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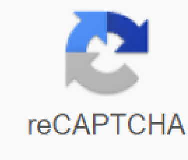
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Oberti v board of education of clementon

GERRY, chief judge. Rafael Oberti is a seven-year-old boy. He has a disability that distinguishes him, in a way, from other seven-year-olds. This process revolves around his home school district in Clementon County, New Jersey, to provide his education. Rafael's parents argue that Clementon's plan to educate Rafael in a segregated special education class outside the school district, instead of a regular school class in Rafael's neighborhood school, was adopted in violation of the Disability Education Act, 20 U.S.C. § 1400-85 (IDEEA) and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The case is before the court following a state administrative ruling in favour of the defendant education board of the Clementon School District. Currently in front of us are cross-proposals for summary judgment. In addition, the applicants made an application to file the affidavit of one of the experts of the defendants or, in the alternative, to be allowed to file a declaration against the declaration. After discussion below, we will reject both proposals for summary judgment; refuse the applicants' request for strike; and grant the complainants permission to file their declaration against the declaration. Finally, we will set this issue for a plenary hearing on an accelerated basis. I. Context Rafael Oberti was born with Downs Syndrome, a genetic defect, and as a result, he has a developmental disability, including mental retardation. He also has a communication deficiency: he has difficulty with expressive language. Rafael's parents are committed to providing him with free and adequate education in a less restrictive environment... [T] hey they left no stone unturned in an attempt to have their child educated in a way that will prepare him for inclusion as an adult in the community in general. They are undoubtedly determined..... [for him to] be able to cope in a population that will naturally include the broad spectrum of human potential. Decision of the Judge of Administrative Law Lavery, 8 March 1991, at 15:00 ('the ALJ Decision). Rafael took special pre-school education courses until he reached kindergarten age. During the summer, before entering kindergarten, the school district's child study team evaluated him and recommended that his parents attend a segregated, autonomous special education class in another school district. Rafael's parents visited a number of recommended classes of the district and found them unacceptable. Subsequently, the parents and the School District agreed that Rafael should go to the development kindergarten of the Clementon Elementary School, a class for kindergarteners who are not fully prepared for the kindergarten for half a day, and a special education class in another school district for the other half of the day. The children's study team is made up of responsible school staff responsible for evaluation and coordination of special education services and for the recommendation of special education placements. State law required the school district to give Rafael a full day of school. The development kindergarten only met half a day. At the end of the school year, the children's study team again proposed a placement outside the district, this time in a separate special education class for students classified as mentally educated retards. Rafael's parents objected and demanded that he be placed at the regular kindergarten of The Clementon Elementary School. The school district rejected this request, and Rafael's parents initiated state administrative proceedings against the district's recommendation. See N.J.A.C. 6:28-2.7. Before the administrative hearing, the school district and Rafael's parents submitted their dispute to mediation. As a result, an agreement was reached whereby Rafael would participate in a class for students classified as disabled at winslow Township School District. In December 1990, however, Rafael's parents requested an administrative hearing because of their dissatisfaction with Winslow's placement. On February 4 and 5, 1991, a hearing was held before Joseph Lavery, Administrative Law Judge, New Jersey Office of Administrative Law. On 15 March 1991, Judge Lavery upheld the School District's decision that the appropriate and least restrictive placement for Rafael, the nearest to the house, was in a segregated special education class outside the school district. Rafael's parents filed this lawsuit against this placement decision. See 20 U.S.C. § 1415(e). II. Disability Education Act (DEA) This reference legislation, adopted in 1975, is a clear commitment by Congress to end a period in our history characterized by segregation and abandonment of children with disabilities. The statute requires states receiving federal assistance to share this commitment by developing ways to include children with disabilities in the mainstream of educational programs in their communities. Congress passed the original law, in response to its finding that children with disabilities were too often excluded from the public school system or stored in special classes and neglected. See 20 U.S.C. § 1400(b); H.R. Rep. No. 94-332, 94 Cong., 1st Sess. 2 (1975) U.S. Code Cong. Admin.News 1975, pp. 1425, 1426. New Jersey is a participating state under the Act. See Lascari v. Education Board of Ramapo Indian Hills Regional High School District, 116 N.J. 30, 34, 560 A.2d 1180, 1182 (1989). THE DEA and its implementing regulations set out different substantive and procedural requirements to ensure that all disabled have available to them . . . adequate free public education, which focuses on special special education related services designed to meet their unique needs[and] to ensure that the rights of children with disabilities and their parents or guardians are protected... 20 U.S.C. § 1400 (c). The central element of these requirements is the Individualized Education Programme (IEP), in which the school district must identify the program it develops to meet the unique needs of each child with disabilities. See Honig v. Doe, 484 U.S. 305, 311-12, 108 S.Ct. 592, 597-98, 98 L.Ed.2d 686 (1988). After it is described by the eleventh circuit: IEP is developed at a meeting between qualified officials, the child's teacher, the child's parents or guardians, and, where appropriate, the child. This should include, inter alia, statements on the child's current level of educational performance, the child's annual targets, the specific educational services to be provided to the child and the extent to which the child will be able to participate in regular education programmes. School officials shall convene a meeting at least once a year to review and, where appropriate, to review the IEP. After acknowledging this court, the IEP is more than just a public relations exercise. This forms the basis of the right of a child with a disability to an individualised and adequate education. Thus, the importance of the development of the EIP in order to meet the individualised needs of the disabled child cannot be underestimated. Greer de Greer v. Rome City School District, 950 F.2d 688, 694-95 (11th Cir. 1991) (quoting Doe v. Alabama State Department of Education, 915 F.2d 651, 654 (11 Cir. 1990)), withdrawn opinion for other reasons, 956 F.2d 1025 (11 Cir. 1992). See also 20 U.S.C. § 1401(a)(19); 34 C.F.R. §§ 300.343-46; N.J.A.C. § 6:28-1 and the following. The IDEEA also sets a preference for integration. The law provides that schools must establish procedures: to ensure that, to the maximum appropriate extent, children with disabilities, including children in public or private institutions or other care centres, are educated with children who are not disabled and that special classes, separate schooling or other movements of children with disabilities from the normal educational environment take place only when the nature or severity of the disability is such that education in classes accustomed to the use of aid and additional services cannot be carried out satisfactorily. 20 U.S.C. § 1412 (5) LITERA (B). Thus, Congress has created a statutory preference for educating disabled children with unhandicapped children. Greer de Greer v. Roma City School District, 950 F.2d 688, 695 (11 Cir. 1991), withdrawn opinion for other reasons, 956 F.2d 1025 (11th Cir. 1992). See also Education Council, Sacramento City United School District Netherlands, 786 F. Supp. 874, 877-78, (E.D.Cal. 1992) (preference of the Law on Integration amounts to a presumption of rejection). FOLLOWING, THE DEA commands that [t]o [t]o children with disabilities should be included in the usual classrooms as close to home as possible. See 34 C.F.R. § 300.552(a)(3); N.J.A.C. 6:28-2.10(a)(3) and (5). THE DEA requires participating school districts to provide a continuum of alternative placements . . . available to meet the needs of children with disabilities. 34 C.F.R. § 300.551. Consequently, at one end of the continuum, there must be completely separate placements in separate schools and, at the other end, placements in ordinary classes in public schools. When a child with a disability is placed as a full member of a regular class, with the provision of additional aid and services, it is known as inclusive supported education (inclusion). The middle of the continuum contains mixed placements in which a child might be a member of a regular class, but obtain certain additional services in a separate resource room, or where he or she might be a member of a self-contained special education class, but spend portions of time integrated into regular classes or along with students undisable in other school activities , it would be recreation or lunch. See Daniel R.R. v. State Council of Education, 874 F.2d 1036, 1050 (5th Cir. 1989). We are impressed by the common sense of this preference for inclusion. Brown v. The Education Council, 347 U.S. 483, 493, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873 (1954), stressed the importance of education and the inequality inherent in any segregated education system. The idea is to bring children with disabilities back into their community. The fact that this approach benefits every member of the community, not just children with disabilities, is often overlooked. The purpose of this type of integration is not only for people with disabilities to learn to live and operate in the community, but also for those members of the disability-free community to learn to live and work with them. THE DEA imposes affirmative obligations on school districts to consider placing children with disabilities in regular classrooms, using additional aid and services, before exploring other alternatives. See Greer, 950 F.2d to 696 (before the school district can conclude that a disabled child should be educated outside the usual class, he must consider whether additional aid and services would allow satisfactory education in the ordinary classroom); Daniel R.R. v. State Council of Education, 874 F.2d 1036, 1048 (5 cir. 1989) (First of all, we wonder whether education in the regular classroom with the use of additional aid and services can be achieved satisfactorily). Consequently, the law includes a least restrictive environment. 34 C.F.R. § 300.552; N.J.A.C. 6:28-2.10. Although the substance of these considerations should be left to the discretion, and the creativity of local school officials, see Daniel R.R., 874 F.2d to 1046, school districts bear the task of justifying contested placements. See Lascari v. Education Board of Ramapo Indian Hills Regional High School District, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989). Please note that a full assessment of each child must take place before any placement decision. See 34 C.F.R. §§ 300.531 300.532. This requirement is met when a disabled child becomes a full member of an ordinary class or when a child who cannot be fully included is integrated to the maximum appropriate extent. In this way, THE DEA aims to overcome segregation and stigmatisation of children with disabilities. Therefore, school districts must carefully examine the educational benefits, both academic and non-academic, available to a disabled child in a regular class. Among the factors to consider are the advantages derived from shaping the behaviour and language of children without disabilities; the effects of such inclusion on other children in the class, both positive and negative; and the cost of additional services required. See Greer, 950 F.2d to 697; Barnett v. Fairfax County School Board, 927 F.2d 146, 153-54 (4th Cir.), certainly refused, ___ U.S. ___, 112 S.Ct. 175, 116 L.Ed.2d 138 (1991); Daniel R.R., 874 F.2d at 1048-50. However, the preference or presumption in favour of inclusion will not be rejected unless the school district shows either that the child's disabilities are so severe that he or she will receive little or no benefit from inclusion; that he or she is so disruptive that it significantly affects the education of other children in the classroom; or that the cost of providing inclusive education will significantly affect other children in the district. Netherlands, 786 F. Supp. to 874. See Daniel R.R., 874 F.2d to 1049 ([T]he language and behavior models available from nonhandicapped children may be essential or useful for the development of the disabled child. In other words, while a disabled child may not be able to absorb all regular school curricula, they may benefit from non-academic experiences in the regular educational environment). The presumption is not rejected by evidence that a placement in separate special education may be academically superior to inclusion in a normal class with additional aids and services. See Roland M. v. Concord School Comm., 910 F.2d 983, 993 (1st Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991); Roncker against. Walter, 700 F.2d 1058, 1063 (6th Cir.), cert. refused, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983); Netherlands, 786 F. Supp. at 878-79. If a child with can receive a satisfactory education in a regular education class, even if it is not the best or ideal academic framework for that child, child, the following are met, and a segregated placement is inadequate. Id. In Daniel R.R., 874 F.2d to 1050, the court confirmed the position of a school district that it could not provide satisfactory education in a regular setting to a six-year-old boy who, as a result of Downs syndrome, was mentally retarded and had a communication deficiency when such inclusion would require the curriculum to be modified beyond recognition. I note, however, in agreement with the Netherlands court, that the change in the curriculum is envisaged by IDEA and that it can become a factor justifying exclusion only when it bears other legitimate factors that can be taken into account, would be the possible negative effects on other students in the class of inclusion of a particular disabled child in the class. See Netherlands, 786 F. Supp. at 879-80. This type of disruption occurs when, despite the assistance of additional aid and services, and having taken all reasonable steps to reduce the burden on the teacher, the other children in the class will still be deprived of their share of the teacher's attention. Netherlands, 786 F. Supp. to 879. The education of other children must be significantly affected by the inclusion of the disabled child in order to justify exclusion on this basis. Id. Neither the Supreme Court nor the Third Circuit have yet taken into account the integration requirements of the DEA. We agree with the Sixth Circuit, which in Roncker v. Walter, 700 F.2d 1058 (6th Cir.), cert. negat. denied, 464 U.S. 864, 104 S.Ct. 196, 78 L.Ed.2d 171 (1983), stated: The perception that a segregated institution is academically superior to a disabled child cannot reflect more than a basic disagreement with the concept of integration. Such disagreement does not, of course, constitute any basis for non-compliance with the mandate of the law. If the segregated facility is considered superior, the court should determine whether the services making the upper placement could be provided in a feasible manner within a non-segregated framework. If possible, placement in the segregated school would be inappropriate under the Act. Id. to 1063 (quotes omissed). Thus, in collaboration with the family, a school district must set the threshold for special services that a disabled child needs and must then determine whether these needs can be met within the matrix of an ordinary classroom, with the provision of additional aid and services. After being mentioned by the Eleventh Circuit: [B]efore the school district can conclude that a disabled child should be educated outside the regular class, must consider whether additional aid and services would allow a satisfactory education in the regular classroom. The school district must take into the full range of additional aid and services, including resources and itinerant training rooms, for which it is under the law and regulations promulgated pursuant to it to provide. Only if the education of the disabled child cannot be carried out satisfactorily, even with one or more of these additional aids and services, the school board may consider placing the child outside the usual class. Greer, 950 F.2d to 696. Courts that oppose such an interpretation of the Act have argued that the Roncker test too intrusively requires an investigation into the educational/political choices that Congress deliberately left to the state and local school officials. Daniel R.R., 874 F.2d to 1046. However, we see no other way to impose IDEI's integration requirements. Moreover, although we agree with Daniel R.R. the court that states do not have to provide every additional aid or services to help the child, id. to 1048, we consider that IDEA obliges school systems to provide a certain level of additional aid and services that will vary in each case. However, in each case, there will be a floor below which such provisions will be considered inadequate. Id. (The law does not allow states to make mere symbolic gestures to accommodate students with disabilities). Thus, Congress has clearly called on schools to hire specially trained staff to help children with disabilities... Irving Independent School District v. Tatro, 468 U.S. 883, 893, 104 S.Ct. 3371, 3377, 82 L.Ed.2d 664 (1984). This includes the services of physical, occupational, and speech therapy. See Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 176 (3d Cir. 1988), cert. denied under nom. Central Columbia School District v. Polk, 488 U.S. 1030, 109 S.Ct. 838, 102 L.Ed.2d 970 (1989); 20 U.S.C. § 1401(a)(16). In addition, a school district must appoint an additional teacher's counsellor to an ordinary, full-time or part-time classroom, if necessary, to meet the special needs of children with disabilities included. See, for example, the Department of Education, State of Hawaii v. Katherine D., 727 F.2d 809, 813 (9 cir. 1983) (aid ordered for the child with cystic fibrosis), certainly refused, 471 U.S. 1117, 105 S.Ct. 2360, 86 L.Ed.2d 260 (1985). In other words, THE DEA requires school districts to supplement their resources to meet the special needs of children with disabilities. In order to achieve the objectives of the DEA, schools need to maximise integration opportunities. Thus, a school district must coordinate the provision of special services to a disabled child placed in a normal classroom setting. In addition, teachers, assistants and other school staff involved in the front line will need different degrees of support and training, depending on the special needs involved. see, for example, Polk, 853 F.2d to 173-74. All this, of course, requires a substantial degree of consultation and communication between the special services forces of a school school complemented by consultations and assistance from external sources, if necessary, and teachers and other front-line school staff. In conclusion, THE DEA sets its preference for integration in terms of the least restrictive environments. Participating school systems must provide a continuum of placements, ranging from full inclusion in regular environments, in which a disabled child becomes a full member of the ordinary class, to completely separate settings, see 34 C.F.R. § 300.551(a) and (b) and must first consider the least restrictive option. In addition, children placed in separate or partially segregated environments must be simultaneously included in mainstream components to the maximum appropriate extent. Finally, in line with the goals and policies expressed by Congress in THE DEA, the goal for each child should be directed towards moving on the continuum towards full inclusion. THE DEA incorporates a vision of our education system in which, whenever possible, children with disabilities become fully integrated members of the educational community. The purpose of IDEI is achieved when a disabled child can become included, accepted and respected as a full member of an ordinary class and is no longer seen as a foreigner. III. Discussion A. IDEEA Review Standards provides that the court will receive the records of administrative proceedings, will hear additional evidence at the request of a party, and, on the basis of its decision on the preponderance of the evidence, will grant the exemption so that the court deems it necessary. 20 U.S.C. § 1415(e)(2). Although the Supreme Court has not reached the integration requirements of the Law, it has defined the standard of revision in other DEA cases, following: First, did the state follow the procedures laid down in the law? And secondly, is the individualized educational program developed through the law procedures reasonably calculated to allow the child to receive educational benefits? If these requirements are met, the state has complied with congressional obligations, and the courts can no longer request it. The Board of Education v. Rowley, 458 U.S. 176, 206-207, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 690 (1982). Although the Court has warned that courts cannot substitute their own notions of sound educational policy with those of the school authorities they review, id. 206, 102 S.Ct. to 3051, in integration cases we must

determine whether the State has complied with the integration requirements laid down in the Law. See Polk, 853 F.2d to 184 (we do not read the Supreme Court's salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to implement legal provisions that ensure free and children with disabilities). In addition, we note that a The district carries the burden of proof not only when trying to change the IEP, but also when parents seek change. Lascari against. Education Board of Ramapo Indian Hills Regional High School District, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989). Thus, when challenged, a school district must demonstrate that its placement decisions meet the procedural and integration requirements of the DEA. With regard to the proposals currently presented to us, we can accept a summary judgment whether the oral arguments, depositions, answers to questions and admission to the file, together with the affidavits, if any, show that there is no real problem with any material fact and that the moving party is entitled to trial as a matter of law. A real dispute will be found if the evidence is such that a reasonable jury could give a verdict on the non-misort party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). See also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (nonmovant must show more than some metaphysical doubts about material facts). In order to prevail over summary judgment, the evidence must be so one-sided that a party must prevail as a question of law. Anderson, 106 S.Ct. at 2512. In delivering that judgment, we look at the facts in the light of the most favourable to the non-moving party, without weighing evidence or making determinations of credibility. See id at 2511. However, we need to look at the evidence in the light of the substantive evidentiary burden. Id. 2513. Consequently, a party who rules for a summary judgment and who does not bear the burden of proof in the proceedings must not deny the other party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). On the contrary, the moving party could carry out its task by demonstrating the absence of an essential element of the case of the opponent, who bears the burden of proof in the process. See id. In matters under judicial, the question is whether the School District has complied with the procedures and requirements of integrating the idea by deciding to place Rafael in a segregated special education class in another city without any contemporary integration. We need to determine whether the School District has paid adequate attention to placing Rafael in a regular classroom with additional aid and services, and whether his current schedule and segregated placement, embedded in the IEP, which does not include integration, is the least restrictive program and placement for him at the moment. Finally, the School District must convince the court that Rafael can be educated within the matrix of a regular class in its neighborhood school with additional help and services and, in fact, is unprepared for any degree of integration. B. B. Educational Experiences We return to examine whether, as far as Rafael Oberti's education is concerned, the Clementon School District has fulfilled its obligations under the IDEA. Although technically we were only asked to review the current plan of the School District for Rafael, which was formulated for the 1990-1991 school year, we begin with the 1989-1990 school year, when Rafael entered the development kindergarten, because subsequent placement decisions were largely based on Rafael's experience that year. 1. The 1989-1990 school year It seems that the first action of the School District on Rafael took place when he was to have entered kindergarten. At that point, after meeting with Rafael's parents and evaluating Rafael, the District recommended an out-of-district placement in an autonomous class. Rafael's parents opposed this recommendation, and then the District agreed to place Rafael part-time in the development kindergarten, and part-time in a special education class outside the district. There is no evidence in the file that the School District independently considered a less restrictive placement for Rafael before making the initial decision to place him in a separate setting. This violated the requirements of the DEA. For example, there is no indication that, either in the meeting with Rafael's parents or in Rafael's assessment, less restrictive placements were considered. In addition, we note that the following year, the School District clearly documented the consideration of alternative placements for Rafael. The IEP prepared for Rafael for that year indicates that the School District planned for kindergarten development primarily to provide social imitation modeling. The special education class was envisaged to implement all other objectives and objectives of the IEP, and such objectives were specified in the IEP. However, the IEP indicated that various additional aids and services for Rafael would be provided in the developmental kindergarten, including physical therapy, speech therapy and occupational therapy consultation. In addition, the IEP considered changing the class's regular expectations to reflect the level of development. Although in the current educational status section the IEP indicated that Rafael had behavioural problems and needed help with the toilet, the IEP did not specify a plan for managing these problems. The IEP was not actually introduced as an exhibition at the administrative hearing and was not otherwise included in the file. A copy of the IEP was finally presented to us by the School District Attorney after a plea. We consider that this is part of the file, as THE DEA provides for the courts to receive additional evidence after the conclusion of the Administrative. See 20 U.S.C. § 1415(e)(2). The IEP stated that Rafael will in kindergarten training programmes, to provide oral stimulation, appropriate example of age and to benefit from accidental learning in the kindergarten class. These included, among others, fine and raw motor skills, academic skills and self-help skills. On oral argument, when asked what additional aids and services were provided to Rafael in kindergarten development, counselor for the School District represented the fact that the teacher, Ms. Reardon, had previous experience working with children with special needs; that he worked closely with the child's study team; that she had frequent consultations with the other kindergarten teacher, who had experience working with children with Downs syndrome; that behavioural control techniques have been implemented; that the class curriculum has been restructured downwards to accommodate Rafael; and that a second aid has been added to the classroom. However, the developmental kindergarten teacher, who testified at the administrative hearing and in the deposition, stated that although she had some experience working with children with special needs, she never taught a mentally retarded child. The ALJ found that the other kindergarten teacher in the school, who was experienced with the children of Down syndrome, provided occasional assistance to Rafael's teacher, and that the school psychologist intermittently provided assistance. As for the addition of aid, it is undeniable that in early December of the school year Rafael's parents asked for a teacher's assistant or counsellor to be added to the class to help Rafael. However, it was not until March that such aid was hired. The parties painted remarkably different images of Rafael's experience in the development kindergarten. Obertis primarily documents the progress Rafael made during the year, although he acknowledges, to some extent, the various behavioural problems that Rafael has manifested there. The school district, on the other hand, primarily documents Rafael's behavioral and communication problems. According to the School District, the class was far beyond Rafael's head; and although Ms. Reardon testified that he was able to follow perhaps up to 25% of the curriculum, the School District claimed that Rafael gained nothing from the experience and substantially disrupted the functioning of the rest of the class. In support of this, progress reports were introduced in which Ms. Reardon stated that there is a social and emotional improvement, better classroom participation, better communication and linguistic development skills, and a certain academic mastery during the school year. The school district portrayed Rafael as a child primitive and resistant. Numerous incidents of Rafael's disruptive outbursts, tantrums and brief tensions have been catalogued. There is a factual dispute between the parties Rafael posed a danger to other children. There is also a factual dispute as to whether Rafael inappropriately touched other children. The school district was obviously extremely concerned about Rafael's difficulties with his toilet skills, and used these difficulties to highlight Rafael's not being prepared for an inclusive program. There is no doubt, however, that working on such skills becomes an integral part of student education. See Battle v. Pennsylvania, 629 F.2d 269, 275 (3d Cir. 1980), cert. refused under nom., Scanlon v. Battle, 452 USA 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981) ([w]here the basic self-help and social skills, would be toilet training... and communication are lacking, formal education begins at that time). If, indeed, after the School District claims, Rafael presented behavioral problems in the classroom that were severe and extremely disruptive to the entire classroom, the school district's remedial answers to these problems seem to have been terribly inadequate. It is undisputed that IEP rafael failed to write a program for managing or trying to manage the difficulties of documented school district behavior. If Rafael was as difficult as the defendants claim it was, providing personal help in March (instigated by a request from parents) without any clear plan on her functions, and irregular, ad hoc, assistance from another teacher and school psychologist, were entirely insufficient efforts to meet Rafael's special needs. Mrs. Reardon's testimony unequivocally confirms this. Although obviously a concerned and conscientious teacher, she was overwhelmed by Rafael's needs and did not receive enough formal support from the school district and child's study team or from external consultants. No structured consultation in the field of special education was offered to him. There was also no formal coordination between the special and regular education components of Rafael's program. Ms. Reardon had no contact with Rafael's special education teacher; and Ms. McDevat, who was a school psychologist and coordinator of special education services, as well as the head of the children's study team in charge of IEP Rafael, visited only the special education class three times throughout the year. For the most part, the district's resources were mobilized to respond to Rafael's disruptive behavior in the classroom, and even this was only on an informal basis. In other words, most interventions were reactive. Ms McDevat acknowledged that there was no written plan in place prospectively designed to deal with Rafael's behavior or, for what it matters, any aspect of his educational needs development kindergarten. Although she testified that the children's study team was in constant contact with Ms. Reardon, there is no evidence in the file suggesting that this communication was in any way appropriate to create an individualized education or management plan. Essentially, Ms. Reardon and Rafael were left to their own devices, and both admitted that they were inappropriate for the task - Ms. Reardon through her express testimony, and Rafael through her behavior. In fact, Ms. Reardon testified at the administrative hearing that her efforts to modify the curriculum to meet Rafael's special needs were unsuccessful, and that much of Rafael's disruptive behavior seemed to be related to his frustration at being left behind about the speed of the curriculum of the rest of the class. She later confessed that her expectations for Rafael were limited to what he could gain from shaping the other children in the class. This reflects the Failure of the School District to develop a comprehensive individualized program for Rafael. On the one hand, the School District relied on the special education class of the afternoon to meet most of Rafael's needs, including all of his academic needs. On the other hand, recognizing that Rafael could follow only 25% of the regular curriculum in kindergarten development, Ms. Reardon on her own was trying to modify the curriculum for Rafael. Her efforts failed, however, due to a lack of systemic support, and Rafael was left adrift. It is no wonder, therefore, that all the witnesses of the School District, including his expert, understood that Rafael's difficulties, in particular his behavioural problems, were the result of his inability to keep up with the regular curriculum. IDEA requires school districts to develop comprehensive individualised plans, reflected and commemorated in the IEP, to deal with the problems presented by children with special needs. See 20 U.S.C. § 1401(a)(19)(C) (IEP must include a statement of specific educational services to be provided). After the court mentioned Daniel R.R.: If the state provides additional aid and services and changes its regular education programme, we need to examine whether its efforts are sufficient. The law does not allow states to make mere symbolic gestures to accommodate students with disabilities; its requirement to modify and supplement regular education is broad. 874 F.2d to 1048 (emphasis provided). See also the Netherlands, 786 F. Supp. to 879 (The idea, in its provision for the IEP process, states that the academic curriculum can be modified to suit the individual needs of children with disabilities). There would be no need for a federal law, be the idea where the resources in place in all participating school systems were adequate to educate children with disabilities to the maximum extent appropriate... with children are not handicapped. Thus, THE DEA requires school systems to supplement and realign their resources in order to overcome those systems, structures and practices that tend to lead to unnecessary segregation of children with disabilities. We find nothing in the file that indicates that the School District has fulfilled these affirmative obligations with regard to Rafael's experience in the development kindergarten. This is not to suggest that an inclusive IEP cannot provide specific educational components to be provided outside the regular class in a resource room, or, as in this case, in a special afternoon program. However, this does not relieve the school of the obligation envisaged by THE DEA to coordinate the special and regular educational components of the child's programme and to implement a comprehensive implementation programme in the ordinary class. Landing a child with special needs in a regular education class, where only for socialization and modeling - and based on the testimony of Ms. Reardon, the School District obviously did not limit so its goals to Rafael in kindergarten development - requires much more input and planning than that allocated by the School District in this case. Ms. Reardon's testimony suggests that the School District failed to support Rafael's inclusion in the first place and thus designed a test experience for Rafael in the development kindergarten, which could have been expected to fail, and which, indeed, at least in part, fulfilled such an expectation. In fact, the minimum of Rafael's progress during the year impresses us with the progress he could have made if a proper program had been provided in the first place. We were not directly called upon to review the adequacy of the IEP that was in force for the development kindergarten year. However, there is no doubt that the School District violated the procedural requirements of the original DEA by not taking into account less restrictive placements for Rafael. In addition, we do not believe that the School District has raised a real material factual problem as to whether it has provided an adequate level of additional aid and services to Rafael in kindergarten development. There is no dispute about the services that have actually been provided; and, although determining the adequacy of these services would normally require expert testimony, I do not consider this necessary here, where the services provided were so clearly inadequate. Consequently, it was unfair and inappropriate for the School District to base subsequent placement decisions on Rafael's behavioral issues, or on his vel non progress, during the development kindergarten year. 2. School year At the end of the 1989-1990 school year, the School District informed Rafael's parents that it had taken into account different including inclusive placements, and concluded that Rafael was to be in an out-of-district segregated class for children classified as mentally retarded. The ALJ found that his was due to shortcomings in academic development offerings, and because of behavioral concerns among staff attributed to the child's performance during the [previous school year] in Clementon. AlJ decision at 4. The school district informed Rafael's parents that he had considered the following: 1. A development kindergarten with a special support teacher in the morning, with regular kindergarten in the afternoon, plus speech, physical therapy and occupational therapy (lunch at home). 2. Regular kindergarten with a teacher support for special education in the morning with resource room and three therapies in the afternoon. 3. Class with perceptual deficiencies and kindergarten with the three therapies. 4. Class with perceptually deficient scare plus resource room, plus therapy. See ALJ Decision at 3-4. After mediation, the School District and Rafael's parents agreed that Rafael should attend a class for children classified as disabled at the Winslow Township School District. Rafael's parents agreed to this placement on the condition that there was significant integration with Winslow and that Rafael was returned to Clementon Elementary School as soon as possible. When it became apparent to them that these conditions were not met at Winslow, where Rafael remained almost completely separate, Rafael's parents requested a timely hearing, and the trial that led to this trial began. The agreement between the School District and Obertis provided, in part, that the possibilities for integration at Winslow would be assessed in six weeks and that the School District would continue to explore appropriate programs for Rafael. Again, the parties presented contrasting and self-serving characterizations of Rafael's experience at Winslow. In support of the proposal that a separate special education class is the most appropriate placement for Rafael, the School District paints a picture of the possible progress at Winslow and stresses that the services provided there, especially the components of special education, absolutely could not be provided to Rafael in a regular education setting. In support of the proposal that inclusive placement is the most appropriate, Obertis suggests that Rafael deteriorated while at Winslow due to the segregated nature of the placement. For example, Rafael's parents testified that there were increased incidents of toilet accidents at Winslow; that Rafael had begun to wet his bed at night; and that he was reluctant to board the school bus (for the daily ride 45 minutes to Winslow). Rafael's mother attributed such a regression to his feelings about in a separate The testimony of Rafael's teacher at Winslow indicated that his general difficulties continued in the first half of the year at Winslow and subsequently improved. Rafael's difficulties in his toilet skills were managed by implementing a behaviour modification program. Otherwise, an integrated, multisensory approach was adopted, in which the teacher worked closely with speech, occupational and physical therapists. I note that the parties do not dispute the adequacy of this educational approach. Their dispute is focused on whether this approach could be replicated in a less restrictive framework. The school district, as well as Winslow staff, argue that Rafael is unprepared even for minimal integration at this time. Regardless of the dispute over the success of the Winslow placement, however, we believe that the School District's decision to place Rafael in a separate, autonomous set for the 1990-1991 school year was flawed because it was substantially based on Rafael's performance in kindergarten development. After failing adequately to address Rafael's behavioral problems in developmental kindergarten, it was inappropriate to justify a segregated placement based on these problems. Consequently, that placement decision must be reversed and the court must determine the appropriate placement for Rafael at this time. So we go back to the experts. C. Battle of the Experts On 25 February 1992, in support of their request for summary judgment, the School District filed with the court the affidavit of Stanley J. Urban, Ph.D. On 27 March 1992, the plaintiffs moved to strike this affidavit because it was filed in violation of Judge Simandle's 8 January 1992 modified the appointment of the Order or , in the alternative, in order to enable them to file Lou Brown's declaration against declaration, Ph.D. I note that there has been some confusion as to the deadlines in this regard. Since THE DEA requires the courts to receive additional evidence after the end of the administrative proceedings, see 20 U.S.C. § 1415(e)(2) and because we believe that the plaintiffs' counter-declaration substantially reduces any harm to them, we choose to consider both statements under oath. See Fed.R.Civ.P. 56(e) (The court may allow the completion or opposition of statements by depositions, replies to interrogations or other affidavits). We have been presented with conflicting expert reports on the degree to which Rafael can be included in a regular education program with additional aid and services, and in particular whether the undoubtedly successful methods and strategies adopted in the education class Winslow could be employed in a regular education class at Clementon. They present a real problem actually disputed material. School staff involved with Rafael at both Clementon and Winslow testified Rafael was just ready for placement in a segregated special education class, would be the Winslow class for students classified as multihandicappeed. Clementon's special services coordinator, Ms. McDevat, testified that the multi-sensory approach committed to Winslow aimed at Rafael's cognitive development could not be replicated to Clementon in a regular class. Dr. Stanley J. Urban, a special education professor at Glassboro State College, who reviewed all files relevant to Rafael's education, and observed and interviewed Rafael for the School District, concluded that, given Rafael's extraordinary and continuing behavioral problems, as well as his immaturity, he is an unsuitable candidate for placement in an ordinary classroom. Based on the premise that Rafael's behavior was more appropriate in his special placements than he was in kindergarten development, Dr. Urban opined that Rafael's aberrant behavior was induced by the frustration of being in a normalized environment, which isolated him and highlighted his differences. According to Dr. Urban, the special training of a regular class teacher and help could not bridge the gap needed to reach Rafael, a task that could only be accomplished by a specially trained teacher. Any attempt to meet Rafael's needs in a regular setting, according to Dr. Urban, would be so labor intensive that the other children in the class would be private. Moreover, Dr. Urban thought it would be educationally unthinkable to try to fashion a separate curriculum for Rafael and implement it in a regular class side by side with the regular curriculum. On the other hand, Dr. Gail McGregor, assistant professor of teacher training at Temple University, and Dr. Lou Brown, a professor of special education at the University of Wisconsin, who reviewed all the files relevant to Rafael's education, and observed and interviewed Rafael for Obertis, concluded that Rafael would not have exposed the type of behavioral problems manifested in the developmental kindergarten if the appropriate programs were specifically designed for him. concluded that Rafael's special education, development, and behavioral needs could be met within the regular classroom with additional aid and services. Moreover, both stressed that Rafael would be hurt by the fact that he was denied experience in an unsegregated setting. In addition, both experts pointed out that children with disabilities even deeper than Rafael were successfully included in regular education programmes with additional aid and services in many communities, when the communities themselves received the appropriate support and assistance. Dr. Brown noted that such a was available to communities in New Jersey. We note that these experts have challenged considers that the readiness for integration or inclusion could be successfully developed within a separate framework and has argued that it is illusory and perhaps even a pretext to argue that segregation can generate preparation for inclusion. The New Jersey Department of Education is committed to providing the option of regular classroom placement with support to all students for whom it would be appropriate, and has already begun the formation of school districts to develop an ability to provide effective inclusive education programs for students with moderate to severe disabilities. See Memorandum of Jeffrey V. Osowski, Director, Special Education Division, February 6, 1992, attached to Lou Brown's statement, Ph.D. Obertis experts do not exclude the possibility of an inclusive IEP with certain additional aids and services provided outside the usual class. However, where the child is included as a full member of an ordinary classroom, the provision of such services remains in the matrix of the ordinary class and the child must not be regarded, by other students or by himself or by himself, as a foreigner. In conclusion, the School District and its experts argue that Rafael's inclusion is not feasible; that Rafael is too severely disabled and too unruly to be educated in the matrix of a regular education class; and therefore that he needs special education services, which can only be provided in a small, self-contained class of special education. According to the School District, this is the only hope to develop even minimal preparation for future integration. Rafael's experts, on the other hand, attest that the inclusion of children like Rafael was and can be achieved successfully. D. Issues at issue Obertis which challenged the placement of the current school district for Rafael, which requires the most restrictive framework, the School District must justify the conclusion that it is not feasible to place Rafael in a regular classroom in his local school with additional aid and services. I consider that the parties have actually raised significant questions on this issue and, therefore, the requests for a summary judgment made by both parties must be rejected. There is no dispute as to whether the school district considered less restrictive placements for Rafael in anticipation of the 1989-1990 school year. It didn't happen. There is no dispute about the level of additional aid and school district services provided to Rafael during his year in kindergarten development. After we have already shown, the level of assistance provided was insufficient. Finally, although the School District is supposed to have considered less restrictive placements for Rafael for the 1990-1991 school year, there is no doubt that this placement decision was substantially and improperly influenced by the problems of rafael's behaviour manifested year of development of the kindergarten. Accordingly, we do not believe that any of the decisions to place the School District for Rafael can stand control according to THE standards of THE DEA. It does not appear that the procedural or integration requirements of the law have not been met with respect to any of the IEP promulgated for Rafael. The conclusions of both the ALJ and the school district expert, Dr. Urban, were also greatly influenced by Rafael's behavioural problems in the development kindergarten. However, it seems to us that real material factual questions have been raised about the feasibility includes Rafael in a regular class framework now. In addition, this is a particularly fact-sensitive issue requiring expert evidence. While there can be no dispute as to the seriousness of Rafael's disability, experts clearly disagree as to whether Rafael can be included in a regular class and as to what types of additional aid and services could be used to facilitate such placement. Thus, the school district has failed to establish that there is no material factual problem with regard to the desirability of the current EpI, and Obertis has not proved that there is no material question of fact as to whether to offer Rafael an inclusive placement in his local school. A plenary hearing will therefore be required for the court to take those decisions. We note that the opinions of the experts here can represent contradictory educational philosophies. Of course, to the extent that the experts recruited by Obertis express a preference for inclusion, this is a preference shared by Congress and incorporated into the DEA. Education Council, Sacramento City United School District v. Netherlands, 786 F. Supp. to 881 (E.D.Cal. 1992). IV. Section 504 of the Obertis Rehabilitation Act also brought claims for discrimination against the School District under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Although there are a number of distinct problems related to this claim, it seems to us that, like the idea, Section 504 would require the inclusion of Rafael in a regular classroom in his local school, if possible. See Alexander v. Choate, 469 U.S. 287, 300 n. 19, 105 S.Ct. 712, 717 n. 19, 83 L.Ed.2d 661 (1985) (the supplier must make reasonable changes to its programmes to accommodate persons with disabilities); 34 C.F.R. § 104.34 (separate school services allowed only if the school district demonstrates that the person's education in the regular educational environment . . . the use of additional aid and services cannot be satisfactorily achieved); 34 C.F.R. § 104(b)(2) (requiring equal educational opportunities within the most adequately integrated person). . This statute provides, in that: No other qualified person with disabilities in the United States . . . is excluded, solely because of its disability, from the participation in which it receives or is subject to discrimination under any programme or activity receiving federal financial assistance. 29 U.S.C. § 794 (a) In the context of Section 504, accommodation for otherwise qualified persons must be made, unless such accommodation would either require a change in the essential nature of the programme or impose an unjustified burden on the beneficiary of federal funds. Stratie against. Ministry of Transport, 716 F.2d 227, 231 (3d Cir. 1983). Since this is the exact question that I have reserved for the trial with regard to Obertis DEA's assertion, it is also not in exchange for a summary judgment. V. Conclusion We have identified various ways in which the School District has violated, since 1989, the procedural and integration requirements of THE DEA with regard to Rafael's education. However, the question remains as to what is the most appropriate placement for Rafael now. A new EIP must therefore be generated after the court determines whether it is feasible for the school district, in collaboration with Obertis, to develop an EIAn for Rafael, which will provide integrated educational services and activities at its local elementary school, with children who are not, to the maximum appropriate extent, using additional aid and services, as appropriate. In accordance with the objectives and requirements of the agenda, we will first direct our attention to whether and to what extent Rafael can be included in the matrix of a regular class and to what additional aid and services would be needed to achieve this. Rafael's unfortunate experience in Clementon's developmental kindergarten can no longer be used as a basis for justifying his exclusion from mainstream programming. It is unfortunate that this matter has reached into litigation where the parties are pitted against each other instead of working together. It's hard to imagine a worse scenario from Rafael's point of view. Creating accommodation for children with disabilities in mainstream education programs is a challenge for everyone involved, and we are sure, if nothing else, that in the process both parties need all the help they can get. In fact, Rafael's lawyer informed the court that, because of Obertis's dissatisfaction with the recommendation of the separate school placement district for the 1991-1992 school year, which was affirmed by the ALJ, they had opted with reluctance to educate Rafael at home pending the resolution of this issue. An appropriate order shall be introduced and this matter shall be set for an emergency plenary hearing. Based on.

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