COMMONWEALTH OF PENNSYLVANIA

STATE CHARTER SCHOOL APPEAL BOARD

In Re: Montessori Regional Charter School	:	
	:	
Appeal from Denial of Regional Charter by the City of Erie School District and the Millcreek Township School District	:	**Docket No. CAB 2002-5**

OPINION AND ORDER

I. BACKGROUND

This matter is before the State Charter School Appeal Board ("CAB") on a Petition for Reconsideration ("Petition") filed by the Montessori Regional Charter School ("Montessori"). By Order dated August 21, 2003, CAB affirmed the decision of the City of Erie School District and the Millcreek Township School District (the "Districts") to deny a charter to Montessori. On September 4, 2003, Montessori filed the Petition with CAB seeking reconsideration of CAB's August 21, 2003 Order. At CAB's September 15, 2003 meeting, it voted to grant Montessori's Petition. The parties filed briefs and presented oral arguments on the Petition at CAB's October 29, 2003 meeting.

II. DISCUSSION

In its August 21, 2003 decision, CAB concluded that Montessori had failed to provide an adequate facility and an adequate financial plan for the charter school. The basis of these findings was that the facility in which Montessori planned to locate its charter school failed to comply with the Americans with Disabilities Act ("ADA"). In addition, CAB found that Montessori failed to provide adequate financing to bring the facility into compliance with the

ADA. Based on these findings, CAB originally affirmed the Districts' denial of a charter to Montessori.

In its Petition, Montessori argues that the facility in which it proposes to locate the charter school constitutes an "existing facility" under the ADA and its regulations. If Montessori's position were correct, it would not have to comply with the ADA but would have to evidence that its program was accessible.

Section 35.150 of the ADA regulations pertains to existing facilities and provides, in relevant part:

> (a) General. A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not –
>
> (1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities . . .

28 C.F.R. §35.150.

Subsection (b) of Section 35.150 provides a variety of methods by which a public entity may comply with the requirements of the section. Specifically subsection (b) provides that "[a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." 28 C.F.R. §35.150(b)(1).

In support of its position, Montessori directs us to the Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services. The Preamble provides a section-by-section analysis of the regulations promulgated by the Department of Justice. Under Section 35.150 in the Preamble, the Department of Justice states that "this regulation adopts the program accessibility concept found in the section 504 regulations for federally conducted programs or activities . . . [and] the concept of program access will continue to apply with respect to facilities now in existence, because the cost of

retrofitting existing facilities is often prohibitive." *See,* Petition for Reconsideration*,* Exhibit B, pgs. 21-22. The Department of Justice further discusses existing facilities leased by a public entity under Section 35.151 of the Preamble.

> Existing buildings leased by the public entity after the effective date of this part are not required by the regulation to meet accessibility standards simply by virtue of being leased. They are subject, however, to the program accessibility standard for existing facilities in §35.150. To the extent the buildings are newly constructed or altered, they must also meet the new construction and alteration requirements of §35.151 . . . . Federal practice under Section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Section 204(b) of the Act [ADA] states that, in the area of "program accessibility, existing facilities," the title II regulations must be consistent with section 504 regulations.

See, Petition for Reconsideration, Exhibit B, pgs. 25-26.

Based on the above, CAB agrees with Montessori's position that the facility to be used to house the charter school constitutes an existing facility under the ADA.

However, the Districts state in their brief that the Department of Justice's interpretation of the ADA should not be accorded controlling weight where it is arbitrary, capricious or manifestly contrary to the ADA statute. *See, Yeskey v. Commonwealth of Pennsylvania, Dept. of Corrections,* 118 F.3d 168, 171 (3rd Cir. 1997). The Districts argue that it was neither unreasonable nor arbitrary for CAB to have originally determined that the facility did not constitute an existing facility under the ADA. However, the question is not whether CAB's original determination was unreasonable or arbitrary but whether the Department of Justice's interpretation of the statute is arbitrary, capricious or manifestly contrary to the statute.

To refute the Districts' implicit argument that the Justice Department's interpretation is arbitrary, capricious or manifestly contrary to the statute, Montessori cites to *Helen L. v. DiDario*, 46 F.3d 325 (3rd Cir. 1995). In *DiDario*, the Court notes that Congress stated that "the first purpose of Title II of the ADA (applicable to public entities) is to make applicable the

prohibition against discrimination on the basis of disability currently set out in regulations implementing Section 504 of the Rehabilitation Act of 1973 to state and local governments. *Id.* at 332, *citing* S. Rep. No. 116, 101st Cong., 1st Sess. 44 (1989).

Furthermore,

> Title II of the ADA, 42 U.S.C. §12131-12134, incorporates the "non-discrimination principles" of section 504 of the Rehabilitation Act and extends them to state and local governments." . . . The Act directs the Attorney General to promulgate regulations necessary to implement Title II . . . . Because Title II was enacted with broad language and directed the Department of Justice to promulgate regulations as set forth above, the regulations which the Department promulgated are entitled to substantial deference . . . . Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . . Unless the regulations are "arbitrary, capricious or manifestly contrary to the statute", the agency's regulations are "given controlling weight".

DiDario, at 331-332.

The regulations the Department of Justice promulgated under the ADA, together with the Department's analysis of Part 35 in the Preamble, are entitled to substantial deference. Since the regulations and the analysis of Part 35 adopt the program accessibility concept found in section 504 regulations, CAB finds that the Department of Justice's construction of the statutory scheme of the ADA is not arbitrary, capricious or manifestly contrary to the statute.

Based on the above, CAB finds that the facility proposed by Montessori for the location of its charter school constitutes an existing facility. Therefore, Montessori is subject to the program accessibility standard for existing facilities under Section 35.150.

The Districts next argue that even if the facility constitutes an "existing facility," Montessori failed to evidence that its program is accessible. The Districts base their position on a letter from Montessori's architect who opined that certain repairs or renovations were necessary to bring the building into compliance with the ADA. In his letter, the architect states

that as an "existing building" and an "existing use," Montessori would only need to bring up to standard those items that are "readily achievable." *See,* Certified Record, Vol. II, Exhibit 19.

However, the "readily achievable" standard is the standard under title III of the ADA and applies to public accommodations and services operated by private entities. 42 U.S.C. §12181 *et seq.* Montessori is not a private entity because under the Charter School Law a charter school is a public school and must be organized as a public, non-profit corporation. 24 P.S. §17-1703-A.[1] Therefore, it is CAB's position that Montessori's architect was incorrect when he opined that Montessori would have to meet the "readily achievable" standard.

Although the architect identified certain repairs and renovations that were required to bring the facility into compliance with the ADA, there was no testimony or evidence that the stated repairs and renovations were necessary to make Montessori's program accessible, which is the standard Montessori must meet.[2] In fact, Michael Wehrer testified that individuals in wheelchairs have previously been enrolled in the school program currently housed in the facility and these students were accommodated without an elevator and that there is an existing ramp and restroom facilities for the first floor. He testified that classrooms on the first floor are accessible and, if necessary, Montessori could change the classrooms from the second floor to the first floor to accommodate a student with special needs. *See,* Certified Record, Vol. 1, Exhibit C, Transcript 12/11/00, pgs. 50-51. Such an accommodation constitutes an acceptable method by

[1] Under Title III of the ADA, a public accommodation is defined as "[t]he following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce . . . ." 42 U.S.C. §12181(7). The list of private entities includes "a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education." 42 U.S.C. §12181(7)(J). Cases cited under this section reference places of education such as private elementary and secondary schools and private law schools. In contrast, Title II of the ADA defines a public entity as including any State or local government or any department, agency, special purpose district, or other instrumentality of a State or States or local government. 42 U.S.C. §12131(1)(A), (B). Cases cited under Title II of the ADA include public school districts. Therefore, it is the opinion of CAB that since a charter school is a public school, it falls within the definition of a public entity under Title II.

[2] If, however, Montessori makes alterations to the existing building, it must meet the accessibility requirements of 28 C.F.R. §35.151. *See,* Petition for Reconsideration, Exhibit B, pg. 25.

which Montessori would make its services, programs, or activities readily accessible to and usable by individuals with disabilities. 28 C.F.R. §35.150(b).

Based on the above, CAB finds that Montessori's program is accessible.

Upon reconsideration of the ADA issue, CAB finds that program accessibility is the standard Montessori must meet. CAB further finds that Montessori's program is accessible, and therefore, CAB grants Montessori's appeal and directs the Districts to grant Montessori a charter.

ORDER

AND NOW, this 16th day of January, 2004, based upon the foregoing and the vote of the Board[3], the appeal of the Montessori Regional Charter School is **GRANTED**, and the City of Erie School District and the Millcreek Township School District are directed to grant the application and sign a charter for Montessori Regional Charter School pursuant to 24 P.S. § 17-1720-A.

For the State Charter School Appeal Board,

/s/
Vicki L. Phillips
Chairperson

[3] At the Board's December 2, 2003 meeting, the Board voted to grant the appeal by a vote of 5-0, with members Bunn, Giorno, Phillips, Reeves and Shipula voting to grant. Melnick and Salinger were not in attendance.