

SWEET | STEVENS | KATZ | WILLIAMS

Lawyers for education.

PENNSYLVANIA PRIVATE SCHOOL STUDENTS' RIGHT TO IDEA SERVICES AND REQUESTS FOR DUAL ENROLLMENT POST-VESCHI

Prior to the 1997 Amendments to the IDEA, courts had reached differing conclusions concerning the extent to which students who were voluntarily attending private schools were entitled to special education services.

As a general rule, services were not provided directly within the private schools, and services that were provided outside of the private schools were given under the concept of "dual enrollment," in trailers or off-site. Although the law required "equitable participation," that entitlement was not well-defined. A common position taken was that dual enrollment was one option a school district could access to discharge its duty to provide a genuine opportunity for "equitable participation" under the federal law, but that there was no "right" to dual enrollment for individual students.

The revision to the IDEA in 2004 and the subsequent 2006 IDEA regulations significantly changed the obligation of States and LEAs to children with disabilities enrolled by their parents in private elementary and secondary schools. The statute and the regulations now require that in Pennsylvania, IUs in which the private schools are located, rather than the LEAs in which the parents of such children reside, conduct child find and provide equitable services to parentally-placed private school children with disabilities.

As states are only required to spend proportionate amounts on special education for these students as a group, based upon discussions with private school authorities concerning group needs, public agencies (public school districts) then must provide students with disabilities voluntarily enrolled in private schools with a "genuine opportunity for equitable participation" in the programs they carry out under Part B of the IDEA. The amount of funds available for equitable participation is now based on the total number of children with disabilities who are enrolled in the private schools located in the IU whether or not the children and their parents reside in the IU.

Confusion occurred with the issuance in April 2001 of the Commonwealth Court decision in *Veschi v. Northwestern Lehigh School District*. That case involved a first grade student who was enrolled by his parents in a parochial school. Upon parental request, the school district evaluated the student and offered him a FAPE within the local district, but the student elected to attend parochial school with speech and language services provided by the local Intermediate Unit. When the parents were advised that these I.U. services would cease, they requested that their school district of residence provide those services under the guise of "dual enrollment."

While the Veschi Court acknowledged that the student had no individual right to services under the IDEA, it also looked to determine whether services were due, nonetheless, based upon state law.

In ruling that those services were to be provided to the student on the premises of the public school district (not the parochial school), the Court in Veschi relied heavily on the State Board of Education Regulations at 22 Pa. Code Section 14.41(e), which at the time of the decision provided that students attending nonpublic schools were to be provided with "equal opportunity to participate in special education services and programs and early intervention services and programs." After the decision, the "new" Chapter 14 regulations were promulgated,

SWEET | STEVENS | KATZ | WILLIAMS

Lawyers for education.

effective June 12, 2001, and these regulations adopted by reference the federal regulations and the provisions of the IDEA, thereby repealing the prior regulatory language of Section 14.41(e).

In addition to the above, the Court also weighed in on Section 5-502 of the Pennsylvania Public School Code, which was and continues to be valid statutory school law. The Court interpreted that provision in a manner to espouse a position that no child should or would have to give up their right to attend a nonpublic school in order to take advantage of a special education class or facility in a public school.

It is that position and analysis that could prove to become problematic to public school districts. Cognizant of the fact that there are arguments that could be made that a district had already expended the proportionate amount of federal funds in some other ways as to benefit private school students, or that the addition of a particular student or other similarly situated students would cause a district to expend significant sums of money beyond resource capability, or that there was no room for the student in question, the Veschi decision is problematic because it seems to mandate the provision of dual enrollment opportunities upon request for students who are enrolled in private schools. It is questionable whether a showing of the factors outlined above (that were noted as absent by the Court) would change the outcome.

Questions which are then posed are: Does the decision open up for review the “old” dual enrollment rule of no related services standing alone, or would a showing of a need for integrated special education services preclude a student from receiving specific pieces of a program? Would the Court have ruled differently if the decision was about the creation of a class or creation of services rather than ones that were already occurring? Is there legitimate concern about the rearrangement of a district schedule to accommodate private school students?

In light of the Veschi decision, it is worthwhile to remember the “old” rules for dual enrollment that were followed by most districts when dual enrollment was offered: no offering of related services standing alone, offered only at times that courses were otherwise being offered (no special scheduling), and offered transportation utilizing existing bus runs (beginning or end of the school day). Likewise, if a District is seeking to implement a policy concerning dual enrollment, that policy should require the same documentation from dually enrolled students as for all other students enrolling in the district: compliance with the district’s registration procedures; compliance with the district’s scheduling; enrollment priority for those enrolled full-time; application of the same rights as all other students and compliance with the same rules and requirements that apply to full-time students; and district responsibility extends only to the time the student is attending the program or activity for which the student is enrolled.

There always will be advocates for students with disabilities who look for ways to access more services from, and, therefore, place more responsibilities and obligations on, the public schools. However, because the course still is uncharted as to the impact of the Veschi decision, and the language contained in the opinion is problematic, we suggest proceeding cautiously when and if a request is made for services based upon that decision.

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.