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

THE PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, NANCY BETH BOWMAN, et al. on behalf of themselves and all others similarly situated,	:	
Plaintiffs	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, ROBERT G. SCANLON, Secretary of Education of the Commonwealth of Pennsylvania, PHILADELPHIA SCHOOL DISTRICT, et al.,	:	CIVIL ACTION
Defendants	:	NO. 71-42
WALTER FIALKOWSKI AND DAVID FIALKOWSKI, members of plaintiff class, by their parents, MARION and LEONA FIALKOWSKI, ADVOCATES FOR DEVELOPMENTALLY DISABLED PEOPLE and POLICE AND FIRE ASSOCIATION FOR HANDICAPPED CHILDREN, plaintiffs	:	CLASS ACTION
Petitioners for Enforcement and Further Orders	:	

TRIAL BRIEF OF PETITIONERS

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TRIAL BRIEF OF PETITIONERS

Petitioners will prove at trial the allegations set forth in paragraphs 16 through 19, pages 10 through 13, which amount to a deprivation of rights of petitioners to an education granted by the decree herein, P.L. 94-142, and Section 504. The facts petitioners will prove and the applicable statutory and equitable law require the relief set forth by petitioners at paragraphs 21 through 58, on pages 13 through 31 (Petition).

The remedy sought here is pleasingly similar to relief granted in Campbell v. Talladega County Board of Education (C.A. No. 79-M-277) by Circuit Judge Robert Vance.

On May 5, 1972 this Court ordered the Commonwealth Department of Education, local schools districts and their respective officers, employees, agents and successors to provide to every mentally retarded person between the ages of sic and twenty-one years "access to a free public program of education and training appropriate to his learning capacities." Pennsylvania Association for Retarded Children, et al., v. Commonwealth of Pennsylvania, et al. [PARC], 343 F. Supp. 279, 302 (E.D. Pa., 1972).

Petitioners here, individual members and organizational representatives of the class benefitted and protected by the Court's orders in PARC, move the Court for further orders to enforce and implement respondents' continuing and undisputed obligation to provide not only access to public education, but also "appropriate" programs of education and training. Since entry of the PARC orders, these obligations have been supplemented by the requirements enacted by Congress in the education for All Handicapped Children Act of 1975, 20 U.S.C. §§1401 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. §794. As petitioners will demonstrate, respondents have not complied with the essential requirement of PARC decree, nor with the parallel provisions of the intervening federal statutes. Accordingly, the Court must exercise its equitable powers to put an end to respondents' continuing deviation from, and disregard of the substance of this Court's orders and to redress respondents' violations of federal law.

II. THE SOURCES AND NATURE OF RESPONDENTS' OBLIGATIONS.

Petitioners appear before the Court to establish, for each severely and profoundly retarded child, the conditions necessary to

fully realize the undisputed professional judgment that:

> "[A]ll mentally retarded persons are capable of benefitting 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;. . ."

343 F.Supp. 296, 307 (E.D.Pa. 1972). This judgment is the paramount consideration which animates the Court's 1972 Orders and is the source of respondents' obligations under the Orders. Respondents' obligations under the Education for All Handicapped Children Act of 1975 follow from the same judgment made by the Congress:

> "Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point."

Battle v. Commonwealth of Pennsylvania, 629 F.2d 269, 275 (3d Cir. 1980). Petitioners will show that although respondents profess to direct their efforts to filfillment of the paramount obligation of the orders and of federal law, they have in fact pursued a course of inaction and inattention. Today, nine years after PARC first imposed the obligation to address and meet petitioners' special needs, respondents have provided little more than access to educational facilities. For the vast majority of petitioners, the starting point for appropriate education has not even been reached.

Petitioners also appear before the court to secure respondents' compliance with another fundamental obligation of PARC orders--provision of appropriate education in the educational environment which maximizes association with their peers and thereby promotes the lessons of self-sufficiency and self-care:

> "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 the general educational policy 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."

343 F.Supp. at 307. The same obligation is imposed upon respondents by the federal statutes. See 20 U.S.C. § 1412(5)(B) and 1414(a)(5) and 45 C.F.R. §§121a.550 et seq.and 121a.132 (Education for All Handicapped Children Act); 29 U.S.C. §794 and 34 C.F.R. §104.34 and Appendix A, para. 25 (Rehabilitation Act). Petitioners will show that compliance with this obligation has been superficial at best. The vast majority of petitioners are relegated to segregated "centers." For those who attend programs in schools also attended by non-handicapped peers, even the most obvious opportunities for association and social learning are foregone and they remain segregated as a practical matter.

Petitioners appear before the Court to secure state respondents' ultimate and non-delegable responsibility to ensure compliance with the mandates of the PARC decrees and of federal law. That responsibility is clearly established by the Court's orders:

> 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. . . .
>
> * * * *
>
> 51. If by September 1, 1972, any local school district is not providing a free public education to all mentally retarded persons within its responsibility as provided hereinbefore in special classes or schoolsestablished and maintained by school districts or has not secured such proper

> education and training outside the public schools of the district or in public institutions. . . the Secretary of Education. . .shall directly provide, maintain, administer, supervise and operate programs for the education and training of children.

343 F.Supp. at 307, 315 (emphasis supplied). State respondents' obligation to ensure provision to petitioners of an appropriate education is also established under the Education for All Handicapped Children Act:

> The state educational agency shall be responsible for assuring that the requirements of this sub-chapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other state or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency and shall meet education standards of the state educational agency.

20 U.S.C. §1412(6) (emphasis supplied); see also 45 C.F.R. §121a.600; 121a.556. These federal pbligations arise from Congress' desire to prevent "an abdication of responsibility for the education of handicapped children," S. Rept. No. 168, 94th Cong., 1st Sess at 24 (1975). "Both a general Congressional perception of the state's primary responsibility to provide a publicly-supported education to all children and a specific intent to centralize this responsibility underlie this explicit statutory mandate." Kruelle v. New Castle County School District, Nos. 80-1875, 1876, 2063 and 2064, slip op. at 19 (3d Cir., April 1, 1981); see also, S-1 v. Turlington, 635 F.2d 342, 350 (5th Cir. 1981) (state education agency required by EHA to oversee local disciplinary matters). Petitioners will show that state respondents have indeed abdicated their responsibilities under PARC and EHA. State respondents are inattentive to the

inadequacies of the education afforded to persons such as petitionrs. Where attention has been given, it is perfunctory and little follow-up has been done.

Petitioners appear before the Court to secure the instructional skill,s approaches and materials necessary to accomplishment of an approrpiate education. Under PARC, respondents were obligated to ensure the "recruitment, hiring and training" of instructional personnel needed to carry out the mandates of the Orders. See 343 F.Supp. at 315 (para. 50). Likewise, under federal law state respondents are duty bound to implement a "comprehensive system of personnel development" which adopts "promising educational practices and materials." 20 U.S.C. §1413(a)(3); see also 45 C.F.R. §121a.380-387, 555. Philadelphia respondents share this obligation. See 20 U.S.C. §1414(a)(1)(C)(i). Petitioners will show that personnel training is a rarity. When it is provided, training is cursory, ineffectual and not reflective of current professional knowledge.

INSERVICE TRAINING

The Education for All Handicapped Children Act requires that states submit a plan which sets forth a

> Description of programs and procedures for (A) the development and implementation of comprehensive system of personnel development which sall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purpose of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects. 20 U.S.C. Section 1413(a)(3) (emphasis supplied).

The Congress fully understood that realization of the rights embodied in Public Law 94-142 would require that state and local educational agencies quickly remedy the unfamiliarity of their personnel with the needs of handicapped children who had so long been neglected. Senator Randolph, a sponsor of the bill which would become P. L. 94-142, observed that comprehensive and continuous personnel development would be essential:

> [The] bill addresses itself to this shortage of qualified personnel by providing that the States develop and implement a comprehensive system of personnel development which includes inservice training of general and special educational instructional and support personnel. Continuous training is vitally necessary, particularly if children are to be mainstreamed into the classroom. Teachers must receive training that not only provides technical assistance necessary to teach handicapped children, but also deals with the potential problem of "attitudinal barriers." 121 Cong. Rec. S10960 (June 18, 1975).

The Labor and Public Welfare Committee of the Senate viewed the continuous in-service training of teachers and support personnel as a responsibility to be borne by both state and local agencies:

> In order to reach the timetable of the bill and to satisfy priorities under the bill for serving handicapped children who are not receiving an education and for serving handicapped children with the most severe handicaps, the in-service training of personnel may be a necessary component of local educational agency programs.

S. Rept. 94-168 (June 2, 1975) at 34; 1975 U.S. Code Cong. & Adm. News 1458 (emphasis added). These requirements of P.L. 94-142 merely state the obvious--there can be no appropriate education without appropriate teaching.

Accordingly, Regulations promulgated by the Department of Health, Education and Welfare to implement P. L. 94-142, 45 C. F. R. Part 121a, require that the annual program plan for each state educational agency include provisions for an annual needs assessment of special education personnel; the state must initiate in-service development programs based on these assessed needs. See 45 C. F. R. Section 121a. 382 (b). In Pennsylvania, the needs and priorities for inservice training were determined at the state level with division chiefs looking to the Legislation to identify areas for training, rather than by conducting a systematic needs assessment. (Deposition of Gary Makuch, July 5, 1977, at 60) (Exhibit E1). Under the Pennsylvania Training Model for Preparation of Teachers of the Severely and Profoundly Retarded and Multi-handicapped, a needs assessment was done in 1975 and training areas were identified from a "random sampling of returned questionnaires" (p. 8). This procedure does not satisfy the requirement of 121a. 382 to conduct annual needs assessments and initiate inservice training based on this assessment.

The recent decision of the Supreme Court in Pennhurst State School and Hospital v. Halderman, ___ U.S. ___, 101 S. Ct. 1531 (1981), does not in any way diminish respondents' obligations to petitioners. In Pennhurst, the Court addressed only one provision of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §6010, and concluded that "Congress did not intend to place either absolute or conditional obligations on the States" through that provision, 101 S.Ct. at 1544. That conclusion has no bearing on the force of obligations negotiated and agreed to by respondents in 1972 in the PARC Orders. Nor does the Pennhurst decision call into question respondents' obligations under the

Education for All Handicapped Children Act of 1975, which established a statutory and regulatory framework of detailed and specific mandates under which respondents have received millions of dollars of federal funds to aid in their compliance with those mandates. What respondents will undoubtedly characterize as "lack of specificity" in the PARC orders and P.L. 94-142 is not lack of specificity at all. Rather, their obligations are as specific as can be accomplished given the fundamental recognition that "individual attention to the needs of each handicapped child," Battle v. Commonwealth, 629 F.2d at 280, is the central requirement of "appropriate education."

III. THE ELEMENTS OF RELIEF REQUESTED BY PETITIONERS ARE WITHIN THE COURT'S EQUITABLE POWERS AND ARE PROPER REMEDIES FOR THE VIOLATIONS SHOWN.

Federal courts, when presented with similar claims of systemic violations of the educational rights of handicapped students, have not hesitated to enter orders akin to those sought here or to adopt substantive provisions negotiated by the parties. The relief sought by petitioners is novel only in its scope and reach; as to each particular element of relief, federal courts have addressed these areas in other cases.

On the issue of the substantive content and appropriateness of educational programs, a court may determine that a curriculum is inappropriate in its substance:

> After carefully weighing the testimony, this court finds that [plaintiff's] program fails in design and execution to further his progress in attaining such self-sufficiency as he may be capable of. As the program stands at present it does little more than to occupy his time with activities devoid of educational justification. While the

> program may not be, as plaintiff's witness suggested, an actual impediment to progress, it is ill-suited to impart to Joseph any functional or communicative skills which might, to whatever degree, increase his independence. The court finds that Joseph's program thus fails to meet even a minimally stringent standard of appropriateness.

Campbell v. Talladage County Board of Education, C.A. No. 79-M-277, unpublished Opinion of March 31, 1981 at 10-11 (N.D. Ala. (Vance, Circuit Judge, sitting by designation). The court ordered state and local defendants to provide instruction which "focusse[d] upon the acquisition of [age appropriate] functional skills" in the areas of daily living activities, vocational activities, voca-ti-nal activities, and social and community adjustment. Id. at 12-13. The Court also found that the plaintiff had "virtually no contact with non-handicapped students outside of his lunch period and even then such contacts are few" and was "not placed into contact with non-handicapped students to the maximum extent appropriate;' and concluded that this was a violaltion of federal law. Slip op. at 11-12. Consequently, the court ordered defendants to "provide. . .significantly increased contact with non-handicapped students" by either moving the plaintiffs' class into a main school building or by educating non-handicapped students in the special center. Id at 13. To assure that substantive changes in educational programs were indeed accomplished, the court ordered that the plaintiff's teacher and a special education administrator "be trained in the techniques essential to an appropriate program." Id. at 13.

Federal courts have likewise ordered or approved other remedies sought by petitioners. In Mattie T. v. Holladay, 3 E.L.H.R. 551: 109 (N.D. Miss. 1979), the court approved a consent decree that

encompassed the issues of state monitoring of least restrictive environment/integration (paras. 12-14), state monitoring of overall special education programs of local districts (paras. 21-22), establishment of procedures for registering and resolving complaints of "systemic" violations of educational rights (para. 23) and the provision and coordination of staff training (para. 15). In Jose T. v. Ambach, 3 E.H.L.R. 551:412 (E.D.N.Y. 1979((Nickerson, J.), the court entered systemic orders encompassing such areas as training of staff, adoption of methodologies, levels of staffing (including therapists), recruitment and hiring of staff, provision of related services and integration with non-handicapped peers. To oversee compliance with the orders the Court made use of a special master.

In Frederick L. v. Thomas, 3 E.H.L.R. 551:569 (E.D.Pa. 1980) the parties entered a stipulation in partial settlement of motion for conempt. Its provisions imposed upon the Philadelphia School District obligations in areas such as staff training, adoption of methodologies, use of educational consultants, assessment of personnel needs, recruitment and hiring of staff andprivision of appropriate programs of vocational education. In Doe v. Grile, 3 E.H.L.R. 551:285 (N.R. Ind. 1979), a suit brought on behalf of severely and profoundly retarded children, an agreement for dismissal reached by the parties included similar provisions. In addition, the agreement requred the local school district to appoint a "ccordinator for programs for severely and profoundly retarded children" who was to be"responsible for the planning, content and execution of programming. Id. at 286.

VOCATIONAL EDUCATION

The free, appropriate public education required by Public Law 94-142 also encompasses access to, and participation in vocational education programs conducted by the School District. See 45 C. F. R. Section 121a. 305, 121a. 14. Indeed, the Congress, in enacting the mechanism for expanded funding of vocational education in the states in 1976, P. L. 94-482, placed special emphasis upon use of those funds to provide vocational education to the handicapped. See, e. g., 20 U. S. C. Section 1310.

The Congress fully intended that both state and local recipients of vocational education funds monitor and conduct these activities so as to comply with the clear mandates of Public Law 94-142. The Labor and Public Welfare Committee of the Senate reiterated that vocational training was an element of an appropriate education for the handicapped and urged state and local educators to modify existing programs to meet the needs of the handicapped:

> Public Law 94-142, the Education for All Handicapped Children Act, requires all handicapped children within a state to receive a free appropriate public education, and requires that procedures be established to assure that such children are educated with children who are not handicapped, and that removal from the regular educational environment occur only when the nature or severity of the handicap is such that education in regular class cannot be achieved satisfactorily. It further provides that individualized education programs be established for each student and that other procedural protections shall be available to protect the student's right to education. These provisions and other protections contained in Public Law 94-142 apply to handicapped students enrolled under the national priority program for handicapped students under the Vocational Education Act and <u>all vocational education funds under</u>

this act are intended to be used consistent with the State's plan under Public Law 94-142 to provide a free appropriate public education to all handicapped children.

The Committee intends the comprehensive long-range plan and the annual plan under these amendments to describe in detail how vocational education programs will be provided within the state consistent with Public Law 94-142, and expects both the State Board of vocational education and the U.S. Commissioner to assure that this is accomplished. The Committee urges State and Local vocational educators to begin immediately to use these vocational education funds to modify existing vocational programs to meet the needs of handicapped students in accordance with the State plan submitted under Public Law 94-142. S. Rept. 882, 94th Congress, 2d. Sess. at 77 (1976); 1976 U.S. Code Cong. and Adm. News 4789 (emphasis supplied).

Commonwealth and District defendants are also required by Section 504 of the Rehabilitation Act of 1973 to provide plaintiffs equal access and equal opportunity in programs of vocational education. Responding to widespread instances of discrimination by recipients of federal funds for vocational education, the Department of Health, Education and Welfare recently promulgated guidelines to assist recipients in complying with the provisions of non-discrimination statutes, among them Section 504. See 44 Fed. Reg. 17162 (March 21, 1979). One of the factual bases for the guidelines was the finding by the Office for Civil Rights that:

> Handicapped students are impermissibly assigned to separate annexes or branches; they are also denied equal vocational education opportunities as a result of...inadequate evaluation procedures. 44 Fed. Reg. 17163 (March 21, 1979).

Most pertinent to the determination of defendants' obligations to plaintiffs and the proper remedy for breach of those duties are two provisions of the Guidelines. Retarded students may not be denied access to vocational education programs because of the need for related aides and services; school districts must modify instructional equipment and modify or adapt the manner in which programs are offered. See 45 C. F. R. Part 80 Appendix B, Paragraph IV-N; 44 Fed. Reg. 17166. If a separate class of facility is identifiable as being for retarded persons, the facility, the programs and the services must be comparable to facilities, programs and services offered to non-retarded students. See 45 C. F. R. Part 80 Appendix B, Paragraph VI-A; 44 Fed. Reg. 17167

CERTIFICATE OF SERVICE

I, Judith Gran, do hereby certify that on June 8, 1981, the foregoing Trial Brief for Petitioners was served by first class mail postage prepaid or by hand delivery on the following:

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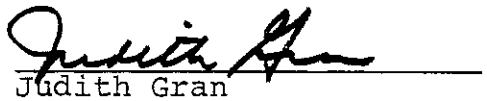

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