

AMENDED/CORRECTED COPY

08-3966 AND 09-2775

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

A.G.,
Plaintiff-Appellant,

-v.-

WISSAHICKON SCHOOL DISTRICT, *et al.*,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA, NO. 04-CV-3880 (TJS)

**BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL ON BEHALF OF
AMICI CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND
EDUCATION LAW CENTER**

LAWRENCE D. BERGER
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
35 East State Street
Media, Pennsylvania 19063

Attorney for *Amici Curiae* Council of Parent
Attorneys and Advocates and Education Law
Center

Dated: October 28, 2009

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IDENTITY AND INTEREST OF AMICI CURIAE

The Council of Parent Attorneys and Advocates (“COPAA”) is an independent, nonprofit organization of attorneys, advocates, and parents in forty-three states (including Pennsylvania, New Jersey and Delaware) and the District of Columbia who are routinely involved in special education due process hearings throughout the country.

The primary goal of COPAA is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.” 20 U.S.C. §1400(c)(1).

Children with severe disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring a free appropriate public education in the least restrictive environment, as the Individuals with Disabilities Education Act (“IDEA” or “Act”) requires.¹

The Education Law Center (“ELC”) is a not-for-profit law firm in New Jersey specializing in education law. Since its founding in 1973, ELC has acted on behalf of disadvantaged students and students with disabilities to achieve education

¹Sometimes hereinafter abbreviated as “FAPE” and “LRE,” respectively.

reform, school improvement and protection of individual rights. ELC seeks to accomplish these goals through research, public education, technical assistance, advocacy and legal representation. In addition to serving as lead counsel to 300,000 urban school children who are the plaintiffs in New Jersey's school funding case, *Abbott v. Burke*, ELC provides a full range of direct legal services to parents involved in disputes with public school officials. ELC serves approximately 600 individual clients each year, primarily in the area of special education law and prioritizes advocating for the education of children with disabilities in the least restrictive environment.

COPAA and ELC submit this brief to address the particular importance of providing education to all children – including children with disabilities – in the least restrictive environment, so as to promote independence and self-sufficiency for all children. In this Brief, COPAA and ELC will therefore place before the Court some of the extensive empirical research which demonstrates the efficacy of providing education to children with disabilities in the least restrictive environment, namely, the general education classroom.

AUTHORITY TO FILE UNDER FED. R. APP. P. 29

All parties have consented pursuant to Federal Rule of Appellate Procedure 29 to the filing of this Brief.

SUMMARY OF ARGUMENT

As set forth in detail in the Brief for Appellants: the Hearing Officer found that the school district had denied Angela Greenwood's right to receive education in the least restrictive environment ("LRE"), and awarded relief for that violation which included a period of "compensatory education" services to match the period of LRE denial. The Special Education Due Process Appeals Panel upheld the Hearing Officer's findings of fact, and legal conclusions finding liability, but reversed the award of compensatory education as relief for that violation. Finally, the District Court denied the compensatory education relief with no explanation except for the statement that "[s]he has received an IDEA compliant public education," a conclusion which was contrary to the findings of both the Hearing Officer and Appeals Panel.

Compensatory education is a form of relief that is designed to restore an injured party to the position that she would have enjoyed if the injury had not occurred. Such relief is not novel in our system of justice. On the contrary, it is fundamental to it. Here, substantial research-based evidence demonstrates that children make greater progress when they receive education in the least restrictive environment, and specifically in the general education classroom. Angela Greenwood had a statutory right to receive education in the least restrictive environment, and that right was wrongfully denied. Therefore, the award of

compensatory education to Angela Greenwood, to restore her to the position that she would have enjoyed if the injury had not occurred, should have been upheld.

ARGUMENT

A. Both The Congressional Findings That Accompanied The 1997 Amendment To The Individuals With Disabilities Education Act, And The Findings Of Many Research Studies, Support The Efficacy Of Inclusive Education, And The Importance Of Angela's Right To Be Educated In A General Education Classroom.

The Congressional findings that accompanied the 1997 Amendments to the IDEA,² supported by many research studies, demonstrate the efficacy of inclusive education, and the importance of Angela's right to be educated in a general education classroom. These findings represent nothing less than a change in the landscape of special education. But the decisions below, and particularly the dismissive treatment of Angela's right to compensatory education, gave no weight to this change in the landscape. The District did not even consider a less restrictive placement until 2002 and then limited inclusion to homeroom and physical education. *In re Educational Assignment of A.G., a Student in the Wissahickon Sch. Dist.*, Spec. Ed. Op. No. 1455, at 3-4 (Pa. SEA 2004); Appx. 35. The District rejected Parents' request for inclusion for academic subjects for, among other reasons, administrative convenience. *Id.* at 3 and n.15, Appx. 35.

In enacting the 1997 Amendments to the IDEA, Congress found that:

²The Hearing Officer, Appeals Panel and District Court all agreed that this case was governed by the IDEA as it stood prior to the 2004 Amendment.

Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

* * * *

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

20 U.S.C. §1401(c)(5)(A) and (D).

As amended in 1997, the IDEA renewed and strengthened the obligations attendant to the LRE requirements. A student's access to the general curriculum and opportunities to be educated alongside age appropriate peers were expressly reinforced:

The new focus is intended to produce attention to the accommodations and adjustments necessary for disabled children to access the general educational curriculum and the special services, which may be necessary for appropriate participation in the particular areas of the curriculum due to the nature of the disability.

H. Rep. No. 105-95, reprinted in U.S. Code Cong. and Admin. News, 105th Congress, First Session, 97-98. Congress thus recognized that special education does not have to take place in a segregated classroom: “special education can

become a service for such children rather than a place where such children are sent.” 20 U.S.C. § 1400(c)(5)(C).³

In keeping with the focus of the 1997 Amendments to the IDEA, Congress adopted a number of measures that furthered the goal of educating children with disabilities in general education classes to the maximum extent appropriate. First, Congress made involvement and progress in the “general curriculum” an overall priority and goal for students with disabilities. Next, Congress defined supplementary aids and services and clarified that such support services are provided in general education classes in order to facilitate inclusion and must be included in a student’s individualized education program (IEP) where appropriate. In addition, a student cannot be removed from general education classes based on a need for curriculum modification. If a student will not be participating in general education classes, then an explanation for that exclusion must be provided in the student’s IEP. Also, a student’s general education teacher is a member of the student’s IEP team and participates in developing the student’s IEP.⁴ 20 U.S.C §§1414 and 1451.

³The fact that special education is not a place is important in understanding how a student with disabilities can be successfully included in general education classes and receive special education services in that same setting.

⁴The student’s IEP team must include at least one general education teacher of the child and a representative of the local educational agency who is knowledgeable about the general education curriculum. 20 U.S.C. §1414(d)(1)(B).

These measures, among many others, reflected Congressional commitment to placement of students with disabilities in general education classrooms. They are a direct outgrowth of the “20 years of research and experience” invoked by the Congress in the 1997 amendments. 20 U.S.C. §1401(c)(5), *supra*. For instance, there is abundant quantitative and qualitative research demonstrating that students with disabilities can achieve considerable educational benefit from placement in general education classes with supplementary aids and services. Research has shown that time spent with non-disabled classmates enhances academic achievement for students with disabilities, that is, that inclusion and achievement are positively correlated. Cheryl M. Jorgensen, RESTRUCTURING HIGH SCHOOLS FOR ALL STUDENTS at 212 (1998) (*citing* A. Karagiannis, *et al.*, “Rationale for Inclusive Schooling” in INCLUSION, A GUIDE FOR EDUCATORS (1996) and J. L. Strully & C. F. Strully, “Friendships As an Educational Goal,” *id.*)

A longitudinal study comparing students with disabilities in both integrated and segregated placements over a two-year period found that those in general education classrooms demonstrated substantial progress in the areas of communication and social skills. By contrast, students in separate classrooms showed regression in these areas across the same periods. Gail McGregor & R. Timm Vogelsberg, INCLUSIVE SCHOOLING PRACTICES: A SYNTHESIS OF THE LITERATURE THAT INFORMS BEST PRACTICE ABOUT INCLUSIVE SCHOOLING 58

(1998) (*citing* D. A. Cole *et al.*, “Social Integration and Severe Disabilities: A Longitudinal Analysis of Child Outcomes,” 25 JOURNAL OF SPECIAL EDUCATION 340-51 (1991)). Another study concluded that “special needs students educated in regular classes do better academically and socially than comparable students in noninclusive settings,” regardless of the student’s type of disability or grade level. Richard A. Villa & Jacqueline S. Thousand, RESTRUCTURING FOR CARING AND EFFECTIVE EDUCATION 19 (2000) (*citing* Baker *et al.*, “The Effects of Inclusion on Learning,” 52 EDUCATIONAL LEADERSHIP 33-35 (1994)).

Research supports the wisdom of this Congressional mandate to educate students with disabilities in the LRE. McGregor & Vogelsberg, *supra* at 7. Studies demonstrate that removing students with mental retardation from general education classrooms results in a fragmented approach to instruction in which general and special educators do not work together and the individual student’s needs go unmet. Lipsky, D.K., & Gartner, A., “Inclusive Education: A requirement of a democratic society,” in Daniels, H. & Garner, P., Inclusive Education, WORLD YEARBOOK OF EDUCATION (1999), 12-23; Sailor, W., Gee, K. & Karasoff, P., “Inclusion and school restructuring,” in Snell, M. & Brown, F., INSTRUCTION OF STUDENTS WITH SEVERE DISABILITIES (5th ed., 2000), 1-30.

Regardless of the severity of disability, children with mental retardation benefit from placement in general education classrooms where opportunities for

inclusion with nondisabled peers are systematically planned and implemented.

Gee, K., “Least Restrictive Environment: Elementary and Middle School,” in The National Council on Disability, *IMPROVING THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: MAKING SCHOOLS WORK FOR ALL CHILDREN* (1996 Supplement) 395-425; Giangreco, M.F. & Doyle M.B., “Curricular and instructional considerations for teaching students with disabilities in general education classrooms,” in Wade, S.E., *INCLUSIVE EDUCATION: A CASEBOOK AND READINGS FOR PROSPECTIVE AND PRACTICING TEACHERS* (2000), 51-70. It is this body of research, and the 1997 Congressional commitment that changed the landscape of including students with disabilities in the general education classroom, that the decisions below ignored.

B. Students With Severe Disabilities, Like Angela, Receive More Instruction In General Education Classrooms.

Many studies have compared the effectiveness of educating children in a segregated or “non-inclusive” setting with the effectiveness of educating children in the least restrictive environment, an integrated general education classroom. For example, a 1994 study compared children with disabilities who were placed in general education classrooms with children who were placed in segregated “special education” classrooms. The study included children with different levels of disability, including children with “severe disabilities.” It found that the students

in general education classrooms, including those with more severe disabilities, received more instruction, and were more engaged in the school day:

[T]here are important differences in the quality and curricular content of written educational programs [*i.e.*, IEPs] for children who are full-time members of general education classrooms; and there are significant differences in their levels of engagement in the activities of the school day, the type of activities in which they are engaged, the type and level of participation in integrated school environments, and the degree to which they initiate and engage in social interactions with peers and adults.

Hunt, *et al.*, "Evaluating the Effects of Placement of Students with Severe Disabilities in General Education Versus Special Classes," 19 JOURNAL OF THE ASSOCIATION FOR PERSONS WITH SEVERE HANDICAPS 200, 212 (1994). *See also id.* at 206 (statistically significant outcome), 207 (IEP objectives for children in general education classrooms included more instruction) and 208 (children in general education classrooms were more actively engaged).

Another important difference between the integrated general education classroom and the segregated special education classroom is the amount of time devoted to instruction. A 1998 study found that children with disabilities received significantly more instructional time in the general education classroom:

A significantly greater amount of time was devoted to instruction in the general education classroom, even when whole class instruction was deleted from the computation of instructional time."

Helmstetter, Curry and Brennan, "Comparison of General and Special Education Classrooms of Students with Severe Disabilities," 33 EDUCATION AND TRAINING IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES 216, 223 (1998).

When expressed as a comparison of "noninstructional time," the disadvantage for segregated classes was 58% noninstructional time as compared with only 35% in integrated general education classrooms. If "whole class instruction" was excluded, then the disadvantage for segregated classes was 60% vs. 47% in integrated classes. *Id.* at 221.

A 1994 review of statistical meta-analytic studies found similar results.

Baker, *et al.*, "The Effects of Inclusion on Learning," 52 EDUCATIONAL LEADERSHIP, 33, 34 (1994). Not only was inclusive education found to be beneficial, but the authors also concluded that segregated education was harmful:

Considerable evidence from the last 15 years suggests that segregation of special students in separate classrooms is actually deleterious to their academic performance and social adjustment, and that special students generally perform better on average in regular classrooms.

Id.

Similarly, a 1991 study which used both classroom observation and standardized assessments to evaluate children with IQs of 30 or less found:

Over a 2-year period, children from integrated sites generally improved in their ability to manage their own behavior in social situations, provide negative feedback

to others, accept assistance from others, indicate personal preferences to others, cope with negative social circumstances, and terminate social contact. Conversely, children from segregated sites generally regressed in each of these skill domains. The overall picture is that children with severe retardation who attend integrated schools made positive gains in social competence, whereas similar children in segregated schools did not.

Cole, *et al.*, "Social Integration and Severe Disabilities: A Longitudinal Analysis of Child Outcomes," 25 JOURNAL OF SPECIAL EDUCATION 340, 348 (1991).

Again, these research findings are echoed in the record here. For example, a psychologist called as a witness on behalf of Angela during the 2006 hearing, Dr. Sandra McClennen, found that the life skills class had a good deal more noise and movement than the general education classes, and that Angela was more engaged in the general education classes. Doc. 59, N.T. 1396-97, Appx. 208-209. Dr. McClennen also reported that much of the time spent in the life skills class was devoted to snack time, lunch, and free time, none of which offered any opportunity for structured educational activities. Another of plaintiff's experts, Dr. Alice Udvari-Solner, reported that the Life Skills classroom provided little opportunity for communication and almost no opportunity for socialization and communication, except with the teacher and aides. Doc. 59, P. Exh. 43 at 5, Appx. 303; see Doc. 59, N.T. 1227-28, Appx. 183 (describing interactions in the general education classroom); *see also* Doc. 59, N.T. 470-71, Appx. 143 (DeLuca).

Thus, both research, and Angela's own experience, demonstrate that the denial in this case of Angela's right to education in the least restrictive environment caused harm to Angela, for which compensatory education is a proper and necessary remedy.

C. Students With Disabilities Make Greater Progress In An Inclusive Class Than In A Segregated Class.

Research studies also confirm that students with disabilities make greater progress in an inclusive class than in a segregated class. Significantly, the record in the case at bar confirms the very same thing because, as the Hearing Officer held, Angela herself made greater progress in a regular class, once she was finally included on a minimal basis:

[D]espite the district's failure to provide adequate supplementary aids and services to Angela in regular class and to keep adequate progress data in regular class, Angela received greater academic and nonacademic benefit in regular class than in the life skills class.

Brief for Appellants at 28, and *see* Appx. 66.

A 2002 study, published in a journal that concentrates on persons with severe disabilities, compared results on measures of child development and social competence for children in inclusive programs versus children in segregated or "self-contained" programs over a 2-year study period. The children enrolled in inclusive programs achieved results which were better, with statistical significance, than the children in the segregated programs. Fisher & Meyer, "Development and

Social Competence After Two Years for Students Enrolled in Inclusive and Self-Contained Educational Programs,” 27 RESEARCH & PRACTICE FOR PERSONS WITH SEVERE DISABILITIES 165, 166, 169-73 (2002). The authors concluded:

The results of this study point to greater gains on psychometrically valid measures for students who were included in general education settings in comparison to matched peers who were segregated. Moving instruction into inclusive environments, rather than providing instruction in isolation from normalized learning opportunities ([such as are] provided in social contacts) seems to be beneficial for individual child learning outcomes. . . .

. . . . At the very least, these data reveal that the vast majority of students do show gains over time that can be related to their educational program. When an individual student does not make progress, the education team should be challenged to alter the program until progress is achieved – rather than allowing failure to be justified by the level of a student’s disabilities.

Id. At 172-73.

It is important to remember that all children – not only those with disabilities but also typical students – learn differently. Including students with disabilities in general education classrooms, as the law requires, makes it possible for educators to develop new methods of instruction that lead to improved outcomes for all students. *See, e.g.,* Gilberts, *et al.*, “The Effects of Peer Delivered Self-Monitoring Strategies on the Participation of Students With Severe Disabilities in General Education Classrooms,” 26 JOURNAL OF THE ASSOCIATION FOR PERSONS WITH

SEVERE HANDICAPS 25 (2001) (study of using peer tutors and self-monitoring by students with disabilities). In short, inclusive education is not only effective, but its effectiveness is growing with greater experience. This makes it even more important that Courts enforce what the law requires – education in the least restrictive environment – and do so without hesitation or compromise. Effective enforcement includes the use of traditional legal remedies like the compensatory relief which the lower Court failed to enforce here.

CONCLUSION

For the reasons stated in appellants' brief and in this brief, COPAA and ELC respectfully urge this Court to reverse the judgment of the District Court to the extent that it denied the compensatory education which had been awarded by the Hearing Officer.

/s/ Lawrence D. Berger

LAWRENCE D. BERGER (PA ID 16028)
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
35 East State Street
Media, Pennsylvania 19063

(610) 891-9880

Attorney for *Amici Curiae* Council of Parent
Attorneys and Advocates and Education Law
Center

Dated: October 28, 2009

**CERTIFICATE OF ADMISSION TO THE BAR OF THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

I hereby certify that I am a member of the bar of this Court.

/s/ Lawrence D. Berger

LAWRENCE D. BERGER
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
35 East State Street
Media, Pennsylvania 19063

Attorneys for *Amici Curiae* Council of Parent
Attorneys and Advocates and Education Law
Center

Dated: October 28, 2009

**CERTIFICATION OF COMPLIANCE WITH FEDERAL RULES OF
APPELLATE PROCEDURE 29(d) AND 32(a),
AND L.A.R. 31.1(c)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,154 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman, a proportionally spaced typeface, using Microsoft Word 2003 word processing software.

3. This brief complies with L.A.R. 31(c) because the text of the electronic brief is identical to the paper copies, and a virus detection program, to wit AVG Anti-Virus, Version 8.5.421, has been run on the electronic file and no virus was detected.

/s/ Lawrence D. Berger
LAWRENCE D. BERGER

CERTIFICATION OF FILING AND SERVICE

I hereby certify that on November 4, 2009, I caused this Amended/Corrected Brief to be filed and served through the Court's electronic docketing system (CM/ECF).

/s/ Lawrence D. Berger

LAWRENCE D. BERGER