

STATE OF VERMONT
RUTLAND COUNTY, S.S.

DISTRICT COURT OF VERMONT
UNIT NO. I, BRANDON CIRCUIT
Docket Nos. 27, 28, 44, 17,
13, 47 78-Br-MR-JR

IN RE JUDICIAL REVIEWS OF:)
)
ROBERT BRACE, et al.,)
)
Residents.)

ORDER

RECEIVED
OCT 21 1980

This matter came on for hearing on December 6, 1979, before the Honorable Charles A. Bristow at Brandon, Vermont, at which time testimony for the residents was presented by J. David Egner, psychologist and Robert Jimmerson, M.D. Further testimony for the residents was presented by Joseph Hasazi, Ph.D. on December 20, 1979. The Department of Mental Health presented the testimony of Ronald Melzer, Ph.D.; Gail Wickes; and Larry Murphy on January 17, 1980. After Motion for Joinder and proposed Stipulation of Settlement were submitted to this Court, notice and summary explanations on both questions were issued to all proposed joined residents and their parents, relatives, guardians, or next of kin and a further hearing was held on September 10, 1980.

Based on the evidence taken in this matter; the proposed Stipulation of Settlement; the statements of those present on September 10, 1980 or submitted in writing subsequent to that hearing; and all documents and records herein; it is hereby ORDERED:

I. The Motion for Joinder is GRANTED. Therefore, this Order shall bind all Brandon Training School residents noticed

in this action, including those students residing at the Brandon Training School and those residents on conditional discharge or visit status who in the past have been declared eligible for discharge by virtue of an order of the District Court or who, in the future, will be declared eligible for discharge by virtue of an order of the District Court. (Whenever "discharge" is referred to in this Order, such term shall mean either conditional or absolute discharge.) The only residents who shall not be joined are those residents of the Giant Step Program in Waterbury, Vermont identified in the final decree in In re Shepard, et al.

II. After careful consideration of all the evidence and materials herein, this Court hereby adopts and approves the proposed Stipulation of Settlement submitted in this case. Accordingly:

A. (1) This Order shall bind the present Commissioner of Mental Health as well as all his successors in office.

(2) As this Order binds all residents joined pursuant to Section I above, who, prior to this Order, have been ordered discharged pursuant to 18 V.S.A. §8810 (or new §8834), prior orders or stipulations that indicate that the resident is eligible for discharge shall be modified by further agreement of the parties to conform with this agreement. Where the parties disagree as to whether or not a resident has been declared eligible for discharge, the resident may move to reopen pursuant to Rule 60(b)(5) or (6) of the District Court Rules of Civil Procedure.

(3) This Order shall have no effect upon those issues reviewable pursuant to 18 V.S.A. §8810 (or new §8834) other than the consequences of a judicial declaration of eligibility for discharge.

B. When the District Court or some other court of competent jurisdiction declares a resident eligible for discharge pursuant to 18 V.S.A. §8810 (or new §8834), such judicial declaration obligates the Department of Mental Health to place the resident within a reasonable period of time without regard for the present availability of community mental retardation services. Eligibility for discharge, in such individual cases, will be for the District Court to determine. Eligibility shall be governed by the test enunciated by the Vermont Supreme Court in In re M.G., et al., 137 Vt. 521 (1979) and by such further tests or guidelines which the Supreme Court may enunciate on appellate review. The test enunciated in In re M.G., et al., supra is as follows:

" . . . The custodial restraint represented by the program for students at the facility [should] amount to no more than is reasonably required for safety and the welfare and best interests of the student."

If clear and convincing evidence is produced by the State that either [(1) it would not be safe for the resident to be discharged from the Training School; or (2) it would not serve the resident's welfare to be discharged from the Training School; or (3) it would not be in the resident's best interests to be discharged from the Training School, the resident shall not be declared eligible for discharge]

C. (1) A "reasonable period of time" is ten years from the date of the judicial declaration of eligibility, except for those unique and compelling circumstances, if any, provided for in Section D, below. Where an order has been modified pursuant to Section A(2) of this Order, the reasonable period of time shall run from the date of the underlying order rather than from the date of modification.

(2) During each reasonable period of time, the Department of Mental Health shall be allowed to use its policies and procedures for program development and client selection as the means to effectuate individual appropriate placements.

(3) The following factors must be considered in determining whether a particular placement from the Brandon Training School is appropriate:

(a) No more than six residents should reside in a single facility and all residents should be mentally retarded;

(b) All residents should, by age and life style, be appropriate to each other;

(c) The residential facility should assure that at least thirty (30) days notice is given before discontinuing placement;

(d) There should be an appropriate developmental program and/or work readily available for each resident at least six (6) hours per day;

(e) The facility operator should encourage a developmental approach to each resident, such that a lessening of dependency may occur;

(f) The facility environment should encourage a developmental approach to each resident, such that a lessening of dependency may occur;

(g) The facility should be located in a community, such that each resident has access to public transportation and/or other access to the community;

(h) There shall be at all times in the residence sufficient staff to safeguard the residents' well-being;

(i) The resident's and the resident's legal guardian's individual preference for placement shall be carefully considered; and

(j) There shall be an annual administrative review of the appropriateness of the placement for the resident.

(4) Any disputes over the appropriateness of a placement which the resident either has been accepted at or has not been referred to may be heard through the regular judicial review process.

D. (1) Where an individual resident can demonstrate a compelling interest to be appropriately placed in the community sooner than the maximum period of time allowed for in section C(1) above, he or she may move the court to set a shorter maximum period of time in which the Department shall be allowed to use its policies and procedures for program development and client selection as the means to effectuate appropriate placement.

(2) A compelling interest is defined solely as either of the following situations:

(a) The resident can objectively demonstrate:

- (i) That serious regression in skill level has occurred and will continue to occur;
- (ii) That the Brandon Training School is unable to remediate such regression; and
- (iii) That such regression could be remediated by placement in a community residential program comparable to those existing in Vermont at the time of the judicial review.

(b) The resident can objectively demonstrate:

- (i) That the resident's major area or areas of skill level has failed to improve to any significant degree and will continue to fail to so improve;
- (ii) That the Brandon Training School is unable to improve to any degree the student's skill level; and
- (iii) That the resident would significantly improve in those areas by placement in a community residential program

comparable to those existing in Vermont at the time of the judicial review.

(3) Where the court has set the reasonable period of time at less than ten years, the Department of Mental Health may move at any time to extend the period of time so set by establishing that the needs of the resident are outweighed by exceptional budgetary or administrative considerations that have limited or will limit the Department's ability to implement appropriate placement within the lesser period of time.

E. It is recognized that it is necessary or desirable to define groups of residents in terms of the types of their needs and to place some groups before others. The Department of Mental Health shall initiate rule-making procedures pursuant to 3 V.S.A. §803 et seq. to determine priorities for placement by November 1, 1980.

The Department of Mental Health shall establish interim priority rules prior to the enactment of permanent rules. Priorities for placement shall not apply to a period of time in excess of twelve years. Priorities shall be established within specified time frames to ensure orderly placement of eligible residents into the community. Compliance with permanent rules so established may be reviewed either pursuant to Section F(3) below, or pursuant to any other procedure provided by law.

F. (1) It is the intention of the parties that appropriate placement should occur within the agreed upon or

court ordered reasonable period of time and should not, if at all possible, occur pursuant to a hearing as set forth in Section G, below.

(2) Notwithstanding the intention of the parties as expressed in subparagraph F(1) above, it is recognized that placement of all those who have been or will be declared eligible for discharge calls for complex and difficult performance by the Department of Mental Health. Consequently, the sole remedy for failure to effectuate an appropriate placement for a resident within the period of time set as reasonable is provided by Section G, below. Contempt powers may, within the sound discretion of the court, be a method to enforce this Order only where the Department has failed to comply with a further order of the Court issued after a hearing pursuant to Section F(3), below, or where the Department has failed to comply with a further order of the court after a hearing pursuant to Section G, below.

(3) During the period of time set as reasonable pursuant to Sections C and D above, if the resident can demonstrate that there has been an anticipatory breach of this Order by the Department of Mental Health as evidenced by actions which show either: (1) that the Department either cannot or will not perform its duty to place the resident appropriately within the period of time set as reasonable; or (2) that the Department has substantially deviated from the priorities established pursuant to Section E, above, the resident may move for further relief from the Court.

(4) The Department of Mental Health shall file with the court, with copy to resident and legal guardian, if any,

annual reports on the efforts made to effectuate placement of residents judicially declared eligible for discharge within the periods of time set as reasonable and the results of those efforts. The resident shall respond to such report within thirty (30) days. Failure to respond shall constitute an acknowledgement that proper efforts are being made by the Department of Mental Health to effectuate placement of the resident within the period of time set as reasonable.

G. If appropriate placement of a resident has not been effectuated within the court-ordered reasonable period of time, a hearing shall be set for the court to determine what specific and conclusive actions the Department of Mental Health must take in order to appropriately place the resident by a date certain. Among the options which the court may consider in its order is direct provision of community services by the Department of Mental Health, acting as a provider of last resort. The date certain should be set at the shortest period of time needed for the Department of Mental Health to take the specific actions necessary to effectuate placement.

H. In the event that residents are without full-time counsel at any time subsequent to the issuance of this Order, the court shall appoint, pursuant to 18 V.S.A. §7111, counsel to monitor and, if necessary, seek the enforcement of this Order.

III. Robert Brace, Ronald Bell, John Collins, Douglas Fleming, Frederick LaVigne, and Bruce Shangraw shall be considered at the procedural stage described in Section II.G. of this Order. Accordingly, the Vermont Department of Mental Health shall take

the following actions in order to effectuate placement of the above-named six residents by May 1, 1981:

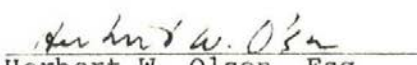
A. The Department of Mental Health shall seek commitments from the community mental health agencies for the appropriate placement of each of the above-named six residents. The Department of Mental Health shall encourage the community mental health agencies, on behalf of each of the above-named six residents, to develop appropriate placements for each of the above-named six residents.

B. If by February 1, 1981, it is reasonably expected that one or more of the above-named six residents will not be placed by May 1, 1981, by the methods referred to in paragraph III.A above, the Department of Mental Health shall directly provide an appropriate placement to such resident or residents by May 1, 1981.

DATED this 16 day of Oct., 1980, at
Hyde Park, Vermont.


Charles A. Bristow
District Judge

APPROVED AS TO FORM:


Herbert W. Olson, Esq.


William J. Reedy, Esq.