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ABSTRACT

Reviewed are the progress and implications of Pennsylvania's Civil Action No. 71-42 which resulted in a consent agreement between the Pennsylvania Association for Retarded Children and the Commonwealth of Pennsylvania effectively guaranteeing public education to all retarded children between the ages of 6 and 21 years. Noted are statutes which had previously been used to exclude the retarded from public education. Testimony is reviewed which claimed the failure to provide notice and a hearing prior to exclusion to be unconstitutional and that evidence is lacking to support the assumption that certain retarded children are untrainable. The end result of the consent agreement is seen to be a zero reject system, with school districts responsible for locating previously excluded children. The agreement is explained to order the state to refrain from postponing school entrance, to refrain from denying homebound instruction, to provide free education for every person between 6 and 21 years, to provide a preschool program for the retarded if such a program exists for regular students, to provide opportunity for a hearing if a child's educational status is to be changed, and to reevaluate the educational assignment of every mentally retarded child not less than every 2 years. Litigation is reported to be in progress in 20 states to secure equal educational rights for retarded children. Appended are summaries of 10 pending or completed court cases, a summary of the right to education suit, and references. (DB)

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RIGHT TO EDUCATION

CIVIL ACTION NO. 71-42

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On May 5, 1972, a three-judge Federal Panel approved a consent agreement between the Pennsylvania Association for Retarded Children and the Commonwealth of Pennsylvania. The agreement was, without a doubt, the greatest victory ever attained by those who carry the banner for retarded citizens. The history of education for the mentally handicapped population has been one of ups and downs with more downs than ups.

In the past, Pennsylvania's effort to educate the retarded has been founded upon the idea that only some mentally retarded children can benefit from an education and/or training. From 1910 through the 1950's, funded programs for retarded children were of an optional nature. In other words, decisions as to the admittance of retarded children were left in the hands of the school districts and the parents of the children.

During Governor George Leader's administration, Pennsylvania adopted legislation which made it mandatory for every mentally retarded child in Pennsylvania who was capable of benefitting from an education to be in some school program. This mandate, so worded, gave the impression that there were retarded children who could not benefit from some form of schooling.

The result of this legislation afforded only children with an I.Q. of at least 75 an education in regular public schools. Children with I.Q.'s from 50 to 75, and labeled "educable" were sent to special education programs; children with I.Q.'s from 30 to 50 were specially educated as trainables. Those with I.Q.'s of less than 30 were considered uneducable and were assigned to the Department of Public Welfare for placement and perhaps training.

Since then, the education and admission of retarded children in Pennsylvania has been based rather loosely on the Pennsylvania School Code which deals, in several sections, with the admission and education of exceptional children. Section 1304 (P.S. Pa. Sec. 13-1304) states, in part: "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". This section of the School Code has been challenged and is no longer valid for retarded students.

A portion of Section 1330 (24 P.S. Pa. Sec. 13-1330) has also been invalidated by the courts. The pertinent portion of this statute states that the compulsory attendance law shall not apply to any child who "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-----". As we shall see, later in this report, the Court agreed that all mentally retarded children are capable of benefiting from education and training. Therefore, the foregoing statute is also no longer a valid reason for excusing retarded children from school attendance.

Another section of the Code (24 P.S. Pa. Sec. 13-1375) mentions the "Temporary or permanent exclusion from the public school of children who are found to be uneducable and untrainable in the public schools". According to the new ruling on the rights of retarded children, there is no such category--all children can attain some measure of benefits from an education, regardless of their mental capacities.

The fourth section of the Code which has been used to exclude retarded children is (24 P.S. Pa. Sec. 13-1326). This portion of the Code states that compulsory school age is 8 to 17 years. However, this statute has been cited as authority to postpone entrance of retarded children until the age of 8 and to terminate their schooling at the age of 17.

By applying these statutes to the education of retarded scholars, the Pennsylvania Association for Retarded Children (P.A.R.C.) estimated that approximately 100,000 mentally retarded children in Pennsylvania were being denied free education and training. The whole procedure of excluding retarded children from an educational placement came to a head on January 7, 1971, when P.A.R.C. brought suit against the Commonwealth of Pennsylvania on behalf of fourteen mentally retarded children and "all others similarly situated". (Pennsylvania Association for Retarded Children, Nancy Beth Bowman, etal, vs. Commonwealth of Pennsylvania, Civil Action No. 71-42). Thomas Gilhool, Philadelphia, Pa., was the Attorney for the plaintiffs and Edward A. Weintraub was Deputy Attorney for the Commonwealth. The suit was heard before three judges in the Eastern District Court of Pennsylvania: Arlin M. Adams, Raymond J. Broderick and Thomas A. Masterson.

Much of the testimony would elicit sympathy from anyone who heard it. For example, Mr. Leonard Kalish who appeared on behalf of his fifteen year old daughter stated that she had been excluded from a public education all of her life. Mr. Kalish had spent approximately $40,000 on his child's schooling during the past nine years because she had been placed in a private facility. She had been denied access to a public education without due process. Similarly, the par-

ents of David Tupi, also one of the plaintiffs, were never notified of their child's exclusion from school. They were made aware of this fact one morning when the school bus did not arrive to pick him up.

With testimony such as the preceeding examples, there seemed to be no acceptable response which the defendants could make to justify such treatment of retarded children.

The testimony was further reinforced by the plaintiffs allegations that Section 1375 (dealing with uneducable and untrainable) and Section 1304 (mental age of 5 years necessary for admittance to school) were "constitutionally infirm". They argued that these statutes do not afford due process because they do not provide for a notice and hearing before a retarded person is excluded or transferred to another educational assignment.

It was further argued that these two statutes violate equal protection because the provisions actually assume that certain retarded children are uneducable and untrainable. This assumption, according to the plaintiff "lacks a rational basis in fact". The basis for this statement is predicated on the fact that the right to an education is a fundamental right, and "therefore the defendants must show a compelling state interest in order to lawfully exclude retarded children".

The Brown v. Board of Education decision (349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) has been cited in support of these arguments. In this case, the U. S. Supreme Court abolished the south's dual system of education. They stated, in part, that where the state has provided an opportunity for an education, such right "must be made available to all in equal terms". Obviously, since the Constitution and laws of Pennsylvania do, in fact, guarantee an education

to all children, the foregoing sections of the School Code do deny that right to retarded children.

Sections 1330 (excusal from compulsory attendance) and 1326 (definition of compulsory school age) also violate due process as applied to retarded children. This section also excuses parents from any criminal action for keeping their children out of school; consequently, this application is a misinterpretation of State law.

Witnesses also presented testimony which encompassed the following ideas:

1. If retarded children are provided with proper and systematic programs of education, they will learn.

2. Education is not only an academic function. It is conceivable that the teaching and learning of self-help skills is part of a continuing process of education. Learning to dress and feed oneself may be achieved through an educational program.

3. The earlier the placement in suitable educational facilities, the greater the possibility of achieving success in social and educational areas.

The Federal suit was most unusual because rather than resulting in a court decision, a consent agreement was reached between P.A.R.C. and the defendants. Both parties agreed to an opportunity for an amicable settlement on the part of the case which dealt with due process hearings before a retarded child could be excluded from school or before a change could be made in his class assignment within the school.

The Court agreed to such settlement, and set the hearing for August 12, 1971. However, a Stipulation was agreed upon by both

parties which, in the interim, prevented the assigning or re-assigning of retarded children without a hearing. This included the stipulation that the parents may be represented by counsel, may demand to examine their child's records, and compel attendance of school officers who may be able to add pertinent information to the proceedings.

At the mid-August hearing, the question of equal protection was discussed and testimony was given by four experts in special education[1]. Both parties once again requested an amicable settlement of the equal protection dispute.

On October 7, 1971, a Consent Agreement was presented to the Court. Since a new interpretation was being placed upon the four Pennsylvania Statutes involved in the litigation, it was necessary for the Attorney General of the Commonwealth of Pennsylvania to issue Opinions on the matter. The court argued that although the statutes themselves were not unconstitutional, the results obtained by improper use of the statutes were unconstitutional.

Section 1375 (dealing with exclusion of uneducable and untrainable children) is now interpreted to mean that "insofar as the Department of Public Welfare is charged to arrange for the care, training and supervision of a child certified to it, (it) must provide a program of education and training appropriate to the capacities of that child". In other words, no longer may a child be placed in a custodial care situation (baby-sitting); rather, a meaningful program of education and training must be provided. Such education will be supervised and approved by the Secretary of Education.

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[1] I. Ignacy Goldberg, Professor of Education, Columbia University; James J. Gallagher, Associate Commissioner of Education, U. S. Office of Education; Donald J. Steadman, Associate Director, J. F. Kennedy Center; Burton Blatt, Director, Div. of Special Education, Syracuse University.

Section 1304 (mental age of 5 years necessary for admittance to school) has now been interpreted to mean that school districts may refuse children in regular primary schools if they have not reached a mental age of 5 years. This means that special education schools may no longer take refuge in this statute for the purpose of excluding retarded children from admittance.

Section 1330 (retarded excused from compulsory attendance) must be expanded to mean that a parent may be excused from liability for failing to send his retarded child to school only if the local school board, the Secretary of Education, and a school psychologist approve such action. School districts may not use this statute to deny a free education to any retarded child.

Section 1326 which deals with the compulsory school age of 8 through 17, has been interpreted to mean that a child is not limited to this age span, but merely represents the compulsory ages for school attendance. School districts may not use this statute either, in excluding a retarded child who has not reached the chronological age of 8 or has passed the age of 17.

In addition to the foregoing statutes, Section 1376 (24 P.S. Sec. 13-1376) which outlines distribution of tuition payment for certain exceptional children, has now been interpreted to include mentally retarded children. Previous to the Consent Agreement, parents were obliged to pay for private schooling of their retarded child, simply because they were not mentioned per se in Section 1376. In order to include these children, the Attorney General construed the term "brain damage" in the statute to include mentally retarded children.

Section 1372 (24 Purd. Stat. Sec. 13-1372 (3))now cannot be used to exclude a retarded child from receiving homebound instruction because no physical disability accompanies the retardation.

All of these opinions issued by the Attorney General have not changed the interpretations of the statutes which were used to exclude retarded children from receiving an education. In order to make certain that these new interpretations were implemented by the deadline of September 1, 1972, the Court appointed two "Masters" to monitor the States' efforts. They are Dennis E. Haggerty, Esq., member of the Pennsylvania Bar and Dr. Herbert Goldstein, Professor and Director of the Curriculum Research Development Center in Mental Retardation at the Ferkaus Graduate School of Humanities, Yeshiva University.

On October 15, 1972, the Court ordered that the term of the Masters be extended through October 15, 1973. They are required to report to the court each month, in writing, concerning the status of compliance with the order. The court itself will retain jurisdiction until October 15, 1973.

It should be mentioned here that the Intermediate Units were not unanimous in their acceptance of the Stipulation and Consent Agreements. By February, 1972, one defendant, Lancaster-Lebanon Intermediate Unit, had not withdrawn objections to the settlement. The Pennsylvania Association of Private Schools for Exceptional Children also expressed dissatisfaction with the agreement.

Lancaster-Lebanon did not question the fact that the proposed settlement was fair; they were raising the issue of jurisdiction of the courts in this matter. They charged that no controversy existed before the court within the meaning of Article III, Sec. 2 of the

U. S. Constitution. This article deals with the jurisdiction of Federal courts to hear certain cases. Lancaster-Lebanon alleged that because there was agreement between the plaintiffs and the Commonwealth, no controversy existed. The Courts contended that when litigants begin a suit as adversaries, and then later come to an agreement, the court does not ipso facto lose jurisdiction over the case. They cite Dixon v. Attorney General of the Commonwealth of Pennsylvania (325 F Supp. 966 - (E.D. Pa. 1971))in this conclusion.

The courts also agreed that their injunctive power must be examined carefully, especially when dealing with state statutes and officers. They have concluded that no risk of friction with the State of Pennsylvania has occurred, since the officers of the state who are responsible for the state's system of education requested that the court retain jurisdiction and not abstain.

The objections of Lancaster-Lebanon were over-ruled, and the court proceeded with its Order and Injunction on May 5, 1972.

The end result of the Consent Agreement is what P.A.R.C. chooses to call a "zero-reject" system in which the state guarantees the right to education to all children--regardless of the severity of their mental handicap. Programs for the retarded must now begin as early as age 4 years 7 months if a kindergarten program for that age group is available in the school district. Schooling for the retarded may continue to age 21 if the parents so desire.

The Intermediate Units and the school districts were then charged with the responsibility of locating the children who had been excluded from school, or who had never been presented for admission. The first step of the program was labeled COMPILE (Commonwealth Plan to Identify,

Locate and Evaluate). P.A.R.C.'s counterpart is called CHILDHUNT, and these two programs represent the first attempt in the United States to search out exceptional children in order to provide them with an education.

The implications inherent in such a task take on staggering proportions; the deadline of September 1, 1972, placed an added burden on the staff of the Intermediate Units. As of this writing, the state has located approximately 12,400 retarded children. This is a far cry from the estimated 100,000 who were thought to be denied an education in Pennsylvania. The Allegheny Intermediate Unit has tracked down 488 children (as of November, 1972) whose placement needs had not been met. Out of this number, 142 have been evaluated and recommended for proper placement.

The extra costs for implementing this widespread program will be paid for by the Commonwealth. Dr. William Ohrtman, Director of the Bureau of Special Education, stated that if it costs $1,000 to educate a normal child and $1,800 for a retarded child, the state will reinburse $800 to the local district. The Commonwealth will also advance funds necessary to hire extra personnel in order to implement this Agreement.

In summary, the Order and Injunction by the Court enjoins the defendants as follows:

1. To refrain from postponing school entrance to retarded children by applying Sections 1304, 1326, 1330 (2), 1371 (1) and 1375 of the School Code.

2. To refrain from applying Sec. 1376 of the School Code of 1949 in order to deny tuition or maintenance to any mentally retarded child.

3. To refrain from denying homebound instruction to the mentally retarded by applying Sec. 1372 (3) of the School Code.

4. To provide, no later than September 1, 1972, free education and training to every retarded person between the ages of 6 and 21 years.

5. To provide a free pre-school program to retarded students age less than six years (if such a program exists for regular students).

6. To provide notice and opportunity for a hearing when the educational status of a retarded child is changed.

7. To re-evaluate the educational assignment of every mentally retarded child not less than every 2 years, but annually if parents so request it.

The Agreement was prepared by Attorney General J. Shane Creamer, with the assistance of Education Secretary, John C. Pittenger and Public Welfare Secretary, Helene Wohlgemuth. With the signing of the Agreement, Pennsylvania became the first state in the nation to officially guarantee a good education to every mentally retarded child from 4 to 21 years of age. Pennsylvania is also the first state in the union to establish a "zero-reject" system of education for retarded children.

The following statutes were challenged by the plaintiffs: 24 P.S. Pa. Sec. 13-1304, 13-1326, 13-1330, 13-1375; P. S. Const. Art. 3 Sec. 14; 28 U. S. C. A. Sec. 1343 (3); 2201, 2202; 42 U. S. C. A. Sec. 1981, 1983. They sought, and received, permanent injunction against the enforcing of these statutes which had been interpreted unfavorably in relation to education of retarded children.

The overwhelming victory which resulted from this litigation will have far-reaching effects insofar as other states are concerned. Indeed, litigation is under way in approximately 20 states, attempting

to secure for the mentally retarded their constitutional rights to an education. Two of these suits have been filed by the Maryland Association for Retarded Children and the Indiana Association for Retarded Children. They aiming for the "zero-reject" goal which has now become a by-word with the National Association.

A list of pending and completed litigation on the denial of education to retarded children is listed on another page of this report.

The impact of the momentous court decision regarding "the right to education" also has had far-reaching effects on the intermediate units in Pennsylvania. One week after the Federal Court approval of the Consent Agreement, educators and P.A.R.C. representatives met in Harrisburg to plan for implementation of the court order. Intermediate unit personnel were told that they could no longer apply the School Code to exclude retarded children from educational facilities. The first job was to find the children who had been excluded or excused from school. Operation COMPILE was followed by Operation COMPET (Commonwealth Plan for Education and Training). The school districts were to have these plans implemented by September of 1972.

Retarded children who have reached the age of 4 years 7 months are now placed in Kindergarten classes, provided that their district has kindergarten for normal children. Retarded students who have reached the age of 18 are now permitted to remain in school as "post-graduates" until the age of 21.

Problems are arising in the schools when profoundly retarded, incontinent, non-verbal, non-mobile students are admitted to kindergarten and other classes. A whole new educational training program

must be inaugurated, and difficult staffing problems must be overcome to meet the demands of the profoundly retarded students. Space is also a problem with most special education buildings, and there has been little time for planning which is necessary for proper implementation of any new program.

P.A.R.C. has offered assistance to any and all parents whose children have been excluded from school. Brochures, pamphlets and information sheets have been printed and freely distributed by P.A.R.C., outlining steps for parents to take to insure their retarded children equal rights with normal children. They emphasize that schools "cannot tell you that there is no class or any other training or educational program for your child". A long list of possible reasons which might be used to deny an education to retarded children has been distributed by PARC. Parents are advised to accept none of them.

Parents also now have the right to examine all of their child's school records--including test scores (rarely done in the past). Due process hearings are afforded when a parent disagrees with placement of his child--P.A.R.C. will give free advice and also send people to the hearing if requested.

Faint rumblings have now been heard from parents of children who are not retarded, but who have been excluded from school for other reasons. Physically handicapped, emotionally disturbed, blind and deaf children who are not retarded are not included in the Consent Agreement. A crystal ball is not needed to predict future legislation for other exceptional children--with or without a lawsuit.

The following words of Chief Justice Earl Warren, which shook the pillars of educational institutions in 1954, have now returned

to shake open the doors which were closed to thousands of retarded students:

> "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".
>
> (Brown v. Board of Education--349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

APPENDIX

and

REFERENCES

PENDING AND COMPLETED LITIGATION
REGARDING EDUCATION OF RETARDED CHILDREN

Mills v. Board of Education of the District of Columbia (Civil Action No. 1939-71 (District of Columbia))

Judgement was for the plaintiff, and included educational rights for every school age child regardless of the degree of the child's mental, physical or emotional impairment. In response to a complaint by the defendant that they had insufficient funds to implement such a program, the court stated that the available funds must then be distributed equitably so that no child, retarded or otherwise, would be denied an education.

Catholic Social Services, Inc., Jimmy, Debbie, etal v. Board of Education of the State of Delaware, Robert McBride, Kenneth C. Madden, etal.

Complaint states that special education facilities in Delaware are totally inadequate. Action pending.

Reid v. New York Board of Education, Civil Action No. 71-1380 (U. S. District Court, S.D. New York)

Class action brought to prevent New York Board of Education from denying brain-injured children adequate and equal educational opportunities. U. S. District Court for the Southern District of New York applied the Abstention Doctrine. Case was appealed, and determination is pending.

John Doe, et. al, v. Milwaukee, Wisconsin Board of School Directors, et. al. (State of Wisconsin, Circuit Court, Civil Division, Milwaukee County)

Plaintiffs sought temporary order requiring immediate enrollment of plaintiffs in class for trainable mentally retarded children. Also sought order enjoining the defendants from maina waiting list for admission to special classes. A temporary injunction was granted forcing admission into classes within 15 days. The order delivered in 1969 is still in effect.

Marlega v. Board of School Directors, Milwaukee, Wisconsin, Civil Action No. 70-C-8 (U. S. District Court, Wisconsin)

Class action suit which sought due process hearings and prevention of board of school directors from excluding any children from school for medical reasons without providing due process hearing.

Fred C. Wolf, et. al. v. The Legislature of the State of Utah Civil Action No. 182646 (Third Judicial District Court, Utah)

A 1969 ruling in the Third Judicial Court of Utah guaranteed the right to an education at public expense to all children in the state, including retarded children.

Maryland Association for Retarded Children, Leonard Bramble, et. al. v. State of Maryland, et. al. Civil Action No. 72-733-K (U. S. District Court, District of Maryland)

Plaintiffs are seeking declaration that provision of unequal amounts of tuition depending on the category of handicap is unconstitutional. Enjoiner to prevent the defendants from violating the due process and equal protection classes of the Fourteenth Amendment. Also asking for identification of retarded children, planning and reporting back to the court. Also request that children receive programs structured to meet their individual needs. Action was introduced on July 19, 1972, and is expected to be heard in fall.

North Carolina Association for Retarded Children, Inc., James Auten Moore, et. al. v. The State of North Carolina, et. al. This case has been joined with civil action No. 72-72.

Plaintiffs are seeking the enforcement of state statutes providing equal educational opportunities for all children. Litigation is pending.

Benjamin Harrison, The Coalition for the Civil Rights of Handicapped Persons et. al. v. State of Michigan, et. al. Civil Action No. 38357 (E. D. Michigan Southern Division)

Class action suit seeks due process hearings for retarded and other handicapped children and all members of the class be provided with a publicly-supported education within 30 days of entry of order. Action pending.

Mindy Linda Panitch, et. al. v. State of Wisconsin, Civil Action No. 72-L-461 (U. S. District Court, Wisconsin)

Suit being brought against state to prevent children who are multi-handicapped and educable from being excluded from program of education and/or training. To date, the state has not answered the complaint.

RIGHT TO EDUCATION SUIT

Civil Action No. 71-42 in U. S. District Court
Eastern District of Pennsylvania

Summary of Federal Court Order

1. Establishes a "zero reject" system of free public education and training for mentally retarded persons between the ages of six and twenty-one years. Sections of the Public School Code of 1949 may no longer be applied so as to postpone, terminate, or in any way deny to any retarded child access to a free public program of education and training.

2. Provides that no child's educational assignment may be changed without notice to the parents or guardians and establishes that an opportunity for a hearing regarding the appropriateness of the recommended change must be accorded the parents or guardians. This right to a hearing must be extended before any child can be assigned from a regular class to any other form of special education. Parents are entitled to inspect their child's school record and to have an independent evaluation of their child's learning capacities prior to the hearing, and have the right to counsel during the hearing.

3. Establishes that every retarded child can benefit from a program of education and training no matter what traditional label based on intelligence quotients (educable, trainable, or profoundly retarded) has been applied to that child. Among every 1,000 children of school age, about 30 will be retarded. Of these 30, twenty-nine can achieve self-sufficiency if education is provided and the remaining one can achieve self-care.

4. Establishes that the mental age of a five-year old can only apply as a criterion for children entering the lowest regular primary class above kindergarten and cannot be applied to children entering special classes.

5. Compels parents to place the retarded child in a school program between the ages of 8 and 17.

6. Permits a mentally retarded child to enter school, if the parent elects, prior to age 8 and to remain in school beyond the age of 17, if the parent elects.

7. Makes public funded pre-school programs available to mentally retarded children prior to 6 years of age wherever there is a public pre-school program for normal children prior to 6 years of age.

8. Expands the term "brain damaged" to include all mentally retarded children, thus making the retarded eligible for payment of tuition for day schools and tuition and maintenance for residential school up to statutory limits.

9. Declares that a mentally retarded child, whether or not physically disabled, may receive a minimum of 5 hours per week of homebound instruction and also provides that homebound instruction is the least desirable alternative to a classroom situation and must be re-evaluated not less than every three months.

10. Requires the retarded child to be placed in a public program of education and training appropriate to the child's capacity and establishes that placement in a regular class is preferable to placement in a special class and placement in a special class is preferable to placement in any other type of program.

11. Requires the Department of Education within 30 days to formulate and submit a satisfactory plan to identify, locate, notify and evaluate all retarded children in Pennsylvania.

12. Requires the Department of Education to implement the above mentioned plan and within 90 days identify, locate, notify and evaluate all retarded children in Pennsylvania.

13. Requires the Department of Education to submit a plan for the education and training of all mentally retarded persons by February 1, 1972, in Pennsylvania and to implement this plan by September 1, 1972.

(Taken from Information Sheet distributed by Pennsylvania Association for Retarded Children. Undated)

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