

JAMES O., KELLY E., and WILLIAM B., *et al.*, :
:
Plaintiffs :
:
v. : Civil Action No.: 86-6-S
:
CHARLES H. MARSTON, in his official capacity :
as Commissioner of the New Hampshire :
Department of Education, *et al.*, :
:
Defendants :
:

I. INTRODUCTION

On June 5, 1986 this Court certified the following class:

All educationally handicapped students in New Hampshire who are or were placed in a facility pursuant to proceedings under New Hampshire RSA 169-B, 169-C, or 169-D, and who are not receiving, or did not receive, a free appropriate public education. The class also consists of the following subclasses:

1. such children whose parents have been or may be held liable for all or a portion of the costs of said placement, including the educational component of said placement;
2. such children whose educational programs are not being provided under the supervision and direction of a legally liable school district;
3. such children whose educational programs are not being provided in conformity with an Individualized Education Program (IEP), which meets the requirements of 34 C.F.R. §§300.340-300.349; and
4. such children who are in need of a surrogate parent but do not have one.

The Defendants are the members of the New Hampshire Board of Education and the Commissioner of the New Hampshire Department of Education, in their official capacities, who are responsible for ensuring that New Hampshire's "special education" programs for students with disabilities comply with the IDEA, RSA 186-C, and other Federal and State statutes protecting the educational rights of students with disabilities. For purposes of this Decree, the Director of the Division for Children and Youth Services is also a Defendant.

II. GENERAL TERMS AND DEFINITIONS

Following a period of negotiation, Plaintiffs and the Defendants have agreed to the entry of this Consent Decree establishing a plan which settles all claims set forth in the Complaint and Final Pretrial Statements filed with this Court for injunctive and declaratory relief, and for costs of residential placements of class members made pursuant to RSA 169-B, 169-C, or 169-D incurred before September 1, 1991. Plaintiffs' claim of attorneys' fees will be addressed separately in a stipulation or other filings with this Court. This Decree also does not resolve any claims against local education agencies that individual class members may have for relief, including claims for relief not covered by this Decree which may be awarded in the normal course of events by a hearing officer or court acting pursuant to 20 U.S.C. §1415, or claims for compensatory education or damages. Agreement to the entry of this Decree does not constitute an admission by any party as to any issue of fact or law regarding the adequacy of efforts to ensure that all educationally disabled students in New Hampshire who are or were placed in a

residential program or facility pursuant to New Hampshire RSA 169-B, 169-C, or 169-D, receive(d) a free appropriate public education. This Decree applies only to class members who were placed, who are being placed, or who will be placed in a program or residential facility pursuant to RSA 169-B, 169-C, or 169-D. This Decree shall not serve to extend DCYS' responsibility for any child beyond the age limits specified in RSA 169-B, 169-C, or 169-D. As used in the body of this Decree, "entry date" means May 20, 1991.

It is, therefore, ORDERED, ADJUDGED, AND DECREED:

1. Richard Chevrefils, the Director of the New Hampshire Division for Children and Youth Services (hereinafter "DCYS") is joined, in his official capacity, as a party to this action for purposes of this Consent Decree.

2. This Court has jurisdiction over the subject matter of all of Plaintiffs' Federal law claims against the Defendant State officials and jurisdiction over the persons of the State Defendants with respect to these claims.

3. Pursuant to Rule 23(c)(3) of the Federal Rules of Civil Procedure, the class to which this Decree applies is all educationally disabled students in New Hampshire who are, were, or may be placed in a residential program or facility pursuant to proceedings under New Hampshire RSA 169-B, 169-C, or 169-D, at any time on or after January 17, 1980.

4. For the purposes of this Decree, the following definitions shall apply unless a contrary meaning is indicated by the text:

- (a) "Child," "children," "school age children," "student," or "youth" shall mean a child or children three years of age or older but less than eighteen (18) years of age, unless the jurisdiction of the State district court has been extended beyond that age pursuant to RSA 169-B, 169-C, or 169-D.
- (b) "Days" shall mean calendar days; except that when the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded.

(c) "Educational records" means any document in the possession of DCYS, the Department of Education, or any school district which is relevant to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. The term "educational records" does not include:

- (1) records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;
- (2) records of a law enforcement unit of an educational agency or institution, but only if educational records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are
 - (i) maintained separately from education records,
 - (ii) maintained solely for law enforcement purposes, and
 - (iii) disclosed only to law enforcement officials of the same jurisdiction;
- (3) records relating to an individual employed by an educational agency or institution, that
 - (i) are made and maintained in the normal course of business,
 - (ii) relate exclusively to the individual in that individual's capacity as an employee, and
 - (iii) are not available for use for any other purpose.

Records relating to an individual who is employed at such agency or institution as a result of his or her status as a student are included within the term "educational records";

- (4) records relating to a student who is eighteen (18) years of age or older, or is attending an institution of post-secondary education, that
 - (i) are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity,
 - (ii) are made, maintained, or used only in connection with treatment of the student (for the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution), and
 - (iii) are disclosed only to individuals providing the treatment; and
 - (5) records that only contain information about an individual concerning acts or occurrences which happen after he or she is no longer a student at that agency or institution.
- (d) "Educationally disabled student" means any person three years of age or older but less than twenty-one (21) years of age who has been, should have been, or is being identified and evaluated by a school district according to Ed 1107 of the New Hampshire Standards, and any such person who has been determined to be autistic, mentally retarded, hard of hearing, deaf, speech or language impaired or both, visually impaired, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, traumatic brain injured, multihandicapped, or a child with specific learning disabilities who, by reason of such impairment,

needs special education or special education and educationally related services.

- (e) "Emergency" means an event, crisis, or set of circumstances necessitating immediate action without the opportunity to follow the procedures set forth in paragraphs 8(a)-(d) and 8(g)-(k) of this Decree, including, but not limited to, changes in a child's placement necessitated by a life or safety emergency, or the unavailability of a placement. Defendants and their agents shall act in good faith to interpret and apply this provision narrowly.
- (f) "Facility" means the Tobey School, Philbrook Center, the Detention Unit of the Youth Services Center, and the YDC.
- (g) "IEP" means "individualized education program" as defined at 34 C.F.R §300.340 and New Hampshire Standards, Ed 1109.01.
- (h) "Legally liable school district" means the school district in which the student lives. If a student is placed and cared for in a location to which the provisions of RSA 193:27-193:29 apply, "legally liable school district" means the "receiving school district" which is responsible for providing special education and special education and educationally related services as stated in RSA 189-a and RSA 193:28, and the "sending district" which is responsible for certain payments under RSA 193:29.
- (i) "Parent" means any person, including a surrogate parent, designated by 34 C.F.R §300.10 and the New Hampshire Standards, Ed 1101.10 to make decisions regarding the provision of a free appropriate public education to a child.
- (j) "Placement" or "place" means the act of enrolling a student in, or committing or moving a student to, an educational program or residential program or facility, or the act of transferring a student from one

educational program or residential program or facility to another; "placement" or "place" also means the site in which a student has been or will be placed.

- (k) "Program" or "services" shall mean a service or collection of services provided to a child in connection either with an adjudication by the State district or superior courts pursuant to RSA 169-B, 169-C, or 169-D, or with identification as an educationally disabled student pursuant to the IDEA and RSA 186-C.
- (l) "Residence" means the physical location of the home, program, or facility in which the student is housed.
- (m) "Residential program" means any place or program, other than the child's own home or the home of a relative, where children placed pursuant to New Hampshire RSA 169-B, 169-C, or 169-D live, including but not limited to detention facilities, treatment centers, group homes, foster homes, and residential schools.
- (n) "Written prior notice" means a letter provided to a parent which describes the action the school district proposes to take, or action it refuses to take, with respect to the identification, evaluation, or the educational program, placement, or services of a child with a disability. Such notice shall be provided to a parent at a reasonable time prior to the proposed action and shall meet the requirements of the New Hampshire Standards Ed 1125.01 (b)(1) and 34 C.F.R §§300.504 and 300.505.
- (o) Unless otherwise indicated, all terms used herein shall be construed in accordance with the New Hampshire Standards Ed 1101 *et. seq.* and the Federal regulations, 34 C.F.R §§300.1 *et. seq.*

5. The current version of the New Hampshire Standards for the Education of Handicapped Students is attached to this Decree as Exhibit #1 and incorporated herein by

reference. All amendments, deletions, or modifications to Defendants' current Standards and Regulations shall be filed with this Court for attachment to this Decree as provided in paragraph 6 of this Decree and, once adopted, will supersede the Standards in Exhibit #1.

6. To the extent that the implementation of this Decree requires any amendment, deletion, or modification of the New Hampshire Standards or any other of Defendants' regulations, such changes shall be adopted by Defendants and have the force of law no later than May 1, 1992, unless otherwise specified in this Decree. However, if Defendants are not able to make such change by that date due to some event beyond their control, the change shall be adopted and have the force of law as soon as practicable thereafter. Barring some event beyond their control, Defendants shall file all amendments, deletions, or modifications to the current Standards and Regulations with this Court for attachment to this Decree no later than thirty (30) days after they adopt such changes; otherwise such changes shall be filed as soon as practicable thereafter. To the extent that any provision of the Defendants' Standards and regulations modify, contradict, conflict, or are inconsistent in any way with this Decree or any subsequent Decree or Judgment entered by this Court in this case, the Decree or Judgment shall be controlling. In the event that Defendants are notified by the United States Department of Education that the provisions of this Decree, any subsequent Decree or Judgment by this Court in this case, or any provision of the Defendants' Standards and regulations required by this Decree, contradict, conflict, or are inconsistent with Federal law, Defendants shall seek any necessary modification of this Decree by this Court within twenty (20) days of receipt of such notice.

III. PRE-PLACEMENT AND PLACEMENT REVIEW PROCEDURES

7. Defendants shall make best efforts to ensure that a child who is being placed pursuant to New Hampshire RSA 169-B, 169-C, or 169-D is provided with a residential program or placement which allows continuation of the child's then current educational program and placement. To this end, whenever possible and appropriate, new placements should allow continued attendance at the same school.

8. Defendants shall adopt regulations and have in effect an interagency agreement, with the force and effect of law, which shall include, at a minimum, the following specific provisions regarding the placement of children under New Hampshire RSA 169-B, 169-C, or 169-D, which provisions shall apply to the initial placement of a class member, and all successive placements by DCYS or a State court acting pursuant to RSA 169-B, 169-C, or 169-D.

(a) In all instances where a residential placement of a student who is or may be educationally disabled has resulted or may result from a State court order under New Hampshire RSA 169-B, 169-C, or 169-D, the following steps shall be taken to ensure that the appropriate public agency assumes responsibility for the provision of a free appropriate public education:

(1) Within ten days of the date of an adjudicatory order which may result in placement of a child or youth, or a request by DCYS for a preliminary order for placement of such a child or youth, whichever comes first, DCYS shall designate the school district(s) which is or may be legally liable, and make a written request to the State court having jurisdiction over the child for joinder of the school district(s) under RSA 169-B:22, 169-C:20, or 169-D:18. A form motion for requesting joinder is appended to this Decree as Exhibit #2 and incorporated herein by reference. Copies of this form shall be made available in sufficient quantities to each DCYS office and State district court.

(2) If in the context of a proceeding pursuant to RSA 169-B, 169-C, or 169-D the legally liable school district(s) cannot be identified, or there is a dispute as to which school district is responsible for a student, DCYS shall seek a court order from the State court having

jurisdiction over the child to designate a legally liable school district.

- (b) Once joined, the school district identified as the legally liable school district shall be responsible, during the pendency of any proceedings under RSA 169-B, 169-C, or 169-D, for evaluating the student, and reviewing, revising, developing, and implementing the IEP and educational placement and, in all other respects, providing the educationally disabled student with a free appropriate public education unless and until another school district is substituted as a party by order of the State court. Where a legally liable school district has not been identified or has refused to assume this responsibility, nothing in this Decree shall be construed to relieve a school district into which an educationally disabled student has been placed (*e.g.*, the receiving school district, under RSA 193:27) from the duty under Federal and State law to identify and evaluate, or otherwise provide a free appropriate public education to an educationally disabled student.
- (c) Any actions taken by DCYS or a school district joined as a party in proceedings under RSA 169-B, 169-C, or 169-D, regarding the provision of a free appropriate public education to an educationally disabled student, are without prejudice to DCYS' or a school district's right under State law to recover monies expended for the provision of such education from any other public agency as defined by 34 C.F.R. §300.11.
- (d) In those cases where no school district assumes responsibility for a class member:
 - (1) The New Hampshire Department of Education shall fulfill the legally liable school district's role for purpose of evaluating the student and reviewing, revising, developing, and implementing the

IEP and placement, until a legally liable school district assumes these responsibilities on its own or by virtue of a State court order. The Department of Education annually shall provide Plaintiffs' counsel, each school district, and each office of DCYS with a list of employees responsible for the implementation of this paragraph.

- (2) DCYS shall provide funding, as necessary, for the purposes of implementing an existing or amended program of special education and special education and educationally related services, during the pendency of a dispute concerning school district joinder and liability.
- (3) The provision of services or the funding for such services by DCYS pursuant to this Decree shall not constitute a waiver of any right held by DCYS to later recover monies expended from any public agency as defined in 34 C.F.R. § 300.11 or from a parent. However, absent a final determination by a hearing officer or a court of competent jurisdiction acting pursuant to 20 U.S.C. §1415 that the program paid for by DCYS was not a component of an educationally disabled student's free appropriate public education, funds expended by DCYS for special education and special education and educationally related services are not subject to recovery from the student's parents pursuant to RSA 169-B, 169-C, or 169-D.
- (e) Except in an emergency, where a DCYS representative has reason to know that DCYS or a State court acting pursuant to RSA 169-B, 169-C, or 169-D may make or change a residential placement of an educationally disabled student or a student who may be educationally disabled:

- (1) The legally liable school district shall be given written notification by DCYS. The notice shall contain, at a minimum, the name and address of the placement or prospective placement, the date or prospective date of placement, and the reasons for placement. A form notice to be utilized by DCYS is attached to this Decree as Exhibit #3 and incorporated herein by reference.
- (2) If the student has not yet been determined to be educationally disabled, and there is reason to believe that the student is educationally disabled, a full evaluation meeting the requirements of the New Hampshire Standards Ed 1107 and 34 C.F.R. §§300.530-300.543 shall be initiated and completed within forty-five (45) days of the date of the notification to the school district of possible placement. Once the evaluation is complete, a student evaluation and placement team meeting shall be convened by the legally liable school district (or, if the legally liable school district fails or refuses, by the Department of Education) and DCYS, jointly, to make a decision about whether the student is educationally disabled. If the student is determined to be educationally disabled, the procedure set forth in paragraphs 8 (e)(3)(i)-(iii) shall be initiated forthwith.
- (3) If the student is educationally disabled, a student evaluation and placement team meeting shall be convened by the legally liable school district (or, if the legally liable school district fails or refuses, by the Department of Education) and DCYS, jointly, at a reasonable time prior to placement:
 - (i) this team meeting shall comply with the requirements of Federal law (specifically 34 C.F.R. §§300.344, 300.345,

and 300.347) and the New Hampshire Standards (Ed 1109.02-1109.05);

- (ii) the team at this meeting shall consider whether such a change in residence or placement is appropriate and in the least restrictive environment, whether the IEP can be implemented upon a change in residence or placement, and whether any revisions in the child's IEP are required. The team assembled for this meeting shall also consider any other matter related to the identification, evaluation, and educational placement of the student or the provision of a free appropriate public education to the student, including, whether there has been a failure to provide a free appropriate public education to the student and, if so, whether this failure has contributed to the conduct leading to the possible change of placement;
 - (iii) the parent shall have the right at this meeting, or any other meeting or proceeding held relative to paragraph 8 this Decree to suggest alternative placement(s).
- (f) In an emergency, whenever a placement of an educationally disabled student or a student who may be educationally disabled must be made (or in any other case for whatever reason where an educationally disabled student or a student who may be educationally disabled was placed without compliance with the procedures established herein):
- (1) DCYS shall promptly give written notice of the placement to the legally liable school district. At a minimum, the notification required by this paragraph shall contain the name and address of the placement or prospective placement, the date or prospective

date of placement, and the reasons for placement. A form notice to be utilized by DCYS is attached to this Decree as Exhibit #4 and incorporated herein by reference.

- (2) DCYS shall take all necessary steps to ensure that a copy of the educational records of the student, including, but not limited to, the child's current IEP and evaluations, shall be made available to the student's new educational program in order that the existing IEP can be implemented immediately. The educational records shall be made available to the student's new educational program within two working days, or as soon as practicable thereafter if that is not possible for reasons beyond the control of DCYS or the legally liable school district.
- (3) If the student has not yet been determined to be educationally disabled, and there is reason to believe that the student is educationally disabled, a full evaluation meeting the requirements of 34 C.F.R. §§300.530-300.543 shall be initiated and completed within forty-five (45) days of the date of the notification to the school district of possible placement. Once the evaluation is complete, a student evaluation and placement team meeting shall be convened by the legally liable school district (or, if the legally liable school district fails or refuses, by the Department of Education) and DCYS, jointly, to make a decision about whether the student is educationally disabled. If the student is determined to be educationally disabled, the procedures set forth in paragraphs 8 (e)(3)(i)-(iii) shall be initiated forthwith.
- (4) If the student is educationally disabled, a meeting which complies with the requirements of paragraphs 8 (e)(3)(i)-(iii) shall be

convened no later than ten days after the student is placed. However, if such residential placement occurs during the period from June 15 through August 20 in other than a residential school, and the student is not receiving or does not need an extended school year program, a meeting shall be convened no later than August 31.

- (g) At the discretion of either the parent or the legally liable school district, a representative of DCYS who is involved with the student for whom placement is being considered shall be provided with written notification of, and invited to attend, any meetings convened pursuant to paragraphs 8 (d) or (e).
 - (1) If the representative of DCYS elects to attend the meeting, that person shall be a member of the team convened pursuant to paragraphs 8 (d) or 8 (e), and shall be permitted to participate in any decisions made or votes taken.
 - (2) Whether or not the representative of DCYS elects to attend the meeting, the representative shall cooperate with the team as necessary to permit the team to make appropriate program and placement decisions and recommendations.
 - (3) The legally liable school district shall promptly provide DCYS with a copy of any educational records developed during or as a result of this meeting.
- (h) Except in an emergency, a placement shall not be recommended by the team unless it finds that the placement is one in which the student will receive a free appropriate public education in the least restrictive environment, and that the IEP will be promptly implemented after placement of the student.

- (i) The legally liable school district shall provide the parents with written prior notice, meeting the requirements of 34 C.F.R. §300.505 and Ed 1125.01 (b), of the team's proposed placement and the findings about its appropriateness, restrictiveness, and ability to implement the IEP. The parents shall have a right to be heard on the issue of the placement or proposed placement in any court or administrative proceedings related to this Decree.
- (j) For a student identified as educationally disabled, the legally liable school district shall at a reasonable time prior to the hearing on placement file with the State district court having jurisdiction over the student a report of the team's recommendations regarding placement. The team's report to the State court shall also include a statement as to whether any of the other placements being considered, including any separate recommendations submitted to a State district court, is appropriate, in the least restrictive environment, and capable of implementing the student's IEP. In those instances where DCYS has the authority, under State law or any court orders then in effect, to place a student without a further court order specifically authorizing or making the placement, the placement, program, and services recommended by the team shall be implemented in a timely manner.
- (k) At any time prior to a hearing regarding placement, any member of the team, including the DCYS representative, may submit to the State court having jurisdiction over the student under RSA 169-B, 169-C, or 169-D, recommendations which differ from those of the team. In this event, the team member or DCYS shall provide the parents with written notification of any such recommendations. The notice shall, at a minimum, be provided to the parent a reasonable time prior to the hearing, and shall

identify and describe the recommended placement, program, and services, and indicate why this proposal is more appropriate than that of the team. A form notice to be utilized by DCYS is attached to this Decree as Exhibit #5 and incorporated herein by reference. However, if DCYS finds that the provision of such notice is likely to subject the member of the class or the residential service provider to a threat of physical harm or severe and irreparable psychological harm, it shall:

- (1) apply to the Department of Education for the appointment of a surrogate parent within two days of this finding;
- (2) delay the provision of any notice required of it or any information contained therein until such time as a surrogate parent is appointed; and,
- (3) provide such notice only to the surrogate parent;

However, notwithstanding a finding by DCYS of physical harm or severe and irreparable psychological harm, the State district or superior court may order such notice to be provided.

- (1) Except in an emergency, if there is a dispute as to any matter related to the appropriateness of an actual or proposed placement, program, or services to a class member, this dispute may be submitted as an administrative complaint or directed to a hearing officer of the Department of Education for consideration and decision as provided by the New Hampshire Standards. To the extent that a decision of the Commissioner or the Commissioner's designee, the complaint investigator, or a hearing officer in any way differs from the recommendations made by the team, the team's recommendations shall be amended accordingly, and the procedures for reporting to the State court set forth in paragraph 8(j) shall be followed. In all cases where there is a dispute, 34 C.F.R. §300.513 shall

apply unless the placement, program, or services for any student are changed or modified by a court of competent jurisdiction within the meaning of 20 U.S.C. § 1415, or a State district court acting pursuant to RSA 169-B, 169-C, and 169-D. In an emergency, the issue shall be submitted for consideration and decision to the State court having jurisdiction over the student pursuant to New Hampshire RSA 169-B, 169-C, or 169-D.

- (m) In any instance where a State district court issues an order authorizing or making a placement, program, or service which differs from or conflicts with the placement, program, or services recommended by the team, special education and special education and educationally related services provided in connection with the placement made by the State court shall be provided free, under public supervision and direction, at no charge to the parents, and in conformity with an IEP developed by the team for use during such placement. When applicable, the procedures set forth in paragraphs 8(e)-(g) and 8(n) shall be followed by the team in any case where an IEP must be reviewed, revised, or developed as the result of a State district court order which in any way varies from or conflicts with the placement, program, or services recommended by the team.
- (n) Whenever any student is or will be placed in a residential program or facility other than a foster home, the legally liable school district shall ensure that:
 - (1) The team develops a written document which shall be included in the student file maintained by the legally liable school district. Such document shall indicate: the date of initial placement in the residential program or facility; the reason for the placement; if appropriate, the specific steps to be taken to obtain a less restrictive

program for the student (*e.g.*, specific work done with the student's parents, foster parents, or other community agencies as well as with a particular school district); and the projected date for change of this placement to a less restrictive environment.

- (2) A copy of all necessary educational records of the student, including, but not limited to, the student's current IEP and evaluations, is provided to the student's new educational program so the IEP then in effect can be implemented immediately.

IV. THE TOBEY SCHOOL, THE PHILBROOK CENTER, THE DETENTION UNIT OF THE YOUTH SERVICES CENTER, AND THE YDC

9. The Defendants shall take the following steps regarding the provision of a free appropriate public education at the Tobey School, Philbrook Center, the Detention Unit of the Youth Services Center, and the YDC:

- (a) By July 1, 1991, the Department of Education shall have completed a 1991 audit for the Philbrook Center, the Tobey School, the Detention Unit of the Youth Services Center, and the YDC to determine their compliance with the IDEA and New Hampshire Standards and issue a report of findings and corrective actions pertaining to each facility.
- (b) These reports by the Department of Education shall:
 - (1) specify the personnel and teaching or professional certification needed, based upon study of the population and existing program characteristics of each facility;
 - (2) identify any practice or procedure which results in the exclusion of educationally disabled children from a 5 1/4 hour, or, in the case of high school students, a 5 1/2 hour per day educational program;

- (3) identify any deficiencies in educationally related physical plant, services, and materials needed to meet the needs of the populations served and to implement IEPs;
 - (4) identify any deficiencies in the qualifications of staff under the IDEA, New Hampshire Standards, and State law; and,
 - (5) state whether extended school year programs are available and provided.
- (c) By November 1, 1991, DCYS and the Department of Education shall have in place a written plan which:
- (1) ensures that the physical plant, services, and materials needed to implement IEPs, including fully functioning libraries, shall be available no later than December 31, 1991.
 - (2) ensures that all remaining deficiencies in educationally related physical plant needed to meet the needs of the populations served shall be available no later than May 1, 1994.
 - (3) corrects no later than December 31, 1991 any practice or procedure, contrary to Federal or State law, which results in the exclusion of educationally disabled students from a 5 1/4 hour or, in the case of high school students, a 5 1/2 hour per day, educational program and which is not otherwise specifically addressed under this Decree.
 - (4) attracts and retains by December 31, 1992 sufficient numbers of appropriately certified personnel under the State Standards and Federal and State law required to implement IEPs of the residents of each facility. This part of the plan shall include a schedule of salary enhancements and comparative salary data for public systems in the geographic area of each of the facilities.

- (5) corrects no later than May 1, 1992, any shortcomings regarding the availability and provision of extended school year programs.
- (6) includes a system of maintaining documentary evidence and providing periodic progress reports regarding compliance with this remedial plan.

10. DCYS shall take the following steps regarding the provision of a free appropriate public education to class members at the Tobey School, Philbrook Center, the Detention Unit of the Youth Services Center, and the YDC:

- (a) By September 1, 1991, DCYS shall implement a written plan and policy which:
 - (1) complies with Ed 1136.04, Juvenile Awaiting Disposition of the Court (ADC), for all children with disabilities placed at the Detention Unit of the Youth Service Center or hospitalized at the Philbrook Center.
 - (2) complies with Ed 1136.01-1136.03 for all students with disabilities placed at YDC.
 - (3) except as provided in paragraphs 10 (a)(4) or 10 (b), requires that all educationally disabled students placed at the Tobey School, the Detention Unit of the Youth Services Center, or YDC attend school and receive an educational program for at least 5 1/4 hour or, in the case of high school students, 5 1/2 hours per day beginning no later than two school days after arrival, and in the case of students hospitalized at the Philbrook Center, beginning no later than seventy-two (72) hours after arrival. However, if such placement occurs during the period from June 15 through August 31, and the student has not been receiving or does not need an extended school year program, attendance at school is not required.

- (4) provides the following procedure whenever it is proposed that a student not begin to attend school and receive an educational program within the specified period after arrival as set forth in paragraph 10 (a)(3):
- (i) A qualified member of the clinical or administrative staff at each facility shall be consulted in each such instance.
 - (ii) Prior to the third school day after admission, a determination shall be made as to whether the student presents such a danger to self or others or would disrupt the educational process to such an extent that it would be impossible for the student to participate appropriately in the educational program.
 - (iii) If, after consultation with the appropriate teaching staff, the designated staff member determines that the student presents such a danger to self or others, or would disrupt the educational process to such an extent that the student cannot appropriately participate in the educational program, the student may be kept out of school only as long as necessary, but in no event longer than ten school days.
 - (iv) The student's parent(s) shall be notified in writing if a determination is made that a student placed at the Tobey School, the Detention Unit at the Youth Services Center, or YDC is to be kept out of school for more than two school days, or a student hospitalized at the Philbrook Center is to be kept out of school for more than seventy-two (72) hours, after admission. Such notice shall identify the dates the

student is to be kept out of school, and the reason for this decision.

- (b) By September 1, 1991, DCYS shall implement a plan and policy regarding the suspension or expulsion of educationally disabled students which sets out in detail the procedures to be followed for any suspension, includes definitions of the terms "suspension" and "expulsion," and specifies that:
 - (1) No educationally disabled student placed at the Tobey School, Detention Unit of the Youth Services Center, or the YDC, or hospitalized at the Philbrook Center, may be expelled from education.
 - (2) Except in an emergency, no educationally disabled student placed at the the Tobey School, Detention Unit of the Youth Services Center, or the YDC, or hospitalized at the Philbrook Center, shall be suspended from his or her educational program for acts not committed in the course of the educational program, or where (i) there is a relationship between the conduct and the student's disabling condition, (ii) the educational placement or program in the facility is inappropriate, or (iii) the IEP is not being fully implemented.
 - (3) Whenever possible, a brief removal from class or the provision of other educational alternatives will be used in lieu of suspension.
 - (4) An emergency suspension, imposed when the student's behavior in his or her current educational placement or program constitutes an imminent danger to self or others, or seriously disrupts the educational process, may last only for as long as necessary to allow the danger or disruption to pass.

- (5) An emergency suspension may not be imposed exclusively by classroom teachers. Such suspensions may only be made after consultation with a qualified member of the clinical or administrative staff to be designated at each facility, as provided in paragraph 10 (a)(4)(i).
- (6) If the persons making the decision whether or not to continue an emergency suspension find (i) a relationship between the conduct and the student's disabling condition, (ii) that the placement or program in the facility is inappropriate, or (iii) that the IEP is not being fully implemented, the student may not be suspended for longer than two days, unless the student's behavior continues to present an imminent danger to self or others, or would seriously disrupt the educational process to such an extent that the student cannot appropriately participate in the educational program.
- (7) Where the persons deciding that an emergency suspension may continue beyond two days finds (i) a relationship between the conduct and the student's disabling condition, (ii) that the placement or program in the facility is inappropriate, or (iii) that the IEP is not being fully implemented, a Special Education Evaluation Placement Team meeting shall be promptly convened.
- (8) Whenever a non-emergency suspension would, if implemented, cause the student to be suspended for a period of fifteen (15) or more non-consecutive school days, the Special Education Evaluation Placement Team shall meet prior to the suspension. The team shall determine whether the conduct for which suspension is being considered is the result of, or related to, the student's disabling condition, whether the educational placement or program

being provided at the facility is appropriate, whether the IEP is being fully implemented, and whether the IEP should be revised. If the Special Education Evaluation Placement Team finds that there is a relationship between the conduct and the student's disabling condition, that the educational placement or program being provided at the facility is inappropriate, or that the IEP is not being fully implemented, the proposed non-emergency suspension may not be implemented. This part of the plan shall not preclude a parent or teacher from requesting that the Special Education Evaluation Placement Team meet prior to any suspension, regardless of its proposed duration. In addition, this part of the plan shall not preclude the team from determining for any suspension, regardless of its proposed duration, that a change in placement or program being provided at the facility is necessary or has occurred.

(9) Whenever the decision is made to suspend a student pursuant to paragraph 10 (b)(8) above, the Special Education Evaluation Placement Team must also determine whether the suspension constitutes a change in placement. In making this determination, the team shall consider:

- the length of each suspension;
- the proximity of the suspensions to one another;
- the total amount of time that the student was excluded from education; and
- the effect that such suspension would have on the student's progress in the education program in the facility.

- (10) Alternative educational programming shall be provided for an educationally disabled student within five days following the student's suspension from the educational program.
 - (11) In addition to any suspension determined by the Special Education Evaluation Placement Team to be a change in placement, any suspension of more than ten consecutive days, or a suspension of more than twenty (20) non-consecutive days in a single school year, constitutes a change in placement to which all of the procedural protections accompanying a change in placement under Federal law and the New Hampshire Standards apply, except that the location of the facility in which the student is placed is governed by the terms of a court's order(s) under RSA 169-B, 169-C, or 169-D.
 - (12) Any action taken to suspend an educationally disabled student shall be accompanied by adequate and timely written notification, and shall be in compliance with the procedural safeguards required by the IDEA and the New Hampshire Standards.
 - (13) Suspensions shall comport with Goss v. Lopez, 419 U.S. 565 (1975), RSA 193:13, and any other applicable Federal and State law.
 - (14) Each facility shall maintain a log in a central location documenting each suspension and the procedures followed with respect to those suspensions.
- (c) By September 1, 1991, in each facility DCYS shall:
- (1) provide sufficient hours of instruction to satisfy the requirements of Ed 1119.09(b) and 1133.12 (requiring that the length of the school day be 5 1/4 hours or, in the case of high school students, 5

1/2 hours, including recess but generally not lunch, except in unusual cases involving team recommendations for a shortened school day due to diminished emotional or physical stamina, and extending the 5 1/4 or 5 1/2 hour requirement to "[e]ach private facility or other non-district program," respectively).

- (2) provide sufficient staff or reorganize staffing patterns so that all students with disabilities shall continue receiving the educational program required by their IEPs even when their teachers are absent.
- (3) remedy any other practice or procedure contrary to Federal or State law, or the New Hampshire Standards which results in the exclusion of educationally disabled youth from a 5 1/4 hour or, in the case of high school students, a 5 1/2 hour per day educational program.
- (4) provide sufficient numbers of appropriately certified personnel under the New Hampshire Standards and Federal and State law needed to provide the counseling and social work services required by the IEPs of all of the residents.

11. By January 1, 1992, the Department of Education shall amend Ed 1136.01 through 1136.04 of the New Hampshire Standards as follows:

- (a) A determination whether a student placed at the Tobey School, Detention Unit of the Youth Services Center, or the YDC, or hospitalized at the Philbrook Center, has been identified as educationally disabled shall be made within two school days through contacting the responsible school district, or through access to the Department of Education SPEDIS system or the Integrated Data System described in this paragraph 19 of this Decree, *infra*.

- (b) With respect to students who are determined to be educationally disabled at the time of placement:
 - (1) DCYS shall immediately (within twenty-four (24) hours) notify the responsible school district, and the responsible school district shall immediately (within twenty-four (24) hours) provide a copy of the student's IEP to the facility and the current IEP shall be implemented within two school days after this information is obtained.
 - (2) If the process required by paragraph 8 of this Consent Decree was not complied with prior to placement of an educationally disabled student, the case shall be treated as an emergency, and the provisions of paragraphs 8(f)-(g) and (n) of this Decree shall be implemented accordingly.
- (c) With respect to students who are not identified as disabled at the time of placement:
 - (1) A screening evaluation shall be completed upon admission of a student to the Tobey School, Philbrook Center, the Detention Unit of the Youth Services Center, or the YDC, and a report issued within ten days of placement, or of obtaining parental consent to evaluate, whichever comes last.
 - (2) All screening evaluations conducted by any facility pursuant to this section shall be administered and completed by staff who are qualified under the New Hampshire Standards to conduct such evaluations or tests.
- (d) With respect to students who are not identified as educationally disabled at the time of placement, but whose screening evaluation indicates that the student may be educationally disabled, the following shall occur:

- (1) The student shall be referred, in writing, to the legally liable school district which shall conduct all necessary evaluations, convene a special education evaluation/placement team, and issue an evaluation report in the manner required by the IDEA and the New Hampshire Standards Ed 1107.
 - (2) Within forty-five (45) days of the date of the referral, the legally liable school district shall make the decision as to whether the student is educationally disabled.
 - (3) The legally liable school district shall consider the results of the screening evaluation in making its decision.
 - (4) The legally liable school district shall provide the parent(s) with written prior notice of the decision as to whether the student is educationally disabled, including a copy of the evaluation report. The school district shall also send a copy of this notice and report to the residential facility.
 - (5) If the parents disagree with the decision of the team, they may proceed with the complaint and impartial due process hearing procedure as provided in the New Hampshire Standards.
 - (6) For newly-identified educationally disabled students, the legally liable school district shall develop an IEP within thirty (30) days of the determination of the student's eligibility for special education.
- (e) The provisions set out in paragraph 8 of this Decree shall apply to any decision regarding the placement, the continuation of placement, or the review of the IEP (which review shall occur at least annually) of class members at the Tobey School, Philbrook Center, the Detention Unit of the Youth Services Center, or the YDC.

V. SURROGATE PARENT PROCEDURES

12. No later than September 1, 1991, DCYS and the Department of Education shall enter into an interagency agreement, with the force and effect of law, regarding surrogate parents. This interagency agreement shall include the following:

- (a) A procedure requiring DCYS to identify at the time of placement, and at least once annually thereafter, whether any educationally disabled student placed in a residential program or facility pursuant to RSA 169-B, 169-C, and 169-D, who does not have a surrogate parent may need a surrogate parent.
- (b) A requirement that whenever DCYS has been awarded custody of a class member or the class member is a ward of the State, or when the parents of a class member are, or may be, unknown or unavailable, DCYS shall promptly refer the class member's name, together with all pertinent information, to both the Superintendent of Schools of the legally liable school district and the Commissioner of Education or the Commissioner's designee.
- (c) A requirement that the Department of Education make a determination as to whether a surrogate parent is needed in accordance with New Hampshire Standards Ed 1121 and State law.
- (d) A requirement that where the parent is determined to be unknown or unavailable, or the child is a ward of the State, the Department of Education shall appoint a surrogate parent for the student in accordance with New Hampshire Standards Ed 1121 and State law.
- (e) A requirement that DCYS notify the Department of Education of any instance in which the surrogate parent appointed for the student has failed, or is failing, to competently advocate for the student; has an interest which would conflict with that advocacy; is an employee of the agency responsible for the residential care or education of the student; has not

become familiar with the child's needs; or is not adequately representing the student at each stage of the special education process, including, but not limited to, identification, evaluation, and the provision of a free appropriate education to the student, and any necessary complaints or appeals related thereto. After reviewing the matter with the surrogate parent, the student, if appropriate, and other interested persons, the Department of Education shall make the final decision as to whether as a result of this information the services of a surrogate parent should be terminated.

13. No later than January 1, 1992, the Department of Education shall amend Ed 1121 of the New Hampshire Standards to provide that:

- (a) The process for the appointment of a surrogate parent shall not exceed forty (40) days from the date on which the Superintendent of Schools or Department of Education receives the referral, unless a parent or guardian objects to the appointment of a surrogate parent.
- (b) If a parent or guardian objects to the appointment of a surrogate parent, the decision whether or not to appoint a surrogate parent shall be made within fifty-five (55) days of the date on which the Superintendent of Schools or Department of Education received the referral.
- (c) In all instances where information from the legally liable school district is necessary to make a determination whether a surrogate parent should be appointed, it shall be the responsibility of the Department of Education to ensure that the class member's local education agency provides all the information necessary to complete the process of determining whether a surrogate parent should be appointed in a timely manner.

14. To the extent necessary to obtain competent surrogate parent volunteers in sufficient numbers, surrogate parents shall be sought from organizations for persons with disabilities.

VI. PROCEDURES FOR REIMBURSEMENT OR WAIVER OF PLACEMENT COSTS

15. In order to ensure that the special education and special education and educationally related services received by the class members is provided free and at no cost to them or their parents, responsibility for the costs associated with the residential placement of class members made pursuant to RSA 169-B, 169-C, or 169-D shall be allocated as follows:

- (a) DCYS waives its statutory right to recover costs associated with RSA 169-B, 169-C, or 169-D residential placements of class members incurred between January 1, 1986 and January 7, 1988 for which recovery has not yet been sought from a parent or other responsible person. Whether DCYS must waive its statutory right to recover costs associated with RSA 169-B, 169-C, or 169-D residential placements of class members incurred after January 7, 1988, for which recovery has not yet been sought from a parent or other responsible person, may be submitted for resolution as set forth in paragraph 17 of this Decree.
- (b) Waiver by DCYS of parental or "other responsible person" liability is the only remedy available against DCYS. No remedy is available against DCYS under this Decree for the costs of residential placements incurred before January 1, 1986.
- (c) The procedures set forth in this Decree are not intended to limit the claims and defenses of the parties with respect to the application of the limitations on liability contained in RSA 186-C:19, 186-C:19-a, & 186-C:19-b, and RSA 193:27 & 193:29, including the availability of immunity defenses and validity of these provisions under Federal and State law.

- (d) No financial liability shall be assessed against the Department of Education other than as provided in RSA 186-C:19-b or for placement costs incurred prior to July 1, 1987.
- (e) All other claims for reimbursement or payment for the costs of placements may be made against the legally liable school districts as provided in the reimbursement procedures set forth in paragraph 17 of this Decree.

16. In order to ensure that the special education and special education and educationally related services received by the class members is provided free and at no cost to them or their parents, Defendants shall give the following notice of the procedures provided for in this Decree for reimbursement, payment, and waiver of amounts owed:

- (a) A notice shall be published in the classified section of one newspaper of general circulation in each county in the State of New Hampshire advising parents of students who are or may be educationally disabled, and any such students who were age eighteen (18) years or older, and who were placed in a residential facility pursuant to RSA 169-B, 169-C, or 169-D, that the students may be members of the Plaintiff class; that they may be, or may have been, entitled to a free appropriate public education; and that they may be entitled to an order which relieves them of responsibility for the costs of such placements or, in the event that they have paid such costs, requires that they be reimbursed. A copy of the notice is attached hereto as Exhibit #6 and is incorporated herein by reference. Notice by publication shall be made during the period between second and fourth months following the entry of this Decree.
- (b) The parents of each class member, and each class member who is now an adult, shall be provided with written notice containing the information about this Decree set forth in paragraph 15 (a). Such notice shall be sent by first class mail between the third and fourth months following the entry

of this Decree. The text of this notice is attached hereto as Exhibit #7 and is incorporated herein by reference. The names contained in the Children's Information System shall be matched with names contained in SPEDIS for the purpose of identifying the class members and their parents to be sent notice.

17. In order to ensure that class members are provided special education and special education and educationally related services free and at no cost to them and their parents, Defendants shall, no later than September 1, 1991, have in place the following procedure for handling claims of class members and their parents for reimbursement, payment, or waiver of amounts owed for the costs of placements made pursuant RSA 169-B, RSA 169-C, or RSA 169-D:

- (a) Written claims for waiver, reimbursement, or payment shall be sent to the Department of Education.
- (b) Such claims must be received by the Department of Education within seven months of receipt of written notice, or the last date of publication notice, whichever is last.
- (c) Notice of all such claims shall be provided to the Office of the Attorney General, DCYS, and the legally liable school district(s).
- (d) In any case in which a legally liable school district fails or refuses to assume responsibility for a student because it contends another school district is responsible, hearing officers of the New Hampshire Department of Education shall be authorized to identify the legally liable school district(s) and to resolve disputes regarding the legal liability of school districts.
- (e) With respect to the the educational component of a placement, the hearing officer shall utilize the following standards in issuing orders on the merits of claims for reimbursement or payment, or requests for waiver:

- (1) A class member and a class member's parents shall be entitled to an order which either (a) relieves them of responsibility for the costs of special education and educationally related services provided in the educational component of placements made pursuant RSA 169-B, 169-C, or 169-D or, (b) if they have paid money toward such costs to a town or county, requires reimbursement in an amount not exceeding the State-approved rate. If no State-approved rate for the residential placement has been set, then the amount actually charged by the placement for the educational component shall be substituted.
- (2) No order shall be issued unless notice has been given in accordance with paragraph 17 (c).
- (3) The hearing officer shall issue a final order concerning liability for the educational component of a residential placement as set forth in paragraph 17 (e)(1) without the need for an impartial due process hearing, unless the school district against which the claim is made objects in writing and requests a hearing within thirty (30) days of its receipt of the claim.
- (4) If a school district against which the claim is made requests a hearing, an impartial due process hearing shall be scheduled.
- (5) Upon a request for a hearing, a school district may be relieved of financial responsibility, in whole or in part, only if one of the following is true:
 - (i) the student is not or was not in fact educationally disabled during the time of placement, in which case a hearing officer may make a retrospective determination that a student was educationally disabled,

- (ii) the amount claimed owed is incorrect based on the formula in paragraph 17 (e)(1), or
 - (iii) it was not the legally liable school district during the placement in question, in which case the other school district(s) believed to be the legally liable school district(s) shall be joined as a party to the proceedings.
- (f) Unless otherwise ordered by the hearing officer, liability orders concerning the educational component of a placement of educationally disabled students pursuant to paragraph 17(e)(1) shall remain in effect through the pendency of any administrative or judicial proceedings, unless a court of competent jurisdiction amends or sets aside such order.
- (g) With respect to the residential component of a placement (costs for non-medical care and room and board), the hearing officer shall order reimbursement, payment, or waiver when one or more of the following is true:
 - (1) the school district failed to consider the educationally disabled student's need for residential programming in accordance with the procedures mandated by Federal and State law and their implementing regulations, including New Hampshire Standards Ed 1107, 1109, and 1115, prior to placement if the school district knew or should have known that the student was to be placed, or within reasonable time after placement if the school district did not or could not have known of the placement; or
 - (2) the school district considered the student's need for residential placement, but failed to notify the student's parents in writing of the school district's decision regarding the need for and the funding of the residential placement in strict compliance with the written

notice requirements of the IDEA and New Hampshire Standards Ed 1125; or

- (3) the residential placement was necessary for the student to benefit from special education and special education and educationally related services, as required by Federal and State law.

(h) A hearing officer may schedule a hearing to resolve all issues relative to the educational and residential components of placements of disabled students made pursuant to RSA 169-B, 169-C, or 169-D. However, if the class member or parent requests that financial responsibility for the residential component of the placement be assumed by DCYS, the Department of Education, or the legally liable school district, the hearing officer has the discretion to bifurcate the hearing and limit the issues in the first instance to the consideration of the procedural issues set forth in paragraphs 17 (g)(1) and (2). If, as a result of a bifurcated hearing, the hearing officer finds compliance with the procedural safeguards, then a hearing shall be scheduled on the necessity of the residential placement as set forth in paragraph 17 (g)(3).

(i) In any case where a hearing officer issues a final order completely or partially relieving a class member or parent of liability for a residential placement made pursuant to RSA 169-B, 169-C, or 169-D, and that order is inconsistent with an outstanding State district court order, DCYS shall request the State district court to issue an amended order on liability which is consistent with the hearing officer's order. A form Motion to Amend Order on Liability is attached to the Decree as Exhibit #8 and incorporated herein by reference. Upon the filing of a claim for reimbursement, payment, or waiver in any case in which a parent has been ordered to pay the costs of a placement made pursuant to RSA 169-B, 169-C, or 169-D,

DCYS shall request the State district court(s) to stay all orders on liability against the class member or parents during the pendency of any proceeding initiated pursuant to paragraphs 15-17 of this Decree. A form Motion to Stay Liability Order is attached to the Decree as Exhibit #9 and incorporated herein by reference.

18. Nothing contained in paragraphs 15-17 of this Decree shall be construed to limit the right of a legally liable school district to raise, or the class member or parent to present objections to, statutes of limitation or other procedural defenses which would result in the dismissal of a claim prior to a determination of the claim of reimbursement or payment on the merits.

VII. INTEGRATED DATA SYSTEM

19. No later than July 1, 1991, the Department of Education and DCYS shall cooperate to create an Integrated Data System, which combines information from the Childrens' Information System (CIS), as operated by the Department of Health and Human Services, and the Special Education Information System (SPEDIS), as operated by the Department of Education. This Integrated Data System will merge, and provide Plaintiffs' counsel and authorized individuals within each Department access to, certain specific data collected within each separate system to ensure that each educationally disabled student placed under RSA 169-B, 169-C, or 169-D, receives a free appropriate public education. The Integrated Data System shall have, at a minimum, the following components and procedures:

- (a) Access to the System shall be available through CIS or SPEDIS terminals located in each District Office of DCYS, the Department of Education, the Tobey School, the Detention Unit of the Youth Services Center, and the YDC. Access to the System for staff at the Philbrook In-patient Psychiatric unit shall be available through the CIS terminal located in the the Detention Unit of the Youth Services Center. In order to maintain the privacy rights of students and their families, access will be limited to key

personnel providing services to the student, the responsible local education agency, and Department of Education personnel responsible for monitoring or auditing the educational programs of class members.

- (b) In order to identify class members, the Department of Education and DCYS shall match the names, dates of birth, and sex of individuals listed in CIS to the names, dates of birth, and sex of individuals listed in SPEDIS.
- (c) For each member of the class identified through the procedure in paragraph 19 (b), DCYS will extract from CIS the following data elements and develop a procedure to transfer these data elements to the operators of SPEDIS:
 - (1) full name;
 - (2) date of birth;
 - (3) DCYS ID number;
 - (4) sex;
 - (5) the name, address, date of placement, and provider type (*e.g.*, foster home, group home, residential school, etc.) for each placement made in the last twelve (12) months; and
 - (6) the name of the State district court and the date of placement order for each placement within the last twelve (12) months.
- (d) For each member of the class, the Department of Education will extract from SPEDIS the following data elements for class members:
 - (1) DCYS ID number;
 - (2) name of student;
 - (3) SPEDIS number;
 - (4) evaluation team meeting date;
 - (5) handicap codes;

- (6) placement meeting date;
 - (7) district of liability;
 - (8) placement begin date and end date; and the
 - (9) name and SPEDIS code of school in which student is placed.
- (e) A data screen which will depict the integrated data elements described in paragraphs 19 (c) and (d) shall be created within each system.
 - (f) The Department of Education and DCYS shall adopt and implement policies to ensure that as any of the above-mentioned information concerning class members changes, the new information is entered into the respective information systems promptly, no later than ten days after the change.
 - (g) Following the initial match, DCYS and SPEDIS data will be matched at least twice a month.

VIII. PROCEDURES FOR IMPLEMENTATION AND MONITORING OF CLASS WIDE RELIEF

20. By June 15, 1991, the Defendants shall provide each school district, DCYS office, and State district court with a copy of this Decree.

21. By September 1, 1991, counsel for the parties shall develop a training program to inform persons of the terms of this Decree, and shall make such training program available to State district court judges, school districts, DCYS, Department of Education, Division of Mental Health and Developmental Services (DMHDS), and State district court personnel.

22. By September 1, 1991, the Defendants shall report to Plaintiffs' counsel on the status of each of the named Plaintiffs and class members listed in Exhibit #10 (hereinafter "identified class members") of this Decree and incorporated herein by reference. This report shall include:

- (a) For identified class members presently attending school, the name of the responsible school district; a description of the specific educational program and related services being provided; the extent of participation in programs and activities with non-disabled children; the name of the entity at which such programs or services are provided; if known, the name of the agency, school district, or any other entity or person who is financially responsible for such programs or services; the citation to the juvenile statute, if any, under which the student is placed; and the name of the State court having jurisdiction;
- (b) For identified class members no longer attending school, the last date of school attendance; the reason for leaving school; a description of the last program attended; and, if known, any educational programs or services received since leaving school.

23. By September 1, 1991, the parties' counsel shall have access to the following information regarding each of the class members listed in Exhibit # 10 of this Decree:

- (a) For class members presently attending school in a special education program, the most recent IEP;
- (b) For class members presently attending school but receiving special education or special education and educationally related services, the most recent documentation indicating that the parent(s), or the class member, if over eighteen (18) years of age, was notified of the class member's right to an appropriate educational program under Federal and State law and the terms of this Decree, and evidencing acceptance or rejection of the programs offered;
- (c) For class members under the age of twenty-one (21) who are not attending school, documentation indicating that the parent(s), or the class member, if over eighteen (18) years of age, was notified of the class member's right to an appropriate educational program under Federal and State law and the term of this Decree, and evidencing acceptance or rejection of the programs offered, if any.

24. By January 1, 1992, the Department of Education shall amend Ed 1103.02(d) of the New Hampshire Standards (Child Find Responsibilities for the Local Education Agency) to provide as follows:

In order to insure that all relevant agencies and/or groups within the boundaries of each local school district are aware of the district's child find efforts and of the process for referring a child who is or may be involved with the State court for possible placement in a special education program for educationally disabled children, the district shall:

- (1) Appoint a district employee to direct the child find effort;

- (2) Publicize the name of that person, his or her functions, and the manner by which he or she may be contacted within the district;
- (3) Correspond at least once a year with agencies or groups within the district which may have knowledge of students with disabilities who are not being served, explaining the referral process and requesting that they refer to the district students under the age of twenty-one (21) who may be educationally disabled. Agencies which must be contacted are: local DCYS offices, local public defenders, local district courts, local residential educational and treatment programs, and social service agencies which provide medical, mental health, welfare, and other human services; and
- (4) Make at least one personal contact per year with appropriate personnel from each of the agencies and groups listed in paragraph 24 (3) for the purposes described in that paragraph.

25. By May 1, 1992, the Defendants shall ensure that each of the named Plaintiffs and the class members listed in Exhibit #10 of this Decree is provided the opportunity for an appropriate educational program, in conformance with the IDEA, the New Hampshire Standards, and the terms of this Decree.

26. By May 1, 1992, the Department of Education shall take the following steps:

- (a) Identify and locate all children or youth who are educationally disabled and who are currently placed in a residential program or facility pursuant to RSA 169-B, 169-C, and 169-D; require the legally liable school district to review the student's program in accordance with the procedures established pursuant to paragraph 8 of this Decree; and ensure that the student is provided with a free appropriate public education in any case in which such education is not being provided;
- (b) Identify, locate, and require the legally liable school district to evaluate in accordance with the procedures established pursuant to paragraph 8 of this

Decree every student suspected of having an educationally disabling condition, who has not been identified as educationally disabled, and who has been placed in a residential program or facility outside his/her parents' home, pursuant to RSA 169-B, 169-C, and 169-D, to determine whether the student is educationally disabled.

- (c) Require the legally liable school district to develop and implement an IEP in accordance with the procedures established at paragraph 8 of this Decree for all children or youth who are educationally disabled, who were placed pursuant to a juvenile proceeding under RSA 169-B, 169-C, or 169-D in a residential program or facility, and who do not have a current IEP;
- (d) Require the responsible local or State education agencies, as applicable under State law, to assume the full costs of special education and special education and educationally related services associated with the student's program for any student who is educationally disabled and who was placed pursuant to a juvenile proceeding under RSA 169-B, 169-C, or 169-D in a residential program or facility, in an amount equal to either the State-approved rate or, if there is no State-approved rate for such program, the amount actually charged for such educational program;
- (e) If an educationally disabled student has been placed in a residential program or facility outside his/her parents' home pursuant to a proceeding under RSA 169-B, 169-C, or 169-D, require the legally liable school district to consider, in accordance with the procedures established pursuant to paragraph 8 of this Decree, whether residential placement is necessary for the student to benefit from special education and special education and educationally related services. If the legally liable school district has

already made this determination in relation to the student's current placement, this procedure need not be repeated.

- (e) If residential placement is necessary for the student to benefit from special education and special education and educationally related services, ensure that local or State education agencies, as applicable under State law, assume the costs of said residential program retroactive to the date that the student was placed in said program.

27. On or before May 1, 1992, the Defendants shall provide the Disabilities Rights Center, Inc. with a report on the progress of implementation of this Decree covering the period from the date of entry of this Decree to April 1, 1992. On September 1, 1993 and on each September 1 thereafter through the year 1999, Defendants shall provide the Disabilities Rights Center, Inc. with a report on the progress of the implementation of this Decree covering each preceding school year. These reports shall include:

- (a) Copies of any interagency agreements which went into effect during the prior school year;
- (b) A description of the Defendants' activities under each paragraph of this Decree;
- (c) The number of complaints, hearings, or requests for hearings regarding implementation of this Decree received by the Defendants, arranged by school district involved.

28. For at least three years from the date of the Decree, the Defendants shall assign an employee to spend at least thirteen (13) hours per week monitoring compliance with this Decree, drawing in part on the Integrated Data System. This employee shall be responsible for ensuring that the meetings required by this Decree in connection with changes in placement by a State court or DCYS are conducted in a timely manner. The duties of this employee shall also include:

- (a) using the Integrated Data System established pursuant to this Decree to determine if there are discrepancies between the placement information provided by the Department of Education and DCYS;
- (b) reviewing the information on SPEDIS and the CIS when such discrepancies are found;
- (c) reviewing documents emanating from such team meetings to determine compliance with the Decree, the IDEA, and the State Standards; and
- (d) undertaking spot checks to ensure that data is being entered in the system as required, as the circumstances change for a particular youth.

29. Upon reasonable notice to the Defendants, and at reasonable times, counsel for the Plaintiffs shall have the same access as any employee of the Special Education Bureau of the Department of Education or DCYS to information about class members which is contained in the Integrated Data System established pursuant to this Decree, SPEDIS, or the CIS. Counsel for the Plaintiffs shall have the right to receive reports containing any information contained in the Integrated Data System established pursuant to this Decree, SPEDIS, or the CIS concerning any class member, or groups of class members. This information and these reports shall be provided to Plaintiffs' counsel within fifteen (15) days of their request.

30. Counsel for the Plaintiffs shall, upon fifteen (15) days notice, have the right to information in the possession of the Defendants on orders of liability or payments to any county or State agency for any placement or services provided any class member, or groups of class members, pursuant to RSA 169-B, 169-C, and 169-D, including, the name of the student, the student's address, the State court which issued the order of liability, the date of the order on liability, and the amount and date of any payments by the parent(s) or other responsible person to any county and/or to DCYS.

31. Counsel for the Plaintiffs and Plaintiffs' experts shall have access to any residential program or facility, except a foster home, which is licensed to provide educational or

other services to children placed pursuant to RSA 169-B, 169-C, and 169-D, which is equivalent to the access furnished to the legal counsel of individual class members.

32. Within ten days of their receipt or issuance by the Defendants, Defendants shall provide Plaintiffs' counsel with a copy of each of the following documents:

- (a) All regulations, bulletins, program instructions, plans, reports, and forms issued by the State in furtherance of implementation of this Decree;
- (b) The Department of Education's annual or periodic schedule of on-site monitoring visits to local school districts, the Philbrook Center, Youth Development Center, and private residential education programs, and monitoring reports;
- (c) The Defendants' written notices to local school districts informing them of their obligations under this Decree;
- (d) Any notices or correspondence to class members or their families related to implementation of this Decree; and
- (e) Any correspondence to or from school districts related to implementation of this Decree;

provided, however, that Plaintiffs' counsel are not entitled to receive copies of any documents, correspondence or other things or materials protected by the work product rule and the attorney-client or other applicable privileges.

33. Unless introduced into evidence by a party, all expert reports concerning this Decree that are created following the Decree's entry shall be confidential and maintained under seal by this Court.

34. Any notice, report, or communication required by this Consent Decree or made pursuant to this Consent Decree shall be sent by first class mail, postage prepaid, to the following counsel or their successors:

To the Plaintiffs:
Ronald K. Lospennato, Esquire
Disabilities Rights Center, Inc.

To the Defendants:
Emily Gray Rice, Esquire
Senior Assistant Attorney General

94 Washington Street
Post Office Box 19
Concord, New Hampshire 03302-0019

Office of the Attorney General
State House Annex, 25 Capitol Street
Concord, New Hampshire 03301

IX. CONTINUING JURISDICTION OF COURT AND ENFORCEMENT

35. If any portion of this Decree terminates or becomes invalid, the other provisions shall remain in effect.

36. This Court retains jurisdiction of this action for purposes of granting further relief or other appropriate orders. Any party to this Decree may, for good cause, move for modification of the Decree or any portion thereof. Good cause under this paragraph shall include but not be limited to amendments to the IDEA, and RSA 186-C, RSA 169-B, 169-C, or 169-D.

37. The terms and conditions of this Decree shall be binding upon each of the Defendant State officials, their agents, employees, and representatives, and upon their successors in office, without the necessity for formal substitution of parties.

38. If any of the parties has questions concerning the provisions of this Decree, or compliance with the provisions, the parties shall first attempt to negotiate in good faith to resolve any such issues between themselves, prior to moving this Court to resolve the issues or impose sanctions.

39. Absent a written finding by this Court that continued jurisdiction over this matter is necessary and stating the reasons for the continued jurisdiction, this Consent Decree shall expire at midnight on January 1, 2000.

APPROVED:

FOR THE PLAINTIFFS:

FOR THE DEFENDANTS:

Ronald K. Lospennato, Esquire
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Emily Gray Rice, Esquire
Senior Assistant Attorney General
Office of the Attorney General
State House Annex
25 Capitol Street
Concord, New Hampshire 03301

SO ORDERED, this, the day of , 1991.

NORMAN H. STAHL,
UNITED STATES DISTRICT JUDGE