IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

KEELY THOMPSON, et al.,	:	
Plaintiffs,	:	Case No. C2-91-464
vs.	:	
STATE OF OHIO, et al.,	:	Judge Holschuh
Defendants.	:	

INTERVENOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM OF LAW IN SUPPORT

Intervenor Plaintiffs, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, move this honorable Court to certify the above action as a class action under Fed. R. Civ. P. 23(b)(2).

Intervenor Plaintiffs bring this action under Federal Rules of Civil Procedure 23(a) and 23(b)(2), on their own behalf and on behalf of all other persons similarly situated. The proposed class is defined as: "All Ohio students, ages three through twenty-one, who are or will be eligible for or are receiving special education and related services in Ohio schools and all otherwise qualified students who have the rights to benefit from, or participate in, programs or activities of schools and to be free from discri-

48

mination on the basis of their handicaps." A Memorandum of Law in Support of this Motion is attached and made a part of this Motion.

Respectfully submitted,

OHIO LEGAL RIGHTS SERVICE

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO CERTIFY CLASS

Part I of this Memorandum summarizes the case; Part II demonstrates that the case meets the requirements of Federal Rule 23(a) and Part III establishes that the case meets the requirements of subsection (b)(2) of Rule 23.

I. SUMMARY OF THE CASE

This case was originally filed by plaintiff school districts, school administrators and teachers and parents of nondisabled students in Perry County Common Pleas Court on May 9, 1991. It was removed to this Court pursuant to 28 U.S.C. §1441(b). Plaintiffs filed a second amended complaint for declaratory and injunctive relief on August 25, 1992.

A motion to intervene and proposed intervenor's class action complaint were filed on August 25, 1993 and granted on February 9, 1994. The intervenor plaintiffs are the Ohio Legal Rights Service (OLRS) and "John Doe." They have intervened individually and on behalf of all others similarly situated, and contend that the system of funding and provision of educational services to students with disabilities in Ohio, and the defendants' actions and inactions, have resulted in the failure to provide sufficient revenue to enable students with disabilities to receive a free appropriate public education and related services in the least restrictive setting, as required by 20 U.S.C. §§1401, *et seq.*, and implementing federal and state regulations. In addition, defendants have failed to assure and monitor compliance with the laws.

Intervenors maintain that defendants' system of funding and provision of services to students with disabilities has deprived intervenors of their rights under the due process and equal protection clauses of the Fourteenth Amendment to the U.S.

Constitution, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act (ADA), 42 U.S.C. §12131, *et seq*.

Ohio has failed to meet the obligations placed upon it by these federal requirements. Because Ohio's funding for special education is inadequate, it encourages discrimination against and segregation of students with disabilities. *See, e.g.*, Intervenors' Complaint, ¶¶86-90; 100-128. Regardless of the handicapping condition label placed upon students, all students with disabilities in Ohio are affected by the funding mechanisms currently in place. These students are also affected by the State of Ohio's failure to monitor and ensure the provision of a free appropriate education in the least restrictive environment appropriate. As discussed below, decisionmaking about placements and services are routinely made by Ohio educators without regard to the individual needs of each student. Instead, funding availability and service delivery configurations are the driving force for how decisions are reached for students with disabilities. As a result of this rigid system, Ohio continues to segregate students with severe and/or multiple disabilities and underserves other students with disabilities.

As the remainder of this Memorandum will demonstrate, the proposed class meets the requirements of Rule 23(a) and 23(b)(2) and the court should, in its discretion, certify the class of intervenor plaintiffs.

II. INTERVENOR PLAINTIFFS MEET THE PREREQUISITES FOR A CLASS ACTION UNDER RULE 23(a).

A. The Proposed Class is so Numerous as to Make Joinder Impracticable.

Although Rule 23(a)(1) requires that it be impracticable to join all members of the proposed class, it does not require that joinder be impossible. *See Sweet v. General Tire and Rubber Co.*, 74 F.R.D. 333, 334 (N.D. Ohio 1967). The numerosity test under Rule

23(a)(1) does not require a specific number of individuals. "Impracticability of joinder is not determined according to a strict numerical test but upon the circumstances surrounding the case." *Senter v. General Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976), *cert. denied,* 429 U.S. 870 (1977). In *Merry v. Parkway School District*, 18 IDELR 947, 949 (E.D. Mo. 1992)(Attachment A), the court found that 2000 students identified as handicapped in the plaintiffs' complaint, together with any unidentified or future handicapped students "presents a class so numerous that joinder of each member would be impracticable."

In the present case, the proposed class is defined as all Ohio students, aged three through twenty-one, who are or will be eligible for or are receiving special education and related services in Ohio schools and all otherwise qualified students who have the rights to benefit from, or participate in, programs or activities of schools and to be free from discrimination on the basis of their handicaps. The Ohio Department of Education identified 211,069 students with disabilities receiving special education services in the school year 1991-92. *Highlights In Special Education*, Vol. 13, No. 1 (Spring, 1992)(Attachment B).

This figure does not necessarily include all the otherwise qualified children with disabilities who may require accommodation pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. Therefore, the class consists at a minimum of approximately 200,000 children. It would certainly be impracticable, if not impossible, to join each of those children through each child's parent or next friend. The paperwork and expense would be enormous and the amount of court time involved in presenting each case would be extraordinary. In addition, children with disabilities and their families already incur expenses due to the realities of dealing with a disability. To

require this expense from numerous individuals to vindicate rights shared by the class would impose a significant litigational hardship. *See Arkansas Education Ass'n. v. Board of Education of Portland*, 446 F.2d 763 (8th Cir. 1971).

B. There Are Common Questions Of Law or Fact.

This case contains numerous common questions of law and fact, as required by Rule 23(a)(2). The proposed class of intervenor plaintiffs are all children with disabilities. All the class members have a right to appropriate educational services and placement in the least restrictive environment. Each of the intervenor plaintiffs has been and is subject to defendants' actions and inactions. Any relief granted would direct Defendants to correct systemic inequities and inadequacies, rather than inadequacies in any individual's Individualized Education Program. Although the specific details of each individual's disability is unique, each class member is subject to the same systemic funding policies and practices that have created violations of their rights as a class. As stated by the Sixth Circuit in *Roncker v. Walter*, 700 F.2d at 1064, "[t]hat the Act requires individual placement decisions does not of itself bar all class actions."[1]

Moreover, Rule 23(a)(2) does not require that all questions of law and fact must

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[1] *See also, Felix by Servietti-Coleman v. Waihee,* 20 IDELR 1205 (D. Haw. 1994)(Attachment C), in which seven children with disabilities alleged a failure by the state to provide an adequate continuum of mental health programs and services for children and adolescents with mental health needs, in violation of the IDEA, Sections 504 and 1983, and state law. In determining that the requirements for class certification were satisfied, the court found that common questions of law or fact existed, because the plaintiffs' claims involved a systemic challenge to the defendants' policies. The court stated that:

> . . . Although the placement of a particular child within one of the state's mental health or educational programs may require individual determinations under federal law, that alone does not bar class certification in this case. (citation omitted)

Id. at 1206.

be common to all class members. *Port Authority Police Benevolent Ass'n v. Port Authority*, 698 F.2d 150 (2nd Cir. 1983). Members of a class, therefore, need not be in identical situations. *See*, *Rich v. Martin Marietta*, 522 F. 2d 333, 340 (10th Cir. 1975); *Institutionalized Juveniles v. Secretary of Public Welfare*, 459 F. Supp 30 (E.D. Pa. 1978); *Lelsz v. Kavanagh*, 710 F. 2d 1040 (5th Cir. 1983); *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1977).

Here, as in *Louis M. by Velma M. v. Ambach*, 113 F.R.D. 133, 136 (N.D. N.Y. 1986), in which handicapped children alleged that the state's review of decisions to place children in private schools based upon their individual handicaps was inadequate:

> ... since plaintiffs are challenging a *practice* of the defendant, and not defendant's conduct with respect to the individual plaintiffs, they have sufficiently satisfied Rule 23(a)(2). (Citations omitted).

In this case each class member has been and continues to be harmed because of defendants' adoption and implementation of policies and practices that infringe upon intervenors' rights under the law.

One common fact that exemplifies the policies and practices affecting class members is that educational placement decisions in Ohio are routinely made upon factors other than the individual needs of each student with disabilities. *OSEP Final Report* at 14(Attachment D). The United States Department of Education, Office of Special Education Programs (OSEP) reviewed the provision of special education in Ohio in 1991. Instead of basing placement decisions on the child's IEP, OSEP found that:

> The decisions regarding whether to educate students with disabilities in the regular education environment were. . .[made] on the basis of other factors such as administrative convenience, availability of space, building accessibility and the availability of paraprofessionals in regular education classes.

Id. at 14. OSEP also found that " 'what [units] the State approves is all that is available.

Units determine placement.' " *Id.* at 20.[2] Finally, OSEP found that The Ohio Department of Education (ODE) had frequently failed to identify these deficiencies and when it did identify them, ODE failed to ensure correction of such deficiencies. *Id.* at 11.

Other common facts include:

- the defendants have failed to insure that adequate funds are available to meet the needs of all students with disabilities [3];
- the money received from the state for unit funding does not cover the cost of the unit;
- the level of funding for special education is determined based upon a budgetary residual and is not based upon the cost of providing services to students with disabilities, i.e., units are funded based upon a flat formula that does not account

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[2] For example, educators reported to OSEP that regular classes with supplementary aids and services and small group instruction are not available to students with developmental handicaps (DH), multiple handicaps (MH) or learning disabilities (LD). A teacher reported that a DH student who was placed in a regular class without necessary supplemental services failed and was subsequently placed in a separate DH class. *OSEP Final Report* at 21. In addition, educators reported that supplemental services teachers (SST) are not an available option for many disabled students. *Id.*

[3] John Herner, State Director of Special Education, has testified that although the state provides funds through the "unit funding system", the cost of a unit funded program is greater than the monies provided by the state. *See* Deposition of John Herner, previously filed with the court, at 110. This situation is exacerbated by the fact that ". . . we [the Ohio Department of Education] always have requests for additional units beyond the funding capacity." Ms. Schindler testified that during the fall of 1992, approximately 1,100 to 1,189 units were requested by local school districts ". . . beyond what we [the ODE] were able to approve." See Deposition of Kathleen Schindler, State Assistant Director of Special Education, previously filed with the Court at 22. Other requirements for which state funding is not provided include the services of aides in multihandicapped or SBH units (*Id.* at 28); assistive devices and assistive technology (*Id.* at 55-56); modifications in materials and instructive techniques required for children who are not considered educationally handicapped under IDEA but have a condition which creates an entitlement to services under Section 504, such as attention deficit disorder, or ADD, *Id.* at 58); and extended school year (ESY) services (*Id.* at 64).

for varying needs of students except to prescribe class sizes;

- the cost of services not funded by the state or by federal funds is borne by school districts and many school districts do not have sufficient funds to fully provide for needs of students with disabilities; therefore, these pupils have been deprived of the full measure of their entitlement;
- the state does not provide funding to pay for any of the facilities or space used by special education units;
- the services included on IEPs are based on what is available rather than on the needs of the students;
- services of occupational and physical therapists are limited, therefore, students receive only a small portion or none of the services needed;
- the state fails to fund assistive technology and assistive technology devices for students with disabilities;
- the state has failed to provide sufficient funds to make buildings and programs physically accessible;
- psychology and speech services are funded based upon the average daily membership (ADM) and not upon the needs of students;
- the state has failed to fund supplementary aids and services to assist students with disabilities in regular classrooms other than an insufficient number of supplemental services teachers (SSTs);
- the state has failed to adequately monitor and enforce standards in traditional and experimental programs;
- the state has failed to ensure that placements in segregated programs are not based upon administrative convenience, availability of space, building

accessibility, and availability of related services personnel;

- the state has failed to ensure that deficiencies are corrected by school personnel;
- the state has failed to insure that students in wealthy and poor districts have equal access and opportunities to receive full, appropriate service;
- the state discriminated against students with disabilities by cutting budget allocations while not cutting allocations for regular education students.

Therefore, the intervenors' claims do not require a case-by-case determination of whether the defendants have met the requirements of federal law regarding the educational placement of each individual class member. Their central point is that because Ohio's funding level and service delivery configuration for special education is inequitable and inadequate, the system encourages discrimination against and segregation of students with disabilities contrary to the individual needs of students and the requirements of the law.[4]

There are also questions of law common to the proposed class.

1. Legal Framework of Rights Shared by the Class

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[4] Intervenor Plaintiffs are not required to exhaust administrative remedies because exhaustion would be futile. *Honig v. Doe*, 484 U.S. 305, 327 (1988); *see also Smith v. Robinson*, 468 U.S. 992, 1014 n. 17 (1984) (discussing futility exception to exhaustion). While there are administrative remedies to address aspects of an IEP, there are no administrative remedies which address the intervenor plaintiffs' claims in this action. Administrative remedies are futile in this case because Ohio law neither allows the filing of an administrative hearing request against the state (O.R.C. §3323.05; OAC 3301-51-02(G)) nor does it authorize hearing officers to grant the relief requested by plaintiffs. Instead, in Ohio the authority of hearing officers is limited to decisions ". . . in Accordance with the Rules for Special Education adopted by the State Board of Education and Federal Rules and Regulations." OAC 3301-51-02(G)(13). Since the special education rules contain provisions prescribing service delivery options for which the state may reimburse, the very rules which limit the hearing officers' authority are those which intervenor plaintiffs allege to be unconstitutional. Since hearing officers have no authority to rule upon intervenor plaintiffs' claims, such review would be futile.

The Education of the Handicapped Act (EHA), P.L. 94-142, which was amended by the Individuals with Disabilities Education Act of 1990 (IDEA), 20 U.S.C. §§1401, *et seq.*, requires that a participating state ensure that all children with disabilities in the state receive a "free appropriate public education." *Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989), *cert denied* 493 U.S. 1025 (1990).

To enable Ohio to receive funding under the IDEA, the state has made a free appropriate public education a matter of right for public school students who are educationally disabled through the enactment of R.C. Chapter 3323. The Ohio Department of Education is a "state educational agency"[5] responsible to each child with a disability in Ohio for special education and related services. The state has the primary responsibility of ensuring the availability of special education programs. *Honig v. Doe*, 484 U.S. 305, 329 (1988). *See also* 34 C.F.R. §300.550(a) and §300.551(b).

Under the IDEA, "the 'basic floor of opportunity' provided . . . consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Board of Education v. Rowley*, 458 U.S. 176, 201 (1982). The education provided must be tailored to the unique needs of the disabled child through an "individualized education program" (IEP) that is prepared by the school district, the child's parents, and the child's teachers. 20 U.S.C. §1401(19).

The IDEA also establishes the goal of:

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5 As defined by 20 U.S.C. §1401(a)(7). Congress has specifically abrogated the states' Eleventh Amendment immunity from suit under the IDEA, thus allowing claims to be made against a state which does not meet its obligation of ensuring that all disabled children within the state receive a "free appropriate public education." 20 U.S.C. §1403(a).

> providing full educational opportunities to all children with disabilities, including . . . to the maximum extent practicable and consistent with the provisions of section 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs.

20 U.S.C. §1414(a)(1)(C). To qualify for federal financial assistance, the State of Ohio must establish:

> procedures to ensure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(5)(B). *See also*, 34 C.F.R. §§300.550-.556.

A student with disabilities must be educated as close to home as possible and educational placement must be based upon his or her individual education program (IEP). 34 C.F.R. §300.552(a). A child with disabilities must attend the school which he or she would attend if not disabled, unless the child's IEP *requires* some other arrangement. 34 C.F.R. §§300.552(a) and (c).[6]

In *Roncker v. Walter*, 700 F.2d 1058 (6th Cir.), *cert. denied sub nom. Cincinnati City Sch. Dist. Bd. of Educ. v. Roncker*, 464 U.S. 864 (1983), the Sixth Circuit set forth the analytic framework to apply to claims that a disabled child was not being mainstreamed according to the requirements of the Act:

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6 Federal regulations which implement Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, also prohibit the assignment of a student with disabilities to a separate educational facility (one where children who are nondisabled generally are not educated) unless the child's IEP documents that a separate facility is *necessary* to the provision of an appropriate education for the child. 34 C.F.R. §104.34(c). These regulations also require that students with disabilities be provided nonacademic activities in as integrated a setting as possible. 34 C.F.R. §§104.34(a) and (b).

> The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate. *Campbell v. Talladega City Bd. of Education*, 518 F.Supp. 47, 55 (N.D. Ala. 1981). In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in a segregated school would be inappropriate under the Act.

Id., at p. 1063. The Court rejected claims that students may be segregated because no other programs are available.[7] Moreover, cost is not a defense to failure to provide a proper continuum of alternative placements. *Id. See also, Clevinger v. Oak Ridge School Board*, 744 F.2d 514 (6th Cir. 1984).

Several federal courts have held that because "mainstreaming" is a presumptive requirement of the law, school districts must consider placing students with disabilities in regular classrooms, with supplementary aids and services, before exploring more restrictive alternatives.[8] The presumption in favor of placement in regular classes will not

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[7] The IDEA requires that a continuum of placement options be available, including instruction in regular classes, resource rooms, special classes, hospitals and institutions and home instruction. 34 C.F.R. §300.551.

[8] *See, e.g., Oberti v. Board of Education of the Borough of Clementon School District*, 801 F.Supp. 1392 (D.N.J. 1992), *aff'd* , 995 F.2d 1204 (3rd Cir. 1993), holding that the school district violated both the IDEA and Section 504 by failing to investigate properly and provide reasonable accommodations necessary to enable an eight year old child with Downs Syndrome to benefit from an "inclusive" education in his home school district, and by excluding him from the regular education program solely on the basis of his disability; *Board of Education, Sacramento City Unified School District v. Holland*, 786 F. Supp. 874 (E.D. Cal. 1992), *aff'd , 14 F.3d 1398 (9th Cir. 1994),* holding that the school district's recommended half day placement in a regular classroom was not appropriate for a student with moderate mental retardation who was entitled to a full-time regular education program with supplemental services; and *Greer*

be rebutted unless the child's disabilities are so severe that he or she will receive little or no benefit from mainstreaming or that he or she is so disruptive as to significantly impair the education of other children in the classroom. *Holland*, 786 F. Supp. at 874.

2. Common Questions of Law In This Case

The central legal question in this case is whether the state has failed to provide a system of funding, monitoring and enforcement that ensures equitable and adequate education in the least restrictive setting for students with disabilities.

Related questions of law include: has the state failed in its duty to properly monitor and enforce the requirements of the Individuals with Disabilities Education Act? Is the current system of funding special education arbitrary and irrational and does it deny intervenors of their rights to educational services in violation of the Equal Protection and Due Process Clauses of the Fourteeth Amendment to the United States Constitution? Does the current system of funding special education in Ohio result in discrimination based on the disabilities of otherwise qualified students? Finally, does the current system of funding special education in Ohio adequately provide for a system that ensures that all of the educational needs of all students with disabilities are met?

The inadequacy and inequity of the policies and practices alleged arise out of common questions of law, and therefore, class certification is appropriate.

C. The Claims Of The Named Intervenor Plaintiffs Are Typical Of The Claims Of The Class.

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v. Rome City School District, 762 F. Supp. 936 (N.D. Ga. 1990), *aff'd* , 950 F.2d 688 (11th Cir. 1991), *withdrawn on other grounds*, 596 F.2d 1025 (1992), holding that removal from a general education classroom and placement in a segregated special class, although "appropriate" for the child, did not meet the least restrictive environment (LRE) requirement because the child was capable of benefiting from a regular class placement, with provision of supplemental services.

Rule 23(a)(3) requires that the claims of the named plaintiffs be typical of the claims of the class. This subsection of Rule 23 is closely related to subsection (a)(2). *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-158, n. 13 (1982). In *Senter v. General Motors Corp.*, 532 F. 2d at 511, the Sixth Circuit identified the focus of the typicality requirement to be on the type of injury suffered by the class members and the interests of the class members. What is important is that the claims of the named plaintiff and the class are interrelated such that the interests of absent class members are fairly and adequately protected. *General Telephone Co.*, 457 U.S. at 157, n.13. As the court stated in *Blankenship v. Secretary of HEW*, 587 F. 2d 329, 332, n.4 (6th Cir. 1978):

> The plaintiffs contend that delays beyond a certain period are unreasonable *per se* under applicable statutes and the constitution, regardless of unique factors in particular situations. The issues of statutory and constitutional 'unreasonableness' are therefore common to all members of the class, and the claims advanced by the named plaintiffs in this regard are typical of the class.

Just as the claims of the class here satisfy the commonality requirement of Rule 23(a)(2), the claims also satisfy the typicality requirement of Rule 23(a)(3). Intervenor John Doe has been subjected to the state funding policies and practices outlined in the complaint. See section D, *infra*.. As a consequence, he has suffered the same types of deprivation all students with disabilities have suffered and will continue to suffer. The relief requested by the representative intervenors concentrates not on alterations for each individual class member, but rather concentrates on systemic remedies which will change a state funding system and implementation of statewide policy. In addition, as in *Evans v. Evans*, 818 F.Supp. 1215 (N.D. Ind. 1993), a recent case in which disabled students seeking class certification were found to satisfy the typicality requirement "...

since the Plaintiffs challenge a rule of statewide application, no danger exists that the named Plaintiffs' claims will be subject to a unique defense which could destroy typicality." *Id.* at 1220.

D. The Named Intervenor Plaintiffs Will Fairly and Adequately Protect The Interests Of The Class.

Rule 23(a)(4) requires that the representative parties fairly and adequately protect the interests of the class. The Sixth Circuit Court of Appeals has established the following standard for determining when the Rule 23(a)(4) requirement is met:

1) The representative must have common interests with unnamed members of the class, and

2) It must appear that the representatives will vigorously prosecute the interest of the class through qualified counsel.

Senter, 532 F.2d at 525.

The claims of the named intervenor plaintiffs are also claims common to and typical of claims of the class. John Doe is entitled to a free appropriate education in the least restrictive setting. He is also entitled to the protections of the Rehabilitation Act of 1973 and the ADA. As a result of the policies and practices of the defendants, he is receiving inadequate and inequitable services. The services he currently receives are largely determined by what the state is willing to fund. For example, John Doe is eligible to be taught by an instructor for students with hearing impairments; however, he will only be placed in a classroom with such an instructor next year if the state approves the unit requested by his home school district. Even if the state approves of this unit, the classroom will be located in a school district other than his district of residence because the classroom will serve children from several school districts. His current program is located out of his district of residence and his mother travels 100 miles a day to transport

1990)(Attachment E); *Coe v. Hogan,* No. C2-87-719 (S.D. Ohio Dec. 30,1988)(Attachment F); *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979); *Sermac v. Brown*, No. C2-80-0220 (S.D.Ohio Nov. 20, 1988)(Attachment G). In finding that the members of the class in *Coe* were adequately represented, the court stated: "Plaintiffs' counsel in this case are employed by Ohio Legal Rights Service, which is statutorily charged with protecting the rights of mentally handicapped individuals. They have demonstrated both vigorous and competent advocacy in the case to date, as well as in other cases, such as *Sermac v. Brown*, involving similar issues." *Coe v. Hogan, slip op.* at 11. Therefore, the requirements of Rule 23(a)(4) are met in the present case.

III. THE REQUIREMENTS OF RULE 23(b)(2) ARE MET: DEFENDANTS HAVE ACTED OR FAILED TO ACT IN A WAY THAT IS COMMON TO ALL CLASS MEMBERS.

In addition to satisfying the four prerequisites of Rule 23(a), the proposed class must meet one of the three requirements of Rule 23(b). Rule 23(b)(2) states:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

Where the party opposing the class has acted or failed to act in a way that is common to class members, a class action is an appropriate vehicle to obtain final injunctive relief for the entire class. The United States Supreme Court has reaffirmed the appropriateness of class action treatment under Rule 23(b)(2) for actions seeking injunctive relief. *Califano v. Yamasaki*, 442 U.S. 682, 701-702 (1979). Class certification under (b)(2) has been found to be appropriate, also, in circumstances where defendants, as is the case here, have established a regulatory scheme which is common

to all class members. *See, e.g., White v. Beal*, 413 F. Supp. 1141 (E.D. Pa. 1976), *aff'd on other grounds*, 555 F. 2d. 1146 (3d Cir. 1977); Wright, Miller & Kane, 7A *Federal Practice and Procedure* , Section 1775 (1986).

In *Cordero v. Commonwealth of Pennsylvania Department of Education*, 795 F.Supp. 1352 (M.D. Pa. 1992) a class of students with disabilities was certified in a challenge to the state educational agency's [SEA] :

> ...absence of procedures for identifying geographic areas within the state which are lacking an adequate continuum of placement options; the failure to investigate and encourage wider development of publicly-operated classes; the lack of monitoring to address situations where individual or groups of individuals have been waiting excessive periods for appropriate placement; and the lack of coordination between the [SEA] and Department of Welfare...

Id. at 1362-63.

In concluding that "the fact that the local agencies (i.e., "school districts") are not performing up to par [is] irrelevant", the court attributed deficiencies to the SEA:

> As defined by the IDEA, the state's role amounts to more than creating and publishing some procedures and then waiting for the phone to ring. The IDEA imposes on the state an overarching responsibility....

Id. at 1362.

As in *Cordero*, this case involves a state department of education than has neither prevented local violations nor cured them. In addition to nonfeasance, the State of Ohio has funding mechanisms which result in an inadequate, overly segregated and discriminatory service delivery system.

The State of Ohio does not fund all special education services. The determination of which programs will receive funds is largely historical. The number and types of units receiving state funds is determined by the Department of Education based upon the total number of units authorized by the General Assembly for which appropriations have

been made.

For the 1993-94 school year, over half of the state supported units for services to students with severe or multiple impairments were allocated to segregated or more restrictive regional programs instead of more integrated, local programs.[9] Not surprisingly, student placement patterns in Ohio are consistent with state unit allocations. According to The Fifteenth Annual Report to Congress on the Implementation of the IDEA(Attachment I), during the 1991-92 school year, 202,156 Ohio students with disabilities age three through twenty-one were served under the IDEA. Only 2.19% of Ohio students with mental retardation were served in regular classrooms, with 81.38 % served in separate classrooms. Only 4.93% of the students labelled as having a serious emotional disturbance were placed in regular classrooms, with 43.71% served in separate classrooms and 34.57% (the highest in the nation) being served in public separate facilities. Only 0.28% of Ohio students with multiple disabilities were placed in regular classrooms, with 43.62% in separate classrooms and 50.33% (second highest in the nation) served in public separate facilities.

In this case, intervenor plaintiffs seek injunctive and declaratory equitable relief to redress inequities and inadequacies which are a direct consequence of defendants' policies, rules, regulations and practices. These policies, rules, regulations and practices are generally applicable to all members of the class. Therefore, the requirements of Rule

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[9] For the 1993-94 school year, school districts received 70.76 occupational therapy (OT) units, 49.01 physical therapy (PT) units and 708.49 multiple handicapped (MH) units. County Boards of Mental Retardation and Developmental Disabilities and County boards of education received 76.7 OT units, 55.65 PT units and 872.66 MH units. The 612 local school districts received only 44.8% of the state supported MH units, 48% of the OT units and 47% of the PT units. See Special Education Directory, School Year 1993-94 (Attachment H).

23(b)(2) have been met.

IV. CONCLUSION

The proposed class of intervenor plaintiffs has suffered harm and will continue to suffer harm as a result of the defendants' policies and practices. The class should be certified in order to protect the constitutional and statutory rights of individuals unable to challenge defendants' policies and procedures themselves.

Defendants have acted on grounds generally applicable to the class, thereby making final declaratory and injunctive relief with respect to the class as a whole appropriate. For the reasons set forth above, this case should be certified as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

Respectfully submitted,

OHIO LEGAL RIGHTS SERVICE

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ATTORNEYS FOR INTERVENOR PLAINTIFFS

CERTIFICATE OF SERVICE

This certifies that a copy of the Intervenor Plaintiffs' Motion for Class Certification and Memorandum of Law In Support was served upon Nicholas Pittner, Sue Wyskiver Yount and John Birath, Jr. of Bricker and Eckler, 100 South Third Street, Columbus, Ohio 43215-4291, who are counsel for the plaintiffs and also upon Mark A. Vander Laan, Joel Taylor, William Mattes, and David Mullen of Dinsmore and Shohl, NBD Bank Building, Suite 300, 175 South Third Street, Columbus, Ohio 43215-5134 who are Special Counsel for the State of Ohio, Supt. Ted Sanders, the Ohio State Board of Education, by ordinary U.S. Mail, postage prepaid, this 6th day of June, 1994.

Susan G. Tobin