceptions are not what govern your conduct, but rather the  
22 laws of the United States and the Constitution of the United  
23 States. The Court also acts in the capacity as a  
24 fact-finder. The Court has to decide what are the true  
25 facts in this case. So when I say the Court, I think it's

1 best for you to understand that I'm not confused about who I  
2 am and who the Court is, but it is important for each of you  
3 to understand that the Court doesn't act like me. The Court  
4 is, in fact, something that is more than just an individual  
5 speaking. The Court in this case is the judge of the facts  
6 concerning the controversy in this lawsuit.

7           The trial of this case began on August the 30th,  
8 1993 with the testimony of Dr. Walter P. Christian, the  
9 first witness presented by the United States. Sixteen  
10 additional witnesses testified live in the courtroom, many  
11 of whom or some of whom were seen by individual members here  
12 and all by the lawyers, and a large number of depositions or  
13 portions of depositions were placed in the record.

14           On September the 10th, 1993, the State of  
15 Tennessee presented its first witness, Mona Reeves-Winfrey,  
16 the superintendent of the Arlington Development Center.  
17 Seven other witnesses testified for the state. The case was  
18 then recessed from September the 17th, 1993 to October 16,  
19 1993, at which time the state resumed its proof with the  
20 testimony of Dr. Alexander Horwitz. The state presented an  
21 additional 11 witnesses, including the testimony of Dr.  
22 Philip Robert Ziring. The United States then presented  
23 three rebuttal witnesses by live testimony, Dr. Christian,  
24 Dr. Victoria Therriault, and Dr. Irene McEwen, all of whom  
25 who had previously testified in the case and also presented

1 by video deposition the testimony of Dr. Susan Hyman. The  
2 parties were allowed to submit post-trial proposed findings  
3 of fact and post-trial memoranda. And the United States  
4 submitted a proposed order in this case.

5 It is now for the Court to determine what the true  
6 facts are in this case and to apply the law to those facts.

7 Now, in order for a fact-finder to determine what  
8 the true facts are, the fact-finder is called upon to weigh  
9 the testimony of every witness who has appeared before it or  
10 whose testimony has been submitted into evidence and to give  
11 the testimony of the witnesses the weight, faith, credit and  
12 value to which the Court determines it is entitled. In  
13 determining which testimony to believe and, where necessary,  
14 which testimony not to believe, the Court considers a number  
15 of factors. The factors that the Court has considered in  
16 determining the credibility or believability of each witness  
17 include the manner and demeanor of the witness while on the  
18 witness stand, whether the witness impressed the Court as  
19 one who was telling the truth or one who was telling a  
20 falsehood and whether or not the witness was a frank  
21 witness. The Court also considered the reasonableness or  
22 unreasonableness of the testimony of the witness, the  
23 opportunity or lack of opportunity of the witness to know  
24 the facts about which he or she testified, the intelligence  
25 or lack of intelligence of the witness, the interest of the



1 witness in the result of the lawsuit, if any, the  
2 relationship of the witness to any of the parties to the  
3 lawsuit, if any, and whether the witness testified  
4 inconsistently while on the witness stand or if the witness  
5 said or did something or failed to say or do something at  
6 any other time that is inconsistent with what that witness  
7 said while testifying.

8 Ladies and gentlemen, if there is a conflict in  
9 the testimony of the witnesses, it is the Court's duty to  
10 reconcile that conflict, if it can be reconciled, because  
11 the law presumes that every witness has attempted to and has  
12 testified to the truth. But if there is a conflict in the  
13 testimony of the witnesses that the Court is not able to  
14 reconcile, then the Court has to determine which ones of the  
15 witnesses to believe and which ones it cannot believe,  
16 that is which witnesses testified to a falsehood.

17 Of course, immaterial discrepancies do not affect  
18 a witness' testimony, but material discrepancies do.

19 It should be noted that the greater weight of the  
20 evidence in a case is not determined by the number of  
21 witnesses testifying to a particular fact or a particular  
22 state of facts, rather it depends on the weight, credit and  
23 value of the total evidence on either side of the issue.

24 As I previously noted, the Court may also consider  
25 circumstantial evidence as well as direct evidence in

1 deciding a case and, obviously, the law permits the Court to  
2 give equal weight to both direct and circumstantial  
3 evidence. Of course, it is up to the Court to decide what  
4 weight to give any of it.

5           In this case, particularly for those of you who  
6 have participated in this case and for those of you who have  
7 attended portions of it, there have been a large number of  
8 individuals who are called expert witnesses. You may, if  
9 you're not a lawyer, may not understand or know that the  
10 Rules of Evidence do not normally present -- do not normally  
11 permit a person to testify as to opinions or conclusions.  
12 An exception to this rule exists for those who testify under  
13 the Rules of Evidence as an expert witness.

14           An expert witness is a person, who by education  
15 and experience, has become an expert in some art, science,  
16 profession or calling. Expert witnesses are allowed to  
17 state their opinions as to a relevant and material matter as  
18 to those things which are relevant and material and, of  
19 course, as to those things as which they profess to be  
20 expert and they may give their reasons for that opinion.

21           In this case, the Court has considered each expert  
22 opinion received as evidence in the case and has given to  
23 each expert's opinion that weight, if any, the Court thinks  
24 it deserves. Where an expert opinion is not based on  
25 sufficient education and experience or if the Court

1 concludes that the reasons given in support of the opinion  
2 are not supported by the record or if the Court finds that  
3 the opinion is outweighed by other evidence or is  
4 unsupported by the facts in the case, the Court may  
5 disregard an expert opinion, or at least portions of that  
6 opinion.

7           In this case, there have been three categories of  
8 individuals supplying testimony. Additionally, there have  
9 been over 440 exhibits. Actually, many of those have not  
10 been paper exhibits, but there have been many, many  
11 exhibits, some of which are long documents, others of which  
12 are videotapes. These exhibits include records from  
13 Arlington Development Center. They include videotapes of  
14 the facility and of practices at the facility. They include  
15 photographs of patients and they include charts and graphs  
16 containing summary information.

17           Now, the testimony has been from three basic  
18 groups of people. First, current and former employees of  
19 Arlington Development Center. Secondly, parents and family  
20 members of individuals who are or were residents at  
21 Arlington Development Center and, third, experts and  
22 consultants retained either by the United States or the  
23 State of Tennessee in connection with this case or in  
24 connection with contracts to provide services to Arlington  
25 Development Center.

1           As is often the case, the documents generated at  
2 the time of the occurrence of events often provide some of  
3 the most reliable information concerning the events in this  
4 case.

5           I will talk a little bit more about some of those  
6 documents later. However, I have considered all of those  
7 documents in reaching my conclusions in this case.  
8 Additionally, those individuals who are currently at  
9 Arlington Development Center or who have previously worked  
10 there are in a particularly good position to provide  
11 information regarding the ordinary practices and policies of  
12 the institution.

13           Parents and family members are in a position to  
14 provide some information, and their testimony has been  
15 appreciated and has been helpful. Of course, the Court must  
16 recognize that individuals who have made the choice to place  
17 their loved one in any institution have a strong desire for  
18 that institution to provide the best possible care.  
19 Additionally, and understandably, generally, their view of  
20 the institution may be strongly affected by whether they  
21 have a continuing interest in the institution as a care  
22 provider or whether they no longer have that interest.

23           The testimony of experts, of course, is affected  
24 by the reliability of the information they receive on which  
25 they base their expert testimony. If they receive

1 inaccurate or incomplete information, then the testimony  
2 provided by the expert may be of limited or little value.  
3 Similarly, if their inquiry is a narrow inquiry as to a  
4 specific aspect of the institution, their opinion may have  
5 little or no application to other parts of that institution.  
6 Finally, if they can be demonstrated to have previous -- to  
7 have previously existing biases or prejudices or to have  
8 previously committed to a position without examination of  
9 the facts at the institution, their testimony may be  
10 severely impeached. Before I proceed to tell you my  
11 assessment of the evidence, I also am going to review with  
12 you in some more detail what the United States must prove in  
13 order to meet its burden of proof on its claim that the  
14 State of Tennessee has violated the Fourteenth Amendment  
15 rights of the residents at that institution.

16           Again, in order for the plaintiff to establish a  
17 violation of the Fourteenth Amendment, the plaintiff must  
18 show that the defendants committed the acts alleged by the  
19 plaintiff, that those facts caused the residents of  
20 Arlington Development Center to suffer the loss of a federal  
21 right and that in performing the acts alleged, the  
22 defendants' actions were a substantial departure from  
23 accepted professional judgment, practice or standards as to  
24 demonstrate that the person responsible actually did not  
25 base a decision on such a judgment. A mere negligent act by

1 the defendants causing harm does not constitute a violation  
2 of the Fourteenth Amendment even though those acts would  
3 constitute malpractice. Thus a mere lack of due care by the  
4 state official does not deprive a resident of a  
5 constitutional right under the Fourteenth Amendment.

6 I now also want to review with you more  
7 particularly some of the language from the United States  
8 Supreme Court in the case of Youngberg versus Romeo, which I  
9 believe sets out the principles governing the Fourteenth  
10 Amendment claim in this case.

11 In Youngberg, the Supreme Court specifically  
12 stated when a person is institutionalized and wholly  
13 dependent on the state, a duty to provide certain services  
14 and care does exist, although even then a state necessarily  
15 has considerable discretion in determining the nature and  
16 scope of its responsibilities.

17 The Supreme Court in Youngberg went on to  
18 specifically raise the question of what is the proper  
19 standard for determining whether a state adequately has  
20 protected the rights of the mentally retarded. The Court  
21 pointed out the Constitution only requires that the courts  
22 make certain that professional judgment, in fact, was  
23 exercised. It is not appropriate for the courts to specify  
24 which of several professionally acceptable choices should  
25 have been made. The mentally retarded are entitled to more

1 considerate treatment, of course, and conditions of  
2 confinement better than criminals whose conditions of  
3 confinement are designed for punishment.

4           Obviously, the Supreme Court points that out  
5 because we have always recognized in the United States, or  
6 at least for a number of years, that individuals who are  
7 incarcerated involuntarily for the purpose of punishment  
8 give up many rights. So the court points out in Youngberg  
9 that individuals in institutions of this nature have rights  
10 and that those rights are different from the rights of those  
11 people who are involuntarily incarcerated for purposes of  
12 punishment.

13           In Youngberg, the Court also observed, the courts  
14 must show deference to the judgment exercised by qualified  
15 professionals. By so limiting judicial review of challenges  
16 to conditions in state institutions, interference by the  
17 federal judiciary with the internal operations of these  
18 institutions should be minimized.

19           The Court noted that the courts should not  
20 second-guess the expert administrators on matters on which  
21 they are better informed. The Court indicated that for  
22 those reasons, the decision, if made by a professional, is  
23 presumed valid; liability may be imposed only when the  
24 decision by the professional is such a substantial departure  
25 from accepted professional judgment, practice or standards

1 as to demonstrate that the person responsible actually did  
2 not base the decision on such a judgment.

3           Youngberg reminds us that the state has a duty to  
4 provide adequate food, shelter, clothing and medical care.  
5 These are essential to the care that the state -- these are  
6 essential elements of the care that the state must provide.  
7 The state also has an unquestioned duty to provide  
8 reasonable safety for all residents and personnel within the  
9 institution. Residents enjoy constitutionally protected  
10 interests in the conditions of reasonable care and safety,  
11 reasonable nonrestrictive confinement conditions and such  
12 training as may be required by these interests.

13           Ladies and gentlemen, it is these principles that  
14 govern the determination made by the Court today.

15           In reviewing the evidence in this case, there is  
16 much testimony and documentation which appears to be  
17 reconcilable. As a general proposition, it appears that  
18 even the defense experts do not seriously question that  
19 conditions at Arlington Development Center in 1990 and 1991  
20 failed to comply with minimal requirements established under  
21 the Fourteenth Amendment for individuals with mental  
22 retardation. In 1990 and 1991, key positions at the  
23 institutions were unfilled. Psychiatric and psychological  
24 services were virtually nonexistent. Outside consultants  
25 were rarely, if ever, used. And staff lacked the training



1 or direction to properly feed, train, monitor and care for  
2 this population.

3           Even at the time of his testimony on September 14,  
4 1993, Dr. Jon Scott Bailey, a fellow of the American  
5 Psychological Association and professor at Florida State  
6 University and a consultant for the State of Tennessee  
7 stated that he is now only beginning to see people who are  
8 starting to be sensitive to the needs of residents at  
9 Arlington Development Center. Dr. Bailey appeared to  
10 concede that data collection at Arlington Development Center  
11 is really not quite good enough to develop behavior  
12 development plans. Dr. Bailey described the work of one of  
13 his colleagues, Dr. Riordan as -- in one of the resident  
14 cottages at Arlington Development Center indicating that in  
15 the Spruce Unit, they are doing much better and that in  
16 other areas they are not as good.

17           Dr. Bailey described the psychology staff as quote  
18 "in transit" and acknowledged that since December 1992, some  
19 of them have quit and some have been added. He also stated  
20 that none of the masters level psychologists have a  
21 background in behavior analysis. He also said we have asked  
22 a lot of people to change the way they're doing things.  
23 They're getting more interested, more involved, morale is  
24 improved a little bit on the two units we have been most  
25 involved in. Dr. Bailey acknowledged that he is not a

1 clinical psychologist and confirmed that he is -- that he  
2 did not independently verify any of the data submitted by  
3 Arlington Development Center for some of his calculations.

4 I should also note that Dr. Bailey submitted a  
5 document entitled Some Common Characteristics of Severely  
6 and Profoundly Retarded Persons, which was marked as Exhibit  
7 309, which on cross examination of Dr. Bailey and on  
8 explanation by other witnesses was thoroughly discredited.

9 Dr. Alexander V. Horwitz, a doctor of psychiatry  
10 and consultant for Arlington Development Center had only, as  
11 of the month of his testimony, recently been increased from  
12 16 hours of consultation per month to 44 hours of  
13 consultation per month at Arlington Development Center. Dr.  
14 Horwitz, again, an expert for the defendants gave testimony  
15 contrary to the testimony of the director of psychology of  
16 Arlington Development Center, Dr. Beverly Cox. Dr. Cox had  
17 given testimony to the effect that some or many of Arlington  
18 residents would prefer to be alone whereas Dr. Horwitz's  
19 testimony was that sitting alone, not socializing is a  
20 behavioral problem. Dr. Horwitz, of course, is a trained  
21 psychiatrist, whereas Dr. Cox has a Ph.D. in education and a  
22 masters in guidance. While Dr. Horwitz has been a  
23 consultant for Arlington Development Center for over one  
24 year, he acknowledged that he has never performed a data  
25 collection check and that he would be concerned if he found

1 that certain patients were not getting behavioral  
2 reinforcement.

3           Dr. Michael J. Levine, a development  
4 neuropsychiatrist in the State of Louisiana and medical  
5 director for the Office of Citizens with Development  
6 Disabilities of the State of Louisiana also testified as an  
7 expert for the State of Tennessee. Dr. Levine, more bluntly  
8 than Dr. Horwitz stated his candid opinion as the Court  
9 understood, that Dr. Cox, the director of psychology at  
10 Arlington Development Center did not have the level of  
11 training required. He went on to state the opinion that  
12 experts from out of state are fun to have, but you have to  
13 grow your own internal expertise. Moreover, in his initial  
14 deposition, Dr. Levine stated that Arlington Development  
15 Center did not meet common practice in neuropsychiatry and  
16 he stated that a good initial evaluation of five to seven  
17 pages is essential and normal in Louisiana, but that he saw  
18 none of that at Arlington Development Center. He was  
19 careful to say that he did not evaluate the quality and  
20 quantity of staffing at Arlington Development Center, but  
21 noted that he did find things missing in records and found  
22 no particular pattern in charts. He admitted that Arlington  
23 Development Center did not have data collection under  
24 control. Dr. Levine described going to Arlington  
25 Development Center's psychiatric program as like going to

1 Samoa and asking where is your nuclear reactor. He also  
2 compared Arlington Development Center with the research  
3 program at the University of California, Los Angeles,  
4 indicating that it was like comparing a Cadillac factory,  
5 that is UCLA, to an ox cart factory, Arlington Development  
6 Center. He stated that he did not see training taking place  
7 at mealtime, at the time he gave his deposition, and he also  
8 confirmed that he saw very little social skill program  
9 development. Dr. Levine criticized the way in which  
10 Arlington Development's records are oriented, indicating  
11 that they are problem-oriented records and that they should  
12 have been service-oriented records.

13           While the State of Tennessee's experts and  
14 consultants were very cautious in their testimony regarding  
15 psychological and psychiatric services, the experts  
16 presented by the United States were unequivocal in their  
17 insistence that the services, processes, procedures,  
18 medication and treatments provided in this institution fall  
19 far below any acceptable standard as to constitute a failure  
20 to exercise professional judgment in their entirety.

21           Dr. Walter Christian, a Ph.D. clinical  
22 psychologist and president of the May Institute in Chatham,  
23 Massachusetts, testified both in the United States initial  
24 presentation of proof and in rebuttal. Dr. Christian  
25 visited Arlington Development Center on October the 14th and

1 15th, 1993. You will recall that we had a break in the  
2 presentation of the testimony and he visited it again having  
3 previously gone several other times.

4 He visited the Arlington Development Center, as I  
5 indicated, on October the 14th and 15th, 1993 to determine  
6 whether psychological services had improved since his  
7 previous visits to Arlington. The visit was a surprise  
8 visit as authorized by the Court, and Dr. Christian found  
9 that most patients were <sup>idle</sup> and he saw more self-injury,  
10 than on any previous tour. Because his October visit was a  
11 surprise visit, he concluded that the previous visits were  
12 staged for my benefit, in his words. He testified that  
13 conditions in his October visit were worse than the visit in  
14 July of 1991, his first visit to the facility. He found  
15 that the staff was poorly trained, that there was no  
16 evidence that the staff was better trained, that the  
17 staff-to-patient ratio remained inadequate and that the  
18 number of psychologists remain totally inadequate. He found  
19 that the Daniel Boone cottage which had been the subject of  
20 work by Dr. Bailey, whom I have previously mentioned, was in  
21 October of 1993 in worse shape than many base line units and  
22 he observed this -- he observed that this was after the  
23 consultants had essentially finished their work at Daniel  
24 Boone. He testified that the problems with self-injury,  
25 inability of staff to react to situations and inadequate or

1 no data collection were, according to Dr. Christian, still  
2 in existence during his October visit. Dr. Christian even  
3 described his observations of a resident -- in fact, he  
4 described his observations of several residents, but he  
5 described his observations of Candace T. who had previously  
6 been observed self-injuring herself in order to obtain  
7 reinforcement with orange juice. During his visit in  
8 October, she was found sitting in a line of nonambulatory  
9 patients facing a wall. It appeared that no one was  
10 observing this group of residents and certainly that no one  
11 was interacting with them. Ultimately, after waiting some  
12 period of time, he determined that these residents had  
13 apparently been placed in line facing the wall so that a  
14 staff member could sit in an office at a desk and look out  
15 the office door to see the patients or the residents lined  
16 up.

17 Dr. Christian found that the blue cards described  
18 at some length by Dennis Mozingo in his testimony on behalf  
19 of the United States were in Dr. Christian's words just a  
20 bell and whistle which was not being properly used to record  
21 behavior.

22 Dr. Christian observed in Daniel Boone 3 at 9 a.m.  
23 during his visit that 11 people had still not had breakfast  
24 because of the new improved feeding program adopted by  
25 Arlington Development Center.

1           In reconciling the testimony of Dr. Christian, Dr.  
2 Bailey, Dr. Horwitz, Dr. Cox, Dr. Szymanski and others,  
3 there is no credible testimony that conditions have  
4 substantially improved from the period of July, 1991, when  
5 it is virtually conceded by the State of Tennessee that  
6 psychiatric and psychological services were virtually  
7 nonexistent. While it is true that some limited progress  
8 may have been made in identifying and analyzing the problem,  
9 and in that regard, the State of Tennessee should be  
10 commended, the actual delivery of services to the vast  
11 majority of Arlington Development residents in need of them,  
12 and the development of a system to provide for the delivery,  
13 monitoring and sustaining of those services has yet to  
14 occur.

15           The pattern demonstrated by the experiences of Dr.  
16 Bailey, Riordan, Mozingo and others, other consultants  
17 consulting to provide improved care at Arlington Development  
18 Center has been repeated in other areas as well. Thus,  
19 while improvements have been planned by Dr. William Hinkle  
20 and feeding programs and efforts to implement improvements  
21 have been undertaken by Carla Lynn Andreas, the lack of any  
22 judgment in implementing that advice has resulted in a  
23 failure thus far of the institution to meet any minimal  
24 standards.

25           In a surprise visit authorized by the Court on

1 October 1 and 2, 1993, Victoria Therriault observed the same  
2 problem as Dr. Christian concerning long delays in residents  
3 being allowed to eat.

4           Additionally, while there may be some improvement  
5 in the preparation of actual feeding plans, Nurse Therriault  
6 testified that those individuals who were actually feeding  
7 residents generally had not been trained on any feeding plan  
8 at all or had specifically not been trained on the feeding  
9 plan for the resident they were feeding.

10           Apparently, because it was a surprise visit and  
11 not a planned visit, Nurse Therriault was also able to  
12 consistently observe inadequate staff-to-resident ratios and  
13 failure of staff to interact with residents. She found as  
14 many as ten people in the Holly Unit who were completely  
15 unsupervised, that is alone. This is significant and was  
16 significant to Nurse Therriault because those individuals,  
17 have been identified as individuals at high risk. As she  
18 had observed in her earlier visits, in her October visit,  
19 she also saw food trays which were given to the wrong  
20 patient - a particular problem since many patients require  
21 specialized diets and the consumption of the wrong or  
22 wrongly textured food may result in immediate harm or even  
23 death. Nurse Therriault also saw, during her October, 1993,  
24 visit continued improper nursing care in connection with the  
25 administration of medication, the repositioning of a patient



1 by a nurse in which the nurse actually pulled up on a  
2 fractured arm, causing the patient to cry out. Once again,  
3 Nurse Therriault was able to observe records in which no  
4 vital signs had been taken when appropriate and where  
5 patients with greater than therapeutic drug levels were  
6 experiencing a complication which nursing personnel should  
7 have, but did not identify.

8           Weighing all of the expert testimony in this case,  
9 including the testimony of individuals who were consultants  
10 or employees of Arlington Development Center, it is clear  
11 that the care actually provided to residents at Arlington  
12 Development Center falls well below any minimum standard and  
13 well below the medical malpractice standard.

14           It further appears and the Court finds that the  
15 care at Arlington Development Center fails to meet the  
16 constitutional tests which I told you about earlier as set  
17 out by the Supreme Court in Youngberg versus Romeo.

18           A similar analysis, when applied to the testimony  
19 concerning compliance with the Individuals with Disabilities  
20 Education Act, reveals that the requirements of that act are  
21 not being satisfied. It is clear that in some area -- it is  
22 clear that in this area, some progress may be being made and  
23 that the consultants in this area have perhaps had the most  
24 satisfactory effect.

25           The evidence from the State of Tennessee itself,

1 however, reflects that the principal within the Arlington  
2 Development Center has recently almost been terminated and  
3 that the best teacher, and the teacher who was shown in the  
4 videotape as illustrative of good teaching at Arlington  
5 Development Center has now left Arlington Development  
6 Center.

7           It is clear from the testimony of the defendants'  
8 own expert, Dr. Gene Alvin Vergason, president of Vergason  
9 Associates, Inc., that the individual education plans are of  
10 questionable adequacy under -- in fact, inadequate under the  
11 Act and that Arlington Development Center does not meet the  
12 standards for the use of assessment data. Dr. Vergason  
13 observed that it was necessary for him to combine the  
14 individual habilitation plan and the individual education  
15 plan in order to obtain sufficient data to create an  
16 adequate IEP. Dr. Vergason concedes that the IEP should  
17 have all of the education goals contained in that plan. Dr.  
18 Vergason testified that the Arlington Development Center is  
19 doing well in placing students in the least restrictive  
20 environment and that he has observed improvements in  
21 attitude, institutional technique, materials and activities.  
22 His testimony was that Arlington Development Center is  
23 moving "in the right direction." Dr. Vergason's  
24 credibility, however, was placed at issue and in question  
25 because his initial opinions were given without the benefit

1 of an adequate review. His conclusions, generally, however,  
2 are not irreconcilable with the proof submitted by the  
3 United States through Dr. Susan Thibadeau, the May Center  
4 program director. Dr. Thibadeau pointed out from her three  
5 visits to Arlington Development Center, that the individual  
6 educational plans, IEP's are inadequate under IDEA  
7 standards. Specifically, the goals and objectives are not  
8 sufficiently comprehensive and the system is inadequate to  
9 measure progress. In fact, that was very, very clearly  
10 demonstrated. Dr. Thibadeau gave numerous examples from  
11 actual students at Arlington Development Center in that  
12 regard. She also testified that related services are not  
13 adequately incorporated for -- into the educational process.  
14 For example, the physical therapist interviewed did not even  
15 know what an individual education plan was. Yet, with this  
16 student population, physical therapy must work closely with  
17 education in order to achieve educational objectives since  
18 many of those objectives are functional in nature.  
19 Reviewing the testimony of Dr. Vergason in conjunction with  
20 the testimony of Dr. Thibadeau, the evidence weighs heavily  
21 in favor of determination that Arlington Development Center  
22 is not in compliance with IDEA.

23           Now, while I have told you about failure to comply  
24 with the Fourteenth Amendment, I am compelled to make one  
25 additional observation regarding the danger that Arlington

1 residents currently face. The Court has indicated that in  
2 each of the areas cited by the United States, the United  
3 States has carried its burden of proof. But the Court  
4 should note specifically that in the medical care area and  
5 in the area of direct staff supervision of patients or  
6 residents, conditions at Arlington Development Center pose  
7 an immediate danger of irreparable harm, including an active  
8 risk of death to patients at Arlington Development Center.  
9 Medical care within the institution, particularly for  
10 patients with seizure disorders, is so deviant from any  
11 recognized principles of medical care that any patient  
12 suffering prolonged seizures or status epilepticus may be in  
13 immediate peril of his life.

14           The testimony is virtually uncontradicted that no  
15 standard of care recognizes the administration of  
16 intramuscular Valium for status epilepticus and that the  
17 only appropriate treatment for status epilepticus involving  
18 the use of Valium is IV Valium. Similarly, the failure of  
19 direct care staff to directly and properly supervise  
20 individuals with known behavior disorders, including eating  
21 disorders, has resulted in deaths which were entirely  
22 preventable. In fact, during these proceedings one resident  
23 of Arlington Development Center, Jane E. died. Jane E. died  
24 on Thursday, September 14, 1993 at 8:32 p.m., on the 9th day  
25 of the trial of this case. This is evidenced in Trial

1 Exhibit 384. The cause of her death, the Court finds, was  
2 lack of supervision, complicated by lack of adequate  
3 emergency medical treatment.

4           While the State of Tennessee may -- it may be  
5 argued has begun to make improvements or to at least  
6 institute processes that might lead to improvements at  
7 Arlington Development Center, it does not appear that at  
8 this time those improvements have either been sufficiently  
9 implemented or continue to be implemented in such a way as  
10 to preclude the necessity of injunctive relief.

11           In analyzing the appropriate relief in this case,  
12 the plaintiffs argue that the defendants have demonstrated  
13 unwillingness to provide Arlington Development Center  
14 residents with constitutional levels of care. The United  
15 States further argues that their resistance to taking  
16 meaningful, voluntary corrective action is so pronounced as  
17 to be deliberate. Plaintiff points to the defendants'  
18 refusal to acknowledge the existence of deficiencies from  
19 the time of the issuance by the United States of its  
20 findings letter in March of 1991. The United States points  
21 to the extraordinary step taken by the Tennessee General  
22 assembly to repeal state statutes that suggested that the  
23 defendants were responsible for the care of mentally  
24 retarded persons at Arlington Development Center.

25           There has been proof in this case, some of which

1 has already been referred to, which supports the position  
2 taken by the United States. During this case, there has  
3 been the late delivery by the State of Tennessee of  
4 documents sought in discovery, documents which were  
5 detrimental to the case presented by the State of Tennessee.  
6 It could be argued that there has been an effort, as  
7 demonstrated by Exhibit 414, by Arlington Development Center  
8 to misrepresent the nature of these proceedings and to  
9 frighten the families and friends of residents at Arlington  
10 Development Center.

11           There has been testimony by former employees of  
12 Arlington Development Center of an atmosphere of  
13 intimidation. One doctor in his letter of resignation  
14 addressed to Dr. Thomas McLemore of December 10, 1990,  
15 stated I have never before worked in a climate such as  
16 exists at Arlington Development Center, the leadership is  
17 poor and one has difficulty in justifying some of the  
18 medical situations that seem to have to be tolerated because  
19 of administrative influence. It seems to me to be a lack of  
20 genuine concern by some of the administrative staff for the  
21 residents who live here and especially for the employees who  
22 are charged with their care. Sincerely yours, George  
23 P. Jones M. D. That is Exhibit 376.

24           Two highly sought after employees in psychology  
25 left Arlington Development Center when their efforts to

1 compile and report to the administration a list of suspected  
2 physical and verbal abuse by direct care staff of Arlington  
3 Development Center were detected. The supervisor, Vickie  
4 Thompson and her supervisor, Assistant Superintendent  
5 Robinson, upon learning of the list demanded a copy and then  
6 another Arlington supervisory employee, Mr. Durr, gave  
7 copies of that list to the employees who were suspected of  
8 possible abuse, either physical or verbal. Two employees,  
9 Rebecca Palmer and Sherry Wilson, found their jobs made  
10 impossible, understandably, because of the actions of the  
11 administrator's intent on protect possible abusers as  
12 opposed to protecting and disciplining individuals for that  
13 offense. In fact, Ms. Palmer was reprimanded for her  
14 action. No investigation was conducted regarding the  
15 employees who were identified as possible abusers. And I'm  
16 not referring to some perfunctory review, I will talk about  
17 some of those later, but no meaningful investigation was  
18 conducted.

19 Ms. Wilson and Ms. Palmer both testified in these  
20 proceedings. Ms. Wilson has a masters in special education  
21 and now works at Open Arms, a group home in the Frayser area  
22 of Memphis. Ms. Wilson testified regarding a lack of  
23 general care, a lack of interaction and a lack of teaching  
24 at the institution. She observed poor feeding and bathing  
25 practices and observed on occasion five or six females in

1 line naked in the bathroom. Vickie Thompson, the immediate  
2 supervisor told Ms. Wilson when Ms. Wilson inquired about  
3 the lack of care that "I give staff rest time" between  
4 Medicaid reviews and Department of Justice inspections.

5 Rebecca Palmer also testified in this case. She  
6 has a bachelors degree in psychology and is now a team  
7 leader at Southern Oklahoma Resource Center. She took a  
8 position at Arlington Development Center in January, 1991  
9 and found the atmosphere negative and intimidating. She  
10 observed a lack of affection for residents, the use of harsh  
11 voice tones and a severe lack of training. The staff which  
12 was charged with supervising residents spent time watching  
13 television, and Mr. Durr, as had Mrs. Thompson, gave the  
14 excuse that "we work hard during surveys, therefore, we  
15 don't work as hard at other times."

16 Ms. Palmer observed that the residents were not  
17 treated with respect and that there was evidence of physical  
18 abuse, but as noted above, her efforts to initiate an  
19 investigation in that regard only resulted in her receiving  
20 a reprimand and no meaningful investigation being conducted.

21 Ms. Palmer's husband, Roland Palmer, also worked  
22 at Arlington Development Center for the period January 11,  
23 1991 through June 3, 1991. He is also now located in  
24 Oklahoma. But while at Arlington Development Center, he was  
25 the director of psychology. Vickie Thompson was his



1 supervisor. When he arrived, he found a virtual absence of  
2 psychological services.

3           It is perhaps instructive to observe what the  
4 superintendent of Arlington Development Center wrote to the  
5 Commissioner of Mental Health and Mental Retardation on  
6 January 7, 1991, regarding Mr. Palmer. She wrote as follows  
7 in advocating his retention by the institution: We cannot  
8 afford to lose this most qualified -- the most qualified  
9 candidate recruited since May, 1989, when the position was  
10 vacated. Further, this request is justified, that was the  
11 request to deviate so they could employ Mr. Palmer or Dr.  
12 Palmer. Further, this request is justified because of our  
13 critical need to have the required doctoral expertise as  
14 head of a service component impacting all individuals served  
15 at the facility. The psychological director -- excuse me,  
16 the psychology director is responsible for the overall  
17 development and implementation of facility-wide behavioral  
18 management strategies. It is the effectiveness of those  
19 strategies that allows the accomplishment of all other  
20 habilitative efforts. For four and a half years, the  
21 continued absence of a psychological director has placed us  
22 in a vulnerable position in maintaining certification and  
23 accreditation. Considering our present Department of  
24 Justice investigation of the quality of our services, our  
25 time is running out, we must have a psychology director.

1 She went on to say Dr. Palmer has the directly related  
2 experience to meet our needs and is the only applicant  
3 having this experience to present reasonable salary  
4 expectations. Dr. Palmer has a total of four years, one  
5 month professional psychologist experience. Two years and  
6 two months of this experience was obtained at a facility  
7 under the same regulations as we must operate. He has a  
8 Ph.D. and masters degree in psychology, both with a  
9 concentration in mental retardation. That letter was sent  
10 to Commissioner Taylor from Mona Reeves-Winfrey dated  
11 January 7, 1991, and is Exhibit 268 in this case.

12 Dr. Palmer testified in these proceedings. As I  
13 have indicated, he found staff with little professional  
14 training. He cited a number of examples, including that of  
15 a patient whose first name is Philip who had a behavioral  
16 disorder in which he struck the corner of tables with his  
17 head. This was a serious condition which Dr. Palmer  
18 immediately recognized. In fact, Dr. Palmer personally  
19 bought a helmet and trained staff regarding the use of the  
20 helmet in order to reduce the personal injury to Philip.  
21 Ironically, Thompson and Riddle, employees at Arlington  
22 Development Center, attempted to oppose the use of the  
23 helmet, both displaying a lack of knowledge regarding  
24 regulations concerning restraint of which this helmet was  
25 not. Palmer made recommendations regarding obtaining

1 psychiatric services, including the consultative services of  
2 a psychiatrist. He routinely found inadequate staffing,  
3 that is one staff person to as many as 16 residents at  
4 Arlington, and routinely found staff watching television.  
5 He found poor and disruptive attitudes by the staff. When  
6 given the task of reviewing the Department of Justice  
7 findings letter which has been marked as an exhibit in this  
8 case, Dr. Palmer's review was unsatisfactory to Arlington  
9 Development Center; that is, it reported that the Department  
10 of Justice was correct, and it appeared to Dr. Palmer that  
11 the superintendent at that time concurred in his findings.  
12 But as you know, the conditions regarding the continued  
13 employment of Ms. Palmer, and as you may not know, the  
14 frustrations of Dr. Palmer in attempting to perform his  
15 duties at Arlington Development Center led to their leaving  
16 Arlington Development Center. Of course, Rebecca Palmer, as  
17 you know, left Arlington Development Center because  
18 conditions had been made impossible and neither of them was  
19 allowed to exercise their professional judgment at the  
20 institution.

21           This attitude of obstruction within the  
22 institution was dramatically demonstrated in an incident  
23 which occurred on December 11, 1992, which is reflected in  
24 Exhibits 275 and 275A in this record.

25           On December 11, 1992, shortly after noon,

1 Lieutenant Robert Yoakum of the Tennessee Highway Patrol  
2 received a call from the state department, that is from the  
3 police department in Brownsville, Tennessee. The call was  
4 that two state vans had stopped at a store and the drivers  
5 had purchased one quart of beer each and then proceeded  
6 toward Brownsville on Highway 19. The vans were loaded with  
7 residents from Arlington Development Center. The vans were  
8 stopped by Trooper Joe Crook and Officer Mark Williams of  
9 the Haywood County Sheriff's Department.

10 Trooper Cook or Crook detected an odor of alcohol  
11 from each driver's breath. One of the drivers was Larry  
12 Williams, an employee of Arlington Development Center, who  
13 stated to Lieutenant Yoakum that both he and Cornell  
14 Willison had stopped at a store in Lauderdale County and had  
15 purchased a quart of beer each. Willison, the other driver  
16 who was also from Arlington Development Center, confirmed  
17 that they had both drunk a quart of beer each.

18 Lieutenant Yoakum then called Mona Reeves-Winfrey,  
19 the superintendent of Arlington Development Center, and  
20 reported what had happened. He reported that the drivers --  
21 he reported the driver's condition and he further reported  
22 that each driver stated he knew the seriousness of his  
23 actions and that they had made an error in judgment.

24 The notes of the call made by Ms. Winfrey at the  
25 time of her conversation with Lieutenant Yoakum state

1 "obviously, blown out of proportion." When the employees  
2 returned, they were not placed on suspension, but an  
3 investigation was conducted by June Stewart with a report to  
4 Edna Robinson. June Stewart, despite the admission of these  
5 two individuals, found that this was simply a case of  
6 misidentification and that the two Arlington employees had  
7 not purchased any beer at all. The report concluded on  
8 December 11, they were notified that no action was being  
9 taken in this matter and that they were to return to work on  
10 their next scheduled work day of December 12, 1992. See  
11 Trial Exhibit 275A for a full statement of the events.

12 Ms. Reeves-Winfrey wrote the letter to the two  
13 employees confirming that no -- "no action is deemed  
14 necessary on the part of Arlington Development Center."  
15 This was in spite of the fact that Ms. Reeves-Winfrey had  
16 talked directly with Lieutenant Yoakum and that she knew  
17 that there was no misidentification as reported by June  
18 Stewart in her report.

19 Ms. Stewart's report was a hastily done document  
20 with no inquiry to the State of Tennessee, with no  
21 investigation with Lieutenant Yoakum, obtained no  
22 documentation that was available readily from the State of  
23 Tennessee. Ms. June Stewart's report was consistent with  
24 the manner of doing business at Arlington Development  
25 Center.

1           In this case, there has been testimony regarding  
2 doing things the Arlington way. The Arlington way, as  
3 described by Dr. Palmer and Rebecca Palmer and Ms. Wilson  
4 and as reflected in the action of Arlington Development  
5 Center in the incident of December 11, 1992, and throughout  
6 its conduct in this case, is a system or policy under which  
7 the convenience and job security of employees is  
8 consistently placed above the constitutional rights of  
9 residents of Arlington Development Center.

10           The Arlington way is reflected in the recordation  
11 of injuries which were the subject of extensive testimony in  
12 this case. It is reflected in the conduct -- in the  
13 conducted tours and the lack of services when third parties  
14 or inspectors are not present. It is reflected in the  
15 higher than normal mortality rate, the higher than normal  
16 injury rate, the failure to effectuate any meaningful  
17 behavior modification programs for residents in need of that  
18 training. It is reflected by the fact that there is very  
19 little staff turnover and that there are very few, as  
20 evidenced by the testimony of the superintendent,  
21 investigations of abuse, much less any discipline for  
22 resident abuse.

23           It is reflected in the testimony of the parents.  
24 In this case, a number of parents testified, and I don't  
25 disregard the testimony of those parents who hope for the

1 best at Arlington Development Center and I'm thankful that  
2 not every parent has had a terrible experience there with a  
3 devastating result, but the testimony that is persuasive  
4 from the parents in this case was the testimony given by  
5 Carolyn Tucker whose daughter was admitted to Arlington  
6 Development Center, a happy, higher functioning individual  
7 at the institution who, because of a failure to provide  
8 proper treatment, and I'm not talking about a failure of  
9 judgment, I'm talking about a failure of any remotely  
10 correct medical judgment at all is now unable to function.  
11 Those events, I'm sure for those of you were who were here  
12 and heard the testimony, were particularly disturbing  
13 because Carolyn Tucker was on the phone, in fact, telling  
14 Dr. Herring the correct procedure for cause -- for allowing  
15 her daughter to come out of status epilepticus. Dr.  
16 Herring, when the seizure began and, in fact, Stevelyn  
17 Tucker had an aura and knew the seizure was to begin because  
18 that was how her seizures manifested themselves. Dr.  
19 Herring gave her Valium IM, that is intramuscularly. The  
20 testimony was simply overwhelming in the case, as I have  
21 previously indicated, that that is not effective in these  
22 circumstances. Most sadly, Carolyn Tucker was on the phone  
23 trying to locate her daughter whom she spoke to regularly  
24 most every evening. At first, there was some confusion  
25 about where she was, and ultimately she was able to talk to

1 some of the medical personnel. She had told all of the  
2 medical personnel when her daughter was admitted in March of  
3 1991 that when these events occurred, she had in the past  
4 successfully been treated with Valium intravenously. She  
5 also had told them that she had very severe seizures. On  
6 the phone that night, she told Dr. Herring they had to start  
7 Valium intravenously. That is, of course, the prescribed  
8 method of treatment. But the seizure continued for three or  
9 four hours. Dr. Herring did not start the proper procedure.  
10 Ultimately, Stevelyn Tucker was transported to Lebonheur  
11 Hospital where, of course, she lingered close to death and  
12 now one of the highest functioning individuals at that  
13 institution, a person who could speak, a person who could  
14 lead a close to normal life for someone in that  
15 circumstance, a person who had wanted to go to Arlington so  
16 she could be with people like herself because it was hard  
17 going to school in middle Tennessee and this was a better  
18 institution for her, that person now is deprived of any  
19 chance whatsoever of fulfilling those goals. It's a tragic  
20 thing that happened that day, but it was the Arlington way  
21 because Dr. Herring was not disciplined. In the mortality  
22 review Dr. Herring was not sanctioned and he's still there  
23 at Arlington Development Center.

24 Jimmie Davis talked about her sister Bobbie. I  
25 brought the photographs of Ms. -- of her sister here,



1 Barbara S. I'm not going to show you those photographs  
2 because she has got terrible bruising, terrible bruising on  
3 the front of her body, black eyes. When she went to  
4 Arlington, that wasn't the circumstance. The superintendent  
5 when confronted with the evidence said she couldn't have  
6 done this to herself, and the Court agrees, but the  
7 investigation blamed it on the resident, a common phenomenon  
8 at Arlington. Of course, the residents have trouble with  
9 credibility because they are there because of their mental  
10 or physical disabilities. No effective investigation was  
11 conducted.

12 Peggy Moore testified regarding her brother Mac.  
13 Mrs. Moore's mother is now 74 years old and she took care of  
14 Mac for approximately 40 years of his life. Mac was finally  
15 placed at Arlington. He was a large individual, apparently  
16 very gregarious, sat at the table, enjoyed eating with the  
17 family. The family noted that he ate too fast, so they  
18 would say, "Mac, don't eat so fast," or "Mac, slow down,  
19 it's not going to go away." He would respond to that.  
20 Finally, because of his mother's advanced age and because of  
21 his disabilities, he was placed at Arlington. When he went  
22 to Arlington, he weighed about 230 pounds. He was a large  
23 person. He was also a very tall person. Arlington, of  
24 course, put him on a diet to where eventually he got down to  
25 140. I think the diet just continued, nobody really

1 monitored it that much. It was very inconvenient to have a  
2 large patient that they couldn't handle very well, although  
3 Mac could respond to verbal commands, but anyway, he was --  
4 his weight was greatly reduced. He ultimately died as a  
5 result of his eating disorder. Sheryl McCollum testified  
6 regarding her son Eric. There was other testimony about  
7 Eric in the record. Eric has two dislocated hips, but  
8 apparently that wasn't noted for some period of time at  
9 Arlington. Mrs. McCollum was understandably upset when she  
10 went on a recent visit to him because she found him soaked  
11 in urine. It was not uncommon for people who made  
12 observations at Arlington to find situations in which  
13 patients had not been cleaned up, and on occasion,  
14 apparently Arlington personnel would say, "If we had known  
15 you were coming, we would have cleaned him or her up."

16 Sam Nuckolls testified in this case regarding his  
17 son. His son had severe disabilities, but had lived at home  
18 and had been taught to help -- considerable amount of  
19 self-help. He had been taught to feed himself with a spoon.  
20 He had been taught to hold the cup and drink water from a  
21 straw. He had been taught to stand and they had worked hard  
22 so he could be an active and bright young man despite his  
23 disabilities. Mr. Nuckolls determined that it was  
24 appropriate for his son to be placed at Arlington. I think  
25 it is fair to say that Arlington makes a good superficial

1 presentation and that most individuals would expect that the  
2 institution could provide adequate care. His son was placed  
3 at Arlington and regressed greatly. He lost his ability to  
4 hold a cup or do those other things that he had been taught  
5 to do. The expert testimony establishes that in this case,  
6 individuals have to be trained repeatedly. They can't  
7 simply remember from long periods of time how to do a  
8 function. And if they're not consistently helped and  
9 reminded, if they don't use that function regularly, they  
10 will lose that part of their life which has been enriched.  
11 That happened with Mr. Nuckolls' son. An interesting thing  
12 also happened, they -- Mr. Nuckolls, of course, as with all  
13 parents who is concerned about the health and welfare of his  
14 child, they wanted to strengthen his leg muscles and they  
15 bought a prone stander that allows the individual to be  
16 placed in the standing position. It improves their muscle  
17 tone. It assists them to the degree that they can to avoid  
18 regression and also hopefully to have some actual  
19 improvement over long periods of time.

20           After awhile, he noticed that the leg stander  
21 seemed to always be in the same place when they came to  
22 visit his son. So he simply put something on the stander so  
23 he could see if anybody moved it or used it. And when they  
24 came back later, not immediately later, but some days later  
25 as you or I might now suspect, it had not been used. That

1 device, which should be used on a regular basis, which  
2 physical therapy would require its use, was not used at all.

3           Peggy Ann Perkins Derringer also testified  
4 regarding her daughter Heather. Heather, when she went to  
5 Arlington was able to ride a big wheel. She could walk and  
6 run and was a happy, bright child. She could swim. In  
7 fact, during that part of the testimony, or some part of the  
8 testimony, I asked about the pool at Arlington because I  
9 knew that they had a pool, but it turned out that it doesn't  
10 have any water in it and hasn't for a number of years. But  
11 anyway, she went to the -- she went to Arlington because her  
12 mother at the time could not continue to provide the care  
13 needed and they had a number of children. Her mother since  
14 has gone on to become, it's my recollection, a nurse, and is  
15 now, I believe, at St. Jude Hospital, but -- at one of the  
16 hospitals here in Memphis.

17           Her daughter is no longer at Arlington and has now  
18 had some surgery which considerably improved her condition.  
19 But the reason that her daughter didn't have that surgery  
20 earlier, the reason that her daughter didn't have that  
21 surgery at Arlington -- and let me say this about her  
22 situation, it was clear from the record that her daughter's  
23 condition at Arlington as of the condition of other children  
24 that I have described, deteriorated at Arlington. Now, we  
25 all understand that there may be some deterioration with

1 some of this patient population, but these individuals  
2 suffered deterioration which was not because of the natural  
3 progression of the condition, it was the result of failure  
4 to provide appropriate care, a failure to provide physical  
5 therapy on a regular and consistent basis, a failure to  
6 provide any program which would allow them to continue or  
7 have some reasonable hope of continuing to have those few  
8 things in life which made life enjoyable or pleasant. Why  
9 didn't her daughter have the surgery while she was at  
10 Arlington? Why did she have it later? She didn't have that  
11 surgery because the doctor who recommended surgery to  
12 correct strictures that had occurred because of the fact  
13 that her child had been placed in a wheelchair and not been  
14 allowed to ambulate as she should have been allowed to  
15 ambulate, because the doctor told her, and it was part of  
16 the record in this case in Exhibit 202, and at least  
17 Arlington was on notice of this, even if it wasn't a major  
18 factor, but the doctor told her that Arlington couldn't  
19 provide appropriate follow-up care. It was because of the  
20 poor quality of physical therapy at Arlington Development  
21 Center. That's consistent with all of the testimony  
22 regarding physical therapy at Arlington Development Center.

23 All of these recent examples that I have given to  
24 you are examples of the Arlington way. A system designed or  
25 a system that follows a policy of convenience for employees,

1 of casting the blame on a resident where there might be some.  
2 fault of an employee, a failure to investigate because there  
3 is a policy of virtually no discipline of employees at  
4 Arlington Development Center in most cases.

5 A defense witness in this case, Dr. Philip Ziring,  
6 chairman of the Department of Pediatric at Chicago Medical  
7 School testified about the difficulty of changing an  
8 institutional culture. Dr. Ziring had been at Willowbrook,  
9 a very large institution in the State of New York, which,  
10 according to Dr. Ziring, was the institution, and the case  
11 that resulted in the enactment of CRIPA. Arlington  
12 Development Center has the same problems that Dr. Ziring  
13 identified at Willowbrook.

14 There are, of course, a number of specific actions  
15 which may be appropriate for a remedial order in this case.  
16 It is, however, the pervasive policy of elevating employee  
17 rights over the civil rights of residents that underlies the  
18 violations of rights in this case.

19 The Court will enter a very brief injunction, in  
20 essence, a preliminary injunction in this case to deal with  
21 the immediate threat to human life at Arlington Development  
22 Center. That order will be entered this afternoon and will  
23 be quite brief.

24 The Court will also enter a broader injunction  
25 after a 15-day opportunity for the State of Tennessee to

1 comment on the proposed injunctive order submitted by the  
2 United States in this case. The Court finds that the  
3 injunctive order submitted by the United States generally  
4 covers those areas appropriate for relief in this case.

5           Additionally, the Court will file additional  
6 findings of fact in this case to supplement the oral  
7 findings of the Court which were made here today. Finally,  
8 the Court will require the State of Tennessee, that is the  
9 Commissioner in this case, to submit a plan to remedy the  
10 violations of constitutional rights and the deprivation of  
11 educational opportunities found to exist in this case. That  
12 plan, after consultation with the United States, should be  
13 submitted by no later than Friday, January 21, 1994 at 5:00  
14 p.m.

15           Ladies and gentlemen, that concludes these  
16 proceedings for today.

17           MRS. BOOKER: All rise, please. This Court is in  
18 recess until 2:00 o'clock.

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## C E R T I F I C A T E

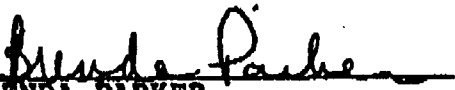
I, BRENDA PARKER, do hereby certify that the foregoing 47 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes of the opinion of the Court on November 22, 1993, in the matter of:

United States of America

vs.

State of Tennessee, et al.

Dated this 6th day of December, 1993.

  
BRENDA PARKER  
Official Court Reporter  
United States District Court  
Western District of Tennessee