

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSE P., a minor under the age 21 years, :
by his mother PASCUALA S.; MARK P., a :
minor under the age 21 years, by his :
mother ELAINE P.; MILTON C., a minor :
under the age 21 years, by his mother :
JACQUELINE C.; JOSEPH N., a minor under :
the age 21 years, by his mother MARIA :
N.; STEVEN R., a minor under the age 21 :
years, by his mother EDITH R.; DAVID R. :
a minor under the age 21 years, by his :
mother ANA AYALA R.; individually and :
upon behalf of all other persons :
similarly situated, :

Plaintiffs, :

- against - :

GORDON M. AMBACH, individually and as :
New York State Commissioner of Education; :
FRANK J. MACCHIAROLA, individually and :
as Chancellor of the New York City :
Board of Education; STEPHEN R. AIELLO, :
individually and as President of the :
New York City Board of Education; JAMES :
F. REGAN, MIGUEL O. MARTINEZ, JOSEPH G. :
BARKAN, AMELIA ASHE, ROBERT J. CHRISTEN, :
MARJORIE A. LEWIS, individually and as :
Members of the New York City Department :
of Education, :

Defendants. :

79C 270
WICKERSON, J.
Index No.

COMPLAINT

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PRELIMINARY STATEMENT

1. This is a class action brought by handicapped children on the ground that defendants are depriving them of a free appropriate public education required by law. This deprivation has occurred through defendants' failure to evaluate and place

handicapped children in appropriate programs in a timely fashion. Plaintiffs seek declaratory and injunctive relief directing the defendants to provide them forthwith with the appropriate education required under the due process and equal protection clauses of the fourteenth amendment to the United States Constitution, the Education for All Handicapped Act, Public Law 94-142, (20 U.S.C. § 1401, et seq.), § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), and New York Education Law § 4401, et seq.

JURISDICTION

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331 and 1343. This action arises under the fourteenth amendment to the United States Constitution and is authorized by 42 U.S.C. § 1983 and by 28 U.S.C. §§ 2201, 2202 and Rule 57, Federal Rules of Civil Procedure, which pertains to declaratory judgments. This action also arises under the Supremacy Clause of the United States Constitution, 20 U.S.C. § 1401, et seq., and 29 U.S.C. § 794.

3. This action is also authorized by the Education Law of the State of New York, Sections 3202, 4401, et seq., Since all state and federal claims herein are derived from a common nucleus of operative facts, this Court has pendent jurisdiction to hear and determine such state and federal statutory claims.

PLAINTIFFS

4. Plaintiff JOSE P. is fifteen-years-old and resides in

New York, New York with his mother PASCUALA S.

5. Plaintiff MARK P. is six years old and resides in Bronx, New York with his mother ELAINE P.

6. Plaintiff MILTON C. is twelve years old and resides in Bronx, New York with his mother JACQUELINE C.

7. Plaintiff JOSEPH N. is eight years old and resides in Bronx, New York with his mother MARIA N.

8. Plaintiff STEVEN R. is thirteen years old and resides in Bronx, New York with his mother EDITH R.

9. Plaintiff DAVID R. is six years old and resides in Bronx, New York with his mother ANA AYALA R.

CLASS ACTION ALLEGATIONS

10. Named plaintiffs bring this action on their own behalf and, pursuant to Rule 23 a and b (2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. Plaintiffs' class is composed of all handicapped children living in New York City, aged five through twenty-one, who, although they are entitled to a free appropriate public education, have not been promptly evaluated and placed in an appropriate program after defendants were notified in writing of the need for evaluation.

11. The class is so numerous that joinder of all members is impracticable. The class consists of thousands of persons who are awaiting evaluation or placement. The questions of law and fact

raised by the named plaintiffs are common to the class. The common legal claims are that defendants' actions deprive plaintiffs and their class of rights secured by the "Education for All Handicapped Act", 20 U.S.C § 1401, et seq., and the equal protection clause of the fourteenth amendment. The common factual claim is that defendants have failed to evaluate and place handicapped children in appropriate programs in a timely manner. Because defendants have acted on grounds generally applicable to the class as a whole, injunctive and declaratory relief with respect to the class is appropriate.

12. The named plaintiffs can fairly and adequately protect the interests of the class. Because of their indigency, plaintiffs are represented by Brooklyn Legal Services Corporation B. Attorneys from Brooklyn Legal Services Corporation B have litigated numerous cases in the Southern and Eastern District, including class actions. Plaintiffs know of no conflicts of interest among members of the class.

13. In addition to meeting the requirements of Rule 23, a class action is necessary in this case to avoid problems of mootness during the course of litigation and on appeal and to insure future enforceability of a judgment for plaintiffs. Because of the nature of this case, defendants may place in appropriate programs all named plaintiffs and future intervenors so that their individual cases will become moot in time, even if the excessive delay in evaluation and placement for other members of the class is not eliminated as plaintiffs contend is legally required.

DEFENDANTS

14. Defendant GORDON M. AMBACH as Commissioner of Education of the State of New York, is the chief administrator of the New York State Education Department. In that capacity he is responsible for the supervision and control of education including special education. He is ultimately responsible for the lawful exercise of the authority delegated to the New York City Board of Education.

15. Defendant FRANK J. MACCHIAROLA, as appointed by the New York Board of Education, is the Chancellor of the New York City Board of Education and, as such, has general supervisory responsibility over the administration of the New York City Public School System in matters relating to education, including special education.

16. Defendant STEPHEN R. AIELLO is President of the New York City Board of Education and, as such, is responsible for the provision of education, including special education, in New York City.

17. Defendants JAMES F. REGAN, MIGUEL O. MARTINEZ, JOSEPH G. BARKAN, AMELIA ASHE, ROBERT J. CHRISTEN, and MARJORIE A. LEWIS are members of the New York Board of Education and, as such, are responsible for the provision of education, including special education in New York City.

STATUTORY SCHEME

I

18. Public Law 94-142, the "Education for All Handicapped Children Act", 20 U.S.C. § 1401, et seq., ("Handicapped Act") and the federal regulations promulgated pursuant to it by the United States Department of Health, Education and Welfare ("H.E.W."), 45 C.F.R. § 121 a, et seq., require that each state (including its political subdivisions) which receives payments under the Handicapped Act to insure that a free appropriate public education is available to all previously identified handicapped children by September 1, 1978 and for all newly identified handicapped children promptly after their identification. 20 U.S.C. § 1412 (3); 45 C.F.R. § 121 a. 321 - § 121 a. 324.

19. Under H.E.W. regulations, 45 C.F.R. § 121 a. 5 (a) the term "handicapped children" includes children who are "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped or having specific learning disabilities, who because of those impairments need special education and related services".

20. The regulations define a "free appropriate public education" as special education and related services which are provided at public expense under public supervision and direction without charge, meet federal and state standards, include pre-school, elementary school and secondary education and are provided in conformity with an individualized education program. 45 C.F.R. § 121 a. 4.

21. Pursuant to the Handicapped Act and regulations, the New York State Education Department has submitted a plan to the Office of Education of H.E.W. The plan was provisionally approved and the State in return received federal funds.

22. The Board of Education of the City of New York subsequently applied to the State Education Department and received from it funds appropriated under the Handicapped Act and subject to its conditions.

II

23. The Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794, prohibits discrimination against handicapped persons in any program, which like defendants' programs, receives federal financial assistance.

24. H.E.W. regulations adopted pursuant to the Rehabilitation Act, 45 C.F.R. § 84.31 (d), et seq., specifically prohibit discrimination in elementary and secondary education. Section 84.33 of those regulations provides that a recipient of federal financial assistance shall provide a free appropriate public education to each qualified handicapped child regardless of the nature or the severity of the child's handicap no later than September 1, 1978.

III

25. The New York State Constitution, Article 11 § 1, mandates that the legislature provide for maintenance and support of

free schools for all children. In accordance with this directive, New York Education Law §§ 3202, 4401, et seq., requires the state and its subdivisions, including the Board of Education of the City of New York, to provide a free suitable special education for handicapped children aged five through twenty-one.

26. Pursuant to New York Education Law § 4401, et seq., (and in accordance with the Handicapped Act, 20 U.S.C. § 1401, et seq., the Rehabilitation Act, 29 U.S.C. § 794, and the regulations thereunder), the New York State Commissioner of Education has promulgated detailed regulations specifying methods, procedures, and criteria with accompanying timetables to insure each handicapped child is provided with a free suitable special education program. 8 N.Y.C.R.R. § 200, et seq. Upon notification in writing by a child's parent or guardian, by a professional staff member of that district, or by a licensed physician that there is reason to believe that a student may be handicapped and in need of special services, an evaluation must be made by the Board of Education within thirty days and placement in an appropriate class must be offered within thirty days of evaluation. 8 N.Y.C.R.R. § 200.5 (d). Days are defined as school work days except during the months of July and August, when days are defined as every day except Saturdays, Sundays and legal holidays. 8 N.Y.C.R.R. § 200.1 (c).

FACTUAL ALLEGATIONS - NAMED PLAINTIFFS

27. Plaintiff JOSE P. is fifteen-years-old. He has been found by the Community Service Society Direction Center to be deaf

mute and spastic. The Direction Center is funded by the Bureau of Education for the Handicapped, of the Office of Education, an agency of H.E.W. JOSE has resided in New York City since July 1, 1978 after arriving from Puerto Rico. JOSE has never received any educational instruction.

28. The Board of Education of the City of New York ("Board of Education") was appropriately notified on or about October 27, 1978 of JOSE's need for evaluation.

29. JOSE has not received an appointment for evaluation by the Board of Education, over a period nearly three (3) months from notification.

30. JOSE P. is being severely injured and will continue to be severely injured until he is placed in a special education program. The treatment of his handicap becomes less possible as he grows older.

31. Plaintiff MARK P. is six years old. On May 22, 1978 the Board of Education was appropriately notified that MARK might be handicapped. The Board of Education evaluated MARK on September 22, 1978 and on November 2, 1978 recommended a class and educational program designed to handle mixed severe learning disabilities.

32. As of this date, defendants have failed to offer MARK the recommended class and program.

33. MARK is not currently attending school and is at home receiving no instruction.

34. MARK P. is being severely injured and will continue to be severely injured until he is placed in an appropriate program. He is falling further behind his age peers. The treatment of his handicap becomes less possible as he grows older.

35. Plaintiff MILTON C. is a twelve-year-old. Defendant Board of Education was appropriately notified on or about January 4, 1978 that MILTON might be handicapped.

36. The Board of Education evaluated MILTON in August, 1978 and on September 20, 1978 recommended a "CRMD" class for children with retarded mental development.

37. As of this date, defendants have failed to offer MILTON the recommended class.

38. MILTON is presently attending public school #73 and is in regular class 5-3. MILTON has been previously left back in the first and fourth grades and is being severely injured by his continued enrollment in a regular public school class.

39. In a letter dated January 18, 1978, the Board of Education informed MILTON's mother that he is to be placed in Public School No. 634, in an "EMR" class. Despite his mother's acceptance of placement, MILTON has still not been placed.

40. MILTON will continue to be severely injured until he is placed in the recommended class. The treatment of his handicap becomes less possible as he grows older.

41. Plaintiff JOSEPH N. is an eight-year-old. Defendant Board of Education was appropriately notified on June 2, 1978 that JOSEPH might be handicapped.

42. The Board of Education evaluated JOSEPH and on September 19, 1978 recommended JOSEPH for a "HC 30" class for neurologically impaired children with normal intelligence.

43. As of this date, defendants have failed to offer JOSEPH the recommended class.

44. JOSEPH is presently attending public school #64, third grade, regular class 3-5, and is being severely injured by his continued enrollment in a regular public school class.

45. JOSEPH will continue to be severely injured until he is placed in the recommended special class. The treatment of his handicap becomes less possible as he grows older.

46. Plaintiff STEVEN R. is a thirteen-year-old. Defendant Board of Education was appropriately notified May 3, 1978 that STEVEN might be handicapped.

47. The Board of Education evaluated STEVEN and on June 3, 1978 recommended STEVEN for a "HC 30" class of neurologically impaired children with normal intelligence.

48. As of this date, defendants have failed to offer STEVEN the recommended class.

49. STEVEN is presently attending public school #235 in a

regular class 6-A. STEVEN has been left back twice in the fourth grade because of attendance in regular classes and he is being severely injured by his continued enrollment in a regular class.

50. STEVEN will continue to be severely injured until he is placed in the recommended special class. The treatment of his handicap becomes less possible as he grows older.

51. Plaintiff DAVID R. is a six-year-old. Defendant Board of Education was appropriately notified on or about October 11, 1978 that DAVID might be handicapped.

52. The Board of Education evaluated DAVID and on November 29, 1978 recommended a class for children with mixed severe learning disabilities.

53. As of this date, defendants have failed to offer DAVID the recommended class.

54. DAVID is presently attending public school #73 where he is in regular first grade class 1-5 and is being severely injured by his continued enrollment in a regular class.

55. DAVID will continue to be severely injured until he is placed in the recommended special class. The treatment of his handicap becomes less possible as he grows older.

FACTUAL ALLEGATIONS - CLASS

56. Despite the clear mandates of federal and state law,

defendants have failed to provide thousands of handicapped children in New York City with an appropriate education.

57. Upon information and belief, there are in excess of fourteen thousand students waiting for an evaluation and placement into appropriate programs in New York City. The average time from original notification to the Board of Education until placement in an appropriate program is approximately two hundred fifty calendar days or one hundred seventy working days, nearly an entire school year.

58. Defendants have repeatedly failed to eliminate unreasonably lengthy waiting periods, although this problem has been brought to defendants' attention in prior administrative proceedings and court actions.

59. Because of their handicapping conditions, the members of plaintiffs' class are in particular need of appropriate education. Without it, their chances of becoming self-sustaining, productive individuals are reduced and their chances of becoming a burden to society are correspondingly increased. Delay in the provision of an appropriate education will increase the problems plaintiffs' class members must deal with and make appropriate education less effective when they do receive it. Thus plaintiffs, class members are daily suffering irreparable injury as a result of the denial to them of the education they need. Plaintiffs and the members of their class have no adequate remedy at law.

FIRST CLAIM FOR RELIEF

60. The Handicapped Act, 20 U.S.C. § 1401, et seq., and binding federal regulations issued pursuant to it, 45 C.F.R. § 121 a., et seq., require defendants to evaluate and place in appropriate educational programs all handicapped children promptly after notification to defendants that evaluation is needed. For children identified as handicapped during the 1977-1978 school year placement was in fact required by September 1, 1978.

61. As alleged in paragraphs "27" through "60" above, defendants have failed to provide plaintiffs and their class with a free appropriate education by failing to evaluate and place them in appropriate programs in a timely manner in violation of 20 U.S.C. § 1401, et seq. and 45 C.F.R. § 121 a., et seq.

SECOND CLAIM FOR RELIEF

62. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the regulations adopted pursuant to it, 45 C.F.R. § 84.31, et seq., prohibits defendants from discriminating against handicapped children in elementary and secondary education and require defendants to provide a free appropriate public education to each handicapped child no later than September 1, 1978.

63. As alleged in paragraphs "27" through "60" above, defendants have discriminated against plaintiffs and their class on the basis of their handicapping conditions and have failed to provide them with free and appropriate public education, in violation of 29 U.S.C. § 794 and 45 C.F.R. § 84.31, et seq.

THIRD CLAIM FOR RELIEF

64. As handicapped children, plaintiffs and their class are entitled to a free suitable special education under New York Education Law § 4401, et seq., and binding regulations promulgated thereunder, 8 N.Y.C.R.R. § 200, et seq.

65. As alleged in paragraphs "27" through "60" above, defendants have denied plaintiffs and their class a free, suitable special education in violation of New York Education Law § 4401, et seq., and 8 N.Y.C.R.R. § 200, et seq.

FOURTH CLAIM FOR RELIEF

66. All New York City children aged five through twenty-one including handicapped children, have been guaranteed an education by virtue of the aforementioned federal and state laws.

67. As alleged in paragraphs "27" through "60" above, defendants provide a free appropriate public education to all non-handicapped children and some but not all handicapped children. They have thus denied to the remaining handicapped children (plaintiffs' class) such education solely due to their handicap and without any rational basis in violation of the due process and equal protection clauses of the fourteenth amendment to the United States Constitution.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully demand on their own behalf and on behalf of all other persons similarly situated that this Court:

- 1) Assume jurisdiction of this cause and set this case down for a prompt hearing;
- 2) Determine by order pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action in accordance with the allegations of paragraphs "10" through "13" of this complaint.
- 3) Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that defendants' failure to provide plaintiffs and their class with free appropriate public special education programs violates plaintiffs' rights as secured by the Handicapped Act, 20 U.S.C. § 1401, et seq., the Rehabilitation Act, 29 U.S.C. § 794; New York Education Law § 4401, et seq.; and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution;
- 4) Issue preliminary and permanent injunctions enjoining defendants, their successors in office, agents and employees, from failing to provide promptly to named plaintiffs and each class member a free appropriate public special education in accordance with law, including an intensive individual remedial program


designed to remedy each injury already suffered by each plaintiff and class member as a result of defendants' failure to provide them with an appropriate educational program in a timely manner;

5) Issue preliminary and permanent injunctions requiring defendants to (1) establish and implement an effective plan to insure that all handicapped children in New York City will receive prompt evaluation and placement in a free appropriate public special education and (2) submit to the Court and counsel for plaintiffs regular periodic reports on the implementation of the plan;

6) Appoint a special master to monitor on behalf of the Court defendants' implementation of the plan required by the preceding paragraph.

7) Allow plaintiffs their costs and reasonable attorneys' fees and grant them such additional, such alternative or additional relief as may seem to this Court to be just, proper and equitable.

February 1,
DATED: ~~January 31,~~ 1979
Brooklyn, New York


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