REVISITING SECTION 504 SERVICES TO DUALLY-ENROLLED STUDENTS

"No otherwise qualified individual with a disability . . . , shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794 (emphasis added). So says Section 504. The plain text, one would think, limits the scope of the non-discrimination provision to a public school's own federally-funded programs and does not create an obligation to assure non-discrimination in private schools. See also 34 C.F.R. § 104.4 (defining prohibited discrimination).

But in a tortured analysis, the Pennsylvania Supreme Court in *Lower Merion School District v. Doe*, say differently.[1] In that decision, the court held that Pennsylvania school districts, because of dual enrollment,[2] must provide Section 504 special education and related services to students who are unilaterally attending private schools. Despite being erroneous on a matter of federal law, it is nonetheless the "law of the land" in the Commonwealth until the Pennsylvania Supreme Court fixes its error.

Without question, Section 504 is "remedial legislation" that addresses historic discrimination. *See D.L. ex. rel. K.L and S.L. v. Baltimore City Bd. of Sch. Comm.,* 706 F.3d 256, 260 (4th Cir. 2013) (considering Section 504 as remedial). But, except for laws of an organic nature, all laws are intended to fix some problem (or perceived problem). The Doe decision hypes the remedial nature of Section 504 to say it is to be interpreted "broadly." Id. at 443.

The problem is that, remedial or not, Section 504, like most federal education laws, is Spending Clause legislation.[3] Because such legislation is viewed analogous to a contractual relationship, the courts interpret the legislation narrowly. Any conditions to federal funding must be set out "unambiguously." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy,* 548 U.S. 291, 296 (2006). The Supreme Court is reluctant to re-write congressional acts to create remedies in Spending Clause legislation. *Pennhurst State Sch. and Hosp. v. Halderman,* 451 U.S. 1, 28-29 (1981). Interpreting Section 504 "broadly" violates this rather basic legal precept. Prior to the Doe case, no precedent suggested, and the terms of Section 504 did not clearly show, an individual right to receive public services in a private school. No basis existed to find an implied right that followed the student to the school of parents' choice.

In the D.L. decision noted above, the U.S. Court of Appeals for the Fourth Circuit[4] held that "we do not read Section 504 to apply an affirmative obligation on school districts to provide services to private school students." D.L., 706 F.3d at 258. The decision points to the U.S. Department of Education, Office of Civil Rights' long-standing opinion that "[w]here a district has offered an appropriate education, a district is not responsible under Section 504, for the provision of educational services to students not enrolled in the public education program based on the personal choice of the parent or guardian." Id. at 259 (quoting *Letter to Veir,* 20 IDELR 864 (1993)).

Ignoring such agency interpretation is another problem with Doe. "Where an agency has made an interpretation of its own regulation, as the Department of Education has done in Letter to Veir, that interpretation is controlling unless it is plainly erroneous or inconsistent with the regulation." D.L., 706 F.3d at 259-60 (quotations omitted). Interestingly, the Doe decision, 931 A.2d 441, discusses this very legal principle (as articulated by the dissenting Commonwealth Court judge with respect to similar Pennsylvania Department of Education interpretations); nonetheless, this legal principle also never took root with the prevailing state

court jurists.

The Fourth Circuit did not address the correctness of the Doe decision (understandably, as a court will be loath to correct another court not under its supervision) , on the grounds that Pennsylvania's dual enrollment provision distinguished the Doe case from the case before it (Maryland had no such law). The D.L. judges pointed out, however, that the Doe "court ignored Letter to Veir. . ." id. at 262, and also interpreted the Third Circuit's decision in *Lauren W. ex. rel Jean W. v. DeFlaminis*, 480 F.3d 259, 273-74 (3d Cir. 2007), as effectively limiting Doe to only dually enrolled students.

Revisiting Doe now, our initial reaction to the case as bad law gains confirmation. Despite the Fourth Circuit's polite characterization of Doe, dual enrollment was not critical to the outcome in Doe. Rather, Doe required services in private school because, the court said, Section 504 requires those services: "as long as Doe is in the District's jurisdiction, the District has to provide what § 504 mandates. The required broad reading of these regulatory requirements in unison leads to the conclusion that § 504 requires the District provide Doe with the therapy services. . . ." Doe, 931 A.2d at 445. The Doe court simply got the federal law wrong.

To the extent Doe applies as the "law of the land," it applies only to dually enrolled students and only to questions of state law. Because claims for Section 504 services in private schools involve a mash-up and state and federal law, they offer a complex but fascinating (to lawyers, at least) circumstance just ripe for refined legal arguments and legal principles. But as the question of Section 504 services involves federal law, a dispute should end up in federal court where we are confident the outcome will be like D.L. and not Doe.

931 A.2d 640 (Pa. 2007).

24 Pa. Stat. § 5-502.

See, among others, Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 566-68 (4th Cir. 1997). The name is derived from the U.S. Constitution, Article 8, which grants to Congress the power to tax and spend. Spending Clause legislation operates much like contracts: in return for federal funding, states must meet certain statutory requirements. "[T]he legitimacy to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract." Suter v. Artist M., 503 U.S. 347, 356 (1992).

The Fourth Circuit hears federal appeals arising in the states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The decision is not binding precedent elsewhere, although it has persuasive precedential value.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

1. 931 A.2d 640 (Pa. 2007).
2. 24 Pa. Stat. § 5-502.
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