

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Center for Student Learning Charter	:	
School at Pennsbury,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1746 C.D. 2010
	:	
Pennsylvania Department of Education,	:	Argued: May 10, 2011
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: September 13, 2011

Center for Student Learning Charter School at Pennsbury (CSL) petitions for review of the August 5, 2010, Order of the Secretary of Education (Secretary), which dismissed CSL's appeal from the Bureau of Assessment and Accountability's (Bureau) denial of CSL's Adequate Yearly Progress (AYP) appeal. Based on CSL's AYP history, the Bureau had placed CSL on School Improvement II status. CSL argues that the Secretary's Order should be reversed because, *inter alia*, the Pennsylvania Department of Education (Department)

violated CSL's equal protection rights by attributing Pennsylvania System of School Assessment (PSSA) scores to CSL,¹ which operates exclusively as an alternative education program (AEP), when no other AEP has such scores attributed to it. For the following reasons, we reverse.

CSL received its charter from the Pennsbury School District (Pennsbury) and serves students in grades six through twelve. (Secretary's Decision, Findings of Fact (FOF) ¶¶ 2-3.) In 2003, CSL obtained Department approval to operate an AEP for disruptive students under Article XIX-C of the Public School Code of 1949 (School Code),² 24 P.S. §§ 19-1901-C - 19-1906-C. (FOF ¶¶ 9-10, 14; Stipulation of Facts (Stip.) ¶¶ 12, 14, R.R. at 577a-78a.) An AEP "provides a combination of intense, individualized academic instruction and behavior modification counseling in an alternative setting to assist students in returning successfully to the regular classroom." (FOF ¶ 14.) CSL receives additional state funding for its AEP students. Section 1903-C of the School Code, 24 P.S. § 19-

¹ In 2001, the United States Congress amended Title I of the Elementary and Secondary Education Act of 1965 with the No Child Left Behind Act of 2001 (NCLB). Funding under Title I and NCLB is conditioned on each state establishing a single, statewide system of accountability that incorporates NCLB's requirements for measuring the AYP of each school district and public school in the state. Section 1111(b)(2)(A) of NCLB, 20 U.S.C. § 6311(b)(2)(A). In accordance with NCLB, the Department determines the AYP of each school district and public school and, as required by NCLB, the Department establishes annual performance targets. AYP is measured partially on student participation in and achievement on the PSSA and, for high schools, student graduation rates. The Pennsylvania Consolidated State Application Accountability Workbook, which is approved by the United States Department of Education, represents the Department's statewide system of accountability.

² Act of March 10, 1949, P.L. 30, added by Section 22 of the Act of June 25, 1997, P.L. 297, as amended.

1903-C (providing alternative education grants for approved AEPs). When a school district identifies a student as disruptive and places that student into an AEP, that student's PSSA scores are attributed to the student's district of residence and to the state because that district remains responsible for educating the student; however, the PSSA scores are not attributed to the AEP the student attends. (FOF ¶ 21; Stip. ¶ 16, R.R. at 578a.) However, for AYP purposes, the Department attributes the PSSA scores of students enrolled in charter schools, even those that operate as an AEP, to the charter school.³ (FOF ¶ 7.)

For schools with fewer than forty students,⁴ such as CSL, the Pennsylvania Consolidated State Application Accountability Workbook (State Plan) sets forth nine methods by which AYP may be calculated, including the use of the PSSA scores and the Pennsylvania Performance Index (PPI) score. (FOF ¶¶ 33-34.)⁵ The PPI score, which is based on a formula approved by the United States Department of Education (USDE) and only used if the other eight criteria are not met, calculates whether a school district, school, or student subgroup is "on track" to meet the 100% proficiency rate by the 2013-2014 school year as required by the No Child Left Behind Act of 2001 (NCLB). (FOF ¶¶ 38-40.)

³ CSL would be attributed the PSSA scores of only those students enrolled at CSL for the full academic year, i.e., before October 1st and through the testing period of the relevant school year. (FOF ¶ 8.)

⁴ Thomas William Reiley, CSL's Executive Director, testified that: approximately 116 students attended CSL at the time of the hearing in this matter; the average length of time a student attends CSL is approximately 121 days; and, in 2008, 54 students took the PSSAs and, of those 54, only 37 scores were attributed to CSL. (Hr'g Tr. at 24-25, R.R. at 454a-55a.)

⁵ For schools with more than forty students, there are seven ways to calculate AYP. (FOF ¶¶ 33.)

In 2004, CSL did not achieve AYP based on its students' PSSA scores and other AYP criteria, and was placed on warning status. (FOF ¶ 23.) In 2005, CSL's PSSA scores were attributed to the students' districts of residence and not to CSL, with the result that CSL did not receive an AYP report for that year. (FOF ¶¶ 24-25.) In the years after 2005, the PSSA scores for CSL's students were attributed to CSL. As a result, it did not achieve AYP in 2006 and was placed on School Improvement I status.⁶ (FOF ¶¶ 26-27.) CSL achieved AYP in 2007, resulting in the change of its status to "making progress." (FOF ¶¶ 28-29.) However, CSL did not achieve AYP in 2008 because it did not meet its required graduation rate and performance targets for math and reading. (FOF ¶¶ 31-32.) Moreover, CSL's PPI target for 2008 was 56.5 and its achieved score was 53.7. (FOF ¶¶ 42-43.) Because it did not meet any of the nine criteria for achieving AYP in 2008, the Bureau placed CSL on School Improvement II status, and CSL appealed. (FOF ¶ 35.)

The Bureau denied the appeal, and CSL appealed to the Secretary. CSL argued, *inter alia*, that the Department was treating it differently than other public schools and AEPs because the Department was attributing CSL students' PSSA scores to CSL and not the students' districts of residence. The Secretary, acknowledging that CSL is different from a typical charter school because all of its students participate in the AEP that CSL provides, determined that CSL is

⁶ The failure to achieve AYP for multiple years results in a school, school district, etc. being assigned a "status," such as warning, School Improvement I, or School Improvement II. Each "status" has goals and reform requirements that are intended to assist in the improvement of the school, school district, etc. which must be implemented and met. (Secretary's Decision at 2.)

responsible for educating its enrolled students, regardless of the type of program it runs and must meet the accountability requirements set forth in NCLB and implemented through the Department's USDE-approved State Plan. (Secretary's Decision at 8-9.) Citing to the Charter School Law (Law)⁷ and the State Plan, the Secretary pointed out that a charter school is a public school and federal law requires the Department to apply NCLB's accountability provisions to it as the Department would to any other public school.⁸ (Secretary's Decision at 9.) CSL now petitions this Court for review.

⁷ The Law was added to the School Code by Section 1 of the Act of June 19, 1997, P.L. 225, as amended, 24 P.S. §§ 17-1701-A—17-1751-A.

⁸ CSL also argued that the Bureau's AYP determination was inaccurate and/or invalid due to: the failure to attribute any PSSA scores to CSL in 2005; CSL's small size; or the application of an incorrect PPI target score. The Secretary rejected all of these arguments for various reasons. On appeal to this Court, CSL raises arguments regarding the 2005 PSSA scores and an incorrect PPI target score, as well as the argument that the Department's AYP determinations improperly ignores CSL's multi-grade-span configuration and that the Department's State Plan and "Attribution Map" (which describes how PSSA scores are to be attributed) are not statements of policy but unpromulgated regulations. However, because of our holding, we need not address those arguments. Additionally, we note that CSL's last two arguments are waived because they were not raised before the Bureau, Secretary, or in its Petition for Review to this Court. Pa. R.A.P. 1551(a) (stating that, with few exceptions not applicable here, "[n]o question shall be heard or considered by the [C]ourt which was not raised before the governmental unit."); Moran v. Unemployment Compensation Board of Review, 973 A.2d 1024, 1028 (Pa. Cmwlth. 2009) (holding that a party waives its challenge to the validity of a department's regulation if not raised before the administrative agency); North Hills Passavant Hospital v. Department of Health, 674 A.2d 742, 745 (Pa. Cmwlth. 1996) (stating that "issues not raised in the petition for review are not properly preserved and this [C]ourt will not address them.")

On appeal,⁹ CSL asserts that the Department has adopted a general policy of attributing the PSSA scores of students enrolled in an AEP to the students' districts of residence instead of to the AEP. CSL maintains that, notwithstanding this general policy, if a student attends an AEP operated by a charter school, such as CSL, the Department attributes that student's PSSA score to the AEP itself, rather than the student's district of residence. CSL notes that Section 1901-C(1) does not distinguish between AEPs that are operated by various entities and, therefore, the Department should be treating all AEPs the same; that is, the PSSA scores of all AEP students should be attributed to the students' districts of residence. According to CSL, this policy of treating a charter school operated AEP differently than other AEPs violates Article XIV, Section 1 of the United States Constitution (the Equal Protection Clause) and Article I, Section 26 of the Pennsylvania Constitution because it treats a subclass of AEPs differently for the purposes of NCLB based on their status as being operated by a charter school without having a rational relationship to the object of the Department's policy. Thus, CSL asserts that this matter is akin to DeFazio v. Civil Service Commission of Allegheny County, 562 Pa. 431, 756 A.2d 1103 (2000), and Harrisburg School District v. Hickok, 781 A.2d 221 (Pa. Cmwlth. 2001), in which the Pennsylvania Supreme Court and our Court, respectively, held that certain statutes were unconstitutional because they violated either the Equal Protection Clause or the Pennsylvania Constitution.

⁹ In reviewing the decision of the Secretary, our review "is limited to [a] determination of whether substantial evidence supports necessary factual findings, and whether an error of law or constitutional violation was committed." Curl v. Solanco School District, 936 A.2d 183, 184 n.1 (Pa. Cmwlth. 2007).

The Department does not dispute that other non-charter school AEPs do not have PSSA scores attributed to them or receive AYP reports. However, the Department argues that, notwithstanding the fact that CSL operates exclusively as an AEP, it is a charter school, which, pursuant to the Law, is a public school subject to the accountability provisions of NCLB. The Department notes that students who attend a charter school operated AEP are un-enrolled in their districts of residence. The Department maintains that CSL seeks to have its identity as a public school disregarded because it operates an AEP in which all of its students participate. According to the Department, CSL is treated the same as any other public school and, therefore, its equal protection rights are not violated.

The Equal Protection Clause provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Art. XIV, § 1. Article I, Section 26 of the Pennsylvania Constitution states: “[n]either the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.” Pa. Const. art. I, § 26. In DeFazio, the Pennsylvania Supreme Court held that legislation that did not permit the sheriff of Allegheny County, a second class county, to hire, fire, or promote his office’s employees was unconstitutional because it differed from the authority given to all other county officials in Pennsylvania and all other sheriffs, and there was no rational basis for the different treatment. DeFazio, 562 Pa. at 435-38, 756 A.2d at

1105-06. The Supreme Court explained the nature of equal protection under both the Pennsylvania Constitution and the Equal Protection Clause as follows:

“The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal protection under the law does not absolutely prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. In other words, the classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation.”

DeFazio, 562 Pa. at 436-37, 756 A.2d at 1106 (quoting Curtis v. Kline, 542 Pa. 249, 254-55, 666 A.2d 265, 267-68 (1995) (citations omitted)). In Harrisburg School District, this Court overruled preliminary objections to the school district’s challenge to a piece of legislation that singled out the district for treatment different from other school districts that had been placed on the Education Empowerment List, based on its low PSSA scores, as being unconstitutional under, *inter alia*, the Equal Protection Clause. Harrisburg School District, 781 A.2d at 229-31. In doing so, this Court upheld the concept that school entities have equal protection rights under the Equal Protection Clause. Id. at 231.

After reviewing the Secretary’s findings of fact and decision, we conclude that the Department is treating CSL’s AEP differently than other AEPs by attributing the AEP students’ PSSA scores to CSL and making an AYP

determination against CSL based on those scores. Although the Department argues that this is not the case because it is *CSL*, not its AEP, that receives the AYP determinations, for all practical purposes, the PSSA scores and AYP determinations are being attributed to the AEP. The Department acknowledges that *all* of CSL's students attend its AEP program; thus, making it a unique program in the Commonwealth of Pennsylvania (Commonwealth). (FOF ¶ 10; Secretary's Decision at 7.) In arguing that CSL is seeking to have its status as a public school overlooked, the Department, itself, is overlooking the fact that CSL operates *exclusively* as an AEP. After reviewing the State Plan and the Department's AYP Performance and Participation Map for the School Year 2007/08 (Attribution Map), we note that other entities that operate AEPs, which are, like CSL, schools in their own right, such as vo-tech schools, do not have the PSSA scores of their AEP students attributed to the school. (Attribution Map at 3, R.R. at 592a.) Rather, the State Plan indicates that those scores are attributed to the "School of residence," "District of residence," and the "State." (Attribution Map at 3, R.R. at 592a.) Given the unique nature of CSL and the AEP involved here, i.e., where all of the students enrolled in CSL are enrolled as AEP students from other schools and school districts, we agree with CSL that the Department's treatment of CSL's AEP is different from the treatment of non-charter school AEPs in the Commonwealth.

However, this conclusion does not end our inquiry because, as the Department correctly points out, if the disparate treatment is reasonable, rather than arbitrary, and bears a rational relationship to a legitimate governmental interest, then there is no constitutional infirmity. DeFazio, 562 Pa. at 436-37, 756

A.2d at 1106 (quoting Curtis, 542 Pa. at 255, 666 A.2d at 268). The Department argues that it has a legitimate governmental interest in requiring *all* schools to be held accountable under NCLB and that attributing the PSSA scores of CSL's AEP students to CSL is rationally related to that legitimate governmental interest. (Department's Br. at 11-12.) Additionally, the Department asserts that NCLB requires it to hold CSL accountable for the progress of its students and that, if CSL does not have the PSSA scores and other accountability criteria applied to it, CSL would have no accountability for the education of its students. CSL contends that there is no rational basis for treating CSL's AEP differently than all other AEPs in the Commonwealth, particularly where there is no support for such treatment in the School Code's AEP provisions.

Initially, we note that NCLB leaves the treatment of charter schools for its purposes up to the individual states. Section 1111(b)(2)(k) of NCLB, 20 U.S.C. § 6311(b)(2)(k) (stating "[t]he accountability provisions under this chapter shall be overseen for charter schools in accordance with [Law]"). Accordingly, the Department's assertion that NCLB *requires* it to treat CSL like any other public school is overly simplistic because the treatment of charter schools for NCLB purposes is determined at the state, not federal, level. Id.

CSL is correct that the Section 1901-C(1) of the School Code does not distinguish between AEPs based on the type of educational entity that operates that the AEP.¹⁰ That section defines “Alternative education program” as

[a]ny applicant’s program applying for funds under this article, which program is implemented by a school district, an area vocational-technical school, a group of school districts or an intermediate unit, which removes disruptive students from regular school programs in order to provide those students with a sound educational course of study and counseling designed to modify disruptive behavior and return the students to a regular school curriculum.

24 P.S. § 19-1901-C(1). This section also provides that school districts “shall adopt a policy for periodic review of those students placed in their respective [AEPs]” that “shall occur, at a minimum, at the end of every semester the student is in the program or more frequently at the district’s . . . discretion.” *Id.* Although Section 1901-C(1) does not specifically refer to charter schools, it applies to “any applicant’s program,” 24 P.S. § 19-1901-C(1), and Section 1901-C(2) defines “Applicant” to include “[a] school district, a combination of school districts or *a charter school that provides an [AEP] within or to a chartering school district or school districts as the central mission of the charter and that applies for funds under this article,*” 24 P.S. § 19-1901-C(2)¹¹ (emphasis added). Additionally, when a charter school applies to “provide[] an [AEP] within or to a chartering school district or school districts,” the charter school must submit “written support

¹⁰ There is an exception for privately run AEPs to which a public school sends disruptive students by contract. See Article XIX-F of the School Code, added by Section 20 of the Act of July 20, 2007, 24 P.S. §§ 19-1901-F - 19-1907-F.

¹¹ We note that the provisions associated with charter schools were added by Section 2 of the Act of July 9, 2008, P.L. 846, retroactively applicable to July 1, 2008. CSL, nevertheless, obtained approval from the Department in 2003 to operate an AEP.

for the application from the chartering school district.” Section 1902-C(9), 24 P.S. § 19-1902-C(9). Although the amendments to Sections 1901-C(1), (2) and 1902-C(9) were enacted and effective after CSL began its Department-approved AEP program, there is no challenge as to whether CSL’s Charter, which had been approved and signed by the Pennsbury Board of School Directors, met the requirements. The Charter specifically refers to the need for additional AEP services in its regional area and its mission to allow “*Pennsbury* students and students from surrounding school districts . . . to be educated within their own school and community.” (CSL’s Charter at 11, R.R. at 922a (emphasis added).)

We acknowledge the Department’s concern regarding the need to hold CSL accountable for the education of the students who attend its AEP, as well as the Department’s statements regarding the fact that students that attended CSL’s AEP were un-enrolled by the students’ parents from their districts of residence in order to be enrolled at CSL. However, these positions do not take into account the special relationship, recognized by the General Assembly, between a charter school that provides AEP services within or to its chartering school district or districts. Sections 1901-C(1) and 1901-C(2) recognize that the relationship between a school district and a charter school that provides AEP services to that district is different than that of the typical chartering school district/charter school. The above quoted language of the School Code reveals that a charter school that operates an AEP is doing so, essentially, *for the benefit of the chartering school district or districts*. Indeed, in order to obtain permission to operate an AEP, the charter school’s *central mission* must be to provide those types of services to the chartering school district or districts, 24 P.S. § 19-1901-C(2), and must obtain

written support from its chartering school district or districts, 24 P.S. § 19-1902-C(9). Again, although these provisions were enacted after CSL began its AEP, CSL's Charter, approved and signed by Pennsbury's Board of School Directors, specifically promoted its relationship with Pennsbury and that its AEP was "cost-effective as compared to outside placements, providing more efficient use of *school districts'* resources." (CSL Charter at 11, R.R. at 922a (emphasis added).) Thus, CSL is different from other charter schools in that its purpose, which is to offer an AEP to disruptive students, is more intertwined with its chartering school district, Pennsbury,¹² as well as the other area school districts that recommend CSL as a possible AEP placement for their disruptive students. Because of this special, intertwined relationship, we disagree with the Department that CSL will escape accountability for the education of its AEP students. If CSL does a poor job in educating these students, school districts will no longer suggest the placement of their students at CSL. This would lead to CSL losing not only the funding associated with that student from the school district of residence, but also the additional AEP funding associated with that student from the Commonwealth.

Moreover, the process of placing students in CSL's AEP, likewise, reflects the special relationship between a district of residence and a charter school that provides AEP services to that district. It is undisputed that it is the district of residence that identifies a student as being eligible for AEP placement; parents

¹² Indeed, CSL initially was located at Pennsbury High School. (Hr'g Tr. at 15, R.R. at 445a.) Mr. Reiley testified that Pennsbury asks that it is kept informed of Individualized Educational Plan (IEP) issues associated with its former students who attend CSL's AEP. (Hr'g Tr. at 44, 474a.)

may not identify their own children as eligible and ask for them to be placed in an AEP. (FOF ¶ 16-17.) In other words, it is the district of residence that decides that a student must be removed from a regular education program and placed in an AEP. Thomas William Reiley, CSL's Executive Director, testified that when a district identifies a student as disruptive and advises the students' parents that the student cannot remain in the school's regular education program, it is the school district that provides the parents with a choice of AEPs, including programs offered by charter schools. (Hr'g Tr. at 16-17, R.R. at 446a-47a.) Mr. Reiley indicated that CSL receives phone calls from sending districts' administrators, and that placement arrangements for students are made verbally between CSL and the sending districts, particularly Pennsbury. (Hr'g Tr. at 16-17, 46-47, R.R. at 446a-47a, 476a-77a.) Thus, although it is the parents who make the ultimate decision as to which AEP their child will attend, it is the district of residence that begins the process and, for all practical purposes, places the child into an AEP, rather than a regular education program.

Finally, CSL is held accountable under the Law. Section 1720-A of the Law provides that the written charter signed by both the board of school directors of the chartering school district and the charter school's board of trustees is a legally binding document. 24 P.S. § 17-1720-A. A charter school's charter sets forth, *inter alia*, specific educational goals, the curriculum that will be offered, and the methods of assessing whether its students are meeting the charter school's educational goals. Section 1719-A(5) of the Law, 24 P.S. § 17-1719-A(5) (setting forth what is required to be included in a charter school's application); 24 P.S. § 17-1720-A(a) (stating, among other things, that the written charter shall contain the

provisions of the charter school application). A charter school does not exist in a vacuum of regulation or accountability; rather, Section 1728-A of the Charter School Law requires the chartering school district to perform annual assessments of the charter school to determine “whether each charter school is meeting the goals of its charter,” as well as “a comprehensive review prior to granting a five (5) year renewal of the charter.” 24 P.S. § 17-1728-A. Similarly, Section 1729-A describes the circumstances under which a charter school’s charter can be terminated or not renewed by the chartering school district. 24 P.S. § 17-1729-A. These reasons include a charter school’s “material violation[] of any of the conditions, standards or procedures contained in the written charter signed pursuant to [S]ection 1720-A” or its “failure to meet any performance standard set forth in the written charter.” 24 P.S. § 17-1729-A(a)(1), (2). Accordingly, CSL remains accountable to Pennsbury to satisfy the terms of its charter and, if it fails to do so, CSL’s charter may be terminated or not renewed.

For the foregoing reasons, we conclude that, in the unique situation where a charter school operates solely as a Department-approved AEP, the Department’s attribution of PSSA scores of the AEP students attending that charter school to the charter school, and not to the students’ district of residence as the Department does in *all* other AEP situations, is not rationally related to its legitimate government interest of holding all schools accountable. This is particularly true where multiple levels of accountability already exist. Therefore, we hold that the Department’s actions here violated CSL’s rights under the Equal Protection Clause and Article I, Section 26 of the Pennsylvania Constitution.

Accordingly, we reverse the Secretary's Order denying CSL's appeal from the Bureau's 2008 AYP determination and CSL's placement on School Improvement II status.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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School at Pennsbury,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1746 C.D. 2010
	:	
Pennsylvania Department of Education,	:	
	:	
Respondent	:	

ORDER

NOW, September 13, 2011, the Order of the Secretary of Education in the above-captioned matter is hereby **REVERSED**.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Center for Student Learning Charter :
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Petitioner :
v. : No. 1746 C.D. 2010
 : Argued: May 10, 2011
Pennsylvania Department of Education, :
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BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

CONCURRING OPINION
BY SENIOR JUDGE FRIEDMAN

FILED: September 13, 2011

I agree with the majority that the Pennsylvania Department of Education (Department) violated the equal protection rights of the Center for Student Learning Charter School at Pennsbury (CSL), which operates solely as an alternative education program (AEP), by attributing Pennsylvania System of School Assessment (PSSA) scores to CSL, but not attributing PSSA scores to other AEP entities.¹ I write to offer a different analysis.

CSL is a charter school that has obtained Department approval to operate an AEP for disruptive students under Article XIX-C of the Public School Code of

¹ CSL essentially contends that the Department has violated its equal protection rights in applying the law.

1949 (School Code).² An AEP is a program that removes disruptive students from regular school programs in order to provide those students with a sound educational course of study and counseling designed to modify disruptive behavior and return the students to a regular school curriculum. Section 1901-C(1) of the School Code, 24 P.S. §19-1901-C(1). A disruptive student is:

A student who poses a clear threat to the safety and welfare of other students or the school staff, who creates an unsafe school environment or whose behavior materially interferes with the learning of other students or disrupts the overall educational process. The disruptive student exhibits to a marked degree any or all of the following conditions:

- (i) Disregard for school authority, including persistent violation of school policy and rules.
- (ii) Display or use of controlled substances on school property or during school-affiliated activities.
- (iii) Violent or threatening behavior on school property or during school-affiliated activities.
- (iv) Possession of a weapon on school property, as defined under 18 Pa.C.S. §912 (relating to possession of weapon on school property).
- (v) Commission of a criminal act on school property or during school-affiliated activities.
- (vi) Misconduct that would merit suspension or expulsion under school policy.
- (vii) Habitual truancy.

Section 1901-C(5) of the School Code, 24 P.S. §19-1901-C(5).

Where the Department has approved an AEP for a school district, the Department attributes the AEP students' PSSA scores to the students' districts of

² Act of March 10, 1949, P.L. 30, added by section 11 of the Act of June 25, 1997, P.L. 297, *as amended*, 24 P.S. §19-1901-C to §19-1906-C.

residence. Thus, in the typical situation, the Department makes no determination as to whether an AEP entity, by itself, has achieved Adequate Yearly Progress (AYP) goals. However, the Department made a determination that CSL failed to achieve its AYP goals for 2008. The Department did so because, although CSL operates as an AEP, CSL is also a charter school. CSL appealed that determination, arguing that the Department was not treating CSL like other AEP entities. The Secretary of Education (Secretary) denied the appeal because, as a charter school, CSL is a public school, and public schools are subject to the AYP accountability system.

The essence of equal protection is the requirement that similarly situated persons be treated alike. *Pennsylvania Social Services Union, Local 668, Service Employees International Union, AFL-CIO v. Department of Public Welfare, Office of Inspector General*, 699 A.2d 807, 812 (Pa. Cmwlth. 1997). To establish a violation of equal protection rights, a person must show that there could be no rational basis for being treated differently from other similarly situated persons. *Abdul Jabbar-Al Samad v. Horn*, 913 F.Supp. 373, 376 (E.D. Pa. 1995). Similarly situated does not require that the parties be identically situated. *Id.*

The first question is whether a charter-school AEP, like CSL, is similarly situated with a non-charter-school AEP. Because **every** AEP, whether or not a charter school, involves only disruptive students and because the purpose of **every** AEP, whether or not a charter school, is to provide disruptive students with an educational course of study and counseling designed to modify disruptive behavior and return the students to a regular school curriculum, I would conclude that a

charter-school AEP is similarly situated with a non-charter-school AEP with respect to its character and purpose.

The second question is whether there is a rational basis for attributing PSSA scores of a non-charter-school AEP to the students' districts of residence, but not doing so for a charter-school AEP. An AEP segregates from the student body those students who have a history of disrupting the educational process. The AEP then attempts to modify the students' disruptive behavior so that they can be reintegrated into the regular educational process. That is the sole purpose of an AEP. Given this role of an AEP in the educational system, whether a charter-school or non-charter-school AEP, there is no rational basis for requiring an AEP to meet AYP goals.

Accordingly, like the majority, I would reverse.

ROCHELLE S. FRIEDMAN, Senior Judge