IN THE UNITED STATES DISTRICT COURT AUG 27 1980

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

TIMOTHY MILONAS, JR., and KENNETH RICE, by and through their attorney and Guardian Ad Litem, Kathryn Collard, on behalf of themselves and all others similarly situated, Plaintiffs, vs. JACK L. WILLIAMS, individually and as Owner and Boys Program Director, Provo Canyon School, ROBERT H. CRIST, individually and as Owner and Medical Director, Provo Canyon School, E. EUGENE THORNE, individually and as Executive Director, Provo Canyon School, JOHN F. McNAMARA, individually and as Administrative Director of the Interstate Compact on Juveniles for the State of Utah, and WALTER D. TALBOT, individually and as Superintendent of Public Instruction, Utah State Board of Education, and UTAH STATE BOARD OF EDUCATION, and their officers, agents, employees and assigns, Defendants.	Civil No. C 78-0352 MEMORANDUM OPINION, FINDINGS OF FACT and CONCLUSIONS OF LAW

This case began as four separate but related actions. They are: (1) A 1983 action for damages by plaintiff Milonas; (2) A 1983 action for damages by plaintiff Rice; (3) An action for damages by Plaintiff Class; (4) An action for declaratory and injunctive relief by Plaintiff Class.

As the matter progressed, the class action for damages was dismissed without prejudice by the court. Plaintiffs had not complied with Rule 23(c)(2), Federal Rules of Civil Procedure. A number of individuals had sought to intervene as parties plaintiff and defendants had objected thereto even

though defendants had prior thereto suggested that a class action for damages was not appropriate because the numbers involved were not overly large. The court denied the petition to intervene, and subsequently denied a motion to consolidate when the "petitioners to intervene" subsequently filed a case seeking damages on an individual basis and sought to consolidate. That case currently awaits trial.

The court on the 21st day of February, 1979 after four days of hearings granted a motion for a preliminary injunction and enjoined certain practices of the defendants Thorne, Crist and Williams, the owners and operators of the Provo Canyon School.

What remained for trial on the merits were the two individual damage actions, the class action seeking declaratory relief and permanent injunctive relief against Williams, Crist and Thorne and the class action seeking declaratory relief and injunctive relief against defendants Talbot, the Utah State Board of Education and McNamara, the Interstate Compact Administrator.

Plaintiffs claimed that Williams, Crist and Thorne, owners of the Provo Canyon School, violated their individual civil rights, violated the civil rights of the class members and violated the rights of certain class members to a "special education".

Plaintiffs further claimed that defendants Talbot and McNamara, Utah State public officials, and the State Board of Education had defaulted in carrying out their public responsibilities in overseeing the activities of the Provo Canyon School and asked that each be ordered to do his law mandated duty.

The Provo Canyon School is not just a place for the instruction of secondary school students under 18 years of age. It is not a school in the traditional, ordinary or classic sense. It does offer classes on a secondary level to its resident population, and in most instances does a good job in its

formal teaching. Provo Canyon School is also a correctional and detention facility. Students are restricted to the grounds. Students are confined. Some students are locked in and locked up with varying degrees of personal liberty restored as each progresses through the institutional program. If a student leaves without permission, he is hunted down, taken into custody and returned.

Provo Canyon School is also a mental health facility. Adolescent males perceived to have mental health or emotional difficulties or who are chemically dependant persons, are counseled and treated. Adolescent males with forms of learning disability, physical, mental or emotional, are housed, counseled and "taught".

The student population, intermixed and various, is subjected to a form of "behavior modification" described by those who run the school as eclectic. Some of its salient features are isolation from the outside world, little or no communication with the outside world, physical confinement, physical punishment, progressive restoration of liberty, investigation and evaluation of student "attitude" and "truthfulness" and "future conduct" through the use of a machine, and counseling.

While some of the adolescent males are at the school by virtue of placement there by a Juvenile Court after a brush with the law, most of those confined in the institution have never had an independant determination by a disinterested party that they should be confined. The population of the Provo Canyon School is a mix which changes in character from time to time. Some attend and are confined as a result of parental agreement. Some attend and are confined as a result of an arrangement with a school district. Some attend and are confined as a result of court mandate. Some attend to avoid state reform school confinement.

Provo Canyon School is also a major business enterprise. A charge of $1,600. per month, per student is made. In 1979, gross revenues totaled $1,857,796.67. Direct or indirect benefits to defendants Williams and Crist for 1978 were in excess of $167,000. each. To a substantial degree the funding for the enterprise to carry out its educational, detention and "therapeutic" activities came from public sources.

Regardless of origin, condition or motivation, once arrived, each person during the beginning phases of the school program was locked in, isolated from the outside world, and whether anti-social, crippled or learning disabled, was subject to mandated physical standing day after day after day to promote "right thinking" and "social conformity". Mail was censored. Visitors were discouraged. Disparaging remarks concerning the institution were prohibited and punished. To "graduate" from confinement to a more liberated phase, one had to "pass" a lie detector test relating to "attitude", "truthfulness" and "future conduct". Some failed to pass and remained in confinement for extended periods of time.

This lawsuit was started by two boys who ran away. They contacted a lawyer and sought the protection of this court. The Chief Judge of this court, upon the agreement of the school, placed the two boys with the Utah State Division of Family Services.

Rice was placed in the Provo Canyon School through the action of the Juvenile Court of the State of Alaska, and was at the school for 7 weeks. Milonas attended the school as a condition of probation through action of a Juvenile Court of the State of Nevada and was at the school for 3 weeks.

After intensive, stubborn and sometimes acrimonious preparation by the parties lasting in excess of one year, the matter went to trial in each of its three remaining phases on March 24, 1980. The trial lasted 4 weeks.

The issues relating to individual damage claims were tried to a jury.

Concurrently therewith, the issues relating to the class action on whether or not declaratory relief and permanent injunctive relief should be granted to the class were tried to the court.

The jury found no cause of action on the individual damage claims.

During the early stages of the trial to the court, the Utah State Superintendent of Public Instruction, Walter Talbot, and the State Board of Education, having carefully examined their duties under Federal statutory law and Federal regulations, entered into a Consent Decree with Plaintiff Class. The court, pursuant to such agreement, approved and entered such decree. At about the same stage in the trial to the court, John McNamara, the Interstate Compact Administrator, who oversees the placement of juveniles from sister states in programs in this state, having examined his legal duties carefully, entered into a Consent Decree with the Plaintiff Class. Pursuant to such agreement, the court approved and entered such decree.

At the time the court had entered its preliminary injunction against Williams, Crist and Thorne, it had expressed its amazement of the absence of interest on the part of the State of Utah in the student population confined and detained at the Provo institution. Indeed the court had dismissed out the Superintendent of Public Instruction based on representations made at that time. As the matter progressed, facts developed which justified the rejoinder of the Superintendent and resulted further in the Consent Decree heretofor entered.

On May 5, 1980 the court orally issued Findings of Fact, Conclusions of Law and a Permanent Injunction in open court. All parties had repeatedly stated throughout the course of this litigation that what was needed from the court was a prompt and dispositive determination of the issues. Thus it

was with these considerations in mind that the court after careful consideration of the facts and the law, felt the need to give a prompt and dispositive ruling from the bench on May 5, realizing that the press of time and the bulk and complexity of the litigation would require final, written Findings, Conclusions and Judgment, as well as this Opinion, all to come after the oral ruling.

The balance of this Opinion will add to the procedural and factual context provided above, will discuss certain post-trial motions filed by the parties and ruled upon at the May 5 hearing, will tie up some loose ends created during the litigation, will discuss the knotty jurisdiction and class action issues raised in this case, and will explain the court's view of the case on the merits.

At the time of the Preliminary Injunction hearing in this case, one thing that greatly concerned the court was that no state or federal agency exercised general regulatory authority over the school despite the fact that the school was receiving significant amounts of funding to house, treat and educate boys, and despite the fact that the school had almost total control over the lives of the boys during the time that they were confined at the school. The normal program at the school anticipated that a boy would reside there at least for one year, and some boys spent almost all of their high school years at the school.

Plaintiffs initially named as defendants John F. McNamara, who is the Administrator of the Interstate Compact on Juveniles of the State of Utah, Walter D. Talbot, who is the Utah State Superintendent of Public Instruction, and the Utah State Board of Education. Plaintiffs alleged that these defendants had the duty to regulate the school and to monitor the school's conduct in relation to the boys. Prior to the Preliminary Injunction hearing, the court had dismissed claims against defendants Talbot and the State Board of Education, without

prejudice. This was based on proffers from these defendants that no boys receiving public special education funds and for whom the state was responsible were at the school, and that absent this funding, these defendants had no duty or authority to regulate the school. Plaintiffs were unable to effectively rebut these proffers at that time, and in their initial complaint had not pled a coherent theory of liability as against these two defendants. Claims against defendants from the Utah Department of Social Services were also dismissed.

Although defendant McNamara moved to dismiss at the same time as the other state defendants, his motion was denied. McNamara administers the Interstate Compact on Juveniles in Utah, as adopted in Utah Code Annotated, § 55-12-1 et seq. The Compact provides a means of placing minors, adjudicated as delinquent in one state, in another state for treatment or rehabilitation. At the time of the hearing on the Motion to Dismiss there was no question that the school contained a small number of boys placed there for treatment by juvenile courts in other states. However McNamara's position at that time was that these boys had been placed there pursuant to special contracts that did not fall within the terms of the Interstate Compact. The court rejected this contention and basically ruled that all placements at the school from out of state juvenile courts were covered by the Compact. At the time of the Preliminary Injunction hearing, plaintiffs and defendant McNamara reached a settlement as to a Preliminary Injunction under which McNamara would permit no future placements at the school from out-of-state juvenile courts and would see that boys presently placed at the school by out-of-state juvenile courts would be removed and unless or until the Utah State Division of Family Services certified the school as an appropriate placement facility for Utah juvenile courts, the Compact would not permit placements there by out-of-state juvenile courts.

Thus at the time of the Preliminary Injunction hearing,

basically the evidence of state action for purposes of civil rights jurisdiction was receipt of significant amounts of public funding by the school, either directly or indirectly, and placement of a very few boys there by juvenile courts. The court expressed on the record its view that the evidence at that time as to state action was "thin". Nevertheless, discovery was just getting underway in the case, and there were numerous unanswered questions concerning the school's relationship to federal special education laws. Also, there was evidence of school policies or practices that in the court's view clearly violated the civil rights laws, if state action were proved. These included mail censorship beyond inspection for contraband, compelling boys to submit to polygraph examinations at regular intervals, excessive use of isolation facilities at the school and excessive use of physical force.

Because these were the types of practices that threatened imminent and irreparable harm to the boys, and because there was no substantial evidence that the school could not continue to function effectively without these practices, the court preliminarily enjoined these practices based on a "provisional" finding of state action. The court also "provisionally" certified a class consisting of all boys residing at the school during the litigation, again realizing that there were unique class certification problems in the case. However the court could not very well extend protection to some boys and not to others where discovery had not yet revealed the source of funding or placement for most of the boys, and where the only persons available to speak for the boys were parties or witnesses who had run away from the school or who had left in some other fashion.

At the Preliminary Injunction hearing, as well as at trial, the school defendants claimed that the polygraph and the mail censorship were necessary components of security and treatment at the school. However the court believed that the

evidence indicated that these practices were gross overreactions to security and treatment needs and unreasonable infringements on basic human and constitutional rights that are possessed by all -- even convicted adult felons. The school defendants also urged that use of physical force and isolation were not excessive because they were only used when students were "out of control". However the term "out of control" as used by the school defendants included everything from physical violence by a boy to a minor infraction of school rules.

Although there was some evidence of actual physical abuse at the school, offered both during the Preliminary Injunction hearing and at trial, these were isolated instances where school employees themselves had lost "control". Abusive actions from "out of control" school employees seemed to be a necessary result of school policies permitting responses out of proportion to behavior that may have been in violation of school rules but was basically innocuous. This was particularly true where the evidence showed that defendant Jack Williams, a director, co-owner and co-founder of the school, was "out of control" on occasion.

Plaintiffs urged, at the Preliminary Injunction hearing and throughout this litigation, that virtually all practices at the school were "anti-therapeutic" and that the school should be closed. This position was not supported by the evidence, even at trial. Some boys perform successfully at the school, and are probably better off for having been there.

On the other hand, for other boys the school is inappropriate and the program could and did lead to tragic results. Although the experts differed about the appropriateness of the school's program as a whole, this is not uncommon. The dispute between the experts is really a dispute between differing philosophies, none of which is entitled to special consideration by the court. There was really no dispute over the fact that the formal educational component of the school is of

high quality. No matter how desirable the ends of behavior control or modification may be, the Constitution, other federal law, and the fundamental set of generally shared values of our civilization place limits on the means used to achieve laudable ends. Lawful ends demand lawful means. Consistency of ends and means is a must.

Thus the aim of the court in its preliminary and final orders in this case has been to preserve the valuable aspects of the institution and to restrain only those practices which clearly invade constitutional or federally protected rights.

As discovery developed after the Preliminary Injunction hearing, it became apparent that the initial information possessed by the state concerning the school's role and its own role in federal special education programs was inaccurate. There were and are substantial numbers of boys at the school whose tuition was funded by federal special education programs such as the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., which is commonly referred to as Public Law 94-142, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Under these programs a "handicapped" child is basically any child who is difficult to educate in the mainstream of public education. Children so defined range from those with physical impairments, to those who are simply behavior problems in class, to those who may have a complex of physical, mental and emotional problems that interfere with their education in a number of ways. However under federal law, all of these children have the right to be educated in the public schools, or if there is no reasonable way for the public schools to perform their job, to be treated and educated in some other appropriate setting at public expense. Receipt by the Provo Canyon School of such "handicapped" children imposed a set of legal duties on the school, on the placing public school district, and on educational officials of the State of Utah. See 45 C.F.R., parts 84 and 121a.

Since it became clear that the Utah State Board of Education was the "state education agency" responsible under Public Law 94-142 for seeing that special education funds to be spent in Utah were allocated to appropriate public or private facilities, and for insuring that facilities in Utah receiving such funds were in full compliance with federal regulations, plaintiffs were allowed to bring in the state board and Dr. Talbot as defendants once again. The state's initial misinformation concerning "handicapped" children at the Provo Canyon School and concerning its own responsibility for these children was one indication of the state's default in its duty to regulate the school under federal law.

Even after all of this became clear to the state, the state's acceptance of its special education responsibilities regarding the Provo Canyon School was reluctant. Although prior to trial the State Board of Education finally sent inspectors to the school, they only examined its classroom component. Of course, the educational component received high marks, and had also received high marks from placing school districts that looked only at the classroom program. This might have been enough if the facility provided only formal education, but it was grossly deficient when dealing with a residential and detention facility with treatment and correctional programs like those at the Provo Canyon School.

Prior to trial, the State Board of Education and Dr. Talbot filed a Motion for Summary Judgment, as did most of the other parties. One ground for that motion was that plaintiffs had failed to exhaust administrative remedies under the federal special education laws. However the court found that administrative remedies were inadequate to deal with the class-claims present in this case, and that resort to these remedies would have been futile. The state's position was somewhat incongruous in the face of its initial denial of any responsibility for the children at the Provo Canyon School, and in light

of the fact that it was not until the trial of this case that the state agreed to adopt a regulatory mechanism capable of implementing certain remedies provided by federal law, and capable of monitoring compliance by the Provo Canyon School, and other so-called "private" institutions in the state receiving special education funds which are burdened by the duties attached to the receipt and use of such funds. This agreement was embodied in a settlement agreement with plaintiff class that included a Consent Decree basically ordering the state to do what it had a duty to do all along.

Shortly before the trial of this case some confusion developed as to what issues would be tried to a jury, what issues would be tried to the court, and in what order legal and equitable issues would be tried. Since the time of the Preliminary Injunction, the court had assumed and thought the parties had assumed that the "trial" in this case would be a trial to the court on the question of a permanent injunction. The court was aware that damage claims were being asserted by plaintiffs individually, but saw those claims as being collateral to the major thrust of the suit for injunctive relief, and anticipated that the two individual damage claims would be tried subsequent to the injunctive claims. Based on this view of the case, the court had declined to permit the joinder of boys formerly at the school, or their parents, who wished to assert additional damage claims against the school defendants. Also, when these same individuals filed a separate action in this District to pursue their damage claims, (Horton et al. vs. Williams, et al., C 79-723), the court declined to consolidate it with the present action, for the same reason. The court thought that it would be unwieldy to try multiple damage claims to a jury at the same time as injunctive claims were being tried to the court.

Nevertheless, the Pretrial Order finally agreed to by the parties specified that a jury trial would be held and didn't distinguish between a trial of legal and equitable issues. The

court frankly overlooked this in signing the Pretrial Order, but at later hearings on February 13, 1980 and March 5, 1980, the court called to the attention of the parties the fact that the Pretrial Order didn't accurately reflect the court's intention to try the equitable issues first in a court trial and to try the damage issues to a jury later, with the possibility that individual damage claims of Milonas and Rice could be consolidated later with the damage action filed by other boys and their parents in C 79-723.

At the time the court initially announced its intentions, defendants made no serious objection to limiting the trial to equitable issues to be decided by the court. Defendants later filed a Motion for Jury Trial on March 11, 1980, relying on cases including Beacon Theaters v. Westover, 359 U.S. 500 (1959) and Dairy Queen v. Wood, 369 U.S. 469 (1962) for the proposition that not only were defendants entitled to a jury trial on the damage claims, but also defendants were entitled to this jury determination prior to the court's determination of equitable issues in order to avoid forfeiture of the Seventh Amendment right to a jury trial by the collateral estoppel effect of a prior court determination of fact issues common to the legal and equitable claims. The court read defendants' cases and found that their motion was well taken. The court ruled that the damage claims would be tried to a jury and that the equitable claims would be decided by the court in the same proceeding, after the jury had returned a verdict. It made sense to bifurcate the trial only if the bulk of the case, i.e. the injunctive claims, could be tried first.

After the jury trial had commenced, it appeared that both plaintiffs and defendants thought that the so-called "class" damage claims were being tried as well. Although the Pretrial Order referred to damage claims by plaintiffs and class claims by plaintiffs, nothing in the Pretrial Order indicated that the class claims included claims for damages or that there were any

claims for damages other than those brought by Milonas and Rice as individuals. More importantly, no notice to the class had been proposed by any party, as required by Federal Rules of Civil Procedure, Rule 23(c)(2). At the earliest practicable time during the trial, the court ruled that the so-called class damage claims were beyond the scope of the litigation, in its existing procedural stance. The court insulated the jury from evidence not relevant to the two individual damage claims by accepting testimony relating only to class injunctive claims out of the presence of the jury.

At the conclusion of the trial on the individual damage claims, the jury's Special Verdicts answered "no" to the following questions as to each of the claims by plaintiffs Milonas and Rice against defendants Williams and Crist:

Was the plaintiff [Timothy Milonas, Jr. or Kenneth Rice] deprived of any of the Federal Constitutional rights specified below, as the proximate result of the knowing acts of defendant [Jack L. Williams or Robert H. Crist]?

[Six such rights were specified, including "freedom of religion", "freedom of speech", "due process of law", "legal counsel", "privacy" and "therapeutic treatment".]

The damage claims against defendant Thorne had been dismissed by the court prior to submitting the case to the jury. Dr. Thorne became Executive Director of the school after the litigation was commenced and there was no evidence tying him to school policies and practices in his previous role as "consultant" to the school.

The court had also directed a finding as a matter of law that defendants Williams and Crist had acted under color of state law with respect to plaintiffs Milonas and Rice. There was no dispute about the facts that gave rise to this determination by the court. Rice had been placed at the school by an Alaskan juvenile court after an adjudication of his delinquency. Although Milonas was placed by his mother, Mrs. Stout, this

placement was a condition of probation imposed by a Nevada juvenile court. Defendants' Exhibits 8L and 8M, admitted into evidence, shed much light on the relationship between the school and these two juvenile courts, as does plaintiffs' Exhibit 88.

In opposing a court finding of state action as a matter of law, defendants Williams and Crist relied on cases indicating that even where state courts or agencies had placed juveniles in private residential or treatment facilities, the "nexus" required for a finding of state action was absent unless direct state participation in alleged constitutional violations occurring after placement was shown. See, Henig v. Odorioso, 385 F.2d 491 (3d Cir. 1967); Campbell v. Glenwood Hills Hospital, Inc., 224 F.Supp. 27 (D.Minn. 1963).

With respect to Milonas and Rice, the authority and duty of the juvenile courts to control the treatment of each boy did not end with mere placement at the school. The Alaskan court executed forms consenting to limited monitoring of Rice's mail and the use of the polygraph on him. The Nevada juvenile judge was listed as a legal guardian and supervisor of the placement at the Provo Canyon School, in the Milonas application for admission to the school. Correspondence contained in the above-referenced exhibits showed that the treatment of both Milonas and Rice after placement at the school was subject to the direct control of the Nevada and Alaska juvenile courts, that these courts were fully aware of policies and practices at the school, and that these courts had the power to eliminate the subjection of the two boys to any school policy or practice, or to remove the boys from the school. Thus the "nexus" missing from the above-cited cases was present regarding Milonas and Rice. See, Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974); sub nom, Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) and Brooks v. Richardson, 478 F.Supp. 793 (S.D. N.Y. 1979),

If state action is not present with regards to the Provo Canyon School's treatment of Milonas and Rice, this court

cannot envision a situation where any "private activity" falls under the civil rights laws, no matter how direct and pervasive the state involvement is in the activity complained of. The power of the state was used to place these two boys in the Provo Canyon School, to knowingly subject them to school policies and practices, and to keep them there against their will, to the same extent as if the courts had placed the boys in a "public" treatment, correctional or detention facility. This was perhaps shown most vividly at a hearing in which counsel for Mrs. Stout informed the court that a bench warrant for the arrest of the Milonas boy had been issued by the Nevada juvenile court, because the boy had left the school. At least one or perhaps both of these boys were subject to the Interstate Compact on Juveniles. Defendant McNamara had not performed his duties with respect to either, and given his later position regarding placements from out of state juvenile courts, these boys should not have been placed in the school at all. The court's subject matter jurisdiction over the class injunctive claims will be dealt with in more detail below.

After the verdict on the two individual damage claims, plaintiffs moved for Judgment Notwithstanding the Verdict and the school defendants moved for Judgment on the Verdict. The school defendants also moved to dismiss the class injunctive claims based on the jury's findings on the individual damage claims, the court's dismissal of the class damage claims, the newly found regulatory authority of the state, and "voluntary" changes in school policies and practices since this litigation commenced.

As to the cross-motions on the verdict, the court ruled that when the evidence is viewed in the light most favorable to defendants, the verdict must stand. Had the verdict contained a clear finding that practices restrained by the Preliminary Injunction did not violate constitutional rights, the court would have set aside that finding as being clearly

erroneous. However as the Special Verdict form quoted above shows, the basis for the verdict of no cause of action could have been any one of several grounds. For example, there was evidence that would support a finding that any injury suffered did not "proximately" result from defendants' "knowing" policy or practice, that the boys were not subjected to certain school practices, or that any injury suffered did not rise to the level of a constitutional violation in light of the short time the two boys were at the school.

However it also appears that the jury verdict did not resolve any fact issues that are common to the equitable injunctive claims tried to the court. In their post-trial Motion to Dismiss the injunctive claims, defendants cite cases for the proposition that where the jury makes findings on fact issues common to both legal and equitable claims in the same action, the jury's findings on the legal claims bind the court's findings on the equitable claims. See, Eli Lilly v. Generix Drug Sales, 460 F.2d 1096 (5th Cir. 1972) and Jones v. Schramm, 436 F.2d 899 (D.C. Cir. 1970). The court has also done some research in this area, which has revealed that there are few cases on this precise issue, and some cases appear to have held contrary to the cases relied on by defendants. See, Wright v. U. S., 472 F.Supp. 1153 (D. Mont. 1979). Nevertheless the court generally agrees with defendants' position as to the proposition. Their problem here, however, is that the jury's verdict resolves none of the issues included in the equitable claims before the court, and was made on an evidentiary base drastically smaller - indeed different from the evidentiary base considered by the court in dealing with the class injunctive claims. For example, neither Milonas nor Rice were funded or protected by federal special education laws, as are other boys within the class. Boys within the class were subjected to school practices other than those to which Milonas and Rice were subjected. Many boys had been at the school much longer than Milonas and Rice and as a result

suffered grievous loss of constitutional or other federal rights. Although some of the above differences between the individual damage claims and the class injunctive claims call into question the status of Milonas and Rice as class "representatives", these and other class certification issues will be discussed more fully below.

Throughout the trial the court asked all parties to submit a list of precise fact issues common to the legal and equitable claims. The parties were unable to do so.

The form of the Special Verdict was primarily within the discretion of the court. See, Midwestern Wholesale Drug, Inc. v. Gas Service Co., 442 F.2d 663 (10th Cir. 1971). The only objection to the Special Verdict form was, in the court's view, untimely, and did not relate to presentation of common fact issues to the jury. A form of Verdict any more detailed than the one given would have been unduly confusing, especially in light of the detailed Instructions requested by the parties and given by the court. In sum, the Verdict found by the jury was irrelevant to the injunctive claims confronting the court.

The school defendants also argued that the state's agreement to regulate special education and juvenile court placements at the school makes a Permanent Injunction unnecessary. This ignores the fact that the state's agreements specifically called for, among other things, rules that would conform to the court's Permanent Injunction. Also the school defendants now appear to contest the newly found regulatory authority of the state, although previously they indicated such authority would be "welcome".

Even though the court found that the practices and policies permanently enjoined violated both civil rights and special education laws, the court makes no finding as to whether other school policies and practices violate special education laws. Instead the court has ordered the school defendants to comply with rules to be adopted by the Utah State

Board of Education under its settlement with plaintiffs, and has enjoined the school from receiving public special education funds if not in full compliance with the requirements of the special education laws. This is a unique and specialized area of the law, requiring the expertise of state education officials, which is why the appropriate state officials, not this court, will carry the burden of insuring future compliance with special education laws by the Provo Canyon School, as well as by other comparable facilities in the state.

The school defendants also argued that "voluntary" changes in school programs made a Permanent Injunction unnecessary. Although the court understands and welcomes the real changes that have occurred at the school, the abandonment of the polygraph and modification of mail monitoring came only pursuant to court order, and the record indicates that these practices would return in some fashion absent court order. The court also sees some of the changes as being cosmetic.

Among the loose ends in this litigation referred to above include questions regarding the guardian ad litem status of plaintiffs' counsel, Kathryn Collard, the question of possible "indispensable" parties to this litigation, and the question of statute of limitations. Although the court has had occasion to make rulings concerning these questions during the course of this litigation, these are questions that appear to have been preserved in the Pretrial Order and deserve fuller exposition here.

At the time Ms. Collard filed this action and sought emergency relief from Chief Judge Anderson, she concurrently filed a motion for her appointment as guardian ad litem for the two named plaintiffs. The record does not indicate that Judge Anderson took any action on this motion, and after this case was reassigned to this judge, the motion was not renewed until quite late in the litigation. When Judge Anderson ordered that the named plaintiffs be placed with the State

Division of Family Services, he did so with the agreement of the school defendants, and the record does not indicate that any objection to Ms. Collard's appointment was made at that time. Although from time to time during the litigation the school defendants and others have collaterally attacked counsel's lack of status as guardian ad litem, no competing motion for appointment was ever filed.

When counsel's motion for appointment was renewed late in the litigation, defendants objected on the grounds that Utah Rules of Civil Procedure, Rule 17(c) required that the motion for appointment be made by the boys themselves because they were over 14 years old, and that counsel had a conflict of interest because she was serving as a volunteer attorney for the American Civil Liberties Union. The court did not find defendants' objections well-taken and granted the appointment as to the two named plaintiffs. It appeared that counsel had in fact acted on behalf of the two boys as well as herself in seeking the appointment. The filing and pursuing of this action, as well as the removal of the boys from the school, was pursuant to the request or desire of the boys themselves, rather than in conflict with their requests or desires. All of this was confirmed later by testimony from the two boys at trial. Although the parents or general guardians might have been appropriate guardians ad litem in other circumstances, the real conflict of interest here was between the boys and their parents or general guardians. The parents or general guardians had expressly consented to school practices that the boys themselves felt were illegal, or at least wrong. Ms. Collard was an appropriate guardian ad litem under the circumstances.

During the course of the litigation, the school defendants urged that parents, juvenile court officials, officials from school districts that had placed boys at the Provo Canyon School, etc. needed to be joined as indispensable parties

under Federal Rules of Civil Procedure, Rule 19. At one point these defendants urged the court to give notice of this action to all parents. The court felt that neither of these steps was necessary to award meaningful relief among the existing parties, or to avoid prejudice to non-parties. The school's position throughout has been that it stands in loco parentis to the boys at the school. In denying defendants' motion for the court to notify parents, the court indicated that the school was free to notify parents if it wished, and the record indicates that the parents were notified, particularly concerning plaintiffs' desire to discover school records on each boy at the school. Certain parents moved to intervene in this action and for the most part those motions were granted. Other non-parties apparently chose not to intervene. The court's orders throughout this case have been designed to protect the interests of parties and non-parties alike. The court has been able to fashion adequate relief based on the existing parties to this suit.

The school defendants have urged that the one year statute of limitations found in Utah Code Annotated § 78-12-29 applies to this action. Assuming, without deciding, that this is true, the practices that the court has enjoined were continuing at the time this action was filed, or had occurred within one year prior to that time and were likely to recur unless enjoined. These defendants also argued that the one year statute of limitations bars consideration of events occurring prior to September of 1977. To the extent that the court has served as factfinder on the equitable claims, a certain amount of historical information about the school has been useful to the court in gaining some perspective. Also, the use of evidence as to historical practices at the school really raises evidentiary questions of relevance and probity rather than statute of limitations issues. To the extent that the court has considered historical evidence, it has

considered remoteness in time, as well as other appropriate factors, in determining the relevance or probity of such evidence.

In assessing both the subject matter jurisdiction of the court and the nature of the class to be certified for purposes of injunctive relief, it is useful to look at sources of placement and funding for boys at the school. Plaintiffs' Exhibits 111 through 150 and defendants' Exhibits 5L through 5R are helpful here. The school had an average attendance of approximately 110 boys in 1979. During 1979, 75 boys received some form of public funding. (See defendants' Exhibit 5L). Of these 75, all but about seven boys received funding for special education under Public Law 94-142 from some 44 school districts throughout the country, including 33 school districts in California, three school districts in Utah, two school districts each in South Dakota and the state of Washington, and one district each in Idaho, Minnesota, New York and Wyoming.

Defendants' Exhibit 5M shows that 77 boys received public funding in 1978. The average school population during that year was about 120 boys. Of the 77 publicly funded boys in 1978, more were funded as a result of juvenile court placements and fewer as a result of school district special education placements than in 1979. From 1973 onward, defendants' Exhibits 5L through 5R show a steady increase in the per cent of school revenues received from public sources, reaching a high of 33% in 1979.

The evidence discussed above in relation to juvenile court knowledge of and consent to school policies and practices regarding Milonas and Rice typifies the state activity involved in the juvenile court placements generally. See, plaintiffs' Exhibit 88. State juvenile court judges and probation officers knew about and consented to the use of the polygraph, and knew or should have known that each

boy had to "pass" a polygraph examination before he could advance within the school program, before he was able to obtain certain rights or privileges from the school, and before he could leave the school either temporarily or permanently. As to mail monitoring, the Alaskan juvenile courts apparently exempted communications to and from attorneys, probation officers and others from the general school policy, although it is not clear whether other juvenile courts did likewise. Besides Alaska, boys were placed from juvenile courts in at least the states of Arizona, California and Indiana.

Much more important than the 20 or so juvenile court placements are the dozens of school district special education placements shown above, and the steady increase in those placements to a high of 68 in 1979. These placements create alternative grounds for this court's subject matter jurisdiction. These placements establish "state action" for purposes of civil rights jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343, as well as federal question jurisdiction under 28 U.S.C. § 1331 for causes of action based upon the federal special education laws themselves, 20 U.S.C. § 1401 et seq. and 29 U.S.C. § 794. A brief review of the applicable federal regulations and the pertinent evidence shows the "nexus" between "state action" and the plaintiffs' causes of action against the Provo Canyon School as well as the jurisdictional base for claims under the special education laws.

First of all, the publicly funded special education placements were not made by parents; they were made by school districts. See plaintiff's Exhibit 14-O. The placements were made by written contracts between the school districts and the Provo Canyon School, and included reimbursement for "counselling and guidance" at the school. See plaintiffs' Exhibits 132 and 133. The reason these placements and

contracts were made by the school districts rather than the parents is because these school districts were attempting to perform their federally mandated duty to provide "special education" to those children they had been unable to educate in their regular public school systems. See, 45 C.F.R. Parts 84 and 121a. Although the "public function" state action analysis is rarely applicable, this case is one instance where it does apply since it is clear that the privately owned facilities of the Provo Canyon School were used by the school districts to meet their federal duty to give a "free and appropriate public education" to handicapped children. See, plaintiffs' Exhibit 143.

If a public school district elects to perform its duties through referral to privately owned residential and detention facilities, such as the Provo Canyon School, it is responsible for insuring that the private facility meets all of the requirements applicable to public facilities providing similar services. 45 C.F.R. §§ 84.33(b)(3) & 121a.2(c). Among the services that must be provided, and that must be state regulated, are "non-academic" services including guidance, counselling, therapy and the like. 45 C.F.R. §§ 84.37 and 121a.306. These services must be provided in the least restrictive program appropriate for the child and the least restrictive appropriate environment within that program. 45 C.F.R. §§ 121a.550 through 556. In selecting the least restrictive alternative, possible harmful effects to the child from a particular program must be considered. 45 C.F.R. § 121a.552(d). All details of the particular program chosen for a child, whether in a public or private facility, must be reflected in an Individual Education Plan (IEP) in which the school district or state education agency must participate and which the state must enforce. 45 C.F.R. § 121a.341. The state must also participate in any changes in the IEP. 45 C.F.R. § 121a.347(b). The Provo Canyon School sent periodic progress reports as required by law, to placing school districts. See, plaintiffs' Exhibit 121.

Despite the fact that the Provo Canyon School maintains that its polygraph, mail monitoring and isolation practices are not just for security purposes but are an integral part of treatment or therapy at the school, despite the fact that therapy is one of the non-academic services that must be part of the IEP, and despite the fact that the school districts are responsible for seeing that such services are provided in the least restrictive appropriate environment, the IEP's for the boys at the school did not mention these school practices. See, plaintiffs' Exhibit 161. Of course these practices had been stopped by the Preliminary Injunction when the state certified the Provo Canyon School as in compliance with P.L. 94-142 in December, 1979. See, defendants' Exhibit 5V. The Consent Decree later agreed to by the Utah State Board of Education effectively repudiates this certification. Similar certifications from other states also overlooked school practices that these states had a duty to control or eliminate.

The federal special education regulations require not only that individual placements at private schools must be regulated and monitored by the placing school district, but also that the state within which school district private placements are made must regulate and monitor the private programs that provide special education and required services such as residential care and therapy. 45 C.F.R. § 121a.600. Also, 45 C.F.R. Subpart D makes regulations for public school special education programs also applicable to private schools that accept school district placements or funding, and makes the states responsible for enforcement. If the private school programs don't comply with applicable state and federal regulations, the school district or state education agency is faced with the choice of either bringing about a change in the private program or withdrawing placements and funding. Similarly, the Provo Canyon School is faced with a choice of either bringing its programs into compliance with the special

education laws or refusing school district placements and funding. However once the school accepts school district placements and funding, and so long as it continues to accept them, it is jointly responsible for the performance of special education duties imposed on the state by federal law, and jointly liable under federal law for the breach of those duties.

Because the states, including the State of Utah, and the Provo Canyon School had not lived up to their joint responsibilities under federal law, this court was also faced with a choice between either fashioning modest injunctive relief to compel both the state and private participants in the federal special education program to meet these responsiblities, or ordering the removal from the school of all boys placed or funded by school districts. This latter alternative would likely cripple the school financially, and lead to the closure of the school sought by plaintiffs. This latter alternative is also the necessary result if the court were to accept defendants' argument that the court may not enforce the federal special education regulations by modifying the practices of the private school programs to which the regulations apply.

The foregoing is but a sample of the evidence of joint participation by school districts, state education agencies, juvenile courts and the Provo Canyon School in the practices complained of by plaintiff. At any given time since this litigation began, over one half of the boys at the Provo Canyon School had been confined there by the authority of state courts or school districts, for purposes of therapy and rehabilitation in conjunction with education. State powers and duties were delegated to or shared with the Provo Canyon School, so that regardless of what test is applied, there can be no doubt that the school acted "under color of state law" in subjecting these boys to practices that the school alleges are a part of the therapy and rehabilitation programs justifying state placements.

Abuse of state authority by the school, or use of state authority in a manner not reasonably related to purposes for which that authority was granted or shared gives this court jurisdiction to remedy such abuse of state power. This jurisdiction covers both the private institution that has assumed state powers or duties and the state entity charged with the supervision of that private exercise of state powers and duties. If the Constitution prevents the states from using the polygraph, prohibits mail censorship, precludes isolation and physical force in the manner practicted at the Provo Canyon School, then it similarly bars the school itself, where the school is engaging in such practices pursuant to state powers and duties to treat and rehabilitate delinquent and handicapped children. This is the Provo Canyon School's quid pro quo for the substantial funding it receives in payment for school district and juvenile court placements.

"State action" so permeates and is so intertwined with every aspect of the operation of the program at the Provo Canyon School, that the school's program as a whole operates "under color of state law", giving this court jurisdiction to issue orders protecting even the minority of boys who have not been placed there by state action. An example of this intertwining of state and private action is found by looking again at the federal special education regulations implementing P.L. 94-142. Although most of these regulations are tied to school district placements or receipt of public funding, 45 C.F.R. §§ 121a.451 through 460 specifically require the state education agency to offer regulated special education services for handicapped children in private schools within the state's borders, even where these children are not placed or funded by a public school district. Thus the federal law establishes that handicapped children in private facilities have a state regulated right to some of the benefits of a "free and appropriate public education", even absent placement by public school districts

or application by parents for the "free" public funding.

This is especially noteworthy in light of evidence that there are substantial numbers of children at the Provo Canyon School who are "handicapped" within the meaning of P.L. 94-142 but were not placed or funded by any school district or state agency. For example, in 1978 only 50-60 boys at the school had been placed by school districts, yet the Provo Canyon School itself estimated that 110 of 125 boys at the school on February 1, 1978 were "educationally handicapped". See, plaintiffs' Exhibit 141. Also, both Rice and Milonas had been diagnosed as "learning disabled", despite the fact that neither was funded under P.L. 94-142. See, defendants' Exhibits 8L and 8M.

The Provo Canyon School's capacity to exercise state special education powers and perform state and district duties is a significant selling point in recruiting students from public and private sources. The school uses such capacity extensively in its advertising. See, plaintiffs' Exhibits 2 and 3 from the Preliminary Injunction hearing. The school encourages parents to place children at the school privately, and then to apply to their school districts for special education funding, which may or may not be forthcoming. See, plaintiffs' Exhibit 2 from the Preliminary Injunction hearing. The lure of public funding is almost overwhelming for most of these parents, and this lure results in private placements at the school, regardless of whether the public funding ever materializes.

Finally, if there was ever any doubt that plaintiffs could include claims of violations of federal special education laws in their civil rights cause of action, that doubt was removed by Maine v. Thiboutot, 48 U.S.L.W. 4859 (U.S. Supreme Court, No. 79-838, June 25, 1980).

Turning to federal question jurisdiction under 28 U.S.C. § 1331 for causes of action directly under P.L. 94-142 and Section 504 of the Rehabilitation Act, defendants dispute that such causes

of action against private defendants are contemplated by these federal laws, even as to injunctive relief. Although the law is mixed and still developing as to whether a damage cause of action may be maintained against either a public or private defendant, the federal courts have almost uniformly permitted injunctive causes of action under federal special education laws against public defendants, where state administrative remedies have been exhausted or are futile. See, Miener v. Missouri, 48 U.S.L.W. 2522 (E.D. Mo. January 25, 1980); Patton v. Dumpson, 48 U.S.L.W. 2523 (S.D. N.Y. January 23, 1980); and Armstrong v. Kline, 476 F.Supp 583 (E.D. Pa. 1979). The court has previously stated its finding herein that state administrative remedies were inappropriate for the class claims in this case, and that Utah administrative remedies that could be applied to the Provo Canyon School were virtually non-existent until the conclusion of this litigation.

If a cause of action for injunctive relief may be stated against public defendants under federal special education laws, then one may be stated against private joint participants who share federal special education duties and responsibilities. This is especially true in this case, where the public defendants had abrogated their responsibilities to control their private delegatees, leaving the court with a choice between either exercising that control itself, or excluding the Provo Canyon School from participation in the federal special education programs, once that participation became known.

Finally, the court finds that the value of the federal special education rights possessed by each child to whom those rights apply exceeds the $10,000. amount in controversy required under 28 U.S.C. § 1331, such amount being slightly over 1/2 of the yearly tuition charged for each boy at the Provo Canyon School, in return for providing special education.

Regarding class certification and representation for purposes of injunctive relief, at the time of the Preliminary

Injunction, this court provisionally certified a class consisting of all boys residing at the Provo Canyon School during the course of this litigation. As a final ruling, this court is certifying a class consisting of all boys residing at the school now and in the future. The court has found that all of the required elements under Federal Rules of Civil Procedure, Rule 23(a) and (b)(2) are met, even though defendants argue that none are met. The court never certified a class, either provisionally or otherwise, for purposes of a class damage claim under Rule 23(b)(3) and (c)(2), and any such claim was dismissed without prejudice at trial, based upon lack of the notice to the class required by Rule 23(c)(2).

Both at the Preliminary Injunction and at trial, defendants argued that since both of the named plaintiffs acting as class representatives had left the school, their individual claims for injunctive relief were moot and there was no standing to assert injunctive claims on behalf of a class of boys still at the school. In U. S. Parole Commission v. Geraghty, 26 Criminal Law Reporter 3139 (U.S. Supreme Court No. 78-572, March 19, 1980), the Supreme Court held that where a class representative has a ripe claim for injunctive relief at the time he applies for class certification; class certification is denied by the District Court; and the representative's injunctive claims subsequently become moot, reversal on appeal of the denial of class certification allows the class claims to be litigated despite the mootness of the representative's individual claims. The court ruled that the class representative retained a personal stake in the class certification issue, despite the mootness of the individual claim for substantive relief. The court believes that the facts of this case fall within Geraghty or within a necessary extension of Geraghty.

At the time the Complaint in this litigation was filed, the two named plaintiffs were either at the school or subject to the custody and control of the school, and thus had

ripe claims for injunctive relief, as well as a claim for class certification contained in the Complaint. However the named plaintiffs contended that as a result of the filing of this suit they were subject to imminent and irreparable harm from the school. Judge Anderson then removed the two boys from school custody based upon this contention and upon the school's agreement. However even after these boys left the school, through counsel they continued to vigorously press for class certification, which continued to be a concrete, sharply presented issue. Since the court's initial class certification was provisional only, and expressly subject to redetermination, the named plaintiffs continued to seek final certification, and final certification remained a concrete and contested issue until the court ruled on the merits from the bench on May 5, 1980. The court thus believes that Geraghty permits the class injunctive claims to be litigated, despite the mootness of the individual damage claims of the named representatives, given the foregoing fact pattern.

Even if Geraghty doesn't directly control this situation, the court believes there are other compelling reasons for permitting the class injunctive claims to be litigated. As a practical matter, no class representative could litigate the injunctive claims in this lawsuit while continuing to reside at the school. The admittedly authoritarian regime at the school could not tolerate the open rebellion such litigation represents, and the threat of retaliation from the school could not be avoided. Furthermore, the school defendants have the power to moot any individual claim for injunctive relief simply by discharging the claimant from the school. The boys at the Provo Canyon School needed someone to speak out on their behalf; school policies and practices effectively muted their own voices; and given the abrogation of state oversight responsibilities, the only persons who could speak for the boys were other boys who had left or who were about to leave the school.

As to the numerosity requirement of Rule 23(a), although the number of boys at the school at any given time was not so great as to make individual joinder impossible, boys whose time at the school had ended were continually being discharged and new boys were continually being accepted by the school. Thus the fluid nature of the school population, rather than the actual number of boys, would make joinder unmanageable.

Regarding issues of fact or law common to the class, defendants contend that because each boy comes to the school with individual problems and therefore receives individualized treatment from the school, there are no such common issues. The evidence does not support this position. Until the Preliminary Injunction, each boy at the school, regardless of the source of his placement or problems, was subject to each of the practices that the court enjoined. Plaintiffs initially sought to have classes and sub-classes certified only as to boys who had been placed at the school by direct state action. However based on the court's finding that state action is intertwined with all aspects of the school program, based on the evidence that all but a handful of boys at the school are "handicapped" within the meaning of the federal special education laws, based on the fact that all boys at the school are entitled to some form of appropriate treatment, and based upon uniform application of many school practices, the appropriate class consists of all boys at the school, now and in the future. The common claims clearly outweigh individual differences between class members and differences between class members and class representatives.

In light of the court's analysis of the mootness issue, the claims of the named plaintiffs are typical, though not identical with, the class claims. Although neither named plaintiff was placed or funded pursuant to special education laws, each was diagnosed as "learning disabled". Also, the Milonas boy was placed and funded by his parent, even though the

parental placement was a condition of his juvenile court probation. The Rice boy was directly placed by a juvenile court and was state funded. It is not necessary, and would be impossible, to have class representatives for each identifiable interest within the class.

The named plaintiffs have fairly represented the interest of the class. Although there may be a conflict of interest between class members and their parents or the school, the court perceives no conflict between class members and their named representatives. The class representatives were not called upon to represent the interests of parents or the school.

Finally, under Rule 23(b)(2), the school defendants have acted on grounds generally applicable to the class. Specifically, the school's position has been that, regardless of the source of placement or funding of a boy, the school has the right to subject him to practices this court has enjoined, all in the name of therapy and rehabilitation, as well as for security purposes. The school's position has also been that its practices are justified because it stands in loco parentis regarding each boy at the school.

Defendants have relied on Parham v. J. L., 47 U.S. L.W. 4740 (U. S. Supreme Court No. 75-1690, June 20, 1979) and Bell v. Wolfish, 441 U. S. 520 (1970) as setting standards that apply to the merits of this case. Parham involved a challenge to Georgia's procedures for "voluntary" commitment of juveniles to state mental hospitals by their parents. Like the case at hand, although "voluntary" for the parents, the commitments were "involuntary" as far as the plaintiff children were concerned. These plaintiffs contended that due process required a formal, adversary hearing before the commitments could occur. However the Supreme Court held that existing Georgia procedures were adequate because due process required only that an informal medical determination be made by a "neutral factfinder", such as an admitting physician, that a child is medically ill

and in need of treatment. The court applied the balancing test used in virtually all procedural due process cases. Although the court recognized that these children had constitutionally protected liberty interests, and that these interests might conflict with the interests of the parents in some instances, the court recognized the rebuttable presumption that parents will act in the best interests of their children, held that parents have a large amount of discretion in pursuing those interests, and held that the independent medical determination was a sufficient check on parental discretion. The court also held that where the state served as a guardian in loco parentis to these children, the same presumptions and considerations applied to the due process requirements for initial commitment as in the case where natural parents sought the commitment.

Bell was an attack on the conditions of confinement by adult pre-trial detainees at a federal jail. The lower courts held that certain jail practices and conditions were unconstitutional because not justified by "compelling necessities" of jail administration or security. The Supreme Court held that this was not the proper standard. Due Process under the Fifth Amendment required only that practices and conditions be "reasonably related" to legitimate purposes for confinement or to legitimate administrative or security interests. Because the pre-trial detainees had not been adjudged guilty of any crime, punishment was not a legitimate state purpose, and the cruel and unusual punishment standards of the Eighth Amendment did not apply. The court found that the conditions and practices under attack were reasonably related to legitimate security and administrative needs, and therefore were not punitive.

The court agrees with defendants that the general standards enunciated in Bell apply to the case at hand. None of the juveniles at the Provo Canyon School have been adjudged guilty of crimes by adult courts, although some have been

adjudged delinquent by juvenile courts. Others have been determined to be handicapped by their school districts. All boys at the school have been found to be in need of education, plus some sort of treatment, therapy or rehabilitation, even where that finding has been made only by the parents and private physicians or counsellors. Thus the Eighth Amendment cruel and unusual punishment standards don't apply. Fifth and Fourteenth Amendments due process standards do apply, given the court's findings as to state action, and the practices at issue in this case are permissible only if reasonably related to legitimate purposes of confinement, or to legitimate school security or administrative needs.

Of course the juveniles at the Provo Canyon School are not pre-trial detainees confined only for the purpose of assuring their presence at trial, and so the legitimate purposes for confinement and the interests of the juveniles confined are different than in Bell. Juveniles placed at the Provo Canyon School by juvenile courts have been adjudged delinquent according to due process standards significantly less strict than those that must be applied to adult criminal defendants. The justification for this is that adjudged juvenile delinquents may not be incarcerated for punishment, but may only be confined for purposes of treatment and rehabilitation. This court recognizes a "right to treatment" for these boys in light of the duty to provide treatment that must be imposed upon juvenile courts as the quid pro quo for relaxed procedural due process requirements. In light of Bell, the court does not believe that the Constitution requires that treatment for adjudged juvenile delinquents must be provided in the "least restrictive" alternative, but only that such treatment must be reasonably related to the juvenile's treatment needs, and must not be unreasonably restrictive.

Juveniles placed at the Provo Canyon School pursuant to federal special education laws do have a federally protected

right to the least restrictive form of appropriate treatment. 45 C.F.R. §§ 121a.550 through 556.

As to juveniles confined at the Provo Canyon School by or with the consent of parents or guardians, defendants argue that under Parham, such parental consent places the school itself in loco parentis, and immunizes school practices from scrutiny, so long as these practices do not constitute child abuse. To bolster their argument defendants point out that the school has obtained express parental consent to specific practices such as mail monitoring and the use of the polygraph. The court does not agree with this analysis of the application of Parham.

Parham was not concerned with conditions of confinement; it was concerned with procedures by which confinement may occur. In the case at hand, the procedures by which children were placed at the Provo Canyon School are not under attack; rather the conditions of confinement are at issue. However Parham did hold that where confinement is to occur at a state facility, even the "voluntary" or private placement by parents was subject to procedural scrutiny under the Due Process Clause of the Constitution. It also held that the placement decision was not subject only to the unbridled discretion of the parents, but was limited by the requirement of an independent medical determination of mental illness and need for confinement.

The court has found that state action is so intertwined with all aspects of the operation of the Provo Canyon School that the school as a whole operates under color of state law. Thus, as in Parham, even "voluntary" parental decisions or parental consent are subject to constitutional scrutiny, where such decisions or consent will result in confinement or significant loss of liberty for a child, and where confinement or loss of liberty occurs at a facility operating under color of state law, such as the Provo Canyon School.

Where such parental decisions or consent relate to conditions of confinement, Bell provides the applicable constitutional standards. The conditions of confinement must be reasonably related to legitimate purposes of confinement or to legitimate security and administrative needs of the confining facility, and may not be unreasonably restrictive in light of those legitimate purposes and needs. The legitimate purposes for confinement at the Provo Canyon School are residential treatment, therapy or rehabilitation, in conjunction with education. Although there may be many treatment alternatives that are reasonable and not unnecessarily restrictive, and the parent has virtually unlimited discretion to choose between those legitimate alternatives, parental consent does not legitimize conditions of confinement that are not reasonably related to treatment needs or that are unreasonably restrictive in light of bona fide security or administrative needs.

Before discussing this analysis in light of specific practices at the Provo Canyon School that have been enjoined, the court should note its view that if there is conflict between legitimate treatment needs on the one hand and legitimate administrative and security needs on the other, the treatment needs dominate, in light of the use of treatment, rehabilitation and parental consent as justifications for limiting the procedural due process protections afforded to juveniles.

The court has found that practices at the Provo Canyon School regarding use of the polygraph, mail monitoring, isolation and physical force are not reasonably related to legitimate treatment needs, are unreasonably restrictive in light of legitimate school security and administrative interests and are therefore unconstitutional. A fortiori, these practices also violate the right to the least restrictive treatment alternative under the federal special education laws. As to the remainder of the 13 practices contested by plaintiffs, the court

has found that these reasonably relate to legitimate treatment and security purposes, are not unreasonably restrictive, and are therefore constitutionally permissible. However the court expresses no opinion as to whether or not these remaining practices violate rights to the least restrictive alternative or other rights under the federal special education laws. The State of Utah, among others, will need to make that determination in the first instance, under its newly found regulatory authority.

As to the polygraph, the court has difficulty envisioning a set of facts that would justify use of the polygraph on juveniles, either in the name of "therapy" or for security. That set of facts certainly did not exist at the Provo Canyon School. Although there was some evidence offered in support of justification, and some evidence of "voluntary" use of the polygraph by boys, this device is inherently coercive and represents the most serious intrusion into the very thought processes of an individual. It was certainly used in a coercive manner at the Provo Canyon School. Refusal to take the polygraph resulted in punishment hours that boys had to stand or sit off and meant that a boy could not advance within the school program and could not leave the school. Boys were subject to punishment not only for what the polygraph revealed they had done, but also for what the polygraph showed they had thought about doing. Until this court's Preliminary Injunction, all boys at the school were subject to the same polygraph policies, even those placed exclusively for special education and those with no record of juvenile offenses.

The school also used the polygraph to prevent the flow of any negative information about the school. Boys entered into agreements and even formal contracts with the school to obey the rules and to avoid "negative thinking", which included saying bad things about the school. The polygraph was used to test performance of these agreements or contracts. Boys even

had to agree that after they left they would not say bad things about the school, and boys knew that any intention to violate that agreement would be revealed by the polygraph, and would prevent or delay their departure. See plaintiffs' Exhibit 74, (Control No. 319).

This use of the polygraph to chill even individual thought and to chill expression of thought is what the court meant on May 5 when it referred to the polygraph as an "instrument of terror" rather than therapy. Although such "thought control" may be very effective in changing behavior, so are a number of "brainwashing" techniques that the Constitution, and certainly the special education laws, won't permit.

The court also cannot envision a constitutionally permissible justification for the mail control policies of the school. The court perceives a reasonable therapeutic reason for limiting "bad influences" on boys from outside the school; such limits are not unreasonably restrictive, and the Permanent Injunction modifies the Preliminary Injunction to reflect this point. Both the Preliminary and Permanent Injunction recognize the valid security reasons for allowing inspection for contraband. However these same justifications are insufficient to support school policies controlling to whom the boys may send outgoing mail and controlling the content of that mail. These policies were another vehicle for preventing any criticism of the school. All outgoing mail was read and boys were forced to "rewrite" letters containing things perceived as "untrue" by therapists, or containing "negative thinking" such as criticism of the school. Therapists even wrote comments such as "manipulative" in the margins of letters that boys were allowed to send. Boys knew that their outgoing mail was being read, which chilled the content of their letters even before they were written. One wonders why an institution that seems to be as proud of its programs as the Provo Canyon School would go to such great lengths to avoid critical comment.

Of course the most dangerous aspect of such control of outgoing contacts and their content is that it prevents boys, who may be the victims of abuse within the walls, from crying out for help. It is no answer for the school to simply create and pick its own "advisory board" and add board members to the list of those whom the boys may contact. This court can perceive no adequate basis for the unreasonably restrictive nature of school and parental control over outgoing contacts from boys confined at a residential facility. The very possibility of such contact can temper inappropriate school practices.

As far as the use of both isolation facilities (P-room) and physical force ("hair dance"), the evidence shows that although written school policies forbade excessive or inappropriate use, actual practices varied from written policies, and excessive or inappropriate use of isolation and physical force took place. The "hair dance", designed as a means of controlling physically violent juveniles without causing them undue physical harm, was used in response to conduct other than physical violence or physical resistence, was used as punishment rather than simply for immediate control, was used as a threat, and on occasion resulted in the very physical injuries it was supposed to prevent.

As plaintiffs' Exhibit 67 shows, the isolation facilities of the P-room were used too often and for intervals that were too long. Other juvenile facilities are permitted to use "time out" procedures, but for shorter intervals, under more carefully controlled conditions and in response to clearly defined physical types of behavior. However the use of the term "out of control" as a justification for the basically uncontrolled discretion of counsellors and others in subjecting juveniles to the P-room and hair dance permitted unreasonably harsh school responses to the conduct of disturbed boys. The Preliminary and Permanent Injunctions intend to more clearly define the appropriate and inappropriate uses of the P-room and physical force.

Finally, the foregoing should show that the court has kept its intrusion into the affairs of the Provo Canyon School to the minimum level necessary to insure the honoring by the school of those rights protected by the Constitution and state and federal special education laws.

We provide comparable protection for convicted felons. School children -- particularly troubled school children -- deserve no less.

FINDINGS OF FACT

This action came on for trial before the Honorable Bruce S. Jenkins, United States District Judge, sitting with a jury, commencing on March 24, 1980, and concluding on April 18, 1980. The following appearances were made:

Kathryn Collard and Martin W. Custen, on behalf of the American Civil Liberties Union--Utah Affiliate, Salt Lake City, Utah, and Mark I. Soler, Michael J. Dale and Loren M. Warboys, on behalf of the Juvenile Justice Legal Advocacy Project, San Francisco, California, appearing as counsel for plaintiffs.

Harold G. Christensen, Paul C. Droz, Alan L. Larson, Max D. Wheeler, of Snow, Christensen & Martineau, appearing as counsel for defendants Jack L. Williams, Robert H. Crist and D. Eugene Thorne.

Thomas C. Anderson, Assistant Attorney General of the State of Utah, appearing as counsel for defendants Walter D. Talbot, State Superintendent of Public Instruction and the Utah State Board of Education.

Joseph P. McCarthy, Assistant Attorney General of the State of Utah, appearing as counsel for defendant John F. McNamara, Administrator of the Interstate Compact on Juveniles of the State of Utah.

The court and/or the jury heard the testimony of plaintiffs' witnesses: Jack L. Williams, Robert H. Crist, D. Eugene Thorne, Martin H. Gerry, Jerome G. Miller, Paul W. DeMuro, John Billings, John F. McNamara, Daniel L. Creson, Steven Forness, Lisa D. King, Patrick T. King, Timothy Milonas, Jr., Kenneth Rice, Art Child, Howard Sloane, Blaine Lee, Frank Purvis, Diane Horton, James P. Wheeler, Andrew S. Gallo, Marjorie Child, Bill Harriman and Pat Stack; and the testimony of defendants' witnesses: Robert H. Crist, Delbert Pearson, R. L. Jones, Kay Wilkinson, Paul Whitehead, Marianne Merritt, Mike Avarett, William A. Lowe, Donald H. Keltner, Tom Kreth,

Eugene Reed Gibbons, Chris Weenig, JoAnn Bryner, Judy Cole, Quentin Harris, Delbert L. Goates, Pam Roth, Marilyn Anderson, Mike Anderson, Kay Lindsay, Curtis VanAlfen, Judge Monroe Paxman, Guy Toombs, Mae Taylor, Ben Bruse, Robert Gordon Eddington, Denny Butterfield, Glen Stepp, Glen Ovard, Allice Allred, Barbara Graves, Roger Mortensen, Mike Miller, Sydney S. Gilbert, Jerry Spanos, Kevin Colinson, Gerold D. Barton, Walter D. Talbot, Barbara Bateman, Lorri Connin, Beverly McConnell, Jeff James, David Raskin, Gregory Leveridge, Nathan Peck and Matt Barkin; and the court received plaintiffs' Exhibits Nos. 1-193, excluding Exhibits Nos. 37, 44, 51, 55, 97, 98, 109, 110, 188 and 191, and defendants' Exhibits, lettered: 1A through 8Q, excluding Exhibits 7-O, 8C and 3C; and the matter having been fully argued and submitted; and the court being otherwise fully advised in the premises, now hereby makes and enters the following Findings of Fact and Conclusions of Law:

1. The named plaintiffs, Timothy Milonas, Jr. and Kenneth Rice, and the members of the Plaintiff Class which they represent, are juveniles involuntarily confined at the Provo Canyon School by orders of juvenile courts in Utah and other states, by state educational agencies and local school districts in Utah and other states, by public welfare agencies and parents in Utah and other states, immediately prior to or during the pendency of this action, or in the future.

2. Defendants Jack L. Williams, Robert H. Crist and D. Eugene Thorne are the owners and operators of the Provo Canyon School.

3. Defendant John F. McNamara is the Administrator of the Interstate Compact on Juveniles for the State of Utah, who, in his official capacity, has supervisory responsibilities with respect to juveniles placed in institutions in Utah by orders of juvenile courts outside the State of Utah.

4. Defendant Walter D. Talbot is the Superintendent of Public Instruction for the State of Utah, who, in his official capacity, is responsible for the supervision of

handicapped children receiving special education in the State of Utah.

5. Defendant Utah State Board of Education is the governmental agency of the State of Utah responsible for education of children in the State, and is the "state education agency" for the State of Utah within the provisions of Public Law 94-142, the Education for All Handicapped Children Act.

6. Plaintiffs invoke the jurisdiction of this court pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202, 42 U.S.C. § 1983, and pursuant to the United States Constitution and particularly the First, Sixth, Eighth, Ninth and Fourteenth Amendments thereto. Plaintiffs also assert jurisdiction in this court for claims based on Public Law 94-142, the Education for All Handicapped Children Act, 20 U.S.C. § 1401, et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

7. The events and acts of defendants giving rise to this action occurred in the Central Division of the District of Utah.

8. The plaintiffs seek to have this matter certified as a "class action" pursuant to the provisions of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. Plaintiffs' Second Amended Complaint alleges that the Plaintiff Class consists of "all juveniles who have been, are now, or in the future will be placed at the Provo Canyon School."

9. This case as tried consists of three parallel actions: first, an action for damages by plaintiff Milonas in his individual capacity initiated pursuant to 42 U.S.C. § 1983; second, an action for damages initiated by plaintiff Rice in his individual capacity pursuant to 42 U.S.C. § 1983; and third, an action by plaintiffs Milonas and Rice, in a representative capacity, on behalf of a class of persons pursuant to 42 U.S.C. § 1983, and the United States Constitution, particularly the First, Sixth, Eighth, Ninth and Fourteenth Amendments thereto, and also pursuant to Public Law 94-142, the Education for All

Handicapped Children Act, 20 U.S.C. § 1401 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, seeking preliminary and permanent declaratory and injunctive relief.

10. Plaintiffs seek declaratory and injunctive relief on the grounds that the following policies, practices and procedures of defendants' Williams, Crist and Thorne, violate plaintiffs' constitutional and statutory rights:

1. Confinement in a secure area in the Orientation Phase without outside exercise or recreation.

2. Deprivation of any personal property other than clothing during the Orientation Phase.

3. Denial of opportunity to attend religious services while in the Orientation Phase.

4. Required attendance at religious services or "character building classes" after the Orientation Phase.

5. Required sitting or standing, for a minimum of four hours at a time, for at least 250 hours, in order to advance out of the Orientation Phase.

6. Required silent sitting or standing for hours at a time for violating school rules or for getting "Incident Reports."

7. Lack of direct, medical supervision in administration of drugs, and overdosing of psychotropic drugs, including Thorazine, Stelazine, Melaril and other major tranquilizers, and administration of drugs by non-medical personnel.

8. Solitary confinement for long periods of time as punishment in the "Prescription Room" or "P Room", a bare 4' x 8' room containing no reading material, other items of recreation, toilet facilities or personal amenities.

9. Denial of a hearing or any other due process before placement in solitary confinement.

10. Reading and censorship of all mail to and from boys at the school.

11. Regular administration of polygraph tests to boys at the school.

12. Denial of access to legal counsel.

13. Brutality and mistreatment by administrators, counselors and other personnel at the school, including lifting, swinging or dragging children by their hair (the 'hair dance').

11. Plaintiffs also seek declaratory and injunctive relief against defendants Dr. Walter D. Talbot, State Superintendent of Public Instruction, and the Utah State Board of Education, on the ground that they failed to monitor the Provo Canyon School to insure that defendants Williams, Crist and Thorne provided children funded at the institution pursuant to Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973 with the special education rights guaranteed to them pursuant to these statutes, which caused plaintiffs to suffer the violation of these rights, including the violation of federal constitutional rights.

12. Plaintiffs also seek declaratory and injunctive relief against defendant John F. McNamara, Administrator of the Interstate Compact on Juveniles for the State of Utah, on the ground that his failure to promulgate standards to govern the placement of children subject to the Compact in private, residential treatment facilities in the State of Utah, and his failure to adequately monitor the placement of plaintiffs in the Provo Canyon School or to adequately supervise such placements, deprived plaintiffs of federal constitutional and statutory rights.

13. This action was filed on September 21, 1978. On the same day, plaintiffs' attorney, Kathryn Collard, filed a Petition for Appointment of Guardian Ad Litem and a Motion for Extraordinary Relief Pending Trial, and this court held a hearing on the motions, the Honorable Chief Judge Aldon J. Anderson presiding. The district court accepted Ms. Collard's representation of the named plaintiffs and granted the Motion for Extraordinary Relief Pending Trial, pursuant to the stipulation of defendants. The court's Order directed James P. Wheeler and the Utah Division of Family Services to assume temporary

custody and control of the named plaintiffs and to provide for their care and treatment pending further order of the court.

14. Although the court did not formally act on plaintiffs' petition to have Ms. Collard appointed as Guardian Ad Litem for the named plaintiffs, Ms. Collard represented the named plaintiffs continuously since September 21, 1978, and on March 5, 1980, this court entered an Order formally appointing Ms. Collard as Guardian Ad Litem for the named plaintiffs.

15. On October 18, 1978, plaintiffs filed their First Amended Complaint. On October 19, 1978, plaintiffs filed a motion to have this action certified as a "class action" pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. On February 8, 1979, plaintiffs filed a Motion for Preliminary Injunction.

16. On February 21-24, 1979, this court conducted an evidentiary hearing on plaintiffs' motion for class action certification and for preliminary injunction. At the hearing, plaintiffs presented the testimony of defendants Jack L. Williams and John F. McNamara; William D. Harriman and Ronald P. Wing, former students at Provo Canyon School; Gordon Eddington, Andrew Gallo, Robert Miller, Frank Purvis, and Randy Wardwell, former counselors at the institution; and Art Child, former polygraph operator at the institution. Defendant McNamara testified as to his duties as Interstate Compact Administrator, and identified the files of sixteen boys who had been placed at Provo Canyon School during the previous year by juvenile courts outside the State of Utah. The files were all admitted into evidence. The other witnesses all testified as to the conditions of confinement and the treatment program at the Provo Canyon School, particularly the specific policies and practices challenged by plaintiffs. Defendants presented the testimony of defendant Crist; Gerold Spanos and Dolly Miller, both employees of the institution; William Holman, parent of a juvenile at the institution; Banae Stout, natural mother of

plaintiff Milonas; D. Eugene Thorne, then a consultant for the Provo Canyon School; and Judge Monroe Paxman, a former juvenile court judge who had visited the institution.

17. During the hearing the district court ordered defendants to provide information regarding sources of funding for the institution. A summary of the information was prepared by the defendants and received in evidence. The summary contained the following information:

TOTAL TUITION BILLED FOR 1978: $1,846,783.00

MONIES RECEIVED FROM VARIOUS SOURCES:

School Districts

Utah Districts (all year) 5,517.17 (9 boys)

Other states:

Jan.-June, '78 ($698. mo. ea.) 75,383.41 (18 boys)
Jul.-Dec., '78 ($724. mo. ea.) 182,504.71 (42 boys)

* Funds paid to parents. (NOTE: To date, 37 boys receiving school funding).

Probations:

Various counties Other States 107,244.86 (10 boys)

Utah Division of Family Services 8,800.00 (1 boy)

Alaska Division of Corrections 83,960.69 (10 boys)

All Other Sources of Tuition Received in Private Funding.

18. At the conclusion of the hearing, this court made a provisional finding of subject matter jurisdiction under 28 U.S.C. § 1343, and provisionally certified the action as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The court noted:

> For the purpose of preliminary relief only, and until further order of the court, the Plaintiff Class shall consist of all juveniles residing at the Provo Canyon School during the pendency of this action. The issues of whether this action may be brought as a class action, and the membership in the class shall be subject to redetermination upon motion by a party or the court as circumstances may warrant.

19. The court also enjoined defendants Williams and Crist from subjecting members of the Plaintiff Class to the following treatment, or conditions of confinement, which

encompassed four of the thirteen practices challenged by the plaintiffs in their Complaint:

1. Opening, reading, monitoring or other censorship of mail to or from students at the school, except for the purpose of detecting or removing contraband.

2. Administration of polygraph examinations for any purpose.

3. Placement of students in the "P Rooms" or other isolation facilities for any reason other than to contain a student who is physically violent and dangerous to himself or others, and only for the period of time during which the student is physically violent and dangerous to himself or others.

4. Use of physical force for any purpose other than to restrain a student who is physically violent and immediately dangerous to himself or others, or to overcome physical resistance to institutional rules. The force used must be restricted to the least amount reasonably necessary in the circumstances.

20. The court also accepted and incorporated into its Order a stipulation for the entry of a Preliminary Injunction against the defendant McNamara, whereby said defendant agreed to be restrained and enjoined from approving the placement of juveniles in the Provo Canyon School during the pendency of this action, and to effect the removal from the school of any juveniles subject to the terms of the Interstate Compact On Juveniles who were in the School pursuant to orders of juvenile courts in states outside the State of Utah.

21. On August 21, 1979, this court granted plaintiffs' motion to amend their complaint, and plaintiffs filed their Second Amended Complaint.

22. On November 16, 1979, plaintiffs and defendants Williams, Crist and Thorne, agreed upon a Stipulated Pretrial Order in this matter.

23. On February 1, 1980, defendants Williams, Crist and Thorne moved for summary judgment in this matter. On the same day, defendants Utah State Board of Education and Walter D.

Talbot also moved for summary judgment. On February 5, 1980, plaintiffs also moved for summary judgment.

24. On February 13, 1980, this court denied the motion for summary judgment, without prejudice, of the defendants Dr. Walter D. Talbot, and the Utah State Board of Education.

25. On March 6, 1980, this court denied the motion for summary judgment of defendants Williams, Crist and Thorne.

26. On March 20, 1980, this court denied the motion for summary judgment of plaintiffs.

27. On March 25, 1980, this court, sitting with a jury, commenced the trial of the named plaintiffs' individual actions for damages against defendants, which matter was finally argued and submitted to the jury on April 18, 1980.

28. On March 31, 1980, plaintiffs and defendants Walter D. Talbot and the Utah State Board of Education submitted to this court a stipulation for the entry of a Consent Decree and Judgment regarding said defendants which this court signed and entered on the same date.

29. On April 4, 1980, plaintiffs and defendant John F. McNamara submitted to this court a stipulation for the entry of a Consent Decree and Judgment regarding said defendant which this court signed and entered on the same date.

30. On April 18, 1980, the jury returned a verdict in the individual damage actions of the named plaintiffs, Rice and Milonas, against these plaintiffs and for the defendants Williams, Crist and Thorne.

31. On April 22, 1980, plaintiffs filed a Motion for Judgment Notwithstanding The Verdict in the individual damage actions of the named plaintiffs, and on April 24, 1980, defendants filed a Motion for Entry of Judgment on the Verdict.

32. On April 24, 1980, defendants Williams, Crist and Thorne filed a Motion to Dismiss Plaintiffs' Claims for Injunctive Relief.

33. On May 5, 1980, this court, following a hearing and full argument by all parties, denied plaintiffs' Motion for Judgment Notwithstanding The Verdict in the individual damage actions of the named plaintiffs, and granted defendants' Motion for Entry of Judgment on The Verdict as to the individual damage actions of the named plaintiffs. The court also denied defendants' Motion to Dismiss Plaintiffs' Claims for Injunctive Relief, and awarded permanent injunctive relief based on oral Findings and Conclusions memorialized herein.

34. The court finds that defendants Williams, Crist and Thorne acted under color of state law in subjecting the plaintiff class to the very practices that plaintiffs allege are unconstitutional or otherwise in violation of federal law. There is a substantial nexus between the federal statutory and constitutional violations alleged, and the continuous placement, regulation and substantial funding of children at the Provo Canyon School by state and local governmental entities and instrumentalities such as school districts, juvenile courts and welfare agencies. The Provo Canyon School is a joint participant with these state agencies, and acts pursuant to powers and duties shared or delegated by these state agencies, in providing residential treatment, rehabilitation and education to juveniles. Even though not every boy at the school is subject to direct state action, the majority are, and state action is so intertwined with all aspects of the operations of the Provo Canyon School that the school as a whole operates under color of state law in all of its activities.

35. Additionally, the court finds that plaintiffs' class claims for injunctive and declaratory relief arise under federal law, specifically Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, and that as to each such claim by an affected class member, the amount in controversy exceeds $10,000, exclusive of interest and costs.

36. Because of the class nature of plaintiffs' claims, and the absence until trial of any state administrative mechanism in Utah for applying federal special education laws to "private" facilities subject to these laws, resort to state administrative remedies contemplated by these laws would have been futile.

37. The court finds that the appropriate plaintiff class to be certified for purposes of final injunctive and declaratory relief consists of all boys residing at the Provo Canyon School now and in the future. Pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the court makes the following findings respecting this class and its representatives:

> (a) At the time this action was filed, the two named class representatives sought to certify a class for purposes of injunctive and declaratory relief, were members of the class they sought to represent, and had ripe claims for injunctive and declaratory relief as individuals. The named plaintiffs' individual claims for injunctive relief became moot after this court, the Honorable Chief Judge Aldon J. Anderson presiding, removed the two boys from the custody of the Provo Canyon School based upon allegations of imminent and irreparable harm likely to be suffered by them as a result of the filing of this action, and based upon the stipulation of the school. Even after they had left the school, the two named plaintiffs continued to vigorously litigate the questions of class certification and relief, and these questions continued to present concrete, sharply contested issues even after provisional class certification by the court, so that the named plaintiffs retained a personal stake in the questions of class certification and relief throughout this litigation.
>
> Furthermore, boys continuing to reside at the Provo Canyon School would have been unable to effectively litigate this action as class representatives while residing there, and defendants had the power to moot injunctive claims of any class representative residing at the school by unilaterally discharging that boy from the school.
>
> (b) Because the class to be certified is fluid, it is too numerous for joinder of all members to be practicable.

(c) There are numerous questions of fact and law common to the class; the claims of the named representatives are typical of the class claims; and the named representatives have fairly and adequately protected the interests of the class.

(d) Defendants Williams, Crist and Thorne have acted and refused to act on grounds generally applicable to the class.

38. Defendants Williams, Crist and Thorne have subjected the plaintiff class to policies and practices concerning the use of the polygraph, mail censorship, isolation, and physical force that are not reasonably related to therapy, rehabilitation, education, school security, or school administration, and these policies and practices are unreasonably restrictive in light of these legitimate purposes for confinement at the Provo Canyon School, and in light of class members' rights to the least restrictive treatment alternative under the special education laws, and their constitutional rights to due process, including appropriate treatment, as well as their constitutional rights to freedom of speech, access to legal counsel, and privacy, under the First, Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution.

39. As to the balance of the practices and policies at issue, as they presently exist, they are reasonably related to legitimate school treatment and security purposes, and are not unreasonably restrictive in light of these purposes, or in light of the constitutional rights of class members. The court makes no finding as to whether these remaining practices and policies violate rights to the least restrictive treatment alternative or other rights under federal special education laws, due to the newly found regulatory authority of defendants Talbot and State Board of Education under the federal special education laws, and under the court's Consent Decree.

40. Despite some evidence of "voluntary" changes in school policies and practices, the court finds that the polygraph, mail monitoring, isolation and physical force policies

and practices were changed only in response to the court's Preliminary Injunction, and that without a Permanent Injunction those policies and practices would likely recur, to the irreparable harm of the plaintiff class. The court further finds that compliance with the court's Permanent Injunction poses no substantial hardship for the Provo Canyon School, that the Permanent Injunction is the least intrusive remedy necessary to protect the rights of the plaintiff class, and that the Permanent Injunction is a necessary supplement to the court's final Orders regarding the Administrator of the Interstate Compact on Juveniles, the State Board of Education, and Superintendent Talbot.

41. The court finds that the practices at issue in this case were in effect at the time the action was filed, or within one year previously.

42. The court finds that it has been able to award meaningful relief based upon the existing parties to the suit, and that the right of non-parties have been adequately protected.

CONCLUSIONS OF LAW

1. The foregoing Findings of Fact are also incorporated herein as Conclusions of Law.

2. The court has not viewed the class claims in this action as encompassing any class claim for damages, primarily because the named plaintiffs, in their capacity as representatives for the plaintiff class, never invoked the notification procedures of Rule 23(c)(2), F.R.C.P. required for prosecution of any damage claims on the part of the class.

3. In examining the evidence presented in the trial of the individual damages actions of plaintiff Milonas and plaintiff Rice in the light most favorable to the named defendants, the court finds that plaintiffs' Motion for Judgment Notwithstanding the Verdict ought to be denied and is denied.

4. Defendants Williams, Crist and Thorne, have moved this court to dismiss the plaintiffs' class claims for injunctive relief, arguing that the adverse jury verdict as to the individual damage actions of Milonas and Rice, plus the dismissal by the court, without prejudice, of any residual class claims for damages, bars injunctive relief. However, the court finds that the adverse verdict of the jury as to the individual damages claims of plaintiffs Milonas and Rice relates only to the individual damage claims of these plaintiffs and did not determine the issues of fact raised by plaintiffs' class claims for declaratory and injunctive relief. The jury decided only that the named plaintiffs were not individually deprived of certain constitutional rights as the proximate cause of the knowing acts of the defendants Williams, Crist and Thorne. The evidence as to the individual claims of the named plaintiffs is weaker in virtually every respect than the evidence of violations suffered by the plaintiff class. The plaintiffs' class claims were not before the jury, nor were the claims of violations of federal special education laws. The basis for the jury's verdict in regard to the individual plaintiffs' damage claims could rest on any number of grounds which would not apply to the claims of the plaintiff class as a whole.

This court has the duty and the discretion under its equitable jurisdiction to make an independent review of the evidence in support of the plaintiffs' class claims for declaratory and injunctive relief. Therefore, defendant's Motion to Dismiss plaintiffs' class claims for declaratory and injunctive relief is denied.

5. A far broader jurisdictional and factual basis now exists for the granting of plaintiffs' class claims for declaratory and injunctive relief than existed at the time of the entry of the Preliminary Injunction herein. The court finds that it has jurisdiction over plaintiffs' class claims for declaratory and injunctive relief pursuant to 28 U.S.C. § 1343, and 28 U.S.C.

§ 1331, based on causes of action asserted under 42 U.S.C. § 1983, P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973.

6. The court finds that the plaintiff class may properly bring a private cause of action for declaratory and injunctive relief against defendants Williams, Crist and Thorne, pursuant to P.L. 94-142 and Section 504 of the Rehabilitation Act of 1973.

7. The court finds that the plaintiff class was not required to resort to state administrative remedies before filing claims based on the federal special education laws, because resort to such remedies would have been futile.

8. There is and has been a federal statutory duty imposed on the defendant Utah State Board of Education and upon school districts in various states, to monitor the Provo Canyon School for compliance with Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, as to students who are receiving special education funds or who are placed by school districts for special education. There is also a duty on the part of Provo Canyon School, as a recipient of children funded by federal special education funds or placed by school districts for special education, to comply with the provisions of Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973.

9. The court and the parties welcome the belated appearance on the scene of the State Superintendent of Public Instruction and the Utah State Board of Education and their recent agreement to fully and effectively perform their federal statutory duties as prescribed in Public Law 94-142 and Section 504 of the Rehabilitation Act of 1973, with respect to the monitoring of Provo Canyon School and similar institutions, to insure compliance with the provisions of these laws. At the time of the hearing on the Preliminary Injunction in this matter, the court lamented the fact that the state education agency and its chief officer had failed to monitor practices at the Provo

Canyon School. Certainly, the state's assumption and execution of its duties will insure that the Provo Canyon School will more fully comply with federal special education laws in the future than the institution did in the past. However the Consent Decree entered into by the state does not fulfill the needs of the plaintiff class for a Permanent Injunction against certain school practices and in fact anticipates such an injunction.

10. The court finds that this action should be certified as a class action pursuant to the Federal Rules of Civil Procedure, Rule 23(a) and (b)(2). For purposes of the Preliminary Injunction, the court provisionally certified a class consisting of all juveniles residing at the Provo Canyon School during the pendency of this action. The court now finally certifies a class consisting of all juveniles residing at the Provo Canyon School now or in the future. Under U. S. Parole Commission v. Geraghty, and the particular facts of this case, the mootness of the individual injunctive claims of the named class representatives does not bar them from litigating the class claims for injunctive relief. The named class representatives need not belong to each purported subclass within the larger class, and need not have suffered identical forms of injury.

11. The court has found that the Provo Canyon School and the defendants Williams, Crist and Thorne, stand in loco parentis for some purposes, and that parents or guardians have consented to some policies and practices at issue in this case. However, the court concludes that since the school and the defendants who operate it act under color of state law and under color of federal special education laws, the defendants may not deprive members of the plaintiff class of constitutional rights or federal rights to special education, even with parental consent.

12. The court also finds that the plaintiffs' class claims for declaratory and injunctive relief are not barred by

the one year statute of limitation in Utah Code Annotated § 78-12-29.

13. The plaintiffs' class claims for declaratory and injunctive relief are not barred by their alleged failure to join indispensible parties.

14. The court finds that certain policies and practices of the defendants Williams, Crist and Thorne, have violated federally protected statutory rights to special education, specifically the right to the least restrictive form of special education and related treatment, and the following constitutional rights: freedom of speech; due process, including the right of an involuntarily confined juvenile to receive therapeutic treatment in an appropriate setting; the right to legal counsel; and the right to privacy.

15. The court finds that because there has been no adjudication of guilt of a criminal offense as to any member of the plaintiff class, the plaintiff class is not protected by constitutional prohibitions of cruel and unusual punishment. This view is consistent with the attitude of the law towards juveniles who have not been convicted of a criminal offense but have been determined to be delinquent, in need of treatment, or in need of special education and have been confined in an institution for purposes of receiving treatment, rehabilitation or education. However due process does require that reasonable treatment, rehabilitation and education be provided to those juveniles.

16. In the pretrial order, plaintiffs identified some thirteen alleged policies or practices of defendants Williams, Crist and Thorne. Of those policies, the court finds that the following policies or practices violated one or more of the constitutional rights specified above and violated federal statutory rights to special education and related treatment in the least restrictive setting. The court finds that none of the following policies or practices of the defendants are

reasonably related to treatment, to security, or to any other permissible goals, and all are unreasonably restrictive.

17. The defendants Williams, Crist and Thorne shall be permanently restrained and enjoined from subjecting members of the plaintiff class or causing them to be subjected to the following listed policies, practices, treatment or conditions of confinement:

(a) Opening, reading, monitoring or refusing to mail any correspondence from members of the plaintiff class to parents, friends, attorneys or other persons, or in any manner restricting the manner or mode of such communications or the number or type of persons with whom such juveniles may wish to correspond.

(b) Reading, monitoring or refusing to deliver any correspondence mailed by any person outside the Provo Canyon School to any member of the plaintiff class in the Provo Canyon School, with the following exceptions. Defendants shall only be permitted to open such correspondence to determine if contraband items are included therein, and to remove such items, if present. In addition, where parents have previously indicated that certain, named individuals outside the Provo Canyon School are not to be permitted to correspond with members of the plaintiff class inside the institution, the school owners may return correspondence from such designated persons to them unopened. However, in no case shall correspondence being sent by members of the plaintiff class to persons outside the institution be opened nor shall defendants refuse to mail such correspondence.

(c) Administration of polygraph examinations to members of the plaintiff class for any purpose whatsoever.

(d) The placement of juveniles in the "P room" or isolation facilties for any reason other than to contain a juvenile who is physically violent and dangerous to himself or others, and only for that period of time during which a juvenile remains physically violent and a danger to himself or others.

(e) Use of physical force for any purpose other than 1) to restrain a juvenile who is physically violent and an immediate danger to himself or others, or 2) to overcome physical resistance, passive or otherwise to institutional rules, and such force shall be restricted to the least amount reasonably necessary to bring a juvenile under physical restraint or to overcome physical resistance in such circumstances.

18. Although the court commends defendants for their voluntary efforts in improving the Provo Canyon School's programs, a Permanent Injunction against the above policies and practices is the least intrusive remedy reasonably necessary to adequately protect the rights of the plaintiff class.

19. The court finds that the remaining practices and policies of the defendants Williams, Crist and Thorne, as these policies and practices presently exist, do not violate the constitutional rights of the plaintiff class.

20. As to these remaining policies and practices, pursuant to the Consent Decree, the Superintendent of Public Instruction and the Utah State Board of Education should be allowed to make determinations as to the requirements of applicable special education laws and to monitor and oversee compliance with these laws by the Provo Canyon School.

21. The defendants Williams, Crist and Thorne shall be ordered to comply with the duly promulgated orders and regulations of the defendant Utah State Board of Education regarding special education, and shall be enjoined from directly or indirectly receiving state or federal funds earmarked for special education unless the Provo Canyon School is in full compliance with the rules and orders of the Utah State Board of Education and the requirements of state and federal special education laws.

22. The permanent injunction previously described shall be effective forthwith, and shall supersede the Preliminary Injunction that the court has entered previously.

23. As to the class action for declaratory and injunctive relief, plaintiffs are the prevailing parties and are entitled to a reasonable attorney's fee and costs pursuant to 42 U.S.C. § 1988. As to the two individual claims for damages, defendants Williams, Crist and Thorne are the prevailing parties and are entitled to costs pursuant to 28 U.S.C. § 1920 et seq. Amounts of respective attorney's fees and costs, and the question of offset, will be determined by subsequent Orders to be issued after final Judgments on the merits are entered.

DATED this 25 day of August, 1980.

BY THE COURT:

BRUCE S. JENKINS
United States District Judge

C 78-0352 Timothy Milonas, etc. -vs- Jack L. Williams, et al.

MEMORANDUM OPINION, FINDINGS OF FACT & CONCLUSIONS OF LAW
JUDGMENT ON SPECIAL VERDICT RELATING TO INDIVIDUAL CLAIMS FOR
DAMAGES OF MILONAS AND RICE
JUDGMENT

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