PHILADELPHIA, FRIDAY, OCTOBER 19, 2007

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES

ALM

Supreme Court Affirms Rights of Privately Placed Special Ed. Students

BY CATHERINE MERINO REISMAN AND AMELIA CAROLLA

Special to the Legal

In a case of first impression, the Pennsylvania Supreme Court has held that school districts in the commonwealth must provide services available under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, to students who are placed by their parents in private schools and dually enrolled in the school district. The case was *Lower Merion School District v. Doe*. Because the Rehabilitation Act also protects students who qualify for services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400, et seq., this is a noteworthy victory for parents who choose to educate their children with special needs in private schools.

Doe was a 6-year-old resident of Lower Merion School District. Prior to his kindergarten year, Doe's parents requested that the school district evaluate him to determine eligibility for services under the IDEA and/or the Rehabilitation Act. The school district evaluation determined that due to spastic diplegia, Doe had difficulties with fine motor skills and visual motor delays.

The school district concluded that Doe did not need IDEA special education services. However, he did meet the eligibility criteria of services under the Rehabilitation Act and Chapter 15 of the Pennsylvania Code (the regulations implementing Section 504). The school district offered Doe weekly occupational therapy services, accommodations and consultation pursuant to a Chapter 15 service agreement.

Pursuant to 24 P.S. Section 5-502, Doe's parents dually enrolled him in the school district and an independent private school. The parents requested that the school district deliver the occupational therapy services at a public school within the district. They did not seek tuition reimbursement for the private school, nor did they ask the school district to provide transportation for purposes of receiving the services.

REISMAN CAROLLA

CATHERINE MERINO REISMAN *and* **AMELIA CAROLLA** *are members of Montgomery McCracken Walker & Rhoads' litigation department and co-chair its special education law practice. Each are parents of children with disabilities and speak frequently on topics relating to advocacy on behalf of children. Reisman's practice concentrates on education-related counseling and litigation at administrative hearings and in federal court, complex commercial and professional liability litigation, appellate litigation, and employment law. Carolla concentrates her practice in complex commercial litigation and education-related matters.*

After the school district refused to provide the occupational therapy services, the parents sought administrative review. A Pennsylvania hearing officer held that the school district must provide the services to a dually enrolled student, if the parents will transport the child to a public school to receive those services. The Supreme Court affirmed this holding.

The *Doe* court rejected the argument that a student seeking only Section 504 services cannot be "dually enrolled" because he is not taking any public school courses. In addition, given the scope of the parents' request, the court did not believe its holding would "lead to absurd results where public schools would have to make major alterations to schedules and facilities to accommodate a private school student's needs at the public school."

The *Doe* court stated from the premise that Section 504 is "remedial legislation" and must "be interpreted broadly to effectuate its purpose." It stated, "The required broad reading of [state and federal] regulatory requirements in unison leads to the conclusion that Section 504 requires [that] the District provide Doe with the therapy services."

Federal regulations under Section 504 require that school districts "provide a free appropriate public education to each qualified handicapped person in the [district's] jurisdiction." Thus, federal law does not require that a student seeking services attend classes within the school district. Similarly, Pennsylvania regulations require that school districts provide Section 504 services to "each protected handicapped student enrolled in the district."

According to the court, federal regulations implementing the Rehabilitation Act impose a twofold obligation. School districts must provide the education and a means of accessing that education. Nothing in the statute or its implementing regulations "sets forth that the education be at the district's school in order for the obligation of facilitating access to an appropriate education to attach." The regulations specifically indicate that a school district does not have to fund tuition costs of a student

enrolled voluntarily at a private school, 35 C.F.R. Section 104.33(c)(4), but there is no provision excusing districts from providing services to access the private school education. Indeed, the court noted that any other reading of the relevant state regulations would be impermissible interference with federal regulation under Section 504.

It stated, "Chapter 15 recognizes the full panoply of school responsibilities and is meant to implement Section 504, not to cut off entitlements due to an otherwise eligible handicapped student." The court acknowledged that the Pennsylvania Department of Education had adopted a narrower interpretation of Section 504 in a "Basic Education Circular." However, a state administrative agency's conclusions cannot trump federal law and interpreting state law to restrict Doe's Rehabilitation Act rights would present potential Supremacy Clause issues.

The interaction between the Rehabilitation Act and the IDEA makes this decision particularly important. The hearing officer in *Doe* relied upon *Veschi v. Northwestern Lehigh Sch. Dist.*, which held that a dually enrolled IDEA-eligible student can receive IDEA-related services at the public school. The *Veschi Roman* stated, "Where the parents of a child with disabilities unilaterally enrolled in a private school must bear the financial burden of tuition where the education agency has offered a free, appropriate education at public expense, that fact does not relieve the … agency, under either federal or state law, from providing 'special education and related services' to voluntarily placed students."

Veschi relied upon 22 Pa. Code Section 14.41(e), which was subsequently repealed. However, because Section 504 protects IDEA-eligible students, after the holding in *Doe*, it is apparent that eligible students placed by their parents in private schools still enjoy the right to publicly funded services, albeit pursuant to Section 504 rather than the IDEA.

Doe is even more significant when considered in conjunction with current judicial recognition of the importance of parental participation in the educational process. In two of its most recent decisions interpreting IDEA, *Winkelman v. Parma City School District* and *Schaffer v. Weast,* the U.S. Supreme Court has observed that the IDEA contemplates that parents will play a "significant role" in educational decisions affecting their children. Both *Veschi* and *Winkelman* place great reliance on the fact that parents have a "recognized legal interest," of constitutional dimension, in the education of their children. Finally, Section 504 protects students entitled to services under IDEA.

Against this backdrop, *Doe* may result in a significant increase in dual enrollment of private school students protected by the IDEA who will then be eligible under the Rehabilitation Act for services provided by public schools in Pennsylvania. •