IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 92-5462

RAFAEL OBERTI, by his parents and next friends,
Carlos and Jeanne Oberti, et al.,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE BOROUGH
OF CLEMENTON SCHOOL DISTRICT, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey
No. 91-2818

BRIEF OF PLAINTIFFS-APPELLEES, RAFAEL OBERTI, BY HIS PARENTS AND NEXT FRIENDS, CARLOS AND JEANNE OBERTI, ET AL.

Frank J. Laski
Penelope A. Boyd
PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA
125 S. 9th Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

Counsel for Appellees

Date: November 13, 1992

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

COUNTER STATEMENT OF ISSUES 1

COUNTER STATEMENT OF THE STANDARD OF REVIEW 2

COUNTER STATEMENT OF THE CASE 3

COUNTER STATEMENT OF THE FACTS 7

COUNTER STATEMENT OF RELATED CASES AND PROCEEDINGS . . . 12

SUMMARY OF ARGUMENT 12

ARGUMENT 14

A. The District Court Opinion and Order Correctly Applied The Individuals with Disabilities Education Act to Protect Rafael Oberti's Entitlement to a Free, Appropriate Education in His Local School. 13

1. The District Court Order is Fully Consistent with the Purposes of The Individuals with Disabilities Education Act 14

2. The IDEA Manifests the Congressional Preference for Education in a Regular Classes Together With Children Who Are Not Handicapped. 15

3. The District Court Properly Determined that the School District Had Not Complied with the Statutory Presumption for Inclusive Education. 20

4. The District Court Properly Imposed the Burden to Justify the Proposed Placement on the School District 24

Page

B. The School District's Opposition to Including Rafael at all in Regular Class at His Local School is Based not On Bona Fide Differences Concerning Rafael's Individual Needs or Reasonableness of Providing Supplementary Aids and Services But is Based in a Fundamental Disagreement with the Congressional Preference for Inclusive Education. 27

C. The District Court Correctly Ruled that the School District has a Duty Under § 504 of the Rehabilitation Act to Afford Rafael Oberti the Benefits of an Inclusive Education in His Local School. 30

1. The Legislative History of § 504 Shows that Congress Intended to End Unnecessary Segregation of Children 32

2. The Administrative Construction of the Secretary of Education Requires That Federally Assisted Education For Disabled Students Be Provided in Inclusive Settings Whenever Feasible 34

3. The Caselaw Construing § 504 Requires that School District's Provide Education to Disabled Children in Inclusive Settings Where Feasible 35

4. The Facts Established at Trial Demonstrate that Clementon School District's Unnecessary Segregation of Rafael Constitute Discrimination on the Basis of Disability 37

5. Under § 504 the School District's Burden of Proof Requires that It Demonstrate that Accommodating Rafael at Clementon would Impose an Undue Burden or Change the Essential Nature of Its Program 39

6. The Facts Establishing Clementon School District's Liability Under § 504 41

CONCLUSION 49

CERTIFICATION OF BAR MEMBERSHIP 49

Appendix A: Winners All: A Call for Inclusive Schools

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Choate, 469 U.S. 287 (1985) 36, 45

Allen v. Wright, 468 U.S. 737 (1984) 36

American Home Products v. Barr Laboratories, 834 F.2d 368 (3rd Cir. 1987) . 2, 3

Bd. of Education v. Holland, 786 F.Supp. 874 (E.D. Cal. 1992) 23, 26, 28

Board of Education of East Windsor Regional School v. Diamond, 808 F.2d 987 (3rd Cir. 1986) 15

Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) 15

Bob Jones University v. United States, 461 U.S. 574 (1983) 36

Brown v. Board of Education, 347 U.S. 483 (1954) 35, 36

Camenisch v. State of Texas, 616 F.2d 127 (5th Cir. 1980), vacated as moot, 451 U.S. 390 (1981) (interpreter services) 45

Cooper v. Tard, 855 F.2d 125 (3d Cir. 1988) 2

Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989) . . passim

David H. v. Spring Branch Independent School District, 569 F.Supp. 1324 (S.D. Tex. 1983) 45

Davis v. Bd. of Education, 530 F.Supp. 1209 (D.D.C. 1982) 25, 26

Garrity v. Gallen, 522 F.Supp. 171 (D. N.H. 1981) 37

Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575 (3rd Cir. 1985) 15, 18, 25

Georgia Association for Retarded Citizens v. McDaniel, 855 F.2d 805 (11th Cir. 1988) 31

Greer by Greer v. Rome City School District, 950 F.2d 688 (11th Cir. 1991) . . . . . passim

Grymes v. Madden, 672 F.2d 321 (3rd Cir. 1982) 25

Hairston v. Drosick, 423 F.Supp. 180 (S.D. W.Va. 1976) 37, 47

Honig v. Doe, 484 U.S. 305 (1988) 15, 16, 18

Lascari v. Board of Education, 116 N.J. 30, 560 A.2d 1180 (1989) 4, 25, 26

Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977) 47

Martinez v. School Board of Hillsborough County, Florida, 861 F.2d 1502 (11th Cir. 1988) 31

McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985) 24

Milliken v. Bradley, 433 U.S. 267 (1977) 36

New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (1982) 2, 31, 37

New York State Association for Retarded Children v. Carey, 612 F.2d 644 (2d Cir. 1979) 32, 37, 40

Pennsylvania Association for Retarded Citizens v. Commonwealth of Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1971) 1

Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3rd Cir. 1988) 2

Protos v. Volkswagen of America, Inc., 797 F.2d 129 (3rd Cir. 1986) 2, 3

Roncker v. Walter, 700 F.2d 1058 (6th Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 196 (1983) 1, 21, 25, 29

S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981) 26

School Board v. Arline, 107 S.Ct. 1123 (1987) 36, 37

Southeastern Community College v. Davis, 442 U.S. 397 (1979) 45

Strathie v. Department of Transportation, 716 F.2d 227 (3rd Cir. 1983) . 30, 38, 39

Tatro v. State of Texas, 625 F.2d 557 (5th Cir. 1980) 31, 45

Timothy W. v. Rochester N.H. School District, 875 F.2d 954 (1st Cir. 1989) . . 29

Tokarcik v. Forest Hills School District, 665 F.2d 443 (1981) 12

Town of Burlington v. Department of Education, 736 F.2d 773 (1st Cir. 1984), aff'd 451 U.S. 359 (1985) 16, 25

Wexler v. Westfield Board of Education, 784 F.2d 176 (3rd Cir. 1986), cert. denied, 479 U.S. 825 (1986) 2

Statutes

20 U.S.C. § 1414(a)(1)(c)(i); 1413(a)(3) 29

20 U.S.C. § 1415(e) 5

20 U.S.C. § 1412(5)(b) 16

Americans with Disabilities Act, 42 U.S.C. § 12101 34

Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et. seq. . 14

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 . . . . . 5, 31

Regulations

34 C.F.R. part 104 34

34 C.F.R. § 104.33(b) 44

34 C.F.R. § 104.34 . . . . . 35, 44

34 C.F.R. § 300.344(a) 18

34 C.F.R. §300.550 16

34 C.F.R. §300.551 17

34 C.F.R. §300.552 . . . . . 17, 19

34 C.F.R. §§ 300.343(a) 18

34 C.F.R. § 104.4(b)(1)(iv) 35

42 Fed. Reg. 22,767 (1977) 35

45 C.F.R. part 84 34

N.J.A.C. 2.2 (b) (1978) 26

N.J.A.C. 6:28-1.3, 3.6(e)(5), 4.1(i)(2) (1984) 26

N.J.A.C. 6:28-2.10 (1989) 18, 26

N.J.A.C. §6:28-1 et. seq. 18

Legislative Material

117 Cong. Rec. 45,974 (1971) 32

117 Cong. Rec. 45,974-75 (1981) 32

118 Cong. Rec. 32,310 (1972) 32

118 Cong. Rec. 525 (1972) 32

118 Cong. Rec. 9495 (1972) 32

118 Cong. Rec. 9495-9501 (1972) 32

H.R. REP. 485(III) (101st Cong. 2d. Sess. May 15, 1990) 49-52 33

S.Rep. No. 168, 94th Cong., 1st Sess. 8 (1975), reprinted in 1975 U.S.Code Cong.& Admin.News. 1425 14

Other

Federal Rules of Civil Procedure 52(a) 3

1973 Congressional Quarterly Almanac 557, et seq. 32

Winners All: A Call for Inclusive Schools, a Report to the National Association of State Boards of Education 16

STATEMENT OF JURISDICTION

Appellees agree with the statement of jurisdiction of Appellant School District. (App. Br. at 1).

COUNTER STATEMENT OF ISSUES

Appellees differ with the formulation of issues offered by the School District. The issues before this Court are:

1. Whether the district court correctly concluded that Rafael Oberti can be included at all in regular education classes with the provision of supplementary aids and service.
2. Whether the School District met its burden under both IDEA and § 504 to justify its refusal to provide supplementary aids and services and to justify its placement decision requiring the exclusion of Rafael Oberti from Clementon Elementary School.
3. Whether the district court was clearly erroneous on any finding of fact necessary to his legal conclusions that the School District violated both IDEA and § 504.
4. Whether the Court will adopt in toto the legal standard of the district court set forth to enforce the IDEA statutory preference for inclusion or craft its own standard for this Circuit, drawing from the teachings of Roncker v. Walter, 700 F.2d 1058 (6th Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 196 (1983); Daniel R. R. v. State Board of Education, 874 F.2d 1036, 1050 (5th Cir. 1989); Greer by Greer v. Rome City School District, 950 F.2d 688 (11th Cir. 1991); and Pennsylvania Association for Retarded

Citizens v. Commonwealth of Pennsylvania, 334 F.Supp. 1257, 1260 (E.D. Pa. 1971).

COUNTER STATEMENT OF THE STANDARD OF REVIEW

Appellant Clementon School District (hereafter "School District") suggest to this Court an improper standard of review.[1] Whether the exclusion of Rafael Oberti from any education with non-handicapped children at Clementon and his placement in a completely segregated class outside of the School District violates the IDEA or §504 of the Rehabilitation Act are questions of law subject to plenary review. Polk v. Central Susquehanna Intermediate Unit, 853 F.2d 171 (3rd Cir. 1988) (IDEA). See also, Wexler v. Westfield Board of Education, 784 F.2d 176, 181 (3rd Cir. 1986), cert. denied, 479 U.S. 825 (1986); New Mexico Ass'n for Retarded Citizens v. State of New Mexico, 678 F.2d 847 (1982) (§ 504).

The district court's extensive findings of fact, based on its assessment of the witnesses credibility and its familiarity with the videotape and documentary evidence, can be reversed only if they are clearly erroneous. American Home Products v. Barr Laboratories, 834 F.2d 368, 370 (3rd Cir. 1987); Protos v. Volkswagen of America, Inc., 797 F.2d 129, 135 (3rd Cir. 1986). A finding of fact may not be reversed on appeal unless "it is completely devoid of a credible evidentiary basis or bears no rational

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[1]Appellant relies on Cooper v. Tard, 855 F.2d 125 (3d Cir. 1988), a constitutional challenge to state prison regulations, where the essential facts were not in dispute. 855 F.2d at 126. Contrary to Appellant, that "the facts of this case were not in dispute" (App. Br. at 23), the central facts were in dispute and contested at trial. As Judge Gerry advised in his opinion denying summary judgment motions of both parties, "We have been presented with conflicting expert reports ... [I]t does appear to us that genuine questions of material fact have been raised about the feasibility of including Rafael in a regular classroom now. Moreover, this is a particularly fact-sensitive issue and one that requires expert evidence." (68-A).

relationship to the supporting data." American Home Products, supra, citing Krasnov v. Dinam, 465 F.2d 1298, 1302 (3rd Cir. 1972). Therefore, if this Court determines that the district court articulated the correct legal standard under IDEA and § 504, its review of the lower court findings is subject to the standards described by Rule 52(a) of the Federal Rules of Civil Procedure. See, Protos v. Volkswagen of America, supra, 797 F.2d at 135, n. 3.[2]

COUNTER STATEMENT OF THE CASE

Rafael Oberti, now eight years old, is a student with a disability (Downs Syndrome) who lives within the Clementon School District. His local school, where his brother and sister go, is the Clementon Elementary School. The District, however, has proposed to place him in self-contained classes located outside the district. In these classes, Rafael would be completely segregated from children without disabilities for the entire school day.

Rafael was enrolled in a developmental kindergarten class at the Clementon Elementary School for the 1989-1990 school year. The following year the District proposed to place him in a segregated, self-contained classroom in the Cherry Hill School District and the parents initiated due process procedures under the New Jersey Administrative Code. N.J.A.C. 6:28-2.7. Following a mediation process under the New Jersey regulations, an agreement was reached by the parties that Rafael would

[2]This includes the findings of fact Appellant urges this Court to reopen and redetermine, based on its own independent judgment (App. Br. at 23), i.e., the district court's findings that it is unnecessary to segregate Rafael for his education (82-A, 84-85-A), that such segregation may be harmful (86-87A) and that professionally-recognized methods and techniques by which educational experiences in regular classrooms can be modified so students like Rafael can benefit from participating in them, without interfering with the education of non-disabled students (85-A).

attend a class in Winslow Township School #1 subject to certain conditions. (N.J.A.C. 6:28-2.6; 427-A). After a few months, the parents felt Clementon School District had failed to implement the mediation agreement and they renewed the due process complaint. N.J.A.C. 6:28-2.7.

At issue in the administrative proceeding was the question of whether Rafael Oberti should return to Clementon Elementary School for his education or whether the district should be permitted to continue to segregate him in a self-contained classroom outside of the district. Three days of hearings ensued (465-A). The Obertis presented testimony from Dr. Gail McGregor, an expert from Temple University who had reviewed the educational records of Rafael and observed the school programs at both Clementon and Winslow Township (117-A), Thomas Nolan, an expert special education teacher from Haddon Heights who had experience modifying a regular class experience for a child with Down Syndrome similar to Rafael (161-A), Mr. and Mrs. Oberti (172-A, 182-A), and Michelle Zbrozek, a Clementon parent who knew Rafael well (203-A). The School District presented eight witnesses, all of whom were responsible for developing Rafael's Individualized Education Plan and providing him with an appropriate education (205-A, et seq.). On March 8, 1991, relying on the New Jersey Supreme Court opinion in Lascari v. Board of Education, 116 N.J. 30, 560 A.2d 1180 (1989), the Administrative Law Judge issued an opinion finding in favor of the School District (464-A).[3]

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[3]Although the Administrative Law Judge agreed with the School District's segregated placement, he added,

> This is not to say that the time may not come when mainstreaming in Winslow and/or Clementon will not be called for. The present record discloses only that now is not such a time. .... By way of caution ... the subject of

On June 26, 1991, Rafael's parents filed a civil action in district court seeking an independent review of the administrative order pursuant to 20 U.S.C. § 1415(e) and bringing discrimination claims against the School District pursuant to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 729. Pursuant to the court's scheduling order, both parties filed motions for summary judgment. On April 24, 1992, the court denied both motions for summary judgment and set the disputed IDEA and § 504 issues for trial as follows:

> [G]enuine questions of material fact have been raised about the feasibility of including Rafael in a regular classroom setting now. ... obviously the experts disagree as to whether Rafael can be included in a regular classroom and as to what types of supplementary aids and services might be employed to facilitate such a placement. Thus, the School District has failed to establish that there is no disputed question of material fact with respect to whether the current IEP is appropriate, and the Obertis have failed to establish that there is no disputed question of material fact with respect to whether it is feasible to offer Rafael an inclusive placement in his local school. A plenary hearing will therefore be required in order for the court to make these determinations.

(32-A) (footnote omitted).

The trial consisted of three days of testimony. At trial, plaintiffs presented: 1) three experts in the education of children with disabilities. They were Dr. Lou Brown, Professor, University of Wisconsin (487-A, 864-A); Dr. Gail McGregor, Professor, Temple University (625-A, 917-A); and Amy Goldman, M.S., an expert in communications (625-A); 2) videotape evidence showing Rafael Oberti, at age 7 (January 1992), learning and demonstrating communications skills, being taught reading

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> placement cannot be considered closed permanently with this decision.

(481-A).

and identification skills, and participating with non-handicapped students in Sunday School Class at the Laurel Heights Bible Church (Exhibits P-1 through P-6); 3) some 55 visual photographic slides depicting students with serious disabilities who have been accommodated in regular education classes with non-disabled students and were learning functional, academic and vocational skills in an inclusive education setting (Exhibit P-8);[4] and 4) the testimony of Jeanne Oberti (668-A) and Mrs. Joanne McKeon (861-A).

The School District's additional evidence consisted of testimony from 1) its education expert, Dr. Stanley Urban (750-A); 2) Karen Albanese, director of the School District's summer enrichment program (699-A); 3) Phyllis Diane Barricelli, an assistant to Ms. Albanese (744-A); 4) Patricia Caponi, a teacher at St. Luke's Elementary School (679-A); and 5) Peggy McDevitt, coordinator of special education for the Clementon Elementary School (826-A).

The District Court entered its Order of August 17, 1992, with Findings of Fact and Conclusions of law. The Court found that, if provided with supplemental aids and services, Rafael could be educated appropriately at the Clementon Elementary School and ordered the School District "to develop an inclusive education plan for Rafael Oberti for the 1992-93 school year consistent with the requirements of the Individuals With Disabilities Education Act, 20 U.S.C. §§ 1400-85, and section 504 of the Rehabilitation Act, 29 U.S.C. § 729." (113-A). This appeal ensued.

[4]The videotape exhibits and the photographic slides have not been included in the Joint Appendix. They are in the possession of the District Court Clerk filed as Exhibits 1-6 and P-8.

COUNTER STATEMENT OF THE FACTS

The District Court, in reviewing the administrative record as well as the supplemental evidence offered at trial found the facts to be as follows:

Rafael Oberti, now eight (8) years old, is a child with Downs Syndrome. His intellectual functioning and ability to communicate are severely impaired, placing him within the lowest percentile of the population. 76-A. He is eligible to receive special education services and resides in the Clementon School District. Id.

Rafael currently receives educational services at home. (84-A). He also participates successfully in "various social, recreational, and church activities, including a T-ball league and a bowling league." Id. His parents believe he is entitled to be educated in a regular classroom in his local school, and to be provided with supplemental aids and services to enable him to do so. The School District asserts that he requires a self-contained, segregated special education classroom, where Rafael would be educated entirely with other children with disabilities. (75-A).

Rafael first entered the Clementon School District when his parents sought to enroll him for kindergarten with his age group. The District Court found that, when the Obertis sought to investigate enrolling Rafael in "regular" kindergarten, the district's Child Study Team initially proposed a number of segregated, self-contained special education programs outside of the School District for that year.[5] (77-A). The Obertis visited the proposed classes and found them unacceptable.[6] Id.

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[5](309-310-A). Ad.Tr. 28 (2/4/91, J.Oberti).

[6]By the time the process was complete, all the out-of-district classes that had been proposed (other than private schools) were no longer options, as they had reached their enrollment capacity. Ad.Tr. 28-29 (2/4/91, J.Oberti).

It was then agreed that Rafael would be enrolled in the Clementon Elementary School developmental kindergarten program for a half day, and that he would attend a class for handicapped preschoolers in the Pine Hill School District for the balance of the day.[7] Id. The District Court found (and the record supports) that the district was reluctant to make this placement but that it acceded to the parents' wishes, and viewed it as a trial placement.[8] Id.

The IEP developed for that year assigned all IEP goals and objectives to the special education class. The district court found that "[t]he experience in the developmental kindergarten was provided in order to give Rafael the opportunity to observe, model, and socialize with children without disabilities, although the teacher did make some efforts to modify the curriculum for him." (78-A). The IEP contained no behavior management plan, no plan for toilet training, no plan to foster communication between the kindergarten teacher and the special education teacher, and no structured special education consultations during the school year.[9] Id.

Despite this lack of planning, the district court found that Rafael made academic, social, emotional and language development progress during that year.[10] (79-A). It

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[7]Ad.Tr. 29 (2/4/91, J. Oberti).

[8] 308-309-A. See also, 307-310-A.

[9]See 956-A.

[10](432-439A). Rafael's Progress Reports in the developmental kindergarten prepared by his teacher show a steady trend of social and emotional improvement during his year in that program, and offer no indication of difficulties at the level that the district now asserts preclude his placement in a regular class. (436-A). For instance, the progress report shows that his "consideration for others" increased and his positive attitude for work and active participation in class showed improvement. At the end of the second marking period, she noted that "Rafael is beginning to communicate verbally. Even though progress is slow, he is showing some mastery in each skill area." Id.

also found that Rafael exhibited inappropriate behaviors during the year, which at times required the teacher to seek assistance outside the classroom. Id. At times, the District Court found, that he acted aggressively toward other children, but there was insufficient evidence to demonstrate that he was a danger to others. Id. But, the district court found, there was no evidence offered by the district to support its assertion that the education of the other children in the class was significantly impaired as a result.[11] (79-A). During the course of the school year, the district made informal, unstructured, ad hoc efforts to manage Rafael's behavior and to remedy his toilet training problems, but these were insufficient to contain the problems. Id.

The District Court found that the district's proposal to place Rafael in an out of district, segregated special education class for the 1990-1991 school year was primarily based upon his experience in the developmental kindergarten the previous year and that its consideration of less restrictive alternatives was "perfunctory".[12] (80-A). The district had reached the conclusion that, regardless of the behavior incidents, Rafael's level of intellectual functioning required that he be educated in a self-contained classroom rather than a regular classroom setting and that inclusion in "regular" classrooms was appropriate only where there is not a significant discrepancy in cognitive abilities. Id. No such class existed in the Clementon School District. Id.

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[11]In fact, one parent testified that she viewed her son being in the same classroom with Rafael as a positive experience for him. See, 203-A.

[12]See, e.g., 184-185A; 315-316-A. There is no evidence in the record, prior to the mediation, that reflects what less restrictive alternatives were considered, if any, by the Child Study Team prior to its recommendation of the self-contained classroom. Nothing was discussed with the parents. (177-A). Once that recommendation was made, the evidence shows only that the team then rejected the alternatives proposed by the parents. (430-A).

Rafael's parents objected, requesting that he continue at the Clementon Elementary School and initiating a due process hearing to secure that relief. (81-A). In the mediation that followed, it was agreed that Rafael would enter a newly developed class for children classified as "multiply handicapped" in the Winslow Township School District.[13] (81-A). The district promised to consider mainstreaming possibilities at Winslow as well to explore a more inclusive future placement in Clementon.[14] (81-A).

The District Court found that, while at Winslow, Rafael had no meaningful opportunities to interact with the nondisabled children at the school[15], and that, for the most part he was kept within the segregated class.[16] (81-82-A). The Court further

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[13]At the time of the mediation, the class was not yet in session, and therefore the Obertis were not able to observe it prior to the agreement and they relied on the representations of the school district. (185-189-A).

[14]The mediation agreement read as follows:

1. R.O. will receive 2 sessions of P.T. per week
2. Specials will be the first area of integration
3. R.O.'s progress in six weeks to determine possibilities for additional mainstreaming
4. Rafael will be reminded of toileting needs -- a verbal reminder -- no more than at 1 1/2 hour intervals.
5. Clementon staff will work with Jointure Commission and parents so assure that bus route and time of rip are reasonable, i.e. 30 to 45 minutes
6. Clementon staff will explore, on an on-going basis, appropriate programs for R.O. for the 1991-1992 school year. Parents continue to be committed to R.O. being educated within the Clementon Elementary School

(428-A). The Obertis were assured that their son would be integrated with other, nonhandicapped, children at the Winslow school and that he would be returned to Clementon as quickly as possible. (178-179A). It was on this basis they agreed to the Winslow program. (186-187A).

[15]147-A, 180-A, 189-190A.

[16]For example, Rafael's class went to the lunchroom and assemblies with the nonhandicapped students, but the children were not permitted to socialize with them. (189-190-A). He did not have art, music, physical education or other non-academic programs with non-handicapped children. (180-A).

found that the program offered a "multisensory" educational approach and integrated Rafael's speech, physical and occupational therapy into his classroom experience. (82-A). Supplementary aids and services necessary to manage Rafael's behavior were provided and demonstrated that, if available, his behavior is not a problem. (85-A). The district court found that a similar approach could be implemented in a regular classroom setting. (82-A).

The district court found that there were accepted educational techniques and strategies available and that they could be provided to Rafael in a regular classroom setting without disruption of the other students.[17] (85-86-A). The Court also found that technical assistance and support in such endeavors were available to School Districts. (86-A).

The Court found that supplemental aids and services may include use of educational strategies which include such techniques such as parallel instruction,[18] and that "[t]he School District has remained closed-minded regarding the possibility of implementing a variety of other available inclusive techniques, and has overstated the degree of parallel instruction that must occur in order to provide Rafael with an

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[17]The feasibility of providing education to Rafael in the matrix of regular education was demonstrated by plaintiffs' evidence showing educational strategies in use in regular classrooms that modify the educational experience for the child with disabilities without disrupting or interfering with the education of the other students. Strategies shown include peer tutoring and non-disabled student helpers. (Ex. P-8 at slides 11, 14, 18); cooperative learning groups, (Ex. P-8 at slide 25, 560-561-A); integrated speech and language therapy, (Ex. P-8 at slide 13, 629-A); consulting teachers in the regular class, (Ex. P-8 at slide 23, 24); modification of curriculum (Ex. P-8 at slide 15, 26; 561-A); and parallel instruction. (Ex. P-8 at slide 22, 557-A). Specific strategies that might have been considered for Rafael included peer tutoring, cooperative learning, small group teaching, supplemental materials that might be used by the parents at home, and multisensory reinforcement opportunities. (128-129A).

[18]516-522A.

inclusive placement." (86-A). The district court's findings also address the harm of unnecessary segregation of children with disabilities, where they are isolated from family and friends and surrounded by inappropriate role models. (86-A). The harm is not offset by benefits later in life, as success in special education classes is not likely to lead to successful functioning in integrated educational settings or in the community. (87-A).

On the other hand, the court described the tangible benefits of integrated education, as it provides children with disabilities with the opportunity to learn to function in society, and nondisabled children with the opportunity to learn to function in a society that includes its members with disabilities. Id.

Having made those factual determinations, the court went on to its conclusions of law and entered an order in favor of Rafael.

COUNTER STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellees are unaware of any related proceedings currently pending before the Court.

SUMMARY OF ARGUMENT

Judge Arlin M. Adams, writing for this Court a decade ago, gave early recognition to the integration imperative Congress set forth both in IDEA (Then The Education for All Handicapped Children Act) and the Rehabilitation Act. He stated:

> [G]iven the advantages of placement in as normal an environment as possible, to deny a handicapped child access to a regular public school classroom without compelling educational justification constitutes discrimination and a denial of statutory benefits.

Tokarcik v. Forest Hills School District, 665 F.2d 443 (1981) (citation omitted).

On a full record, Chief Judge John F. Gerry concluded that Appellant School District so discriminated against Rafael Oberti and denied him the benefits of inclusive education. By this appeal, the School District attempts to avoid that judgment and nullify the Congressional mandate.

Judge Gerry's order is consistent with and fully supported by the purposes of IDEA and its strong and explicit presumption in favor of education of children with disabilities in regular education environments together with non-disabled children. The district court properly found that the School District's procedural failings in developing Rafael Oberti's individual education plan and failure to provide any behavioral plans or any effective supplementary aids and services in the regular class violated the IDEA. Based on these violations of IDEA and the School District's inability to present credible evidence to justify total segregation of Rafael, the district court correctly concluded that the School District did not comply with the IDEA requirements and properly ordered a new individual education plan be developed.

The School District's opposition to including Rafael in its elementary school is based on fundamental disagreement with the Congressional mandate for inclusion.

The district court's conclusion that the School District discriminated against Rafael on the basis of his handicap is supported by legislative history of § 504, the administrative interpretation of § 504 and caselaw prohibiting unnecessary segregation of children with disabilities.

The findings of the district court supporting its § 504 conclusion are based in a factual record that leaves no doubt that Rafael Oberti's § 504 rights were violated.

ARGUMENT

A. The District Court Opinion and Order Correctly Applied The Individuals with Disabilities Education Act to Protect Rafael Oberti's Entitlement to a Free, Appropriate Education in His Local School.

The District Court's order of August 17, 1992, is consistent with the intent and purpose of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 et. seq., as Rafael Oberti has been denied the free appropriate public education to which he is entitled under the Act. The District offered the District Court no evidence that would justify Rafael's placement in a completely segregated classroom setting outside his home School District.[19]

1. The District Court Order is Fully Consistent with the Purposes of The Individuals with Disabilities Education Act

The Findings of Fact and Conclusions of Law of the District Court are entirely consistent with the legislative purpose underlining the IDEA's requirements that children with disabilities be provided with a "free appropriate public education" and that that education be provided with children without disabilities to the maximum extent appropriate. See, Greer v. Rome City School District, 950 F.2d 688, 694-695 (11th Cir. 1991). The IDEA was passed by Congress in response to its finding that almost half the handicapped children in the United States were receiving an inadequate education, if they were receiving any education at all. Daniel R. R. v. State Board of Education, 874 F.2d 1036, 1038 (5th Cir. 1989) citing 20 U.S.C.A. §1400(b) (West 1988 Supp.); S.Rep. No. 168, 94th Cong., 1st Sess. 8 (1975), reprinted in 1975 U.S.Code Cong.& Admin.News. 1425, 1432.

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[19]The school district continues to propose a segregated placement, this time in the Cherry Hill School District. See, 1074-A. Defendants offered no evidence at the trial regarding this placement. (854-A).

The IDEA requires states, as a condition of receipt of federal funding, "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to met their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." 20 U.S.C. §1400(c). See, Honig v. Doe, 484 U.S. 305, 309 (1988); Greer by Greer v. Rome City School District, 950 F.2d 688, 694 (11th Cir. 1991); Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575, 577 (3rd Cir. 1985). The Act thus confers upon students with disabilities an enforceable right to public education as a condition of receipt of federal funding. Honig v. Doe, supra, 484 U.S. at 310; Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982). New Jersey is a recipient of federal funding and a participant under the Act. See,e.g., Board of Education of East Windsor Regional School v. Diamond, 808 F.2d 987, 991 (3rd Cir. 1986); Geis v. Board of Education of Parsippany-Troy Hills, 774 F.2d 575, 578 (3rd Cir. 1985).

2. The IDEA Manifests the Congressional Preference for Education in a Regular Classes Together With Children Who Are Not Handicapped.

In addition to granting students the right to a free appropriate public education, the IDEA specifically indicates a legislative preference for the placement of children with handicaps within the school system, guaranteeing children with disabilities not only the right to a free appropriate public education, but the right to receive that education in the least restrictive environment. E.g., Honig v. Doe, supra, 484 U.S. at 311. Therefore, participating states must establish procedures:

> to assure that ... to the maximum extent appropriate, handicapped children ... are educated with children who are

> not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(5)(b) (emphasis added). See, 34 C.F.R. §300.550. See also, Greer v. Rome City School District, supra, 950 F.2d at 695; Honig v. Doe, supra, 484 U.S. at 310-311.[20] Congress thus did not intend that a School District simply give passing thought as to whether, in the opinion of its staff, the child might be educated in the "regular classroom", Congress intended that there be serious consideration how supplementary aids and services might be used to allow the child to remain in the regular classroom.[21]

That is not what happened here. Either through ignorance or lack of experience in teaching children with disabilities, the district gave no serious consideration to alternatives to a segregated, out-of-district special education class for Rafael. He was immediately relegated to the segregated class placement, with such little justification as to suggest that the District viewed it as a foregone conclusion.

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[20]Although courts have adopted the educator's phrase "mainstreaming," as a short-hand to describe the requirements set forth in 20 U.S.C. 1412(5)(b), educators and public school authorities have come to the judgment that the mainstreaming terminology has become confusingly tied to disability category. Thus, now in both special education and general education, the term inclusive, with its definitional emphasis on supports and services in regular class, is well understood and accepted. Judge Gerry correctly defined inclusion (91-92A). Appendix A to this Brief, a page excerpt from Winners All: A Call for Inclusive Schools, a Report to the National Association of State Boards of Education, describes inclusion and distinguishes it from mainstreaming.

[21]"Congress was concerned about the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." Town of Burlington v. Dept. of Ed., 472 U.S. 359, 373 (1985).

The regulations which implement the Act place affirmative obligations on the School Districts to provide a wide variety of options for the education of handicapped children:

> (a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.
> (b) The continuum required under paragraph (a) of this section must:
> (1) Include the alternative placements listed in the definitions of special education under §300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and
> (2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

34 C.F.R. §300.551. Furthermore, the regulations express a clear and definite preference for education in a regular class placement, as close to the student's home as possible:

> Each public agency shall insure that:
> (a) Each handicapped child's educational placement: (1) Is determined at least annually,
> (2) Is based on his or her individualized education program, and
> (3) Is as close as possible to the child's home;
> (b) The various alternative placements included under §300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;
> (c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and
> (d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

34 C.F.R. §300.552.[22]

Under the IDEA, the "primary vehicle for implementing these congressional goals"[23] is the Individualized Education Program (IEP):

> It must include, among other things, statements of the child's present level of educational performance, annual goals for the child, the specific educational services to be provided the child, and the extent to which the child will be able to participate in regular education programs. School officials must convene a meeting at least annually to review and, when appropriate, revise the IEP. As this court has recognized, 'the IEP is more than a mere exercise in public relations. It forms the basis for a handicapped child's entitlement to an individualized and appropriate education.'

Greer by Greer v. Rome City School District, supra, 950 F.2d at 694-695. See also, Honig v. Doe, supra, 484 U.S. at 311; Geis v. Board of Education of Parsippany-Troy Hills, supra, 774 F.2d at 577-578. Development of the IEP is governed extensively by federal and state regulations. See, N.J.A.C. §6:28-1 et. seq. Federal regulations assign the responsibility for the development and review of the IEP to the School District, 34 C.F.R. §§ 300.343(a), and identifies the individuals who must participate in the development of the plan. 34 C.F.R. § 300.344(a). Parent participation is the bedrock

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[22]The New Jersey regulations state a strong preference for regular education in the neighborhood school. They state, inter alia:

> (a) Each district board of education shall ensure that:
> 1. To the maximum extent appropriate, an educationally handicapped pupil shall be educated with children who are not educationally handicapped;
> 2. Special classes, separate schooling or other removal of educationally handicapped pupils from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily;
> 3. Placement shall be provided in an appropriate educational setting as close to home as possible. ....

N.J.A.C. 6:28-2.10.

[23]Honig v. Doe, supra, 484 U.S. at 311.

of the procedural protection offered by the Act. Honig v. Doe, supra, 484 U.S. at 311-312.

Had the district's IEPs complied with the requirements of New Jersey law with respect to the contents of IEPs, there might be some formalized indication of what was considered for Rafael. The state regulations require that the IEP include, inter alia:

> 5. A description of the pupil's educational program which includes:
>
> i. A rationale for the type of educational program and placement selected;
>
> ii. An explanation of why the type of program and placement is the least restrictive environment appropriate in light of the pupil's needs;
>
> iii. A description of the extent to which the pupil will participate in regular educational programs. The participation of a pupil with an educational disability in regular school programs or activities shall be based on the nature and extent of the pupil's educational needs. Appropriate curricular or instructional modifications to the regular education program shall be stipulated. Precautionary arrangements shall be made to protect the safety and well-being of the pupil.

N.J.A.C. 6:28-3.6(e). However, given the evidence before it, the district court could readily conclude that continuing Rafael at Clementon was not considered. In three days of administrative hearings and three days of trial, the district offered no evidence as to the alternatives considered prior to the recommendation of a segregated, self-contained classroom. The district court thus found that no such alternatives had been considered prior to the recommendations of segregated self-contained kindergarten classes in the 1989-1990 school year[24], (77-A), and that the considerations of alternatives to

[24]In fact, the testimony of school psychologist suggests that the segregated placements were identified and provided to the parents before the Individual Education Plan was developed (309-A), a clear violation of the requirements of the IDEA. See, 34 C.F.R. §300.552.

segregated, self-contained classes in the 1990-1991 school year were "perfunctory".[25] (80-A). As a result, the requirements of the Act were not met.[26] Greer v. Rome City School District, supra, 950 F.2d at 699.

3. The District Court Properly Determined that the School District Had Not Complied with the Statutory Presumption for Inclusive Education.

Appellees submit that the District Court properly found that the School District had not complied with the IDEA's presumption for inclusion. This is properly the threshold question for the district court. It is not until this issue is resolved that a court can address the standard for evaluating whether the child is receiving a "free appropriate public education." Greer v. Rome City School District, supra, 950 F.2d at 695-696. See also, Daniel R.R. v. State Board of Education, supra, 874 F.2d at 1045.

The issue of legal standard for inclusion under IDEA has not yet been decided in this Circuit, however, four other Courts of Appeals have considered cases involving similar issues. While these courts have reached two somewhat different standards, there are common threads in both tests that should be adopted by this Circuit as well. In each case, the court evaluated the proposed placement of the child in a regular classroom in

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[25]This evaluation process must be completed during the development of the IEP in conjunction with the parents. A district cannot meet this test by post hoc rationalization when an objection is made by the parents. Greer v. Rome City School District, supra, 950 F.2d at 696. ["It is not sufficient that school officials determine what they believe to be the appropriate placement for a handicapped child and then attempt to justify this placement only after the proposed IEP is challenged by the child's parents."]

[26]Similarly, the IEP failed to specifically indicate what inclusive opportunities were to be provided to Rafael, if assigned to the self-contained class. The federal regulations requires that the plan specifically state that the IEP include "[a] statement of the specific special education and related service to be provided to the child, and the extent to which the child will be able to participate in regular educational programs ..." 34 C.F.R. §300.346(c) (emphasis supplied).

the context of the supplemental aids and services that could make it possible, defining the inquiry as follows:

1. identifying the impediments to regular classroom placement and examining the supplementary aids and services that might be employed to reduce or eliminate the barrier; and,

2. identifying the beneficial elements of the more restrictive placement to determine whether they could be provided in the regular classroom.

These inquiries are complementary and require a careful examination of the proposed placement and the needs of the individual child. They were properly made by the district court in its consideration of the two justifications offered by the district for placing Rafael in a segregated, self-contained classroom: the first as to his behavior problems, particularly while at the Clementon developmental kindergarten, and the second as to his intellectual disabilities.

The first Court of Appeals to consider this issue was the Sixth Circuit Court of Appeals in Roncker v. Walter, supra. It described the standard to be applied as follows:

> The proper inquiry is whether a proposed placement is appropriate under the Act. ... In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.

Roncker v. Walter, supra, 700 F.2d 1063 (citations omitted).

In applying this standard to the evidence before it, the district court properly concluded that the benefits of the proffered segregated placement could be replicated in a regular classroom setting, and that, to some extent the district's resistance to placement in a regular classroom was no more than a philosophical disagreement with

the requirements of the IDEA. The School District argues that Rafael requires by virtue of his mental retardation "... small group instruction, a multisensory teaching approach by qualified special education teachers, frequent repetition of lessons, conceptual development and integrated development of speech language skills." (App. Br. at 35; see 318-A - 319-A). The district court properly found that these services could be provided to him in a regular classroom setting[27] (82-A), and concluded that the school district's objections amounted to a disagreement with the mainstreaming requirements of the IDEA. (82-A; 100-A).

The Fifth and Eleventh Circuits articulated the inclusion test as follows:

> First we ask whether education in the regular classroom with the use of supplemental aids and services, can be achieved satisfactorily. See §1412(5)(B). If it cannot and the school intends to provide special education or to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate.
>
> Because this test adheres so closely to the language of the Act, and, therefore, clearly reflects Congressional intent, we adopt it. Like the Fifth Circuit, we hold that no single factor will be dispositive under this test. "Rather, our analysis is an individualized, fact-specific inquiry that requires us to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs.

Greer v. Rome City School Board, supra, 950 F.2d at 696, quoting Daniel R.R. v. State Board of Education, 874 F.2d 1036, 1045, 1048 (5th Cir. 1989).

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[27]This finding was more than adequately supported by the record where the school district's evidence suggested that, although it had never attempted to do so, it rejected the idea out of hand while appellees offered expert testimony by persons experienced in including handicapped children in regular classrooms, and doing so successfully. E.g., 511-A - 515-A; 128-A - 132-A.

To satisfy the first part of this test, the court must look to whether the School District evaluated whether Rafael could be educated in a regular classroom if provided with supplemental aids and services, and a full range of such services must be considered:

> Thus, before the School District may conclude that a handicapped child should be educated outside the regular classroom, it must consider whether supplemental aids and services would permit satisfactory education in the regular classroom. The School District must consider the whole range of supplemental aids and services, including resource rooms and itinerant instruction, for which it is obligated under the Act and the regulations promulgated thereunder to make provision. Only when the handicapped child's education may not be achieved satisfactorily, even with one or more of these supplemental aids and services, may the school board consider placing the child outside of the regular classroom.

Greer v. Rome City School Board, supra, 950 F.2d at 696. The district court properly applied this standard in concluding that the district gave no consideration to regular class placement in the 1989-1990 school year. In fact, the district initially considered only special education placements for Rafael (390-A - 310-A), and recommended an out-of-district placement, not on any direct knowledge of the class, but on its class size and description as a class for children classified as educably mentally retarded. (345-A - 346-A). Specific supplementary aids and services were not rejected for Rafael, the concept of aids and services was never considered by the School District.

As to the second part of the inclusion test, four factors have been identified as relevant to the determination that a placement is appropriately mainstream:

1) the relative educational benefits of the two programs;

2) the non-academic benefits of interaction with non-handicapped children;

3) the effect of the presence of the handicapped child or the teacher and other children in the regular classroom; and

4) the case of supplementary aids and services necessary to mainstream the child in a regular education setting.

Board of Education v. Holland, 786 F.Supp. 874, 878 (E.D. Cal. 1992). See also, Greer v. Rome City School Board, supra, 950 F.2d at 697. Although its determination of the School District's failure to consider alternatives made it unnecessary,[28] the findings of the district court thoroughly addressed the first three of these factors. The fourth issue, cost, was not raised by the School District.

The district court addressed the relative educational benefits of the two programs insofar as it was possible, in its determination that Rafael had made progress in the regular classroom (79-A) and the beneficial elements of the segregated classroom could be replicated in the regular classroom. (81-82-A). It found that Rafael could be harmed by being placed in a segregated class which offers him inappropriate role models far from his family and his friends (86-A) and that he needs access to integrated experiences in order to learn how to function effectively. (87-A).

As to the effects on non-handicapped children, the district court found that they would benefit from the opportunity to learn to function with people with disabilities and that there are substantial benefits to all children, as well as to the community at large. (87-A).

4. The District Court Properly Imposed the Burden to Justify the Proposed Placement on the School District

The result in this case does not turn on the allocation of the burden of proof.

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[28]See, Greer v. Rome City School District, supra, 950 F.2d at 699.

Allocation of the burden of proof is not a serious issue in this case where the School District offered absolutely no evidence regarding its current proposals for Rafael's education. See, 854-A, 951-A, 1074-A. Where the School District offers no evidence in support of its proposed placement, the finding by the district court is "unassailable on appeal." McKenzie v. Smith, 771 F.2d 1527, 1534 (D.C. Cir. 1985). Therefore, the School District's attacks on the district court's assignment of the burden of proof are misplaced.

The district court properly imposed the burden of justifying the proposed placement on the School District, inviting evidence regarding proposals not presented to the Administrative Law Judge.[29] (96-97-A). The IDEA and its legislative history express a "strong preference" in favor of inclusion. Roncker v. Walter, supra, 700 F.2d at 1063. That preference assumes the evidentiary function of a rebuttable presumption in favor of regular classroom placement. Daniel R. R. v. State Board of Education, supra, 874 F.2d at 1045; Board of Education v. Holland, supra, 786 F.Supp. at 878. The district court properly assigned the burden of rebutting that presumption to the School District in this case. Grymes v. Madden, 672 F.2d 321 (3rd Cir. 1982). In light of the School District's responsibility to develop and implement an appropriate IEP, it must bear the burden of justifying a segregated placement. Davis v. Bd. of

[29] The district court clearly indicated that, following dispositions of the motions for summary judgment, the remaining issue was Rafael's current ability to participate in a regular classroom setting, an issue not before the Administrative Law Judge. 481-A. As to this evidence, there was no administrative determination and the district court could properly assign the burden to the school district, particularly when it accords it the deference due school officials. See, Town of Burlington v. Department of Education, 736 F.2d 773, 794 (1st Cir. 1984), aff'd 451 U.S. 359 (1985). Furthermore, in its summary judgment opinion, the district court found that the Act's determination was based on Rafael's experience in developmental kindergarten, which was not properly considered in light of the procedural violations in the development of Rafael's IEP for that year. (63-A).

Education, 530 F.Supp. 1209, 1211 (D.D.C. 1982); Lascari v. Board of Education, 116 N.J. 30, 560 A.2d 1180, 1188 (1989)[30].

This requirement is a practical one. It is the School District that is required to comply with the procedures of the IDEA, and, in conformity with the Act's strong preference should bear the burden of establishing that something other than regular class placement with supplementary aids and services is required. It is the district that is the recipient of federal funding and has the expertise and resources available to justify the proposal. 560 A.2d at 1188. It is thus best able to come forward with evidence to enable the court to determine that it has complied with both the procedural and substantive requirements of the law. Id.

When the School District asserts that educating the child in the regular educational environment cannot be achieved satisfactorily, and thereby seeks to exclude the child from its programs, the School District is properly assigned the burden of overcoming the IDEA's strong statutory preference for inclusion[31] by showing that such education with non-handicapped students is not possible. Lascari v. Board of Education, supra, 560 A. 2d at 1189. See also, S-1 v. Turlington, 635 F.2d 342, 349 (5th Cir. 1981); Bd. of Education v. Holland, supra, 786 F.Supp. at 880, n. 7; Davis v. Board of Education, supra, 530 F. Supp. at 1211. See also N.J.A.C. 6:28-2.10 (1989); N.J.A.C. 6:28-1.3, 3.6(e)(5), 4.1(i)(2) (1984); N.J.A.C. 2.2 (b) (1978). The district was unable to do that here. It cannot demonstrate what alternatives have been

[30]Appellees submit that the standard imposed by the Supreme Court of the State of New Jersey, to the extent that it imposes a higher burden of proof on school districts within the state than may be required by the IDEA, is an appropriate one for school districts within the state. See, Geis v. Board of Education, 774 F.2d 575 (3rd Cir. 1985).

[31]20 U.S.C. §1412 (5)(b); 34 C.F.R. §300.550(b)(2),

considered in the IEP process because placement in a segregated setting was a foregone conclusion for the district. The School District instead presented the district court with a litany of behavior in series of situations where Rafael did not have an individualized education plan and where he was not provided with supplemental aids and services.

B. The School District's Opposition to Including Rafael at all in Regular Class at His Local School is Based not On Bona Fide Differences Concerning Rafael's Individual Needs or Reasonableness of Providing Supplementary Aids and Services But is Based in a Fundamental Disagreement with the Congressional Preference for Inclusive Education.

Appellants' long recitation of "disruptive behavior"[32] is prelude to the School District's position that Rafael must be segregated because of his disability. This is apparent when appellants argue:

> If .... Rafael was not a behavior problem, the School District would still be compelled to educate him in a special education class. His level of mental retardation and his speech impairment present needs of such magnitude that they can only be addressed through special education techniques which cannot be employed in a regular class.

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[32]The School District's recounting of the behavioral incidents on appeal is misleading without acknowledging the facts established below that explain the behavior and methods by which the behavior could be controlled. The expert testimony at trial established that behavior problems are a function of Rafael's educational program. When programs are specifically designed for Rafael, he does not exhibit behavior problems. Appropriate educational and related services can be offered to Rafael in a regular educational setting. If those services were provided, Rafael probably will not exhibit behavior problems. See, 126-A (McGregor); 574-577-A (Brown).

The School District's expert, Dr. Urban agreed that the behaviors he observed could be controlled and with systematic training, Rafael's classroom behavior would improve. (805-806A). It is not surprising that in the review of the expert testimony, appellant neglects to mention that School District's own expert. (App. Br. 32-36).

(App. Br. at 38). This statement is consistent with the School District's position at trial that because of Rafael's intellectual disability, he must be educated in a segregated setting (106-A) and confirms the lower court's finding that:

> As a matter of educational philosophy, the School District contends that it is not appropriate to educate children with intellectual disabilities as severe as Rafael's within the matrix of regular education.

(100-A). This philosophical position is so much at odds with the facts established below, including the professional opinion of is own expert, that it is not possible to imagine how Clementon could make an individualized determination about the appropriateness of including Rafael in any educational activities at Clementon. The philosophical disagreement with the Congressional mandate provides the only explanation for the current Clementon proposal that contemplates zero participation in school with non-handicapped children and 100% segregation. (1074-A). There is no expert opinion that supports the total lack of integration proposed in the new 1992 Clementon Child Study Team IEP. Clementon's own consultant on this matter and expert, Dr. Urban, testified that Rafael's IEP should include more opportunities for integration (e.g., integrated physical education). (822-A).[33]

When asked his professional opinion on the proposition appellants now assert (App. Br. at 38), their expert, Dr. Urban testified that if he conducted a careful assessment, it would be possible for Rafael to attend a regular kindergarten or first grade. (806-A).

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[33]Dr. Urban testified "I know very few ... children who are [in] a totally self-contained class. Most children will go out for something and have opportunities for integration." (852-A).

The School District's steadfast belief that children with retardation such as Rafael Oberti or Rachel Holland[34] must be educated in classes completely apart from non-handicapped children reflects a basic disagreement with inclusion and disagreement with providing regular class participation as an option within the Clementon schools. As the Court of Appeals for the Sixth Circuit noted: "Such a disagreement is not, of course, any basis for not following the Act's mandate." Roncker v. Walter, 700 F.2d 1058 (1983).

Not only does the School District's position conflict with federal law but is in opposition to clear New Jersey state policy and practice on inclusive education. The court heard testimony (656-A) and received documentary evidence of New Jersey's efforts to make available the regular education for students with moderate and serious disabilities (86-A; 935-A). The record also contained detailed testimony of successful inclusive education for children like Rafael in neighboring districts. (657-658-A). Yet, the School District personnel who disagree with any inclusion for Rafael refused to visit those programs or avail themselves of the training and assistance available from the state (86-A; 652-A; 935-A).[35] As the Court of Appeals for the First Circuit noted in a case where, as here, the local School District had basic disagreement with the federal law:

> The law explicitly recognizes ... that educational methodologies ... are not static but are constantly evolving

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[34]See, App. Br. at 45, commenting that District Court Judge Levy should have been appalled by the facts relating to Rachel Holland (a moderately retarded ten year old girl participating in a regular class). Judge Levy's discussion points to the importance of expert testimony and the district court's rule in assessing the credibility of witnesses. Board of Education v. Holland, supra, 786 F.Supp. at 881.

[35]Thus, the school district's position not only disregards the federal statutes' inclusion mandate but also violates the requirement for use of a comprehensive system of personnel development that adopts "promising practices, materials and technology." 20 U.S.C. 1414(a)(1)(c)(i); 1413(a)(3).

> and improving. It is the School District's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs.

Timothy W. v. Rochester N.H. School District, 875 F.2d 954, 973 (1st Cir. 1989).

In this case, where the district court found not only that there are numerous methods and approaches, not new but tried and proven both in New Jersey and elsewhere (85-86A), this Court cannot entertain an ideological argument that would have this court disregard all expert testimony and allow the School District simply to assert that it will not investigate and provide supplementary aids and services in the regular class because it does not know what they are or how to make them available in its elementary schools.

C. The District Court Correctly Ruled that the School District has a Duty Under § 504 of the Rehabilitation Act to Afford Rafael Oberti the Benefits of an Inclusive Education in His Local School.

The district court carefully considered that Clementon School District's exclusion of Rafael from his local school and his placement out of district in a completely segregated educational setting violated § 504. Applying the longstanding § 504 standard, Strathie v. Department of Transportation, 716 F.2d 227 (3rd Cir. 1983), Judge Gerry found:

> The School District has failed to demonstrate that it is necessary to educate Rafael in a self-contained special education class, in this case located out of the district. Moreover, the School District has failed to demonstrate that accommodating Rafael by designing an inclusive individual education program for him within the district would require a modification of the essential nature of the program or place an undue burden upon the School District.

(109-A).

Thus, the district court concluded,

> The School District violated section 504 by failing to properly investigate and failing to provide the reasonable accommodations necessary to enable Rafael to benefit from an inclusive education program in his home School District, and by excluding him from regular education programming solely on the basis of his disability.

(110-A).

The district court's conclusion is fully supported by the legislative history of §504, the administrative interpretation of § 504 and the case law construing § 504.

Section 504 of the Rehabilitation Act of 1973 provides, in part, that:

> No otherwise qualified individual with handicaps in the United States, ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. § 794(a) (1988).

In enacting the Handicapped Children's Protection Act of 1986, Congress made plain that handicapped children and their parents may raise claims under § 504 and the IDEA in the same lawsuit.[36]

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[36]The Handicapped Children's Protection Act added to 20 U.S.C. §1415 the following subsection:

> (f) Effect on other laws.
>
> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [ ], or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsection (b)(2) and (c) of this section [i.e. the administrative review procedures of the EHA] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

The case law interpreting § 504 in the education context shows clearly that § 504 is an independent source of rights in addition to the IDEA. See, for example, Martinez v. School Board of Hillsborough County, Florida, 861 F.2d 1502, 1505 (11th Cir. 1988); Georgia Association for Retarded Citizens v. McDaniel, 855 F.2d 805, 806 (11th Cir. 1988); New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847, 852-55 (10th Cir. 1982); Tatro v. State of Texas, 625 F.2d 557, 565 (5th Cir. 1980); New York State Association for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979).

1. The Legislative History of § 504 Shows that Congress Intended to End Unnecessary Segregation of Children.

Prior to its enactment of the Education for All Handicapped Children Act, Congress considered § 504 and advanced it to enactment over a period of two years.[37] Congress understood the history of disability discrimination, was moved by the continuing destructive effect of segregation, and acted to reverse that regime and establish handicap as a basis for civil rights protection.

The central purpose of § 504 was to disestablish the exclusion and segregation of handicapped persons, especially severely handicapped children. The evil § 504 was intended to overcome was squarely put by Senator Humphrey, its primary sponsor in the Senate:

> [T]he fundamental fact that one confronts is ... the segregation of millions of Americans from society -- suggesting a disturbing viewpoint that these people are not only forgotten but ... expendable.... This bill responded to an awakening public interest in millions of handicapped

[37]Introduction, 118 Cong. Rec. 525 (1972), 117 Cong. Rec. 45,974 (1971); additional co-sponsors, 118 Cong. Rec. 32,310 (1972); the passage of the Rehabilitation Act of 1973, 1973 Congressional Quarterly Almanac 557, et seq.

> children, youth and adults who suffer the profound indignity and despair of isolation, discrimination and maltreatment. 118 Cong. Rec. 9495 (1972).

Throughout the legislative history, eliminating the segregation of disabled people was linked with including disabled people in the local schools and in their community.[38]

The current Congressional understanding remains that § 504 prohibits unnecessary segregation and requires reasonable steps and accommodations to provide opportunities for participation of people with disabilities together with non-disabled persons. The 1990 Report of the House Committee on the Judiciary, on Title II of the Americans With Disabilities Act, extends the protection of § 504 to cover all programs of state or local governments, regardless of the receipt of federal financial assistance, H.R. REP. 485(III) (101st Cong. 2d. Sess. May 15, 1990) 49-52. The Congressional Report explains and interprets the provisions of Title II by explaining § 504.

The House Judiciary Committee emphasized that the central purpose of § 504 was to integrate people with disabilities into all areas of the life of our society:

> Section 504 of the Rehabilitation Act has served not only to open up public services and programs to people with disabilities, but has also been used to end segregation. The purpose of Title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life. The Committee intends that title II work in the same manner as Section 504.

H.R. REP. at 49 (emphasis supplied). The House Committee makes clear that fiscal and administrative convenience do not excuse noncompliance with § 504:

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[38]See 117 Cong. Rec. 45,974-75 (1981) (sponsors intend to remedy differential access among disabled to schooling, armed services training, the Job Corps, vocational training, family services); id. at 42,293-94 (schooling, job training, workshops, family services, foster care, recreation); 118 Cong. Rec. 9495-9501 (1972) (schooling, job training, public employment services, pre-school programs, group homes).

> While the integration of people with disabilities will sometimes involve substantial short-term burdens, both financial and administrative, the long-range effects of integration will benefit society as a whole.
>
> ...
>
> The fact that it is more convenient, either administratively or fiscally, to provide services in a segregated manner, does not constitute a valid justification for separate or different services under Section 504 of the Rehabilitation Act. Nor is the fact that the separate service is equal to or better than the service offered to others sufficient justification for involuntary different treatment for persons with disabilities. While Section 504 ... do[es] not prohibit the existence of all separate services ... the existence of such programs can never be used as a basis to exclude a person with a disability from a program that is offered to persons without disabilities, or to refuse to provide an accommodation in a regular setting.

Id. at 49-50 (emphasis supplied).[39]

Thus, the consistent legislative history of § 504 from its introduction in 1972 to its amendment in the Americans with Disabilities Act, 42 U.S.C. § 12101 fully supports the district court's approach requiring discriminatory segregation and compelling the School District to investigate and provide reasonable accommodations to Rafael in the regular setting of his home School District.

2. The Administrative Construction of the Secretary of Education Requires That Federally Assisted Education For Disabled Students Be Provided in Inclusive Settings Whenever Feasible.

Judge Gerry's ruling that exclusion of Rafael from education with non-disabled children and his consignment to a totally segregated, out of district program violates §

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[39]There is no issue of financial burden in this case. (109-A, n. 25). At most, what is at stake, is the administrative convenience of sending all mentally retarded students and other seriously disabled students outside the school district for their education. See 851-A, 930-932A [showing no mentally retarded students included in regular education in the Clementon District, and that the only special education class is for marginally handicapped children classified as perceptually impaired].

504, correctly relied on longstanding federal regulation that, consistent with the intent of the Congress, prohibits unnecessary separate services, and affirmatively requires effective and meaningful services to disabled persons. 45 C.F.R. part 84.

In 1977, the Secretary of HEW issued a regulation that prohibits unnecessarily separate services, and affirmatively requires effective and meaningful services to disabled persons. 45 C.F.R. part 84. When the Department of Education became a separate entity in 1979, it recodified the identical rule, 34 C.F.R. part 104. According to the Secretary's preamble to the regulation, § 504 "established a mandate to end discrimination and to bring handicapped persons into the mainstream of American life." 42 Fed. Reg. 22,767 (1977).

The regulation, under the title "Discrimination Prohibited," flatly says:

> A recipient, in providing any aid, benefit or service may not . . . [p]rovide different or separate aid, benefits or services to handicapped persons or any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others.

34 C.F.R. § 104.4(b)(1)(iv) (emphasis provided). The local School District defendants, as recipients of federal assistance, are required to provide federally assisted services "in the most integrated setting appropriate to the person's needs." Id. § 104.4(b)(2).

Segregated, self-contained, handicapped-only elementary school programs such as those provided to Rafael at Winslow Township are permissible only if "it is demonstrated by the [defendant] that the education of the person in the regular educational environment operated by the recipient with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 104.34.

3. The Caselaw Construing § 504 Requires that School District's Provide Education to Disabled Children in Inclusive Settings Where Feasible.

Constructions of § 504 by the courts confirm the right of handicapped children to participate in inclusive educational settings. The modern caselaw regarding segregation begins with Brown v. Board of Education, 347 U.S. 483 (1954). Looking to "the effect of segregation," id. at 492, especially its "intangible" effect, id. at 493, the Court ruled that "[t]o separate them . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494. Thus, the Supreme Court held: "Separate . . . facilities are inherently unequal." 347 U.S. at 495.[40]

In subsequent decisions, the Supreme Court has reiterated that segregation is "one of the most serious injuries recognized in our legal system." Allen v. Wright, 468 U.S. 737, 756 (1984). "An unbroken line of cases following Brown v. Board of Education establishes beyond doubt" that segregation "violates a most fundamental national public policy, as well as rights of individuals. 'The right ... not to be segregated ... is ... fundamental and pervasive.'" Bob Jones University v. United States, 461 U.S. 574, 593 (1983), quoting Cooper v. Aaron, 358 U.S. 1, 19 (1958). The harm of segregation to children is especially profound and long-lasting; for, as Chief Justice Burger wrote for the Supreme Court in Milliken v. Bradley, 433 U.S. 267, 287 (1977),

> Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, and conduct and attitudes which reflect their cultural isolation[,]habits ... which vary from the environment in which they must ultimately function and compete if they are to enter and be a part of that community. This is not

[40]Judge Gerry noted the common purposes of Brown and the federal statutory preference for inclusion. (44-A).

> peculiar to race; in this setting, it can effect any children who, as a group, are isolated by force of law from the mainstream. Cf. Lau v. Nichols, 414 U.S. 563 (1974).

As Judge Gerry noted, the same principles apply to the statutory equality guarantee of § 504. (104-A). In Alexander v. Choate, 469 U.S. 287 (1985) the Supreme Court, expressly addressing § 504, acknowledged "the statutory rights of the handicapped to be integrated into society." 469 U.S. at 300 (emphasis added). Again construing § 504 in School Board v. Arline, 107 S.Ct. 1123 (1987), the Court found that the exclusion of handicapped persons has been a result of "archaic ... attitudes," id. at 1126, including the abhorrence of persons with handicaps to others. Id. at 1128-29 & nn. 9, 12. The Court found that, because of historical policies of exclusion and segregation, "the American people are simply unfamiliar with and insensitive to the difficulties confront[ing] individuals with handicaps." 107 S.Ct. at 1126, quoting S. Rep. No. 93-1297, p. 50 (1974). But § 504 was designed to deal with the range of discriminating practices in education and other programs which stemmed from "stereotypical attitudes and ignorance about the handicapped." 107 S.Ct. at 1126 n. 3.

From the outset, judicial constructions of § 504 applied to school-age children with disabilities have been the same. "Under § 504 and its regulations properly interpreted," the courts have explicitly held that School Districts are required "to accommodate and integrate" handicapped people to serve them in programs also serving their "nonhandicapped" peers. New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d at 885. New York State Association for Retarded Children v. Carey, 612 F.2d 644, 649 (2d Cir. 1979). See also Garrity v. Gallen, 522 F.Supp. 171, 205 (D. N.H. 1981); Hairston v. Drosick, 423 F.Supp. 180, 183-84 (S.D. W.Va. 1976).

4. The Facts Established at Trial Demonstrate that Clementon School District's Unnecessary Segregation of Rafael Constitute Discrimination on the Basis of Disability.

The School District asserts, without argument, analysis or reference to the evidentiary record, that the district court's findings of fact related to the § 504 violation are clearly erroneous. (App. Br. at 48).

Relying only on cases concerning college and graduate education, appellant suggests that public elementary schools may exclude children on the basis of disability and characteristics related to disability. (App. Br. at 48). Rafael Oberti's § 504 claims and the district court's § 504 adjudication are not so easily avoided.[41]

The requirements that must be met to establish a violation of the Rehabilitation Act are clear in this Circuit. In 1983, Chief Judge Seitz wrote:

> "In order to establish a violation of the Rehabilitation Act, a plaintiff must meet four requirements: 1) he or she is a 'handicapped individual,' 2) he or she is 'otherwise qualified' for participation in the program, 3) the program receives 'federal financial assistance,' and 4) he or she was 'denied the benefits of' or 'subject to discrimination' under the program. Strathie v. Department of Transportation, 716 F.2d 227, 230 (3d Cir. 1983)."

Contrary to the School District's assertion, there is ample evidence in the record to support each of these four elements necessary to establish a violation of § 504. Furthermore, the School District produced no evidence to meet its burden of proof to avoid liability under § 504.

The four Strathie requirements were admitted by defendants prior to trial. The Obertis alleged and defendants in their answer admitted that Rafael is a handicapped

[41]Appellants treat the § 504 claims here and in the district court in the same way, choosing to ignore them. (109-A, n. 25).

individual; that he is "otherwise qualified within the meaning of §504;[42] that the School District receives federal financial assistance;[43] and that Rafael was denied the benefits of education in his local School District and required to attend a segregated classroom far from his home for the 1990-1991 school year.

Given the admissions and lack of dispute as to the § 504 requirements as set forth in Strathie, the § 504 issue that the district court had before it was simply whether the evidence in the record justified: 1) the exclusion of Rafael and denial of education benefits; and 2) the total segregation of Rafael for educational purposes.

To analyze whether the district court properly concluded that the School District did not justify the exclusion of Rafael, it is necessary first to consider the burden of proof placed on defendant under § 504 and the application of the 504 standards to the facts of this case.

5. Under § 504 the School District's Burden of Proof Requires that It Demonstrate that Accommodating Rafael at Clementon would Impose an Undue Burden or Change the Essential Nature of Its Program.

Although the School District now suggests that Rafael Oberti is not qualified to attend the Clementon public schools and that the district court improperly concluded that Rafael could be accommodated by Clementon, no where does the School District address its burden of proof on the 504 issue.

In Strathie, this Court, taking into full account the deference due to public administrators, set the standard for making the determination as to whether a

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[42]Complaint, ¶56 (25-A); Answer, ¶56 (33-A); Complaint ¶¶1 & 7 (10-12-A); Answer ¶¶1 & 7 (28-A, 30-A).

[43]Complaint, ¶12 (14-A); Answer, ¶12 (30-A).

handicapped individual is otherwise qualified. The Third Circuit standard is stated as follows:

> "A handicapped individual ... is otherwise qualified unless there is a factual basis in the record reasonably demonstrating that accommodating that individual would require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds."

Strathie, at 231.

The Third Circuit standard is drawn from and consistent with the analytical approach applied by the Second Circuit Court of Appeals in N.Y.A.R.C. v. Carey, 612 F.2d 644 (1979) in an education context that is strikingly similar to the appeal here. In N.Y.A.R.C., the defendant School District attempted to exclude some mentally retarded children from the public schools and isolate them in special classrooms.

Circuit Judge Jon Newman faced with the assertion by the New York City School Board that its exclusion of handicapped children was based upon the possibility of health hazards and risk of transmission of disease, ruled that under §504:

> "once the plaintiff has established a prima facie case that he has been discriminated against, the defendant must present evidence to rebut the inference of illegality. . . . [citation omitted] Clearly deference to a state agency fact-finding is inappropriate once that agency is the defendant in a discrimination suit. The agency is required to come forward in the district court with sufficient evidence to rebut the plaintiffs' prima facie case."

N.Y.A.R.C. at 649.

In this case, applying the Strathie standard defendants were required to come forward with the "factual basis in the record" reasonably demonstrating that accommodating Rafael at Clementon would require either a modification of the essential nature of the Clementon Elementary School or impose an undue burden. Strathie at

231. They did not. The record below is devoid of any factual basis that properly including Rafael and providing reasonable accommodations would be burdensome. The factual record is convincing that Rafael would benefit from inclusive education, his non-handicapped classmates would benefit, and that the accommodations to be employed are well accepted by educators and used in New Jersey and other School Districts. See, supra, n. 18.

6. The Facts Establishing Clementon School District's Liability Under § 504.

Applying the § 504 standard to the facts of this case, four sets of facts support the conclusion of the court below as to § 504 liability.

First, the court's conclusion is supported by the facts that show that Rafael Oberti can benefit from participation with non-handicapped students in Clementon Elementary School.

Second, the court's conclusion is supported by the facts that show that any educational adaptations, modifications or accommodations necessary to allow Rafael to benefit further from education with non-handicapped children at Clementon Elementary School would not unduly burden Clementon or jeopardize the overall viability of the Clementon special education or regular education programs.

Third, the facts show that none of the post hoc excuses raised by appellants in the court justify either Rafael's exclusion from Clementon Elementary School, his total segregation and separation from non-handicapped peers, or appellant School District's refusal to modify the Clementon Elementary School to accommodate Rafael.

a. Rafael has demonstrated he can benefit from education at Clementon Elementary School.

During the year that Rafael attended Clementon Elementary School, at each point that his teachers and educational team formally and seriously evaluated his performance, they indicated that Rafael did benefit from his participation with non-handicapped children and make educational progress.

In the progress report prepared by his teacher, Mrs. Reardon, for the first three marking periods, Rafael was graded as satisfactory or having made satisfactory progress in a number of both special and academic subject areas.

Rafael was consistently marked satisfactory (the highest grade) for all marking periods in the following areas: plays and works well with others; is courteous is happy and cheerful in school; listens without interrupting; waits his turn participates in group activities; and shows good sportsmanship.[44] The teacher's comments on the progress report for each of the periods were as follows:

- 1st Marking Period - "Rafael continues to show improvement. His lack of verbal language hinders his participation."
- 2nd Marking Period - "Rafael is beginning to communicate verbally. Even though progress is slow, he is showing some mastery in each skill area. Rafael often has difficulty beginning a new task. Sometimes with encouragement, we are able to get him to work, and at other times, we cannot."
- 3rd Marking Period - "Most of Rafael's progress has been in language development."[45]

[44]436-A. The possible grades in the academic areas are S - Satisfactory; N - Needs improvement; ✓ Progress still developing - area not evaluated.

[45]436-A.

At the close of the year in June, Mrs. Reardon's final Progress Report shows that Rafael clearly benefitted from the year at Clementon and made progress. The Clementon teacher's year end comments were as follows:

> "Rafael has shown growth in all areas of the developmental kindergarten program. He was introduced to all pre-reading skills (colors, shapes, patterns, etc.), letters, letter sounds, and numbers, and was able to meet the challenges with some degree of success.
>
> "Rafael enjoys learning when it is done in a fun and motivating atmosphere. He does show some resistance when he has to sit quietly and work, but with a fun approach, and rewards (stickers, praise, etc.) upon completion of a task, he will perform.
>
> "Rafael has shown the most significant growth in language development. He is now beginning to form simple sentences."[46]

Rafael's afternoon teacher, Ms. Braidwood, also graded his progress on the same Individual Education Plan objectives for 1989-90 school year. Her evaluation is consistent with Mrs. Reardon's. There was complete agreement on reading and math readiness, self-help skills, auditory perception skills. Ms. Braidwood's report, like Mrs. Reardon's at Clementon, shows that Rafael made significant progress between January and June of 1990. In January he was reported as having mastered six Individual Education Plan objectives and in June, he had mastered 12. In no instance, did his report show regression in skills learned.[47] Thus, a careful review of the reports of educational progress from both of Rafael's teachers as well as the recorded meeting of his IEP teams show Rafael did benefit from his education at Clementon with non-handicapped children.

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[46]432-A (emphasis supplied).

[47]437-439-A.

Those reports are bolstered by the unrebutted expert opinions of Dr. Brown, Dr. McGregor and Ms. Goldman that Rafael would benefit socially and academically. For example, there is nothing in the record to contradict Ms. Goldman's evaluation that Rafael would benefit in communication and articulation from modeling the communications of non-handicapped children. (640-A). The trial record firmly establishes if Rafael is provided appropriate education in an inclusive setting he will be able to gain a great degree of independence in adult life and accomplish a great deal. As an adult he will be able to live in his own apartment with support. He will contribute significantly to his daily living by earning at least minimum wage while working alongside non-disabled co-workers at a real job. He will be able to negotiate and participate in community integrated environments. He will be able to shop for himself, use parks and recreation areas, ride public transportation, and will enjoy a decent social life with non-disabled adults. (530-532-A).

b. Program modification or accommodations necessary to allow Rafael to benefit further from education at Clementon would not unduly burden appellants or jeopardize the overall viability of the School District's program.

Section 504 requires that School Districts provide aids and services to enable children who are handicapped to benefit from education in regular classes. The Department of Education's § 504 regulation requires:

> "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met ...."

34 C.F.R. § 104.33(b).

The § 504 regulation also requires that a School District:

> "shall place a handicapped person in the regular educational environment ... unless it is demonstrated ... that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."

34 C.F.R. § 104.34.

Education cases brought under § 504 uphold the right of handicapped students to adaptations, accommodations, aids and services to enable them to participate in and benefit from schooling. See, e.g., Tatro v. State of Texas, 625 F.2d 557, 565 (5th Cir. 1980) (§ 504 requires public school to provide catheterization to enable handicapped child to attend regular public school); Camenisch v. State of Texas, 616 F.2d 127 (5th Cir. 1980), vacated as moot, 451 U.S. 390 (1981) (interpreter services); David H. v. Spring Branch Independent School District, 569 F.Supp. 1324 (S.D. Tex. 1983) (development for an individual child of a new educational program the school had not offered before).

There are only two limitations upon a school's duty to modify its programs to enable handicapped persons to participate in those programs. First, the program need not accommodate a person whose handicap precludes him or her from ever realizing the principal benefits of the program; and second, the program does not have to make accommodations that are unduly costly or burdensome. Alexander v. Choate, 469 U.S. 287 (1985); Southeastern Community College v. Davis, 442 U.S. 397 (1979). The first exception certainly does not apply in this case since the evidence is undisputed that Rafael can benefit from the education at Clementon. As for the second exception, the School District has not raised cost or burden as an issue in this case. (109-A).

Rather than provide the necessary supplementary aids and services while Rafael was at Clementon, the facts show that defendants first failed to provide any

supplementary services or supports whatsoever although those supports are routinely available and provided to non-handicapped students. (97-A). Then, only when the school year was nearly over, did the school belatedly respond to a request to provide an aide for the classroom. (78-A).

The accommodations that could be employed were displayed extensively in the record below, and the court found that they are in use in School Districts in New Jersey and around the country. (85-A). Among the educational accommodations in use in regular classrooms that modify the educational experience for the child with disabilities such as Rafael, without disrupting or interfering with the education of the other students, include peer tutoring and non-disabled student helpers, Ex. P-8 at slide 11, 14, 18; cooperative learning groups, Ex. P-8 at slide 25 (560-A); integrated speech and language therapy, Ex. P-8 at slide 13; consulting teacher in regular class, Ex. P-8 at slide 23, 24; modification of curriculum, Ex. P-8 at slide 15, 26, (561-A); and parallel instruction Ex. P-8 at slide 22 (556-557-A).

c. None of the post-hoc reasons offered by the School District justify its exclusion of Rafael from Clementon Elementary School.

A careful review of the educational record prior to the Child Study Team's decision in June 1990 to exclude Rafael from further participation in the Clementon Elementary School with non-handicapped shows no basis, and certainly no compelling reason that would justify his exclusion under § 504.

Three concerns emerged during the school year that the School District thought were sufficient to exclude Rafael. They were: (1) his needs for assistance in self help and toileting; (2) his inability to keep up with the rest of the class academically; and

(3) a lack of cooperation and resistance to direction. None of these excuses offered by defendants and credited by the Administrative Law Judge in his application of the New Jersey and federal education acts, justify Rafael's exclusion from Clementon under § 504. The issue to be addressed under § 504 is whether accommodating Rafael's needs in the regular class is unduly costly or jeopardizes the viability of the Clementon program. The undisputed facts demonstrate that none of the School District concerns rise to anywhere close to a level that would justify exclusion and total separation from his non-handicapped peers.

Clementon School District's former concerns about Rafael's self-care and toileting needs do not justify his exclusion. As Dr. McGregor testified, Rafael's incontinence was transitory and with simple attention to scheduling and training was soon resolved.[48] Appellant acknowledges that at the time of the administrative hearing (February 1991) Rafael was toilet trained and was able to go to the bathroom on his own. (App. Br. at 17). There was no evidence presented in the district court to the contrary.[49]

The second reason for excluding Rafael is his inability to keep pace with his non-handicapped peers and the regular developmental kindergarten curriculum. As the district court found and review of Rafael's IEP goals and classroom progress shows that keeping up with the kindergarten curriculum was not Rafael's academic goal. The team in reviewing progress correctly focused on educational goals in self help, speech production, expressing needs, gross motor skills, socialization and cooperation. (441-A).

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[48]432-A, 439-A, 441-A.

[49]As early as 1976 the courts established that incontinence is not a sufficient reason to exclude a handicapped child from regular class and consign that child to a segregated special education class. Hairston v. Drosick, 423 F.Supp. 180 (1976).

It is undisputed that at no time during the school year, was it an IEP objective for Rafael to keep up with or master the academics at the same pace as his non-handicapped peers.[50] It was only after the Child Study Team decided to exclude him from Clementon that this concern became paramount. Such post hoc generalization cannot be used to escape § 504 requirements. Only after it is determined that adaptation would jeopardize the essential nature of the program can the § 504 duty to integrate be compromised. Here, where the adaptations and accommodations and support services are so common and commonly accepted educational tools, there is no factual basis for such a compromise.

The final and now for the School District the most compelling reasons for Rafael's exclusion from Clementon were the behavioral incidents recorded by his teacher during the year and observed by other school personnel, as well as incidents from an unstructured summer program and Rafael's first six weeks at St. Luke's Elementary School. The court found that none of the teachers or the child study team ever designed or implemented a written IEP objective to manage Rafael's occasional resistance or lack of cooperation. In fact, with respect to the summer program and St. Luke's, there was no IEP at all. (78-A, 694-695-A, 728-A).

All these facts confirmed by the absence of any bona fide educational record of other documentation characterizing Rafael's behavior as disruptive or harmful to his classmates -- lead to the conclusion that the exclusion of Rafael from Clementon because

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[50]Indeed, to set such an objective without adaptations to the curriculum would have constituted the most blatant violation of § 504 imaginable -- akin to requiring a deaf child or non-English speaking child to master the curriculum without special services or requiring wheelchair users to use public transportation by boarding buses that are without lift ramps and otherwise inaccessible. Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).

he was "disruptive" to the extent of having any material adverse impact on students is pure pretext, manufactured after the decision to exclude, used in the context of the pending due process dispute, raised again in the district court and rejected by Judge Gerry, and now raised again to distract this Court from the important legal issues at stake in this appeal.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA

By_____
Frank J. Laski
Penelope A. Boyd

125 South 9th Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

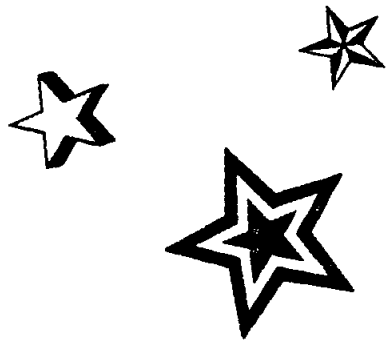
November 13, 1992

Attorneys for Appellees

CERTIFICATION OF BAR MEMBERSHIP

I, Frank J. Laski, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Frank J. Laski
Public Interest Law Center of
Philadelphia



Winners All:

A Call for Inclusive Schools

THE REPORT OF THE NASBE STUDY
GROUP ON SPECIAL EDUCATION

October 1992

The National Association of State Boards of Education, 1012 Cameron Street, Alexandria, Virginia, 22314. (703) 684-4000. Additional copies of this report may be obtained from NASBE at a cost of $10.00, prepaid.

APPENDIX A

3. An Inclusive System for the Education of ALL Children

After examining the problems related to mainstreaming, the separate special education bureaucracy, and the poor education outcomes that have been described, NASBE's Special Education Study Group concluded that the next bold step must now be taken: the creation of an inclusive system that strives to produce better outcomes for all students. An inclusive system of education is based upon the needs of the *whole* student and not merely the academic achievement of the central band of "average" students. As described in the NASBE Study Group's interim report,

> [There is a] need for education that encompasses the many facets of the "whole" child. That is, in order for a child to develop as an academic learner, his or her schooling must encompass a holistic view that is attuned to the student's non-academic needs. Incorporated within this model is the underlying philosophy that education should be germane and relevant for each student, encompassing at the least three spheres of development: (1) the academic...; (2) the social and emotional...; and (3) personal and collective responsibility and citizenship....

For special education, an inclusive system is based on "including" students rather than merely "mainstreaming" them. Mainstreamed students pass in and out of general education classrooms throughout the day. Because they are frequently assigned to the school that houses the district's program for their disability category, mainstreamed students often attend schools that are far away from their home school, isolated from where siblings and friends attend. For example, a school district will typically designate one school to house the program for the "learning disabled" or "mildly retarded," and all children qualifying for that program are then bused to that school for instruction.

Inclusion, on the other hand, means that students attend their home school with their age and grade peers. It requires that the proportion of students labeled for special services is relatively uniform for all of the schools within a particular school district, and that this ratio reflects the proportion of people with disabilities in society at large. Included students are not isolated into special classes or wings within the school. To the maximum extent possible, included students receive their in-school educational services in the general education classroom **with appropriate in-class support**. This instruction is complemented with community-based instruction that provides the student with the opportunity to learn a variety of life and employment skills in normal community settings. And principals of inclusive schools are accountable for the outcomes of **all** of the students in the school.

CERTIFICATE OF SERVICE

I, Frank J. Laski, certify that on November 13, 1992 I served true and correct copies of the foregoing on all parties by first class mail, postage pre-paid to counsel at the following address:

Thomas J. Murphy, Esquire
Executive Center of Greentree
1 Eves Drive, Suite 111
Marlton, NJ 08053

PUBLIC INTEREST LAW CENTER
OF PHILADELPHIA

By _____
Frank J. Laski

125 South 9th Street, Suite 700
Philadelphia, PA 19107
(215) 627-7100

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Attorneys for Appellees