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In The United States District Court
For The Eastern District of Pennsylvania

JOHN T., A Minor by His Parents and Next Friends,
Paul T. and Joan T., and PAUL T. AND JOAN T.,
Individually and On Their Own Behalf

v.

THE DELAWARE COUNTY INTERMEDIATE UNIT

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF EDUCATION

No. 98-5781

May 8, 2000

Memorandum and Order

Norma L. Shapiro, S. J.

The parents of a mentally retarded student with Down's Syndrome bring this action against defendant Delaware County Intermediate Unit ("DCIU") to compel DCIU to provide the student with special education services in his regular education classroom at St. Denis, a private Catholic school. Plaintiffs bring claims under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"), 504 of the Rehabilitation Act, 29 U.S.C. 794,[1] 24 Pa. Cons. Stat. 9-972.1

("Act 89"), and 24 Pa. Cons. Stat. 13-1372(4) ("13-1372(4)"); they allege DCIU fails to provide mandated special education services to John T. at St. Denis.
Plaintiffs seek declaratory, injunctive, and compensatory relief, including preliminary and permanent injunctions compelling DCIU to provide speech therapy, occupational therapy, itinerant teaching services,[2] and a teacher's aide[3] ("special education services" or "services at issue"). Plaintiffs also demand reimbursement with interest for past expenses incurred providing these services for John T., but do not seek reimbursement for the tuition at St. Denis.

DCIU filed a third party complaint against the Commonwealth of Pennsylvania Department of Education ("PDE"); PDE has moved to dismiss. PDE is an indispensable party without immunity for the relief requested; the motion to dismiss will be denied.

Plaintiffs' motion for preliminary injunctive relief will be granted. In light of the time since this action was filed, the preliminary injunction will become permanent on May 26, 2000 unless either party requests a hearing to present new evidence or argue against a permanent injunction.

In accordance with Federal Rule of Civil Procedure 52(a), the court, after two hearings on the motions, enters the following findings of fact and conclusions of law.

Findings of Fact [4]

1. Plaintiff John T. ("John T.") was born on October 17, 1989; he resides in the Haverford Area School District, in Pennsylvania, with his parents, Paul T. and Joan T. John T. was diagnosed with Down's Syndrome and mental retardation at two months of age. He participated in an early intervention program at St. Denis until he was old enough to enter first grade.

2. In September, 1996, the beginning of his first grade year, John T. attended Coopertown Elementary School, Haverford Area School District. An Individual Education Plan ("IEP") was prepared by the school district in accordance with state law, and a free appropriate public education ("FAPE") was offered.

3. The FAPE offered was declined by plaintiffs because John T. was very upset and frustrated while attending Coopertown Elementary School. John T.'s two brothers attended St. Denis and John T. was disturbed by separation from them. John T. was not accepted or helped by his peers at Coopertown Elementary School. Joan T. and John T.'s third grade teacher testified credibly that John T.'s brothers and friends accepted and helped him; he wanted to wear the same uniform and be with his brothers and friends. John T. could not do well emotionally when at school away from his brothers and his friends. John T. would cry and resist getting on the bus to Coopertown Elementary; his resistance prevented him from getting an education there. John T. can only be educated effectively at St. Denis; he cannot receive an appropriate education at Coopertown Elementary School.

4. After three weeks of attempting to force John T. to attend first grade at Coopertown Elementary School, Paul and Joan T. voluntarily withdrew John T. from Coopertown Elementary School and placed him at St. Denis so he could be with his siblings. During his first and second grades at St.

Denis, John T. received special education services paid for by his school, the school district, DCIU, and his parents.[5]

Discussion

DCIU is the educational agency designated by Pennsylvania law and the PDE to provide a "program of auxiliary services" in private schools within Delaware County, Pennsylvania. See 24 Pa. Cons. Stat. 9-972.1 ("Act 89"). PDE has responsibility for general supervision of programs for students with disabilities and for ensuring that the requirements of the IDEA are met in Pennsylvania. DCIU receives its total available Act 89 funds from a line item appropriation to PDE.

DCIU currently provides handicapped students at St. Denis with: 1) one day per week of speech language services (including John T.); 2) two days per week of remediation services (including John T.); 3) one day per week of guidance and counseling (not including John T.); and 4) psychological and diagnostic services as needed. See DCIU Memorandum at 3. DCIU is willing to provide the services at issue to John T. at Coopertown Elementary, but not at St. Denis.

IDEA requires that in exchange for federal funds, states provide children with disabilities (as defined in Part B of the IDEA)[6] with a "free appropriate public education" ("FAPE") in the "least restrictive environment" ("LRE") to be provided by a state education agency ("SEA") and local education agency ("LEA") within a given school district. See 20 U.S.C. 1412. John T.'s qualification under the IDEA as a child with disabilities has not been stipulated, but no evidence to the contrary was presented at the hearing on the motion for preliminary relief. John T.'s disabled status has been assumed in deciding his eligibility for services.

The LEA, with power delegated from the SEA, is required to identify those students within a district who would benefit from special services and is charged with proposing an Individualized Education Program ("IEP") for each eligible child. See 20 U.S.C. 1413. The district is required to seek the approval of the IEP by the child's parents and secure their approval on a Notice of Recommended Assignment ("NORA"). See 20 U.S.C. 1414. If the parents do not accept the IEP, they are entitled to a due process hearing with an appeal to either state or federal court. See 20 U.S.C. 1415.

Act 89 requires intermediate units in Pennsylvania to "furnish on an equal basis auxiliary services to all pupils in the Commonwealth in both public and nonprofit nonpublic schools." 24 Pa. Cons. Stat. 9-972.1(a). Intermediate Units have the power and duty to "provide, maintain, administer, supervise and operate such additional classes or schools as are necessary or to otherwise provide for the proper education and training for all exceptional children who are not enrolled in classes or schools maintained and operated by school districts or who are not otherwise provided for." 24 Pa. Cons. Stat. 1372(4) ("1372(4)").

I. Plaintiffs' Motion for Injunctive Relief

Plaintiffs seek preliminary and permanent injunctive relief requiring defendants to provide requested auxiliary services at St. Denis under the IDEA, the Rehabilitation Act, and Pennsylvania

law. A preliminary injunction is granted only if: 1) the movant has shown a reasonable probability of success on the merits; 2) the movant will be irreparably injured by denial of relief; 3) granting the preliminary relief will not result in even greater harm to the nonmoving party; and 4) granting the preliminary relief will be in the public interest. See *Allegheny Energy, Inc. v. DQE, Inc*., 171 F.3d 153, 158 (3d Cir. 1999).

A. Success on the Merits

1. Rehabilitation Act

Section 504 of the Rehabilitation Act prohibits discrimination in federally funded programs because of a person's disability. See 29 U.S.C. 701 et. seq. (1999). To establish a violation of 504 of the Rehabilitation Act, a plaintiff must prove: 1) he is disabled as defined by the Act; 2) he is otherwise qualified to participate in school activities; 3) the school or the board of education receives federal financial assistance; 4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school; and 5) defendants knew or should have known of his disability. See *Ridgewood Bd. of Educ. v. N.E. for M.E.*, 172 F.3d 238, 253 (3d Cir. 1999). Section 504 imposes a duty to identify a disabled child within a reasonable time after school officials are on notice of behavior likely to signal a disability. *See id*.

John T. is disabled; St. Denis receives federal financial assistance; and defendants knew of John T.'s disability. John T. was not excluded from participation in Haverford School District activities; plaintiffs rejected its offer of a FAPE at Coopertown Elementary and sought the relevant services at St. Denis. Discrimination has not caused the alleged denial of plaintiffs' rights.
There can be no recovery under the Rehabilitation Act alone.

2. IDEA

The 1997 amendments to the IDEA made explicit that "[s]ubject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility." 20 U.S.C. 1412(a)(10)(C).(7) Courts of appeal addressing this issue have all held the IDEA alone does not require a state to fund special educational needs in a nonpublic setting if there is a suitable public school setting available that the parents have voluntarily rejected. See *KDM v. Reedsport School Distr*., 196 F.3d 1046, 1049 (9th Cir. 1999); *Foley v. Special Sch. Dist. of St. Louis County*, 153 F.3d 863, 863 (8th Cir. 1998); *Russman v. Board of Educ*., 150 F.3d 219, 222 (2d Cir. 1998); *K.R. v. Anderson Comm. Sch. Corp*., 125 F.3d 1017, 1019 (7th Cir. 1997), cert. denied, __U.S.__, 118 S. Ct. 1360 (1998); *Cefalu v. East Baton Rouge Parish Sch. Bd*., 117 F.3d 231, 233 (5th Cir. 1997). See also *William L. Dowling, Special Education and the Private School Student: The Mistake of the IDEA Amendments Act*, 81 Marq. L. Rev. 79, 82 (1997) ("Essentially the Amendments Act eliminated a court's ability to require a school board to pay for a private school student's special education, regardless of the circumstances.").

Children enrolled in private schools must participate equitably in the services offered; private school students are entitled to a proportionate share of the federal funds received by the state on behalf of disabled students. See *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1436-37 (10th Cir. 1997). The Haverford Area School District (the LEA) did not refuse to provide special educational services; if so, plaintiffs would be entitled to relief under the IDEA. *See School Comm. of Burlington v. Department of Educ*., 471 U.S. 369-70 (1985).

DCIU made the requested services available, but Paul and Joan T. placed their child in a private facility. The parties agree that DCIU and the LEA made a FAPE available at a public school. John T. reacted poorly at Coopertown Elementary School, but plaintiffs stipulated that the services offered by the public school were adequate. Having conceded that, the services offered by the DCIU are deemed appropriate under IDEA. Unless a separate state standard controls, plaintiffs are not entitled to on-site special education services. *See id*. Plaintiffs cannot prevail on the IDEA alone.

a. Act 89 or 24 Pa. Cons. Stat. 13-1372(4)

i. Incorporation

Plaintiffs argue the heightened standards of Pennsylvania Act 89 and 24 Pa. Cons. Stat. 1372(4) are incorporated into the IDEA and require DCIU to provide John T. with the services at issue. Plaintiffs can prevail only if: 1) Act 89 or 24 Pa. Cons. Stat. 13-1372(4) is incorporated into the IDEA and, if so, it requires DCIU to provide the services at issue; and 2) doing so does not violate the Establishment Clause.

If, as Plaintiffs argue, the IDEA incorporates Act 89 and 24 Pa. Cons. Stat. 13-1372(4),[8] DCIU must provide the services at issue as a matter of federal law. See 20 U.S.C. 1401(8)(B) ("The term 'free appropriate public education' means special education and related services that . . . meet the standards of the state educational agency").

The Court of Appeals for the Third Circuit has not decided this issue, but it has held that a predecessor of the IDEA incorporated higher state standards. See, e.g., *Board of Educ. v. Diamond*, 808 F.2d 987, 992 (3d Cir. 1986); see also *Frith v. Galeton Area School Dist*., 900 F. Supp. 706, 712 n.9 (E.D. Pa. 1995). Courts of appeals that have considered this issue have held that the IDEA incorporates heightened state educational standards. See *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10 Cir. 1999); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999). Pennsylvania administers Act 89 programs separately from special education programming under IDEA, but this distinction is administrative and not legally significant. 20 U.S.C. 1401(8)(B) incorporates more stringent Pennsylvania educational standards into IDEA; IDEA permits plaintiffs to enforce Pennsylvania's Act 89 and 24 Pa. Cons. Stat. 13-1372(4) in federal court.

ii. Requirements under Act 89 and 24 Pa. Cons. Stat. 13-1372(4)

Act 89 requires Intermediate Units to "furnish on an equal basis auxiliary services to all pupils in the Commonwealth." 24 Pa. Cons. Stat. Ann. 9-972.1(a). "Auxiliary services" include:

> guidance, counseling and testing services; psychological services; visual services as defined in section 923.2-a; services for exceptional children; remedial services; speech and hearing services; services for the improvement of the educationally disadvantaged (such as, but not limited to, the teaching of English as a second language), and such other secular, neutral, nonideological services as are of benefit to all school children and are presently or hereafter provided for public school children of the Commonwealth.
>
> **24 Pa. Cons. Stat. 9-972.1(b).**

For students in nonpublic schools, Act 89 provides that auxiliary services:

> shall be provided by the intermediate unit in which the nonpublic school is located . . . directly to the nonpublic school students by the intermediate unit in the schools which the students attend, in mobile instructional units located on the grounds of such schools or in any alternative setting mutually agreed upon by the school and the intermediate unit [to the extent permitted by the laws of Pennsylvania and the United States] . . . .

24 Pa. Cons. Stat. 9-972.19c

The Pennsylvania Supreme Court has not decided whether Act 89 creates a personal entitlement to services at a private school. "Furnishing auxiliary services on an equal basis" is interpreted by DCIU to require prorating its allocated budget provided by the Pennsylvania Department of Education to provide services by highest priority in its geographical area, as determined through consultation with the principal of each private school and with the Archdiocese of Philadelphia; it is interpreted by plaintiffs to require providing IEP services at a school of the plaintiffs' choice.

A federal court confronting an undecided issue of state law must predict the interpretation that will be adopted by the state's highest court. See *In re Professional Insurance Management*, 130 F.3d 1122, 1125 (3d Cir. 1997). Interpreting a statute must begin with its plain meaning. See, e.g., *Commonwealth v. Bell*, 512 Pa. 334, 340, 516 A.2d 1172, 1175 (1986). The legislative history is only consulted if the plain language of the statute is unclear. *See id*. Recourse to legislative history or underlying legislative intent is unnecessary when a statute's text is clear and does not lead to an absurd result. See *Commonwealth v. Hagan*, 539 Pa. 609, 615, 654 A.2d 541, 544 (1995); 1 Pa. Cons. Stat. 1922(1).

Act 89 plainly states that auxiliary special education services should be provided to disabled children on an "equal basis." The plain meaning of "equal basis" is proportional allocation of a fixed allotment to all qualified students. "Equal basis . . . to all pupils in the Commonwealth" does not require providing child-specific auxiliary services; the language expresses a clear legislative intent to disburse funds equally among all qualified students.

DCIU allocates Act 89 funds equally to all qualified students, with the advice of private school principals, in accordance with Pennsylvania and Federal law. See 24 Pa. Cons. Stat. 13-1372. The DCIU helps principals of private schools set priorities for allocated services and students. Act 89 does not provide a right for students to demand specific services from intermediate units. We predict the Pennsylvania Supreme Court will find that Act 89 neither expressly nor impliedly establishes a right to individual services; it does not create an individual entitlement for John T. beyond that already provided by DCIU at St. Denis.

24 Pa. Cons. Stat. 13-1372(4) states:

> [t]he Intermediate unit shall have power, and it shall be its duty, to provide, maintain, administer, supervise and operate such additional classes or schools **as are necessary or to otherwise provide for the proper education and training for all exceptional children who are not enrolled in classes or schools maintained and operated by school districts** or who are not otherwise provided for. 24 Pa. Cons. Stat. 13-1372(4) (emphasis added).

The statute's plain language requires intermediate units to provide classes for all exceptional children not enrolled in public schools. John T. is an exceptional child not enrolled in a school operated by a school district; 24 Pa. Cons. Stat. 13-1372(4) imposes a duty on DCIU to provide the services at issue to John T. at St. Denis. 24 Pa. Cons. Stat. 13-1372(4) is more detailed and stringent than Act 89; when read together as part of the same educational code, Act 89 and 24 Pa. Cons. Stat. 13-1372(4) require DCIU to provide for the proper education and training of John T. See, e.g., *United Steelworkers v. North Star Steel*, 5 F.3d 39, 43 (3d Cir. 1993) (a statute's provisions should be read to be consistent with one another, rather than the contrary).

Special services are necessary to provide John T. with a proper education. 24 Pa. Cons. Stat. 13-1372(4) requires that the services at issue be provided at St. Denis because it is impossible for John T. to receive a proper education in the Coopertown public school. 24 Pa. Cons. Stat. 13-1372(4) does not protect only students "who are not otherwise provided for;" it requires an intermediate unit to provide additional classes for all exceptional children not enrolled in public schools, or who are not otherwise provided for. While John T. is otherwise provided for by the Intermediate Unit, he remains an exceptional child not enrolled in a public school who is in need of special services for his proper education and training.

All of the services at issue are covered by 24 Pa. Cons. Stat. 13-1372(4). The occupational and language therapy classes are "additional classes;" the itinerant teacher and classroom aide "otherwise provide for" John T.'s proper education and training in his classes.

We predict the Pennsylvania Supreme Court will find that Pennsylvania law creates a personal entitlement for John T. to the services at issue at St. Denis.

b. Establishment Clause

Providing a classroom aide, speech therapy, or occupational therapy to John T. at St. Denis would not violate the First Amendment; it does not result in governmental indoctrination or create excessive entanglement between religion and the state. See Agostini v. Felton, 521 U.S. 203 (1997). While an itinerant teacher's assistance in the religious instruction of John T. would raise serious constitutional concerns, it has been stipulated that an itinerant teacher would only facilitate John T.'s secular education.

A government practice violates the Establishment Clause of the First Amendment if it: 1) has a sectarian purpose; and 2) its primary effect advances religion and creates an excessive entanglement of the government with religion. See *ACLU of New Jersey v. Schuldner*, 168 F.3d 92, 97 (3d Cir. 1999). Entanglement, standing alone, "will not render an action unconstitutional if the action does not have the overall effect of advancing, endorsing, or disapproving of religion." Id.

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court held that a New York City program sending public school teachers to parochial schools to provide secular remedial education to disadvantaged children did not violate the Establishment Clause because the program was not governmental indoctrination and did not define its recipients by reference to religion, or create an excessive entanglement. In *Zobrest v. Catalina Foothills School Dist*., 509 U.S. 1 (1993), the Supreme Court held that providing an interpreter under the IDEA[9] to a student attending a Catholic

high school did not violate the Establishment Clause because the interpreter was provided under a general government program, without reference to religion, did not add or subtract from the sectarian school's environment, and the primary beneficiary was not the school but the child.

Here, the itinerant teacher would not be involved in the religious aspects of John T.'s curriculum, but would serve a purely secular purpose by advising John T.'s teachers on educating him in his secular subjects. This would primarily benefit John T., not St. Denis School, and the services would be provided to him because of his special needs, not his religion. Any entanglement between church and state would not have the overall effect of advancing religion. Therefore, providing the services at issue to John T. at St. Denis would not violate the Establishment Clause.

B) Irreparable Harm

To establish irreparable harm, plaintiffs must demonstrate "potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Campbell Soup Co. v. Conagra, Inc*., 977 F.2d 86, 91 (3d Cir. 1992). The preliminary injunction must be the only way to protect plaintiffs from the harm they identify. *Id*. Proof of a risk of irreparable harm is not sufficient; the "'requisite feared injury or harm must be irreparable-not merely serious or substantial,' and it 'must be of a peculiar nature, so that compensation in money cannot atone for it.'" *Id*. at 92 (quoting *ECRI v. McGraw-Hill, Inc*., 809 F.2d 223, 226 (3d Cir. 1987).

Compensation in money can never atone for deprivation of a meaningful education in an appropriate manner at the appropriate time. Compensatory education, requiring "a school district to provide education past a child's twenty-first birthday to make up for any earlier deprivation," may sometimes be awarded. *M.C. on Behalf of J.C. v. Central Reg. School*, 81 F.3d 389, 395 (3d Cir. 1996). The right to compensatory education "accrues when the school knows or should know that its IEP is not providing an appropriate education." *Ridgewood Board of Educ. v. N.E. on behalf of M.E*., 172 F.3d 238, 249 (3d Cir. 1999). Having stipulated that a FAPE is available to John T. at Coopertown Elementary School, and that his IEP is adequate, an award of compensatory education may not be available to plaintiffs. But even if it were, compensatory education after age 21 would not satisfactorily remedy denial of special services to John T. during his crucial early educational years.

At Coopertown Elementary School, separated from his brothers, John T. was very unhappy and resistant to education; at St. Denis, John T., protected by his brothers, is an accepted part of the educational community. John T.'s skills in math, language, and communication have all improved at St. Denis; it is the only appropriate placement for John T. in the circumstances. Though Joan T. and John T.'s teacher testified that John T. is doing well and making meaningful progress in the absence of DCIU funding, it is only because John T.'s parents are paying for most of the special education services.

John T.'s parents currently pay for the services at issue, except for an itinerant teacher. However, Joan and Paul T. are in arrears and will soon be forced to stop payment for the special education services John T. needs at the only school meeting his emotional needs. At this time, John T. can only achieve meaningful progress at St. Denis with the special education services. Without special education services, John T. will suffer irreparable harm.(10)

C) Harm to the Nonmoving Party

John T. has a legal entitlement to the services at issue; the longer DCIU fails to provide them, the greater harm he suffers. Providing statutorily granted special services to a child does not harm DCIU; doing so is its function under state and federal law. DCIU argues that Act 89 is a limited fund to which there is no individual student entitlement, and that it cannot levy taxes to obtain more funds. But DCIU has joined PDE as a party to ensure DCIU has funding to provide adequate services. Granting injunctive relief to the plaintiffs will not cause more harm to the nonmoving parties than benefits to plaintiffs.

D) Public Interest

The IDEA and 24 Pa. Cons. Stat. 13-1372(4) declare and establish the public interest in securing proper education and training for exceptional children. It is in the public interest to provide benefits to those entitled to them under the law.

II. PDE Motion to Dismiss

DCIU, as a third party plaintiff, joined the Commonwealth of Pennsylvania Department of Education[11] as a third party defendant under Fed. R. Civ. Proc. 14(a).[12] DCIU lacks power to tax or raise funds on its own, so any decision requiring additional expenditure by DCIU would require action by the PDE. Under Fed. R. Civ. Proc. 19(a), a party must be joined, if feasible, if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may
> (i) as a practical matter impair or impede the person's ability to protect that interest or
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

PDE is a necessary party because: 1) it is likely that complete relief cannot be accorded to prevailing plaintiffs by DCIU, so PDE may be financially responsible instead; 2) PDE has an interest in the fiscal expenditures of the Commonwealth, particularly from its own budget, and a finding for plaintiffs will affect the PDE budget; and 3) PDE may be required to change its policies as a result of the judgment for plaintiffs. Joinder of PDE will not deprive the court of subject matter jurisdiction, and PDE is subject to service of process. An intermediate unit may bring an action against the Commonwealth Department of Education. See, e.g., *Lincoln Intermediate Unit No. 12 v. Commonwealth of Pa., Dept. of Educ*., 553 A.2d 1020 (Pa. Commw. 1989) (action to compel compliance with special education statutes); *Philadelphia County Intermediate Unit No. 26 v. Commonwealth of Pa., Dept. of Educ*., 432 A.2d 1121 (Pa. Commw. 1981) (action for reimbursement).

PDE argues that: 1) a state agency cannot be held to answer in federal court for violations of state law under the Eleventh Amendment to the United States Constitution; and 2) the Pennsylvania Constitution precludes an agency from exceeding its allotted appropriation.

A state agency can be sued for violations of federal law despite the Eleventh Amendment when Congress clearly and unequivocally expresses its intent to make states liable. See *Welch v. Texas Dept. of Highways & Public Transp*., 483 U.S. 468, 475 (1987).

Congress expressly abrogated the states' sovereign immunity for suits brought in federal court under the IDEA. See 20 U.S.C. 1403(a) ("A state shall not be immune under the eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter."). PDE will only be liable to DCIU to the extent required by the IDEA; PDE is not immune under the Eleventh Amendment to this action by DCIU under the federal IDEA.

The Pennsylvania Constitutional provision limiting payment from the Treasury to appropriations made by law is not applicable; if plaintiffs prevail, PDE may be forced to reallocate its appropriated funds, but will not be ordered to requisition new funds or pay retroactive damages.

DCIU is a necessary party, and will not be dismissed as a third party defendant.

Any facts in the Discussion section not found in the Facts section are incorporated by reference therein.

Conclusions of Law

1. The court has jurisdiction over the parties and subject matter.

2. Under 24 Pa. Cons. Stat. 9-972.1 and 24 Pa. Cons. Stat. 13-1372(4), as incorporated into the Individuals With Disabilities Education Act, plaintiff John T. is entitled to speech therapy, occupational therapy, a classroom aide, and an itinerant teacher from defendant DCIU, at levels reasonably calculated to afford meaningful educational progress. They should be provided in his current school program at St. Denis.

3. Provision of the services at St. Denis does not violate the Establishment Clause of the United States Constitution.

4. The Commonwealth of Pennsylvania, Department of Education, is a necessary party whose joinder is feasible; it will not be dismissed.

In the United States District Court for the Eastern District of Pennsylvania

JOHN T., A Minor by His Parents and Next Friends, Paul T. and Joan T., and
PAUL T. AND JOAN T., Individually and on Their Own Behalf

v.

THE DELAWARE COUNTY INTERMEDIATE UNIT,
AND THE COMMONWEALTH OF PENNSYLVANIA

No. 98-5781

ORDER

AND NOW this 8th day of May, 2000, upon consideration of plaintiffs' motion for preliminary injunction, plaintiffs' supplemental memorandum, defendant DCIU's response thereto, DCIU's post-trial memorandum of law in opposition to plaintiffs' motion for preliminary injunction, PDE's motion to dismiss, DCIU's response thereto, and PDE's memorandum in opposition to plaintiffs' motion for preliminary injunction and opposing its inclusion as a party defendant, and the attached memorandum,

It is **ORDERED** that:

1. Plaintiffs' motion for preliminary injunction is **GRANTED**. Defendant DCIU shall provide John T. with speech therapy, occupational therapy, a teacher's aide, and an itinerant teacher, for secular subjects only, at levels reasonably calculated to afford meaningful educational progress in his current school program at St. Denis.

2. The preliminary injunction will be converted to a permanent injunction on **May 26, 2000** unless any party requests a hearing to present new evidence or argue against a permanent injunction.

3. The Motion by Third-party Defendant Commonwealth of Pennsylvania, Department Education to Dismiss The Complaint of the Delaware County Intermediate Unit is **DENIED**.

Norma L. Shapiro, S.J.

Footnotes

1. Plaintiffs, having made little argument under the Rehabilitation Act, have primarily pressed their case under the IDEA and Pennsylvania laws.

2. An itinerant teacher, by consulting with a child's classroom teacher, aids the classroom teacher in modifying the regular education curriculum to teach the child. Plaintiffs attest that an itinerant teacher would not be involved in teaching religion to John T.

3. A teacher's aide is a one-on-one assistant working directly with the child, full time, to help the child perform in a mainstream classroom. A teacher's aide minimizes the burden on the classroom teacher of caring for the special needs of a disabled child; for example, a teacher's aide takes the disabled child out of the classroom for breaks and keeps the disabled child's classroom materials in order.

4. Background facts are derived from stipulations and hearings.

5. In prior litigation, John T. and DCIU settled claims for reimbursement for the services provided to John T. in first and second grade.

6. John T.'s qualification under the IDEA was not among the stipulations submitted; in its answer defendant stated "[w]hether or not John T. is eligible for special education programs and related services is a conclusion of law to which no response is necessary and which is therefore denied." (Ans. 12). John T.'s disabled status is not an issue in this action; the concern is his eligibility for services.

7. Subparagraph A of that subsection, titled "Children enrolled in private schools by their parents," provides:

(i) In general

> To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f) of this section:
>
> (I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.
>
> (II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law. 20 U.S.C. 1412(a)(10)(A).

8. Plaintiffs did not raise claims under Section 1372(4) until their Supplemental Memorandum. DCIU responded to the new arguments under this statute, so it will be considered herein.

9. The student's entitlement to an interpreter at Catholic school under the IDEA was not at issue before the Supreme Court.

10. Sovereign immunity may prevent Joan and Paul T. from recouping prior expenditures for John T.'s special education services. Joan and Paul T. will suffer irreparable harm the longer they must pay for the services John T. requires.

11. Plaintiffs do not object to the joinder.

12. Fed. R. Civ. Proc. 14(a) provides:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

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