

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

THE PENNSYLVANIA ASSOCIATION FOR  
RETARDED CHILDREN, NANCY BETH BOWMAN,  
et al., on behalf of themselves and  
all others similarly situated

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA, ROBERT  
HENDERSHOT, Acting Secretary of Education  
of the Commonwealth of Pennsylvania,  
PHILADELPHIA SCHOOL DISTRICT, Philadelphia,  
Pennsylvania, et al.

Defendants

Civil Action  
No. 71-42

THE PHILADELPHIA ASSOCIATION FOR  
RETARDED CITIZENS;  
JOHN GARRETT ARMSTRONG,  
by his mother, Patricia Armstrong;  
GREGORY PROODIAN,  
by his mother, Rosette Proodian;  
MARK HORVAT,  
by his mother, Diane Horvat;  
JEANNE MC CREERY,  
by her mother, Margaret McCreery;  
JAMES LEROY GREEN,  
by his mother, Daisy Green;  
LAWRENCE DESTRALO,  
by his mother, Helen Destralo;  
DOROTHY SCHAEFFLER,  
individually and by her mother,  
Dora Schaeffler;  
MICHAEL HELDUSER,  
by his mother, Mary Helduser;  
DONNETTA THOMPSON,  
by her mother, Gloria Thompson;  
WESLEY GORE,  
by his mother, Carrie Gore;  
on behalf of themselves and all others  
similarly situated,

Petitioners for  
Contempt and  
Enforcement

MEMORANDUM IN SUPPORT OF MOTION

### History of the Case

On January 7, 1971, suit was filed in this Court under 42 U.S.C. §1981 and §1983, alleging that certain laws of the Commonwealth of Pennsylvania were unconstitutional in that they violated the rights of school-aged mentally retarded children in Pennsylvania under the Due Process and Equal Protection clauses of the Fourteenth Amendment by denying to these children access to a free appropriate program of public education and training. A three judge court was appointed, and arguments were heard on May 26, 1971. On June 18, 1971, an order was issued requiring notice and a due process hearing before the educational assignment of any mentally retarded child could be changed. Also on that date, the Department of Education and the Department of Public Welfare entered into a stipulation with plaintiffs regarding appropriate due process procedures. On October 7, 1971, a Consent Agreement was entered into by the parties, and an Order was entered by this Court, stating that the sections of the Pennsylvania School Code being challenged could no longer be used to deny mentally retarded children access to free, appropriate public education. In December of 1971, thirteen individual school districts and the Pennsylvania Association of Private Schools for Exceptional Children filed objections to the Court's Order of October 7, 1971. Twelve of these school districts later dropped their objections. On February 14, 1972, the parties entered into an Amended Stipulation and Amended Consent Agreement, which was approved and adopted by this Court in its Order and Injunction of May 5, 1972.

Actions Required Under This Court's Order

The Amended Stipulation approved and ordered into effect by this Court requires that no child of school age who is or is thought to be mentally retarded can be subjected to a change in educational assignment without first being accorded notice and the opportunity to have a due process hearing. Amended Stipulation, Paragraph 2. The notice must describe the proposed action in detail, and state clearly and fully the reasons for the proposal, Amended Stipulation, Paragraph 3(c), and inform the parent or guardian of the child of the child's right to a hearing.

The hearing must be scheduled "not sooner than fifteen (15) nor later than thirty (30) days after the receipt of the request for a hearing from the parent or guardian, provided however that upon good cause shown, reasonable extensions of these times shall be granted at the request of the parent or guardian." Amended Stipulation, Paragraph 3(j). There is only one exception to the requirement of prior notice and opportunity to be heard before an educational change.

(In) extraordinary circumstances the Director of the Bureau of Special Education, upon written request to him by the district or intermediate unit setting forth the reason therefore and upon notice to the parent may approve an interim change in educational assignment prior to the hearing, in which event the hearing will be held as promptly as possible after the interim change. Amended Stipulation, Paragraph 3(v).

The Amended Consent Agreement approved and ordered into effect by this Court provided that this action was maintained as a class action on behalf of all mentally retarded persons who were residents of Pennsylvania and who "have

been, are being, or may be denied access to a free public program of education and training while they are, or were, less than twenty-one years of age." Amended Consent Agreement, Paragraph 1. The immediate relief provided was to be provided to all members of the class who were less than twenty-one years of age on May 5, 1972. Paragraph 7 of the Amended Consent Agreement provides:

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

(Emphasis added)

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

Amended Consent Agreement, Paragraph 43.

The Amended Consent Agreement also ordered the adoption of certain policies and the preparation of certain plans by the defendants. Specifically, homebound instruction was to be made available to mentally retarded children where appropriate, provided that it was clearly recognized

that homebound instruction is the least preferable of the programs of education and training administered by the Department of Education and a mentally retarded child shall not be assigned to it unless it is the program most appropriate to the child's capacities;

that homebound instruction shall involve education and training for at least five hours a week or for such other reasonable

period as the State Board of Education may by regulation provide;

that an assignment to homebound instruction shall be reevaluated not less than every three months, and notice of the evaluation and an opportunity for a hearing thereon shall be accorded to the parent or guardian, as set out in the Order of this Court dated June 18, 1971, as amended.

Amended Consent Agreement, Paragraph 33

The Agreement also required the Commonwealth defendants to submit to the Masters within thirty days of the date of the Court's Order a plan for the identification, location and evaluation of mentally retarded children who were members of the plaintiff class, and within ninety days of the date of the Order, to put the plan into effect by using it to identify, locate and evaluate those children.

Amended Consent Agreement, Paragraphs 48 and 49. In compliance with this requirement, defendants promulgated the Commonwealth Plan for Identification, Location and Evaluation of Mentally Retarded Children, hereinafter referred to as COMPILE. The drafting of and compliance with the plan are explicitly required by the Amended Consent Agreement, and therefore compliance with COMPILE is required by the Court's Order adopting that Agreement.

COMPILE, pertinent portions of which are attached to the annexed Motion as Exhibit L, requires that a multidisciplinary team evaluation be provided to each member of the plaintiff class, providing an individualized assessment leading to prescriptive programming to meet the individual needs of each child. COMPILE, page 2. All relevant disciplines must evaluate each child and then meet in joint conference to recommend an appropriate program of education and training. COMPILE, pp. 6-9, Paragraphs 3a-c.

These requirements have been binding on all defendants, including the School District of Philadelphia, for more than four years. Moreover, the requirements of this Court's Order have been reinforced by subsequent federal legislation. The Education Amendments of 1974, Public Law 93-380, require any state receiving funding under the Act to establish a goal of providing full educational opportunities for all handicapped children, and to submit a detailed plan and timetable for achieving that goal by August of 1974. It also requires the adoption of procedural safeguards in identifying, evaluating and placing handicapped children, and mandates that such children be integrated into regular classes whenever possible.

Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93-516, prohibits discrimination against handicapped individuals under any program or activity which receives federal financial assistance. The proposed regulations under that section, published in the July 16, 1976, Federal Register, provide, in relation to education, that any educational agency receiving federal monies must provide a free suitable education, including related services, to each handicapped person of school age, regardless of the nature or severity of the person's handicap. Section 84.34, page 29564. Moreover, this education must be provided in the most normal setting feasible, Section 84.35, page 29565, and only after a full, individual evaluation of the person's special educational needs. Section 84.36, page 29565.

The Education for All Handicapped Children Act of 1975, Public Law 94-142, requires that each handicapped child be provided with "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child." Section 4(a)(16). A free, appropriate education must include related services, which are "such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services...) as may be required to assist a handicapped child to benefit from special education..." Section 4(a)(17) and (18). The Act also provides for due process procedures, Section 615, the creation for an individualized education plan for each handicapped individual, Section 612(4) and Section 614(a)(5), and the education of children in the most normal and least restrictive setting possible, Section 612(5)(B).

These federal laws do no more than emphasize the requirements for appropriate education set down by this Court's 1972 Order. The Order is neither unusual nor overly burdensome. It is in the mainstream of a trend in both law and education, which has as its goal the provision of free, appropriate educational services to handicapped children in such a manner as to safeguard their rights both to due process and to education.

Violations of this Court's Order by the  
School District of Philadelphia

The School District of Philadelphia is in contempt of this Court's Order. The School District is an original named defendant in this action. It has had ample notice of this Court's Order and of its provisions. The School District's failure to comply with the provisions of that Order has been repeatedly brought to the attention of School District administrators and officers by the Local Task Force on Right to Education, advocacy groups and parents. Little effort has been made to achieve compliance. The Court's Order is clear.

The Third Circuit in the case of In Re Rubin, 478 Federal Reporter 2d 104 (1967), at 108, stated:

In order to cite a person for contempt of a court order, two principles, each a corollary of the other, must, among other requirements, be established. The first of these is that it must be proved that the alleged contemnor had knowledge of the order which he is said to have violated...(Citations omitted). The corollary of this proposition is that the order which is said to have been violated must be specific and definite.

The School District of Philadelphia meets these requirements.

The School District of Philadelphia had knowledge of the Order in this action. The Order required the School District in clear language to provide due process hearings within the time frame specified in Paragraph 3(j) of the Amended Stipulation. This is not now being and has never been done. Exhibits B and J. The Order requires the School District to provide multidisciplinary evaluations according to COMPILE. This is not not being done on any scale, and has never been done for the vast majority of children served by the School District. Exhibits A-K. The Order requires

the School District to provide a free, appropriate program of education to every mentally retarded child within its jurisdiction by September 1, 1972. There are children who are still excluded from school, and others who have been excluded for periods of time since September 1, 1972, in violation of the Court's clear mandate. Exhibits D, E, F and I. The School District refuses to provide appropriate education to retarded children by refusing to hire the personnel to provide them with individual educational prescriptions, appropriate therapies, or even the transportation to get them physically into school. Exhibits A-K.

Despite the clear language of Paragraph 33 of the Amended Consent Agreement relating to homebound instruction, the School District has used it as a means to segregate children it does not wish to educate in the public schools, even though they are perfectly capable of attending class. Moreover, it has failed to provide for the children relegated to such placement the mandated evaluations and due process rights. Exhibits F, I and L. Additionally, the School District has consistently violated the due process rights guaranteed by Paragraph 3(v) of the Amended Stipulation by excluding children from school for periods of time without offering them alternative placements, informing them of their due process rights, or receiving prior permission to change their placements from the Director of the Bureau of Special Education. Exhibits D, E and F.

The fact that these violations arise under a consent agreement has no effect on the Court's power to punish them

under its contempt power. U. S. v. Schine, 260 Federal Reporter 2d 552, (2nd Circuit, 1958 ), Franklin Mint Corporation v. Franklin Mint Ltd., 360 Federal Supplement 478, (ED Pa., 1973). The Court has the inherent power to enforce its own decrees through the use of that power. Shillitani v. U. S., 384 U. S. 364, (1966).

#### Standing of Petitioners for Contempt and Enforcement

The Philadelphia Association for Retarded Citizens is one of the member chapters of the Pennsylvania Association for Retarded Citizens. This Court, in its Order of May 5, 1972, stated:

The Pennsylvania Association for Retarded Children (PARC) and its fifty-three member chapters constitutes an organization which for some twenty years has undertaken the part of the burden of educating and training retarded children in the Commonwealth. In addition, PARC has sought to advance the general interests of retarded citizens in Pennsylvania. Footnote 1.

The Philadelphia Association for Retarded Citizens for many years provided education and training for mentally retarded children in Philadelphia. Since the Court's Order in this case, the Philadelphia Association has been a strong advocate for the rights of children in Philadelphia to free, appropriate education and to due process.

The Philadelphia Association for Retarded Citizens is a permanent member of the Local Task Force for Right to Education. Since 1972, the Philadelphia Association has received hundreds of complaints and requests for advocacy from parents whose children are unable to obtain the services guaranteed them under the Order of this Court.

Because of its long-standing position as an advocate and an authority in the area of educational rights, the Philadelphia Association is uniquely situated to assert the rights of the class of mentally retarded school-aged children in Philadelphia.

Individual named petitioners are all mentally retarded, school-aged Philadelphia residents, and as such, are members of the original PARC class, asserting their rights under the PARC Order.

The Power of the Court to Enforce its Orders and to  
Grant the Relief Requested

This Court has the power to enforce its orders by the use of its contempt powers. As the United States Supreme Court said in McCombe v. Jacksonville Paper Company, 336 U. S. 187, at 193:

We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt is determined by the requirements of full remedial relief. This may entail the doing of a variety of acts.

Petitioners in this motion are asking the Court to use its contempt powers to provide them with full remedial relief by ordering the School District of Philadelphia immediately to provide each named petitioner and each member of the class they represent with a multidisciplinary team evaluation and a written individual educational prescription, to comply with due process time requirements and with hearing officers' decisions ; to hire sufficient personnel to meet the educational needs of retarded children in Philadelphia, and to provide compensatory education for the time lost by members of the petitioners' class because of exclusion from or inappropriate placement in school by the School District of Philadelphia since September 1, 1972.

Moreover, this Court has the power under Rule 70 of the Federal Rules of Civil Procedure to appoint some person or persons

other than the officers and employees of the School District of Philadelphia to devise the plans for providing adequate services and hiring sufficient personnel to meet the educational needs of mentally retarded children in Philadelphia, and to train those personnel. Rule 70 provides in pertinent part:

If a judgment directs a party to execute a conveyance of land...or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party...The court may also in proper cases adjudge a party in contempt.

The School District of Philadelphia has had more than four years in which to comply with the Order of this Court to provide appropriate education to mentally retarded children. The School District has failed to do so and has failed to devise an appropriate plan for doing so. In such a situation, application of Rule 70 is necessary to assure that the Court's Order is carried out, albeit nearly five years late.

There is ample authority for the Court's power to award reasonable costs and attorneys' fees in a contempt action. Lichtenstein v. Lichtenstein, 425 Federal Reporter 2d 1111, (3rd Cir., 1970), modified on other grounds, 454 Federal Reporter 2d 69; Benner v. Philadelphia Musical Society, 233 Federal Supplement 108, (E. D. Pa., 1974); Universal Athletic Sales Corp. v. Salkeld, 376 Federal Supplement 514, (W. D. Pa., 1974), vacated on other grounds, 511 Federal Reporter 2d 904.

An alternative basis for the Court's power to grant the relief requested rests in its inherent power to enforce its own orders by appropriate action. In Morgan v. Kerrigan, 401 Federal Supplement 216, (E. D. Mass., 1975), the District Court enforced its order of June, 1974, requiring desegregation of the Boston public school system, by appointing experts and special masters to help the court devise an adequate desegregation plan. Once

a finding of discrimination had been made by the court, the court was "obliged, as it is empowered, to remedy this wrong." Morgan, supra, at 229-30. The Morgan court took matters back into its hands for further orders because of the delay and "default" of the Boston school committee originally charged with devising and implementing an appropriate desegregation plan. Ibid., at 230. The court gave to the experts it appointed the power to resolve the issues of facilities utilization, program allocation and enrollment units. On appeal, the First Circuit affirmed the court's order, and the unusual grant of power to the experts and the special masters, holding that these were justified by "the School Committee's actual violations of the court's substantive and procedural orders, and its unwarranted delay in the face of the urgent necessity of finalizing these decisions" before the beginning of the next school year. Morgan v. Kerrigan, 530 Federal Reporter 2d 401, (1st Cir., 1976), at 430.

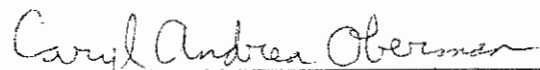
In the action now before this Court, a similar situation presents itself. For four years, the School District of Philadelphia has been left to its own authority to correct a pattern of past discrimination in the provision of educational opportunity by providing appropriate education and due process rights to mentally retarded children in Philadelphia. During that time, the School District has violated this Court's substantive and procedural orders, and has delayed and defaulted on its responsibility to provide and to devise adequate plans for providing appropriate educational services and due process procedures to mentally retarded children. This Court is empowered and obliged to remedy this wrong.

This Court has broad powers to require action in education cases where discrimination is involved. Hart v. Community School Board of Brooklyn, N. Y. School Dist. #21, 383 Federal Supplement 699, (E. D. N. Y., 1974), at 748-9, affirmed 512 Federal

Reporter 2d 37. "A district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." 383 Federal Supplement 699, at 755. The Hart court cites Swann v. Board of Education, 402 U.S. 1, 15, (1971): "Having found a violation, the court has broad equitable powers to order changes designed to eliminate future misconduct and to reduce the effect of prior violations." 383 Federal Supplement 699, at 755.

In order for rights to be effectuated, courts must be willing to enforce old remedies and to create new remedies in the service of their mandates. The Court has the power to do so, and petitioners urge the Court to use that power in the service of their rights.

Respectfully submitted,



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