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# THE DELIVERY OF SPECIAL EDUCATION SERVICES IN CATHOLIC SCHOOLS: ONE HAND GIVES, THE OTHER HAND TAKES AWAY

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*This article examines legal issues surrounding the delivery of special education to children whose parents have voluntarily enrolled them in Catholic schools. In so doing, the article reviews the Individuals with Disabilities Education Act (IDEA), its regulations, and case law over the extent to which special education must be provided, the way in which it is delivered, and the quality of services that students in Catholic schools receive. The final portion of the article addresses questions about the delivery of special education in Catholic schools, including guidelines for implementing the new provisions in the IDEA in a manner that avoids running afoul of the Establishment Clause.*

**NOTE:** 1) In this article, the authors use the term “special education” to include both special education and related services; and 2) even though the IDEA and its regulations actually use the terms “private” and “parochial” schools, the authors prefer, and typically use, the terms nonpublic or religiously affiliated nonpublic schools.

**T**he Individuals with Disabilities Education Act (IDEA) (1999) is designed to provide a free, appropriate public education to all students with disabilities in the least restrictive environment. As a federal statute, the IDEA

clearly applies to students in public schools. However, since the IDEA, originally named the Education for All Handicapped Children Act, became law in 1975, questions remain over whether, or to what extent, it applies to students whose parents voluntarily enrolled them in religiously affiliated nonpublic schools, most notably Catholic schools.

Following the Supreme Court's ban on the on-site delivery of remedial Title I services in religiously affiliated nonpublic schools (*Aguilar v. Felton*, 1985), districts had to provide services at public schools or neutral sites. Fortunately, from the point of view of those who are interested in Catholic education, the landscape began to evolve when two Supreme Court cases lifted the ban against the on-site delivery of services to students who attended religiously affiliated nonpublic schools (*Agostini v. Felton*, 1997; *Zobrest v. Catalina Foothills School District*, 1993). Additional change occurred in 1997 when Congressional reauthorization of the IDEA included provisions further clarifying the obligations of public school systems to provide special education and related services to students in nonpublic schools. Even so, neither Congress nor the courts conclusively answered questions about the delivery of special education for children in religiously affiliated nonpublic schools. Moreover, the statutory and regulatory changes have created something of a dilemma because while, on the one hand, they make it clear that children in religious schools are entitled to receive some special education services, on the other hand, they contain funding restrictions that may actually mean that these children will receive fewer services.

In light of legal issues surrounding the delivery of special education to children who attend Catholic schools, this article is divided into three parts. The first section reviews recent changes in the law and regulations dealing with the delivery of special education to children in nonpublic schools. The second part reviews both pre- and post-amendment litigation on special education in nonpublic, mostly Catholic, schools; this section highlights a case from Louisiana, now on appeal before the Supreme Court, that challenged a state law permitting the on-site delivery of special education in Catholic schools. The Court's resolution of this dispute may go a long way in defining whether, and to what extent, public school systems can continue to offer the on-site delivery of special education for children in Catholic and other nonpublic schools. The third part addresses issues in need of further clarification about the parameters of delivering special education to children. The authors hope that this article will provide interested readers with an improved understanding of case law and the regulations that will help them better provide for the delivery of special education to children who attend Catholic schools.

## 1997 IDEA AMENDMENTS AND 1999 REGULATIONS

The 1997 IDEA Amendments unequivocally declare that students whose parents voluntarily enroll them in nonpublic schools are entitled to some level of participation in special education. However, students in nonpublic schools may not necessarily be entitled to participate to the same level as they would have had they been enrolled in public schools. The statutory provisions detailing the duties of school districts to offer special education to students in nonpublic schools are examined in the following sections.

### STATUTORY PROVISIONS

The 1997 Amendments (IDEA § 1412(a)(10)(A)(i)) indicate that public school districts must make provisions for the participation of students with disabilities whose parents have voluntarily enrolled them in “private schools.” The sum of money that districts spend on special education for children in nonpublic schools must equal a proportionate amount of federal funds made available to them under the IDEA (IDEA § 1412(a)(10)(A)(i)(I)).

Another major change in the 1997 Amendments indicates that special education may be provided to students with disabilities on the premises of “private” schools, including “parochial” or “sectarian” schools (IDEA § 1412(a)(10)(A)(i)(II)), as long as appropriate safeguards are in place to avoid too close a relationship between the government *qua* public school districts and religious institutions.

### REGULATIONS

In implementing the IDEA, the Department of Education released new regulations, *Assistance to States for the Education of Children with Disabilities*, in March 1999. These regulations incorporate the statutory changes and offer additional guidance on carrying out the IDEA’s requirements while borrowing from the pre-existing Education Department General Administrative Regulations (EDGAR). The EDGAR regulations require school systems to provide students in nonpublic schools with opportunities for equitable participation in federal programs (34 C.F.R. § 76.651(a)(1)). More specifically, this means that students in nonpublic schools are entitled to equal opportunities to participate in federal programs that are of comparable quality to those available to children in public schools (34 C.F.R. § 76.654(a)). In developing such programs, public school personnel must consult with representatives of the nonpublic schools to consider which students will be served, how their needs will be identified, what benefits they will receive, how the benefits will be delivered, and how the programs will be evaluated (34 C.F.R. § 76.652(a)(1)-(5)). As might have been anticipated, the original IDEA and

EDGAR regulations have been subject to litigation over the delivery of special education to students in religious schools. To date, the 1999 regulations have yet to be challenged in court.

## **PRIVATE SCHOOL STUDENTS DEFINED**

Public school districts are responsible for locating, identifying, and evaluating all students with disabilities who attend "private schools" within their jurisdictions, including children who attend religiously affiliated schools (34 C.F.R. § 300.451). As such, districts must develop plans to permit these students to participate in programs carried out pursuant to the IDEA (34 C.F.R. § 300.452). The regulation defines students in private schools as those whose parents have voluntarily enrolled them in such schools or facilities. However, the definition does not include students whose districts have placed them in private facilities at public expense in order to provide them with a free appropriate public education (34 C.F.R. § 300.450).

## **SPENDING LIMITS**

Consistent with restrictions in the IDEA, there is a limit on the amount of money that a district must spend in providing services to pupils in nonpublic schools (34 C.F.R. § 300.453). The total is limited to a proportionate amount of the federal funds received based on the number of students in nonpublic schools in relation to the overall number of pupils in the district. At the same time, districts are not prohibited from using state funds to offer more than the IDEA calls for since the regulation only establishes a minimum amount that they must spend on these children.

## **COMPARABLE SERVICES**

Another regulation (34 C.F.R. § 300.454) explains that students with disabilities in nonpublic schools are not entitled to the same level of services that they would have received had they attended public schools. The regulation gives public school officials, after consultation with representatives from nonpublic schools, the authority to decide which students from nonpublic schools will be served, what services they will receive, and how the services will be delivered. The regulation emphasizes that the consultation must give representatives from the nonpublic schools a genuine opportunity to express their views before to any decision-making about the expenditure of funds. Needless to say, a district has the final authority to decide which services will be provided to eligible students in nonpublic schools.

Students in nonpublic schools are entitled to receive services that are of comparable quality to what is offered to their peers in the public schools (34 C.F.R. § 300.455). Moreover, public school personnel who deliver services to students in nonpublic schools must meet the same standards as their coun-

terparts in the public schools. If service providers in nonpublic schools are certificated, they are considered to have met the same standards as public school personnel. This regulation adds that children attending nonpublic schools may receive a different amount of services than their public school counterparts and that nonpublic school students are not entitled to any service or to any amount of a service that they would have received had they been enrolled in public schools.

Insofar as students in nonpublic schools are not entitled to a free appropriate public education unless they attend a public school, the regulations do not require the development of an individualized education program (IEP). Instead, the regulations require a district to develop a services plan describing the services that it will provide to a student (34 C.F.R. § 300.455(b)(1)). However, the services plan must meet the IEP content requirements and must be developed, reviewed, and revised in a manner consistent with the IEP process (34 C.F.R. § 300.455(b)(2)).

## **ON-SITE DELIVERY OF SERVICES**

Consistent with the language of the IDEA, the regulations reiterate that services may be offered on-site at nonpublic schools even if they are religiously affiliated (34 C.F.R. § 300.456(a)). Consequently, in order to differentiate between schools, the regulations use the term “religious school” to reflect the fact that all religious schools are included within the statutory framework.

If services are not offered on-site and students must be transported to alternate locations to receive them, districts must provide transportation (34 C.F.R. § 300.456(b)). At the same time, it is important to note that the cost of transportation may be included in calculating the minimum amount of federal funds that districts must spend on students in nonpublic schools. Further, districts need not transport students between their homes and religious schools as they must only do so between sites during the school day.

## **LIMITS ON FUNDING**

According to the new regulations (34 C.F.R. §§ 300.458-300.462), IDEA funds cannot be used to benefit private religiously affiliated schools in ways that would violate the Establishment Clause. In other words, public funds cannot be used to offer impermissible aid to religious institutions such as financing existing instructional programs, otherwise providing them with direct financial benefits in the form of money, or organizing classes based on students’ religions or schools they attend. Even so, the regulations allow districts to employ public school personnel in nonpublic schools as long as they are not supplanting services that are normally provided by those institutions. The regulations further permit districts to hire personnel from nonpublic schools to provide services outside of their regular hours of work as long as

they are under the supervision and control of officials from the public schools. Finally, equipment purchased with IDEA funds can only be used on-site in nonpublic schools for the benefit of students with disabilities.

## LITIGATION INVOLVING STUDENTS IN NONPUBLIC SCHOOLS

As often as the IDEA has been litigated, it is surprising that so few of the cases deal with the delivery of special education for students whose parents voluntarily enrolled them in nonpublic schools. Moreover, as might have been anticipated, since approximately 85% of students in nonpublic schools attend religiously affiliated schools (National Center for Educational Statistics, 1997), most of the litigation has centered on questions involving the Establishment Clause. Even though the recent statutory changes address many of the issues that were already litigated, a brief review of the pre-amendment cases will set the stage for disputes directly involving the 1997 IDEA Amendments.

### PRE-AMENDMENT LITIGATION

A major controversy that the 1997 IDEA Amendments seems to have resolved is whether districts must provide special education on-site at a student's nonpublic school. In *Goodall v. Stafford County School Board* (1991) the Fourth Circuit held that a district in Virginia met its obligation under the IDEA by offering such services at a local public school rather than the Christian school that the student attended. Following *Zobrest* (1993), wherein the Supreme Court permitted a student in a Catholic high school in Arizona to receive the on-site delivery of the services of a sign language interpreter, the Fourth Circuit affirmed its earlier judgment (*Goodall v. Stafford County School Board*, 1995).

Four other courts agreed with *Goodall* (*Cefalu v. East Baton Rouge*, 1997; *Foley v. Special School District of St. Louis County* 1996; *K.R. v. Anderson Community School Corporation*, 1996; *Tribble v. Montgomery*, 1992). These courts generally ruled that districts met their obligations under the IDEA when the necessary services were made available at public schools. Yet, not all courts agreed as others interpreted the regulations as requiring districts to provide students in nonpublic schools with services that were comparable in quality, scope, and opportunity for participation to those offered to their peers in public schools (*Fowler v. Unified School District*, 1997; *Natchez-Adams School District v. Searing*, 1996; *Peter v. Wedl*, 1998; *Russman v. Sobol*, 1996). Insofar as three of these cases, *K.R. v. Anderson Community School Corporation*, *Russman v. Sobol*, and *Fowler v. Unified School District*, were appealed to the Supreme Court, they are discussed below.

Where districts do not provide services on-site, the question arose as to whether they had to offer transportation to students between nonpublic schools and the locations where they received services. Even though a regulation (34 C.F.R. § 300.456(b)) specifically addresses this question by declaring that transportation must be provided if students need it to benefit from or participate in the special education programs, litigation ensued.

In *Felter v. Cape Girardeau School District* (1993), a federal trial court in Missouri reasoned that the district had to provide transportation for a student with visual and mobility impairments from the sidewalk in front of her religiously affiliated nonpublic school to the public school where she attended special education classes; the court identified the child's school as St. Mary's Cathedral School but did not identify its denominational affiliation. Conversely, in *Donald B. v. Board of School Commissioners of Mobile County* (1997), a judgment that was issued shortly after the passage of the 1997 IDEA Amendments, but which involved a situation that occurred before its enactment, the Eleventh Circuit found that a district in Alabama was not required to transport a student who attended an Episcopalian school to a public school for speech therapy. Although acknowledging that transportation was a related service, the court concluded that it was unnecessary since the student could walk safely from one school site to the other. These cases can be reconciled because in *Donald B.* the student was able to access services without transportation while in *Felter* the child's disabilities prevented her from taking advantage of the services without transportation between sites.

## POST-AMENDMENT LITIGATION

As appeals in *K.R. v. Anderson Community School Corporation*, *Russman v. Sobol*, and *Fowler v. Unified School District* were pending before the Supreme Court, Congress passed the 1997 IDEA Amendments. Subsequently, the Court vacated and remanded these cases for reconsideration in light of the Amendments. On remand, the courts had to determine what the districts had to do both before and after the 1997 IDEA Amendments went into effect because even though the suits arose before the changes were passed, the students continued to need special education.

In *K.R. v. Anderson Community School Corporation* (1996), the Seventh Circuit originally denied the request of a student from Indiana for an instructional aide on-site in her Catholic school. On remand in *K.R. v. Anderson Community School Corporation* (1997), the Seventh Circuit affirmed that the 1997 IDEA Amendments did not require states and districts to spend their money to ensure that students with disabilities who attend nonpublic schools would receive publicly funded special education comparable with what is offered to children in public schools. Similarly, a federal trial court in Wisconsin, citing *Anderson*, asserted that a hearing-impaired student whose parents enrolled him in a Christian school was not entitled to the services of



a sign language interpreter (*Nieuwenhuis v. Delavan-Darien School District Board of Education*, 1998). In positing that the 1997 IDEA Amendments confirmed that an interpreter did not have to be provided on-site in the religious school, the court wrote that the district complied with the Act by offering a free appropriate public education at a public school. The court was of the view that when the parents rejected the public school placement which offered an appropriate education, they elected a lesser entitlement for their son.

In a case that was resolved before the enactment of the IDEA Amendments, the Tenth Circuit, in *Fowler v. Unified School District* (1997a), indicated that a district was not required to provide a sign language interpreter on-site at a private nonsectarian school if doing so cost more than delivering a similar service at a public school. On remand, the Tenth Circuit (*Fowler v. Unified School District*, 1997c) wrote that since the 1997 IDEA Amendments were not applicable retroactively, its original holding stood with respect to events that took place before the Amendments went into effect on June 4, 1997. Conversely, as to actions after June 4, 1997, the court explained that the district's sole obligation was to spend a proportionate amount of federal funds on students in nonpublic schools. The court remarked that the Amendments pointed out that states and districts were not obligated to spend their own funds to provide special education for children whose parents voluntarily enrolled them in nonpublic schools. The court added that districts were not required to pay the educational costs of such students who were offered a free appropriate public education. Rather, the court was satisfied that districts merely had to make a proportionate amount of federal funds available to pay for the education of children who attended nonpublic schools.

In *Russman v. Sobol* (1996), the Second Circuit initially declared that if delivering special education services at a Roman Catholic school entailed significant additional costs, a district in New York complied with the IDEA by offering them at a local public school. On remand under the name of *Russman v. Mills* (1997), the court agreed that the 1997 IDEA Amendments did not require school districts to spend their own funds on students with disabilities whose parents voluntarily enrolled in nonpublic schools. Instead, the court believed that districts were only required to offer services that can be paid for with a proportionate amount of the federal IDEA funds. Further, the court acknowledged that the IDEA does not obligate districts to deliver on-site services to students with disabilities whose parents voluntarily enrolled them in nonpublic schools since the language of the Act is permissive rather than mandatory.

In *Cefalu v. East Baton Rouge Parish School Board* (1997a), the Fifth Circuit initially was of the opinion that a hearing-impaired student in a Catholic school in Louisiana was entitled to the on-site delivery of the assis-

tance of a speech language interpreter if he could demonstrate that he had a genuine need for such aid. However, after withdrawing its original opinion in light of the passage of the 1997 IDEA Amendments (*Cefalu v. East Baton Rouge Parish School Board*, 1997b), the court reversed itself and held that the board was not required to furnish the student with an interpreter since he rejected its offer of a free appropriate public education at public school.

Shortly after the 1997 IDEA Amendments went into effect, the Eighth Circuit upheld its pre-amendment decision in *Foley v. Special School District of St. Louis County* (1998) but relied on the revised version of the law since a child and her parents sought prospective relief. The trial court originally held that the student in Missouri was not entitled to on-site delivery of special education services in her Catholic school because the district met its obligation by offering them at a public school. In affirming, the Eighth Circuit stated that under the amended statute, the student did not have an individual right to receive special education at a particular location.

In a second case from the Eighth Circuit, *Peter v. Wedl* (1998), the court ruled that a child in a Christian school in Minnesota did not have a right to the on-site delivery of services by a full-time paraprofessional. However, since the district had a long-standing policy and practice of providing services to students with disabilities at nonreligious, nonpublic, and home schools, the court decreed that the denial of similar services to a student in a religious school amounted to religious discrimination. The court also reasoned that under *Agostini*, the district lacked a valid argument that it risked violating the Establishment Clause by delivering special education at the religious school. On remand under the name *Westendorp v. Independent School District No. 273* (1998), a federal trial court acknowledged that since the district violated the pre-amendment version of the IDEA by refusing to provide the child with the services he needed unless he attended a public school, he was entitled to prospective relief. In other words, the court concluded that since the district violated the child's rights under the IDEA, it was required to provide him with the services of a full-time paraprofessional for the next six years regardless of where he attends school.

Finally, a suit from Louisiana, based in part on state law, has the potential to have a significant impact on the delivery of special education and other federally funded programs in Catholic schools. In the part of the case most relevant to special education, the Fifth Circuit, in *Helms v. Picard* (1998) reversed a trial court ruling, *Helms v. Cody* (1994), and upheld a state law that permitted the on-site delivery of special education services to children who attended Catholic schools. Insofar as there have been no changes in the membership of the Supreme Court since it reached its decision in *Agostini* (Osborne & Russo, 1997; Russo & Osborne, 1997), it is likely that the Louisiana statute will survive judicial scrutiny. In another part of the case with the potential to affect the delivery of special education in Catholic

schools, the Fifth Circuit struck down Chapter 2, now Title VI, of Title I of the Elementary and Secondary Education Act (1998), a far-reaching federal statute which permits the loan of state-owned instructional materials such as computers, slide projectors, television sets, tape recorders, maps, and globes to nonpublic schools. The court decided that the law was unconstitutional because it had the impermissible effect of providing direct and substantial assistance to religiously affiliated schools. In agreeing to hear an appeal in the case, now *Mitchell v. Helms* (1999), the Supreme Court is likely to resolve these questions of vital importance to Catholic schools.

## **ISSUES IN NEED OF FURTHER CLARIFICATION**

As significant as the litigation surrounding the IDEA has been, there are at least four important issues in need of further clarification about the delivery of special education for children in Catholic schools: whether services must be provided to all students whose parents voluntarily enroll them in religious schools; whether public school officials have discretion over where and how services are delivered; whether districts must offer services to children whose parents voluntarily enroll them in religious schools; and whether there are specific safeguards that public school administrators must put in place pursuant to the delivery of special education services to children in religious schools. The final section of this article reviews these important issues.

## **CHILDREN VOLUNTARILY ENROLLED IN NONPUBLIC SCHOOLS**

The IDEA does not direct districts to serve all children in nonpublic schools. Rather, the IDEA requires districts to spend a proportionate share of their federal funds on students who are enrolled in nonpublic schools. As long as districts spend the minimum amount of federal funds on these pupils, they will have met their obligations under the IDEA, even if all eligible children are not served. Accordingly, it is conceivable that districts could serve some but not all of these students. For example, districts could choose to serve only students with mild to moderate disabilities in the more common categories but not those with low-incidence disabilities. Thus, districts can spend all of their proportionate share of federal funds on a select group of children in nonpublic schools and none on the rest of the students. Alternatively, districts may provide services to all students with disabilities who attend nonpublic schools but each would receive only a proportionate share of services. In the latter case, the share of services that children in nonpublic schools would receive is likely to be much less than that of similarly situated students in public schools. However, it should be noted that the IDEA does require districts to locate and identify students with disabilities who are attending

nonpublic schools.

## **DELIVERY OF SERVICES**

The regulations grant public school officials a great deal of latitude over where and how special education services are offered to children in nonpublic schools. Although the 1997 IDEA Amendments incorporated *Agostini v. Felton's* holding that allows public school districts to provide the on-site delivery of certain federally funded services at religiously affiliated nonpublic schools, the Act does not mandate such delivery. The latitude that educators have over the delivery of services presumably includes the location where they are offered. Even so, as noted, before acting, public school officials must consult with representatives from the nonpublic schools and give them the opportunity to express their views.

Case law supports the notion that school systems satisfy the IDEA once they offer students with disabilities a free appropriate public education. Consequently, if parents reject the services offered at public schools, districts are under no obligation to deliver them in nonpublic schools. The fact that an individual right to services does not exist is found in the regulation (34 C.F.R. § 300.457(a)) that the due process provisions of the IDEA are unavailable to students in nonpublic schools. The Tenth Circuit's analysis in *Fowler* asserted that all districts simply had to make a proportionate share of federal funds available to students in nonpublic schools.

In choosing where and how special education services are provided to pupils in nonpublic schools, administrators must make sure that they do not discriminate against a particular class of nonpublic school students. In other words, as in *Peter v. Wedl*, educators cannot refuse to provide on-site services to children in religious schools while offering them to peers in nonsectarian institutions.

Where a school system does not offer the on-site delivery of services, and children from nonpublic schools must travel to other locations, districts may be required to provide transportation. Insofar as transportation is a related service under the IDEA, districts must provide it where it is necessary for students to benefit from special education (IDEA § 1401(22)). As such, districts may have to provide transportation between sites when students need it in order to access related services. Courts have held that transportation is necessary if students' disabilities require it but can be dispensed with if students can safely access services without being transported.

## **NATURE OF THE SERVICES AVAILABLE TO CHILDREN IN NONPUBLIC SCHOOLS**

The IDEA and its regulations make it clear that students who attend nonpublic schools do not have the right to the same level of services that they would

have received had they been in public schools. In fact, consistent with both *Anderson* and *Cefalu*, since individual students do not even have the right to receive any services at all, districts are under no obligation to provide any particular level of services.

Districts that offer services to students in nonpublic schools need not spend more on them than on children in public schools for similar services. In fact, students in nonpublic schools can receive lesser services than similarly situated peers in public schools if the cost of delivery to the former is greater than the cost of delivering the same to the latter. The regulations support this interpretation in stating that individual students in nonpublic schools do not have the right to the same level of services that they would have received in public schools. At the same time, both the IDEA and the regulations declare that districts may pay for services for pupils in nonpublic schools only up to an amount equal to the federal funds that they would have spent on them if they were enrolled in public schools. As such, if districts offer services to students with disabilities in nonpublic schools, they may provide only a level of services to each student that can be paid for with the proportionate share of federal funds. The net result is that in such a situation, each student would be likely to receive a bare minimum of services.

The regulations dictate that districts providing services to individual students must employ personnel who meet the same certification standards as their counterparts in the public schools. The regulations add that students in nonpublic schools do not have the rights to receive the same amount of services as their peers in the public schools. Consequently it seems that districts may limit the kind and extent of the services they offer, but once provided, services must be of comparable quality.

## **SAFEGUARDS IN DELIVERING SPECIAL EDUCATION SERVICES IN RELIGIOUSLY AFFILIATED SCHOOLS**

The Supreme Court's 1985 decision in *Aguilar v. Felton* declared that the New York City Board of Education (NYCBOE) violated the Establishment Clause by allowing teachers and counselors paid with Title I funds to enter religiously affiliated nonpublic schools, mostly Roman Catholic schools and Hebrew Day Academies, to provide services to students. The Court struck the practice down even though the NYCBOE had controls in place to avoid excessive entanglement between educators in the public and nonpublic schools. Twelve years later, the Court took the extraordinary step of expressly repudiating *Aguilar* in *Agostini v. Felton* (1997).

In *Agostini* the Court found that the NYCBOE (and, by extension, other districts) could, if they wished, but were not required to, provide Title I (1997) services on-site in religious schools. Based in large part on the fact that the NYCBOE spent over \$100 million on computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those

locations since 1986 (*Agostini*, 1997), the Court agreed that since appropriate procedures were in place, the funds would have been better spent educating students.

The guidelines adopted by the NYCBOE in *Agostini* are relevant to special educators for two important reasons. First, since both the IDEA and Title I are federal laws, they are likely to be interpreted in similar fashions. Second, the last of the 25 questions in a memorandum issued by Secretary of Education Richard W. Riley and the Department of Education (1997) shortly after *Agostini* was resolved indicates that it applies to federal programs other than Title I. According to the Department of Education:

Question 25: Does the Supreme Court's decision in *Agostini* apply to other Federal education programs?

Answer: The Supreme Court's decision dealt directly with the issue of the constitutionality of providing instructional services under Title I, Part A programs in private schools. However, the implication of the Court's ruling is that there is no constitutional bar to public school employees providing educational services in private schools under other Federal programs under similar circumstances.

To the extent that many, but not all, of the safeguards that the NYCBOE used are incorporated in the memorandum from the Department of Education, they should be instructive in developing programs providing the on-site delivery of special education to students who attend religiously affiliated nonpublic schools.

The NYCBOE instituted safeguards for its personnel who worked in religious schools under Title I. First, only staff who volunteered to do so were eligible to serve as Title I personnel in religious schools. Second, assignments were made without regard to the religious affiliations of the public employees, most of whom worked in schools not of their own faiths. Third, Title I staff were supervised by field personnel from the NYCBOE who made frequent unannounced visits on at least a monthly basis. Fourth, all religious symbols were removed from the classrooms and offices used in Title I programs. Fifth, as itinerants, most Title I staff ordinarily did not spend a full week in one location. Sixth, the Title I personnel were told to limit their discussions with classroom teachers and other staff in the religious schools to matters on mutual concerns over the education of the Title I students.

Consistent with the tripartite test enunciated by the Supreme Court in *Lemon v. Kurtzman* (1971), the leading case on matters involving the law and public education in religiously affiliated nonpublic schools, Title I personnel were also given detailed instructions highlighting the secular nature and purpose of that law while explaining the importance of avoiding excessive entanglement. First, staff were reminded that, as public school employees, they were responsible only to their own supervisors. Second, public employees

were told that they could instruct only students who were approved by their supervisors. Third, staff were warned not to engage in team teaching or other cooperative instructional methodologies with personnel from the religious schools. Fourth, public employees were forbidden from introducing any religious materials in their classrooms and work areas. Fifth, staff were told to avoid involvement in religious activities at the schools where they worked. Finally, public employees were reminded that all materials and equipment purchased with Title I funds were to be used solely in that program; in light of *Mitchell v. Helms* (1999), it will be interesting to see how the Court interprets Chapter 2, now Title VI, of the Elementary and Secondary Education Act (1999) with regard to the use of such materials.

To the extent that public school systems offer the on-site delivery of special education for students with disabilities who attend religious schools, then the closer their policies conform to the safeguards initiated by the NYCBOE and the memorandum from the Department of Education, the more likely that they will be to survive a legal challenge.

## CONCLUSION

Recent statutory, regulatory, and judicial actions addressing the delivery of special education in religiously affiliated nonpublic schools have left children in Catholic schools with the proverbial half of a loaf of bread. That is, while the law makes it clear that students in Catholic schools are entitled to special education, the funding restrictions may actually limit the amount of services that they receive. Moreover, even though it is unlikely that the Supreme Court will invalidate the Louisiana law in *Mitchell v. Helms* (1999) that permits the on-site delivery of special education in Catholic schools, this case, like so many other areas of the law, bears watching as it has the potential to have a significant impact on American Catholic schools.

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