

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

PENNSYLVANIA ASSOCIATION FOR	:	CIVIL ACTION
RETARDED CHILDREN, et al.,	:	
	:	
Plaintiffs	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
SCHOOL DISTRICT OF PHILADELPHIA,	:	NO. 71-42
et al.,	:	
	:	
Defendants	:	
	:	
WALTER FIALKOWSKI	:	
and DAVID FIALKOWSKI,	:	
by their parents, MARION	:	
and LEONA FIALKOWSKI,	:	
	:	
Petitioners	:	CLASS ACTION

PETITION OF WALTER AND DAVID FIALKOWSKI
FOR ENFORCEMENT OF ORDERS AND FOR SANCTIONS
INCLUDING COMPENSATORY FINE
AND FOR DETERMINATION OF PLAINTIFFS'
RIGHTS UNDER PARAGRAPH 45
OF THE AMENDED CONSENT AGREEMENT

Walter and David Fialkowski, members of the plaintiff class in this action, by their parents and next friends Marion and Leona Fialkowski, hereby move this Honorable Court, nunc pro tunc, as of August 30, 1974:

A. for an order requiring defendants Commonwealth of Pennsylvania, the State Board of Education, the Secretary of Education, the School

District of Philadelphia, their responsible officers and ranking employees, immediately to provide to David Fialkowski a free public program of education and training appropriate to his learning capacities and, pursuant to Rule 70, Fed. R. Civ. P., to appoint some person other than defendants' officers or employees to design a program of education and training appropriate to David Fialkowski, to oversee its provision and to revise the program as necessary to assure its appropriateness to his learning.

B. for an order requiring defendants Commonwealth of Pennsylvania, the State Board of Education, the Secretary of Education, the School District of Philadelphia, their responsible officers and ranking employees, to provide to Walter and David Fialkowski a free public program of education and learning appropriate to each's learning capacities and in the least restrictive setting for such period as is necessary to compensate each for the denial to each of them of such an appropriate program since the Orders of this Court dated May 5, 1972, and, pursuant to Rule 70, to appoint some person to design, oversee, determine, and revise such an appropriate program, as prayed above; or, in the alternative, for an order requiring defendants Commonwealth of Pennsylvania, the State Board of Education, the Secretary of Education, the School District of Philadelphia, their responsible officers and ranking employees, since May 5, 1972, to pay to Walter and David Fialkowski, their parents and next friends, a compensatory fine in such amount as to allow them to purchase an appropriate program of education and training for such period as is necessary to compensate for the denial to them of such an appropriate program since the Orders of this Court dated May 5, 1972; and

C. to hear the question reserved by Paragraph 45 of the Amended Consent Agreement approved and adopted by this Court on May 5, 1972, namely the obligation of defendants to accord compensatory educational opportunity to

members of the plaintiff class, and in particular to Walter and David Fialkowski, of whatever age who were theretofore denied access to a free public program of education and training without notice and without a due process hearing while they were aged six to twenty-one years, and, upon hearing, to order in accordance with this Court's remedial powers and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, further education for Walter and David Fialkowski;

D. for an order requiring defendants and respondents to pay a compensatory fine to Walter and David Fialkowski, their parents and next friends, for such other losses and damages suffered by them by reason of defendants' and respondents' disobedience of this Court's Orders, and to award costs and attorney's fees to them and their counsel.

In support of their motion the plaintiffs Fialkowski aver as follows:

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A. Introduction and Summary

1. On May 5, 1972 this Court enjoined defendants, their officers, employees, agents and successors, inter alia, to provide to every mentally retarded person between the ages of six and twenty-one years "access to a free public program of education and training appropriate to his learning capacities." By Order of October 16, 1972 the Court retained jurisdiction of the matter.

2. The Order that an educational program individually appropriate to each retarded child be provided was based, inter alia, on record testimony before this Court that "an inappropriate educational assignment is tantamount to exclusion" (N. T. 359). See also N. T. 89, 129-30 (Ohrtman) and testimony of Goldberg, Gallagher, Stedman and Blatt, *passim*.

3. The necessary condition of appropriate education of each severely and profoundly retarded student is a fine-grained, rigorous, precise, integrated and individualized formulation of short and long-term educational objectives, the similar selection of teaching methods and techniques, and the similar sequencing of their delivery. In turn, the necessary conditions of this are a multi-disciplinary assessment of each child's developmental levels, his skills and deficits, and his learning styles; and the formulation, and periodic reformulation, of a written prescriptive program based thereon to guide, articulate, and measure the delivery of the individually appropriate program to each child.

4. Such individualized use of this teaching method, commonly called the diagnostic-prescriptive method, is now and has been at all times relevant hereto commonly recognized in the profession as necessary to the appropriate education of each severely and profoundly retarded student. The use of this method constituted the predicate of the testimony of each of the expert witnesses at trial of this case that "without exception all mentally retarded persons are capable of benefitting from a program of education and training." N.T. at 17-21, 22, 24-26, 29, 31, 36, 41-43 (Goldberg); N.T. at 56-57, 58, 64, 69, 72-73, 82-83 (Gallagher); N.T. at 105, 106-7, 116-117, 123, 125 (Stedman); N.T. at 138-141 (Blatt). Commonwealth and School District defendants, their officers and ranking employees, recognized the use of this method as necessary to the appropriate education of plaintiff children. Depositions of School District Associate Superintendent Horowitz and Assistant Superintendent Young (September, 1977)

5. In accordance with Paragraph 48 of the Consent Agreement approved and adopted by this Court, Commonwealth defendants formulated and the Masters approved a plan to identify, locate and evaluate (COMPILE) each member of plaintiff class. As a pre-condition of providing an appropriate program to each child, that plan, which was binding upon Commonwealth and School District defendants, required the multi-disciplinary assessment of each child and the formulation for each child of a written prescriptive program for his education.

6. Among the provisions of the Consent Agreement adopted and ordered into effect by this Court on May 5, 1972, paragraph 50, characterized by this Court as perhaps the most important provision of the agreement, 343 F.Supp. at 288, required Commonwealth defendants to formulate and submit to the Masters for their approval:

"a plan (COMPET) to commence or recommence a free public program of education and training for all mentally retarded persons described(...) and for all mentally retarded persons of such ages hereafter. The plan shall specify the range of programs of education and training, their kind and number, necessary to provide an appropriate program of education and training to all mentally retarded children, where they shall be conducted, arrangements for their financing, and, if additional teachers are found to be necessary, the plan shall specify recruitment, hiring, and training arrangements. The plan shall specify such additional standards and procedures, including but not limited to those specified in paragraph 39 above, as may be consistent with this Order and necessary to its effectuation."

Paragraph 39 specified standards for hours of instruction, pupil-teacher ratios, curriculum, facilities, and teacher qualifications.

7. Because of defendants' failure to abide by and to enforce the multi-disciplinary assessment and written prescription requirements of COMPILE,

and because of defendants' failure even to formulate let alone to promulgate COMPET and their consequent failure to provide the training, the supervisory assistance, and the standards for organizing and setting objectives for education of plaintiff class and otherwise by reason of defendants' derelictions, Walter and David Fialkowski have, contrary to this Court's order, not been provided "access to a free public program of education and training appropriate to" their respective "learning capacities."

8. With a "program of education and training appropriate to his learning capacities" David and Walter Fialkowski each could have and can attain vocational proficiencies and skills. By virtue of defendants' derelictions, and by defendants' express and categorical disavowal, inappropriately, of vocational objectives for the teaching of severely and profoundly retarded children, David and Walter Fialkowski have not been provided such appropriate education. The affidavit of MARC GOLD is attached hereto and incorporated herein as if fully set forth here. Appendix A

B. The Plaintiffs Fialkowski

9. Marion and Leona Fialkowski are the parents of ten children, ranging in age from Barbara, age 29, a poet, who in June of 1976 received her Ph.D. in English from the University of Ohio and was appointed to the faculty of Bowling Green University, to Kate, age 12, who upon her graduation from Sullivan Elementary School in June was awarded seven academic prizes.

10. In the years since 1959, when the Fialkowskis first sought appropriate schooling for Walter, Marion Fialkowski has worked as a candymaker and, since 1961, as a Supervisor at the Wm. H. Rorers pharmaceutical company. On August 31, 1976, Marion Fialkowski, at age 64, retired.

11. Two of the Fialkowski's children, David, age 14, and Walter, age 24, are the petitioners here.

12. Walter Fialkowski was born February 10, 1953. Four weeks after birth he underwent surgery for an intestinal disorder, and insufficient oxygen at and after surgery caused him to be profoundly retarded and cerebral palsied.

13. David Fialkowski was born March 19, 1962. Because of a birth defect, David is severely to profoundly retarded and has cerebral palsy.

C. The Non-Education of The Plaintiffs Fialkowski

1959 - 1968

14. Walter Fialkowski was of school age with the school year beginning September, 1959. He was, however, excluded from school until June, 1968.

15. David Fialkowski was of school age with the school year beginning September, 1967. He was excluded from school until June, 1968.

16. On or before June 23, 1959, the Fialkowskis requested that Walter be admitted to school. On June 23, 1959, the school district decided to "omit examination this year" and not to admit Walter to school.

17. On July 15, 1960, Walter Fialkowski was examined by the school district, was not recommended for school placement, but for re-examination in July, 1962, "at which time exclusion will probably be made".

18. On July 17, 1962, Mr. Cloak, a school district psychologist gave a psychological examination to Walter Fialkowski, concluded that "This child is obviously uneducable and almost completely untrainable. He is not now and will not be a candidate for any public school facility for retarded children", and recommended "permanent exclusion".

19. On January 4, 1963, the school district assigned an IQ of "Below 21" to Walter Fialkowski, found him to be "uneducable and untrainable" and, after approval by the Philadelphia Board of Education, and by the State Superintendent of Education (as the Secretary was then called), excluded him from school, by placing him on roll at Longfellow School and then dropping him.

20. Between 1962 and 1968 and thereafter, school district employees on several occasions suggested to the Fialkowskis that Walter be placed in a state institution for the mentally retarded; and on each occasion the Fialkowskis expressed their wish that Walter continue to live at home and that he be educated in the community.

21. On July 17, 1967, David Fialkowski was examined by a school district psychologist and was found to be "a severely retarded child who may eventually need institutional placement". David was not admitted to school in September of 1967; rather his admission was postponed indefinitely.

1968-1972

22. In June, 1968, Walter and David Fialkowski were enrolled in the multiple-handicapped class established through the efforts of his mother at Longfellow School and attended until May, 1971.

23. From May, 1971 until January, 1972 they attended a class organized by his mother and run cooperatively by parents at the Northeast Boys Club. From January, 1972 until December 1972, excepting the summer, they attended the class at Longfellow.

24. Leona Fialkowski was "a pioneer in the effort to have the School District of Philadelphia provide in-school education for Multiple-Handicapped Children and worked untiringly to make certain the Multiple-Handicapped children receive all of the educational benefits which are due them." (quotation from December 3, 1973 letter of Thomas K. Minter, District Seven Superintendent, to Mrs. Fialkowski).

25. Mrs. Fialkowski "played the primary role in having (the first) class (in the Pennsylvania public school system for severely and profoundly retarded children) established." (quotation from March 30, 1970 letter of John G. Mooney, Assistant to the Superintendent of the Philadelphia School District, to Mrs. Fialkowski).

26. In May of 1968, Mrs. Fialkowski approached school district officials and then ultimately, the then Director of Special Education, Dr. Jerry Miller, to establish a school program for severely and profoundly retarded children. After her presentation to the School Board, a six-week summer program was authorized by the Board.

27. On August 12, 1968, the School Board approved Mrs. Fialkowski's request to continue the program at Longfellow School for the severely and profoundly retarded children through the school year.

28. Mrs. Fialkowski recruited volunteers to assist in the class, raised money and secured donations of equipment for the class, persuaded the School District first to pay transportation expenses to get the children to school and then to provide school bus transportation for the children

informed the School District of federal monies available to fund the class, and persuaded the District to install an inclinator on the steps of Longfellow School.

29. In 1970, Mr. and Mrs. Fialkowski met in the office of the Secretary of the Commonwealth's Department of Education (or Commonwealth Superintendent of Public Instruction as he was then called) with then Secretary Kurtzman and the Director of the Bureau of Special Education William Ohrtman to inform them of the Longfellow program for severely and profoundly retarded children, to seek (successfully) state funding of the costs of the program and to seek (unsuccessfully) state direction to improve the quality of the program.

30. No multi-disciplinary assessments of David or Walter were made or caused to be made by defendants during the period 1968-1972 nor were written prescriptions for their education and training formulated.

31. November, 1971, evaluations of the Longfellow class and of the parents co-operative class at the Northeast Boys Club by Bernice B. Baumgartner, then Director of Education for the Pennsylvania Department of Public Welfare, an experienced teacher of the severely and profoundly retarded and an author of several books thereon; William David Wood, Educational Co-ordinator for the Philadelphia Association for Retarded

Children; and Paul C. Richardson, Director of Special Education Programs at the Elwyn Institute are attached as Appendix B and incorporated herein as if set forth here in their entirety.

32. The teacher of the Longfellow class at the time of the evaluation, taught the Longfellow class since September of 1968; the findings of the 1971 evaluation of the Longfellow program obtained throughout the period 1968 - 1972 and any competent evaluation of the class would have disclosed them.

33. On the one hand the program offered at Longfellow sought to teach such things as distinguishing the concepts of left and right and how to begin to read - skills not appropriate to the education of severely and profoundly retarded children.

34. On the other hand, the program offered at Longfellow constituted "play school", not the structured program necessary to the appropriate education of retarded children.

35. Both defects arise from the failure to use the diagnostic prescriptive method, including multidisciplinary evaluation and written prescriptive programming.

The Fialkowskis' Request for Hearing on Appropriate Program -

36. By letter of May 23, 1972, shortly after the PARC orders were entered on May 5, 1972, the Fialkowskis requested a hearing on the education of Walter and David.

37. In response, Mr. and Mrs. Fialkowski met with Dr. Young, Dr. Minter and Mr. D'Amico on June 13, 1972, but no hearing was scheduled.

A school district memorandum of that meeting recites "It is apparent that the actual placement of David and Walter is not the prime question. The principal problem revolves around their dissatisfaction with the manner in which the MH class is being operated."

38. By letter of July 7, 1972, the Fialkowskis were advised that their request for a hearing for their children had been turned over to the Legal Division of the School District, and that they should hear further within two weeks. They did not so hear, nor was the hearing scheduled.

39. On March 22, 1973, the Fialkowskis received two due process notices from the school district. Although the PARC Decree, Amended Stipulation, paragraph 3 (c) requires that such notices include a statement "in detail" of the educational program recommended for a child, the Fialkowski notices (at page 2) did not specify the program design or content but said only:

"Walter's severe mental and physical handicaps warrant his placement in a class specifically designed to aid him to develop to the best of his ability."

"David's severe mental and physical handicaps warrant his placement in a class specifically designed to aid him to develop to the best of his ability."

A supplementary letter from the school district, dated March 29, 1973, recommended "continuation in the class for multiply-handicapped children", but contained no specification of program.

40. On March 26, 1973, the Fialkowskis signed the due process form thereby again requesting a hearing on the educational programs for Walter and David.

41. On May 9, 1973, the hearing was scheduled for May 23, 1973 and a notice of hearing was sent to the Fialkowskis.

The hearing was held on May 23, 1973 and a decision was rendered on or about July 10, 1973. The hearing officer's decision was transmitted to the Fialkowskis and to the school district on or about July 10, 1973. The Fialkowskis were not informed by the hearing officer or by any official or employee of the Department of Education or of the School District of their right to appeal the hearing officer's decision to the Secretary of Education under a newly formulated procedure for appeals which purported to be effective about June 4, 1973, and the Fialkowskis did not know of their purported right to appeal to the Secretary. Nor were the Fialkowskis informed of their right to review in the Commonwealth Court, and they did not know of any such right.

42. Those matters, arising from the use of the diagnostic-prescriptive method, which are crucial to the provision of appropriate education to severely and profoundly retarded students were not articulated, inquired into or in any way even aired at the Fialkowski hearing and as a consequence that hearing and the decision emanating therefrom did not in any way address, let alone redress, the appropriate education of the plaintiffs' Fialkowski.

43. Defendants' delay in scheduling hearings and their failure to articulate and describe programs in sufficient detail in the due process notice to support the testing of such programs' appropriateness in the hearings themselves was and is endemic and system-wide, and at all times relevant hereto has been known to defendants, their officers and their ranking employees, for example:

a. Joseph Lantzer, Director of the Right to Education Office of the State Department of Education informed School District Superintendent Costanza by letter of October 31, that the School District of Philadelphia was not in compliance with the provisions of the PARC Decree and specified, inter alia, "The period of time between the requests for a hearing signed by the parents, the assignment of hearing officers and the actual hearing are almost always well beyond the stipulations included in the Amended Consent Agreement. In addition there have been cases of recommendations presented at hearings being different than those on the 'Notice of Proposed Change in Educational Assignments'... as well as cases where parents have felt a need to go to a hearing in order to find an avenue of communication with school personnel in such areas as transportation, specific class placement and program content."

b. Nancy Heyman, Regional Field Co-Ordinator in the Right to Education Office, reiterated these violations in a letter of January 29, 1974 to Winifred Tillery, Deputy to School District Assistant Superintendent for Special Education Young, specifying, inter alia, that "the program which is being proposed is not fully expressed in the notices," and by letters to Edward M. Cloak, Assistant to Young between December 21, 1973 and February 14, 1974, Ms. Heyman returned a series of Notices to the school district for insufficient specificity of assessment and program in the Notices.

44. For the reasons stated in paragraph 43, and for other reasons, the Fialkowski due process hearing did not, and most hearings do not, function to test and assure educational program appropriate to each child. The affidavit of Bruce Dworkin, Research Director and presently Acting Director of the three-year National Institute of Education funded Project to assess the impact and implementation of the PARC decree is attached hereto as Appendix C and incorporated here.

45. For example, the hearing officers had not, by May of 1973, nor have they at any time since, been given any training by the State Department of Education in the diagnostic-prescriptive method nor in questioning and other fact-finding techniques. Such training was suggested by the Pennsylvania Association for Retarded Citizens as early as October 4, 1973 and the suggestion reiterated to Secretary Pittenger by PARC's letter to him of May 8, 1974.

46. As a defendant in the PARC case, the Philadelphia School District was apprised of the timing and detailed statement requirements not only by the PARC Courts' Final Orders of May 5, 1972, but by the Preliminary Orders of October 7, 1971 and, even earlier, by the original Stipulation on due process executed in June of 1971.

1972-74

47. The 1972-73 Longfellow class for David and Walter Fialkowski did not commence until October 9, 1972.

48. On November 20, 1972 Mrs. Roberta P. Rifkind became the teacher of the Longfellow class and continued to teach the class after it was moved to Sullivan School in September, 1973.

49. No multidisciplinary assessments of Walter or David were made or caused to be made by defendants during the period 1972-1974 nor were written prescriptions for their education and training formulated.

50. When Mrs. Rifkind arrived in the class there were no written prescriptions for the education and training of the children. She had available to her only the district's psychological reports on the children, and no records of their previous education except "some anecdotal records and year-end summaries that were very general".

51. Neither a Referral Placement Master nor the accompanying fourteen-page Commonwealth Right to Education Evaluation Form, both required under COMPILE, had been completed for Walter or David.

52. In December of 1972 Mrs. Rifkind herself filled out Right to Education Forms for Walter and David by herself, despite the instruction on the evaluation form that "all disciplines necessary for evaluation of the person should be contacted and/or requested to perform an examination." She did so because "at that time children at Longfellow were not being considered 'Right to Education Children.'" In the "Program Prescription" portion of the evaluation form where the form instructed "describe a program for the person based on the preceding findings", Mrs. Rifkind wrote, for both Walter and David, "gross motor, fine motor, visual

motor, auditory, tactile/kinesthetic, self-concept and self-help, communication, conceptual, social interaction." The same entries were made in the Program Prescription portion of the evaluation forms filled out by Mrs. Rifkind for two other very differently functioning children in the class, W.L., except gross and fine motor was left out, and C.H., except self-concept was left out.

53. At no time during 1972-73 or 1973-74 did Mrs. Rifkind formulate or have available to her a written prescription for the education of David and Walter Fialkowski. There were no written multi-disciplinary assessments and no written statements of long-term or short-term objectives, nor of task breakdowns and sequencing of learning tasks (other than the anecdotal), and no recording of progress on tasks and toward objectives (other than the anecdotal).

54. As a consequence the program offered in that class was not appropriate to the education of the plaintiffs Fialkowski. For example, the cognitive and language development materials and exercises were derived from nursery or kindergarten materials and from relaxation materials for speech therapy and were inappropriate to the education of severely and profoundly retarded students, and in particular to the plaintiffs Fialkowski. There was no vocational programming in the class.

55. The eight children enrolled in Mrs. Rifkind's class from January, 1973 through the school year 1973-74 ranged in age from 9 years (1), through 11 years (4), 12 (1), 17 (1) to 20 years (1).

56. Their developmental levels were very heterogenous ranging from one, C.H., a physically handicapped child refused admission to Widener School, who functions at a high moderate level of retardation with language and conceptual skills in the high "trainable" range and who has

been assigned an I.Q. in the 50's; to another, I.L., a "trainable" child, "not low functioning", from a Spanish-speaking family, who has an artificial limb and who in the spring of 1974 was assigned to a "trainable" class; to another, W.L., a higher functioning emotionally disturbed child diagnosed as having childhood schizophrenia. Five of the children were ambulatory; three were not. Of the five apparently severely or profoundly retarded children in the class, three had expressive speech of varying levels and two had no speech at all. Receptive language varied from a developmental level of six months to eighteen months. Toileting and self-feeding skills varied with each of the children.

57. As a consequence of the absence of multi-disciplinary assessments, or written prescriptive programs for each child, of recorded measures of teaching progress, together with the heterogeneous learning needs of the children in the class, the fine grained development and integration of individualized instruction could not and did not take place and the plaintiffs Fialkowski were not offered education appropriate to their learning capacities.

58. On or about December 3, 1973 the Fialkowskis sought to enroll David and Walter in the Spruance School class for multiply-handicapped children, one of seven multiple-handicapped classes funded by federal Title III funds through the state Department of Education, whose teachers received more inservice training than any others, which were required by federal regulation to be evaluated annually and which had vocational training facilities available. At this time there were 69 Multiply Handicapped classes altogether in the Philadelphia School District. The Fialkowski children were denied access to the Spruance School class.

1974-1976

59. Walter Fialkowski became 21 on February 10, 1974. Despite the provisions of Section 1926 of the School Code, 24 Purd. Stat. Sec. 19-1926 that "Any board of school directors may admit persons less than six years of age, or more than twenty-one years of age, to suitable special or vocation schools or departments," and the Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794, defendants have not offered or provided schooling to Walter since he became 21.

60. David Fialkowski was assigned to Dennis Flanagan's classroom at Sullivan School and attended there from October 21, 1974 through the end of the 1974-75 school year and from the beginning of the 1975-76 school year through September 24, 1975 and from December 4, 1975 through March 12, 1976.

61. No multidisciplinary assessments of David were made or caused to be made by defendants during the period 1974-1976 nor was a written prescription for his education and training formulated.

62. The only assessments done by the school district and seen by David's teacher were three, each by a school psychologist, dated December 19, 1972, May 13, 1971, and April 25, 1967 and two by a physical therapist, dated October 21, 1974 and June 19, 1975.

63. David's teacher was given no records of David's previous classroom performance.

64. The file School District of the School Districts' Psychological Services Division contained:

a. a physical therapy and rehabilitation evaluation dated October 14, 1974 by Richard G. Ruoti, a contract physical therapist for the base service unit;

b. a Psychological Evaluation administered July 7, 1974
by two private clinical psychologists;

c. a Vineland Social Maturity Scale, undated;

d. a Vineland Social Maturity Scale, administered December
19, 1972;

d. a Vineland Social Maturity Scale, administered December
19, 1972;

e. a face sheet Referral/Placement Master (RPM) dated
March 13, 1973 containing, inter alia, recommendations of program
design/content;

f. a physical therapy evaluation by D. Noga L.P.T.
(undated)

g. a physical therapy evaluation by D. Noga L.P.T.
December 1975.

h. physical therapy progress notes by D. Noga for the
period January 1975 to June 1975 and September 1975 to March 1976;

but none of these assessments were shown to David's teacher.

65. Mr. Flanagan did not know the recommended program
design/content code used on the face sheet of the Referral/Placement
Master, and he had never seen an R.P.M. prior to his deposition in
August, 1976.

66. None of the school district files including the
Psychological Services file which otherwise contains all records
of formal assessments administered by the district to David, contains
the COMPILE required the fourteen page Right to Education Evaluation Form

which is intended to accompany the Referral/Placement Master. The same is true of the RPM for Walter Fialkowski.

67. The School District never secured the extensive records of St. Christopher's Hospital for Children on David, and, per force, never shared them with David's teachers, which records include neurological, orthopedic, vision and social work evaluations as well as psychological and general physical evaluations.

68. At no time were all of the authors of the several assessments of David convened together with his teachers to design and plan a program for his or to write a prescription for his education and training.

69. The PARC Decree at paragraph (j) of the Order and Injunction enjoined the Philadelphia School District "to re-evaluate the educational assignment of every mentally retarded child not less than every two years... and upon such re-evaluation to provide notice and the opportunity for a hearing." Notice having been given the Fialkowskis on or about March 22, 1973, re-evaluation and notice including a statement "in detail" of the program thought to be appropriate for the education and training of David was due no later than March 22, 1975. Such re-evaluation and notice has not been given.

70. The only writings of any kind during this period prescriptive of David's program are 12 cards prepared by Mr. Flanagan, and used during the 1975-76 school year. These cards, in the opinion of Charles R. Glean, appointed School District Supervisor of Classes for the Severely and Profoundly Retarded in November of 1974, represented the farthest development and use of prescriptive techniques he observed in eight visits to the multiply handicapped classes at Sullivan School.

71. In consequence of the failure to provide a multidisciplinary assessment and the failures otherwise to train, to supervise, and to support teachers in the use of the diagnostic-prescriptive method, as pleaded below, the limited 12-card prescriptions selected teaching objectives for David "arbitrarily", set some teaching objectives which were contra-indicated by David's physical condition, set others which sought to teach skills which he already had, and could and did not provide an appropriate program of education and training from which he could benefit.

72. The hearing officers decision of July 10, 1973 had directed that:

a. " regular conference be scheduled at least monthly with the parents to explain the program for David... as well as to provide suggestions for parents' follow-up of techniques and approaches at home" and that

b. "the supervisor of special classes consult regularly with the teacher of the multiply-handicapped class to review the individual programs goals for each student. "

During the period 1974-1976 neither of these things occurred. There was only one such conference, in the Spring of 1975, and while the district supervisor met periodically with Mr. Flanagan, and others, they never "sat down specifically to discuss David's program"

73. In the class taught by Mr. Flanagan and one aide there were 6 to 8 children ranging in age from five to 18 (a distribution of 5, 9, 12, 13, 15, 18 at the close of the 1975-76 school year) with a wide range of developmental levels in the various skills areas. No vocational skills were taught.

1976-1977

74. In early September, 1976 the Fialkowski's received a form letter dated August 21, 1976 from the District Seven Special Education Supervisor assigning David to a "special education class" at the Marshall School.

75. The August 31 letter states that "As a result of end-of-the school year or summer evaluations and because we wish to do our best to meet the needs of your child we have re-organized several of our special education classes in District Seven." David, however, received no end-of-the school year or summer evaluation, nor (see paragraph 69 above) did he receive the periodic re-evaluation required every two years by the PARC decree and due David no later than March 22, 1975.

76. Children previously assigned to classes at Sullivan School were reassigned to classes in Marshall or other schools for this school year for one or more of three reasons (1) "to make age grouping a reality where before it wasn't," (2) to allow safe and easy access for children who cannot walk to the classrooms (Sullivan has 20 steps and no ramp or inclinator), and (3) because of changes in their educational program. David Fialkowski walked the stairs at Sullivan School.

77. Despite the program-altering reasons for change, David Fialkowski was not accorded due process notice of the change in assignment with a statement "in detail" of the proposed program, nor has he been accorded the opportunity to be heard on the appropriateness of the proposed program, as required by the PARC Decree.

78. Mr. and Mrs. Fialkowski visited the Marshall School before the school year began and spoke with the proposed new teacher who told them that she had never taught severely or profoundly retarded children before, that she was fearful of lifting the children or otherwise engaging them physically lest she injure them, that she would not be teaching them toileting skills, that she had not received any diagnostic or educational records of the children assigned to her class and would in any event prefer to "design" her own program with the help of the physical therapist assigned to the class.

79. Neither the Longfellow, the Sullivan nor the Marshall classes are or were funded under Title III.

80. Mr. and Mrs. Fialkowski thereupon withdrew David from the public schools and enrolled him in a day program, largely for over-school-age persons, at Woodhaven Center, the Southeastern State School and Hospital for the Mentally Retarded, which is operated for the Department of Public Welfare by Temple University. David's parents want for him an appropriate program of education and training in a school in the community.

81. On November 14, 1975, Walter Fialkowski was admitted to Woodhaven Center and thereafter he has lived at the institution. Under prevailing policy Walter Fialkowski, like any other resident of Woodhaven, may reside and receive education and training there for no more than two years from the date of his admission and thereafter must reside and receive training in a community setting.

D. The Actions and Inactions of Defendants, Their Officers
And Ranking Employees Which Have Caused the Non-
Education of David and Walter Fialkowski

82. The cause of defendants derelictions and the consequent non-education of the plaintiffs Fialkowski is not money.

83. In the four and a half years since the PARC Decree the Philadelphia School District has enrolled an additional 1700 mentally retarded students, 635 of whom are severely and profoundly retarded. Eighty-nine classes have been established for the severely and profoundly retarded students, but the other retarded students have largely been accommodated in previously existing classes. In 1970-71, the last pre-PARC school year, the Philadelphia School District had 588 classes for the mildly and moderately retarded; in 1975-76 the District had 527 such classes.

84. In 1970-71, the Philadelphia School District received \$16 million in state appropriations for special education; in 1975-76, the District received \$34.4 million for special education. The 1972-73 allocation was \$18 million (in that school year there were two strikes lasting three months); in 1973-74, \$23.1 million; in 1974-75, \$29.4 million.

85. Statewide appropriations for special education increased even more: in 1970-71, \$62 million; in 1972-73, \$139.6 million; in 1973-74, \$137.6 million; in 1974-75, \$152.8 million; in 1975-76, \$243 million.

86. The non-education of the plaintiffs Fialkowski is the consequence of Commonwealth and School District defendants' contemptuous failure to implement the requirements of COMPILE and their contemptuous failure to formulate, to promulgate or to implement the requirements of Paragraph 50 of the Decree, characterized by this Court as perhaps the most important of the Decree's requirements, 343 F. Supp. at 288, namely:

"a plan (COMPET) to commence or recommence a free public program of education and training for all mentally retarded persons described (...) and for all mentally retarded persons of such ages hereafter. The plan shall specify the range of programs of education and training, their kind and number, necessary to provide an appropriate program of education and training to all mentally retarded children, where they shall be conducted, arrangements for their financing, and, if additional teachers are found to be necessary, the plan shall specify recruitment, hiring, and training arrangements. The plan shall specify such additional standards and procedures, including but not limited to those specified in paragraph 39 above, as may be consistent with this Order and necessary to its effectuation."

Paragraph 39 specified standards for hours of instruction, pupil-teacher ratios, curriculum, facilities, and teacher qualifications.

87. Defendants, by and large, did provide to the plaintiff class physical access to the schools. It was access to appropriate schooling, delivery to the plaintiff class of appropriate educational program, that was wanting. The risk and the reality of inappropriate programming for severely and profoundly retarded students was called to defendants' attention in the several reports by the Masters appointed by this Court and was attributed by the Masters to defendants' failures

- a. to implement Paragraph 50 of the Decree;
- b. to qualify staff for teaching severely and profoundly retarded students, whether by pre-service or continuing in-service training;
- c. to supervise and in-service the staff;
- d. to provide the necessary ancillary services, including multi-disciplinary assessment services;
- e. to specify and to superintend, and support, the necessary and appropriate methods of instruction and courses of study for severely and profoundly retarded students;
- f. to evaluate program for them;

g. to specify and to superintend the constitution and size of classes, including grouping by age and developmental level, teacher-student ratio and side-teacher ratio.

The relevant parts of the second and third Master's Reports and the entire fourth and final Report of the Masters including its Exhibit A is attached hereto as Appendix D and incorporated herein.

88. From the beginning defendants recognized the necessity to provide systematic and intensive staff development if severely and profoundly retarded children were to receive appropriate programs of education and training. For example,

a. In Commonwealth and Philadelphia School District Plan For Implementation of the Right to Education Decree By January 1973, submitted to this Court on November 6, 1972 in response to the Court's Order of October 5, 1972, the defendants jointly wrote:

"Implementation of the Right to Education decree requires initial and continuous staff development of special education teachers, para-professionals, and supporting professional staff. In addition, in order to provide the climate essential to acceptance of the new population, a program of broad staff development to include total faculties is needed. Great emphasis upon in-service training is highly essential because of the general lack of first hand experience in working with severely retarded children. Although special education certified teachers and supportive staff are qualified by training to understand the problems they are facing, they, for the most part, have not had the intimate day-by-day experience to meet the demanding needs of the severely retarded."

b. In The Pennsylvania State Board of Education, Special Education Personnel Preparation Priorities As Recommended By the 1202 Commission (June 18, 1975), submitted by defendants Secretary and the State Board of Education in satisfaction of requirements of federal law for federal funding:

"In order to satisfy some recent changes in special education activities, it is necessary to begin emphasizing the development of teacher behavior designed to deliver programs and services for the lower functioning pupil (particularly the severely and profoundly retarded). Most educational programs in the past have been primarily concerned with the educable mentally retarded child.... A change is needed if we are to prepare our teachers, both in-service and pre-service, to deliver programs and services to other exceptional children and adults whose individual needs are distinctly different."

c. State defendants stated at part II A3, (page 3) of

"Defendant Commonwealth of Pennsylvania's Proposed Findings and Conclusions (sic) of Fact Concerning the Final Report of the /PARC/ Masters,
and submitted to the Masters in December, 1973 or January, 1974 for consideration by the Masters in the formulation of their final report,
"nearly all school psychologists are not skilled and have never been trained in prescriptive programming".

d. The School District's Report of Problems in Implementation of the Right to Education Decree (July 27, 1973) pages 8 and 9, identified the problems in "The Instruction Program" as:

- "1. The problem of provision of regular classroom supervision to give on-site assistance to teachers with development of specific educational prescriptions to meet individual pupil needs;
2. The problem of assistance to teachers in the development of workable, realistic plans for accurate record keeping and periodic careful reassessment;
3. The problem of sufficient time (without responsibility for pupil supervision) for teachers to study records, as (sic) prescriptive programming, create materials, confer with parents, use supportive resources;"

and the problems in "Staff Recruitment and Development" as:

- "1. The problems of pre-service training which does not equip teachers for work with the severely retarded and multiple handicapped pupils;
2. The problem of the difficulty in providing the necessary amount of detailed classroom supervision in order to insure the effective application of course content in the classroom;

3. The problem in making immediate direct response to total staff development needs at the local school level because of problems of funding, provision of time, union regulations and identification of available qualified staff."

and concluded that the three priority "recommendations for future implementation" were:

- "1. Need for staff development.
2. Emphasis upon importance of processes of instruction and training.
3. Development of more exact criteria for classification and placement of children."

e. On October 15, 1974, the Commissioner of Basic Education of the State Department of Education, Donald M. Carroll, Jr., in the State Department's application for \$99,646 in federal funds for a project entitled Pennsylvania Training Model for Preparation of Teachers of the Severely and Profoundly Mentally Retarded and Multi-Handicapped acknowledged:

"In September, 1972 Pennsylvania had over two hundred (200) new classes added to its total of classes for the mentally retarded. The students in these classes were severely and profoundly mentally retarded and multi-handicapped children all with very special and unique needs.

"The teachers and teacher assistants in these classes were past teachers of the educable or mildly mentally retarded, past teachers of the trainable or moderately mentally retarded, past teachers of the learning disabled child, new teachers with no previous teaching experience... and, thus, the problem. There were children with unique needs and teachers who were not trained to meet those needs.

"To the present there does not exist anywhere in Pennsylvania an appropriate training program designed to teach special techniques for the instruction of the severely mentally retarded and profoundly mentally retarded and multi-handicapped.

"Not only were teachers unprepared in techniques of teaching, they also lacked in the knowledge of appropriate curricula, appropriate materials and equipment, and many areas concerned with management of the child and educational program.

"To add to the magnitude of the problems, it was found that there was a general lack of knowledge of the special needs of these types of children by administrators, supervisors, school psychologists and itinerant personnel such as speech, hearing, vision and physical therapists. Therefore, these persons were, for most cases, unable to give, other than moral support, adequate supportive services.

"That problem existed in September, 1972 and that problem exists currently in September, 1974. The only difference is that, at this time, Pennsylvania has over four hundred (400) classes for severely and profoundly mentally retarded and multi-handicapped children residing in the State.

"There have been attempts to give supportive services to teachers in the area of curriculum. These attempts have come in the form of workshops and IU consortiums. Some of the colleges have added a course on curriculum for the severely and profoundly mentally retarded child; but, all of these attempts are isolated. They offer only a small portion of the knowledge that is needed to provide an appropriate education."

f. On November 14, 1975, the later Commissioner of Basic Education in a supplemental application for \$2,400 for the Pennsylvania Training Model asserted: "Pennsylvania views this project as a first major attempt to train, statewide, a group of professionals who are impacting a new student population."

89. Neither School District nor Commonwealth defendants however provided these necessities. The "isolated" in-service training provided to Philadelphia teachers, aides, school psychologists and other personnel, singly and in sum inadequate to equip staff to deliver appropriate programs to severely and profoundly retarded children, included only the following:

a. Dr. Lou Brown, Professor at the University of Wisconsin was brought to Philadelphia for three days, November 8, 1972 through November 10, 1972, to consult with the Division of Special Education, to spend 6 hours visiting the seven Title III multiply handicapped classes, and to meet for 2-1/2 hours with Supervisors of Special Education.

b. Dr. Willbeth Stephens, then Professor at Temple University, conducted a course from July 5, 1972 to August 11, 1972, limited to the seven Title III class teachers and an additional three teachers of multiply handicapped classes. Teachers of the other 53 classes established by the end of 1972-73 did not attend. None of the Fialkowski's teachers attended, except Mr. Armstrong who was transferred to a Retarded Trainable class a month after classes began in the fall.

c. Three follow-up workshops of two and a half-hours each were given in the fall of 1972 and four, in the spring of 1973. Mrs. Rifkind attended each of these workshops.

d. Bernice B. Baumgartner conducted workshops for administrators and supervisors September 20-22, 1972 in Philadelphia and May 16-18, 1973 which some Philadelphians attended in Lancaster and she visited sixteen classrooms during the school year for a few hours each to provide an introduction to the COMPE T curriculum materials.

e. Numerous "acquaintance" sessions for briefings and updates on the requirements of the Right to Education decrees were held over the years, most of them of an hour or two duration, a few for a full day.

f. District supervisors and the city-wide supervisor were encouraged to attend various workshops conducted by other instrumentalities, like the West Chester Department of Public Welfare workshops and visits to Woodhaven Center.

g. There has been no in-service specifically designed for aides in classes for the severely and profoundly retarded. Some severe and profound class aides along with head-start and early childhood education aides, bus aides, and other special education aides attended a ten-session course conducted twice in 1975-76 and entitled "Course #1--Child Growth and Development." Only one of the ten sessions concerned "The Special Child."

h. There has been no in-service training specifically designed for physical therapists, occupational therapists or speech therapists working with severely or profoundly retarded children.

i. From June 28, 1976 through July 9, 1976 an intensive course was offered for homebound teachers of the severely-profoundly impaired student.

j. In the two years since In-Service Councils were created in all Intermediate Units and required to present an annual in-service plan to the State Department, Philadelphia's plan has provided, and Philadelphia has offered, only courses in the education of the mildly retarded and of the gifted.

k. Bernice B. Baumgartner was assigned full time to the Department of Education for the year 1972-73 as its only in-service consultant on the severely and profoundly retarded. She retired at the end of the 1972-73 school year and thereafter no one in the Department worked full time, or even half-time, on in-service training.

1. "Guidelines for Approved In-Service Credit", and "In-Service Education: A Rationale and A Plan" describe the Commonwealth's creation in 1973-74 of In-Service Councils across the state. These Councils were not instructed nor even exhorted to develop training for personnel concerned with the education of severely and profoundly retarded children, and, as in Philadelphia, the In-Service Councils across the state gave it no attention.

m. The Pennsylvania Training Model has yet to deliver any inservice training in Philadelphia.

90. Although teachers of the seven Title III funded classes in Philadelphia (and the plaintiffs Fialkowski were not allowed access to any of those classes) have had more in-service opportunities than the other teachers of the severely and profoundly retarded,

a. The April 1973 evaluation of the first year of the Title III project identified as a "special problem and weakness", the "need for a development of a unified, systematic procedure of continuous evaluation of students" and recommended: "conduct in-service program to establish a unified, systematic procedure for evaluation of students;"

b. The April 1974 evaluation of the second year of the Title III project recommended: "an on-going in-service program for teachers, aides, and parents should be conducted continuously;"

c. In the September, 1974 revised abstract-narrative for the Project's third year, Dr. Lafayette Powell, Associate Director of Special Education, wrote the following comment on the April 1974 recommendation and acknowledged: "Since the inception of the program, opportunities for staff

development have been minimal. However, a consistent staff development program will be developed in Year Three which will be oriented both toward teacher needs and the concept of reinforcing learning through drill;"

d. The only result of the September 1, 1974 representation was the 1974-75 program of workshops for teachers of the severe and profound in the home, not in classrooms. The May 1975 evaluation reported further, "A city-wide system is in process of being established whereby teachers and aides are clustered in small groups which will meet once a month to work on improving teaching strategies and skills. One of the multiple handicapped classes is currently involved in a cluster. Within the next year, it is expected that all classes will participate in the staff development program." During the year 1974-75, the School District Supervisor of Classes for the Severely and Profoundly Impaired visited only five of the seven Title III and those only once each.

91. Despite defendants' recognition of the necessity of supervisory resources, the school district's single city-wide Supervisor of Classes for the Severely and Profoundly Handicapped is only employed on a ten month, not a full year's, basis; and until November of 1974 the school district had no Supervisor of Classes for the Severely and Profoundly Handicapped at all.

92. The statement of objectives formulated in January, 1975, for the performance of this Supervisor included for just two objectives: one visit each month to each teacher of the 89 classes for the severely and profoundly retarded and ten monthly meetings with clusters of 5 to 10 teachers and aides in the 89 classes.

93. None of the visitation, evaluation and follow-up planning tasks set to achieve these objectives have been accomplished, nor can they be. Even the recording tasks set for the Supervisor to achieve those objectives--"Maintenance of a written log of visits to document observed teacher behavior relating to program standards" and "On-going reporting to principals and to the Assistant Director of Special Education in charge of instruction as to staff development progress; reporting will be written and will summarize content of sessions and recommendations to be implemented" -- have not yet been begun.

94. The Supervisor visited the Sullivan School classes on five occasions during the 1974-75 school year, and on only three occasions during the 1975-76 school year, and on two of the latter Mr. Flanagan, David's teacher, was not present.

95. Each of the Philadelphia School District's eight internal administrative districts has only one Supervisor of Special Education responsible not only for supervision and support of classes for the severely and profoundly retarded, but for all the rest of special education as well, including classes for the educable mentally retarded, trainable mentally retarded, the socially and emotionally disturbed, the learning disabled and the physically handicapped.

96. The evaluation of the Philadelphia School District's special education program by a team of administrators and educators from the Pittsburgh Intermediate Unit as a part of the State Department's Peer Evaluation Program, in March, 1974, identified as a significant weakness in Philadelphia,

"The duties and coverage expected of the supervisors seem quite broad and makes program supervision and classroom observation difficult to provide." (page 6);

"There is a wide breadth of control and expertise expected of the supervisors responsible for supervision of all classes within a district." (page 10);

"There are not enough supervisory services available directly to teachers. Expertise in specific program areas varies and the supervisor does not always have adequate knowledge in all program areas. Recommendations: (a) Consider hiring additional supervisors especially those responsible for specific program areas. (b) Investigate the possibility of employing instructional advisors to provide hands-on supervision and support of teachers." (page 15).

The only change made since that date is the hiring of the single, ten month city-wide Supervisor of Classes for the Severely and Profoundly Handicapped, mentioned above.

97. Despite the additional over 1700 retarded children in school and the additional time as well as care and skill necessary to assess and prescribe for the new 635 who are severely or profoundly retarded, the School District has increased its staff of school psychologists only from 33 in the summer of 1972 to 41 at the close of the 1975-76 school year. These psychologists must also serve the programs for the socially and emotionally disturbed and the gifted and the learning disabled of which the latter two have significantly expanded since 1972.

98. Despite these widely known derelictions and despite the knowledge that these derelictions would prejudice, and render impossible, the provision to severely and profoundly retarded students of "programs appropriate to their learning capacities", state defendants have still not formulated or promulgated or enforced the plan required by paragraph 50 of the PARC Decree. Nor did state defendants formulate or promulgate the part of that plan which would constitute "Standards for Program and Services for the Education of Severely and Profoundly Retarded Persons", until December 8, 1976, even though revised Standards for the "educable" and "trainable"

mentally retarded were promulgated by them on October 2, 1972 and despite constant entreaties since 1972 that they do so. Furthermore, even these lately promulgated 1977 Standards do not respond adequately to state defendants' own articulated recognition of the necessities of inservice training and supervision with measurable, enforceable standards.

99. Beginning with the intermediate unit special education plan submission of June 1, 1974, special education plan submissions took on a new format at the Pennsylvania Special Education Planning System Workbook-Phase II. This format required, inter alia, the setting by each Intermediate Unit of definitions, goals, objectives and procedures for each of fourteen specific programs including "mental retardation, severe and profound".

100. In its June 1, 1974 plan submission, Philadelphia omitted the statement of definitions, goals, objectives and procedures for programs for "mental retardation, severe and profound." When the State's Regional Adviser informed Philadelphia the plan could not be approved without it, Philadelphia officials told the Regional Advisor it was omitted and severely and profoundly retarded children subsumed under "mental retardation, trainable" because there were no state standards for the severe and profound.

101. The first Philadelphia plan - Phase II submission to articulate a definition, goals, objectives and procedures for the severely and profoundly retarded is the 1976-77 plan, submitted on or about May 1, 1976. In that submission the definition of severely and profoundly retarded pupils distinctly understates their capacity to learn, given proper program. The bibliography set out for programs for the severely and profoundly retarded, is exactly the same bibliography set out for programs for the trainable retarded, despite the fact that their education must be distinctly different. The submission excurses vocational education for the severely and profoundly retarded. And the primary "recommendation for change" is "to insure that each severely and profoundly retarded child has an individual prescription

in all important areas", an objective not achieved since 1972.

102. Throughout the relevant time period Commonwealth defendants have been aware of the failures of the Philadelphia School District and of their own, (for example:

a. Philadelphia's failure to provide multi-disciplinary assessments and particularized program prescriptions for the severely and profoundly retarded was observed and reported to state defendants by Nancy Heyman, then the State Department Regional Field Coordinator for Philadelphia.

b. By letter of October 31, 1973 defendants informed defendants Costanzo, Young and Horowitz that Philadelphia was not in compliance with the PARC Decree, specifying that because of inadequate and untailored statements of program in due process notices "parents have felt the need to go to a hearing in order to find an avenue of communication with school personnel in such areas as... specific class placement and program content."

c. By letter of January 29, 1974, Miss Heyman informed Philadelphia defendants that Philadelphia due process letters were chronically "incomplete" - "the reasons for change or continuance of placement... and the program which is being proposed is not expressed fully" - and that Philadelphia's Referral/Placement Masters and Evaluation Forms were chronically incomplete" - "using a random selection, it was found that many evaluation forms are incomplete or are completed in a rather haphazard manner".)

but, throughout, Commonwealth defendants have failed to execute their own duties under the Decree of this Court, whether by exercising their enforcement powers under the Pennsylvania School Code, 24 Purd. Stat. §13-1372 (5), 13-1357, 13-1355 and 11-1123 or otherwise by acting formally or informally to "provide to every retarded person a free public program of education and training appropriate to his learning capacities."

WHEREFORE, plaintiffs Walter and David Fialkowski pray this Court find defendants in contempt of this Court's Orders of May 5, 1972 and enforce those Orders as prayed above, including Ordering defendants to provide such further appropriate education, or the financial means thereto, as is necessary to compensate the plaintiffs Fialkowski for their deprivations heretofore.

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