

④ 11/7/71
#

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

10/28
1 copy
"Schools"

THE PENNSYLVANIA ASSOCIATION :
 FOR RETARDED CHILDREN, :
 NANCY BETH BOWMAN :
 by her father, Horace Bowman; :
 LINDA TAUB, :
 by her father, Allen Taub :
 CHARLES O'LAUGHLIN, :
 by his father, Charles :
 O'Laughlin; :
 CHRISTOPHER JOHN KELLY, :
 by his father, JOSEPH KELLY; :
 MARK MOSER, :
 by his father, Clark Moser; :
 WILLIAM REESE, :
 by his father, Edward Reese; :
 DAVID TUPI, :
 by his father, Steven Tupi; :
 SANDRA LYDARD, :
 by her mother, Mrs. Douglas :
 Lydard; :
 EMERY THOMAS, :
 by his father, Reginald :
 Thomas; :
 WILLIAM WENSTON, :
 by his father, Robert Wenston; :
 CINDY MAE HATT, :
 by her father, Scott Hatt; :
 RONALD GREEN, :
 by his mother, Mrs. Mattie :
 Green; and :
 GLENN LOWREY, :
 by his father, Richard Lowrey, :
 on behalf of themselves and all :
 others similarly situated, :
 Plaintiffs :
 v. :
 COMMONWEALTH OF PENNSYLVANIA, :
 DAVID H. KURTZMAN, individually and as :
 Secretary of Education of the :
 Commonwealth of Pennsylvania; :
 THE STATE BOARD OF EDUCATION of the :
 Commonwealth of Pennsylvania; :
 JOSEPH ADLESTEIN, individually and as :
 Acting Secretary of Public Welfare :
 of the Commonwealth of Pennsylvania :

COMPLAINT - CLASS ACTION

COMPLAINT

(For preliminary and permanent injunctive relief and declaratory judgment to prevent the denial to plaintiff retarded children, aged six to twenty-one years, of their equal right to education.)

Jurisdiction

1. The jurisdiction of the Court is invoked under Title 28, U.S.C. Sec. 1343, 42 U.S.C. Secs. 1981 and 1983, and Title 28, U.S.C. Secs. 2201 and 2202, this being an action for declaratory judgment and preliminary and permanent injunctive relief to redress the deprivation under color of state law of rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States.

2. Monetary damages are inadequate and plaintiffs have been suffering and continue to suffer irreparable harm from defendants' actions, policies, and procedures and from the laws complained of herein. Accordingly injunctive relief is necessary.

Parties

3. The plaintiffs are:

(a) The Pennsylvania Association for Retarded Children, a non-profit corporation created in 1949 and existing under the laws of the Commonwealth of Pennsylvania, with member chapters in 53 of Pennsylvania's 67 counties, whose purpose it is to advance the interests of retarded citizens of Pennsylvania and to secure to them their just share of the resources available to all citizens of the Commonwealth. For twenty years the chapters of the Pennsylvania Association for Retarded Children have conducted programs for the education of retarded children.

(b) Nancy Beth Bowman and Linda Taub, citizens of the U. S. and of the Commonwealth of Pennsylvania, residents of Pennhurst State School and Hospital and retarded children who are presently receiving no education.

(c) Charles O'Laughlin and Christopher John Kelly, citizens of the United States and of the Commonwealth of Pennsylvania and retarded children who have been excluded from public school as "uneducable and untrainable" by defendants under 24 Purd. Stat. Sec. 13-1375 and who are presently receiving no education or are attending a private school wholly or partly at their parents' expense.

(d) Mark Moser, William Reese, David Tupi and Sandra Lydard, citizens of the United States and of the Commonwealth of Pennsylvania and retarded children who have been "excused" from school attendance by defendants as "unable to profit therefrom" under 24 Purd. Stat. Sec. 13-1330(2), and thus refused the right to attend school, and who are presently receiving no education or are attending a private school wholly or partly at their parents' expense.

(e) Emery Thomas and William Wenston, citizens of the United States and of the Commonwealth of Pennsylvania and retarded children over the age of six whose attendance at public school has been postponed by defendants, purportedly under 24 Purd. Stat. Sec. 13-1326, until they are eight years of age and who are presently receiving no education or are

attending a private school wholly or partly at their parents' expense.

(f) Cindy Mae Hatt, Ronald Green and Glenn Lowrey, citizens of the United States and of the Commonwealth of Pennsylvania and retarded children over six years of age who have been refused the right to attend public school under 24 Purd. Stat. Sec. 13-1304 because they have not attained "a mental age of five years" and who are presently receiving no education or are attending a private school wholly or partly at their parents' expense.

(g) All other persons, residents of Pennsylvania, aged six to twenty-one years, who are eligible for free public education except that defendants herein (1) have excluded or (2) excused them from attendance at public schools or (3) have postponed their admission or (4) otherwise have refused to allow them free access to public education because they are retarded.

4. Each of the named plaintiffs herein is of school age; each is a retarded child and would benefit from education; the parents of each elect to have their child enter public school; and, each has been wrongfully denied his right to a free public education because he is retarded.

5. Each of the named plaintiffs herein is a minor child and sues by his parent and next friend, respectively:

Horace Bowman, 1246 Mildred Street, Roslyn, Montgomery County, Pennsylvania; Allen Taub, 6828 E Roosevelt Boulevard, Philadelphia, Pennsylvania; Charles M. O'Laughlin, 3413 Lynwood Drive, West Homestead, Allegheny County, Pennsylvania; Joseph Kelly, 208 Elm Street, Lincoln Park, Reading, Berks County, Pennsylvania; Clark Moser, 813 St. Francis Drive, Broomall, Delaware County, Pennsylvania; Edward Reese, 904 Charles Street, Glenshaw, Allegheny County, Pennsylvania; Steven Tupi, 771 Hazelwood Avenue, Pittsburgh, Pennsylvania; Mrs. Douglas Lydard, 422 North 12th Street, Reading, Berks County, Pennsylvania; Reginald Thomas, 265 South Hirst Street, Philadelphia, Pennsylvania; Robert Wenston, 209 Stratford Avenue, Pittsburgh, Pennsylvania, Scott Hatt, Sinking Springs, R. D. #6, Gogersville, Berks County, Pennsylvania; Mrs. Mattie Green, 453 East Sharpnack Street, Philadelphia, Pennsylvania; and Richard Lowrey, R. D. #1, Forest City, Susquehanna County, Pennsylvania.

6. The defendants are:

(a) The Commonwealth of Pennsylvania which has assumed and has among its primary governmental functions the education of all of Pennsylvania's children.

(b) David H. Kurtzman, Secretary of Education of the Commonwealth of Pennsylvania, and a citizen thereof, who is charged under the Pennsylvania Administrative Code, 71 Purd. Stat. Secs. 66 and 352, with the enforcement, operation and

execution of the provisions of the Pennsylvania Public School Code of 1949 as amended, 24 Purd. Stat. Secs. 1-101 et seq., and, in particular, with approving the certification of a child as "uneducable and untrainable" under 24 Purd. Stat. Sec. 13-1375, with superintending the organization of classes and other arrangements for special education under 24 Purd. Stat. Sec. 13-1372, and, under 24 Purd. Stat. Sec. 13-1372(5), with directly providing proper education and training to exceptional children in school districts where the needs of exceptional children are not being adequately served.

(c) The State Board of Education, which is charged under the Administrative Code, 71 Purd. Stat. Sec. 367, with the adoption of policies and principles and the establishment of standards governing the educational process of the Commonwealth and, in particular, with adopting and prescribing standards for the education and training of all exceptional children under 24 Purd. Stat. Sec. 1372, standards for temporary or permanent exclusion from public schools of children found to be "uneducable and untrainable" under 24 Purd. Stat. Sec. 13-1375, regulations for excusing from compulsory school attendance those unable to profit therefrom under 24 Purd. Stat. Sec. 13-1330(2), standards for refusal to accept beginners who have not attained a mental age of five years under 24 Purd. Stat. Sec. 13-1304.

(d) Joseph Adlstein, Acting Secretary of Public Welfare of the Commonwealth of Pennsylvania and a citizen thereof, who is charged under the Pennsylvania Public Welfare Code, 62 Purd. Stat. Sec. 302, with the supervision of state institutions for the mentally retarded, and with the enforcement, operation and execution of the provisions of the Pennsylvania Mental Health and Mental Retardation Act of 1966, 50 Purd. Stat. Sec. 4101 et seq., and under the Public School Code, 24 Purd. Stat. Sec. 13-1375, with the care, training, and supervision of children excluded from the public schools as "uneducable and untrainable."

(e) The following named school districts of the Commonwealth of Pennsylvania:

- (i) Abington School District, Montgomery County;
- (ii) Philadelphia School District;
- (iii) Allegheny County School District;
- (iv) West Homestead School District, Allegheny County
- (v) Berks County School District;
- (vi) Governor Mifflin School District, Berks County;
- (vii) Shaler Township School District, Allegheny County;
- (viii) Wilson School District, Berks County;
- (ix) Marple-Newtown School District, Delaware County;

(x) Pittsburgh School District, Allegheny

County;

(xi) Reading School District, Berks County;

(xii) Susquehanna County School District;

(xiii) Mountain-View School District,

Susquehanna County;

Each of these school districts is charged under 24 Purd. Stat. Sec. 13-1372(3) with providing, alone or jointly with neighboring school districts, special classes or schools for exceptional children, securing such education or training for them outside the public schools or in special institutions, or teaching them in their homes.

(f) All other school districts of the Commonwealth of Pennsylvania, each of which is similarly charged under 24 Purd. Stat. Sec. 13-1372(3).

Class Action Allegations

7. Thirteen named plaintiffs sue on their own behalf and, pursuant to Rule 23 Fed. R.Civ. P. and each portion thereof, on behalf of the class of all persons, residents of Pennsylvania, aged six to twenty-one years, who are eligible for a free public education except that defendants herein (1) have excluded or (2) excused them from attendance at public school or (3) have postponed their admission or (4) otherwise have refused to allow them free access to a public education because they are retarded.

8. The class so defined may number as many as 53,000 persons but the precise number is within the knowledge of defendants and its formulation must await discovery and hearing.

9. The circumstances, age, diagnosis, and attributed intelligence of the named plaintiffs are a fair sampling of the characteristics of retarded children generally, and the named plaintiffs, therefore, adequately represent the class.

10. The defendants have acted to refuse plaintiffs and their class free access to public education on the basis of the laws and regulations, and practices, specified below in this Complaint, which are statewide in their application and by devices which are common throughout the state.

11. The capacity of all retarded children, whatever their attributed intelligence, to benefit from education is the predominant question of fact in this action and is common to all members of the class. The subsidiary questions of fact, specified below in this Complaint, are similarly common to all retarded children.

12. The number of persons in the class, the number of jurisdictions empowered to act with respect to them, albeit each of them responsible to the same Secretary of Education and the same laws, and the low visibility of these crucial actions raise considerable danger of inconsistent or varying adjudications and underscore the desirability of settling in one forum the requirements which shall govern the public education of retarded children.

13. The class of all school districts of the Commonwealth of Pennsylvania, of whom thirteen defendant school districts, varying in location and size, are sued as representative pursuant to Rule 23 Fed R. Civ. P. and each portion thereof, numbers 742, each governed by the same laws and responsible to the same Secretary of Education who is also a defendant herein.

The Non-Education of Nancy Beth Bowman

14. Nancy Beth Bowman, born December 12, 1950, has been assigned an intelligence quotient of approximately 55.

15. From 2-1/2 to 6 years of age, Nancy Beth Bowman at her parents expense attended private school from 9:00 A.M. to 2:00P.M., five days a week at the Chestnut Hill Rehabilitation Center. Later she attended the Day School of the Montgomery County Association of Retarded Children.

16. During this early schooling Nancy Beth Bowman learned the rudiments of reading and counting; she became toilet trained and learned table manners.

17. When Nancy Beth Bowman was eight years of age, the school psychologist of the Abington School District announced that she could not stay in school and recommended long term placement to her parents. Her parents have not been informed by the School District whether she was excluded or excused from the public schools.

18. Since her placement at the Pennhurst State School in 1960, Nancy Beth Bowman has received no educational instruction, nor is any now being provided.

The Non-Education of Linda Taub

19. Linda Taub, born May 12, 1951, is a blind retarded child, assigned an intelligence quotient of approximately 20.

20. From 1956 until the Spring of 1960, Linda Taub attended the Chestnut Hill Rehabilitation Center and the Upsal Day School, private schools, at her parents' expense.

21. For six weeks in the Spring of 1960, she attended a special class in the Philadelphia public schools, but on May 25, 1960, the Superintendent of District Four wrote to her parents excluding her, albeit not under 24 Purd. Stat. Sec. 13-1375, from the schools because she had not "responded" and had toilet training problems.

22. Thereafter, in 1961-62, Linda Taub attended the Awbury School and during 1963-1966 the Upsal Day School, both private schools, at her parents expense.

23. In October, 1966, Linda Taub entered Pannhurst State School and Hospital. For the first fourteen months she was enrolled in a federally funded program for teaching blind and visually handicapped retarded children.

24. Through this and earlier education, Linda Taub has learned to chew, to eat by herself, and has made progress toward toilet-training.

25. On December 29, 1969, Linda Taub was removed from that program by the then Superintendent of Pennhurst and since then she has received no educational instruction, nor is any now being provided.

The Non-Education of Charles O'Laughlin

26. Charles O'Laughlin, born January 16, 1953, has been assigned an intelligence quotient of approximately 30.

27. Charles O'Laughlin attended special classes in the Beaver County School District for two years beginning in the fall of 1959.

28. From 1961 until 1967, at his parents expense, he attended St. Anthony's School for Exceptional Children in Oakmont, Pennsylvania.

29. During the school terms, 1967-69 and 1968-69, Charles O'Laughlin was enrolled in a trainable class at the Mon Valley School of the Allegheny County School District.

30. On September 30, 1969, his parents were informed by letter from a school psychologist that Charles O'Laughlin was excluded from the public schools as "uneducable and untrainable."

31. On October 8, 1969, the exclusion forms were filed with the Department of Education by the local school district.

32. Despite his parents' request for a statement of the reasons for exclusion, no reasons have been stated nor have the parents had an opportunity for a hearing on the exclusion.

33. Despite his parents' request to the West Homestead School District for a tutor for home instruction, no home instruction has been provided.

The Non-Education of Christopher John Kelly

34. Christopher John Kelly, born December 17, 1960, has been assigned an intelligence quotient of approximately 20.

35. From June to September, 1969, he attended the pre-school day camp of the Berks County Association for Retarded Children, where he was an attentive student and progressed. He is toilet-trained and able to feed himself, he speaks in phrases and repeats words.

36. From September through December, 1969, he attended a special class at the Pennwyn School of the Berks County School District.

37. At Christmastime, 1969, Christopher John Kelly's parents received a letter from the school psychologist of the Berks County School District saying that he could not return to school, that school was "not any good for him," and excluding him therefrom as "uneducable and untrainable."

38. To the best of his parents knowledge neither their local Wilson School District nor the Berks County School District Boards of Education nor the Secretary of Education have formally acted on his exclusion.

39. His parents have not been accorded notice or a hearing on their child's exclusion from the public schools.

The Non-Education of Mark Moser

40. Mark Moser, born December 21, 1954, has been assigned an intelligence quotient of approximately 70.

41. Mark Moser is presently enrolled at River Crest Center, a private school, at an expense to his parents of \$175.00 a month. He can read and write.

42. In September, 1960, his parents registered Mark Moser at the Russell School, Marple-Newtown School District, but were informed that there was no class available to him.

43. From September, 1967 to November, 1967, Mark Moser attended the Bell Avenue School of the Marple-Newtown School District, in a class with students below his own capabilities.

44. In November, 1967, the School District informed his parents that no other class was available, encouraged the parents to remove him from the school, and excused him from public school attendance as unable to profit therefrom.

The Non-Education of Billy Reese

45. William Reese, born October 27, 1957, has been assigned an intelligence quotient of approximately 70.

46. William Reese is presently receiving no education at all. He reads at a second grade level, does three number arithmetic, draws, and is able to spell syllabically.

47. From September, 1964 until October, 1966, William Reese attended special classes at the Cumberland Hills School of the Allegheny County School District.
48. During the 1967-68 school year, he attended Cumberland Hills School two days a week, and was tutored at St. Francis, a private school, one hour a day, three days a week at his parents' expense.
49. In September, 1968, he returned to Cumberland Hills full time but after eight days he was put out of school, excused as "unable to profit from school attendance."
50. For the remainder of the 1968 school year, he was tutored at St. Francis an hour a day, five days a week.
51. In February, 1969, his parents requested home instruction from the Shaler Township School District; the request was denied.
52. In the summer of 1969, William Reese attended the Buttonwood Farms Camp in Bucks County, at an expense of \$900.00 to his parents.
53. In September, 1969, when his parents again sought to enroll him in public school, the Shaler Township District psychologist refused to accept him.
54. During the school year 1969-70, he was privately tutored two hours a week.
55. In the summer of 1970, he again attended the Buttonwood Farms Camp at his parents' expense.

56. In September, 1970, his parents again requested home instruction and, again, home instruction was refused by the Shaler Township School District.

57. William Reese was accepted in August, 1970, at the Elwyn Institute, a private boarding school in Delaware County, where the tuition will be \$5,400 a year plus \$150.00 admission fee, but has since been on the waiting list for admission.

The Non-Education of David Tupi

58. David Tupi, born February 24, 1956, has been assigned an intelligence quotient of approximately 30.

59. David Tupi has not been in public school since he was "excused" therefrom in October, 1968. Since then and until May, 1970, he attended St. Anthony's School for Exceptional Children, a private school, for recreation and therapy on an after school basis three to five days a week.

60. In August, 1962, he was examined by a school psychologist and in December was accepted for the Larimer School of the Pittsburgh School District. After three weeks attendance, he was excused from the school because "he couldn't make the adjustment."

61. Two weeks later his parents, at an expense to them of \$20 a month, enrolled David Tupi at St. Anthony's School for Exceptional Children which he attended for three years.

62. In April, 1968, David was tested again by the Pittsburgh School District and accepted for September, 1968. For one month he attended a class of handicapped children, most of them bigger and older than David. In October, 1968, his parents were informed that "he couldn't handle the classroom", and he was sent home as "unable to profit from school attendance."

The Non-Education of Sandra Lydard

63. Sandra Lydard, born August 17, 1954, has been assigned an intelligence quotient of approximately 35-40.

64. Sandra Lydard attended a pre-school special class in the Laurel, Maryland School District most of the 1959-60 school year.

65. During the next three years, while living in Cumberland, Maryland and Frankfurt, Germany, she did not attend school because the school districts had no special classes for her.

66. In Fort Dix, New Jersey during the school year 1964-65, she attended a special class for retarded trainable children which her parents were instrumental in requiring the school district to start.

67. From March, 1965 until June, 1970, Sandra Lydard attended the Special Education Center of the Reading School District, where her parents settled after her father retired from the United States Army.

68. In the course of this education Sandra Lydard learned, *inter alia*, to talk more fluently, to recognize pictures, letters and numbers.

69. On June 1, 1970, the principal of her school by letter to Sandra Lydard's parents announced that "we are no longer able to provide a program at the Special Education Center that will challenge your child's ability or increase her educational background", and excused her from school as "unable to profit therefrom."

The Non-Education of Emery Thomas

70. Emery Thomas was born March 19, 1963.

71. In September, 1968, Emery Thomas was registered for school with the John Barry School of the Philadelphia School District.

72. His mother was thereupon informed that "we don't feel he is ready", "the classroom is overcrowded," and his admission was postponed until he is eight years of age.

The Non-Education of William Wenston

73. William Wenston was born January 5, 1963.

74. In the fall of 1969 his parents contacted the Pittsburgh School District, were told that there were "not too many trainable classes" and his admission was postponed until he is eight years of age.

75. From September, 1967 to June, 1970, William Wenston, at an expense to his parents of \$20.00 a month, attended the Shady Side Pre-School Program of the Allegheny County Association

for Retarded Children.

76. Since September, 1970, William Wenston has been on the waiting list for the District's Larimer School.

The Non-Education of Cindy Mae Hatt

77. Cindy Mae Hatt, born February 14, 1962, has been assigned an intelligence quotient of approximately 40.

78. In September, 1968, Cindy Mae Hatt was registered for school with the Governor Mifflin School District, but the school psychologist of the Berks County School District told her parents that her admission to school was postponed.

79. In June, 1969, Cindy Mae Hatt entered Hamburg State School and Hospital for the intensive educational program known as Temporary Placement.

80. In June, 1970, when Cindy Mae Hatt left Hamburg State School and Hospital, she had learned to sleep in a bed, rather than in a crib with netting over it, to feed herself, to control her toilet habits, and her comprehension had significantly improved.

81. In September, 1970, Cindy Mae Hatt entered the special class at the Pennwyn School of the Berks County School District, but in October the school psychologist announced that she "doesn't fit in there" and would not be retained in school because she had not attained a mental age of five years.

82. Since November, 1970, Cindy Mae Hatt has attended the pre-school program of the Berks County Chapter for Retarded Children a private school funded by the Federation of Junior Women's Clubs.

The Non-Education of Ronald Green

83. Ronald Green, born October 4, 1963, has been assigned an intelligence quotient of approximately

84. From September, 1968 through January, 1969, Ronald Green attended kindergarten at the Emlen School of the Philadelphia School District.

85. In September, 1969, he was registered for admission to the public schools, and in March, 1970, was tested by the Philadelphia School District.

86. In that month, the counselor of the Emlen School announced to his mother that Ronald Green would not be admitted until he was eight because he had not yet attained a mental age of five years, and he set a further test for March, 1971.

87. His mother has been unable to enroll him in any other educational program; he is too old for Get Set; the day school of Philadelphia Association for Retarded Children is filled; other private schools are too expensive or too far away. Ronald Green has learned to feed and dress himself; he is toilet trained and fully able to speak.

The Non-Education of Glenn Lowrey

88. Glenn Lowrey, born July 6, 1964, has been assigned an intelligence quotient of approximately 56.

89. In late summer, 1970, he was registered for school with the Mountain View School District.

90. At that time, the school psychologist of the Susquehanna County School District informed Glenn Lowrey's parents that he was "not yet ready for school, perhaps he'll be ready at eight," and he was refused admission to school because he had not yet attained a mental age of five years.

91. Since September, 1970, Glenn Lowrey has attended the Developmental Day Program of the United Cerebral Palsy Association of Lackawanna County, a United Fund supported program in Scranton, Pennsylvania, a round trip of 40 miles a day, where he has been toilet trained and his communication skills have improved significantly.

The Right to Education

92. Education is the central function of American state government:

(a) Since 1776, the Constitution of the Commonwealth of Pennsylvania has provided for free public education, and since 1874, for "all the children of this Commonwealth above the age of six years." As presently comprehended in Article 3, Sec. 14: "the General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth".

(b) In decisions since the 19th Century the Courts of the Commonwealth of Pennsylvania have declared the Commonwealth's intention universally to provide education for all of its citizens.

(c) The Pennsylvania Public School Code

24 Purd. Stat. Sec. 13-1301, has provided since 1911 that "Every child between the ages of six (6) and twenty-one (21) years may attend the public schools in his district."

(d) The Pennsylvania Public School Code,

24 Purd. Stat. Sec. 13-1326, has provided since 1911 that every child must attend school from "the time the child's parents elect to have the child enter school, . . . not later than at the age of eight (8) years, until the age of seventeen (17) years."

93. Education is required in the performance of the most basic public responsibilities; it is the very foundation of good citizenship.

94. Education is a principal instrument in awakening the child to cultural values, in preparing him for later training, and in helping him to adjust normally to his environment.

95. No child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

96. The opportunity of education, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

97. The Commonwealth of Pennsylvania has explicitly declared, in the Public School Code, 24 Purd. Stat. Sec. 13-1372, its responsibility to provide for "the proper education and training of all exceptional children."

The Retarded

98. There are as many as 103,800 retarded children of school age in the Commonwealth, only 50,043 of whom are in the public schools.

99. The retarded are commonly described in four groupings: The mildly retarded, with intelligence quotients ranging from 50 - 55 to 70 - 75; the moderately retarded, with intelligence quotients ranging from 35-40 to 50-55; the severely retarded, with intelligence quotients ranging from 20 to 35-40; and the profoundly retarded, with intelligence quotients ranging below 20.

100. Among every 1,000 children of school age, approximately 30 will be retarded children. Of each 30 retarded children, 25 will be mildly retarded (what has traditionally been called "educable"), 4 will be moderately or severely retarded (what has traditionally been called "trainable") and 1 will be profoundly retarded (traditionally called "dependent").

101. Whatever the traditional label, retarded children of any intelligence quotient are capable of benefitting from education.

102. Among every 30 retarded persons, 29, if education is provided to them, are capable of moving toward self-sufficiency; (25 of them, with education, would be able to achieve sufficient skills to enter the labor market and to secure employment in competitive jobs; 4, with education, to secure employment in a sheltered or supervised setting) and one, if education is provided to him, is capable of achieving some degree of self-care.

103. The fact that a child is retarded is not an index of, nor a valid basis for predicting, the educability vel non of that child.

104. Education is even more important to the development of the retarded citizen than it is to the normal citizen, for the latter may develop skills willy-nilly and informally, but the retarded citizen cannot, without sustained educational attention.

105. Education is even more important to the retarded citizen than it is to the normal citizen, for absent education the retarded citizen will be unable to provide for himself and will be in jeopardy of institutionalization and loss of his liberty or, absent education, he may be incapable of self-care and in jeopardy even of life.

106. The earlier a retarded child begins his education, the more thoroughly he will benefit from it and the greater the likelihood of his realizing a capacity for self-sufficiency.

107. Historically and still retarded persons have been regarded with prejudice and subjected to discrimination. They constitute a discreet and insular minority to whom the usual political processes have not been open.

Count I

108. The Pennsylvania Public School Code, 24 Purd. Stat. Sec. 13-1375, provides:

"Uneducable Children Provided for by Department of Public Welfare. The State Board of Education shall establish standards for temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools. Any child who is reported by a person who is certificated as a public school psychologist as being uneducable and untrainable in the public schools, may be reported by the board of school directors to the Superintendent of Public Instruction and when approved by him, in accordance with the standards of the State Board of Education shall be certified to the Department of Public Welfare as a child who is uneducable and untrainable in the public schools. When a child is thus certified the public schools shall be relieved of the obligation of providing education or training for such child. The Department of Public Welfare shall thereupon arrange for the care, training, and supervision of such child in a manner not inconsistent with the laws governing mentally defective individuals."

109. Section 13-1375, on its face and as applied, deprives plaintiffs of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily and capriciously and with no rational basis discriminates between persons who are "educable and untrainable" and persons who are "educable or trainable" excluding the former from the public schools, consigning them to the Department of Public Welfare which has no duty to educate, and depriving them of the right to an education.

110. Section 13-1375, on its face and as applied, deprives plaintiffs of Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily and capriciously and for no adequate reason denies to retarded children of school age the education, and the opportunity to become self-sufficient, contributing members of the Commonwealth, guaranteed by the Constitution and Laws of the Commonwealth of Pennsylvania, and subjects them to jeopardy of liberty and even of life.

111. Section 13-1375, on its face and as applied, deprives plaintiffs of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that, excluding plaintiffs from the public schools, it conditions their education upon the impermissible criteria of wealth, denying education to those children whose parents are poor.

112. Section 13-1375, on its face and as applied, denies plaintiffs the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that plaintiffs' parents are taxed for the support of a system of public education, nevertheless their children are denied the benefits thereof and they must pay additional monies to secure an education for their children.

Count II

113. Alternatively, Section 13-1375, on its face and as applied, deprives plaintiffs of procedural Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that there is no provision for notice or for a hearing of any kind, let alone an impartial hearing, with right of cross-examination, prior to, or after, the exclusion.

Count III

114. The Public School Code, 25 Purd. Stat. Sec. 13-1304, provides:

"Admission of Beginners.

. . . The board of school directors may refuse to accept or retain beginners who have not attained a mental age of five years"

115. Section 13-1304, on its face and as applied, deprives plaintiffs of the Equal Protection of the Law in violation of the Fourteenth Amendment of the Constitution of the United States, in that it arbitrarily and capriciously and with no rational basis discriminates among children who have reached the chronological age of six, at which age parents may elect under 24 Purd. Stat. Sec. 13-1301 to send their children to school, allowing school districts to refuse admission only to children with a mental age under five years, and depriving them of the right to an education.

116. Section 13-1304, on its face and as applied, deprives plaintiffs of Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it arbitrarily and capriciously and for no adequate reason denies to retarded children of school age the education guaranteed by the Constitution and Laws of the Commonwealth of Pennsylvania and at an age when education can have the most beneficial effect upon a child's capacity for self-sufficiency and self-care.

117. Section 13-1304, on its face and as applied, deprives plaintiffs of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that, having postponed plaintiffs' admission to the public schools, possibly until they are twelve

years of age, it conditions their education upon the impermissible criteria of wealth, denying education to those children whose parents are poor.

118. Section 13-1304, on its face and as applied, denies plaintiffs the Equal Protection of the Law in violation of the Fourteen Amendment to the Constitution of the United States, in that plaintiffs' parents are taxed for the support of a system of public education, nevertheless their children are denied the benefits thereof and they must pay additional monies to secure an education for their children.

Count IV

119. The Public School Code, 24 Purd. Stat. Sec. 13-1330 provides:

"Exceptions to Compulsory Attendance.
The provisions of this act requiring regular attendance shall not apply to any child who: . . .

(2) Has been examined by an approved mental clinic or by a person certificated as a public school psychologist or psychological examiner, and has been found to be unable to profit from further public school attendance, and who has been reported to the board of school directors and excused, in accordance with regulations prescribed by the State Board of Education; . . ."

120. Contrary to the clear intent of Section 13-1330, which is to forgive what otherwise would be violations of compulsory attendance requirements and to preserve to the parent the decision whether the child shall attend school, the Regulations of the State Board of Education Secs. 5-400, confuse excusal and exclusion.

121. In practice Section 13-1330 is used by defendants not to forgive non-attendance which a parent might mandate but to mandate non-attendance contrary to the parent's wishes.

122. This Court has pendent jurisdiction of claims based upon state law.

123. Sections 5-400 of the Regulations of the State Board and the practice thereunder are unlawful as contrary to Section 13-1330 of the Public School Code.

Count V

124. The Public School Code, 24 Purd. Stat. Sec. 13-1326 provides:

"Definitions. The term 'compulsory school age' as hereinafter used, shall mean the period of a child's life from the time the child's parents elect to have the child enter school, which shall be not later than at the age of eight (8) years, until the age of seventeen (17) years."

125. The Public School Code, 24 Purd. Stat. Sec. 13-1301, provides:

"Every child between the ages of six (6) and twenty-one (21) years may attend the public schools in his district."

126. In practice the defendants have unlawfully confused the above-cited discreet provisions, excluding retarded children from the schools until the age of eight years and excluding retarded children from schools at seventeen years, despite their parents' election to the contrary and the clear statutory guarantee that every child may attend the public schools between the ages of six and twenty-one.

127. This Court has pendent jurisdiction of claims based upon state law.

128. The practice of excluding retarded children from the schools until the age of eight years and at the age of seventeen years is unlawful as contrary to Section 13-1301 of the Public School Code.

Count VI

129. Defendants have consistently, and arbitrarily, to the great detriment of plaintiff retarded children, applied Sections 1375, 1330, 1326 and 1304 of the Public School Code, and tolerated their application by those under their supervision and control, and otherwise have so acted to deny plaintiff retarded children their right to attend public school and to an education, inter alia, by excluding and excusing them from school, by postponing their admission to school, by terminating their attendance at seventeen years, and by failing to provide education for children resident at State Schools and Hospitals for the retarded.

130. The within cited statutory provisions have been arbitrarily and capriciously applied by defendants unconstitutionally denying an education to plaintiff retarded children and depriving them of their right to the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States.

131. The above cited conduct of defendants has unconstitutionally denied an education to plaintiff retarded children depriving them of their right to the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States.

132. The statutes as applied by defendants, and their conduct, deprive plaintiffs of Due Process of Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that they arbitrarily and capriciously and for no adequate reason deny to retarded children of school age the education, and the opportunity to become self-sufficient, contribution members of the Commonwealth, guaranteed by the Constitution and Laws of the Commonwealth of Pennsylvania, and subject them to jeopardy of liberty and even of life.

133. The statutes as applied by defendants, and their conduct, deprive plaintiffs of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States in that, having excluded plaintiffs from public schools, they condition plaintiffs education upon the impermissible criteria of wealth, denying education to those children whose parents are poor.

134. The statutes as applied by defendants, and their conduct, deprive plaintiffs of the Equal Protection of the Law in violation of the Fourteenth Amendment to the Constitution of the United States, in that plaintiffs' parents are taxed for the support of a system of public education, nevertheless their children are denied the benefits thereof and they must pay additional monies to secure an education for their children.

WHEREFORE, it is respectfully prayed that this Court:

(1) Convene a three-judge District Court as required by Title 28 U.S.C. Secs. 2281 and 2284.

(2) Declare Sections 1375 and 1304 of the Public School Code of 1949 and any enforcement thereof unconstitutional.

(3) Declare Sections 1375, 1330, 1325, and 1304 of the Public School Code of 1949 unconstitutional as applied and defendants' policies, practices and procedures thereunder as complained of herein, unconstitutional.

(4) Preliminarily and permanently enjoin all defendants, their employees, agents, successors and all others acting in concert with them and subject to their supervision and control from:

(a) enforcing Sec. 1375 and 1304 of the Public School Code of 1949;

(b) denying admission to the public schools and an education to any retarded child of school age;

(c) otherwise giving differential treatment concerning attendance at school to any retarded child.

5. Preliminarily and permanently enjoin the Secretary of Education directly to provide, maintain, administer, supervise, and operate classes and schools for the education of retarded children in each school district where hearing shows an inadequate number of such classes or schools are provided by the district and further, enjoin the Secretary of Education to charge the cost thereof to any money due to such district out of any state appropriation.

6. Preliminarily and permanently enjoin the Secretary of Education directly to provide, maintain, administer, supervise and operate classes and schools for the education of retarded children in each State School and Hospital for the retarded, and further enjoin the Secretary of Education to charge the cost thereof to any monies due out of any state appropriation to the school districts of each child's origin.

7. Preliminarily and permanently enjoin defendants to provide compensatory years of education to each retarded person who has been excluded, excused or otherwise denied the right to attend school while of school age and further enjoin defendants to give notice of the judgment herein to the parents or guardian of each such person.

8. Grant plaintiffs the cost of prosecuting this action.

9. Grant such other relief as shall be necessary and proper.

Thomas K. Gilhool

Thomas K. Gilhool

Room 1300
One North 13th Street
Philadelphia, Pennsylvania 19107
215-LO 3-8604

January 7, 1971

Attorney for Plaintiffs

COMMONWEALTH OF PENNSYLVANIA
:SS.
COUNTY OF PHILADELPHIA

JAMES R. WILSON JR. being duly sworn according to law, deposes and says that he is President of the Pennsylvania Association for Retarded Children, one of the plaintiffs in the foregoing action, that he is authorized by the Association and by each of the plaintiffs to take this affidavit and that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

J. James R. Wilson, Jr.

JAMES R. WILSON, JR.

Sworn to and subscribed
before me this day
of 1971.

NOTARY PUBLIC
My Commission Expires: _____

#54

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA ASSOCIATION FOR :
RETARDED CHILDREN, :
NANCY BETH BOWMAN, et al. :

Plaintiffs :

v. : CIVIL ACTION
NO. 71-42

COMMONWEALTH OF PENNSYLVANIA, :
DAVID H. KURTZMAN, et al. :

ORDER, INJUNCTION and CONSENT AGREEMENT

AND NOW, this 7th day of October, 1971, the parties having consented through their counsel to certain findings and conclusions and to the relief to be provided to the named plaintiffs and to the members of their class, the provisions of the Consent Agreement between the parties set out below are hereby approved and adopted and it is hereby so ORDERED.

And for the reasons set out below it is ORDERED that defendants the Commonwealth of Pennsylvania, the Secretary of the Department of Education, the State Board of Education, the Secretary of the Department of Public Welfare, the named defendant school districts and intermediate units and each of the School Districts and Intermediate Units in the Commonwealth of Pennsylvania, their officers, employees, agents and successors be and they hereby are enjoined as follows:

- (a) from applying Section 1304 of the Public School Code of 1949, 24 Purd. Stat. Sec. 1304, so as to postpone or in anyway to deny to any mentally retarded child access to a free public program of education and training;

- (b) from applying Section 1326 or Section 1330(2) of the School Code of 1949, 24 Purd. Stat. Secs. 13-1326, 13-1330(2) so as to postpone, to terminate or in anyway to deny to any mentally retarded child access to a free public program of education and training;
- (c) from applying Section 1371(1) of the School Code of 1949, 24 Purd. Stat. Sec. 13-1371(1) so as to deny to any mentally retarded child access to a free public program of education and training;
- (d) from applying Section 1376 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1376, so as to deny tuition or tuition and maintenance to any mentally retarded person except on the same terms as may be applied to other exceptional children, including brain damaged children generally;
- (e) from denying homebound instruction under Section 1372(3) of the School Code of 1949, 24 Purd. Stat. Sec. 13-1372(3) to any mentally retarded child merely because no physical disability accompanies the retardation or because retardation is not a short-term disability.
- (f) from applying Section 1375 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1375, so as to deny to any mentally retarded child access to a free public program of education and training;
- (g) to immediately re-evaluate the named plaintiffs, and to accord to each of them, as soon as possible but in no event later than October 13, 1971, access to a free public program of education and training appropriate to his learning capacities;

(h) to provide, as soon as possible but in no event later than September 1, 1972, to every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter, access to a free public program of education and training appropriate to his learning capacities;

(i) to provide, as soon as possible but in no event later than September 1, 1972, wherever defendants provide a pre-school program of education and training for children aged less than six years of age, access to a free public program of education and training appropriate to his learning capacities to every mentally retarded child of the same age.

The above Orders are entered as interim Orders only and without prejudice, pending notice, as described in Paragraph 3 below, to the class of plaintiffs and to the class of defendants determined in Paragraphs 1 and 2 below.

Any member of the classes so notified who may wish to be heard before permanent Orders are entered shall enter his appearance and file a written statement of objections with the Clerk of this Court on or before October 20, 1971. Any objections so entered will be heard by the Court at 10 o'clock on October 22, 1971.


_____ J.

Arthur M. Adams
_____ J.


_____ J.

CONSENT AGREEMENT

The Complaint in this action having been filed on January 7, 1971, alleging the unconstitutionality of certain Pennsylvania statutes and practices under the Equal Protection Clause of the Fourteenth Amendment and certain pendent claims; a three-judge court having been constituted, after motion, briefing and argument thereon, on May 26, 1971; an Order and Stipulation having been entered on June 18, 1971, requiring notice and a due process hearing before the educational assignment of any retarded child may be changed; and evidence having been received at preliminary hearing on August 12, 1971;

Now, therefore, this 7th of October 1971, the parties being desirous of effecting an amicable settlement of this action, the parties by their counsel agree, subject to the approval and Order of this Court, as follows:

I.

1. This action may and hereby shall be maintained by plaintiffs as a class action on behalf of all mentally retarded persons, residents of the Commonwealth of Pennsylvania, who have been, are being, or may be denied access to a free public program of education and training while they are, or were, less than twenty-one years of age.

It is expressly understood, subject to the provisions of Paragraph 44 below, that the immediate relief hereinafter provided shall be provided to those persons less than twenty-one years of age as of the date of the Order of the Court herein.

2. This action may and hereby shall be maintained against defendant school districts and intermediate units as a class action against all of the School Districts and Intermediate Units of the Commonwealth of Pennsylvania.

3. Pursuant to Rule 23, Fed. R. Civ. P., notice of the extent of the Consent Agreement and the proposed Order approving this Consent Agreement, in the form set out in Appendix A, shall be given as follows:

(a) to the class of defendants, by the Secretary of Education, by mailing immediately a copy of this proposed Order and Consent Agreement to the Superintendent and the Director of Special Education of each School District and Intermediate Unit in the Commonwealth of Pennsylvania;

(b) to the class of plaintiffs, (i) by the Pennsylvania Association for Retarded Children, by immediately mailing a copy of this proposed Order and Consent Agreement to each of its Chapters in fifty-four counties of Pennsylvania; (ii) by the Department of Justice, by causing an advertisement in the form set out in Appendix A, to be placed in one newspaper of general circulation in each County in the Commonwealth; and (iii) by delivery of a joint press release of the parties to the television and radio stations, newspapers, and wire services in the Commonwealth.

II.

4. Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the

remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.

5. The Commonwealth of Pennsylvania has undertaken to provide a free public education to all of its children between the ages of six and twenty-one years, and, even more specifically, has undertaken to provide education and training for all of its exceptional children.

6. Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.

7. It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.

III.

Section 1304

8. Section 1304 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1304, provides:

"Admission of beginners"

The admission of beginners to the public schools shall be confined to the first two weeks of the annual school term in districts operating on an annual promotion basis, and to the first two weeks of either the first or the second semester of the school term to districts operating on a semi-annual promotion basis. Admission shall be limited to beginners who have attained the age of five years and seven months before the first day of September if they are to be admitted in the fall, and to those who have attained the age of five years and seven months before the first day of February if they are to be admitted at the beginning of the second semester. The board of school directors of any school district may admit beginners who are less than five years and seven months of age, in accordance with standards prescribed by the State Board of Education. The board of school directors may refuse to accept or retain beginners who have not attained a mental age of five years, as determined by the supervisor of special education or a properly certificated public school psychologist in accordance with standards prescribed by the State Board of Education.

"The term 'beginners,' as used in this section, shall mean any child that should enter the lowest grade of the primary school or the lowest primary class above the kindergarten level."

9. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officers, employees, agents, and successors agree that they shall cease and desist from applying Section 1304 so as to postpone or in any way to deny access to a free public program of education and training to any mentally retarded child.

10. The Attorney General of the Commonwealth of Pennsylvania (hereinafter "the Attorney General") agrees to issue an Opinion declaring

that Section 1304 means only that a school district into or to retain in the lowest grade of the regular the lowest regular primary class above the kindergarten child who has not attained a mental age of five years.

11. The Attorney General of the Commonwealth shall issue an Opinion thus construing Section 1304, and of Education (hereinafter "the Board") shall issue regulations said construction and to supersede Sections 5-200 of the Regulations, copies of which Opinion and Regulations shall with the Court and delivered to counsel for plaintiffs on or October 25, 1971, and they shall be issued and promulgated on or before October 27, 1971.

12. The aforementioned Opinion and Regulations shall (a) provide for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971, before a child's admission as a beginner in the lowest grade of a regular primary school, or the regular primary class above kindergarten, may be postponed; (b) the automatic re-evaluation every two years of any educational assessment other than to a regular class, and (c) provide for an annual re-evaluation at the request of the child's parent or guardian, and (d) provide upon each such re-evaluation for notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971.

13. The aforementioned Opinion and Regulations shall also require the timely placement of any child whose admission to regular primary school or to the lowest regular primary class above kindergarten

is postponed, or who is not retained in such school or class, in a free public program of education and training pursuant to Sections 1371 through 1382 of the School Code of 1949, as amended 24 Purd. Stat. Sec. 13-1371 through Sec. 13-1382.

Section 1326

14. Section 1326 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1326, provides:

Definitions

The term 'compulsory school age,' as hereinafter used shall mean the period of a child's life from the time the child's parents elect to have the child enter school, which shall be not later than at the age of eight (8) years, until the age of seventeen (17) years. The term shall not include any child who holds a certificate of graduation from a regularly accredited senior high school."

15. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1326 so as to postpone, to terminate, or in any way to deny access to a free public program of education and training to any mentally retarded child.

16. The Attorney General agrees to issue an Opinion declaring that Section 1326 means only that parents of a child have a compulsory duty while the child is between eight and seventeen years of age to assure his attendance in a program of education and training: and Section 1326 does not limit the ages between which a child must be granted access to a free,

public program of education and training. Defendants are bound by Section 1301 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1301, to provide free public education to all children six to twenty-one years of age. In the event that a parent elects to exercise the right of a child six through eight years and/or seventeen through twenty-one years of age to a free public education, defendants may not deny such child access to a program of education and training. Furthermore, if a parent does not discharge the duty of compulsory attendance with regard to any mentally retarded child between eight and seventeen years of age, defendants must and shall take those steps necessary to compel the child's attendance pursuant to Section 1327 of the School Code of 1949, 24 Purd. Stat. Sec. 13-1327, and related provisions of the School Code, and to the relevant regulations with regard to compulsory attendance promulgated by the Board.

17. The Attorney General shall issue an Opinion thus construing Section 1326, and related Sections, and the Board shall promulgate Regulations to implement said construction, copies of which Opinion and Regulations shall be filed with the Court and delivered to plaintiffs' counsel on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Section 1330(2)

18. Section 1330(2) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1330(2) provides:

"Exceptions to compulsory attendance.

The provisions of this action requiring regular attendance shall not apply to any child who:

* * *

(2) Has been examined by an approved mental clinic or by a person certified as a public school psychologist or psychological examiner, and has been found to be unable to profit from further public school attendance, and who has been reported to the board of school directors and excused, in accordance with regulations prescribed by the State Board of Education."

19. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units, each of them, for themselves, their officers, employees, agents, and successors agree that they shall cease and desist from applying Section 1330(2) so as to terminate or in any way to deny access to a free public program of education and training to any mentally retarded child.

20. The Attorney General agrees to issue an Opinion declaring that Section 1330(2) means only that a parent may be excused from liability under the compulsory attendance provisions of the School Code when, with the approval of the local school board and the Secretary of Education and a finding by an approved clinic or public school psychologist or psychological examiner, the parent elects to withdraw the child from attendance. Section 1330(2) may not be invoked by defendants, contrary to the parents' wishes, to terminate or in any way to deny access to a free public program of education and training to any mentally retarded child. Furthermore, if a parent does not discharge the duty of compulsory attendance with regards to any mentally retarded child between eight and seventeen years of age, defendants must and shall take those steps necessary to compel the child's attendance pursuant to Section 1327 and related provisions of the School Code and to the relevant regulations with regard to compulsory attendance promulgated by the Board.

21. The Attorney General shall issue an Opinion so construing Section 1330(2) and related provisions and the Board shall promulgate Regulations to implement said construction and to supersede Section 5-400 of the Pupil Attendance Regulations, a copy of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiff on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Pre-School Education

22. Defendants, the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, the Secretary of Public Welfare, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1371(1) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1371(1) so as to deny access to a free public program of education and training to any mentally retarded child, and they further agree that wherever the Department of Education through its instrumentalities, the School Districts and Intermediate Units, or the Department of Public Welfare through any of its instrumentalities provides a pre-school program of education and training to children below the age of six, they shall also provide a program of education and training appropriate to their learning capacities to all retarded children of the same age.

23. Section 1371(1) of the School Code of 1949, as amended,

24 Purd. Stat. Sec. 13-1371(1), provides:

'Definition of exceptional children; reports; examination

(1) The term 'exceptional children' shall mean children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes."

24. The Attorney General agrees to issue an Opinion declaring that the phrase 'children of school age' as used in Section 1371 means children aged six to twenty-one and also, whenever the Department of Education through any of its instrumentalities, the local School District, Intermediate Unit, or the Department of Public Welfare, through any of its instrumentalities, provides a pre-school program of education or training for children below the age of six, whether kindergarten or however so called, means all mentally retarded children who have reached the age less than six at which pre-school programs are available to others.

25. The Attorney General shall issue an Opinion thus construing Section 1371 and the Board shall issue regulations to implement said construction, copies of which Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Tuition and Tuition and Maintenance

26. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officers, employees,

agents and successors agree that they shall cease and desist from applying Section 1376 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1376, so as to deny tuition or tuition and maintenance to any mentally retarded person.

27. The Attorney General agrees to issue an Opinion, and the Council of Basic Education of the State Board of Education agrees to promulgate Regulations, construing the term "brain damage" as used in Section 1376 and as defined in the Board's "Criteria for Approval . . . of Reimbursement" so as to include thereunder all mentally retarded persons, thereby making available to them tuition for day school and tuition and maintenance for residential school up to the maximum sum available for day school or residential school, whichever provides the more appropriate program of education and training. Copies of the aforesaid Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiff on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

28. Defendants may deny or withdraw payments of tuition or tuition and maintenance whenever the school district or intermediate unit in which a mentally retarded child resides provides a program of special education and training appropriate to the child's learning capacities into which the child may be placed.

29. The decision of defendants to deny or withdraw payments of tuition or tuition and maintenance shall be deemed a change in educational assignment as to which notice shall be given and an opportunity for a hearing afforded as set out in this Court's order of June 18, 1971.

Homebound Instruction

30. Section 1372(3) of the School Code of 1949, as amended,
24 Purd. Stat. Sec. 13-1372(3), provides in relevant part:

'Standards: plans; special classes or schools

* * *

(3) Special Classes or Schools Established and Maintained by School Districts.

... If . . . it is not feasible to form a special class in any district or to provide such education for any [exceptional] child in the public schools of the district, the board of school directors of the district shall secure such proper education and training outside the public schools of the district or in special institutions, or by providing for teaching the child in his home. . . ."

31. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, each of them, for themselves, their officials, employees, agents and successors agree that they shall cease and desist from denying homebound instruction under Section 1372(3) to mentally retarded children merely because no physical disability accompanies the retardation or because retardation is not a short-term disability.

32. The Attorney General agrees to issue an Opinion declaring that a mentally retarded child, whether or not physically disabled, may receive homebound instruction and the State Board of Education and/or the Secretary of Education agrees to promulgate revised Regulations and forms in accord therewith, superseding the 'Homebound Instruction Manual' (1970) insofar as it concerns mentally retarded children.

33. The aforesaid Opinion and Regulations shall also provide:

- (a) that homebound instruction is the least preferable of the programs of education and training administered by the Department of Education and a mentally retarded child shall not be assigned to it unless it is the program most appropriate to the child's capacities;
- (b) that homebound instruction shall involve education and training for at least five hours a week;
- (c) that an assignment to homebound instruction shall be re-evaluated not less than every three months, and notice of the evaluation and an opportunity for a hearing thereon shall be accorded to the parent or guardian, as set out in the Order of this Court dated June 18, 1971;

34. Copies of the aforementioned Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27, 1971.

Section 1375

35. Section 1375 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1375, provides:

"Uneducable children provided for by Department of Public Welfare

The State Board of Education shall establish standards for temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools. Any child who is reported by a person who is certified as a public school psychologist as being uneducable and untrainable

In the public schools, may be reported by the board of school directors to the Superintendent of Public Instruction and when approved by him, in accordance with the standards of the State Board of Education, shall be certified to the Department of Public Welfare as a child who is uneducable and untrainable in the public schools. When a child is thus certified, the public schools shall be relieved of the obligation of providing education or training for such child. The Department of Public Welfare shall thereupon arrange for the care, training and supervision of such child in a manner not inconsistent with the laws governing mentally defective individuals."

36. Defendants the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, on their own behalf and on behalf of all School Districts and Intermediate Units in the Commonwealth of Pennsylvania, and the Secretary of Public Welfare, each of them, for themselves, their officers, employees, agents and successors agree that they shall cease and desist from applying Section 1375 so as to deny access to a free public program of education and training to any mentally retarded child.

37. The Attorney General agrees to issue an Opinion declaring that since all children are capable of benefiting from a program of education and training, Section 1375 means that insofar as the Department of Public Welfare is charged to "arrange for the care, training and supervision" of a child certified to it, the Department of Public Welfare must provide a program of education and training appropriate to the capacities of that child.

38. The Attorney General agrees to issue an Opinion declaring that Section 1375 means that when it is found, on the recommendation of a public school psychologist and upon the approval of the local board of school directors and the Secretary of Education, as reviewed in the due process

hearing as set out in the Order of this Court dated June 18, 1971, that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than he would from any program of education and training administered by the Department of Education, he shall be certified to the Department of Public Welfare for placement in a program of education and training.

39. To assure that any program of education and training administered by the Department of Public Welfare shall provide education and training appropriate to a child's capacities the plan referred to in Paragraph 49 below shall specify, inter alia,

(a) the standards for hours of instruction, pupil-teacher ratios, curriculum, facilities, and teacher qualifications that shall be met in programs administered by the Department of Public Welfare;

(b) the standards which will qualify any mentally retarded person who completes a program administered by the Department of Public Welfare for a High School Certificate or a Certificate of Attendance as contemplated in Sections 8-132 and 8-133 of the Special Education Regulations;

(c) the reports which will be required in the continuing discharge by the Department of Education of its duty under Section 2809(1) of the Administrative Code of 1929, as amended, 71 Purd. Stat. Sec. 2809(1), to inspect and to require reports of programs of education and training administered by the Department of Public Welfare, which reports shall include, for each child in such programs an annual statement of educational strategy (as defined in Section 8-123 of the Special Education Regulations)

for the coming year and at the close of the year an evaluation of that strategy;

(d) that the Department of Education shall exercise the power under Section 1926 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 19-1926 to supervise the programs of education and training in all institutions wholly or partly supported by the Department of Public Welfare, and the procedures to be adopted therefor.

40. The Attorney General agrees to issue an Opinion so construing Section 1375 and the Board to promulgate Regulations implementing said construction, which Opinion and Regulations shall also provide:

(a) that the Secretary of Education shall be responsible for assuring that every mentally retarded child is placed in a program of education and training appropriate to his learning capacities, and to that end, by Rules of Procedure requiring that reports of the annual census and evaluation, under Section 1371(2) of the School Code of 1949, as amended, 24 Purd. Stat. 13-1371(2), be made to him, he shall be informed as to the identity, condition, and educational status of every mentally retarded child within the various school districts.

(b) that should it appear that the provisions of the School Code relating to the proper education and training of mentally retarded children have not been complied with or the needs of the mentally retarded child are not being adequately served in any program administered by the Department of Public Welfare, the Department of Education shall provide

such education and training pursuant to Section 1372(5) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1372(5).

(c) that the same right to notice and an opportunity for a hearing as is set out in the Order of this Court of June 18, 1971, shall be accorded on any change in educational assignment among the programs of education and training administered by the Department of Public Welfare.

(d) that not less than every two years the assignment of any mentally retarded child to a program of education and training administered by the Department of Public Welfare shall be re-evaluated by the Department of Education and upon such re-evaluation, notice and an opportunity to be heard shall be accorded as set out in the Order of this Court, dated June 18, 1971.

40. Copies of the aforesaid Opinion and Regulations shall be filed with the Court and delivered to counsel for plaintiffs on or before October 25, 1971, and they shall be issued and promulgated respectively on or before October 27 1971.

IV.

41. Each of the named plaintiffs shall be immediately re-evaluated by defendants and, as soon as possible, but in no event later than October 13, 1971, shall be accorded access to a free public program of education and training appropriate to his learning capacities.

42. Every retarded person between the ages of six and twenty-one years as of the date of this Order and thereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972.

43. Wherever defendants provide a pre-school program of education and training for children less than six years of age, whether kindergarten

or howsoever called, every mentally retarded child of the same age as of the date of this Order and hereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972.

44. The parties explicitly reserve their right to hearing and argument on the question of the obligation of defendants to accord compensatory educational opportunity to members of the plaintiff class of whatever age who were denied access to a free public program of education and training without notice and without a due process hearing while they were aged six years to twenty-one years, for a period equal to the period of such wrongful denial.

45. To implement the aforementioned relief and to assure that it is extended to all members of the class entitled to it, Dr. Herbert Goldstein and Dennis E. Haggerty, Esquire are appointed Masters for the purpose of overseeing a process of identification, evaluation, notification, and compliance hereinafter described.

46. Notice of this Order and of the Order of June 18, 1971, in form to be agreed upon by counsel for the parties, shall be given by defendants to the parents and guardian of every mentally retarded person, and of every person thought by defendants to be mentally retarded, of the ages specified in Paragraphs 42 and 43 above, now resident in the Commonwealth of Pennsylvania, who while he was aged four years to twenty-one years was not accorded access to a free public program of education and training, whether as a result of exclusion, postponement, excusal, or in any other fashion, formal or informal.

47. Within thirty days of the date of this Order, defendants shall formulate and shall submit to the Masters for their approval a satisfactory plan to identify, locate, evaluate and give notice to all the persons described in the foregoing paragraph, and to identify all persons described in Paragraph 44, which plan shall include, but not be limited to, a search of the records of the local school districts, of the intermediate units,

of County MH/MR units, of the State Schools and Hospitals, including the waiting lists for admission thereto, and of interim care facilities, and, to the extent necessary, publication in newspapers and the use of radio and television in a manner calculated to reach the persons described in the foregoing paragraph. A copy of the proposed plan shall be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

48. Within ninety days of the date of this Order, defendants shall identify and locate all persons described in paragraph 46 above, give them notice and provide for their evaluation, and shall report to the Masters the names, circumstances, the educational histories and the educational diagnosis of all persons so identified.

49. By February 1, 1972, defendants shall formulate and submit to the Masters for their approval a plan, to be effectuated by September 1, 1972, to commence or recommence a free public program of education and training for all mentally retarded persons described in Paragraph 46 above and aged between four and twenty-one years as of the date of this Order, and for all mentally retarded persons of such ages hereafter. The plan shall specify the range of programs of education and training, there kind and number, necessary to provide an appropriate program of education and training to all mentally retarded children, where they shall be conducted, arrangements for their financing, and, if additional teachers are found to be necessary, the plan shall specify recruitment, hiring, and training arrangements. The plan shall specify such additional standards and procedures, including but not limited to those specified in Paragraph 39 above, as may be consistent with this Order and necessary to its effectuation. A copy of the proposed plan will be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

50. If by September 1, 1972, any local school district or intermediate unit is not providing a free public education to all mentally retarded persons 4 to 21 years of age within its responsibility, the

Secretary of Education, pursuant to Section 1372(5) of the Public School Code of 1949, 24 Purd. Stat. 1372(5) shall directly provide, maintain, administer, supervise, and operate programs for the education and training of these children.

51. The Masters shall hear any members of the plaintiff class who may be aggrieved in the implementation of this Order.

52. The Masters shall be compensated by defendants.

53. This Court shall retain jurisdiction of the matter until it has heard the final report of the Masters on or before October 15, 1972.

Thomas K. Gilhool
Thomas K. Gilhool
Attorney for Plaintiffs

J. Shane Creamer
J. Shane Creamer
Attorney General

Ed Weintraub
Ed Weintraub
Deputy Attorney General
Attorneys for Defendants

Acknowledged:

Dr. David H. Kurtzman
Dr. David H. Kurtzman
Secretary of Education

Dr. William F. Ohrtman
Dr. William F. Ohrtman
Director, Bureau of
Special Education

Mrs. Helene Wohlgemuth
Mrs. Helene Wohlgemuth
Secretary of Public Welfare

Edward R. Goldman
Edward R. Goldman
Commissioner of Mental
Retardation

APPENDIX A

NOTICE*

(* the bracketted portions below will appear in the Notice but not in the newspaper advertisement)

To: (1) All parents and guardians of mentally retarded persons resident in the Commonwealth of Pennsylvania

[(2) All school Districts and Intermediate Units in the Commonwealth of Pennsylvania]

(1) Notice is hereby given that a proposed Order approving a Consent

Agreement and issuing certain Injunctions in Pennsylvania Association

for Retarded Children, et al. v. Commonwealth of Pennsylvania, E.D.

Pa., C.A. No. 71-42, is on file with the Clerk of the United States

District Court [and available for inspection there and in the offices

of the Superintendent of each School District and Intermediate Unit in the Commonwealth of Pennsylvania and of each County Chapter of the Pennsylvania Association for Retarded Children.]

(2) That the above mentioned action, on behalf of all mentally retarded persons who have been denied access to a free, public program of education and training, was begun on January 7, 1971, raising certain procedural and substantive claims against the laws and practices of the Commonwealth of Pennsylvania, the Department of Education, the Department of Public Welfare, 12 named School Districts and Intermediate Units and the class of all School Districts and Intermediate Units in the Commonwealth, because of their failure to provide a free public education to all mentally retarded children.

(3) That the proposed Order would approve a Consent Agreement entered into by the named parties on October 7, 1971, providing that each mentally retarded child shall be accorded access to a program of

education and training, that notice and an opportunity for a hearing shall be accorded before any change in the educational assignment of mentally retarded children, that certain sections of the Public School Code shall be so construed, and that certain Regulations so providing shall be promulgated thereunder, and that a Special Master shall be appointed to oversee the identification by defendants of all mentally retarded children who have been denied an education and the formulation and implementation by defendants of a plan to provide a free, public program of education and training to all mentally retarded children as soon as possible and no later than September 1, 1972, and would also issue certain Injunctions consistent with the Consent Agreement.

(4) That the parents or guardian of any mentally retarded child [or any school district or intermediate unit] who may wish to make an objection to the Proposed Order approving the Consent Agreement may do so by entering an appearance and filing a statement of objections with the Clerk of the United States District Court for the Eastern District of Pennsylvania, 9th and Chestnut Streets, Philadelphia, on or before October 27, 1971. Hearing thereon shall be held before the Court at 10:00 o'clock A.M., October 22, 1971.