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

FEB. 2 1972

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN, NANCY BETH BOWMAN, et al.	:	
Plaintiffs	:	
v.	:	CIVIL ACTION NO. 71-42
COMMONWEALTH OF PENNSYLVANIA, DAVID H. KURTZMAN, et al.	:	
Defendants	:	

AMENDED CONSENT AGREEMENT

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

Fred Davis
S.E.M.H.

The parties being desirous of effecting an amicable settlement of this action, having entered into a Consent Agreement on October 7, 1971, approved by the Court on an interim basis that day, and notice having been given to members of plaintiff and defendant classes and certain objections having been raised by members of the classes, the objections having been heard, and in the particulars set forth below, agreed to, and the objections having been withdrawn by the members of the classes.

NOW, THEREFORE, the parties agree this day of January, 1972, subject to the approval and Order of this Court, to the following final amended Consent Agreement.

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

It is expressly understood, subject to the provisions of Paragraph 45 below, that the immediate relief hereinafter provided shall be provided to those persons less than twenty-one years of age

as of the date of the Order of the Court herein.

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

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

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

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

and (iii) by delivery of a joint press release of the parties to the television and radio stations, newspapers, and wire services in the Commonwealth.

II.

4. Expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from a program of education and training; that the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently a mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from a program of education and training.

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

6. Having undertaken to provide a free public education to all of its children, including its mentally retarded children, the Commonweal

of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.

7. It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of 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.

III.

Section 1304

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

> "Admission of beginners
>
> The admission of beginners to the public schools shall be confined to the first two weeks of the annual school term in districts operating on an annual promotion basis, and to the first two weeks of either the first or the second semester

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

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

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

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

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

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

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

and (d) provide upon each such re-evaluation that the school district or intermediate unit shall give notice and an opportunity for a hearing as set out in this Court's Order of June 18, 1971, as amended, on the findings of the re-evaluation and the appropriateness of the educational assignment based thereon. As used herein and throughout this Agreement the term "re-evaluation" contemplates that degree of analysis and investigation necessary to make a sound judgment as to the appropriateness of the educational assignment of the child thought to be mentally retarded, which in some instances, may involve reviewing existing cumulative data and documentation or, in other instances may involve comprehensive psycho-educational testing.

13. The aforementioned Opinion and Regulations shall also require the timely placement of any child whose admission to regular primary school or to the lowest regular primary class above kindergarten is postponed, or who is not retained in such school or class, in a free public program of education and training pursuant to Sections 1371 through 1382 of the School Code of 1949, as amended 24 Purd. Stat. Sec. 13-1371 through Sec. 13-1382.

Section 1326

14. Section 1326 of the School Code of 1949, as amended,

24 Purd. Stat. Sec. 13-1326, provides:

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

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

16. The Attorney General agrees to issue an Opinion declaring that Section 1326 means only that parents of a child have a compulsory duty while the child is between eight and seventeen years of age to assure his attendance in a program of education and training; and Section 1326 does not limit the ages between which a child must be granted access to a free, public program of education and training. Defendants are bound by Section 1301 of the School Code of 1949,

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

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

Section 1330(2)

18. Section 1330(2) of the School Code of 1949, as amended,

24 Purd. Stat. Sec. 13-1330(2) provides:

> "Exceptions to compulsory attendance.
>
> The provisions of this action requiring regular attendance shall not apply to any child who:
>
> * * *
>
> (2) Has been examined by an approved mental clinic or by a person certified as a public school psychologist or psychological examiner, and has been found to be unable to profit from further public school attendance, and who has been reported to the board of school directors and excused, in accordance with regulations prescribed by the State Board of Education."

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

20. The Attorney General agrees to issue an Opinion declaring that Section 1330(2) means only that a parent may be excused from liability under the compulsory attendance provisions of the School Code when, with the approval of the local school board

and the Secretary of Education and a finding by an approved clinic or public school psychologist or psychological examiner, the parent elects to withdraw the child from attendance. Section 1330(2) may not be invoked by defendants, contrary to the parents' wishes, to terminate or in any way to deny access to a free public program of education and training to any mentally retarded child.

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

Pre-School Education

22. Defendants, the Commonwealth of Pennsylvania, the Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, and the Secretary of Public Welfare, each of them, for themselves, their officers, employees, agents,

and successors agree that they shall cease and desist from applying Section 1371(1) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1371(1) so as to deny access to a free public program of education and training to any mentally retarded child, and they further agree that wherever the Department of Education through its instrumentalities, the School Districts and Intermediate Units, or the Department of Public Welfare through any of its instrumentalities provides a pre-school program of regular education and training to children below the age of six, they shall also provide a program of education and training appropriate to their learning capacities to all retarded children of the same age.

23. Section 1371(1) of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 13-1371(1), provides:

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

24. The Attorney General agrees to issue an Opinion declaring that the phrase "children of school age" as used in Section

1371 means children aged six to twenty-one and also, whenever the Department of Education through any of its instrumentalities, the local School District, Intermediate Unit, or the Department of Public Welfare, through any of its instrumentalities, provides a pre-school program of regular education and training for children below the age of six, whether kindergarten or however so called, means all mentally retarded children who have reached the age less than six at which such pre-school programs are available to others.

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

Tuition and Tuition and Maintenance

26. The Secretary of Education, the State Board of Education, the named School Districts and Intermediate Units, each of them, for themselves, their officers, employees, agents

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

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

28. Defendants may deny or withdraw payments of tuition or tuition and maintenance whenever the school district or inter-

mediate unit in which a mentally retarded child resides provides a program of special education and training appropriate to the child's learning capacities into which the child may be placed.

29. The decision of defendants to deny or withdraw payments of tuition or tuition and maintenance shall be deemed a change in educational assignment as to which notice shall be given and an opportunity for a hearing afforded as set out in this Court's Order of June 18, 1971, as amended. The issue at such hearing shall be whether the School District or Intermediate Unit provides an appropriate program of education and training for the particular child.

Whenever an additional facility or program within a School District or Intermediate Unit is submitted for approval by the Secretary of Education, then at the same time, a School District or Intermediate Unit, upon written notice to the parent or guardian, may in writing request approval of the Director of the Bureau of Special Education, acting as the Secretary's designee, for the transfer of particular children from private schools to the additional facility or program. Any district or unit so requesting shall submit documentation of the appropriate-

ness of the new facility or program for the particular children proposed for transfer. The parents or guardians may submit any documentation to the contrary. If after appropriate investigation the Director of the Bureau certifies the new facility or program as appropriate for those children and approves their transfers, such certification and approval shall be in lieu of individual hearings as provided above in this paragraph.

Homebound Instruction

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

> "Standards; plans; special classes or schools
>
> * * *
>
> (3) Special Classes or Schools Established and Maintained by School Districts.
>
> . . . If . . . it is not feasible to form a special class in any district or to provide such education for any [exceptional] child in the public schools of the district, the board of school directors of the district shall secure such proper education and training outside the public schools of the district or in special institutions, or by providing for teaching the child in his home . . . ."

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

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

33. The aforesaid Opinion and Regulations shall also provide

(a) that homebound instruction is the least preferable of the programs of education and training administered by the Departme[nt] of Education and a mentally retarded child shall not be assigned to it

unless it is the program most appropriate to the child's capacities;

(b) that homebound instruction shall involve education and training for at least five hours a week or for such other reasonable period as the State Board of Education may by regulation provide.

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

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

Section 1375

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

"Uneducable children provided for by Department of Public Welfare

"The State Board of Education shall establish standards

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

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

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

and supervision" of a child certified to it, the Department of Public Welfare must provide a program of education and training appropriate to the capacities of that child.

38. The Attorney General agrees to issue an Opinion declaring that Section 1375 means that when it is found, on the recommendation of a public school psychologist and upon the approval of the local board of school directors and the Secretary of Education, as reviewed in the due process hearing as set out in the Order of this Court dated June 18, 1971, that a mentally retarded child would benefit more from placement in a program of education and training administered by the Department of Public Welfare than he would from any program of education and training administered by the Department of Education, he shall be certified to the Department of Public Welfare for placement in a program of education and training.

39. To assure that any program of education and training administered by the Department of Public Welfare shall provide education and training appropriate to a child's capacities the plan referred to in Paragraph 50 below shall specify, inter alia,

(a) the standards for hours of instruction, pupil-

teacher ratios, curriculum, facilities, and teacher qualifications that shall be met in programs administered by the Department of Public Welfare;

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

(c) the reports which will be required in the continuing discharge by the Department of Education of its duty under Section 1302(1) of the Administrative Code of 1929, as amended, 71 Purd. Stat. Sec. 352(1), to inspect and to require reports of programs of education and training administered by the Department of Public Welfare, which reports shall include, for each child in such programs an annual statement of educational strategy (as defined in Section 8-123 of the Special Education Regulations) for the coming year and at the close of the year an evaluation of that strategy;

(d) that the Department of Education shall exercise the power under Section 1926 of the School Code of 1949, as amended,

24 Purd. Stat. Sec. 19-1926 to supervise the programs of education and training in all institutions wholly or partly supported by the Department of Public Welfare, and the procedures to be adopted therefor.

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

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

(b) that should it appear that the provisions of the School Code relating to the proper education and training of mentally retarded children have not been complied with or the needs of the

mentally retarded child are not being adequately served in any program administered by the Department of Public Welfare, the Department of Education shall provide such education and training pursuant to Section 1926 of the School Code of 1949, as amended, 24 Purd. Stat. Sec. 19-1926.

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

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

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

IV.

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

43. 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.

44. Wherever defendants provide a pre-school program of regular education and training for children less than six years of age, whether kindergarten or however called, every mentally retarded child of the same age as of the date of this Order and hereafter shall be provided access to a free public program of education and training appropriate to his capacities as soon as possible but in no event later than September 1, 1972.

45. The parties explicitly reserve their right to hearing and argument on the question of the obligation of defendants to accord

compensatory educational opportunity to members of the plaintiff class of whatever age who were denied access to a free public program of education and training without notice and without a due process hearing while they were aged six years to twenty-one years, for a period equal to the period of such wrongful denial.

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

47. Notice of this Order and of the Order of June 18, 1971, in form to be agreed upon by counsel for the parties, shall be given by Commonwealth defendants to the parents and guardian of every mentally retarded person, and of every person thought by defendants to be mentally retarded, of the ages specified in Paragraphs 43, and 44 above, now resident in the Commonwealth of Pennsylvania, who is not being accorded access to a free public program of education and training, whether as a result of exclusion, postponement, excusal, or in any other fashion, formal or informal.

48. Within thirty days of the date of this Order, Com-

monwealth defendants shall formulate and shall submit to the Masters for their approval a satisfactory plan to identify, locate, evaluate and give notice to all the persons described in the foregoing paragraphs, and to identify all persons described in Paragraph 45, which plan shall include, but not be limited to, a search of the records of the local school districts, of the Intermediate Units, of County MH/MR units, of the State Schools and Hospitals, including the waiting lists for admission thereto, and of interim care facilities, and, to the extent necessary, publication in newspapers and the use of radio and television in a manner calculated to reach the persons described in the foregoing paragraph. A copy of the proposed plan shall be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

COMPILE

49. Within ninety days of the date of this Order, Commonwealth defendants shall identify and locate all persons described in paragraph 47 above, give them notice and provide for their evaluation, and shall report to the Masters the names, circumstances, the educational histories and the educational diagnosis of all persons so identified.

50. By February 1, 1972, Commonwealth defendants shall formulate and submit to the Masters for their approval a plan, to

be effectuated by September 1, 1972, to commence or recommence a free public program of education and training for all mentally retarded persons described in Paragraph 47 above, 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. A copy of the proposed plan will be delivered to counsel for plaintiffs who shall be accorded a right to be heard thereon.

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

public schools of the district or in special institutions, and if an intermediate unit is not providing such education by means of additional classes or schools as are necessary or otherwise providing for the proper education and training of such persons who are not enrolled in classes or schools maintained and operated by school districts or who are not otherwise provided for, the Secretary of Education, pursuant to Section 1372(5) of the Public School Code of 1949, 24 Purd. Stat. 1372(5), shall directly provide, maintain, administer, supervise and operate programs for the education and training of these children.

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

53. The Masters shall be compensated by Commonwealth defendants.

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

55. Any child who is mentally retarded and who also has another exceptionality or other exceptionalities, whether

blind, deaf, cerebral palsied, brain damaged, muscular dystrophied or social or emotionally disturbed, or otherwise, irrespective of the primary diagnosis, shall be considered mentally retarded for purposes of the Agreements and Orders herein.

Thomas K. Gilhool
Attorney for Plaintiffs

J. Shane Creamer
Attorney General

Ed Weintraub
Deputy Attorney General
Attorneys for Defendants

Acknowledged:

Secretary of Education

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

Mrs. Helene Wohlgemuth
Secretary of Public Welfare

Edward R. Goldman
Commissioner of Mental Retardation

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

FEB. 2 1972

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN, NANCY BETH BOWMAN, et al.	:	
Plaintiffs	:	
v.		CIVIL ACTION
	:	NO. 71-42
COMMONWEALTH OF PENNSYLVANIA, DAVID H. KURTZMAN, et al.		
Defendants	:	

AMENDED STIPULATION

AND NOW, this day of January , 1972, subject to the approval and Order of the Court, it is agreed by the parties that the Stipulation of June 18, 1971, be amended to provide as follows:

1. Definitions

(a) "Change in educational status" shall mean any assignment or re-assignment based on the fact that the child is mentally retarded or thought to be mentally retarded to one of the following educational assignments: Regular Education, Special Education or to no assignment, or from one type of special education to another.

(b) "Department" shall mean the Pennsylvania Department of Education.

(c) "School District" shall mean any school district in the Commonwealth of Pennsylvania.

(d) "Intermediate Unit" shall mean the intermediate units as provided by the Pennsylvania School Code.

(e) 'Regular Education" shall mean education other than special education.

(f) "Special Education" shall mean special classes, special schools, education and training secured by the local school district or intermediate unit outside the public schools or in special institutions, instruction in the home and tuition reimbursement, as provided in 24 Purd. Stat. Sec. 13-1371 through 13-1380.

(g) Wherever the word 'Parent" is mentioned, it will include the term 'Guardian" and the plural of each where applicable.

2. No child of school age who is mentally retarded or who is thought by any school official, the intermediate unit, or by his parents or guardian to be mentally retarded, shall be subjected to

a change in educational status without first being accorded notice and the opportunity of a due process hearing as hereinafter prescribed. This provision shall also apply to any child who has never had an educational assignment.

Nothing contained herein shall be construed to preclude any system of consultations or conferences with parents heretofore or hereafter used by School Districts or Intermediate Units with regard to the educational assignment of children thought to be mentally retarded. Nor shall such consultations or conferences be in lieu of the due process hearing.

3. Within 30 days of the approval of this Stipulation by the Court herein, the State Board of Education shall adopt regulations, and shall transmit copies thereof to the superintendents of the School Districts and Intermediate Units, the Members of their Boards, and their counsel, which regulations shall incorporate paragraphs 1 and 2 above and otherwise shall provide as follows:

(a) Whenever any mentally retarded or allegedly mentally retarded child of school age is recommended for a change in educational status by a School District, Intermediate Unit or any school official, notice of the proposed action shall first be given to

the parent or guardian of the child.

(b) Notice of the proposed action shall be given in writing to the parent or guardian of the child either (i) at a conference with the parent or (ii) by certified mail to the parent (addressee only, return receipt requested).

(c) The notice shall describe the proposed action in detail, including specification of the statute or regulation under which such action is proposed and a clear and full statement of the reasons therefor, including specification of any tests or reports upon which such action is proposed.

(d) The notice shall advise the parent or guardian of any alternative education opportunities available to his child other than that proposed.

(e) The notice shall inform the parent or guardian of his right to contest the proposed action at a full hearing before the Secretary of Education, or his designee, in a place and at a time convenient to the parent, before the proposed action may be taken.

(f) The notice shall inform the parent or guardian of his right to be represented at the hearing by any person of his choosing, including legal counsel, of his right to examine before the hearing his child's school records including any tests or reports upon which the proposed action may be based, of his right to present evidence of his own, including expert medical, psychological and educational testimony, and of his right to call and question any school official, employee, or agent of a school district, intermediate unit or the department who may have evidence upon which the proposed action may be based.

(g) The notice shall inform the parent or guardian of the availability of various organizations, including the local chapter of the Pennsylvania Association for Retarded Children, to assist him in connection with the hearing and the school district or intermediate unit involved shall provide the address and telephone number of such organization in the notice.

(h) The notice shall inform the parent or guardian that he is entitled under the Pennsylvania Mental Health and Mental Retardation Act to the services of a local center for an independent medical, psychological and educational evaluation of his child and

shall specify the name, address and telephone number of the MH-MR center in his catchment area.

(i) The notice shall specify the procedure for pursuing a hearing.

If the notice is given at a conference with the parent, the parent may at that conference indicate his satisfaction with the recommendation and may in writing waive the opportunity for a hearing or, if dissatisfied, may in writing request a hearing. In either event, the parent may within five calendar days of the conference change this decision and may then request or waive the opportunity for a hearing by so indicating in writing to the school district or intermediate unit. If the parently decision is indicated at a conference, the parent shall be given a postcard which shall be mailed to the school district or intermediate unit within five calendar days thereafter, if the parent desires to change the decision. There shall be no change in educational assignment during the five day period.

If notice is given by certified mail, the parent must fill in the form requesting a hearing and mail the same to the school district or intermediate unit within ten (10) days of the date of receipt of the notice.

(j) The hearing shall be scheduled not sooner than fifteen (15) days nor later than thirty (30) days after 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.

(k) The hearing shall be held in the local district and at a place reasonably convenient to the parent or guardian of the child. At the option of the parent or guardian, the hearing may be held in the evening and such option shall be set forth in the form requesting the hearing aforesaid.

(l) The hearing officer shall be the Secretary of Education, or a person designated by him acting in his stead, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.

(m) The hearing shall be an oral, personal hearing, and shall be public unless the parent or guardian specifies a closed hearing.

(n) The decision of the hearing officer

shall be based solely upon the evidence presented at the hearing.

(o) The proposed change in educational status shall be approved only if supported by substantial evidence on the whole record of the hearing. Introduction by the school districe or intermediate unit of the official report recommending a change in educational assignment shall discharge its burden of going forward with the evidence, thereby requiring the parent to introduce evidence (as contemplated in paragraphs f, r, s, and t herein) in support of his contention.

(p) A stenographic or other transcribed record of the hearing shall be made and shall be available to the parent or guardian or his representative. Said record may be discarded after three years.

(q) The parent or guardian of the child may be represented at the hearing by any person of his choosing, including legal counsel.

(r) The parent or guardian or his representative shall be given reasonable access prior to the hearing to all records of the school district or intermediate unit concerning

his child, including any tests or reports upon which the proposed action may be based.

(s) The parent or guardian or his representative shall have the right to compel the attendance of, and to question any witness testifying for the school board or intermediate unit and any official, employee, or agent of the school district, intermediate unit, or the department who may have evidence upon which the proposed action may be based.

(t) The parent or guardian shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(u) No later than twenty (20) days after the hearing, the hearing officer shall render a decision in writing which shall be accompanied by written findings of fact and conclusions of law and which shall be sent by registered mail to the parent or guardian and his representative.

(v) There shall be no change in the child's educational status without prior notice and the opportunity to be heard as set forth herein, except that in extraordinary circum-

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stances the Director of the Bureau of Special Education, upon written request to him by the district or intermediate unit setting forth the reasons therefor and upon notice to the parent may approve an interim change in educational assignment prior to the hearing, in which event the hearing w ll be held as promptly as possible after the interim change. The Director shall act upon any such request promptly and in any event within three (3) days of its receipt.

Suspensions

(w) Any time limitation herein shall be construed and applied so as to do substantial justice and may be varied upon request and good cause shown.

4. The Department of Education shall revise its regulations to be in accord with the procedures agreed upon herein, shall disseminate the revised regulations to the school districts and intermediate units and shall thereafter file with the court and plaintiffs a statement of how and to whom said regulations and any covering statements were delivered.

5. Notice and the opportunity of a due process hearing, as set out in paragraph 3 above, shall be afforded on and after the effective date of the stipulation to every child who is mentally

retarded or who is thought by any school official, the intermediate unit, or by his parents to be mentally retarded, before subjecting such child to a change in educational status as defined herein.

Ed Weintraub
Deputy Attorney General

Thomas K. Gilhool
Counsel for Plaintiffs

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

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN, NANCY BETH BOWMAN, ET AL. :	
Plaintiffs :	
v.	CIVIL ACTION NO. 71-42
COMMONWEALTH OF PENNSYLVANIA, DAVID H. KURTZMAN, ET AL. :	
Defendants :	

MEMORANDUM CONTRA OBJECTIONS OF THE
LANCASTER-LEBANON GROUP

Thomas K. Gilhool,
Attorney for Plaintiffs

J. Shane Creamer
Ed Weintraub
Attorneys for Named Defendants

The matter is before the Court for decision pursuant to Rule 23(e), Fed. R. Civ. P., which provides in relevant part that "a class action shall not be . . . compromised without the approval of the court, and notice of the proposed . . . compromise shall be given to all members of the class in such manner as the court directs."*

After notice twice given to the class of defendants, three days of hearings and the submission of An Amended Consent Agreement and Stipulation, the Montgomery County Intermediate Unit, the Schuylkill Intermediate Unit, the Delaware County Intermediate Unit, the Downingtown Area School District, the Chester County Intermediate Unit, the Halifax Area School District and the Allegheny (Suburban) Intermediate Unit have withdrawn or signified their intention to withdraw their objections. Only the Lancaster-Lebanon Group of defendant-objectors —the Lancaster-Lebanon Intermediate Unit, and three of its constituent school districts, Ephrata, Hempfield, and Warwick**— remain before the Court.

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* While the determination of the classes in this action does not specify, the classes here are undoubtedly 23(b)(1) or (b)(2) classes. See Moore's Federal Practice, Secs. 23.31, 23.35, and 23.40, esp. P. 23-651. Cf. Mills v. Board of Education, C.A.No.1939-71, an action pending in the federal District Court for the District of Columbia raising the questions of access to eduaction raised here, but for a class which includes not only the retarded but children with any other exceptionality as well. For the convenience of the Court, copies of two orders entered in that action are attached to this Memorandum.

** The School District of Lancaster appears for the first time in these proceedings as a signatory to the Lancaster-Lebanon Group's brief. Since it did not appear as objector prior to the appointed date (December 7, 1971), it may not appear now. City of Philadelphia v. Morton Salt Company, 385 F.2d 122 (3rd Cir. 1969), cert. denied 390 U.S. 995 (1969).

The standard for judging Lancaster-Lebanon's objections is clear: the trial court has broad discretion in approving or disapproving a proposed compromise; the question is simply whether the compromise is "fair and reasonable". See Moore's Federal Practice, Secs. 23.80(4), esp. p. 23-1555, and 23.1.24(2), and the cases cited therein.

While their various submissions have sometimes seemed to cover the waterfront, Lancaster-Lebanon limited its presentation of evidence to the hearing question (Nov. 12 Tr. 34, 51), agreed that the terms of the October 7 injunctions were "clear, precise and properly judicial" (Original Lancaster-Lebanon Objections, p. 7), and confessed through counsel (Nov. 12 Tr. 49) and through its single witness (Nov. 12 Tr. 61) that it has no quarrel with the substantive provisions of the October 7 Agreement.* In sum, Lancaster-Lebanon raises two objections: one, their sole objection to the merits of the compromise, the prior nature of the due process hearings, and two, embellished with much out-of-place rhetoric, a plea for abstention.

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* The fairness and reasonableness of each of the provisions of the compromise is, in any case , amply supported by theextensive testimony of William Ohrtman (Dec. 15 Tr.) and of the plaintifs' expert witnesses.(Aug. 12 Tr.)
The notice questions have, of course, gone out of the case, by virtue of the sucessive notices of last fall and the appearance of the Lancaster-Lebanon Group here. In any event, since this was not a 23(b)(3) class action, the "best notice practicable" requirement of Rule 23(c)(2) did not apply; and the notice under Rule 23(e), which may also fairly be read as the discretionary notice under Rule 23(d)(2) ("of the proposed extent of the judgment"), was sufficient.

A. The Fairness and Reasonableness of Prior Due Process Hearings.

There can be no doubt that if the question of due process hearing before change in educational status had gone to decision by this Court, plaintiffs would have prevailed.

Lancaster-Lebanon agrees that a prior hearing is appropriate before any exclusion from education but objects that a change in educational status, particularly from regular class to special class, does not require a prior hearing.

It is a position Lancaster-Lebanon cannot sustain. First, the injury to the school district asserted to flow from a requirement of hearing prior to change in educational status (the danger of disruption of regular classes), is not --on the testimony of Lancaster-Lebanon's own witness-- real. Dr. Sherr's testimony was clear: the problem would arise, if at all, with respect only to severely retarded children; as to them, identification is rather straightforward, and early identification, required both by state law and sound practice, will allow hearing and decision, if there is a dispute, well before school begins. To be sure, the requirement of a prior hearing will place significant pressure on the school districts for early identification, but, as Dr. Sherr testified, that is only proper. See Nov. 12 Tr. pp.68, 62-67.**

**The Amended Stipulation onhearings provides in"extraordinary circumstances", that must be established in a kind of preliminary hearing on a paper record before the Director of the Bureau of Special Education, for tentative assignment to precede hearing.

Second, Lancaster-Lebanon is wrong on the law. The Supreme Court has held again and again that where a person's essential interests are at stake, governmental action must await notice and the opportunity for a hearing. See, e.g. Bell v Burson, 402 U.S. 542 (1971)(suspension of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970)(termination of public assistance benefits)*; Sneidach v. Family Finance Corp., 395 U.S. 337 (1969)(prejudgment garnishment); Armstrong v. Manzo, 380 U.S. 545 (1965)(deprivation of parenthood); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)(right to take bar examination); Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926)(accountant's qualifications to practice in front of Board).

The essential interests of a child affected by a change in educational status are twofold. First, the testimony of plaintiffs' experts (Aug. 12 Tr.) and of William Ohrtman (Dec. 15 Tr.) indicates clearly that, for retarded children, assignment to the wrong educational program is tantamount to no educational assignment at all. Second, the interest of a child in not being labelled mentally

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* Lancaster-Lebanon attempts a spurious distinction to avoid Goldberg, namely that there is necessarily a constitutional difference between terminating or excluding and merely reducing. There may be such a difference, of course. It depends upon whether the action crucially affects an essential interest. As to Goldberg itself, note that this District Court, prior to Goldberg, held hearings constitutionally required prior to public assistance terminations, suspensions or reductions. Caldwell v. Laupheimer, 311 F. Supp. 853 (1969)(three judge court). Among the other decisions of this Court finding a prior hearing constitutionally necessary, see Swarb v. Lennox, 314 F. Supp. 1091 (1970); McElroy v. Santiago, 319 F. Supp. 284 (1970).

retarded. The stigma that accompanies such labelling is very clear on this record, see especially the testimony of Ignacy Goldberg (Aug. 12 Tr.).**

That a public education is such a weighty interest as to require notice and a full hearing prior to deprivation is by now well settled. See, e.g. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), cert. denied 368 U.S. 930 (1961); Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Stricklin v. Regents of Univ. of Wisconsin, 297 F. Supp. 416 (W. D. Wis. 1969)(short-term suspension); Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E. D. Mich. 1969). And see Knight v. Board of Education, 48 F.R.D. 115 (S. D. N. Y. 1969) (transfer from full time day to part time night school held to require notice and prior hearing); and Stewart v. Phillips, C. A. No. 70-1199-F (D. Mass. 1971) (court approved consent agreement requiring notice and prior hearing before transfers in and out of special education).

Similarly, the United States Supreme Court has held a full due process hearing necessary before the state stigmatizes any citizen. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), without notice to Mrs. Constantineau or a

**Unfortunately neither the doctrine of parens patriae nor the good will (which, with Lancaster-Lebanon, we are willing to assume) of those acting in the name of that doctrine is sufficient to protect the essential interest of children. See generally, e.g. Application of Gault, 387 U.S. 1, 14-19 (1967). And more particularly, see, Garrison and Hammill, "Who Are the Retarded?" J. of Exceptional Children p. 13 (Sept. 1971)(in five-county metropolitan Philadelphia, at least 25%, and perhaps as many as 68%, of the children assigned to classes for the Educable Mentally Retarded are misclassified and should be in regular classes)(copies of this article were submitted to the Court for its judicial notice at the conclusion of the December hearings).

prior hearing, her name had been posted in all reatil liquor establishments forbidding sales to her because of "excessive drinking". The Court wrote:

> "The only issue present here is whether the label or characterization given a person by 'posting', though a mark of illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the district court that the private interest is such that those requirements . . . must be met.
> It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.
> . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."

Following Constantineau, see, e.g. Dale v. Hahn, 440 F. 2d 633, 636 (2d Cir. 1971) ("The stigma of incompetency, the implication that she has some kind of mental deficiency, with attendant untrustworthiness and irresponsibility, and the consequences to her reputation and her normal human relationships with others in the community" requires notice and hearing before declaration of incompetency). Cf. Doe v. McMillan, 442 F. 2d 879, 881 (D. C. Cir. 1971).*

Thus, clearly, had this matter proceeded to a decision, this Court could only have held notice and a hearing required before any change in the educational status of any child who is mentally retarded or who is thought, by school or parents, to

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* See also McMichael v. Chester Housing Authority, 325 F. Supp. 147 (E. D. Pa. 1971)(Fullam,J.)(requiring notice and hearing prior to a notice of termination of lease on the ground that issuing such a notice is "an event of importance which alters the landlord-tenant relationship and places the tenant in a position of uncertainty")(the analogue of course, is to the effect which labelling will have on the expectations of a teacher, and the further effect which expectations of a teacher have on a child's learning

be mentally retarded. That plaintiffs would have prevailed on the issue of procedural due process is ample demonstration that the proposed compromise on this issue is "fair and reasonable". Cohen v. Young, 127 F. 2d 721 (6th Cir. 1942). The Objectors offer nothing, in argument or in fact, persuasive to the contrary. The objection to notice and a hearing prior to a change in educational staus must therefore be dismissed and the compromise approved.

B. Abstention

As Judge Gibbons wrote in Stephens v. Yeomans, 327 F. Supp. 1182, 1185 (D.N.J. 1970)(three-judge court), "Abstention is at best a discretionary doctrine." Contrary to Lancaster-Lebanon's assertions in its recent brief, abstention is not a doctrine derived in Constitutionally binding fashion from the Tenth Amendment, nor is it jurisdictional. Rather, abstention is a discretionary doctrine, applicable in narrowly limited "special circumstances," where the federal district court having jurisdiction over a claim, Propper v. Clark, 337 U.S. 472, 492 (1949), may, in recognition of the principles of comity, refrain from exercising jurisdiction.

Curiously, the claim Lancaster-Lebanon singles out and presses in its objections, plaintiff's procedural due process claim, is a claim as to which abstention by this Court would have been clearly improper. In Wisconsin v. Constantineau, 400 U.S. 433 (1971), in a precisely similar procedural due

process case, the Court faced the abstention question and — in a 6-3 decision written by Mr. Justice Douglas who eleven months before had written Reetz v. Bozanich, 397 U.S. 82 (1970) — held:

> "In the present case the Wisconsin Act does not contain any provision whatsoever for notice and hearing. There is no ambiguity in the state statute. There are no provisions which could fairly be taken to mean that notice and hearing might be given under some circumstances or under some construction but not under others. The act on its face gives the chief of police the power to do what he did to the appellee. Hence, the naked question, uncomplicated by an unresolved state law, is whether the Act on its face is unconstitutional. As we said in Zwickler v. Koota, 389 U.S. 241, 251 abstention should not be ordered merely to await an attempt to vindicate that claim in a state court. Where there is no ambiguity in the state statute, the federal court should not abstain but proceed to decide the federal constitutional claim."

Exactly so here. The special education provisions of Pennsylvania's School Code contain no provision for notice and hearing. Had a decision been necessary here, this Court under Constantineau could not have abstained.

Constantineau has beenfollowed and abstention refused in two recent prior hearing cases decided by federal district courts. In Osmond v. Spence, 317 F. Supp. 1349, 1351 (D. Del. 1971)(three-judge court), Judges Van Dusen, Wright and Layton refused to abstain from deciding the constitutionality of a Delaware statute authorizing judgment by confession on warrant of an attorney. The Court cited Askew v. Hargrave, 401 U.S. 476 (1971) and distinguished Reetz on the ground that "the case before us involves substantially the same claim under the Delaware Constitution." Thus the fact that Pennsylvania's Constitution has clauses whose reach is the same as the due process clause of the Fourteenth Amendment does not indicate that abstention is proper. As

the Supreme Court said in Constantineau:

> "We would negate the history of the enlargement of the jurisdiction of the federal district courts, if we held the federal court should stay its hand and not decide the question before the state curts decided it."

In Davis v. Weir, 328 F. Supp. 317, 323 (N.D. Ga. 1971), a federal district court declined to abstain and held that due process requires a prior hearing before a city can stop supplying water to apartment tenants on the ground of an outstanding bill incurred by the tenants' landlord.

Thus as to the very matter to which, on the merits, Lancaster-Lebanon makes strongest objection, the requirement of aprior due process hearing, abstention would have been improper. Judicial economy would have suggested that the Court, in its sound discretion, retain jurisdiction of the entire case. In the present posture of this case, however, there are still other and basic reasons why abstention makes no sense.

The chief purposes of the abstention doctrine are (1) to avoid decision of a federalconstitutional question and (2) to avoid needless conflict wit the administration by a state of its own affairs. Railroad Commission v. Pullman Co.; 312 U.S. 496, 500-01 (1941). In the present posture of this case, decision of any federal constitutional question is, of course, rendered unnecessary by the terms of the proposed compromise now pending before the Court. As to the second, "the avoidance of needless friction," in federal-state relationships, Pullman, 312 U.S. at 500, the state officers responsible for administering the special education and training scheme in question here —

the Secretary of Education, the State Board of Education, the Director of the Bureau of Special Education, and the Secretary of Welfare -- as well as the state's chief legal officer, the Attorney General, have joined in asking this Court to retain jurisdiction until the proposed compromise of this action is implemented. In this posture, comity can hardly be said to be in jeopardy and, the basal reasons for invoking abstention thus absent, sound discretion would refuse abstention.

The opinion of this Court in Corporation of Haverford College v. Recher, 329 F. Supp. 1196, 1201 (E.D. Pa. 1971)(three-judge court) is apposite here. In that case, Judge Jos. Lord, writing for himself, Judge Biggs and Judge Ditter, declined to abstain from deciding the constitutionality of the Higher Education Assistance Act, saying:

> "The lengthy delay which would occur if we referred this case to the state courts, would occasion an equally lengthy period of infringement on the rights plaintiffs seek to protect in this action, assuming these claims to be valid . . . . In addition our worries about possible friction with state officials arising from failure to abstain are mitigated somewhat by the fact that attorney's representing the state agency have never raised abstention."

See also Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329 (1964). Here, the state officers have not only not requested abstention but have affirmatively asked this Court to retain jurisdiction. And here the pains of delay that abstention would bring to the most fundamental interests of plaintiff children would be even greater.

It need hardly be repeated here that education is fundamental. In Brown v. Board of Education, 347 U.S. 483, 493 (1954), the Court wrote:

/Education/ is required in the performance of our most basic responsibilities . . . . It is the very foundation of good citizenship. It is a principal instrument in awakening the child to cultural values, in preparing him for later . . . training, and in helping him to adjust normally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

See also Hoosier v. Evans, 314 F. Supp. 316 (D. St. Croix 1970)(access of alien children to education); Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971) (access of pregnant girls to education); Hobson v. Hanson, 269 F. Supp. 401, 507 (D. D.C. 1967). If an ordinary child may not be expected to succeed without an education, how much more the retarded child. For as the testimony in this case indicates (Aug. 12 Tr.), the ordinary child may learn willy-nilly, on the street or from television, but the retarded child requires a formal, structured program of education, and if denied it, he is not only at jeopardy of success but also of liberty and life.

It is this, among other things, that distinguishes the present case from Reid v. Board of Education, __ U.L. L. Wk. __ (2d Cir. 1971).* This case is concerned, apart from procedural due process, simply with access to education. In Reid it was conceded by all parties that brain-damaged children would be given access to education, indeed some were already being provided homebound instruc-

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* Reid was, of course, also in quite a different posture from this case when the abstention question was raised. And Reid raised no procedural due process claim.

tion, the only question was what is a reasonable time for screening them for admission -- peculiarly a question for state resolution. Here had plaintiffs' substantive claims gone to decision the sole question would have been access or not to education -- quite a different and more fundamental question. As the Court said in Harmon v. Forssenius, 380 U.S. 528 (1965), a decision to abstain must take account of the "nature of the Constitutional deprivation alleged and the probable consequences of abstaining," of the "importance and immediacy" of the issue. If, as there and here, "fundamental civil rights of a broad class of citizens" is at stake, then sound discretion would refuse abstention.

Thus, however the question might be approached in this case -- whether because of the presence here of the procedural due process claim, or of the fundamental claim to access to education, or because in the posture of this case abstention would serve none of its intended functions, and would in fact simply delay the realization of fundamental procedural and substantive rights -- this Court should not now abstain, but should instead dismiss the objections of the Lancaster-Lebanon Group, approve the proposed compromise and make final its Order of October 7, 1971.

Respectfully submitted,

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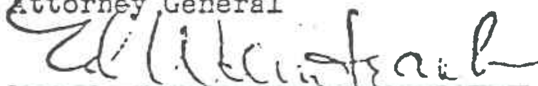
Attorney General



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