MAR 31 1975

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Patricia Welsch, et al,)

Plaintiffs,)

vs.)

Vera J. Likins, et al)

Defendants.)

MEMORANDUM ORDER

No. 4-72-Civ. 451

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The background necessary for an understanding of the present Order is set forth in two prior Orders of this Court. The first, dated February 15, 1974, is published. Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974). The second is dated October 1, 1974. The latter Order provided for a retention of jurisdiction, declaring that:

> ". . . (b)y retaining jurisdiction . . . the Court will be in a position to dictate more demanding requirements should the responses of the non-parties fail to heed this admonition and conditions at Cambridge warrant further relief."

In accordance with that provision, the plaintiffs on June 9, 1975, filed a motion for leave to file a Supplemental Complaint, together with a motion requesting the convening of a three judge court. The defendants responded with a motion to dismiss the Supplemental Complaint and a separate motion to amend the Order of October 1, 1974. A hearing was held in November and December 1975 on the motions, with particular emphasis on the need for further relief and the need for modification of this Court's October 1, 1974 Order. Proposed findings have been submitted by counsel, and a ruling will be issued in the near future.

During the hearing, an evidentiary problem arose which is the subject of the present Order. Defendants' Exhibits Z-23 through Z-31, which consist of a Minnesota Department of Public Welfare "Study of Midwest Institutions for the Mentally Retarded" and the backup data thereto, were received in evidence subject to the plaintiffs' motions to strike. These exhibits purport to show the authorized staff-resident ratios and the extent of carpet use in 40 institutions for the mentally retarded in eight midwestern States. After careful examination of the exhibits and consideration of the memoranda of opposing counsel, the Court has concluded that the exhibits are not relevant to any legal or factual issue now before the Court. See Federal Rules of Evidence 401 and 402.

Accordingly, it will grant the plaintiffs' motions to strike the exhibits as well as the testimony of Warren H. Bock, insofar as that testimony incorporates findings and conclusions based on the exhibits.

The defendants argue that their Study "speaks to each of [the factual] issues" involved in the current motions, "giving data on Minnesota's comparative standing with its geographic neighbors." Despite the number and complexity of the pending motions, the Court at present la faced with only two primary substantive factual issues related to these exhibits:

(1) Are qualified staff in sufficient numbers being provided at Cambridge State Hospital to make the constitutionally required process of habilitation a reality for its residents?

(2) Under all the circumstances at Cambridge, is carpeting essential to provide the safe and humane physical and psychological environment necessary for the constitutionally required process of habilitation?

This Court cannot agree that the disputed evidence is probative on either issue.

The Study offered by the defendants discloses absolutely nothing about the extent or success of habilitation offered to mentally retarded patients in the 40 institutions surveyed. For all this Court knows, each of those patients may be housed in surroundings in which habilitation is physically impossible and may be served by a staff so inadequate in site and training that there is no realistic opportunity for habilitation. Apart from missing evidence that the process of habilitation is really working in circumstances similar to Cambridge, bare statistical proof of the staff employed elsewhere does not tend to make it more probable than not that a particular staff-resident ratio is constitutionally required at Cambridge. Similarly, information demonstrating that institutions in other States eschew the use of carpeting, without proof that such institutions provide the safe and humane physical and psychological environment necessary for habilitation, does not tend to make it more or less probable that carpeting is constitutionally required at Cambridge. This Court can no more assume that the process of habilitation is working at the 40 institutions surveyed than it can assume that habilitation is working at Cambridge, and that would assume the answer to the very question being litigated,

There is no merit to the defendants' claim that to reject this Study will be "to ignore the considered judgment of other states on how best to provide for the habilitation of the mentally retarded." There is no showing that the legislators, executives and administrators in any of the eight States were aware, at the

time when the staffing and carpet decisions reflected in the Study's statistics were made, of a constitutional right to habilitation. the staff-ratios and carpeting realities in other States may in truth have nothing to do with "considered Judgments" on how best to habilitate the mentally retarded. Instead, they may reflect those States' considerably lass ambitious assessments of the minimum housing and custodial care which may be accorded to the mentally retarded at State expense without causing a public uproar. The point is not that this Court assumes base motives or callousness on the part of other State governments. The point is simply that this Court cannot know what factors have led to the statistics reflected in the Study. It surely cannot assume that the institutions in State X have no carpeting and have staff-resident ratios of 1:1.5 because it is the judgment of enlightened public officials guided by knowledgeable experts that this mix of facilities and staff will provide the constitutionally required opportunity for habilitation. As proof of that ultimate fact, the bare statistics are hearsay of the rankest sort, and are totally unreliable.

Finally, the defendants argue that other courts have specifically relied upon comparative evidence in proceedings similar to the present one. They note that in Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), the Court admitted evidence reflecting Alabama's rock-bottom ranking among all States in patient expenditures. This Court finds nothing inconsistent in that ruling. Comparative statistics may be probative to show that a given State's conduct is so far below the norm as to raise serious questions About its constitutionality. It does not follow, however, that the average staff-resident ratios or even the highest ratios in the country are adequate to provide the opportunity for habilitation required by the Constitution. This Court is not aware of any State—including the eight surveyed in the Study—in which the involuntary confinement and treatment of the mentally retarded has yet been adjudicated to be consistent with the constitutional requirement of an opportunity for habilitation. Under the circumstances, proof that Minnesota ranks near the top of eight States in staff-resident ratio is no more probative on the constitutional question presented than would be proof in 1954 that the schools of Topeka, Kansas, were no more segregated than' those in neighboring States. Cf. Carter v. Gallagher, 337 F. Supp, 626, 634 (D. Minn. 1971).

Nor does this Court's prior reference to comparative evidence, see October 1, 1974, Order at 32-33, call for admission of the disputed Study, On that prior occasion the evidence was used to show that Cambridge is not "an abysmal and degrading "Pit" beyond all hope of redemption. That is no longer an issue in this

case. In sum, the fact that other comparative studies may have been probative on other factual issues in the past does not alter the fact that Exhibits Z-23 through Z-31 are totally irrelevant to the issues now before the Court.

IT IS ORDERED:

That the plaintiffs' motions to strike Defendants' Exhibits Z-23 through Z-31 and any testimony of Warren H. Bock incorporating findings and conclusions based on those exhibits, are hereby granted.

March 30, 1976.

/s/ Earl R. Larson
United States District Judge

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FOOTNOTE

1. The defendants contend that a third issue is whether any shortcomings at Cambridge are of sufficient magnitude to call for the radical refinancing order sought by the plaintiffs, and that the Study is probative on that issue. Assuming for the moment that this Court has power to engage in such sweeping equitable relief, the degree of gap between reality and the staff and facilities required by the Constitution does become an important issue. But the Court cannot agree that the Study is probative on this issue. Since the Study provides no information whatsoever on the gap between reality and constitutional requirements in other States, it can provide no guidance in determining whether the gap in Minnesota is more or less severe than that existing elsewhere.