

The Pennsylvania Senate's School Vouchers Bill 2011 SB-1: A Preliminary Look at the Implications for Special Education

By David F. Conn

Governor Corbett made "school choice" a prominent plank in his campaign. As part of that push, he has expressed a desire to initiate a school voucher program for students attending the lowest performing schools. The Pennsylvania Senate, perhaps in response to the Governor's initiative, proposed a school voucher bill as its first order of business in the 2011-12 session, SB-1.

On its face, SB-1 purports to permit any student in an identified school to attend either another public school, even though the student does not reside there (a "non-resident public school"), or a "participating nonpublic school". SB-1 is structured to provide vouchers for low income families whose home school is a "persistently lowest achieving school". "Persistently lowest achieving school" is defined as a school which achieves in the lowest 5% of schools in the Commonwealth based on the "most recent assessment for which data is posted" on the Department of Education's website. Since the determination relies solely on a single year's data, it is not clear what the word "persistently" is intended to convey. The definition specifically excludes charter or cyber charter schools. "Low income child" is defined as child of a household with income at 130% of federal poverty level or less. Despite the limited reach of the proposed bill, the legislative findings in SB-1 specifically articulate that the long term intent is to broaden the program to all students in the Commonwealth.

General challenges to voucher programs have produced a mixed set of results. In 2003 The United States Supreme Court held that an Ohio program did not violate the Establishment Clause of the Constitution. However, both the Florida and Arizona supreme courts have subsequently invalidated voucher programs based on their respective state constitutions' language. It is worth noting that the Arizona voucher program was specifically for disabled students. Ironically, Florida has a separate voucher program specifically for disabled students which was not challenged and therefore remains an active, and expanding, voucher program in Florida.

To date, no federal case has adjudicated a challenge to voucher programs based on the program's impact on disabled students, and there is consequently no precedent to examine regarding the reach of the Individuals with Disabilities Education Act ("IDEA"). This is also true as to the impact of Section 504 of the Rehabilitation Act ("Section 504"). In July of 1990, the United States Department of Education Office of Civil Rights ("OCR") did issue a "staff memorandum" discussing these issues in reference to the Milwaukee Choice Program a voucher program for low income families. OCR opined that placement by parents in a nonpublic school, even under a voucher program, is still a private placement and neither the public school where the family resides nor the nonpublic school would be obliged to offer a Free Appropriate Public Education under the IDEA. OCR further opined that so long as the funding used for vouchers is only state funding and not commingled with federal funding, Section 504 does not apply to nonpublic schools.

SB-1 is clear that a participating nonpublic school is not permitted to "discriminate" on the basis of handicap. However, SB-1 also prohibits the Commonwealth from requiring a participating

nonpublic school to accept a student if “the school does not offer appropriate programs or is not structured or equipped with the necessary facilities to meet the special needs” of the student.

Pennsylvania’s proposed program raises several issues for students with disabilities. First, the bill makes no provision for monitoring or regulating a program provided by a participating nonpublic school. Thus, if OCR’s opinion is correct, children with disabilities will have no mechanism or remedy to challenge the program provided by a nonpublic school. Parents, of course, would retain the remedy of returning the student to the public school where they reside.

Furthermore, because SB-1 proposes to allow vouchers to be used for non-resident public schools, this raises the issue of whether a disabled student using a voucher to attend a nonresident public school is still entitled to protections under IDEA and Section 504. SB-1 sets forth the procedure for eligible students to attend nonresident public schools. It obliges school districts to establish procedures by which it will take voucher students. The proposed bill appears to permit school districts to decide whether to accept nonresident voucher students. It is difficult to articulate a defensible argument to justify a district electing to accept only nondisabled voucher applications or for avoiding the mandates of IDEA and Section 504. In fact, the bill appears to anticipate that participating nonresident public schools would still be obliged to provide services. Section SB-1 would charge the cost of services for a special education student against the Commonwealth’s special education subsidy to the resident school district so long as that charge does not exceed the difference between the cost the resident would have incurred to provide services and the amount of the voucher payment.

In addition, no court has yet examined whether state laws and regulations promulgated the IDEA have any independent effect on nonpublic schools receiving voucher students. For most states, this issue would not arise as the protections for disabled children derive from and match those provided in the IDEA. Pennsylvania, however, provides legal protections for gifted children. The Pennsylvania School Code includes both gifted and disabled children in its definition of “children with exceptionalities” and the Pennsylvania Administrative Code provides for services for both categories under Chapters 14 and 16. These protections are entirely independent of the IDEA, but SB-1 is silent as to whether nonpublic schools would be bound by the provisions of Chapter 16 for voucher students who are gifted.

Finally, SB-1 would create funding challenges for districts. The bill proposes that beginning in the second year of a student’s utilization of a voucher to attend a participating nonresident or nonpublic school, the resident school district will have its basic education funding reduced by an amount equal to the Commonwealth’s share of the school district’s total revenue per average daily membership. This raises a particular difficulty in the case of a student with a disability attending a nonresident public school, as the resident may remain responsible for reimbursing the nonresident district for special education services while losing a major component of the Commonwealth’s basic education subsidy for that same student. Furthermore, IDEA requires school districts to allocate a certain amount of their special education funding for the provision of services to eligible children in private placements. For a disabled student attending a nonpublic school via the voucher program, OCR has apparently already taken the position that such a student must be counted as a student in a private placement. The result is that funding that would otherwise be available for the provision of services to eligible students in the public school will instead be unavailable for such use. This particular outcome may prove particularly

pesky since SB-1 appears to suggest that a student remains eligible to use the voucher program from year to year unless the family ceases to meet the definition of low income. Since a student in a nonpublic school will not be subject to the reevaluation procedures of the IDEA, the resident school district will have no mechanism to determine whether the student is still eligible for special education services. The consequence is that a student who entered the voucher program having already been identified as entitled to services under the IDEA will continue to be counted as an eligible student in a private placement even if that student, in fact, would no longer qualify as eligible under the IDEA.

As of this writing, SB-1 has been re-referred to the Senate Appropriations Committee. It is reasonable to expect that the bill will undergo a number of revisions before final consideration. However, while the bill continues to attract considerable attention, very little of the discussion has addressed students with disabilities. Thus, whether the particular issues addressed in this article are the subject of any drafting revisions remains an open question. If they are not, then school districts will be left forging their own answers in the aftermath of the bill's passage.

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