

## **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.

With the 1997 Amendments to the IDEA, it became clear that parentally placed private students did not have individual rights to special education services, and that what was "owed" by the public schools was something less than a "FAPE." Current law in Pennsylvania, through both federal regulations which implement the statutory requirements of the IDEA, and the "new" Chapter 14 state regulations, requires that states develop policies and procedures to ensure that, to the extent consistent with the number and location of children with disabilities in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under Part B of the IDEA by providing such children with special education and related services.

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 Office of Special Education Programs ("OSEP") recently addressed this right of voluntarily enrolled private school students to be given an opportunity for "equitable participation" in special education programs, and confirmed that indeed there is not an entitlement to individual services or an individual "FAPE." Under IDEA 1997 and its implementing regulations, the local educational agencies ("LEAs") must spend a proportionate amount of Part B funds on voluntarily enrolled private school students, and any services provided to this category of students must be comparable in quality to the services furnished to district students. Determination of what constitutes a "genuine opportunity for equitable participation" in IDEA programs occurs when the LEA initially determines what portion of its Part B funds must be allocated for providing services to voluntarily enrolled private school students. This calculation is based on a specific formula used to determine a proportional amount of the federal funds. After this calculation is made, the LEA then is obligated to consult with private school representatives of the students to determine which students will be served and what

services will be furnished. The LEA, however, is not obligated to provide services to all students within this class. If a dispute arises over the services to be provided to a voluntarily enrolled private school student, the dispute is to be resolved through the state's complaint procedures, not due process.

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, 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? Does the decision expand upon the already existing child find obligations and responsibilities of a public school system? Lastly, does this decision affect transportation obligations of public schools to private school students?

As to the last question, transporting dually enrolled students to and from the nonpublic schools so that they can participate in school district programs would necessarily begin with an analysis of the two general provisions in the School Code governing transportation of nonpublic school children, Sections 1361 and 1374. Section 1361 requires that “identical” transportation services be provided to public and nonpublic school students, with the latter being transported to non-profit private schools within district boundaries and outside district boundaries at a distance not to exceed ten miles via the nearest public highway. Section 1374 requires that any exceptional child, who is regularly enrolled in a special class that is approved by the Department of Public Instruction, or who is enrolled in a regular class in which approved educational provisions are made for him, must be furnished with free transportation by the school district or I.U. It appears that an interpretation of Section 1374 of the School Code could require that an exceptional child enrolled in a Department-approved special class or in a regular class with approved special education provisions is entitled to free transportation by the district, possibly even midday. Otherwise, it appears that the student may ride a bus on a regularly scheduled route running closest to the time of the program, so long as the student is eligible for transportation and space is available, and that there need not be any alterations of routes or new bus stops for regular education 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.

It also is worthwhile to consider Act 89 programs which may provide the parent with the services sought at the site of the private school. Act 89 services are funded through the intermediate units and questions concerning what services are available can be directed to the local I.U. *John T. v. Delaware County Intermediate Unit, 2001 WL 1391500 (E.D. Pa Nov.7, 2001)* also has been cited as a case creating confusion in the area of services and responsibilities of public schools to privately placed school students.

However, that decision was based upon an interpretation of section 1372(4) of the School Code and Pennsylvania's Act 89, and was brought only against the Intermediate Unit. The suit was not against the local school district, which had evaluated the student and offered the student a free appropriate public education within the district. The federal court, in ruling that the I.U. must provide speech and occupational therapy on site at the parochial school, as well as itinerant teaching services and a teacher's aide, based its decision on section 13-1372(4) of the School Code. Section 13-1372(4) provides that I.U.s have the power and duty to provide special education services to students for whom services are not provided by the school districts. Nonetheless, this section of the School Code today is obsolete because I.U.s no longer have the power to decide, nor the funding to deliver, special education services, and can claim, legitimately, no authority nor funds to provide such services.

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.