

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTINA MARIE SANTHOUSE, : CIVIL ACTION
by her mother and next friend, :
LYNNE SANTHOUSE :
 :
 :
 v. :
 :
 BRISTOL TOWNSHIP SCHOOL :
DISTRICT : NO. 97-2502

M E M O R A N D U M

Padova, J.

August 4, 1997

Before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). For reasons that follow, the Motion will be denied.

I. BACKGROUND

The Complaint alleges the following: Plaintiff, Christina Marie Santhouse, is a ten-year-old girl who suffers from Rasmussen's encephalitis, a rare disorder that causes seizures. As a result of brain surgery to correct the disorder in February, 1996, Christina is partially paralyzed on her left side, has lost peripheral vision, and has difficulty comprehending densely printed material (Compl. ¶¶ 1, 6.)

Defendant, Bristol Township School District, is responsible for the provision of educational services within its boundaries, and "is required to provide accommodation for disabled

individuals. To that end, Defendant has a trailer located on the grounds of Plaintiff's present school, the Immaculate Conception School, in which it provides services to disabled individuals." (Compl. ¶ 7.)

Defendant has proposed a number of services to accommodate Plaintiff's disability.¹ Most of them are contained in a service agreement proposed by Defendant. It recommends the following aids, services, or accommodations:

1. Preferential seating which may vary with each activity. Christina needs to be free to move when copying off of the blackboard.
2. Additional time to complete classwork.
3. Tests should be read to Christina.
4. Continuous monitoring of academic progress.
5. Teacher will prompt Christina to attempt cursive letter formation for improving overall speed of written material
6. Modify workbooks and worksheets to limit the visual complexity.
7. Modify items in Christina's workbooks and worksheets so they are organized for her. Items could be numbered, boxed or underlined so that Christina can attend to the areas she needs to.

¹ When assessing the needs of a child with a disability, a school district is required to conduct an evaluation to determine the student's educational needs. The district must review this evaluation and formulate an Individualized Education Plan designed to meet those needs. See 20 U.S.C.A. §§ 1401(a)(20), 1414(a)(5) (West 1990 & Supp. 1997); Honig v. Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 598 (1988). Defendant made an evaluation of Plaintiff's needs and abilities and produced a report recommending several accommodations to her special needs. (Compl. Exs. B., C.)

8. Teacher will reinforce Christina checking her own work.
9. Occupational Therapist to review adaptive equipment for fasteners on clothing.
10. Provide clip boards and other adaptive strategies to stabilize paper instead of using her left arm.
11. Occupational therapist will monitor use and effectiveness of assistive communication device for writing which was loaned to Christina for evaluation purposes by the Bucks County Intermediate Unit #22.
12. Occupational therapist will monitor school environment to accommodate appropriate sitting posture and accessibility.
13. Teacher prompts for one-handed techniques for the right upper extremity and the occupational therapist will provide additional training for compensatory strategies as needed.
14. Occupational therapist will monitor current adaptive equipment and make recommendations for modification within the classroom and school environment as needed.
15. Occupational therapist will provide additional strategies and compensatory techniques for left unilateral visual neglect and monitor effectiveness within the school environment.
16. Teacher prompt [sic] Christina's need to scan, particularly when she is walking in new or crowded areas.
17. Physical therapist will monitor physical adaptations.
18. Physical therapist will review appropriate exercises for Christina with regard to her physical abilities and provide them to the physical education teacher.
19. Medical documentation as a result of routine reevaluations should be shared with school personnel. Re-evaluation of this service agreement must be annual or upon staff/parent

request or when new medical documentation becomes available which demands consideration by the team.

(Compl. Ex. B.) In addition to these accommodations, Defendant agreed to provide the services recommended by a psychologist who examined Plaintiff. They include physical, visual, and occupational therapy and psychological counselling for Plaintiff, consultative services for her classroom teacher, and an variety of physical aids, such as a tape recorder for others to record long printed passages she must comprehend and a computer for scanning densely printed text and reprinting it with extra space between lines. (Compl. Ex. C.) Plaintiff does not dispute the adequacy of the recommendations, but she does dispute the location where Defendant proposes to make the services available: at LaFayette Elementary School, a local public school.

Plaintiff contends that by refusing to make the accommodations at Immaculate Conception School, Defendant is discriminating against her on the basis of her disability in violation of the section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West 1985 and Supp. 1997).² (Compl. ¶ 11.) Plaintiff asks the Court to issue a declaratory judgment that Defendant's conduct violates the Rehabilitation Act, to provide injunctive relief requiring Defendant to make an appropriate

² Plaintiff also alleges that Defendant is discriminating against her on the basis of her religion in violation of the First and Fourteenth Amendments to the Constitution, but she does not seek a declaration with respect to those alleged violations. (Compl. ¶ 11.)

program available to her at Immaculate Conception, and to award costs and fees. (Compl. "Wherefore" cl.)

II. LEGAL STANDARD

The purpose of a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the complaint. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A claim may be dismissed under Rule 12(b)(6) only if the plaintiff could prove no set of facts in support of the claim that would entitle her to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). In considering such a motion, a court must accept all of the facts alleged in the complaint as true and must liberally construe the complaint in the light most favorable to the plaintiff. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). The question is not whether the plaintiff will ultimately prevail, but whether she is entitled to present evidence in support of her claims. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974).

III. DISCUSSION

The section of the Rehabilitation Act Plaintiff alleges Defendant is violating is entitled "Nondiscrimination under Federal grants and programs." It reads in pertinent part:

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

29 U.S.C.A. § 794(a). To state a claim under the Rehabilitation Act, a plaintiff must therefore allege: (1) that she is disabled; (2) that she is otherwise qualified; (3) that she was discriminated against solely because of her disability; and (4) that the program or activity in question receives federal financial assistance. See Toney v. U. S. Healthcare, Inc., 840 F. Supp. 357, 360 (E.D. Pa. 1993), (quoting Strathie v. Dept. of Trans., 716 F.3d 227, 230 (3d Cir. 1983)), aff'd, 37 F.3d 1489 (3d Cir. 1994)).

Defendant concedes that Plaintiff is disabled, that she is otherwise qualified, and that Defendant receives federal funds. It maintains, however, that it is not discriminating against Plaintiff by offering to provide her with the auxiliary services to which she is entitled only at a public school. With respect to the trailer Defendant allegedly operates on the grounds of Immaculate Conception School,³ Defendant points out

³ Defendant states that it does not own or operate the trailer on the grounds of Plaintiff's school. "The trailer is owned and operated by the Bucks County Schools Intermediate Unit

that "nothing in the complaint states or implies that Christina needs or is being denied access to the trailer. The services that the parties agree are needed to enable Christina to access education are plainly classroom-based adaptations and accommodations." (Def.'s Mem. at 2.) The Complaint contains no information as to what occurs in the trailer. Liberally construing the Complaint in the light most favorable to Plaintiff, I cannot find that auxiliary services could not be provided for Plaintiff in or from the trailer. That is a factual question on which no data has been presented.

Defendant next argues that the Rehabilitation Act does not require that a public school district make a private sectarian school accessible to a child with a disability when a free appropriate public education is available in the public schools. (Def.'s Mem. at 3.) It states:

Pivotal to plaintiffs' claim . . . is that the Immaculate Conception school is somehow part of the "program or activities" of the public school system for which the District is responsible and that the District must not only ensure that the curriculum and instruction offered in its public elementary schools is accessible to children with disabilities but that the curriculum and instruction offered in private schools is accessible as well. Thus, under plaintiffs' apparent legal theory, if a child were wheel-chair bound and desired to forego an available public

No. 22, a regional public school entity that provides state-mandated services in trailers to some private-school students." (Def.'s Mem. at 2 n.2.) For purposes of this Motion, the Court must accept as true Plaintiff's allegation that Defendant operates the trailer; however, in her response to Defendant's Motion, Plaintiff seeks leave to add Bucks County Intermediate Unit No. 22 as a Defendant. (Pl.'s Resp. at 3.)

school education in favor of a private school, his or her public school district would have to retrofit the private premises of the private school with ramps, lifts, elevators, and other devices as would be required to render the curriculum and instruction of the private school accessible.

(Def.'s Mem. at 4.) My reading of the Complaint in the light most favorable to Plaintiff does not support such a concern. While Plaintiff does ask that Defendant be required to provide the auxiliary services "at The Immaculate Conception School," I do not take that to mean that Defendant should make physical modifications to the school itself, only that it should provide services in the trailer on the school grounds. The Complaint alleges that disabled children receive some services from Defendant in the trailer, and it is not evident from the Complaint that Plaintiff cannot receive the services she needs there.⁴

Defendant cites regulations implementing the Rehabilitation Act to the effect that, if the recipient of federal funding has made available a free, appropriate education, it is not required to pay for the person's education in a private school.⁵ Id. I do not read the Complaint to request that

⁴ Even if some of the services are "classroom-based," it may be that they could be monitored and supervised adequately from the trailer.

⁵ The relevant regulation, 34 C.F.R. § 104.33(c)(4), provides:

Placement of handicapped persons by parents. If a recipient has made available, in conformance with the requirements of this section and § 104.34, a free

Defendant be required to pay for Plaintiff's entire education in private school, only that Defendant be required to provide the needed auxiliary services on the school grounds at its expense.

Under Pennsylvania law, auxiliary services are defined as

guidance, counseling and testing services; psychological services; visual services . . . ; 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. Stat. Ann. § 9-972.1(b) (West 1992). Pennsylvania law specifies that such auxiliary services be provided to all students, regardless of the school they attend.

Students attending nonpublic schools shall be furnished a program of auxiliary services which are provided to public school students in the school district in which their nonpublic schools located. The program of auxiliary services shall be provided by the intermediate unit in which the nonpublic school is located, in accordance with standards of the Secretary of Education. Such services shall be provided directly to the nonpublic school students by the intermediate unit except that such services shall not be provided in a church or in any facility under the control of a sectarian school.

appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school.

24 Pa. Stat. Ann. § 9-972.1(c). While this section would appear to prevent provision of the auxiliary services in Immaculate Conception School itself, it does not rule out their provision in a trailer on the school grounds which was under the control of the School District or Intermediate Unit. Defendant acknowledges that the public school system already provides some services for disabled students in a trailer at Immaculate Conception School.

Finally, Defendant argues that the provision of services of the sort described in its plan for Plaintiff on the site of a private sectarian school would violate the Establishment Clause of the Constitution.

The District has offered an exhaustive array of adaptations and accommodations ranging from rearrangement of the physical environment to adaptation of curriculum materials to provision and maintenance of equipment and assistive devices to direct and consultive services by occupational and physical therapists. Were these public school services provided in a sectarian school environment, a plainly excessive entanglement of sectarian and secular educational authorities and a direct public support of religious instruction would result.

(Def.'s Mem. at 10.) While a considerable array of services is contemplated, I cannot, on the basis of the allegations in the Complaint, say that the provision of auxiliary services on the school grounds would result in excessive entanglement or direct public support of religious instruction. In addition to requiring more information, such a determination would have to take into account the Supreme Court's recent decision in Agostini v. Felton, No. 96-552, 65 U.S.L.W. 4524, 1997 WL 338583 (U.S.

June 23, 1997), which relaxes the bar on the state provision of educational services on the premises of parochial schools.

Pennsylvania law places the burden of providing auxiliary services to nonpublic schools on the shoulders of the intermediate units rather than the local school districts. The intermediate units may then contract with the local school districts to provide the services. 24 Pa. Stat. Ann. § 9-964 (West 1992). It is not clear how much authority can thereby be delegated or how much could be delegated in this case. The correspondence attached to the Complaint from Defendant's Counsel to Plaintiff's counsel lists "[t]he [auxiliary] services that the Bristol Township School District is offering" at LaFayette School and states that "[t]he District is not in a position to make any accommodations to Christina's program at Immaculate Conception School." (Compl. Ex. A.) It may be that the Intermediate Unit could contract with the District for the District to make the accommodations at Immaculate Conception School. Plaintiff brought this action against the School District only, but she now wishes to amend her Complaint to include Bucks County Intermediate Unit #22 as a Defendant. I will grant her request and deny the Motion to Dismiss.

An appropriate Order follows.

