ADDRESSING ABSENTEEISM IN VERMONT SCHOOLS

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EXECUTIVE SUMMARY

GOALS OF THE PROJECT

Schools have an obligation to their students to provide everyone access to education. This involves making accommodations for students with extenuating circumstances including but not limited to students with disabilities, trauma histories, and poverty-driven complex lives. Among the problems that some of these students face is chronic absenteeism and how the school contends with it. Vermont laws and regulations provide for a court-driven approach to combatting absenteeism, which ultimately results in students and their families being brought into court if the matter cannot be resolved at school. The attendance and truancy policies of each school and school district vary across the state, and are also being applied inconsistently to individual students within that school or school district. It is the belief of Vermont Legal Aid and several individuals interviewed within this report that truancy tends to be a symptom of a much larger and more serious problem at home, and court proceedings can sometimes, if not often, exacerbate this problem.

The purpose of this report is to explore legal and policy strategies aimed toward eliminating the use of truancy courts in Vermont for students and parents with disabilities, trauma histories, and/or poverty-driven complex personal lives. Though there must be some enforcement mechanism for laws put forth by state legislatures, and court is the most obvious and authoritative enforcement mechanism, in the case of children and their families, court should be a last resort. There must be more communication between the Vermont Agency of Education, schools, and students and their families to create a more benevolent approach to combatting absenteeism without involving the court. This report explores potential problems that Vermont

could face in regards to its obligation to meet both federal and state laws as well as solutions to each of the problems put forth within.

METHODOLOGY

The research for this report involved interviews with individuals with an interest in combatting absenteeism. We interviewed families, lawyers, advocates, individuals working for non-profit organizations, and school administrators with the goal of ascertaining a well-rounded interpretation of the scope of the problem and how it can be improved. We have also researched case law, relevant federal and state statutes, and statutes regarding attendance and truancy from other states using Westlaw® and LexisNexis®. In light of Vermont's laws regarding the confidentiality of juvenile records, we were unable to uncover much case law regarding Vermont's truancy proceedings and were limited to cases that made it to the Vermont Supreme Court.[1] We also visited the websites of each school district and supervisory union to compare and contrast attendance and truancy policies across the state of Vermont. We divided into subcommittees to prepare each of our substantive sections as well as to edit, fact check, and compile the final work product.

FINDINGS

Vermont Attendance and Truancy Statutory Scheme

Vermont's compulsory education law requires all students between the ages of six and sixteen to attend an approved education program.[2] It is the legal responsibility of the person who has control over the child to ensure the student's attendance.[3] Each year, the school board appoints a truancy officer who, if a student who is not excused from school fails to attend, will

[1] VT. STAT. ANN. tit. 33 § 5118(b) (West 2014).
[2] VT. STAT. ANN. tit. 16 § 1121 (West 2014).
[3] *See id.* § 1121.

begin an inquiry into the student's absence.[4] However, there is no statutorily imposed definition of what constitutes an excused absence; this is generally left up to each individual school or district to define.[5] Furthermore, the truancy officer is charged with the duty of notifying those in control of the child, if the child is deemed "absent without cause," however, there is no definition for "absent without cause."[6] If the individual in control of the child fails to get the child to attend school after receiving notice from the truancy officer, the truancy officer can file a petition with the state's attorney who can decide whether to initiate a CHINS(d) proceeding. The CHINS(d) proceeding seeks to determine whether a child is "habitually and without justification truant" from compulsory school attendance.[7]

Individuals with Disabilities Act and Section 504 of the Rehabilitation Act of 1973

Congress enacted the Education of the Handicapped Act (since amended to become the Individuals With Disabilities Act ("IDEA")) in 1975 in response to the documented and pervasive problem of exclusion and marginalization of students with disabilities.[8] Under the IDEA, students with disabilities are entitled to special education and related services designed to meet their unique needs.[9] In addition to providing students with disabilities an enforceable, substantive right to public education, the IDEA lays out a system of procedural protections available to students and their parents.[10] These procedures—for example, disciplinary provisions that govern how schools must deal with behavioral issues of students with disabilities—serve to

[4] *See id.* § 1123.
[5] Armando Vilaseca, *2009 Report on Act 44, Section 46 (Truancy), An Act Relating to Miscellaneous Amendments to Education Law,* VERMONT AGENCY OF EDUCATION 5 (Dec. 15, 2009), (http://www.leg.state.vt.us/reports/2009ExternalReports/251416.pdf); *see* Appendix B(1)(a).
[6] *See id.* § 563(1).
[7] VT. STAT. ANN. tit. 33 § 5102 (3)(d)(West 2010).
[8] Individuals with Disabilities Education Act, 20 U.S.C. § 1400(a)(2) (2010).
[9] *See id.* § 1400(d)(1)(A).
[10] *See id.* § 1415(a) (2005).

limit the unilateral authority schools previously possessed in dealing with this population of students.[11]

Section 504 of the Rehabilitation Act of 1973 ("Section 504") prohibits discrimination on the basis of an individual's disability in federally funded programs and is enforced by the U.S. Department of Education.[12] It provides that "[n]o otherwise qualified individual with a disability in the United States 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."[13] In 2008, Congress amended the Americans with Disabilities Act ("ADA) to further interpret Section 504 by re-defining "disability" in a broader sense.[14] The primary difference between the ADA and Section 504 is that while Section 504 applies only to organizations that receive Federal funding, the ADA applies to a much broader universe; however, in regards to education, both statutes are administered by the Office for Civil Rights and considered essentially identical both in terms of their objectives and the language used.[15]

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[11] Honig v. Doe, 484 U.S. 305, 323 (1988).
[12] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools*, VERMONT DEPARTMENT OF EDUCATION 1 (May 2010), (http://education.vermont.gov/documents/educ_sped_laws_504_guide.pdf); see Appendix C(1)(a).
[13] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 2.
[14] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 1; *see generally,* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (holding that to be substantially limited in a major life activity, an individual must be severely restricted "from doing activities that are of central importance to most people's daily lives," and that the impairment must be "permanent or long term."); *and*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that impairments must be evaluated only after considering medical intervention or other means that the individual uses to mitigate the impact of the impairments).
[15] S. James Rosenfeld, *Section 504 and IDEA: Basic Similarities and Differences*, WRIGHTSLAW (http://www.wrightslaw.com/advoc/articles/504_IDEA_Rosenfeld.html) (last visited Feb. 22, 2015); *see* Appendix C(1)(b).

Both of these federal laws serve an important function when it comes to protecting the rights of students with disabilities, and can be particularly useful when applied in situations where students with disabilities are chronically absent for reasons relating to their disabilities.

School districts are required to find, locate, and evaluate all children within their jurisdiction with disabilities under the IDEA.[16] If schools are not fulfilling this obligation, parents have recourse under the IDEA by requesting a hearing disputing the identification (or lack thereof) of their child's disability. Chronic absenteeism may be a clear sign of a disability. This stage of the process—identifying, locating, and evaluating—provides an early intervention to get a student with a disability on an IEP or 504 plan and could help them avoid the consequences of their absenteeism. Additionally, schools have an affirmative duty to address excessive absenteeism as it occurs for students with disabilities.

Disciplinary provisions and procedural protections of federal special education laws may protect students with disabilities from schools initiating truancy proceedings against them.

Due Process under the Fourteenth Amendment

The 14th Amendment guarantees that the state of Vermont cannot deprive "any person of life, liberty, or property, without due process of law."[17] As Vermont has a compulsory education law for children between the ages of 6 and 16,[18] public education in Vermont is a protected property and liberty interest that cannot be taken from students without adherence to the procedural requirements of the Due Process Clause of the 14th Amendment.[19] If a student is to be removed from the classroom for a truancy proceeding, or referred to the state's attorney for a

[16] Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(3)(A) (2005).
[17] U.S. CONST. amend. XIV, § 1.
[18] VT. STAT. ANN. tit. 16 § 1121 (West 2014).
[19] Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

CHINS(d) proceeding, the adjudication must be preceded by "notice and opportunity for hearing appropriate to the nature of the case" at a time when the "deprivation can still be prevented."[20]

School District and Supervisory Union Attendance and Truancy Policies

Schools and districts within Vermont display a wide variety of attendance policies. These policies can be categorized in terms of the number of absences they allow before students are referred to court, the definition of unexcused absence, and the availability of intervention services. Comparisons between implemented policies and model policies proposed by the state can be made using these categories.

CONCLUSIONS

Vermont's compulsory attendance statutes and the attendance and truancy policies of individual schools and supervisory unions could result in those schools and supervisory unions violating their federal and state statutory obligations towards their students. To remedy this problem, it is the opinion of this report, and of Vermont Legal Aid, that a less court-driven approach to combatting absenteeism would be a more benevolent and effective method. Vermont executives, legislators, and schools should focus on keeping students and families out of court in order to discover the reasons as to why a student may not be able to attend school and to find a solution to ensure that the student comes to school daily and receives the education he or she is entitled to.

RECOMMENDATIONS

Each of the issues explored within this report has the ability to be improved. We have put forth a series of recommendations that legislators, the Agency of Education, and school districts

[20] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950); Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

should work together to implement, as they will help ensure that each child in the state of Vermont will be able to have access to the education they deserve:

- Establish minimum standards for what is an excused and unexcused absence.
- Create a model policy for schools to refer to for guidance when creating their own truancy policies.
- Establish comprehensive and consistent data collection on absences and truancies.
- Establish minimum protocols for schools to implement after a certain number of absences.
- Establish a curriculum that educates teachers and administrators on absenteeism as it arises for students with disabilities, trauma histories, and complex poverty-driven lives.
- Initiate pilot diversion programs to keep students who are unable to attend school out of truancy proceedings.
- Distribute information to parents, guardians, and teachers explaining the rights of students with disabilities and the school's responsibility to these students.

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SOCIAL CONTEXT

Matthew greets each day with a particular routine.[21] Getting dressed can take up to an hour due to his sensory issues; he needs to wear a specific type of pants with an elastic waist and his cotton shirt must fit a certain way.[22] Assuming that Matthew is able to pick out an outfit that he will wear, his mom will then drive him to school. Before Matthew will go inside, she needs to kiss him once on the head and once on the heart to assure him that she's always with him.[23] Once he is at school, he must overcome his acute anxiety while navigating the busy hallways and crowded classrooms. Even things like hanging up his hat and coat at the same time as everyone else can make him feel very overwhelmed and uncomfortable. As a result, Matthew often misses school or is tardy.[24]

Matthew suffers from autism, social anxiety and separation anxiety.[25] Matthew is on an individualized education plan ("IEP") that addresses his disabilities while he is in school, and even grants him late arrivals to school.[26] Despite this accommodation, Matthew's school filed a complaint with the State's Attorney for his violation of the school's attendance policy.[27] He and his mother were informed that they would need to partake in truancy proceedings, which would expose his mother to the grave risk of losing custody of her son.[28]

Kim is like any other parent trying to do what is best for her child. However, the school and subsequent court proceedings have made her feel like she must "defend [her] parenting."[29] For Kim, Matthew's late arrivals and absences should be treated as excused because he has an

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[21] Telephone Interview by Anna Holding with C.Q. (Feb. 4, 2015) (on file with author) (this is a true story in Vermont. The names of the mother and child have been changed to protect their identities).
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *Id*.
[28] *Id*.
[29] *Id.*

identified disability that is at the root of his absences and this accommodation is written into his IEP.[30] For Kim, it seems the school's solution is to use the court system as a scare tactic for Kim to get Matthew to school on time.[31] This situation highlights some of the complex underlying causes of truancy and the inadequacy of relying on the court to provide solutions in such a situation. Is it accurate, or fair, to label Matthew "truant"?

Understanding Students Who Are Unable to Attend School

The vocabulary used in situations where a student is unable to attend school must be carefully deployed. Generally, absenteeism refers to "excusable or inexcusable absences from elementary or secondary [school] (middle/high school),"[32] whereas truancy refers to a progression from absenteeism in which the student's inability to attend school is "unexcused, illegal, surreptitious… non-anxiety based absenteeism" often linked to complex personal, academic, and social factors.[33] The complexity of these terms is frequently not reflected in the way society thinks and talks about students who are unable to attend school. Too often the student is perceived as a "kid just being a brat" rather than confronting the absence as a symptom of larger underlying issues.[34] For example, Matthew's behavior is a result of complex personal barriers rather than willful disobedience, but the remedy given-- court proceedings and the threat of removal from his mother-- reflects a view that his absence is a behavioral problem deserving of punishment rather than a manifestation of his disabilities.

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[30] *Id.*
[31] *Id.*
[32] Christopher A. Kearney, *School Absenteeism and School Refusal Behavior in Youth: A Contemporary Review* 28 CLINICAL PSYCHOL. REV. 451, 452-3 (2007) (*available at* http://ac.els-cdn.com/S027273580700133X/1-s2.0-S027273580700133X-main.pdf?_tid=eea59190-c10b-11e4-9152-00000aab0f02&acdnat=1425321952_4c0476dfc07a1ee2a55bf1d3969c1fbf).
[33] Kearney, *supra* note 32, at 452-3.
[34] Telephone Interview by Jillian Schlotter with Lindy Boudreau, Juvenile Justice Director, Dept. for Children and Families (Jan. 7, 2015).

The Consequences of a Student Being Unable to Attend School

If a student's inability to attend school is not adequately addressed, there can be long-lasting academic and social consequences. Students need school in order to learn an abundance of skills, from reading and writing to socializing with their peers. The most important indicator of a child's success is their attendance in school.[35] Beyond the potential academic consequences, absence from school has been identified as a "key risk factor for suicide attempt, perilous sexual behavior, teenage pregnancy, violence, unintentional injury, driving under the influence of alcohol, and alcohol, marijuana, tobacco, and other substance use."[36]

The use of the court in a truancy proceeding can also unnecessarily introduce the student to what is known as the "school to prison pipeline." The "school to prison pipeline" describes the interconnected policies of the education and criminal justice systems that lead to a student being "pushed out of school and into prison." Students enter the so-called "school to prison pipeline" through a variety of zero tolerance disciplinary procedures, testing protocols, and through judicial mechanisms, such as the use of truancy courts for students with multiple absences.[37] Statistics demonstrate a strong connection between a person's level of education and their probability of incarceration. 69% of all incarcerated adults never finish high school, 33% of all juveniles in incarceration cannot read at a fourth-grade level, and those who do not graduate from high school are 3.5 times more likely to become incarcerated than graduates.[38] Given these statistics, truancy policies that discourage kids from being in school through their punitive or

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[35] Robert Balfanz and Vaughan Byrnes, *The Importance of Being in School: A Report on Absenteeism in the Nation's Public Schools*, JOHNS HOPKINS UNIVERSITY CENTER FOR SOCIAL ORGANIZATION OF SCHOOLS 28 (2012) (a*vailable at* http://new.every1graduates.org/wp-content/uploads/2012/05/FINALChronicAbsenteeismReport_May16.pdf); *see* Appendix A(1).

[36] Kearney, *supra* note 32, at 452-3

[37] Barbara Fedders and Jason Langberg, *School--Based Legal Services as a Tool In Dismantling the School--to-Prison Pipeline and Achieving Educational Equity*, 13 U.MD. L.J. RACE RELIG. GENDER & CLASS 212, 212-3 (2013) (*available at* http://digitalcommons.law.umaryland.edu/rrgc/vol13/iss2/3).

[38] Chauncee Smith, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases Through A Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009, 1018 (2009).

adversarial qualities can significantly increase the likelihood that these students will interact with the criminal justice system in the future.

Furthermore, a stigma can attach to a student who is labeled as "truant" because they are unable to attend school. The word "truant" is often associated with words like "delinquent" that carry a large negative connotation, and can create a self-fulfilling prophecy for a student.[39] The student believes they are "truant", or are prone to misbehavior in some way, and this belief can create a different idea of a student's sense of self.[40] Beyond that, a student being labeled as "truant" may create a self-fulfilling prophecy for the teacher's sense of the student.[41] A teacher may have a misrepresentation of a student's ability or their willingness to learn based on the student being labeled "truant." By using a truancy proceeding to address a student's inability to attend school, the student can become both legally and personally defined by their absence, rather than being seen as a student with very real underlying issues that need to be addressed.

Reasons a Student May Be Unable to Attend School

To reduce the likelihood that a student will be unable to attend school, the personal, socioeconomic, and familial context for the absence must be understood. A student may be unable to attend school for a multitude of complex reasons. For example, a student may be absent for reasons beyond their control such as illness, family illness, issues with housing or transportation, etc. Students may also be absent because of what is known as "school withdrawal" or "school refusal behaviors."[42] School withdrawal describes absences that result

[39] "A self-fulfilling prophecy occurs when an erroneous social belief leads to its own fulfillment. Self-fulfilling prophecies, therefore, may a least sometimes help sustain a social stigma and appear to provide justification for continuing derogate some group." *See* THE SOCIAL PSYCHOLOGY OF STIGMA 376 (Todd F. Heatherton et al. ed., 2003).
[40] THE SOCIAL PSYCHOLOGY OF STIGMA, *supra* note 39, at 376.
[41] Alison E. Smith et al., *Self-Fulfilling Prophecies, Perceptual Biases, and Accuracy at the Individual and Group Levels*, 34 JOURNAL OF EXPERIMENTAL SOC. PSYCHOLOGY 530, 532 (1998) (*available at* http://www.rcgd.isr.umich.edu/garp/articles/eccles98h.pdf).
[42] Kearney, *supra* note 32, at 452-3.

when "parents deliberately keep a child home from school for economic purposes, to conceal maltreatment, to prevent abduction from an estranged spouse, to protect a child from perceived school-based threat, to assist a parent with psychopathology, or for other reasons."[43] School refusal behavior is an "umbrella term" that describes "child-motivated refusal to attend school and/or problems remaining in classes for an entire day."[44] Many of these students suffer from social related factors such as social anxiety, bullying or harassment that creates "an intense dread about school that precipitates pleas for future nonattendance."[45]

The above categories may help us broadly define the reasons students may be unable to attend school, but they do not provide a complete illustration. For example, if a student's family is impoverished the student may face distinct impediments to their ability to attend school such as the need to work during school hours, caregiving responsibilities for younger siblings, and frequent relocation.[4647]

Additionally, a student with a disability may have additional factors that complicate their ability to attend school. Furthermore, attending school may exacerbate the disability and therefore increase school refusal behaviors. For example, the student may suffer from social anxiety, like Matthew, whose anxiety manifests in social situations often accompanied by school settings. Students could be suffering from other diagnosed, or undiagnosed mental disabilities such as anxiety or depression that impedes their ability to feel safe and comfortable in school.[48]

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[43] Kearney, *supra* note 32, at 452-3.
[44] Kearney, *supra* note 32, at 452-3.
[45] Kearney, *supra* note 32, at 452-3.
[46] Martell Teasley, *Absenteeism and Truancy: Risk, Protection, and Best Practice Implications for School Social Workers,* 26 CHILDREN & SCH. 117, 120 (April, 2004) (*available at* http://cs.oxfordjournals.org/content/26/2/117.full.pdf+html).
[47] Telephone Interview by Anna Holding with Marc Wennberg, Director, St. Albans Community Justice Center (Jan. 7, 2015) (on file with author).
[48] Telephone Interview by Anna Holding with C.Q. (Feb. 4, 2015) (on file with author) (this is a real account about a family in Vermont. The names of the mother and child have been changed to protect their identities).

Vermont-Specific Reasons a Student May Be Unable to Attend School

To address the reasons a student may be unable to attend school in Vermont, it is critical to address the unique dynamics students in the state face. Specifically, in the last decade, Vermont has seen a vast increase in illicit drug use, a decline in affordable housing, and an increase in child poverty.[49]

Illicit Drug Use

In the last five years, the use of drugs, specifically opiates and heroin, has risen dramatically[50] to the point where Vermont currently leads the country in illicit drug use.[51] This dramatic increase in drug use and the number of addicted Vermonters has become so apparent that in January of 2014, Vermont Governor Peter Shumlin dedicated his entire State of the State address to the heroin and opiate epidemic.[52] In the address, Governor Shumlin laid out a comprehensive and rehabilitative plan for the State to compete with the overpowering force that is the addictiveness of these two drugs, and did not hesitate to label the epidemic a "medical crisis."[53] The heroin and opiate epidemic in Vermont has increased in the last five years due to a combination of factors.[54] The high availability of addictive opiates, Vermont's rural location, and

[49] Vermont Child Poverty Council, *Findings and Recommendations*, HOUSING AND HOMELESSNESS SUBCOMMITTEE (http://www2.leg.state.vt.us/CommitteeDocs/2014/Vermont%20Child%20Poverty%20Council/Subcommittee%20Reports/W~Housing%20and%20Homelessness%20Subcommittee~Housing%20and%20Homelessness%20Subcommittee%20Findings%20and%20Recommendations~12-16-2014.pdf) (last visited Mar. 8, 2015); *see* Appendix A(4)(a).
[50] Sam Hemingway, *Prescription Drug Abuse in Vermont 'A Problem of Epidemic Proportions'* BURLINGTON FREE PRESS 7 (Jan. 23, 2011) (http://www.burlingtonfreepress.com/article/20110724/NEWS02/107240308/Prescription-drug-abuse-Vermont-problem-epidemic-proportions-); see Appendix A(2)(a).
[51] Andy Bromage, *Powder Trail: Tracing Vermont's Heroin Epidemic to Its Sources,* SEVEN DAYS (May 15, 2013) (http://www.sevendaysvt.com/vermont/powder-trail-tracing-vermonts-heroin-epidemic-to-its-sources/Content?oid=2243560); *see* Appendix A(2)(b).
[52] Governor Peter Shumlin, State of the State Address (January 8, 2014) (*available at* http://governor.vermont.gov/newsroom-state-of-state-speech-2013); *see* Appendix A(2)(c).
[53] Shumlin, *supra* note 52.
[54] Shumlin, *supra* note 52.

the higher price willing to be paid for drugs in the state, have resulted in a heroin market worth $2 million a year.[55]

The proliferation of drug use in Vermont can contribute to the reasons why a student may be unable to attend school. A student struggling to overcome substance abuse problems may find it difficult to attend school consistently due to their addiction. Similarly, a student with a family member who is struggling with substance abuse issues may find it difficult to attend school if they are fearful about leaving that family member unattended.[56]

Scarcity of Affordable Housing

Housing is defined as affordable when a household is "paying no more than 30% of its income for rent and utilities or for mortgage, taxes and insurance."[57] Due to a confluence of factors, Vermont is currently the 17th worst state in the United States for acquiring affordable housing.[58] In Vermont, 47% of renters and 38% of homeowners spend more than 30% of their income on housing costs. Acquiring affordable housing presents an acute challenge for families

[55] Shumlin, *supra* note 52.

[56] Rita Rinehart, Guardian ad Litem, and Lindy Boudreau, Juvenile Justice Director at the Department for Children and Families, have both seen this correlation quite frequently. Both are currently working on cases where the child is essentially the parent in the household due to the parents' drug or substance abuse. "He was truant because he was taking care of his younger brother and couldn't do everything all at once… he wanted to go to school but couldn't because of his family situation." Phone Interview by Mark Macchi with Rita Rinehart, Guardian ad Litem, Rutland County (Jan. 30, 2015). Similarly, Lindy Boudreau spoke about an eight-year-old who was afraid of his mother using and overdosing if he was not home to watch over her. Phone Interview by Jillian Schlotter with Lindy Boudreau, Juvenile Justice Director, Department for Children and Families (Jan. 7, 2015). Rita and Lindy both went on to say that they see truancy as a symptom of a bigger picture. "It could be a mother who is too drugged to get the child out to school, or it could be that the mother or father or both are on drugs and couldn't be bothered. It could be that the kid is actually the parent in the family and that the parent isn't doing their job…there's a dozen different reasons…." Phone Interview by Mark Macchi with Rita Rinehart, Guardian ad Litem, Rutland County (Jan. 30, 2015). (Interviews on record with author).

[57] John Fairbanks, *Family Homelessness in Vermont,* VERMONT HOUSING FINANCE AGENCY 3 (Jun. 2008), (http://www.vhfa.org/documents/family_homelessness.pdf); *see* Appendix A(4)(b).

[58] Maura Collins, *Between a Rock and a Hard Place: Housing and Wages in Vermont,* VERMONT HOUSING FINANCE AGENCY 3 (Apr. 2011) (*available at* http://www.vhfa.org/documents/housing-wages-2011.pdf); *see* Appendix A(4)(c).

in Vermont due to shrinking incomes, rising housing prices, high utility costs, "aging housing stock," and "expiring federal subsidies in some Vermont apartments."[59]

According to the Vermont Housing Finance Agency, the scarcity in affordable housing "perpetuates the long and stagnant cycles of homelessness."[60] Recently the state's "homeless shelters have been consistently full," and have resorted to opening "emergency 'overflow' shelters to accommodate the increased demand."[61] A study of Vermont's homeless in November 2010, discovered that 32% of those sleeping in Vermont's shelters were children.[62]

Students and families who are struggling to find affordable housing may experience significant obstacles to their ability to attend school. For example, homeless children experience "fair or poor health twice as often as other children and four times as often as children whose families earn more than $35,000 a year."[63] Homeless children between the ages of six and seventeen "are more than twice as likely as other children to have problems with anxiety, depression and withdrawal." Similarly, homeless children "suffer from emotional or behavioral problems that interfere with learning" at nearly three times the rate of other children.[64] Each of these reasons compounded with the potential need to relocate can make it particularly difficult for children in Vermont to attend school consistently. In our interview with long-time guardian ad liten, Rita Rinehart, we learned about several obstacles that she and the courts face merely in just tracking down parents to initiate the CHINS(d) proceedings. "I've got a kid right now who has been in court three times and his mom hasn't shown because they can't find her. There is a summons out for her, but they haven't been able to get the summons issued yet because she

[59] Collins, *supra* note 58, at 1.
[60] Collins, *supra* note 58, at 5.
[61] Collins, *supra* note 58, at 5.
[62] Collins, *supra* note 58, at 5.
[63] Fairbanks, *supra* note 57, at 7
[64] Fairbanks, *supra* note 57, at 7

keeps on moving. It is probably because she doesn't really have a home, and the kid is suffering all this time because we aren't able to get mom into court."[65]

Children Living in Poverty

According to the United States Census Bureau's 2013 American Community Survey, 11.8% of Vermonters are living in poverty; however, children are disproportionately impacted with 15.3% living in poverty.[66] This number represents a nearly 25% increase in the number of children living in poverty since 2007.[67] The 2013 Federal Poverty Guidelines set the poverty threshold for a family of four at $23,624, but does not take into account additional facets of a family's economic status such as debts or financial assets.[68]

Children in poverty are more likely to experience a large number of negative outcomes in relation to their physical health, cognitive ability, ability to achieve in school, and emotional and behavioral health.[69] Each of these factors may contribute to the reasons why a child is unable to attend school. Moreover, Vermont's rural landscape enhances the challenge of connecting impoverished children with the services they require.[70] Kathy Stergas, guidance counselor at Hunt Middle School in Bennington County, stated how fortunate the school is to be in a more urban area because they are able to provide students accommodations such as money for buses or

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[65] Phone Interview by Mark Macchi with Rita Rinehart, Guardian ad Litem, Rutland County (Jan. 30, 2015).
[66] *Table s1791: Poverty Status in the Past 12 Months:2013 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU, (http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_S1701&prodType=table) (last visited Mar. 8, 2015); *see* Appendix A(4)(d).
[67] *Table B17001: Poverty status in the past 12 months by sex and by age. Three-year data for 2007 – 2012; American Community Survey*, U.S. CENSUS BUREAU, (http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_3YR_B17001&prodType=table) (last visited Mar. 8, 2015); see Appendix A(4)(e).
[68] Office of the Assistant Secretary for Planning and Evaluation, *2014 Poverty Guidelines*, U.S. DEPT. OF HEALTH & HUMAN SERVICES (http://aspe.hhs.gov/poverty/14poverty.cfm#thresholds) (last visited Mar. 8, 2015); see Appendix A(4)(f).
[69] Jeanne Brooks-Gunn and Gregg Duncan, *The Effects of Poverty on Children,* 7 CHILDREN AND POVERTY 55, 57 (Summer/Fall 1997) *(http://www.princeton.edu/futureofchildren/publications/docs/07_02_03.pdf)*; *see* Appendix A(3)(a).
[70] Telephone Interview by Jillian Schlotter with Kathy Stergas, Guidance Counselor, Hunt Middle School (Feb. 12, 2015).

a cab in order to access city transportation to get to school.[71] Children in poverty in Vermont's rural areas do not get the benefit of the concentration of resources, like public transportation, found in urban areas.

The link between poverty and children's development and academic performance has been well documented, beginning as early as their second year of life.[72] Most American students who start school significantly behind their peers never close this gap; in fact, the gap tends to widen as they move through school.[73] The long-term consequence of this 'readiness gap' is an increased risk of truancy, drop out, and unhealthy or delinquent behaviors.[74] Addressing family welfare issues at an early stage may curb later absenteeism; otherwise, the dominant impact of child poverty on school attendance—while still present—eventually gives way to other influences that cause a child to be unable to attend school.[75]

Conclusion

Vermont philosopher and educator John Dewey postulated that "education is not preparation for life – education is life itself."[76] Likewise, the reasons why a student may be unable to attend school are as multi-varied as life itself. A student may be unable to attend school for many reasons, both within and beyond the student's control. To fulfill the state's promise of a public education for all children[77], school administrators, legislators, and judges in Vermont

[71] Telephone Interview by Jillian Schlotter, supra note 70.
[72] Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes,* 1136 ANNALS N.Y. ACAD. SCI. 243, 244 (2008) (*available at* http://onlinelibrary.wiley.com/doi/10.1196/annals.1425.023/abstract).
[73] Engle, *supra* note 72, at 244.
[74] Engle, *supra* note 72, at 244.
[75] Ming Zhang, *Links Between School Absenteeism and Child Poverty*, 21 PASTORAL CARE IN EDUC. 10, 13 (2003) (*available at* http://onlinelibrary.wiley.com/doi/10.1111/1468-0122.00249/abstract).
[76] PETR GROTEWELL AND YANUS BURTON, EARLY CHILDHOOD EDUCATION ISSUES AND DEVELOPMENT 30 (2008).
[77] VT. STAT. ANN. tit. 16 § 1121 (West 2014).

must acknowledge the context of a student's absence and craft solutions that seek to alleviate the barriers a student faces. The stakes are too high to do otherwise.

PROCEDURAL CONTEXT

Vermont Statutory Scheme

The state of Vermont requires all children between six and sixteen years of age to "attend a public school, an approved education program, or a home study program for the full number of days for which that school is held" unless the child is "mentally or physically unable," has finished the tenth grade, is excused by the superintendent or a "majority of the school directors," or is enrolled in and attending a postsecondary school.[78] It is the legal responsibility of the person who has "control" of the child to ensure the student's attendance.[79] The superintendent may excuse a student from the compulsory education requirement "only for emergencies or from absence from town" not exceeding "ten consecutive school days."[80]

Each year, the school board must appoint at least one truancy officer. [81] If a student, who is not "excused or exempted," fails to attend school, the "teacher or principal shall notify the truant officer and either the superintendent or the school board," based on their school district's policy, unless the teacher or principal believes the student is sick.[82] Once notified, the truancy officer must begin an inquiry into the cause of the student's absence.[83] If the truancy officer finds that "the child is absent without cause," the truancy officer must give "written notice to the person having control of the child" of their absence without cause, and communicate that it is their responsibility to ensure that the child attend school in compliance with the state's

[78] VT. STAT. ANN. tit. 16 § 1121 (West 2014).
[79] *See id*. § 1121.
[80] *See id*. § 1123 (West 2013).
[81] *See id*. §1125 (West 1969).
[82] VT. STAT. ANN. tit. 16 § 563(1) (West 2014); VT. STAT. ANN. tit. 16 § 1126 (West 2014).
[83] VT. STAT. ANN. tit. 16 § 1127(a) (West 2014).

compulsory education statute.[8485] There is no statutory definition for an "absence without cause." If, after notice, the person with control of the child fails "without legal excuse" to get the child to "attend school as required," the person could be subject to a fine not to exceed $1,000 and the truancy officer "shall enter a complaint to the town grand juror of the town in which such person resides, or to the state's attorney of the county" pursuant to their school district's policy.[86] The complaint must provide a "statement of the evidence."[87] The grand juror or state's attorney can then proceed to prosecute the person with control of the child for educational neglect [a legal process which a call to the Vermont Judiciary and several of our interviews has shown does not happen]. Or, as is the current practice in Vermont, the case can proceed to the Family Division of the Superior Court ("court"), Vermont state trial court, alleging that the "child is need of care or supervision ("CHINS")."[88] Each of Vermont's 14 counties has a Family Division that hears CHINS cases as well as all family related legal matters.[89]

A child can be deemed to be a CHINS when they are "habitually and without justification truant from compulsory school attendance."[90] Truancy was added as a CHINS designation in 2009 as part of the Juvenile Judicial Proceedings Act ("JJPA").[91] The JJPA was part of a larger reform effort aimed at increasing Vermont's high school graduation rates to 100% by the year 2020 while providing for the "care, protection, education, and healthy mental, physical, and

[84] *See id*. § 1127(a).
[85] *See id.* § 1121.
[86] VT. STAT. ANN. tit. 16 § 563(1) (West 2014); VT. STAT. ANN. tit. 16 § 1126(b)(c) (West 2014).
[87] *See id.* § 1126 (c).
[88] VT. STAT. ANN. tit. 16 § 1126 (c) (West 2014); VT. STAT. ANN. tit. 33 § 5309(a) (West 2009).
[89] VERMONT SUPERIOR COURT FAMILY DIVISION, (https://www.vermontjudiciary.org/GTC/Family/default-old.aspx) (last visited Feb. 8, 2015); *see* Appendix B(1)(b).
[90] VT. STAT. ANN. tit. 33 § 5102 (3)(d)(West 2010).
[91] *See generally* Relating To Juvenile Judicial Proceedings Act, ch. 51, Vermont Law No. 185 H.615 1,3 (2008) (codified as amended at 33 V.S. §5102 (2014)) (http://www.njjn.org/uploads/digital-library/615.pdf).

social development of children" who may fall into one of the four CHINS categories.[92] This designation of CHINS for truancy is one of four CHINS classifications established in the JJPA, but the following procedures and potential consequences apply to all CHINS cases.[93]

The CHINS petition must include "a concise statement of the facts which support the conclusion that the child is a child in need of care or supervision" in conjunction with a statement that the proceedings are "in the best interest of the child."[94] There is no statutory definition for what is and is not a justified absence.

When the state's attorney files a CHINS petition but does not request a temporary care order, the Court must schedule a "preliminary hearing on the petition" within 15 days and issue a judicial summons to the "parent, guardian, custodian, or care provider" with a copy of the petition attached.[95] At the preliminary hearing, the court must set a pretrial hearing within 15 days.[96] In the event that there is no admission on behalf of the parent, guardian, custodian, or caregiver or a dismissal of the petition at or before the pretrial hearing, the court "shall set a hearing to adjudicate the merits of the petition."[97]

At a hearing to adjudicate the merits of the petition, the "State shall have the burden of establishing by a preponderance of the evidence that the child is in need of care and supervision."[98] To sustain a CHINS determination based on truancy, the State must prove by a preponderance of the evidence that the student's habitual absences were "without justification."[99] The State may meet its burden with "properly admitted school records showing the child's

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[92] 2009 Vt. Acts & Resolves, Act 44 of 2009 § 39,44; *see* Appendix B(1)(c); *see also* VT. STAT. ANN. tit. 33 § 5101 (West 2009).
[93] VT. STAT. ANN. tit. 33 § 5102 (3) (West 2010).
[94] VT. STAT. ANN. tit. 33 § 5310(b)(1) (West 2009).
[95] *See id.* § 5311(a).
[96] *See id.* § 5313(a).
[97] *See id.*
[98] VT. STAT. ANN. tit. 33 § 5315(a) (West 2009).
[99] In re JH, 70 A.3d 1054, 1057 (Vt. 2013).

unexcused absence."[100] The parties may stipulate to the merits of the petition, or contest the merits and present evidence and examine witnesses.[101] If the merits are contested, the Court must "make its findings on the record" after hearing all of the evidence.[102] If the Court finds that the State's allegations in the petition have not been established, the Court shall dismiss and vacate any related temporary orders.[103] If the court finds that the CHINS allegations have been established based on the parties stipulations or the evidence presented the "Court shall order the department [of Children and Families] to prepare a disposition case plan within 28 days of the merits hearing and shall set the matter for a disposition hearing."[104]

The Department for Children and Families ("DCF") disposition case plan for any of the five CHINS designations shall include as appropriate:

> (1) A permanency goal. The long-term goal for a child found to be in need of care and supervision is a safe and permanent home. A disposition case plan shall include a permanency goal and an estimated date for achieving the permanency goal. The plan shall specify whether permanency will be achieved through reunification with a custodial parent, guardian, or custodian; adoption; permanent guardianship; or other permanent placement. In addition to a primary permanency goal, the plan may identify a concurrent permanency goal.
> (2) An assessment of the child's medical, psychological, social, educational, and vocational needs.
> (3) A description of the child's home, school, community, and current living situation.
> (4) An assessment of the family's strengths and risk factors, including a consideration of the needs of children and parents with disabilities, provided that the child's needs are given primary consideration.
> (5) A statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing the changes.
> (6) A recommendation with respect to legal custody for the child and a recommendation for parent-child contact and sibling contact, if appropriate.
> (7) A plan of services that shall describe the responsibilities of the child, the parents, guardian, or custodian, the Department, other family members, and treatment providers, including a description of the services required to achieve the permanency

[100] *Id.*
[101] VT. STAT. ANN. tit. 33 § 5315(b) (West 2009); VT. STAT. ANN. tit. 33 § 5315(c) (West 2009).
[102] VT. STAT. ANN. tit. 33 § 5315(e) (West 2009).
[103] *See id.* § 5315(f).
[104] *See id*. § 5315(g).

> goal. The plan shall also address the minimum frequency of contact between the social worker assigned to the case and the family.
> (8) A request for child support.
> (9) Notice to the parents that failure to accomplish substantially the objectives stated in the plan within the time frames established may result in termination of parental rights.

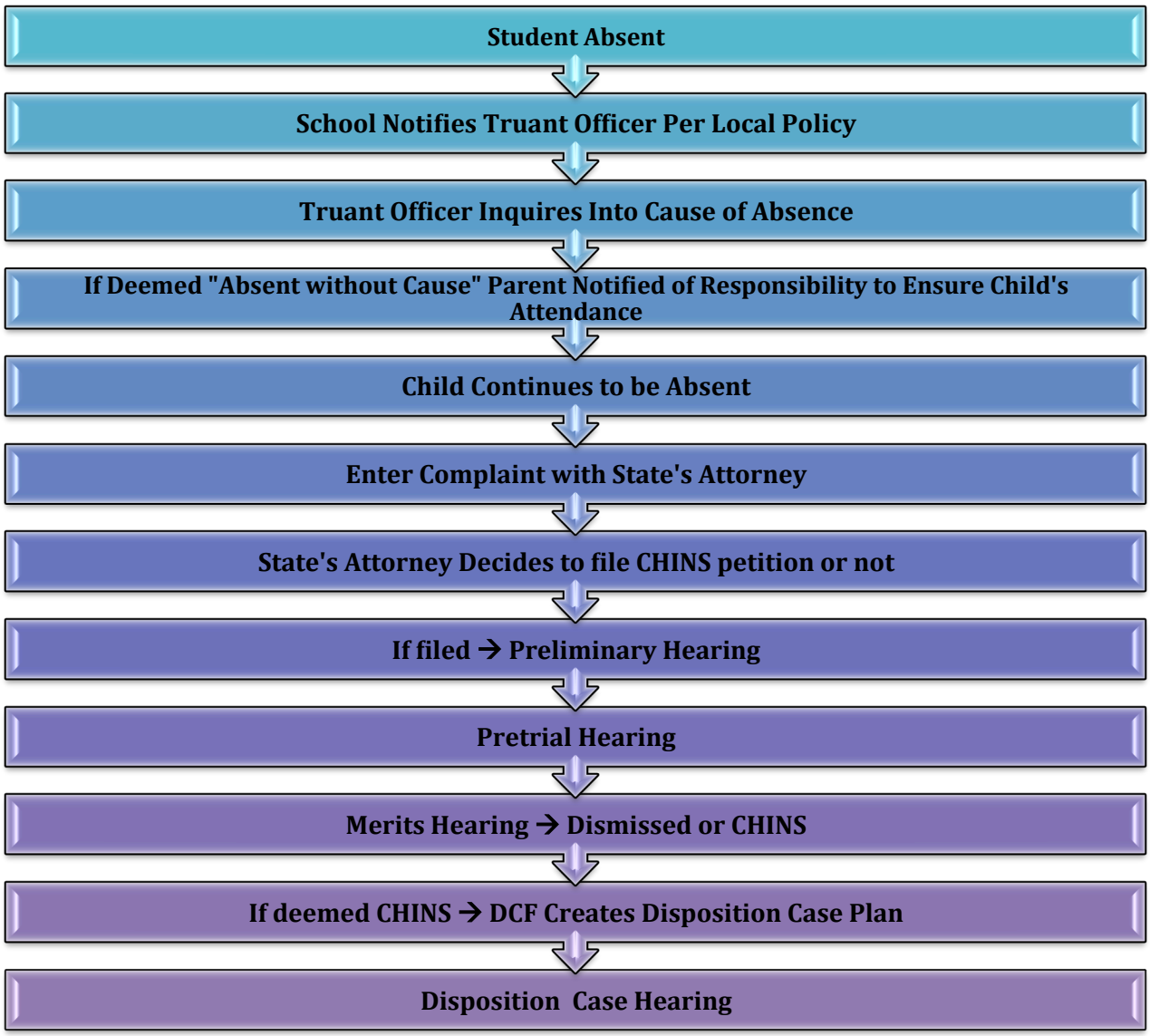
Vt. Stat. Ann. tit. 33, § 5316 (West 2009).

As DCF compiles the disposition case plan, the court must schedule a disposition case hearing no later than 35 days after the CHINS finding.[105] If disposition is contested, all parties are entitled to "present evidence and examine witnesses."[106] At the disposition case hearing, the Court must make a determination in "the best interest of the child" which could include a plan of services to help the child attend school and if necessary an order transferring legal custody of the child.[107]

If the "permanency goal" of the disposition case plan is for the child to be reunified with a parent, guardian, or custodian, the Court "shall hold a review hearing within 60 days" of the disposition order to monitor progress and review parent-child contact.[108] Notice of the post-disposition hearing must be provided to all parties and offer an opportunity to be heard.[109] If the "permanency goal" of the disposition case plan transfers "legal custody or residual parental rights and responsibilities" to DCF, it shall be for an "indeterminate period" and "subject to periodic review at a permanency hearing."

[105] VT. STAT. ANN. tit. 33 § 5317(a) (West 2009).
[106] *See id.*
[107] *See id.* § 5318(a).
[108] *See id*. § 5320.
[109] *See id.*

PROGRESSION OF VERMONT TRUANCY PROCEEDINGS



Vermont State Guidance

At the state level, Vermont does not provide specific regulations for the administration of truancy policies; instead, the secretary of the Agency of Education delegates the power to develop truancy policies to the supervisory unions in each county.[110] The power to delegate the

[110] 2009 Vt. Acts & Resolves, Act 44 of 2009, Sec. 46, 57-8 (http://education.vermont.gov/documents/educ_act_44_related.pdf).

responsibility of creating countywide truancy policies to the supervisory unions is expressed in 16 V.S.A. § 212 (5), which describes the secretary's duties to "supervise and direct the execution of the laws relating to the public schools and ensure compliance."[111] Each supervisory union has the statutory authority and duty to adopt supervisory union-wide truancy policies consistent with the model protocols developed by the secretary of the Agency of Education.[112] The Agency of Education recommends that these policies be developed using a collaborative intervention model that includes collaboration with all supervisory unions and districts working with the local state's attorney, a representative of the Department for Children and Families, appropriate community service providers, and members of the judiciary.[113] The secretary recommends each attendance policy contain the following features:

> a. They be in effect from the outset of compulsory attendance, rather than focusing on middle school and high school students.
> b. The [secretary] has a preference for attendance protocols calling for judicial intervention after no more than 10 unexcused absences. If both excused and unexcused absences are considered as a basis for intervention, the school must establish a timely and informal appeal process to be used prior to a team intervention meeting.
> c. In the event that a protocol uses excused as well as unexcused absences as a basis for intervention, a referral to the Judiciary will be initiated whenever a student has no more than 18-20 days of absences a year. This would be about 10 percent of the school year.[114]

The secretary recommends that a family intervention model be implemented following a certain number of absences.[115] The secretary explains this model in more detail in a 2011 report, "An Act Related to Miscellaneous Amendments to Education Law: Truancy"; in this report, the

[111] VT. STAT. ANN. tit. 16 § 212(5) (West 2014).
[112] *See id*. § 261a.
[113] Vilaseca, *supra* note 5, at 5.
[114] Vilaseca, *supra* note 5, at 5.
[115] Vilaseca, *supra* note 5, at 5.

secretary described the model as a way to develop a plan to support the student's attendance.[116] The report touts the family intervention team models currently in place in Chittenden, Rutland, and Addison counties, which provide for mandatory family intervention team meetings after a set number of absences and before the case is referred to the state's attorney for prosecution.[117]

These recommendations were not meant to be binding on the supervisory unions when creating their countywide policies; rather they were to serve as guidance for the creation of truancy policies. The secretary's 2009 report, "An Act Related to Miscellaneous Amendments to Education Law: Truancy" suggested the regional differences between the school districts and supervisory unions should be taken into account when establishing truancy policies.[118] For this reason the secretary chose to defer to a countywide, rather than a statewide truancy policy.[119] The secretary based his decision on several factors, including the state attorney's countywide prosecutorial authority, the Vermont courts' countywide jurisdiction, the varying resources available across different counties, and the fact students often move between schools within a county.[120]

The secretary of the Agency of Education tracks attendance data and the effectiveness of the policies developed by the supervisory unions through the Vermont Agency of Education's Elementary/Secondary School Register.[121] The register allows the Agency of Education to maintain records on truancy and attendance at each school throughout Vermont. It also provides

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[116] Armando Vilaseca, *2011 Report on Act 44, Section 46 (Truancy), An Act Relating to Miscellaneous Amendments to Education Law*, VERMONT AGENCY OF EDUCATION 2 (Jan. 15, 2011) (http://www.leg.state.vt.us/reports/2011ExternalReports/263477.pdf).
[117] Vilaseca, *supra* note 116, at 2.
[118] Vilaseca, *supra* note 5, at 3.
[119] Vilaseca, *supra* note 5, at 3.
[120] Vilaseca, *supra* note 5, at 3-4.
[121] *Elementary/Secondary School Register School Year 2014-2015*, VERMONT AGENCY OF EDUCATION 21 (April 2014) (http://education.vermont.gov/documents/EDU-Data_Collection_Elementary_Secondary_School_Register_2014_2015.pdf); *see* Appendix B(2)(a).

definitions of "truancy" and "excused absences,"[122] While these definitions provide supervisory unions with guidance, they are not mandatory. The register defines a "truant" as a student who is absent for the full school day without an acceptable excuse, and explains, for federal reporting purposes, a "truant" is a student with 10 or more unexcused absences.[123] The register describes excused absences in the following manner:

> An absence is considered excusable when it is the result of:
> (a) Personal illness;
> (b) Appointments with health professionals that cannot be made outside of the regular school day;
> (c) Observance of recognized religious holidays when the observance is required during a regular school day;
> (d) Emergency family situations such as a death in the family;
> (e) Planned absences for personal or educational purposes which have been approved
> (f) Absences due to suspension or expulsion.

Elementary/Secondary School Register School Year 2014-2015, VERMONT AGENCY OF EDUCATION 21 (April 2014) (http://education.vermont.gov/documents/EDU-Data_Collection_Elementary_Secondary_School_Register_2014_2015.pdf).

While the register provides this list of what the Agency of Education considers to be an excused absence, it fails to provide any information about what evidence a parent or guardian would need to prove that the absence was in fact excused. That being said, the definitions used in the register could help supervisory unions implement consistent definitions of these terms throughout their jurisdiction. At the end of the day, however, the guidance from the Agency of Education merely serve as recommendations and do not include any required standards or procedures the supervisory unions have to include in their truancy policies.[124]

The lack of regulations promulgated by the state and the deference to the supervisory unions has led to a wide variety of truancy policies in place throughout the state of Vermont.

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[122] *Elementary/Secondary School Register School Year 2014-2015, supra* note 121, at 21.
[123] *Elementary/Secondary School Register School Year 2014-2015, supra* note 121, at 24.
[124] Vilaseca, *supra* note 5.

Truancy policies in Vermont vary on their definition of truancy, which type of absences are considered excused or unexcused, and the procedure for addressing truancy. As a result, depending on the school a student attends, he or she may be subject to vastly different standards for what is a violation of a school's attendance policy and the varying models schools use to address habitual absences.

No Child Left Behind

The No Child Left Behind ("NLCB") Act targets different areas in elementary, middle and high school education. Unfortunately, NCLB provides the states minimum guidance as to how to define truancy. However, it offers the states the discretion to define what an excused versus unexcused absence entails, and requires them to annually report its findings. Since every state has the discretion of defining truancy it is difficult to find aggregated national data.

The No Child Left Behind Act was signed into law in 2002. Its main purpose is to close the achievement gaps between high and low performing children, especially the gaps between nonminority and minority students and between the disadvantaged children and their advantaged peers.[125] NCLB's emphasis on accountability and testing has been controversial. NCLB demands that states show adequate academic progress to close these gaps. Each state is required to develop annual deliverables based on the previous requirements, and to evaluate at least 95% of students by standardized assessments.[126] Each school must report its adequate yearly progress ("AYP") for the student body as a whole and for each of the following four subgroups:

[125] Individuals With Disabilities Education Act, 20 U.S.C.A. § 6301 (West 2002).
[126] *No Child Left Behind - Overview*, NEW AMERICA FOUNDATION (Apr. 24, 2014) (http://febp.newamerica.net/background-analysis/no-child-left-behind-overview).

economically disadvantaged, special education, limited English Proficient students (also known as ELL---English Language Learners), and students from major racial/ethnic groups.[127]

NCLB has been beneficial to previously overlooked and academically unchallenged students, especially students with disabilities. Under the new standard, schools were required to include students with disabilities in regular core classes. Students with disabilities benefited from being held to the same standards as their peers.[128] Most of the criticism of NCLB has focused on its heavy emphasis on testing, as some may argue that teachers "teach for the test"[129] rather than focus on what is important for their students' learning.

NCLB and Truancy

For the purposes of this project, NCLB does not provide a truancy standard for the states. Even though truancy rates are part of the AYP report, the main deliverables considered are the academic standards consisting of standardized testing. NCLB does not require schools to collect truancy data, but rather to provide "comparative information to the public"[130] and for NCLB Title IV funding opportunities.[131] "Truancy rate" is defined by Uniform Manager Information and Reporting System[132] as "the rate of students who have 10 or more unexcused absences per year per 100 students, with the definition of unexcused absence based on local definition."[133] By

[127] *NCLB Action Briefs: Adequate Yearly Progress*, NATIONAL COALITION FOR PARENT INVOLVEMENT IN EDUCATION (http://www.ncpie.org/nclbaction/ayp.html) (last visited Jan. 7, 2015).
[128] *The No Child Left Behind Act and IDEA Progress Report*, NATIONAL COUNCIL ON DISABILITY 1 (Jan. 28, 2008) (http://www.ncd.gov/publications/2008/).
[129] James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 934 (2004).
[130] The Uniform Data Set: a Guide to Measures for the Uniform Management Information and Reporting System. It is a provision of the NCLB Act that requires states to collect and report truancy data at the school level about youth drug use and school violence at the state and local levels. States must provide information on a school-by-school basis on: truancy rates; the frequency, seriousness, and incidence of violence and drug-related offenses resulting in suspensions and expulsions in elementary schools and secondary schools in the State. *See* Westat and EMT Associates, Inc., *The Uniform Data Set: a Guide to Measures for the Uniform Management Information and Reporting System* (2007) (a*vailable at* https://www.eride.ri.gov/doc/truancy_rate_08.pdf); *see* Appendix B(3)(a).
[131] Title IV funding is part of the NCLB act, and aims to support programs that prevent violence. *See* 20 U.S.C. § 6301 (2002).
[132] Westat and EMT Associates, *supra* note 130.
[133] Westat and EMT Associates, *supra* note 130.

definition, NCLB establishes a threshold of 10 days to label a student truant but gives the states autonomy to define what is classified as an unexcused absence.

DISABILITIES AND ABSENTEEISM

A common reason students may be unable or unwilling to attend school is because they have an underlying disability that is either undiagnosed, lacking appropriate accommodations, or a manifestation of the disability itself. There are currently three federal statutes which aim to protect individuals with disabilities: The Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1973 ("Section 504"), and the Individuals with Disabilities Education Act ("IDEA"). The ADA and Section 504 are both civil rights statutes while the IDEA is an education act. The ADA defers to Section 504 for school-related disabilities, so this report will mainly focus on the impact Section 504 and the IDEA have in regards to addressing the absenteeism of students with disabilities. Oftentimes absenteeism is a result of schools not meeting their federal obligations with respect to these laws. Rachel Malone, a public defender in Chittenden County stated, "in cases where [truancy proceedings] help, it's because the court is forcing somebody, usually the schools, to do something they were supposed to be doing already. It can be very traumatic for kids who have legitimate mental health issues or disabilities when what they really need is the proper treatment or accommodation."[134]

We have identified a few key features of these expansive laws, discussed below, that are important in order to understand the relationship between absenteeism and students with disabilities. These include the legislative intent, eligibility requirements, and the entitlement to a free appropriate public education, memorialized in two different educational plans.

[134] Telephone Interview by Mariah O'Rourke with Rachel Malone, Staff Attorney, Chittenden County Office of the Defender General (Jan. 7, 2015).

History/Legislative Intent

IDEA

In *Brown v. Board of Education,* the Supreme Court declared education to be "perhaps the most important function of state and local governments."[135] Yet, at the time, the educational needs of millions of children with disabilities were not being fully met.[136] A 1975 congressional study revealed that more than half of the 8 million learning disabled students at the time were not receiving the accommodations they needed, and one out of eight of these students were excluded from school altogether.[137] Disabled students with emotional disturbances were among the most poorly served.[138] Similarly, a 1975 Senate report revealed that the educational needs of 82 percent of all children with emotional disabilities at the time went unmet.[139]

In response to this documented and pervasive problem of exclusion and marginalization, Congress enacted the Education of the Handicapped Act (since amended to become the Individuals With Disabilities Act in 1975.[140] As a condition of receiving federal financial assistance, the statute requires states to ensure a free appropriate public education ("FAPE") for all students with disabilities in the least restrictive environment ("LRE"), regardless of the severity of their disabilities.[141] Under the IDEA, students with disabilities are entitled to special education and related services designed to meet their unique needs.[142] In addition to providing students with disabilities an enforceable, substantive right to public education, the IDEA lays out a system of procedural protections available to students and their parents.[143] These procedures—

[135] Brown v. Board of Education*,* 347 U.S. 483, 493 (1954).
[136] Individuals with Disabilities Education Act, 20 U.S.C § 1400(a)(2) (2010).
[137] *See* H.R.Rep. No. 94–332, p. 2 (1975); 89 Stat 773.
[138] *See* S.Rep. No. 94–168, p. 8 (1975).
[139] *See Id.*
[140] Individuals with Disabilities Education Act, 20 U.S.C. § 1400(a)(2) (2010).
[141] Honig v. Doe, 484 U.S. 305, 308 (1988).
[142] Individuals with Disabilities Education Act, 20 U.S.C § 1400(d)(1)(A) (2010).
[143] *See id*. § 1415(a) (2005).

for example, disciplinary provisions that govern how schools must deal with behavioral issues of students with disabilities—serve to limit the unilateral authority schools previously possessed in dealing with this population of students.[144] Although the Act leaves to the states the primary responsibility of developing and executing educational programs for students with disabilities, it imposes *significant* requirements to be followed in the discharge of that responsibility.[145]

It is significant that in nine out of the eleven IDEA cases the Supreme Court has heard involving disputes between children and their schools, the Court, displaying great deference to the remedial intentions of Congress and to choices made by parents, substantially upheld claims that the school was not providing adequate services or protections to children with disabilities.[146] The Court is not sympathetic to the argument from school districts that their lack of resources prevents them from fulfilling obligations imposed by the IDEA.[147] The IDEA is thus a powerful tool—not susceptible to routine excuse or qualification—for enforcing students with disabilities' substantive and procedural rights to a free appropriate public education.

Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of an individual's disability in federally funded programs and is enforced by the U.S. Department of Education.[148] It provides that "[n]o otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be

[144] Honig v. Doe, 484 U.S. 305, 323 (1988).
[145] Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley, 458 U.S. 176, 183 (1982).
[146] Dean Hill Rivkin, *Decriminalizing Students with Disabilities,* 54 N.Y.L SCH. L. REV. 909, 913 (2009).
[147] Rivkin, *supra* note 146, at 913-14.
[148] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 1.

denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance."[149]

Discrimination on the basis of disability is established upon a showing that: (1) a student is "disabled" as defined by the Act; (2) that he is "otherwise qualified" to participate in school activities; (3) that the district receives federal financial assistance; and (4) that the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school.[150] The definition of *disability* under Section 504 and the ADA is significantly broader than the definition used in the IDEA.[151] Under Section 504 and the ADA, a person is considered to have a disability if that person: has a physical or mental impairment that substantially limits one or more of such person's major life activities; has a record of such an impairment; or, is regarded as having such an impairment.[152] Thus, many types of disabilities, such as: students with allergies or asthma, students with attention-deficit disorder or ADHD, students with learning disabilities who do not manifest a significant discrepancy between intellectual ability and achievement, students who are considered to be socially maladjusted, students who have a history of drug and alcohol abuse, students with communicable diseases (i.e. hepatitis), or even student's whose parent(s) have a disability, may be covered under Section 504 and the ADA but not under the IDEA.[153] It is also worth noting that while IDEA requires "more" of schools for children of disabilities, it also provides schools with additional funding.[154] Section 504 requires that schools not discriminate, and in some cases undertake actions that require additional

[149] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 2.
[150] 34 C.F.R. § 104.33(b)(1) (2000).
[151] Tom E.C. Smith, *Section 504, the ADA, and Public Schools*, 22 REMEDIAL AND SPECIAL EDUCATION 335, 337 (Nov. 2001) (http://rse.sagepub.com/content/22/6/335.full.pdf+html).
[152] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 3.
[153] Smith, *supra* note 151, at 335, 338.
[154] Rosenfeld, *supra* note 15.

expenditures, but provides no additional financial support, which oftentimes leads to schools dragging their feet in providing needed services to children under Section 504.[155]

In 2008, Congress amended the ADA to interpret Section 504, by re-defining "disability" in a broader sense.[156] The ADA Amendments Act of 2008 were aimed at redefining the scope of what a "disability" entails and who meets the criteria as "disabled" under the ADA.[157] While the legislative intent of the 2008 Amendments were expressly directed towards restoring protections eroded by the Supreme Court in a series of employment cases under the ADA, these vicissitudes also affect discrimination claims regarding students and student eligibility for 504 plans.[158] The 2008 Amendments expressly state that the definition of "disability" should be construed in favor of "broad coverage."[159] For example, these amendments have extended the list of "major life activities" that may be substantially limited by a disability, to include reading, thinking and concentrating, among others.[160]

The primary difference between the ADA and Section 504 is that while Section 504 applies only to organizations that receive Federal funding, the ADA applies to a much broader universe; however, in regards to education, both statutes are administered by the Office for Civil

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[155] Rosenfeld, *supra* note 15.
[156] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 1; *see generally,* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002) (holding that to be substantially limited in a major life activity, an individual must be severely restricted "from doing activities that are of central importance to most people's daily lives," and that the impairment must be "permanent or long term."); *and*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that impairments must be evaluated only after considering medical intervention or other means that the individual uses to mitigate the impact of the impairments).
[157] Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, ABA CHILDREN'S RIGHTS LITIGATION (May 23, 2011) (http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2011-section-504-ada-idea.html); *see* Appendix C(1)(e).
[158] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 1.
[159] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 1.
[160] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 1.

Rights and considered essentially identical both in terms of their objectives and the language used.[161]

For a further analysis comparing the ADA, IDEA, and Section 504, see the chart below.

A Comparison of ADA, IDEA and Section 504[162]

Category:	ADA:	IDEA:	504:
Type and Purpose	A civil rights law to prohibit discrimination solely on the basis of disability in employment, public services, and accommodations.	An education act to provide federal financial assistance to State and local education agencies to guarantee special education and related services to eligible children with disabilities.	A civil rights law to prohibit discrimination on the basis of disability in programs and activities, public and private, that receive federal financial assistance.
Who is protected?	Any individual with a disability who: (1) has a physical or mental impairment that substantially limits one or more life activities; or (2) has a record of such impairment; or (3) is regarded as having such an impairment…	Children ages 3-21 who are determined by a multidisciplinary team to be eligible within one or more of 13 specific disability categories and who need special education and related services…	Any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment or (3) is regarded as having such an impairment…
Provides for FAPE?	Not directly. However, (1) ADA protections apply to nonsectarian private schools…;	Yes. A FAPE is defined to mean special education and related services. Special education	Yes. An "appropriate" education means an education comparable to that

[161] Rosenfeld, *supra* note 15.
[162] *A Comparison of ADA, IDEA, and Section 504*, DISABILITY RIGHTS EDUCATION & DEFENSE FUND (http://dredf.org/advocacy/comparison.html) (last visited February 22, 2015).

	(2) ADA provided additional protection in combination with actions brought under Section 504. Reasonable accommodations are required for eligible students with a disability to perform essential functions of the job…	means "specially designed instruction at no cost to the parents, to meet the unique needs of the child with a disability..."; IDEA requires the development of an IEP document with specific content and a required number of participants at an IEP meeting.	provided to students without disabilities…Section 504 does require development of a plan, although this written document is not mandated…
Funding to implement services?	No, but limited tax credits may be available for removing architectural or transportation barriers…	Yes. IDEA provides federal funds under Parts B and C to assist states and local education agencies in meeting IDEA requirements…	No. State and local jurisdictions have responsibility. IDEA funds may not be used…
Procedural safeguards	The ADA does not specify procedural safeguards related to special education; it does detail the administrative requirements complaint procedures, and consequences for noncompliance…	IDEA requires written notice to parents regarding identification, evaluation, and/or placement. Further, written notice must be made prior to any change in placement…	Section 504 requires notice to parents regarding identification, evaluation and/or placements. Written notice is recommended. Notice must be made only before a "significant change" in placement…
Evaluation and placement procedures	The ADA does not specify evaluation and placement procedures: it does specify provision of	A comprehensive evaluation is required. A multidisciplinary team evaluates the	Like IDEA, evaluation and placement procedures under Section 504 require

	reasonable accommodations for eligible activities and settings….	child, and parental consent is required before evaluation. IDEA requires that reevaluations be conducted at least every 3 years...	that information be obtained from a variety of sources of the area of concern; that all data are documented and considered; and that decisions are made by a group of persons knowledgeable about the student, evaluation data, and placement options…
Due process	The ADA does not delineate specific due process procedures... individuals who are discriminated against may file a complaint with the relevant federal agency or due in federal court…	IDEA delineates specific requirements for local education agencies to provide impartial hearings for parents who disagree with the identification, evaluation, or placement of a child.	Section 504 requires local education agencies to provide impartial hearings for parents who disagree with the identification, evaluation, or placement of a student…

Eligibility Requirements

IDEA

Students are entitled to receive special education services under the IDEA if they are determined to be a "child with a disability."[163] In general, the term "child with a disability" means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), a serious emotional disturbance, orthopedic impairments, autism, a traumatic brain injury, other health impairments,

[163] Individuals with Disabilities Education Act, 20 U.S.C. § 1400(d)(1)(A) (2010).

or specific learning disabilities.[164] Additionally, the student, because of one of these aforementioned disabilities, must need special education or related services.[165]

Section 504

Before deciding whether a student is eligible for a 504 plan, the child must be assessed and the school team must agree that the child has a substantial and pervasive impairment and meets the definition of a "qualified disabled person."[166] There are a plethora of situations that may trigger the need for an initial evaluation, including: a student failing to achieve passing grades, a student failing to advance from grade to grade, a student returning to school after a serious illness or injury or alcohol/drug treatment, or a student being chronically absent from school, among others.

The eligibility requirements under Section 504 and the ADA are not the same as the eligibility requirements under the IDEA and a "child with a disability" is defined differently under Section 504/ADA than it is in the IDEA.[167] For example, eligibility under Section 504 is not age restricted, as is the case under the IDEA, nor is it related to specific categories of disabilities.[168] Eligibility is based on the functional impact of a physical or mental impairment.[169] The Rehabilitation Act defines a "physical or mental impairment" as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal… or (b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning

[164] *See id*. § 1401(3)(A)(i).
[165] *See id.* § 1401(3)(A)(ii).
[166] *See* A. Bennett & L. Frank, *Special Education Process: IEP vs. 504 Plan*, DAVIDSON INSTITUTE FOR TALENT DEVELOPMENT (Jan./Feb. 2009) (http://www.davidsongifted.org/db/Articles_id_10671.aspx); *see* Appendix C(1)(f).
[167] Rosenfeld, *supra* note 15; *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 8.
[168] Smith, *supra* note 151, at 336.
[169] Smith, *supra* note 151, at 336.

disability."[170] The last part of the "physical or mental impairment" definition is similar to the one found in the IDEA.[171] However, the first part, although including some of the categories found in the IDEA, goes well beyond those specific areas in defining *disability*.[172]

Furthermore, Section 504 and the ADA require that the person have a physical or mental impairment that substantially limits one or more of the person's major life activities.[173] "Major life activity" is broadly defined under Section 504 and the ADA and includes a wide variety of daily activities, such as walking, seeing, hearing, etc.[174] Essentially, any function that is performed routinely is considered a "major life activity."[175] For example, asthma may qualify you for a 504 plan to get air purifiers in the classroom, but does not qualify you for any special education services unless you are not making effective progress in school because of asthma.[176] A 504 plan allows you access to the same education everyone else is getting and gives you whatever services you need to access the same education.[177] A 504 plan cannot modify curriculum however; only the IDEA makes modifications and accommodations not only to access but to the curriculum as well.[178]

Whether or not the disability "substantially limits" a major life activity is also very broadly defined and subjective.[179] "Substantially limits" may be defined as "unable to perform a major life activity that the average person in the general population can perform, or significantly

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[170] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 4.
[171] Smith, *supra* note 151, at 337.
[172] Smith, *supra* note 151, at 337.
[173] Smith, *supra* note 151, at 337.
[174] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 4.
[175] Smith, *supra* note 151, at 337.
[176] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 4.
[177] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 3.
[178] *Section 504 of the Rehabilitation Act of 1973 and Vermont Schools: A Manual For Parents, Families, And Schools, supra* note 12, at 8.
[179] Smith, *supra* note 151, at 337.

restricted as to the condition, manner, or duration for which an individual can perform a particular major life activity as compared to the condition, manner, or duration for which the average person in the general population can perform that same major life activity."[180] When determining whether the "substantially limits" requirement is met, school personnel should consider the nature and severity of the impairment, the duration of the impairment, and any long-term impact of the impairment.[181]

Entitlements/Protections Once Qualified—A Tale of Two FAPEs

When people litigate under the IDEA or Section 504, they are saying that the school is not providing for a free appropriate public education. A FAPE is different under the IDEA than under Section 504. For IDEA, a FAPE means that a student is able to access the education, whereas a FAPE under Section 504 means the student is able to access the education as well as his/her peers.

IDEA

Once a student qualifies as a "child with a disability" under the IDEA, that student is entitled to a "free appropriate public education" (FAPE).[182] The IDEA defines FAPE as:

> "The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under § 1414(d) of this title."[183]

[180] Smith, *supra* note 151, at 337.
[181] Smith, *supra* note 151, at 337.
[182] Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(2005).
[183] *See id*. § 1401(9).

Board of Educ. v. Rowley was the first case in which the Supreme Court interpreted any provision of the Education of the Handicapped Act.[184] In this case, Amy Rowley, a deaf student at the Furnace Woods School, was evaluated to determine what supplemental services she would require and placed on an IEP.[185] Despite successfully completing her kindergarten year, Amy's parents advocated for additional services; specifically, the Rowley's wanted Amy to be provided a qualified sign-language interpreter in all of her academic classes.[186] The school denied this request and the Rowley's demanded a hearing before an independent examiner, who said that an interpreter was not necessary because Amy was achieving in all areas without such assistance.[187] The Rowley's appealed this determination and argued that the denial of the interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.[188] The independent examiner's determination was affirmed in both the District Court and the Court of Appeals for the Second Circuit.[189] The Supreme Court granted certiorari to review the lower courts' interpretation of the Act.[190] Specifically, the Supreme Court was called on to determine the meaning of "free appropriate public education" (FAPE).[191]

While the formal definition of FAPE does provide a starting point, the majority in *Rowley* believed this definition tended "toward the cryptic rather than the comprehensive."[192] The United States itself, appearing as an *amicus curaie*, stated that, "although the Act includes definitions of a 'free appropriate public education'…the statutory definitions do not adequately explain what is

[184] Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley, 458 U.S. 176, 187 (1982).
[185] *Id*. at 184.
[186] *Id*.
[187] *Id*. at 185.
[188] *Id*.
[189] *Id*.
[190] *Id*. at 186.
[191] *Id*.
[192] *Id*. at 188.

meant by 'appropriate.'"[193] The *Rowley* majority rejected the proposition that Congress failed to offer any assistance in defining this term and attempted to define "FAPE" by looking at legislative intent.[194] Ultimately, the *Rowley* majority decided that since the Education of the Handicapped Act was implemented in response to the vast number of children with disabilities who were either excluded entirely from the public school system or receiving an inappropriate education, Congress sought primarily to make public education *available* to handicapped children.[195] According to the Court, "the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided to other children."[196] As such, a "free appropriate public education" is achieved by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.[197][198]

In addition, *Rowley* sets the standard for the level of judicial review afforded to suits brought under the IDEA. The majority writes that a court's inquiry in these suits is twofold—first, has the State complied with the procedures set forth in the Act and second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive

[193] *Id*. at 187.
[194] *Id*. at 189.
[195] *Id*. at 192.
[196] *Id*. at 198.
[197] *Id*. at 202.
[198] Board of Educ. of the Hendrick Hudson Central School District, Westchester County, et al., Petitioners v. Rowley, 458 U.S. 176, 212-13 (1982) (White, J., dissenting) (rejected the majority's definition of "free appropriate public education." White reasoned that the Act itself announces that a State must provide a "full educational *opportunity* to all handicapped children" (emphasis added). 20 U.S.C. § 1412(2). In addition to the textual evidence regarding the definition in the Act, White also contended that the legislative intent was to provide equal educational opportunity, not simply equal access. Still, *Rowley* remains the standard definition for "free appropriate public education.").

educational benefits?[199] If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.[200]

§ 1415(e)(2) of the IDEA provides districts courts with authority to grant "appropriate" relief based on a preponderance of the evidence, but does not invite the courts "to substitute their own notions of sound educational policy for those of the school authorities which they review."[201]

Section 504

A discrimination claim under Section 504 or the ADA involving a denial of a FAPE is not coextensive with an IDEA claim. FAPE under Section 504 is defined as, "the provision of regular or special education and related aids and services that... *are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons* are met…."[202] Thus, while IDEA defines FAPE to include the provision of special education and related services and focuses on a student's access to education, Section 504 includes the provision of special or regular education and related services and looks at comparing the education of students with and without disabilities.[203]

While the American Bar Association points to two seminal cases outside of the Second Circuit, which outline the nuances between these two laws, the Second Circuit has ruled along similar lines in several cases.[204] In *Mark H. v. Lemahieu*, petitioners, both individually and as

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[199] Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley, 458 U.S. 176, 206-07 (1982),
[200] *Id*. at 207.
[201] *See* Board of Educ. of the Hendrick Hudson Central School District, Westchester County, et al., Petitioners v. Rowley, 458 U.S. 176, 216 (1982) (White, J., dissenting) (challenging the scope of judicial review defined by the majority, instead reasoning, "that Congress intended the courts to conduct a far more searching inquiry" into whether a student is receiving an "appropriate" education).
[202] 34 C.F.R. § 104.33(b)(1) (2000) (emphasis added),
[203] Rosenfeld, *supra* note 15.
[204] Weber, *supra* note 157; S.W. by J.W. v. Warren*,* 528 F.Supp.2d 282, 290 (S.D.N.Y.2007) (Courts in this Circuit have recognized that a Section 504 claim may be predicated on a claim that a student with disabilities was denied

guardians ad litem for their autistic daughters, filed suit against the Hawaii DOE and various school officials, alleging that the "[Agency]'s failure to provide autism specific services…during the crucial years of ages three to seven…was a violation of § 504…."[205]

The Agency moved to dismiss the complaint on several grounds.[206] They believed that the IDEA is the exclusive remedy for these injuries and that the H. family's § 504 claim is barred because they only litigated the IDEA claims, not the claims under § 504, in the administrative hearing.[207] The Court of Appeals for the Ninth Circuit, in reversing the lower court's decision, held that the IDEA is not an exclusive remedy and that the appropriate education duty under IDEA, while similar, is not identical with that under Section 504.[208] The court emphasized that Section 504's "appropriate education standard" requires "a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the 'design' of a child's educational program."[209] Failure to offer a valid IDEA program may, but does not necessarily, violate the Section 504 requirements.[210]

Similarly, in *Lyons v. Smith*, the court declared that a hearing officer may order a public school system to provide special education to a student deemed "otherwise qualified handicapped" under the Rehabilitation Act even if the student is not considered "other health

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access to a FAPE, as compared to the FAPE students without disabilities receive."); however, this requires proof of "bad faith or gross misjudgment." Wenger v. Canastota Ctrl. Sch. Dist., 979 F.Supp. 147, 152 (N.D.N.Y.1997); French v. New York State Dep't of Educ., 476 F. App'x 468, 472 (2d Cir. 2011) *quoting* Wenger v. Canastota Ctrl. Sch. Dist., 979 F.Supp. 147, 152 (N.D.N.Y.1997), *aff'd mem.,* 208 F.3d 204 (2d Cir.2000) ("[S]omething more than a mere violation of the IDEA is necessary in order to show a violation of Section 504 in the context of educating children with disabilities, *i.e.,* a plaintiff must demonstrate that a school district acted with bad faith or gross misjudgment.").

[205] Mark H. v. Lemahieu, 513 F.3d 922, 930 (9th Cir. 2008).

[206] *Id*. at 931.

[207] *Id*.

[208] *Id*. at 933.

[209] Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008) ("a FAPE requires education and services 'designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met'" (emphasis added)) (quoting 34 C.F.R. § 104.33(b)(1) (2000)).

[210] *Id*. at 935.

impaired" under the IDEA.[211] The plaintiff, an eight-year-old student in the DC school system, had been diagnosed with ADHD, causing him to have behavioral problems at home and at school.[212] He was subsequently evaluated and determined to be ineligible for special education under IDEA and Section 504.[213] The District Court upon review of the hearing officer's rulings, affirmed the decision that a child with ADHD did not fit into the IDEA category of "other health impaired"; however, the court reversed the latter part of the determination, which had declined to order that the child be given special education services pursuant to Section 504.[214]

As previously mentioned, *Mark H.* and *Lyons* establish that the Section 504 FAPE standard is enforceable not only when a case is brought for violation of the statute, but also that the standard it imposes on public schools is different from the IDEA FAPE standard.[215] For example, a wealthy school district that does exceedingly well for its students who do not have disabilities, (i.e. offering them a range of instruction and activities that maximizes their educational opportunities), would subsequently be held to a high standard for children covered by Section 504, a standard well above that of *Rowley*.[216] For school districts that are struggling to offer students a decent level of services (i.e. school district is poor or failing for other reasons), the non-IDEA-eligible children with disabilities in those districts might receive services that are below some of the more generous interpretations of the IDEA standard.[217]

[211] Lyons v. Smith, 829 F. Supp. 414, 420 (D.D.C. 1993).
[212] *Id*. at 416.
[213] *Id*.
[214] *Id*. at 419.
[215] Weber, *supra* note 157.
[216] Weber, *supra* note 157.
[217] Weber, *supra* note 157.

In *K.M. ex rel. Bright v. Tustin Unified School Dist*.[218], the U.S. Court of Appeals for the Ninth Circuit, in reversing the lower court's decision[219], held that the success or failure of a student's IDEA claim should not dictate the success or failure of a Title II claim, as the two FAPE requirements are "overlapping but different."[220] Courts have never held that compliance with the IDEA dooms *all* Section 504 claims and must analyze each claim separately under the applicable statutory and regulatory framework.[221]

Furthermore, regarding the connection between Title II of the ADA and Section 504, the court held that "if the evidence could support a finding that there is more than one reason for an allegedly discriminatory decision, a plaintiff need show only that discrimination on the basis of disability was a 'motivating factor' for the decision."[222] By contrast, "[t]he causal standard for the Rehabilitation Act is even stricter," requiring a plaintiff to show a denial of services "solely by reason of" disability.[223] While the federal regulations implementing Title II are parallel for the most part with regulations enforcing Section 504, Congress did intend certain differences.[224] Specifically, Congress mandated that the Title II regulations as to all topics "[e]xcept for 'program accessibility, existing facilities,' and 'communications' " be consistent with Section 504 regulations codified at 28 C.F.R. § 41; and, that the Title II regulations as to "'program accessibility, existing facilities,' and 'communications'" be consistent with Section 504

[218] Two high school students who are deaf or hard-of-hearing filed suit alleging that their public schools violated their obligations under IDEA and Title II of the ADA, by not providing them with word-for-word transcription service. Each student, through her parents, requested that the school district provide the students with Communication Access Realtime Translation ("CART") in the classroom so that they may fully understand the teacher and fellow students without undue strain or stress. In both cases, the school district denied the request for CART. K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1092 (9th Cir. 2013).
[219] The district court held that "(1) a valid IDEA IEP satisfies the Section 504 FAPE regulation; (2) Section 504 and Title II are substantially similar statutes; (3) therefore, a valid IDEA IEP also satisfies Title II." K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1098 (9th Cir. 2013).
[220] K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088; 1098 (9th Cir. 2013); *see also id*. at 1101.
[221] K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1101 (9th Cir. 2013).
[222] Martin v. Cal. Dep't of Veterans Affairs, 560 F.3d 1042, 1048–49 (9th Cir.2009).
[223] *Id*.
[224] K.M. ex rel. Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1099 (9th Cir. 2013).

regulations codified at 28 C.F.R. § 39.[225] However, Congress did not mandate that Title II regulations be consistent with the Section 504 FAPE regulation, codified at 34 C.F.R. § 104.[226]

Pursuant to the Supreme Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), an otherwise qualified individual with a disability under Section 504 is one who, with reasonable modifications, is able to meet all of the program's requirements in spite of his or her disability.[227] The Court held that since the intent of Section 504 is non-discrimination, there is no affirmative action obligation upon entities covered.[228] Subsequent court decisions have affirmed that a school's obligations under Section 504 are measurable and require a balancing of various factors.[229] As the Second Circuit Court of Appeals stated in *Rothschild v. Grottenthaler et. al*., 907 F.2d 286 (2nd Cir. 1990), Section 504 "must be responsive to two powerful but countervailing considerations: the need to give effect to the statutory objectives and the desire to keep Section 504 within manageable bounds."[230]

Apart from the fundamental duty of schools to provide a FAPE (as defined by the Section 504 regulations) to Section 504/ADA-eligible children, there are other educational obligations that public schools must adhere to.[231] The duties include: avoiding purposeful exclusion of children with disabilities from school (*B.T. ex rel. Mary T. v. Dep't of Educ.*, 2009 WL 1978184 (D. Haw. 2009) (discriminatory age limits); *Bess v. Kanawha County Bd. of Educ.*, 2009 WL 3062974 (S.D. W. Va. 2009) (persuading a parent to keep a child with disabilities home from school));… providing protection against harassment and abuse on the basis of disability (*Enright v. Springfield Sch. Dist.*, 2007 WL 4570970 (E.D. Pa. 2007)); and, avoiding segregation of

[225] *Id*.
[226] *Id*.
[227] Se. Cmty. Coll. v. Davis, 442 U.S. 397, 403 (U.S. 1979).
[228] *Id*. at 398.
[229] Rosenfeld, *supra* note 15.
[230] Rosenfeld, *supra* note 15.
[231] Weber, *supra* note 157.

children with disabilities at school (*L.M.P. ex rel. E.P. v. Sch. Bd.*, 516 F. Supp. 2d 1294 (S.D. Fla. 2007)).[232]

IEPs and §504 Plans

IEPs

A "free appropriate public education" for a student with a disability covered under the IDEA is outlined in his or her Individualized Education Plan (IEP). An IEP is a written statement for a child with a disability that is developed, reviewed, and revised in accordance with the procedure set forth in the IDEA and that includes the following: (I) a statement of the child's present levels of academic achievement and functional performance, (II) a statement of measurable annual goals, including academic and functional goals, (III) a description of how the child's progress toward meeting the annual goals will be measured and when progress reports will be provided, (IV) a statement of the special education and related services and supplementary aids and services to be provided to the child or on behalf of the child, (V) an explanation of the extent to which the child will not participate with nondisabled children in the regular class, (VI) a statement of accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments, and (VII) the projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.[233]

An IEP is developed by the IEP team and must consist of the following parties:

> **"(i)** the parents of a child with a disability;
> **(ii)** not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
> **(iii)** not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

[232] Weber, *supra* note 157.
[233] Individuals With Disabilities Education Act, 20 U.S.C. §1414(d)(A)(i) (2005).

> **(iv)** a representative of the local educational agency who--
>
> > **(I)** is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
> > **(II)** is knowledgeable about the general education curriculum; and
> > **(III)** is knowledgeable about the availability of resources of the local educational agency;
>
> **(v)** an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
> **(vi)** at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
> **(vii)** whenever appropriate, the child with a disability."

Individual with Disabilities Education Act, 20 U.S.C. §1414(d)(1)(B) (2005).

When developing a student's IEP, the IEP team must consider the strengths of the student, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation, and the academic, developmental, and functional needs of the student.[234] Additionally, the IEP Team must consider special factors like behavioral issues.[235] In the case of a child whose behavior impedes the child's learning or that of others, the Team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.[236]

The IEP Team must review the student's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the student are being achieved.[237] The Team must revise the IEP as appropriate to address the following factors:

> **(I)** any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
> **(II)** the results of any reevaluation conducted under this section;

[234] *See id.* §1414(d)(3)(A).
[235] *See id*. §1414(d)(3)(B).
[236] *See id*. §1414(d)(3)(B)(i).
[237] *See id*. §1414(d)(4)(A)(i).

> **(III)** information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);
> **(IV)** the child's anticipated needs; or
> **(V)** other matters.

Individual with Disabilities Education Act, 20 U.S.C. §1414(d)(4)(A)(ii) (2005).

Parents who disagree with the IEP have a right under the Act to an administrative hearing to determine if the IEP is appropriate.[238]

§504 Plans

A §504 plan also seeks to provide a free appropriate public education, but memorializes the plan in a different way than in an IEP. Unlike a child with an IEP under the IDEA, there are no legal requirements for what must be included in a 504 plan nor are there mandatory members of a 504 team.[239] Sometimes the 504 team will include the same constituents as an IEP team, but is not required to include them all.[240] Section 504, like the IDEA, requires the use of evaluation and re-evaluation procedures.[241] School districts may use the same process to evaluate the needs of students under Section 504 as they use do to evaluate the needs of students under the IDEA; however, if they choose to adopt a separate process for evaluating under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulatory provision at 34

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[238] *See id*. §1415(f).
[239] *See* A. Bennett & L. Frank, *Special Education Process: IEP vs. 504 Plan*, DAVIDSON INSTITUTE FOR TALENT DEVELOPMENT (Jan./Feb. 2009) (http://www.davidsongifted.org/db/Articles_id_10671.aspx); Peter W.D. Wright & Pamela Darr Wright, *My Child with a 504 Plan is Failing, School Won't Help*, WRIGHTSLAW (last revised Jan. 24, 2014) (http://www.wrightslaw.com/info/sec504.idea.eligibility.htm); *see* Appendix C(1)(g); *Section 504: What Does It Mean*, KIDS LEGAL (last updated May 2013) (http://www.kidslegal.org/section-504-what-does-it-mean); *see* Appendix C(1)(h).
[240] *See* A. Bennett & L. Frank, *Special Education Process: IEP vs. 504 Plan*, DAVIDSON INSTITUTE FOR TALENT DEVELOPMENT (Jan./Feb. 2009) (http://www.davidsongifted.org/db/Articles_id_10671.aspx); Peter W.D. Wright & Pamela Darr Wright, *My Child with a 504 Plan is Failing, School Won't Help*, WRIGHTSLAW (last revised Jan. 24, 2014) (http://www.wrightslaw.com/info/sec504.idea.eligibility.htm); *see* Appendix C(1)(g); *Section 504: What Does It Mean*, KIDS LEGAL (last updated May 2013) (http://www.kidslegal.org/section-504-what-does-it-mean); *see* Appendix C(1)(h).
[241] *Protecting Students with Disabilities; Frequently Asked Questions about Section 504 and the Education of Children with Disabilities,* U.S DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS (Dec. 19, 2013) (http://www2.ed.gov/about/offices/list/ocr/504faq.html); *see* Appendix C(1)(i).

C.F.R. 104.35.[242] Similarly, re-evaluations may be conducted in accordance with the IDEA regulations calling for re-evaluation every three years or more frequently if necessary.[243] Unlike an IEP, the 504 plan does not have to be in writing, but it may be put in writing upon request.[244] Not having a 504 plan in writing may lead to several issues, chief among them being that teachers or staff not knowing about the student's 504, as there is no protocol for how it gets communicated to the staff. Thus, it could be helpful if you are combatting a CHINS(d) petition to have in writing exactly what the school's obligations to your child are and parents should always request that their child's 504 plan be put in writing or memorialized in a letter, so they have documentation. This may also be key to a cause of action in enforcing the FAPE if there is a dispute with the school about the child's needs not being met. For a further analysis of IEPs compared to 504 plans, see chart below.[245]

A Comparison of IEPs and 504 Plans

Category:	IEP:	504 Plan:
Basic Description	A blueprint or plan for a child's special education experience at school.	A blueprint or plan for how a child will have access to learning at school.

[242] *Protecting Students with Disabilities; Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, supra,* note 241.
[243] *Protecting Students with Disabilities; Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, supra,* note 241.
[244] *See generally* A. Bennett & L. Frank, *Special Education Process: IEP vs. 504 Plan*, DAVIDSON INSTITUTE FOR TALENT DEVELOPMENT (Jan./Feb. 2009) (http://www.davidsongifted.org/db/Articles_id_10671.aspx); Peter W.D. Wright & Pamela Darr Wright, *My Child with a 504 Plan is Failing, School Won't Help*, WRIGHTSLAW (last revised Jan. 24, 2014) (http://www.wrightslaw.com/info/sec504.idea.eligibility.htm); *see* Appendix C(1)(g); *Section 504: What Does It Mean*, KIDS LEGAL (last updated May 2013) (http://www.kidslegal.org/section-504-what-does-it-mean); *see* Appendix C(1)(h).
[245] *The Difference Between IEPs and 504 Plans*, UNDERSTOOD (reviewed on Jun. 27, 2014), (https://www.understood.org/en/school-learning/special-services/504-plan/the-difference-between-ieps-and-504-plans); *see* Appendix C(1)(g).

What It Does	Provides individualized special education and related services to meet the unique needs of the child. These services are provided at no cost to parents.	Provides services and changes to the learning environment to meet the needs of the child as adequately as other students. As with IEPs, a 504 plan is provided at no cost to parents.
What Law Applies?	IDEA 2004	Section 504 of the Rehabilitation Act of 1973
Who Is Eligible?	To get an IEP, there are two requirements: 1. A child has one or more of the 13 specific disabilities listed in IDEA… 2. The disability must affect the child's educational performance and/or ability to learn…	To get a 504 plan, there are two requirements: 1. A child has any disability, which can include many learning or attention issues. 2. The disability must interfere with the child's ability to learn in a general education classroom…
Independent Educational Evaluation	Parents can ask the school district to pay for an independent educational evaluation (IEE) by an outside expert... The district must either agree to fund it if a parent asks, or file a due process claim stating that their evaluation is complete.[246]	Doesn't allow parents to ask for an IEE. As with an IEP evaluation, parents can always pay for an outside evaluation themselves.
Who Creates the Program/Plan?	There are strict legal requirements about who participates. An	The rules about who's on the 504 team are less specific than they

[246] 34 C.F.R. § 300.502 (2006).

	IEP is created by an IEP team that must include: The child's parent, at least one of the child's general education teachers, at least one special education teacher, school psychologist or other specialist who can interpret evaluation results, & a district representative with authority over special education services	are for an IEP. A 504 plan is created by a team of people who are familiar with the child and who understand the evaluation data and special services options…
What's in the Program/Plan?	The IEP sets learning goals for a child and describes the services the school will give her. Here are some of the most important things the IEP must include: - The child's present levels of academic and functional performance - Annual education goals for the child and how the school will track her progress - The services the child will get—this may include special education, related, supplementary and extended school year services - The timing of services—when they start, how often they occur and how long they last	There is no standard 504 plan. Unlike an IEP, a 504 plan doesn't have to be a written document. A 504 plan generally includes the following: - Specific accommodations, supports or services for the child - Names of who will provide each service - Name of the person responsible for ensuring the plan is implemented

	- Any accommodations—changes to the child's learning environment - Any modifications—changes to what the child is expected to learn or know - How the child will participate in standardized tests - How the child will be included in general education classes and school activities	
Parent Notice	When the school wants to change a child's services or placement, it has to tell parents in writing before the change. This is called prior written notice. Notice is also required for any IEP meetings and evaluations. Parents also have "stay put" rights to keep services in place while there is a dispute.	The school must notify parents about evaluation or a "significant change" in placement. Notice doesn't have to be in writing, but most schools do so anyway.
Parent Consent	A parent must consent in writing for the school to evaluate a child. Parents must also consent in writing before the school can provide services in an IEP.	A parent's consent is required for the school district to evaluate a child.
How Often It's Reviewed and Revised	The IEP team must review the IEP at least once a year. The student must be reevaluated every three	The rules vary by state. Generally, a 504 plan is reviewed each year and a reevaluation is done

	years to determine whether services are still needed.	every three years or when needed.
How to Resolve Disputes	IDEA gives parents several specific ways to resolve disputes (usually in this order): Mediation, Due process complaint, Resolution session, Civil lawsuit, State complaint, Lawsuit	Section 504 gives parents several options for resolving disagreements with the school: Mediation, Alternative dispute resolution, Impartial hearing, Complaint to the Office for Civil Rights, Lawsuit
Funding/Costs	Students receive these services at no charge. States receive additional funding for eligible students.	Students receive these services at no charge. States do not receive extra funding for eligible students. But the federal government can take funding away from programs (including schools) that don't comply. IDEA funds can't be used to serve students with 504 plans.

SCHOOL DISTRICT AND SUPERVISORY UNION POLICIES

Vermont's education system is governed through both the state Agency of Education and the local school districts or supervisory unions. The Agency of Education is responsible for "overseeing the entire system, for setting and enforcing reasonable standards of quality, and for supporting local districts in delivering quality education", while the school district boards and supervisory union boards are responsible for providing high quality education to their

communities.[247] This section will focus on the local level, on school district boards and on supervisory union boards since local truancy policies are developed at the local school board (supervisory union and district) level.[248]

Supervisory unions function as school districts but generally consist of two or more school districts within a county.[249] "School board" can mean "the board of school directors elected to manage the schools of a school district" as well as "the supervisory union board of directors…."[250] "The school board of a school district is given the authority to "determine the education policies of a school district"[251] for "general application to the district."[252] School districts and supervisory unions are recommended, by the state, to ensure that their attendance policies are consistent with model protocols developed by the secretary of the Agency of Education.[253] The policy should be in writing and be made available to the public.[254]

As required by law, the model policy on attendance provided by the Vermont School Board Association ("VSBA"), sets a baseline policy on student attendance.[255] The model policy refers to state statute for legally acceptable excuses (mentally or physically unable to attend, has completed the tenth grade, is excused by the superintendent, or is enrolled in and attending a postsecondary school), and grants authority to the superintendent to develop rules and procedures to implement the attendance policy.[256][257][258] There are sixty-two superintendents in

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[247] *The Essential Work of Vermont School Boards*, VERMONT SCHOOL BOARD ASSOCIATION 5 (2012) (http://www.vtvsba.org/download/2012EssentialWork.pdf).
[248] VT. STAT. ANN. tit. 16, § 261a(a)(12) (West 2014).
[249] *See id.* § 11(23).
[250] *See id.* § 11(9).
[251] *See id.* § 563(1).
[252] *See id.* § 563(1).
[253] *See id.* § 261a.
[254] *See id.* § 563(1).
[255] *Model Policy on Student Attendance:F25,* VERMONT SCHOOL BOARD ASSOCIATION (http://www.vtvsba.org/policy/f25.html) (last visited Mar. 2, 2015); *See also* Appendix B(4)(f).
[256] VT. STAT. ANN. tit. 16, § 1121.
[257] *See id.* § 11(13) ("Superintendent" means the chief executive officer of a supervisory union and each school board within it.).

Vermont, each with its own superintendent to supervise its public schools.[259][260] For the purpose of this section, the data regarding the local policies will be based on the localities with superintendents. This number will likely fluctuate as the number of supervisory unions and school districts shift over time.[261]

Generally, each superintendent receives "a list of information that a supervisory union, a school board, a school district, a school… is required under State or federal law to make available to… community members, parents, or students."[262][263] Attendance policies are generally not among the items required to be made available to "the electorate, community members, parents or guardians, and students" under state or federal law.[264] The VSBA has created a required attendance policy for each school district, but this does not include specific truancy policy and procedures.[265] This leads to districts and supervisory unions omitting truancy policies from their student handbooks, like in Addison Central Supervisory Union.[266] Their website lists what is required to be made available and does not require the inclusion of a truancy policy in the student handbook that is provided to the student and parents/guardians.[267]

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[258] *Model Policy on Student Attendance:F25, supra* note 255.
[259] *The Essential Work of Vermont School Boards*, *supra* note 247, at 8.
[260] *Vermont Superintendents List*, VERMONT SCHOOL BOARDS ASSOCIATION (Jul. 1, 2014), (http://www.vtvsa.org/files/FY15_SuptList8.pdf); *see also* Appendix B(4)(e).
[261] *See generally Number of Vermont School Districts and Educational Entities,* VERMONT DEPARTMENT OF EDUCATION (http://education.vermont.gov/documents/educ_master_district_list.pdf) (last visited Mar. 2, 2015); *Cf. Vermont Superintendents List*, VERMONT SCHOOL BOARDS ASSOCIATION (Jul. 1, 2014) (http://www.vtvsa.org/files/FY15_SuptList8.pdf). (For example, Rutland-Windsor was a supervisory union according to the *Number of Vermont School Districts and Educational Entities* list, but is not in the *Vermont Superintendents List*).
[262] VT. STAT. ANN. tit. 16, § 212(14).
[263] Memorandum from Vermont Agency of Education to Superintendents, Principals & Heads of Schools (Jul. 23, 2013) (http://education.vermont.gov/documents/EDU-Administrator_Handbook.pdf); *see also* Appendix B(4)(h).
[264] Memorandum, *supra* note 263.
[265] *VSBA Required Policies: State Board Rule 2120.8.3.3,* VERMONT SCHOOL BOARD ASSOCIATION (http://www.vtvsba.org/policiesrequired.html) (last visited Mar. 2, 2015); *see also* Appendix B(4)(g),
[266] *See infra* Appendix B(4) *(*Addison Central Supervisory Union).
[267] *See infra* Appendix B(4) (Addison Central Supervisory Union).

Given that the power to enforce and create specific truancy policies varies with each superintendent or local school board, there is no uniform truancy policy throughout the state. Policies are generally determined at a supervisory union level or district level by the school boards. Thus, the following discussion will use the term "locality" as a way to uniformly refer to a supervisory union or school district.

Out of Vermont's sixty-two supervisory unions and school districts sixteen have published extensive truancy policies online.[268] The rest either do not have comprehensive truancy policies or their policies are not made available on their respective websites.[269] Therefore, the information gathered within is limited to those policies that were accessible online.

There are significant differences between the attendance and truancy policies of each supervisory union and school district, but the largest three are 1) the number of absences before a student is referred to the State's attorney for potential prosecution is inconsistent, 2) the definition of excused and unexcused absence is varied and often non-existent, 3) the availability and scope of pre-court intervention program differs from locality to locality. At least five localities appear to merely mirror Vermont's model policy giving the Superintendent the responsibility to develop administrative rules and procedures.[270]

The number of absences before a student is referred to the State's attorney is inconsistent.

The protocols created by the secretary of the Agency of Education prefer that attendance policies refer students for judicial intervention after no more than ten unexcused absences, or

[268] *See infra* Appendix B(4), *Local Supervisory Union and School Policies* (Addison-Rutland, Bennington-Rutland, Chittenden Central, Chittenden East, Chittenden South, Colchester, Milton Town, North County, Orange East, Orange North, Orange Southwest, Rutland South, Rutland City, Washington South, Washington West, Winooski).
[269] *See generally infra* Appendix B(4).
[270] *See infra* Appendix B(4) (Addison Northeast, Addison Northwest, Franklin Central, Franklin Northeast, Franklin Northwest).

eighteen to twenty days, if both excused and unexcused absences are taken into consideration.[271] However, as will be seen in the second section discussing the schools' policies, school districts tend to set minimum standards or guidelines, which their individual schools build upon to develop their own policies.[272] Common numbers do range between ten and twenty unexcused absences before referral to the state's attorney but, because the register defines "truant" as a student who is absent for the full school day without an acceptable excuse, schools may start their referral to the local truancy officer anywhere from three to ten days of unexcused absences and only refer the case to the State's attorney after future unresolved absences.[273][274][275][276]

Excused and unexcused absences are inconsistently defined and often not defined at all.

The district's definition of an excused absence is critical to the understanding of a truancy policy. Excused absences generally do not count towards a student's "truant status", with some exceptions being Battenkill Valley Supervisory Union and supervisory unions in Chittenden County.[277] Both Battenkill Valley Supervisory Union and Chittenden County Supervisory Unions have higher thresholds before court intervention (20+ days), but they do not differentiate between excused and unexcused absences when it comes to truancy. Eighteen of the localities surveyed consider these to be excused absences: illness, observance of religious holidays, deaths in the family, [family emergency][278], medical appointments, "situations beyond the students control as determined by the school board [Administrator/principal/ superintendent/ designee] or

[271] Vilaseca, *supra* note 5.
[272] *See infra* Procedural Context – School Policies.
[273] *See infra* Appendix B(4) (Addison-Rutland Supervisory Union, Orange East Supervisory Union, Orange North Supervisory Union, Rutland Northeast Supervisory Union, Rutland South Supervisory Union, Rutland City School District).
[274] *See infra* Appendix B(4) (Chittenden Central Supervisory Union, Chittenden East Supervisory Union, Chittenden South Supervisory Union, Colchester School District, Milton Town School District, Washington West Supervisory Union).
[275] *Elementary/Secondary School Register School Year 2014-2015, supra* note 121, at 24.
[276] *See infra* Appendix B(5) (*e.g.* Blue Mountain School district, Rutland Northeast-Leicester School).
[277] *See infra* Appendix B(4) (Battenkill Valley and Chittenden County supervisory unions).
[278] *See infra* Appendix B(4) (Caledonia North Supervisory Union does not include family emergencies in their definition of an excused absence).

circumstance which cause reasonable concern to the parent or guardian for the health or safety of the student" as long as the student's parent or guardian contacts the school verbally or in writing.[279] Other school localities require valid causes for absences to be confirmed in writing.[280]

Some supervisory unions and school districts do not provide definitions of what constitutes an excused absence aside from stating that the "Superintendent [principal] shall develop administrative rules and procedures to ensure implementation [of the attendance policy]" and that the school's student handbook should address attendance issues.[281] Because there is no clear definition of which absences are considered excused or unexcused at the supervisory union level, this could lead to vast discrepancies on how the individual schools creates and implements its own policies. For example, in Poultney High School in Rutland Southwest Supervisory Union, it is considered an unexcused absence when students are serving an out of school suspension, despite it being considered an excused absence by the Vermont Secondary/Elementary School Register.[282]

The availability and scope of pre-court intervention programs differ between localities.

The Secretary of the Agency of Education also recommends that districts and supervisory unions have a family intervention model in place to use in instances of chronic absenteeism.[283] Schools are to implement these intervention models with the intention that they will enhance the attendance rates of their students.[284] However, these recommendations are merely guidelines, and

[279] See infra Appendix B(4) (Addison Northeast Supervisory Union, Addison Northwest, Addison-Rutland, Caledonia North, Colchester, Essex-Caledonia, Essex Town, Franklin West, Franklin Northwest Grand Isle, Lamoille South, Orange East, Orange North, Orange Southwest, Orleans Central, Rivendell Interstate, Rutland Central, Rutland Windsor).
[280] *See infra* Appendix B(4) (St. Johnsbury School District, South Vermont School district).
[281] *See infra* Appendix B(4) (*Franklin Northeast Supervisory Union F21 Student Attendance Policy)*.
[282] *Elementary/Secondary School Register School Year 2014-2015, supra* note 121 at 24.
[283] Vilaseca, *supra* note 5.
[284] Vilaseca, *supra* note 5.

are not binding or required of any district or supervisory union in the state.[285] Of the sixty-two school districts and supervisory unions in the state, twenty-three have publicly accessible intervention plans for students who are unable to attend school.[286] These intervention programs range in scope and include a combination of methods, such as: sending notifications to the parents by letter or phone call, doing a home visit, setting up referrals to community services, creating a plan for services or recommending alternative services, and creating a team that can help ensure a student's attendance in school.[287] As noted below, the availability of intervention programs varies based on resources and as a result, not all schools or students are required to participate in intervention programs.[288]

Based on information found on the locality websites, an estimated 37% of supervisory unions and school districts mention some form of school-based intervention prior to being referred to the state attorney in their truancy policies.[289] The type of school-based intervention varies from each district. For example, Bennington County has a Pre-charge program and Kids are Our Strength Program (KAOS) where the school works with community services, which offer to intervene and provide a restorative justice approach for students to learn how to combat the behaviors that are causing the truancy (ex. bullying).[290] Conversely, in River Valley Technical Center School District the attendance policy merely states that a letter will be sent to the parent after four and eight absences, but it is not clear if other intervention services are

[285] *See supra* Procedural Context – State Regulations.
[286] *See infra* Appendix B(4).
[287] *See generally infra* Appendix B(4).
[288] *See infra* Procedural Context – School Intervention Services.
[289] *See generally infra* Appendix B(4).
[290] Telephone Interview by Ethan Kolodny with Leitha Cipriano, Director, Center of Restorative Justice, Bennington County (Jan. 6, 2015).

offered.[291] Participation in these programs are voluntary for both the schools (to refer) and the students (to participate).[292]

Conclusion and Recommendation

The research conducted shows that attendance and truancy policies vary in many degrees within the various supervisory unions. What is considered an excused absence in one jurisdiction may be different in another. Likewise, a student who goes to school in one supervisory union may have more access to community resources and in-school intervention programs than another. These variances can make it difficult for those involved to tackle the root cause of absenteeism. For example, Andy Strauss, Prosecutor at Chittenden County, looks beyond the label of excused and unexcused absences to see if there is a real problem of truancy, knowing that different schools apply it to students differently.[293]

One way to address this issue would be to have consistent and enforceable minimum standards throughout the localities across the state.[294] Having clearer definitions and uniform minimum standards will force schools to apply their truancy policies more evenly amongst students. Another solution would be for the supervisory unions to publish and provide accessible, up-to-date policies for families to access in order for them know what is considered to be an excused or unexcused absence in their locality and how to submit an excused absence to the administration. For example, Southwest Vermont Supervisory Union's Attendance Policy requires written explanations for all absences instead of a verbal confirmation by the parent or guardian.[295] According to their website, this policy was adopted 16 years ago and is still being

[291] *See infra* Appendix B(4) (River Valley Technical).
[292] Telephone Interview by Ethan Kolodny with Leitha Cipriano, Director, Center of Restorative Justice, Bennington County (Jan. 6, 2015).
[293] Telephone Interview by Mark Macchi with Andy Strauss, Chittenden County Prosecutor (Jan. 12, 2015).
[294] Telephone Interview by Ethan Kolodny with Leitha Cipriano, Director, Center of Restorative Justice, Bennington County (Jan. 6, 2015).
[295] *See infra* Appendix B(4) (South Vermont Supervisory Union).

utilized.[296] The range of truancy policies exhibited by the different localities in Vermont is extremely varied depending on which supervisory union, district or school board a school is under. As will be seen below, some districts choose to not promulgate their own truancy policies, instead relying on their individual schools to come up with their own policies that are in line with state statutes.

ATTENDANCE AND TRUANCY POLICIES OF INDIVIDUAL SCHOOLS

The diversity of policies among individual schools within a local supervisory union or school district is similar to the diversity of policies among school districts themselves. Many supervisory unions or school districts give the authority to formulate truancy policies to schools, rather than promulgating a supervisory union-wide policy.[297] This results in a variety of policies, even among schools within the same district. Using the same three factors applied to school districts as a baseline for the purposes of comparison (number of unexcused absences allowed before students are considered "truant", definition of excused absences, and the availability of intervention services), discrepancies between state guidelines and school polices can be identified when comparing the policies of individual schools.

The number of absences before a student is referred to State's attorney for potential prosecution is inconsistent.

As with supervisory union and school district truancy policies, schools in Vermont allow for a spread in the number of unexcused absences before students are referred to court. This results in a lack of uniformity of truancy policies, even when schools in the same district are compared. While one locality surveyed within this report (North County Supervisory Union)

[296] *See infra* Appendix B(4) (South Vermont Supervisory Union).
[297] *See infra e.g.* Appendix B(5) (Rutland Northeast and Rutland Northwest).

applied a uniform policy across all schools in its jurisdiction,[298] the other districts did not.[299] In Vermont, elementary schools tend to permit fewer absences than middle and high schools in terms of how many unexcused absences are allotted prior to truancy proceedings.[300] Extreme examples include Bennington-Rutland Supervisory Union's Currier Memorial School and The Dorset School, with five and three absences allowed before referral to the State's attorney, respectively.[301] Of the seventeen school districts that have a specific number of unexcused absences included in their publicly accessible attendance policy, seven have policies which allow for court referral at the ten day mark, while ten districts have policies which allow for referral only after more than ten days, which is in conflict with the guidelines set by the Agency of Education.[302][303] The number of unexcused absences permitted by a school before a student is declared "truant" is important because it impacts the amount of time parents have to work with the school prior to being referred to court.

Excused and unexcused absences are inconsistently defined and often not defined at all.

Schools have discretion in determining the definition of an excused absence before referring a student to the State's attorney for truancy proceedings, as evidenced by varying definitions of absence between schools within the same district.[304] While all schools surveyed with posted attendance policies consider illness and family emergencies to be excused absences, there are a variety of other excuses that parents and students can use in some schools and districts, but not in others. For example, Rutland Central Supervisory Union's Proctor Elementary School includes "unsafe travel conditions" in their policy, while Bennington-Rutland

[298] *See infra* Appendix B(5) (North Country Supervisory Union).
[299] *See generally infra* Appendix B(5).
[300] *See generally infra* Appendix B(5).
[301] *See generally infra* Appendix B(5).
[302] *See generally infra* Appendix B(5).
[303] Vilaseca, *supra* note 5.
[304] *See infra* Appendix B(5).

Supervisory Union's The Dorset School institutes an administrative discretionary policy where parents can request that their student's absences be declared excused.[305] District definitions of excused absence are often either built upon or adopted in their entirety by schools. [306] [307] On the other hand, certain schools, such as Sunderland School in Bennington-Rutland Supervisory Union, have no definition of an excused absence in their parent handbook, and make no reference to a district definition.[308] If these schools have attendance policies, they are not published online in any accessible form.

The availability and scope of pre-court intervention program differs between schools.

Intervention services offered by schools to combat truancy display the greatest amount of disparity among the three major factors (number of unexcused absences permitted, definition of unexcused absence, and availability of intervention services) of comparison. This component of truancy policies appears to be within the realm of individual schools, based upon what services are available in their area, rather than their parent school district. For example, Rutland Central Supervisory Union has no required intervention services, but two of their schools have reasonably comprehensive intervention plans.[309] These sorts of plans range from letters sent to parents at varying intervals, to services like conferences with administrators and school counselors, and notifying DCF. Burlington High School has a particularly unique "attendance contract" intervention method in which a student makes an agreement with school administrators

[305] *See generally infra* Appendix B(5).
[306] *See infra* Appendix B(5) (Bennington-Rutland Supervisory Union (Currier Memorial School, The Dorset School), Burlington School District (Burlington High School)).
[307] *See infra* Appendix B(5) (North Country Supervisory Union, Burlington School District (Champlain Elementary)).
[308] *See generally infra* Appendix B(5).
[309] *See infra* Appendix B(5) (Proctor (Elementary & Jr. Sr. High School) and Rutland Town School).

to a specific attendance plan.[310] Unique approaches like this should be an avenue for future research.

There are schools with no published intervention services, such as West Rutland School and Sudbury County School.[311] These schools could have some services available for students who are unable to attend, but these services are likely either not published in their parent handbook, or they administer services on an *ad hoc* basis. Needless to say, the lack of definite information on these particular schools makes it difficult to compare their intervention services with others.

There are potential conflicts between school and supervisory union policies.

Identifying the potential discrepancies between district and school policies will be a critical component in formulating a plan to reduce the amount of variability of truancy policies in the state of Vermont. A number of potential conflicts between school and district policies have already been identified.[312]

Bennington-Rutland Supervisory Union has two potential conflicts with its Currier Memorial School and The Dorset School. In these two cases, the number of unexcused absences permitted before a student is recommended for truancy proceedings is lower in the school policies than in the district policies. Additionally, Burlington School District has two possible violations with its Champlain Elementary and Edmunds Elementary. The nature of this possible violation is the same, with the number of unexcused absences permitted being lower in the school policy than in the district policy. Further investigating of these conflicts could be important for future work and research, particularly in terms of litigation, and lobbying efforts to promote geographic equity.

[310] *See generally infra* Appendix B(5).
[311] *See generally infra* Appendix B(5).
[312] *See generally infra* Appendix B(5).

Conclusions and Recommendations

While a number of school districts comply with the model policies proposed by the secretary of the Agency of Education, this result is not necessarily the best for Vermont's students and families. The model policies proposed by the secretary are not detailed enough to be implemented effectively by the districts and schools and do not contain an adequate amount of information to allow administrators to effectively make decisions regarding attendance.[313] For example, they do not contain any definition for an excused absence, nor do they lay out any kind of staged intervention system in which a family would be contacted and provided with services to help improve their child's attendance.[314] Additionally, the state guidelines do not account for a number of instances that may occur on a regular basis in many schools. For instance, Part C may require a student to be referred to court for having twenty excused absences.[315] This could theoretically result in students who are chronically ill or recovering from surgery to be referred to court. The model attendance policy proposed by the secretary would require additional development if it were to be adopted statewide.

ILLUSTRATING THE ISSUES

To demonstrate the potential application of the following legal arguments we have crafted stories about five fictional children whose lives demonstrate some of the challenges faced by children with a disability, trauma history, or complex poverty-driven personal life. Throughout the legal arguments these stories will be woven in to contextualize the arguments as

[313] Vilaseca, *supra* note 5.
[314] *See supra* Procedural Context – State Regulations.
[315] *See supra* Procedural Context – State Regulations.

they relate to students who are unable to attend school in Vermont, and how they are impacted by the state's truancy proceedings.

Amanda:

Amanda is a student who deals with a complex, poverty driven life. She is considered a child living in poverty. Amanda and her family deal with some of the bigger issues in Vermont, such as lack of housing and drug addictions. Amanda's family is constantly moving in search of stable housing, but due to the low availability of housing in Vermont, it is not often that they stay in one place for a long period of time. Furthermore, Amanda's mother has been addicted to various drugs. Amanda often misses school due to her fear that her mother may overdose while she is away.

Bran:

Bran lives in Rutland County, VT where he attends Rutland Town School. After 10 absences as a result of Bran being sick his case was referred to the State's Attorney's office to begin truancy proceedings. After a preliminary and pre-trial hearing on Bran's case the court proceeded to a merits hearing to adjudicate the merits of the state's petition.[1] Bran contends that his absence was excused since he was, and the school has only submitted school records that indicate his absences were marked as unexcused. It is unclear what evidence Bran can present to successfully challenge the school's records since he did not see a doctor for treatment. Bran's counsel argues that the vagueness of the law is a violation of due process as he has been denied proper notice and an opportunity to fully respond to the state's charge.

CeeCee:

CeeCee is an eleven-year-old sixth-grader living in Montpelier, VT. CeeCee is autistic and was diagnosed at a young age. She has trouble with her social interactions, gets overwhelmed easily, and is particularly resistant to change in her daily routine. Her IEP seeks to accommodate these issues by providing her with an area of the classroom where she can go when she is feeling overwhelmed, providing her with advanced notice of any change of schedule, and allowing her to enter and leave class a few minutes early to avoid the chaos of the hallways. In addition, she has a special education teacher who helps adapt lesson plans to meet her individualized needs.

Starting middle school has been a struggle for CeeCee because school now starts at 7:30am instead of 9:00am as school did in elementary school. Because of this, CeeCee often feels rushed in the morning, and, despite her mother's best efforts to implement a new morning routine, CeeCee has frequent breakdowns and either shows up to school late or not at all. This amounted to fifteen absences in the first half of her school year.

The school sent letters to CeeCee's mom warning her that CeeCee was nearing their 10-absence limit. With no improvement in CeeCee's attendance, the school eventually filed a complaint with the State's Attorney, who initiated truancy proceedings.

Dani:

Dani is a 14-year-old freshman at Brattleboro Union High School. School has always been difficult for her. She often finds it hard to concentrate and frequently acts out in class.

Reading has always been a struggle for her, and she feels particularly anxious when she has to read aloud. Often her behavior results in getting her kicked out of class and sent to the

principal's office. She has very few friends and has always been made fun of for her difficulties in the classroom. Because of this, Dani started cutting school. She does not believe she gets anything out of going to class and would rather spend her time with animals, which is her true passion.

Dani has missed 15 days of school this year. Her school administrators have attempted to get her back in school by telling her that if she does not cooperate she will be sent to court. The school lacks sufficient resources to discover the real problem: Dani suffers from both attention deficit hyperactive disorder and dyslexia and has gone undiagnosed for her entire life. The question is what duty does the school owe the truant Dani if her school or even her parents are unaware of her condition?

Ed:

Ed is in 7th grade. He has cerebral palsy. While it does not interfere with his progress in the general curriculum, it does require him to use special equipment to access his education (i.e. elevators, handrails, etc). As Ed has met the definition of a "qualified disabled person" ("physical or mental impairment that substantially limits a major life activity"), Ed qualified and is under a 504 Plan. Unfortunately, the school is not doing everything in its power to grant Ed a free appropriate public education and meet its reasonable accommodation requirement. Ed has requested that his classes meet on the first floor of the building so that he does not need to climb

up and down the stairs everyday. Alternatively, Ed has requested an elevator key so that he may take the elevator when he pleases. The school has yet to move Ed's classes to the first floor or provide him with an elevator key. Consequently, Ed is forced to climb up and down the

stairs everyday for class where he is picked on by some of the meaner middle school students for his disability. Ed has become depressed and no longer wants to go to school.

LEGAL ARGUMENTS

Introduction

We have identified several potential legal avenues students who are unable to attend school can utilize to contest their participation in a truancy proceeding. A student and their family could challenge the legitimacy of a truancy proceeding if it does not adhere to the due process requirements of the 14th Amendment granting them notice and the opportunity to be heard, abrogates the rights of the student under the IDEA or §504 of the Rehabilitation Act of 1973, ignores the responsibilities of the school to prevent bullying, or is an arbitrary punishment of the student permitted by the vagueness of Vermont's truancy requirements.

Due Process

The 14th Amendment guarantees, "no state shall" deprive "any person of life, liberty, or property, without due process of law."[316] Protected interests in property are typically not established by the Constitution, but are "created and their dimensions are defined" by other sources such as state statutes or regulations that entitle citizens to certain benefits.[317] For example, in *Goss v. Lopez*, the United States Supreme Court held that by instituting a compulsory education program the state of Ohio had established a student's access to public education as a property and liberty interest that could not be withdrawn without due process of

[316] U.S. Const. amend. XIV, § 1.
[317] Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

law.[318] Vermont, like the state of Ohio, has a compulsory education program for all children between the ages of 6 and 16.[319] As a result, public education in Vermont is a protected property and liberty interest that cannot be taken from students without adherence to the procedural requirements of the due process clause of the 14th Amendment.[320]

Having established that public education in Vermont is a protected property interest, it must be determined what procedures are necessary to ensure the due process of law is preserved when a student is engaged in a truancy proceeding. Due process is not a static principle, but is "flexible and calls for such procedural protections as the particular situation demands."[321] There are, however, minimum standards that require the deprivation of life, liberty, or property by adjudication be preceded by "notice and opportunity for hearing appropriate to the nature of the case"[322] at a time when the "deprivation can still be prevented."[323]

Determining the Specifics of Due Process

In *Mathews v. Eldridge,* the Supreme Court held that determining the specific notice and hearing requirements of due process necessitates a weighing of three factors: the interest that will be affected by the State's action, the "risk of an erroneous deprivation" of the interest through the government's used procedures, and the State's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[324]

In the instance of suspension from school, the Supreme Court held in *Goss v. Lopez* that the student's property interest in education is "to avoid unfair or mistaken exclusion from the

[318] Goss v. Lopez, 419 U.S. 565, 574 (1975).
[319] VT. STAT. ANN. tit. 16 § 1121 (West 2014).
[320] U.S. Const. amend. XIV, § 1.
[321] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
[322] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).
[323] Fuentes v. Shevin, 407 U.S. 67, 81 (1972).
[324] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

educational process, with all of its unfortunate consequences."[325] The Court held that the 14th Amendment will not shelter a student "from suspensions properly imposed," but that an unjustified suspension defeats both the student's and the State's interest, and that the risk of erroneous deprivation of property in disciplinary hearings is high.[326] The Court acknowledged that although disciplinarians are often acting in "utmost good faith" they are frequently responding to the "reports and advice of others" and that the "controlling facts and nature of the conduct under challenge are often disputed."[327]

Based on the balancing of the three factors established in *Mathews*, the Supreme Court held in *Goss* that in the case of a suspension of more than 10 days the Constitution requires the student be given "effective notice" and an "informal hearing" where the student has the opportunity to present their "version of the events."[328] Following this hearing, it is up to the discretion of the disciplinarian to bring in the student's accuser, to allow for cross-examination, to permit the student to present their own witnesses, and in the most complex cases to allow the student to bring in counsel to reduce the risk of an erroneous suspension.[329] In the case of a suspension of 10 days or less, the student must be provided with oral or written notice of the charges against them, and, if they deny the charges, an explanation of the disciplinarian's evidence and an opportunity to present their side.[330]

Applying the three balancing factors of *Mathews*,[331] it appears that truancy proceedings, like suspensions, must adhere to the procedural requirements of due process. First, in a truancy proceeding, the student's interest mirrors that of a student at risk of suspension in terms of

[325] Goss v. Lopez, 419 U.S. 565, 579 (1975).
[326] *Id*. at 579-80.
[327] *Id*.
[328] Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Goss v. Lopez, 419 U.S. 565, 583 (1975).
[329] Goss v. Lopez, 419 U.S. 565, 584 (1975).
[330] *Id*. at 581.
[331] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

avoiding "unfair or mistaken exclusion from the educational process."[332] In a CHINS(d) proceeding a student is excluded from the educational process when they must attend at least one hearing.[333] If their case reaches a CHINS(d) judicial proceeding, the even greater interest of both the parent and student, who are both parties in the proceedings, is not having the student unnecessarily removed from their home or family.[334] Second, in Vermont, in a truancy proceeding, like in a suspension, the risk of "erroneous deprivation" is also quite high as discretion as to what is an "unexcused" or "unjustified" absence is left at varying times to the school, the truant officer, the state, and the parents/student.[335] Finally, as to the state's countervailing interests, there is no singular procedure in Vermont so it would not appear that they have demonstrated consistent countervailing interests.[336] Therefore, in order to protect the student's interest in compliance with the constitutional requirements of due process, the student must be afforded no less than what is required for students at risk of a suspension of ten days or less- "effective notice" and an "informal hearing" granting them an opportunity to be meaningfully heard prior to a CHINS(d).[337]

Notice

For over a century, the Supreme Court has held that common justice and fundamental fairness require that a person have an opportunity to be heard prior to a deprivation of a protected interest, and in order to be heard they must have proper notice.[338] Due to the drastic variations in truancy policies across Vermont, the notice provided to students prior to the beginning of a CHINS(d) proceeding is inconsistent and potentially in violation of the requirements of due

[332] Goss v. Lopez, 419 U.S. 565, 579 (1975).
[333] VT. STAT. ANN. tit. 33 § 5311(a) (West 2009); VT. STAT. ANN. tit. 33 § 5313(a) (West 2009).
[334] VT. STAT. ANN. tit. 33, § 5318 (West 2014).
[335] VT. STAT. ANN. tit. 16 § 1126 (West 2014); VT. STAT. ANN. tit. 16 § 1127(a) (West 2014); VT. STAT. ANN. tit. 33 § 5102 (3)(d)(West 2010).
[336] *See generally infra* Appendix B(4).
[337] Goss v. Lopez, 419 U.S. 565, 583 (1975).
[338] Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citing Baldwin v. Hale, 68 U.S. 223, 233 (1863).

process depending on where a student is enrolled in Vermont. For instance, the truancy policy of Rutland Southwest Supervisory Union does not indicate what notice, if any, a parent will receive of a student's status as truant prior to the initiation of CHINS(d) proceedings.[339] In contrast, after 10 unexcused absences a student in the North Country Supervisory Union will receive a letter of notification and is entitled to a conference with the school nurse, school administrators, representatives from DCF, and additional service providers as needed culminating in the creation of a Memorandum of Understanding illustrating what steps and services will be undertaken to ensure the student is able to attend school.[340] Across the state of Vermont, different levels of notice are afforded at different times—and sometimes not at all—potentially denying students due process of law.[341]

Opportunity to Be Heard

The right to be heard is considered a "basic aspect of the duty of government to follow a fair process of decision-making," so as to ensure fair play for the individual and to protect them from arbitrary or unfair deprivation of their protected interests.[342] This prohibition against the deprivation of an individual's property without the opportunity to be heard reflects the esteemed place given to a person's right to enjoy what is theirs, free from the meddling of the government that is deeply "embedded in our constitutional and political history."[343]

For an opportunity to be heard to satisfy due process, it must be conducted under an appropriate standard of proof.[344] A unanimous Supreme Court in *Addington v. Texas,* held that the purpose of a standard of proof in the context of due process "and in the realm of fact-finding,

[339] *See generally infra* Appendix B(4).
[340] *See generally infra* Appendix B(4).
[341] *See generally infra* Appendix B(4).
[342] Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).
[343] *Id*.
[344] Addington v. Texas, 441 U.S. 418, 423 (1979).

is to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[345] Thus the minimum standard of proof "tolerated by the due process requirement" reflects society's view of the weight of the interests at stake, "a societal judgment about how the risk of error should be distributed between the litigants," and how parties are to prepare if they are to be meaningfully heard.[346]

The standard of proof required for a particular type of judicial proceeding is typically the prerogative of the judiciary within that jurisdiction to decide.[347] In Vermont, during a merits adjudication in a CHINS(d) proceeding, the burden is on the State to prove by a preponderance of the evidence that the student's absence was "without justification."[348] The State may meet this burden with "properly admitted school records showing the child's unexcused absence."[349] The state does not have to describe why the absence was unexcused only that it was recorded as such.[350]

The Supreme Court has stated that a standard of proof like Vermont's requiring only that the state prove its case by a preponderance of the evidence indicates that society has a "minimal concern with the outcome," and that the parties "should share the risk of error in roughly equal fashion."[351] However, it does not seem that this standard accurately reflects the weight of the interests at stake in Vermont's truancy proceedings, especially since a CHINS(d) determination could result in both a student's exclusion from school and the termination of parental rights—an

[345] *Id.*
[346] Santosky v. Kramer, 455 U.S. 745, 755 (1982).
[347] Woodby v. INS, 385 U.S. 276, 284 (1966).
[348] In re JH, 70 A.3d 1054, 1057 (Vt. 2013).
[349] *Id*.
[350] *Id*.
[351] Addington v. Texas, 441 U.S. 418, 423 (1979).

interest the Supreme Court has declared to be "far more precious than property.[352] When the interests at stake are both "particularly important" and "more substantial than mere loss of money," the Supreme Court "has mandated an intermediate standard of proof" requiring "clear and convincing evidence."[353]

In *Santosky v. Kramer*, the Supreme Court held that a New York statute requiring the state to meet only a standard of proof of preponderance of the evidence in a parental termination proceeding is both a violation of due process and fundamentally unfair under the *Mathews* balancing test because, "the private interest is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest of favoring that standard is comparatively slight."[354] As a result, the Supreme Court held that it is up to the state legislatures or courts to determine whether a standard of proof equal to or greater than "clear and convincing evidence" be used in a parental termination proceeding.[355] As a CHINS(d) proceeding carries the potential for a termination of parental rights, it would seem that due process requires the Vermont legislature or courts to demand a standard of proof greater than or equal to "clear and convincing evidence" as prescribed by the Supreme Court in *Santosky*.[356]

Vermont's current standard of proof requiring the state to show only that the student's absence was unjustified based on a "preponderance of the evidence" unconstitutionally splits the risk of an arbitrary adjudication between the student and state even though, as in *Santosky,* the termination of parental rights are at stake.[357] Such a low standard of proof makes it more difficult

[352] VT. STAT. ANN. tit. 33 § 5318(a) (West 2014); Lassiter v. Department of Social Services, 452 U.S. 18, 27 (1981).
[353] Addington v. Texas, 441 U.S. 418, 424 (1979).
[354] Santosky v. Kramer, 455 U.S. 745, 758-59 (1982).
[355] *Id*. at 768-70.
[356] VT. STAT. ANN. tit. 33 § 5318(a) (West 2014); Santosky v. Kramer, 455 U.S. 745, 768-70 (1982).
[357] In re JH, 70 A.3d 1054, 1057 (Vt. 2013).

for a student and their parent to know what evidence is sufficient to combat the state's low burden of proof as it would seem that the state can meet their burden of proof relatively easily.

Illustrating the Issues

The failure to adhere to the requirements of due process could disproportionately impact children with disabilities, trauma histories, and complex poverty-driven backgrounds. For instance, as Amanda's family is without stable housing, even if they are in the enviable position of being enrolled in a supervisory union that requires a letter be sent prior to the initiation of truancy proceedings, without a stable mailing address, they could still be denied effective notice and an opportunity to be heard. Without a clear idea of what evidence can be presented at a merits adjudication, it is unclear how Amanda can dispel the school's assertion that her absence was without justification when she stayed home out of fear that her mother would overdose. If Amanda's case were to proceed to the judicial phase she may even be reluctant to reveal the true cause of her absence out of fear of removal from her home as it is unclear what her rights are in regards to the evidence she can present.

Similar to Amanda's experience, it is unclear what evidence Bran could present to defend himself against the school's charge that he was absent without justification. Even though Bran was sick, which is within the school's definition of an excused absence, he does not know what useful evidence he can bring to counter the school's claims, as he did not see a doctor for

treatment and thus does not possess a doctor's note. Since the school need only submit school records indicating that he was marked as absent to meet their burden of proof, the low standard of proof makes it impossible for Bran to be prepared and meaningfully heard.[358]

[358] In re JH, 70 A.3d 1054, 1057 (Vt. 2013) (established the state's burden to prove absence was unjustified by a preponderance of the evidence that could consist only of "properly admitted school records").

For Cee Cee, Dani, and Ed, the basis of their defenses against the school's truancy charge is that their absences are a result of their schools' failure to meet their needs as students with disabilities. Within the current scheme it is unclear what evidence they can present to contest the school's claims that their absences are without justification. Due to the lack of effective notice and the opportunity to be heard, they are vulnerable to deprivation of their right to a public education, despite their protections under the ADA and the IDEA as students with disabilities.

Litigating Special Education Cases Under the IDEA, Title II of the ADA, & Section 504

The IDEA, Title II of the ADA, & Section 504 all provide various means of litigating special education cases. The IDEA has generally been understood to be the primary vehicle available to parents for disputing the identification, evaluation, or educational placement of the child, or when a parent believes the child is not receiving a FAPE.[359] §1415 of the IDEA outlines the procedural protections in place and what protections parents can invoke at different points in the process.[360] After a rigorous administrative complaint process, which includes a due process hearing, the option of mediation, and an administrative appeals process, parties unhappy with the outcome of the administrative proceedings are able to bring a civil action in any state court of competent jurisdiction or in a district court of the United States.[361]

Over the past several years, many school districts across the country have found children ineligible for services under the IDEA, with courts upholding these findings.[362] If eligibility under IDEA continues to be cut back, parents of children with disabilities are likely to bring

[359] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(b)(6)(A) (West 2005).
[360] *See Id*. § 1415.
[361] *See Id.* §1415(i)(2)(A).
[362] Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, ABA CHILDREN'S RIGHTS LITIGATION, (May 23, 2011) http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2011-section-504-ada-idea.html (*see, e.g., Anello v. Indian River Sch. Dist.*, 355 F. App'x 594 (3d Cir. 2009); *Brado v. Weast*, 2010 WL 333760 (D. Md. 2010).)

more claims for services under Section 504 and Title II of the ADA.[363] As will be discussed in more detail below, Section 504 prevents schools from discriminating because of a disability, while Title II prevents state and local governments and school districts from disability discrimination.[364]

Section 504 and the ADA have often been viewed as supplemental causes of action in special education cases, typically used when a student on or eligible for IDEA services has a plausible claim for damages relief.[365] The general consensus among courts is that the cause of action in IDEA does not allow claims for compensatory damages; however, Section 504 and Title II do allow for compensatory damages in certain cases.[366] Yet, Section 504 and the ADA remain underdeveloped as avenues of judicial relief in many special education cases[367]

The hope is that this underdevelopment of services may end soon, as the 2008 Amendment to the ADA has greatly expanded Section 504/ADA coverage, overturning Supreme Court precedent that previously narrowed the coverage of the ADA and Section 504.[368] The special education rights conferred by Section 504 and the ADA are critical to children and include procedural protections, an obligation by the school to provide appropriate education that meets the needs of those children as adequately as it does the needs of children without

[363] Weber, *supra* note 157.
[364] Weber, *supra* note 157.
[365] Weber, *supra* note 157.
[366] Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, ABA CHILDREN'S RIGHTS LITIGATION (May 23, 2011) (http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2011-section-504-ada-idea.html) (section 504 establishes a private right of action which allows victims of prohibited discrimination, exclusion, or denial of benefits to seek "the full panoply of remedies, including equitable relief and [compensatory] damages." Greater L.A. Council on Deafness, Inc. v. Zolin, 812 F.2d 1103, 1107 (9th Cir.1987).)
[367] One such example: "We usually hear from parents that the school has not exhausted all of its resources, and they often have paperwork to show the school has reneged on what they said they were going to do. Our role is to be that bridge, because it is true that special education regulations are complex and sometimes parents don't know their rights and they might distrust the schools. Or perhaps refuse services or refuse to sign papers because they are suspicious. Oftentimes, parents are very stressed and are distrustful of the school and they don't think the school treats them well so they throw up a wall. We help that communication flow." – Interview by Joanna Clark with Karen Price, Associate Director, Vermont Family Network (Feb. 6, 2015) (on file with author).
[368] Weber, *supra* note 157.

disabilities, and the provision of special rights in disciplinary proceedings.[369] These rights will all be discussed in more detail below, specifically in relation to truancy.

Avoid: Identification Pitfalls

Identifying children in need of special education and related services under the IDEA.

School districts are required to identify, locate, and evaluate all children in their jurisdiction who are in need of special education and related services in accordance with the Child Find provision of the IDEA:[370]

> (3) Child find
>
> (A) In general
>
> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

Individuals with Disabilities Education Act 20 U.S.C. § 1412(a)(3)(A) (2005).

Although the burden technically lies with the school, in practice, parents usually drive the process of having their child diagnosed and evaluated for services under the IDEA. A parent, State educational agency, other educational agency, or local educational agency may initiate a request for an initial evaluation, but ultimately parents must give their consent for the evaluation and any services.[371] To have failed its obligation under the IDEA to identify students with disabilities, a school district must have overlooked clear signs of disability or been negligent in

[369] Weber, *supra* note 157.
[370] Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(3)(A) (2005).
[371] Individuals with Disabilities Education Act, 20 U.S.C. § 1414(a)(1)(D)(i)(I)-(II) (2005).

failing to order testing, or there must have been no rational justification for not deciding to evaluate.[372]

As the Third Circuit so persuasively stated:

> [[A] child's entitlement to special education should not depend upon the vigilance of the parents (who may not be sufficiently sophisticated to comprehend the problem) nor be abridged because the district's behavior did not rise to the level of slothfulness or bad faith. Rather, it is the responsibility of the child's teachers, therapists, and administrators—and of the multi-disciplinary team that annually evaluates the student's progress— to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly.

M.C. on Behalf of J.C. v. Central Regional School Dist., 81 F.3d 389, 397 (3rd. Cir. 1996).

Identifying students with disabilities who qualify for a §504 plan

A school or educator must evaluate a student when they have reason to suspect that a child may have a disability and is in need of accommodations.[373] The school must notify the parent(s) of the need for an evaluation and evaluate the student.[374] If the student then qualifies for a §504 plan, a plan must be developed and implemented in tandem with the 504 team.[375] As previously mentioned, a student must demonstrate that they have a "mental or physical impairment that substantially limits one or more major life activities."[376] When determining whether the "substantially limits" requirement is met, school personnel should consider the nature and severity of the impairment, the duration of the impairment, and any long-term impact

[372] J.S. v. Scarsdale Union Free School Dist., 826 F.Supp.2d 635, 661 (S.D. N.Y. 2011).
[373] *Guidelines for Educators and Administrators for Implementing Section 504 of Rehabilitation Act of 1973-Subpart D,* U.S DEPT. OF EDUC. FOR CIVIL RIGHTS 25 (2010) (https://doe.sd.gov/oess/documents/sped_section504_Guidelines.pdf); *see* Appendix C(1)(k).
[374] *Guidelines for Educators and Administrators for Implementing Section 504 of Rehabilitation Act of 1973-Subpart D, supra* note 373, at 25.
[375] *Guidelines for Educators and Administrators for Implementing Section 504 of Rehabilitation Act of 1973-Subpart D, supra* note 373, at 25.
[376] *Guidelines for Educators and Administrators for Implementing Section 504 of Rehabilitation Act of 1973-Subpart D, supra* note 373, at 3.

of the impairment.[377] Section 504 and the ADA do not provide any operational criteria for what this all means or how to apply it, relying instead on school personnel to use their collective and professional judgment to make these determinations.[378] This may particularly prove troublesome if the school lacks resources or the knowledge to properly make these determinations.[379]

Sometimes, a school district and parents disagree on the details or enforcement of the child's 504 plan or that he/she has a pervasive impairment that is "substantially limiting." In this circumstance, the parent(s) have several options: 1) informal negotiation with the school (meetings with the school may always be requested); 2) alternative dispute resolution (i.e. mediation); 3) impartial hearing ("Section 504 says the school must give you the option of an 'impartial hearing.' This is like a short trial where you present your side of the story. You need send a letter to the school district, formally requesting an impartial hearing."); file a complaint with the Office for Civil Rights within 180 days of the violation (this is essentially a letter claiming that the school violated Section 504); or, 5) file a lawsuit, if you believe the school is discriminating against your child because of his or her disability).[380]

Illustrating the Issues

Due to Ari's complex, poverty-driven family life, which includes a lack of stable housing

[377] Smith, *supra* note 151 at 337.
[378] Smith, *supra* note 151 at 337.
[379] *See generally* Telephone Interview by Jillian Schlotter with Kathy Stergas, Guidance Counselor, Hunt Middle School (Feb. 12, 2015) (Hunt Middle School only has 1.4 guidance counselors for approximately 400 students); Telephone Interview by Lina Drada with Laura Singer, Principal, Albert D. Lawton Middle School (Feb. 6, 2015) ("there is a lack of counselors and therapists that are out in the community to help parents who are in crisis…the team…is limited in resources and have so many calls that they do not have the resources to address all of the issues and then the student either continues to not show up or they show up with a crisis").
[380] S. James Rosenfeld, *Section 504 and IDEA: Basic Similarities and Differences*, WRIGHTSLAW (http://www.wrightslaw.com/advoc/articles/504_IDEA_Rosenfeld.html) (last visited Feb. 22, 2015); *supra* note 15; *see also* Andrew M.I. Lee, 5 *Options for Resolving a 504 Plan Dispute,* UNDERSTOOD, https://www.understood.org/en/school-learning/your-childs-rights/dispute-resolution/5-options-for-resolving-a-504-plan-dispute (last visited May 22, 2014).

and a parent addicted to drugs, she runs a greater risk of having a learning disability go undiagnosed. This could contribute to an unwillingness to attend school and, if allowed to progress, an eventual violation of the school's attendance policy and referral to court. Ari is in a particularly vulnerable position in terms of getting a diagnosis for her learning disability for several reasons. First, an evaluation for a learning disability and the implementation of an IEP, as discussed below, requires parental participation and consent throughout the process. With a parent who may be unable to participate in this process due to an addiction, Ari may lack the important educational advocacy parents typically offer. Second, schools may mistake Ari's learning disability for a lack of motivation or due to poor role models. Additionally, due to her unstable housing, schools may attribute Ari's challenges to moving around so much, and may not be privy to her educational history if she has had to transfer schools. Third, Ari may have a learning disability caused by the conditions associated with her poverty, such as stress, malnutrition, poor heath, that the IDEA does not yet recognize as a covered disability.[381] Researchers have found that stress, in particular, strongly influences brain development.[382]

However, this may not translate into eligibility under the IDEA. All of these conditions expose Ari to a greater risk of having a disability go undiagnosed and suffering the logical consequence of absenteeism.

Dani's story reflects a slightly different situation in terms of issues that can arise when identifying children with disabilities. Dani's AD/HD and dyslexia more clearly qualify her as a "child with a disability" under the IDEA. Still, her disability may go undiagnosed, especially if she is progressing from year-to-year in school. Despite Dani and potentially Ari having

[381] James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455, 1464 (2013).
[382] Ryan, *supra* note 381, at 1485.

undiagnosed disabilities, the IDEA outlines an administrative process for parents or guardians, allowing them to request an evaluation by the school. Dani and Ari's parents can invoke §1415, which provides an opportunity for any party to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child."[383] Once the complaint is received, their parents take part in an impartial due process hearing.[384] If either party is dissatisfied with the outcome of the hearing, parties can appeal these administrative determinations in a civil action.[385] Getting on an IEP would afford Dani and Ari the full protections of the IDEA, which would address underlying issues before they led to absenteeism prior to the initiation of a truancy proceeding to help them attend and succeed in the classroom.

The Benefits and Challenges of the "Substantial Emotional Disturbance" Categorization

Emotional disabilities, codified as a disability in the IDEA as a "serious emotional disturbance", can be hard for schools to identify because they are often confused with social maladjustment, which is not considered a disability under IDEA standards.[386] This difficulty can arise with regard to truancy, which likewise straddles the fine line between free will and the involuntary expression of a disability. The Department of Education defines "serious emotional disturbance" in the following way:

> (4)(i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
>
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

[383] Individuals with Disabilities Education Act, 20 U.S.C § 1415(b)(6)(A) (West 2005).
[384] *See id*. § 1415(f)(1)(A).
[385] *See id*. § 1415(i)(2)(A).
[386] 34 C.F.R. 300.8(c)(4)(ii) (2007).

(C) Inappropriate types of behavior or feelings under normal circumstances.
(D) A general pervasive mood of unhappiness or depression.
(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i) (2007).

Vermont has adopted a slightly different definition in an effort to provide a "Coordinated Service Plan" to children experiencing a severe emotional disturbance so that they will not be eligible for services in one agency, only to be denied services in another agency because of a different definition.[387] Vermont defines a child with a severe emotional disturbance in the following way:

"Child or adolescent with a severe emotional disturbance" means a person who:

A. exhibits a behavioral, emotional, or social impairment that disrupts his or her academic or developmental progress or family or interpersonal relationships;
B. has impaired functioning that has continued for at least one year or has an impairment of short duration and high severity;
C. is under 18 years of age, or is under 22 years of age and eligible for special education under state or federal law; and
D. falls into one or more of the following categories, whether or not he or she is diagnosed with other serious disorders such as mental retardation, severe neurological dysfunction or sensory impairments:
    i. Children and adolescents who exhibit seriously impaired contact with reality and severely impaired social, academic and self-care functioning whose thinking is frequently confused, whose behavior may be grossly inappropriate and bizarre and whose emotional reactions are frequently inappropriate to the situation.
    ii. Children and adolescents who are classified as management or conduct disordered because they manifest long-term behavior problems including developmentally inappropriate inattention, hyperactivity, impulsiveness, aggressiveness, anti-social acts, refusal to accept limits, suicidal behavior or substance abuse.
    iii. Children and adolescents who suffer serious discomfort from anxiety, depression, irrational fears and concerns who symptoms may be exhibited as serious eating and sleeping disturbances, extreme sadness of suicidal

[387] *Act 264: A Law on Behalf of Children and Adolescents Experiencing a Severe Emotional Disturbance and Their Families*, DEPARTMENT OF MENTAL HEALTH: AGENCY OF HUMAN SERVICES (http://mentalhealth.vermont.gov/cafu/act264/description) (last visited Feb. 26, 2015); *see* Appendix C(1)(l).

> proportion, maladaptive depending on parents, persistent refusal to attend school or avoidance of non-familial social contact.

VT. STAT. ANN. tit. 33 § 4301(3) (West 2014).

Act 264 mandates that the departments for mental health, education, and child welfare work together on behalf of children and adolescents experiencing a severe emotional disturbance through individual plans for youth in need, as well as interagency planning, budgeting, and service development.[388] Vermont's commitment to providing this level of coordination of care for children suffering from severe emotional disturbance implies that they would favor a more inclusive outcome when it comes to distinguishing between students who are socially maladjusted and those who have a severe emotional disturbance in favor of the latter.[389] That legislative priority, coupled with the fact that "substantial emotional disturbance" does not require any official diagnosis, makes it a potentially powerful tool for special education advocates in Vermont.[390]

Illustrating the Issues

For someone like Ari, who has experienced the trauma of having a parent addicted to drugs and the long-term effects of stress from living in poverty, the IDEA's "substantial emotional disturbance" disability may serve to qualify her for protections and services that will ultimately help her get to and stay in school. Given Ari's background, this categorization is not outside the realm of possibility. Students in Vermont with substantial emotional disturbances

[388] *Act 264: A Law on Behalf of Children and Adolescents Experiencing a Severe Emotional Disturbance and Their Families*, *supra* note 387.
[389] VT. STAT. ANN. tit. 33 § 4301(2) (West 2014).
[390] Cheryl Brauner and Cheryll Stephens, *Estimating the Prevalence of Early Childhood Serious Emotional/Behavioral Disorders; Challenges and Recommendations,* 121 (3) THE PUBLIC HEALTH REPORT 303, 304 (May-Jun. 2006) (*available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1525276/pdf/phr121000303.pdf).

account for nearly 15% of the total number of Vermont students with disabilities recognized under the IDEA.[391]

Address: Updating IEPs And §504 Plans

Requirements For Updating IEPs And §504 Plans

Addressing absenteeism as it arises, by creating a measurable annual goal of attendance to work towards and improve, could keep many students with disabilities from being unnecessarily subject to truancy proceedings. As discussed above, schools are required to review students' IEPs and §504 plans at least annually and reevaluate students every three years.[392] Additionally, IEPs must be updated as appropriate if there is any lack of expected progress towards the documented goals.[393] Proactively addressing absenteeism or the insufficient accommodations which are causing absenteeism as it becomes an issue is not only a smart preventative step, it also is the school's legal duty, as seen in the cases below.

Addressing Absenteeism In IEPs And §504 Plans

Two cases from Massachusetts district courts underscore a school's duty to address excessive absenteeism of a student in his or her IEP. The same logic can also be applied to the updating of §504 plans. In *Springfield School Committee v. Doe*, a student, Quetzal Doe, had difficulties with attention, concentration and had overall poor academic skills, which subsequently led to behavioral and discipline issues, on top of poor attendance.[394] Doe was found

[391] *Child Count Information Disability Percentage by SU,* VERMONT AGENCY OF EDUCATION (Dec. 1, 2013) (http://education.vermont.gov/documents/EDU-Data_2013_Special_Education_Child_Count_Disability_Percentage_by_SU.pdf); *see* Appendix C(1)(m).
[392] *See supra*, Legal Arguments: IDEA/504.
[393] Individual with Disabilities Education Act, 20 U.S.C. §1414(d)(4)(A)(ii) (2005).
[394] Springfield Sch. Comm. v. Doe., 623 F. Supp. 2d 150, 153 (D. Mass. 2009).

eligible for special education services and eventually put on an IEP, which provided for counseling and implementation of a behavior plan among other services.[395]

Upon turning 16 years old, Doe dropped out of Springfield's school district, eventually enrolling in an adjacent school district, but not until approximately a year later.[396] Between the start of the school term at Springfield and Doe's eventual departure, he missed 33 days of school; yet, his special education team did not reconvene as a result of these absences nor was Doe ever contacted for an explanation of his absences.[397]

Doe subsequently brought this suit, alleging that he was denied a FAPE because of Springfield's failure "to properly and timely convene a Team meeting to address [his] poor attendance and lack of effective progress entitling [him] to compensatory education."[398] Springfield, in response, asserted "there has been no explicit statutory or regulatory directive establishing the responsibility of the district when a student who is eligible or potentially eligible for special education is chronically absent from school."[399]

The court, in affirming the hearing officer's ruling, held that the school district did have a duty to respond to Doe's chronic absenteeism, particularly when the truancy became excessive, as it did here; failing to do so in a timely manner resulted in the denial of a FAPE for Doe.[400] As the hearing officer explained, one of the goals of Doe's IEP was to "improve" his basic handling of school responsibilities, such as being late to and from class, among other behavioral issues.[401] "Behavior management services fall within the scope of services a school district may be

[395] *Id*.
[396] *Id*. at 154.
[397] *Id*.
[398] *Id*. at 158.
[399] *Id*. at 158-59.
[400] *Id*. at 160.
[401] *Id*. at 161.

required to provide under the IDEA."[402] Thus, the IEP team had a responsibility to make a determination as to whether Doe's "truancy" was related to his disability and, if it was, to address it through the IEP.[403]

Another Massachusetts case further illustrates this point. In *Lamoine School Committee v. Ms. Z. ex rel. N.S.*, the court held that Lamoine school district failed to address N.S.'s excessive absenteeism via his two IEPs, citing to the 2002-03 IEP, as it did not "…address all areas of need, i.e. social, emotional, and mental health, all of which had a direct impact on educational benefit" and the 2003-04 IEP, as it was not the least restrictive educational setting.[404] "The September 9, 2002 IEP specifically identifies his attendance as an issue [and]…that [there] might be a need in the future to have a modified school day for [N.S.] should difficulties arise with getting [him] to school [within] the traditional hours."[405] It was further mentioned that N.S. failed to attend class on November 15, 2002, when he was scheduled to be observed, and that his teacher then acknowledged that he had attended his class only once or twice all semester.[406] Yet, even with this knowledge, Lamoine failed to address the issue of N.S.'s absenteeism until November 25, 2002, in an IEP that did not even become effective until the following month.[407]

Besides the clear lack of expediency, the court found the November 25th IEP failed in several other regards. The IEP had a two-fold approach to addressing his absences: assign counseling services for one hour per week and waive the school attendance policy on tardiness.[408] Yet, the IEP never actually explained what the objectives and goals of the

[402] Springfield Sch. Comm. v. Doe., 623 F. Supp. 2d 150, 161 (D. Mass. 2009) *quoting* Rome Sch. Comm. v. Mrs. B., 247 F.3d 29, 32 (1st Cir. 2001).
[403] Springfield Sch. Comm. v. Doe., 623 F. Supp. 2d 150, 161 (D. Mass. 2009).
[404] Lamoine Sch. Comm. v. Ms. Z. ex rel. N.S., 353 F. Supp. 2d 18, 29 (D. Me. 2005).
[405] *Id*. at 33.
[406] Lamoine Sch. Comm. v. Ms. Z. ex rel. N.S., 353 F. Supp. 2d 18, 33 (D. Me. 2005).
[407] *Id*.
[408] *Id.*

counseling were or how it would improve N.S.'s attendance at school.[409] Furthermore, the court determined that Lamoine and the IEPs failed to address all areas of N.S.'s needs, as it did not anticipate attendance and lateness issues, did not account for his presence or absence from school, and renounced its responsibilities, both legally and professionally (particularly in regards to criticizing N.S.'s mother when she attempted to be proactive and come up with solutions for N.S.'s attendance and behavioral issues).[410]

"Here, Lamoine knew or should have known N.S. was having attendance and tardiness problems from at least early September 2002; by December 2002, N.S. had effectively stopped attending school. Nevertheless, on January 17, 2003, when the issue came up, Lamoine could not even quantify the amount of time N.S. had missed from school."[411] It is the responsibility of the teachers, therapists, and administrators to determine the educational needs of the child and respond to any deficiencies, not whether or not the parents are vigilant in obtaining these services themselves.[412] A free appropriate education requires at a minimum that the student be present and on time to school.[413] Thus, the court held that Lamoine failed in not addressing via the IEPs, N.S.'s continued absence and tardiness and that these IEPs were not "adequate and appropriate."[414]

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[409] *Id.*
[410] *Id.* at 37.
[411] *Id.* at 38.
[412] Lamoine Sch. Comm. v. Ms. Z. ex rel. N.S., 353 F. Supp. 2d 18, 35 (D. Me. 2005) *quoting* M.C. ex rel. JC v. Central Regional School District, 81 F.3d 389, 396–97 (3d Cir. 1996).
[413] Lamoine Sch. Comm. v. Ms. Z. ex rel. N.S., 353 F. Supp. 2d 18, 34 (D. Me. 2005).
[414] Lamoine Sch. Comm. v. Ms. Z. ex rel. N.S., 353 F. Supp. 2d 18, 34 (D. Me. 2005) *quoting* Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 788 (1st Cir. 1984).

Illustrating the Issues

Similar to the students above, CeeCee is already on an IEP at her school due to her autism. However, if her school is not updating her IEP to account for her recent and habitual absences, their failure to do so could amount to a denial of a free appropriate public education for CeeCee. CeeCee's move to middle school and the new educational accommodations that move would require should have either been anticipated in advance by her IEP team during her transition or addressed as soon as her absenteeism became apparent.

Ed is situated similarly to CeeCee. Ed, too, already has an identified disability and is on a Section 504 plan. However, Ed's school has yet to respond to Ed's reasonable request for accommodations that would allow him to better access his education. As a result, his Section 504 plan has not been updated to reflect these requests. Ed's absenteeism is a direct consequence of his Section 504 plan not adequately addressing his needs, and the school's failure in this regard amounts to a denial of a free appropriate public education.

Alleviate: Tempering Discipline For Students With Disabilities

IDEA—"Stay Put" Provision & Manifestation Determination Meetings

Chronic absenteeism in violation of a school's truancy policy carries with it the risk of what can be described as one of the harshest disciplinary measures: a school's recommendation to the state's attorney to initiate a CHINS(d) proceeding as a result of the student's habitual absences.[415] An ever-present feature of these proceedings is the threat that a child will be removed from his or her home.[416]

[415] VT. STAT. ANN. 16 § 1126(c) (West 2014).
[416] *See id*.

Despite the harshness of this disciplinary measure, students with disabilities are not explicitly protected from truancy proceedings in the same way they would be for other so-called "bad behaviors" under the IDEA.[417] For example, schools seeking to suspend or expel a student with a disability for a violation of the school's code of conduct are required to abide by the procedural safeguards set forth in §1415(j)-(k) of the IDEA:

> (j) Maintenance of current educational placement
>
> Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.
>
> (k)(1)(E) Manifestation determination
>
> (i) In general
>
> Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child' s IEP, any teacher observations, and any relevant information provided by the parents to determine—
>
> (I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP
>
> (ii) Manifestation
>
> If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.
>
> (F) Determination that behavior was a manifestation
>
> If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall--

[417] Individuals with Disabilities Education Act, 20 U.S.C. §1415(k)(1)(B) (2005).

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

20 U.S.C. §1415(j)-(k)(1)(E-F) (2005).

Subsection (G) accounts for special circumstances in which a school may remove a student from their current educational placement without regard to whether their behavior was a manifestation of their disability.[418] These circumstances include possession of a weapon at school, possession, use or sale of illegal drugs at school, or infliction of serious bodily injury upon another person.[419]

Honig v. Doe is the only Supreme Court case that interprets §1415(j) of the IDEA, commonly known as the "stay-put" provision, of the IDEA.[420] In *Honig*, the San Francisco Unified School District (SFUSD) sought to expel two students for violent and disruptive conduct related to their disabilities.[421] The issue before the court was whether the SFUSD violated "stay-put" provision, as outlined in §1415(j).[422]

The first student, John Doe, was a 17-year-old student whose IEP identified him as a socially and physically awkward adolescent who experienced considerable difficulty controlling

[418] Individuals with Disabilities Education Act, 20 U.S.C. §1415(k)(1)(G) (2005).
[419] *See id.*
[420] Honig v. Doe, 483 U.S. 305, 308 (1988).
[421] *Id*. at 312.
[422] *Id*. at 308.

his impulses and anger.[423] One of the goals listed in his IEP was to improve his ability to relate to his peers and to cope with frustrating situations without resorting to aggressive acts.[424] One day at school, Doe responded to the taunts of a fellow student by choking him and subsequently kicking out a school window when he was brought to the principal's office.[425] The school suspended him for five days and ultimately decided to expel him.[426] His mother protested the actions, eventually filing suit against the school district.[427]

The second student, Jack Smith, was identified as an emotionally disturbed child unable to control verbal or physical outbursts.[428] His IEP noted that he was easily distracted, impulsive, and anxious.[429] Smith continued his disruptive behavior, which included stealing, extorting money from classmates, and making sexual comments to female classmates.[430] The school suspended him for 5 days before recommending his expulsion.[431] His grandparents protested on similar grounds as Doe's mother.[432] The school eventually canceled his expulsion hearing in favor of providing home tutoring for Smith.[433] Nonetheless, Smith sought and obtained leave to intervene in Doe's suit.[434]

The Supreme Court held in an opinion written by Justice Brennan that the language in the "stay-put" provision was unequivocal in providing that a child shall remain in his or her current educational placement during the pendency of any proceedings initiated under the EHA, and that

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[423] *Id*. at 312.
[424] *Id*. at 312-13.
[425] *Id*. at 313.
[426] *Id*.
[427] *Id*. at 314.
[428] *Id*.
[429] *Id*. at 315.
[430] *Id.*
[431] *Id.*
[432] *Id.*
[433] *Id.*
[434] *Id*

the action undertaken by SFUSD was therefore a violation of the "stay-put" provision.[435] Although the school district argued that Congress could not have possibly meant to require school districts to return violent or dangerous students to school while EHA proceedings ran their course, Brennan vehemently rejected this proposition.[436] He wrote, "We think it clear that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students…In doing so, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts."[437] Brennan ultimately concluded that suspensions in excess of 10 schooldays constituted a "change in placement"—a view now codified in §1415(k) of the amended IDEA.[438]

The IDEA's disciplinary provisions as they now stand have been the subject of much debate. Critics of the disciplinary provisions provide three main arguments: 1) *Honig*'s dual system of discipline for disabled and nondisabled students is unfair, 2) disciplinary provisions protect disabled students at the expense of nondisabled students, and 3) schools will be disincentivized from identifying students with disabilities if it would result in disciplinary immunity.[439] Advocates, on the other hand, argued that these provisions are important because disciplinary infractions have frequently been invoked by school districts as a pretext to exclude students with disabilities.[440]

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[435] *Id*. at 323.
[436] *Id*.
[437] *Id.* at 323-24.
[438] *Id*. at 328-29.
[439] SAMUEL BAGENSTOS, DISABILITY RIGHTS LAW 697 (2nd ed. 2013)
[440] *Id.*

Disciplinary Provisions Under §504 Of The ADA

Section 504 protects students with disabilities from being improperly removed from school for misconduct that is related to their disability.[441] As a general rule, Section 504 and IDEA apply to the disciplinary removal of students with disabilities in a similar way.[442] Before a district may implement a disciplinary action that constitutes a "significant change in placement", it must evaluate the student to determine whether his/her misconduct is either related to a disability or due to an inappropriate placement (this type of evaluation is commonly referred to as a "manifestation determination").[443] If a student's misconduct is a manifestation of his/her disability, a district cannot implement a disciplinary action that constitutes a significant change in the student's placement.[444] If the misconduct is not a manifestation of his or her disability, a district can discipline the student in the same manner that it disciplines non-disabled students for the same misconduct.[445]

Under Section 504, unlike IDEA, a district does not have to provide a disabled student educational services during the period of time the student is properly removed from school for disciplinary reasons.[446] Pursuant to the Vermont Special Education Rules[447], a Section 504 student shall not be removed from his or her current educational placement for disciplinary reasons for more than 10 cumulative school days in a school year unless a re-evaluation has taken place, as defined by 34 C.F.R. §104.35, a determination by the student's Section 504 team has been made that the conduct is not a result of his or her disability, and when the removals

[441] 7-1 Vt. Code R. § 12:4312(1) (2015) (available at http://education.vermont.gov/documents/EDU-Rules_2360_Special_Ed.pdf).
[442] *See id*. § 12:4312(2).
[443] *See generally id*. § 12:4312.
[444] *See id.* § 12:4312(4).
[445] *See id*. § 12:4312(3).

[446] *See generally id*. § 12:4312.
[447] *See id*. § 12:4312(6).

constitute a change in placement as defined in Rule 4313.7.[448] When it has been determined by the student's Section 504 team that the conduct is not a result of the student's qualifying disability, the student may be subject to the same disciplinary proceedings, including suspension or expulsion, as a non-disabled child.[449] However, when the student's Section 504 has determined that the conduct is a result of his or her qualifying disability, a change in the child's program or placement may be implemented via the Section 504 team and they may respond to the conduct by designing, amending and/or enforcing a plan of behavior management.[450] The school district, parent, and relevant members of the child's 504 plan should collectively review all relevant information to determine if the conduct in question was caused by or is directly related to the child's disability, or if the conduct in question was the direct result of the school's failure to implement the 504.[451] If the school, parent, and relevant members of the 504 Team make the determination that the conduct was a product of the child's disability, the team shall either: (a) [c]onduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or (b) [i]f a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior."[452]

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[448] *See id*. § 12:4312(2), *see* 7-1 Vt. Code R. § 12:4313.7 (2015) (available at http://education.vermont.gov/documents/EDU-Rules_2360_Special_Ed.pdf) ("for purposes of removals of a child with a disability from the child's current educational placement under Rules 4313.1 through 4314.4, a change of placement occurs if: (a) The removal is for more than 10 consecutive school days; or (b) The child has been subjected to a series of removals that constitute a pattern-- (1) Because the series of removals total more than 10 school days in a school year; (2) Because the child's behavior is substantially similar to the child's behavior in the incidents that resulted in the series of removals, taken cumulatively, is determined, under Rule 4313.1(f), to have been a manifestation of the child's disability; and (3) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.").
[449] *See id*. § 12:4312(3).
[450] *See id*. § 12:4312(4).
[451] 7-1 Vt. Code R. § 12:4313.1(e)(1) (2015) (available at http://education.vermont.gov/documents/EDU-Rules_2360_Special_Ed.pdf).
[452] *See id.* § 12:4313.1(f)(1) (2015).

An influential case regarding schools' limitations on disciplining a student on a Section 504 plan is *S-1 v. Turlington*[453], which involved several students with disabilities who were expelled from their high school in Florida for alleged misconduct.[454] The Court, relying on Section 504 and as well as the IDEA, held that a student with a disability may not be expelled for misconduct that results from the disability itself.[455] *Honig v. Doe* overruled portions of this opinion with respect to interpreting the disciplinary provisions of the IDEA, but *S-1* remains good law for the purposes of interpreting the behavioral provisions of Section 504 of the Rehabilitation Act.[456]

Under the current version of the IDEA, some disciplinary removals may take place regardless of whether the child's behavior was a manifestation of the disability, and the definition of what is a manifestation of the disability is quite limited.[457] *S-1* would call into question whether school officials have the same unilateral authority as granted under the IDEA with regard to children protected by Section 504 and the ADA.

Disciplinary Provisions Under The IDEA And ADA/504 Limit Schools' Ability To Initiate Truancy Proceedings

While *Honig v. Doe* remains the Supreme Court authority on interpreting the "stay-put" provision of the IDEA, advocates on both sides of the issue are eager to gain clarity from the Court about how far the holding in *Honig* extends and what exactly the responsibilities and limitations of the schools are when it comes to disciplining students with disabilities. These

[453] S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981) *noted in* Honig v. Doe, 484 U.S. 305 (1988) (overrules portions of Turlington not relevant to Section 504, does not discuss the language on Section 504 in *Turlington*).
[454] S-1 v. Turlington, 635 F.2d 342, 343 (5th Cir. 1981).
[455] *Id*. at 350.
[456] Weber, *supra* note 157.
[457] Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(1)(E)-(G) (2011).

discussions raise the question: Is it ever permissible to punish a student for behavior that is a manifestation of his or her disability? The trend in these cases and in current scholarship seems to indicate that it is not permissible and *should* not be permissible.

Nearly 10 years after *Honig v. Doe* was decided, another case gained considerable national attention on the subject of school discipline.[458] *Morgan v. Chris L.* focused on the legal limitations that govern school systems when they seek to prosecute students with disabilities in juvenile court for school misconduct. [459] [460] Ultimately, the Supreme Court denied certiorari because the juvenile court petition was dismissed and Chris turned eighteen, but the amici briefs submitted to the Supreme Court along with the lower court holdings provide a good sense of the new contours of the debate.[461]

Chris L. was a fourteen-year-old eighth grader attending Northwest Middle School in Knoxville, Tennessee when he allegedly kicked and broke a pipe in a school bathroom, causing approximately $800 in damage.[462] The school system filed a petition against Chris in juvenile court the day after the incident, without conducting a manifestation determination to see if his behavior was a result of his only recently diagnosed AD/HD.[463] Chris's father initiated due process litigation under the IDEA.[464] The administrative law judge ("ALJ") that was assigned to hear his case determined that Chris's behavior was a manifestation of his disability and that the school's filing of the petition should be considered "the initiation of a change in placement

[458] Rivkin, *supra* note 146, at 910.
[459] Morgan v. Chris L., 927 F. Supp. 267 (E.D. Tenn. 1994), aff 'd, 106 F.3d 401 (6th Cir. 1997), cert. denied, 520 U.S. 1271 (1997).
[460] Rivkin, *supra* note 146, at 910.
[461] Rivkin, *supra* note 146, at 935.
[462] Rivkin, *supra* note 146, at 917.
[463] Rivkin, *supra* note 146, at 917.
[464] Rivkin, *supra* note 146, at 921.

and/or disciplinary action commensurate with expulsion or suspension for more than ten days."[465] The school was ordered to seek dismissal of the juvenile court petition against Chris.[466]

The school system appealed this decision in the US District Court for the Eastern District of Tennessee.[467] The school argued that making exceptions to the school disciplinary policy like this would render the policy as a whole ineffective, in light of the fact that about 20 percent of the students in Knox County Schools were IDEA certified.[468] The district court judge rejected this argument, upholding the determination of the ALJ and ruling in favor of Chris.[469] The school system appealed again to the U.S. Court of Appeals for the Sixth Circuit.[470] The school system argued a similar position as it had in district court, emphasizing that the filing of the juvenile court petition did not constitute a change of placement under the IDEA as a matter of law, and therefore no procedural protections were necessary before filing a petition against a student with a disability.[471] It also put forth a federalism argument that a ruling mandating a school system refrain from prosecuting a student with disabilities was beyond the realm of congressional power and that school discipline should be a matter for the State.[472] The National School Boards Association and several other school systems filed amicus briefs on behalf of Knox County Schools in which they emphasized the rising tide of school violence and the important role that courts play in combating crimes in school.[473]

[465] Rivkin, *supra* note 146, at 924.
[466] Rivkin, *supra* note 146, at 924.
[467] Rivkin, *supra* note 146, at 924.
[468] Rivkin, *supra* note 146, at 925.
[469] Rivkin, *supra* note 146, at 926.
[470] Rivkin, *supra* note 146, at 927.
[471] Rivkin, *supra* note 146, at 927.
[472] Rivkin, *supra* note 146, at 928.
[473] Rivkin, *supra* note 146, at 929.

On the other side, Chris L.'s attorneys reiterated the language, purpose, and history of the IDEA.[474] They also argued that the district court holding was quite narrower than the school system was categorizing it, reigning in the conversation from a debate about school violence and federalism to one centered on the IDEA and the rights of students with disabilities.[475] Amici briefs submitted by the Center for Law and Education, the Juvenile Law Center of Philadelphia, and several other advocacy groups advanced the perspective that this situation was a school-failing rather than a student-failing, interpreting the district court decision as a bulwark counseling against the practice of transforming educational disputes into criminal ones.[476]

This strategy persuaded the circuit court judges. One judge noted that "the manifestation of the act resulting from [Chris's] disability is intertwined with his problem, and you can't guarantee that [Chris] isn't going to be sent to a juvenile home for twenty days".[477] Another judge opined, "It seems to me…that we've got a situation where the school system arguably ignored federal law and failed to attend to the educational needs of a child for an entire school year. And that this discipline problem escalated because of the failure of the school system to follow Federal law and guidelines in terms of putting together a program for this kid…and now the school system seeks to discipline him through the criminal system as opposed to through a structured program".[478] The panel, in a per curium decision, eventually affirmed the judgment of the district court, and the opinion "tracked the child-focused, disability-driven, school-failure emphasis that had been pursued from the beginning of the case".[479] The opinion stated that "rather than affording Chris the procedural safeguards mandated by the IDEA, the Knox County

[474] Rivkin, *supra* note 146, at 929.
[475] Rivkin, *supra* note 146, at 929.
[476] Rivkin, *supra* note 146, at 930.
[477] Rivkin, *supra* note 146, at 930-31.
[478] Rivkin, *supra* note 146, at 931.
[479] Rivkin, *supra* note 146, at 931.

Schools sought to exclude him through a punitive and disciplinary measure in juvenile court".[480] Lastly, the court held that "pursuant to the IDEA's procedural safeguards…the school system must adopt its own plan and institute a [team meeting] before initiating a juvenile court petition for this purpose".[481]

This case and the debate it has ignited could have direct implications on the legality of initiating truancy proceedings against students with disabilities without first conducting a manifestation hearing to determine if their absences are a result of their disability. First, the circuit court clearly agreed that the IDEA's procedural safeguards relating to school discipline apply to other forms of discipline beyond suspensions over 10 days long and expulsions. The filing of the juvenile court petition itself constituted a change in placement analogous to a suspension over 10 days long or an expulsion because of the even slim possibility that the student be sent to a juvenile home for twenty days. Similarly, one of the potential outcomes that can be in a disposition case plan at the end of a CHINS(d) proceeding is the removal of a child from his or her home—arguably an even more severe change in placement than a temporary transfer to a juvenile home.[482] The likelihood of a change in placement seems like a less important factor to the court's analysis than the (even remote) risk that such a change in placement could occur.

Second, the circuit court broadened the idea of what "school exclusion" can look like. In *Honig*, the Supreme Court recounted the history of exclusion—"the literal "warehousing" of students in separate schools or classes and the system's neglect of students until they dropped out

[480] Rivkin, *supra* note 146, at 932.
[481] Rivkin, *supra* note 146, at 932.
[482] *But see* In re Beau II, 95 N.Y.2d 234, 241 (2000) ("We cannot condone a blanket rule that all PINS proceedings are barred by the IDEA, which *Morgan* suggests. Intensely case specific, the need to follow IDEA procedures turns on whether there is a contemplated change in a child's educational placement.").

of school".[483] In *Chris L.*, the school's exclusion was qualitatively different; the school system failed to develop a structured program to address Chris's behavioral issues, relying on the court system instead.[484] Applied in a truancy context, it is reasonable that a court might find that the school is effectively excluding that student in violation of the spirit and purpose of the IDEA by relying on the court system to address a student's absenteeism as opposed to developing an individualized, school-based program.

Lastly, the court reiterated a general theme, that schools should not be relying on the court system to enforce school discipline. In *Chris L.*, the court invalidated the school's position that they were merely seeking more effective services for Chris by engaging the court.[485] Truancy proceedings are also thought of as a way to get the right services to students. Andy Strauss, a prosecutor in Chittenden County who works on truancy cases, demonstrates this perspective: "Ideally, we are not seeking an adjudication—we are hopefully having a discussion in court and potentially getting services in place for students in the hopes that, after a status conference or two, the child will show consistent improvement so that we can dismiss the case."[486] On the other hand, Judge Jay Blitzman, First Justice of the Middlesex Juvenile Court in Massachusetts, states, "Courts are not social service agencies. There is a way to have a vibrant and dynamic juvenile court, but the way to do that is through fairness and process."[487] Judge Blitzman points out that if courts were to be used in this way, they would be a "second class social service agencies."[488] In fact, the existence of a supposed court remedy itself may

[483] Rivkin, *supra* note 146, at 916.
[484] Rivkin, *supra* note 146, at 931.
[485] Rivkin, *supra* note 146, at 932.
[486] Telephone Interview by Marc Macchi with Andy Strauss, Prosecutor, Chittenden County (Jan. 12, 2015) (on record with author).
[487] Telephone Interview by Jillian Schlotter with Jay D. Blitzman, First Justice, Juvenile Court Department at Middlesex Division (Jan. 29, 2015) (on record with author).
[488] Telephone Interview by Jillian Schlotter with Jay D. Blitzman, First Justice, Juvenile Court Department at Middlesex Division (Jan. 29, 2015) (on record with author).

disincentivize schools to proactively provide students with the services they are entitled to. As Judge David Bazelon points out, "The situation is truly ironic. The argument for retaining…truancy jurisdiction is that juvenile courts have to act in such cases because 'if we don't act, no one else will.' I submit that precisely opposite is the case: because you act, no one else does. Schools…refer their problem cases to you because you have jurisdiction, because you exercise it, and because you hold out promises that you can provide solutions."[489]

While the court in *Chris L.* equated the initiation of juvenile court proceedings with a change in placement, some districts have held that other forms of discipline, while not rising to the level of a "change in placement", still violate the IDEA because they punish behavior that is a manifestation of a student's disability.[490] Either way, the general premise remains—a student cannot be punished for behavior that is a manifestation of their disability.

Illustrating the Issues:

CeeCee has accumulated fifteen absences in the first half of her school year in violation of her school's attendance policy. The school, without first conducting a manifestation determination meeting to see whether her absences were a result of her disability, filed a complaint with the state's attorney. At this point in the process, in order to gain relief under the IDEA, CeeCee's lawyer must argue that the initiation of truancy proceedings are analogous to a "change in placement" or that the punishment is so overly punitive as to violate the spirit of the disciplinary protections of the IDEA. However, these arguments have not been made with much

[489] Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education,* 3 DUKE FORUM FOR LAW & SOCIAL CHANGE 139, 139 (2011) (quoting David Bazelon, *Jurisdiction over Status Offenses Should be Removed from the Juvenile Court,* 21 CRIME & DEALING 97, 98 (1975)).

[490] *See* B.H. v. West Clermont Bd. Of Educ., 788 F.Supp.2d 682, 697-98 (S.D. Ohio 2011) (the Sixth Circuit agreed that B was denied a FAPE because the school did not using positive behavioral interventions and their use of restraint was unduly punitive because it punished her for behavior related to her disability).

success, and CeeCee's better recourse is to address the inadequacies of her IEP before the situation turns into a court situation.

Bullying

The Director of the Center of Restorative Justice (CRJ), Leitha Cipriano, Rachel Malone, staff attorney at the Office of Defender General in Chittenden County, and Karen Price, Director of Family Support and Vermont Family Network, all cite bullying as a reason why some students do not attend school.[491][492][493]

Vermont requires its schools to provide "safe, orderly, civil, and positive learning environments" and no student should feel threatened or discriminated against at school.[494] The school board "shall develop, adopt, ensure enforcement, and make available" harassment and bullying policies, and they are required to be at least as stringent as the model policies developed by the secretary.[495] If the school board fails to adopt a model policy, the most current model policy published by the secretary shall be presumed to be adopted.[496] The Agency of Education model policy for bullying and harassment can be found on Vermont's Agency of Education website for school boards.[497]

The Agency of Education has defined bullying as "any overt act or combination of acts… directed against a student or group of students and which is repeated over time… intended to ridicule, humiliate, or intimidate the student… [and occurs on school or school related activities

[491] Telephone Interview by Ethan Kolodny with Leitha Cipriano, Director, Center of Restorative Justice (Jan. 6, 2015).
[492] Telephone Interview by Mariah O'Rourke with Rachel Malone, Staff Attorney, Chittenden Co. Office of the Defender General (Jan. 7, 2015).
[493] Telephone Interview by Joanna Clark with Karen Price, Director of Family Support, Vermont Family Network (Feb. 6, 2015).
[494] VT. STAT. ANN. tit. 16 § 570(a) (2014).
[495] *See Id*. § 570(b).
[496] *See Id.* § 570(b).
[497] *Model Policies*, VERMONT AGENCY OF EDUCATION (last updated Dec. 4, 2014) (http://education.vermont.gov/publications/model-policies#vsba). *See* Appendix C(2)(c).

or poses a clear and substantial interference with a student's right to access education programs]."[498] This can include actions that are repeated over time such as, "name calling, verbal taunts, physical threats or actual harm, [and] social media posts that ridicule or intimidate to the extent that the targeted student is not able to fully access the school's programs."[499]

Sometimes an act of bullying may be considered unlawful harassment when it is based on or motivated by a student's actual or perceived race, creed, color, national origin, marital status, disability, sex, sexual orientation, or gender identity.[500] Traditionally, this bullying has the "… effect of objectively and substantially undermining and detracting from or interfering with a student's educational performance or access to school resources by creating an objectively intimidating, hostile, or offensive environment."[501]

When a bullying incident occurs, the student bullied, or any witness to the incident, is encouraged to report the conduct to the designated employee who receives the complaints.[502] School employees shall report to the designated employee any information they deem to potentially constitute bullying.[503] Once the assigned employee receives the complaint, an investigation should take place within one school day after filing the complaint and a written determination should be submitted within five school days.[504] If the school finds that bullying did take place, the school should take remedial action to stop and prevent any recurrence of

[498] *Model Policy on the Prevention of Bullying Students*, VERMONT AGENCY OF EDUCATION 1 (http://education.vermont.gov/documents/EDU-Bullying_Prevention_Model_Policy_updated%20122612.doc) (last visited Feb. 27, 2015). *See* Appendix C(2)(a).
[499] *Model Policy on the Prevention of Bullying Students*, *supra* note 498.
[500] *Model Policy on the Prevention of Bullying Students*, *supra* note 498.
[501] *Model Policy on the Prevention of Harassment*, VERMONT AGENCY OF EDUCATION (http://education.vermont.gov/documents/educ_model_harassment.pdf) (last visited Feb. 27, 2015). *See* Appendix C(2)(b),
[502] *Model Policy on the Prevention of Bullying Students*, *supra* note 498, at 2.
[503] *Model Policy on the Prevention of Bullying Students*, *supra* note 498, at 2.
[504] *Model Policy on the Prevention of Bullying Students*, *supra* note 498, at 2-3.

bullying and create a safety plan.[505] The safety plan "may include such measures as checking in with the target and his/her parents on a regular basis, identifying a safe in-school person for the target to seek out when s/he feels threatened, informing teachers to pay particular attention to interactions/dynamics between identified students and rearranging the schedule of the perpetrator…."[506] The school staff shall also be trained to prevent, recognize and respond to bullying.[507]

Based on Vermont's model policy on bullying and harassment, it is the school staff's responsibility to maintain a safe, orderly and civil school.[508] If the school administrators, employees or teachers lack adequate training they may fail to identify, report, or investigate any bullying or harassment towards a student. While it is beyond the scope of this report to determine if all of these requirements are being met, it is worth researching given the information received from the interviews cited within as students may be unable to attend school as a result of their school's failure to maintain a safe environment.

Illustrating the Issues

Each day Ed is taunted and harassed by some of his classmates as he climbs the stairs to class. As a result, Ed struggles to muster the will to go to school, and sometimes does not attend at all because of the emotional distress and alienation he experiences. Ed's school has a duty to provide a "safe, orderly, civil, and positive learning environment." If the school cannot meet their legal obligations to maintain a safe learning environment they cannot then use absences resulting from their failure as the justification for the initiation of a truancy proceeding.

[505] *Model Policy on the Prevention of Bullying Students*, *supra* note 498, at 3.
[506] *Model Policy on the Prevention of Bullying Students*, *supra* note 498, at 3-4.
[507] *Model Policy on the Prevention of Bullying Students*, *supra* note 498, at 5.
[508] *Model Policy on the Prevention of Bullying Students*, *supra* note 498.

Implications of State Law and Policy

While statutory law is vague in general, the vagueness present in Vermont's education statutes create problems for students who are unable to attend school. This is particularly true when the law requires school administrators and employees to make decisions regarding the reason for a student's absence. Education law in Vermont is structured to provide significant local control to schools and districts. The state legislature writes the statutes to be vague and allow for further refinement at the regulatory level. Then, the Agency of Education provides more specificity. The Agency of Education, however, has delegated much of the policy design to the districts and schools. The districts then create their own policies, which are further refined at the school level. It is unsurprising to see that a multitude of attendance regimes have emerged across the state, indeed, from school to school.[509] This process of refinement and variation can, for some types of policies, be beneficial in developing the best policies for a community. However, here it has created significant and particularized problems for students who are unable to attend school because of a disability, trauma history, or complex personal life.

The categorization of a student's absence a either excused or unexcused is crucial to the outcomes experienced by students and parents. In a number of cases, students suffering from disability, poverty, and/or trauma have been brought into the truancy system when their absence from school is merely a symptom of some greater problem, and their excuse for irregular attendance should be considered valid and justified.[510] The way that school administrators interpret absences is critical to how cases work their way through the system. Cases where a student's attenuating circumstances are either ignored or not noticed can work their way all the

[509] *See infra* Appendix B(4)(a).
[510] Telephone interview by Joanna Clark with Mary Hayden, Coordinator of Guardian Ad Litem Program (Jan. 6 2015).

way to the court system, resulting in a waste of resources. It is more efficient, and better public policy, to catch these cases early on, provide the necessary social services, and prevent the issue from making its way to court.

For example, Vermont law requires that students who "fail to attend" be reported to the truancy officer or superintendent of the school board unless they are "excused or exempted", which is determined by their teacher or principal.[511] If the school's director of special education fails to recognize that a student has severe anxiety, which prevents them from attending school regularly, then that student's absence will not be deemed "excused or exempted". From the point of view of the school administrator handling absences, this hypothetical student is simply marked "absent", rather than "absent because of a serious disability". The truancy officer who is then sent to investigate if the student's absence from school is "without cause" may not have the appropriate knowledge to determine if the student is suffering from a disability because of previous failures to identify a disability, despite his or her legal obligation to determine whether the absence is "without cause".[512] Should the case eventually reach the court, the judge is tasked with determining if the student was absent "without justification".[513] Absences due to disabilities, trauma histories, or poverty driven complex personal lives should be considered "excused" [514] by school administrators for "cause" [515] by the truancy officer, and with "justification" [516] by the court.

There are a number of justifications that should be available to parents and students who are brought into truancy proceedings for why the student was unable to attend school.

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[511] VT. STAT. ANN. tit. 16 § 1126 (West 2014).
[512] *See id.* § 1127(a).
[513] VT. STAT. ANN. tit. 33 § 5102 (West 2010).
[514] VT. STAT. ANN. tit. 16 § 1126 (West 2014).
[515] *See id.* § 1127(a).
[516] VT. STAT. ANN. tit. 33 § 5102 (West 2010).

Essentially, any violation of a student's due process rights or 504/IEP plan should be used in court to justify that student's absence from the classroom. It is in a student's best interest "to avoid unfair or mistaken exclusion from the educational process" and excluding a student from education because of a disability, trauma history, or poverty is fundamentally unfair.[517] The various points at which school officials interact with students who are unable to attend creates multiple opportunities for students with trauma histories, poverty driven complex personal lives, and disabilities to become subject to "erroneous deprivation" of education because of a lack of vigilance on the part of school administrators, or because of a lack of clarity in the language of a school attendance policy.[518] Schools must provide an "informal hearing" and "effective notice" to protect the student's educational interest.[519] Finally, a violation of a student's IEP should be considered justification for that student's absence from school if the behavior causing the absence is a manifestation of their disability.[520] Not adjusting a student's IEP to meet their evolving status is also a violation of the IDEA.[521]

Every point at which a school fails to make an accommodation required by law should be used in court as a justification for the student's absence. Whether because of a lack of training or a flaw in the structure of the process, students with valid justifications for their absence from the classroom are being brought into court. What has failed to happen is the consideration of social context, trauma histories, and disability at each stage of the process, by school officials and administrators, each of whom is responsible to the students placed in their care. Students and

[517] Goss v. Lopez, 419 U.S. 565, 579 (1975).
[518] VT. STAT. ANN. tit. 16 § 1126 (West 2014)
[519] Goss v. Lopez, 419 U.S. 565, 583 (1975).
[520] *Section 504 Frequently Asked Questions*, CAMAS SCHOOL DISTRICT, (http://www.camas.wednet.edu/section-504-frequently-asked-questions/) (last visited Mar. 2, 2015); *see* Appendix C(1)(d).
[521] Individuals with Disabilities Education Act, 20 U.S.C. §1415(k)(1)(E-F) (2005).

families are in the court system as a result of this failure, because their valid justifications were not taken into account.

Waste of Resources

Ultimately, truancy proceedings are not a valuable use of time or taxpayer resources. Schools that provide early intervention services could prevent this entire process from occurring. By implementing early intervention services for families with students who are unable to attend, the state of Vermont can likely conserve resources. Correcting attendance issues and their underlying causes early, rather than letting these issues develop into chronic absenteeism, is both good social policy and makes economic sense. Additionally, social service agencies are better equipped than courts to handle cases of chronic absenteeism. Courts play a largely punitive role, which is a starting point that we believe reduces their efficacy in bringing students back into the classroom. Social service agencies, on the other hand, can provide services and aid, which are better suited to this goal.

ALTERNATIVE PRACTICES

Introduction

This report seeks to properly analyze the effectiveness of Vermont's truancy policies, and, as such, it is necessary to compare Vermont's policies to the policies of other states. Other states' policies reveal that a less punitive approach may be a more effective and fair method to combat truancy. Given that many students are absent for underlying reasons, laws imposing fines and forcing families into court will not address the underlying reasons, and may even make problems worse. All of the states analyzed (New York, Kentucky, Washington, Connecticut, New Hampshire, Maine, and Minnesota) have punitive aspects of their policies, and while this

report recognizes the benefits of a legal enforcement mechanism for keeping students in school, it does not endorse the unnecessarily punitive aspects of the laws of these states. These states were chosen for two reasons. First, each of them are either close to Vermont in proximity, share similar demographics, or, like Vermont, have an abundance of rural communities. These factors could have an influence on the types of policies implemented and how feasible it would be for Vermont to adopt similar policies. Second, in spite of the punitive parts of their policies, these states have found ways to focus on service-oriented programs and initiatives to keep students and families out of court unless absolutely necessary.[522]

This report does endorse, and will highlight, the aspects of each policy that give guidance to school districts on attendance policies but still allow for discretion to craft policies that work best based on their needs and resources, the implementation of diversion and early-intervention programs that significantly decrease the use of the court, and any other laws that focus on delivering the resources students and families need to attend school and succeed. As a reference, a complete layout of the laws regarding truancy for each of these states is included in Appendix D(1).[523]

Minimum Procedural Standards of Truancy Policies

Vermont has very little in its laws regarding a procedural standard for combating truancy.[524] Stricter reporting laws, a state-wide standard for providing notice to parents that their child has an unacceptable number of absences, and the creation of minimum standards in regards to what a truancy policy requires and what absences are excused are all ways that Vermont can regulate the districts and create more consistency throughout the state without robbing the

[522] The research for this report focused mainly on the primary sources of law for each state; the relative success of the states in implementing these policies is beyond the scope of this report.
[523] *See* Appendix D(1) (Statutory overview for NY, KY, WA, CT, NH, ME, and MN).
[524] *See supra* Procedural Context - Statutes and Regulations.

districts of their local control of the schools and their policies. Several states have laws and regulations that create the framework for strong programs while balancing these factors.

For instance, the policy implemented in Maine requires district superintendents to keep track of how many students are "truant" and how the district is handling problems with absenteeism, and to send those statistics to the commissioner of the Department of Education each year.[525] The commissioner then sends a report to the governor and the state legislature in order to "evaluate the effect of state laws on the incidence of truancy."[526] The Maine Department of Education has created a section of its website devoted to truancy and dropout rates.[527] The website serves as a place for parents to access state laws, definitions, and statistics related to attendance, and it provides links to resources such as truancy and attendance restorative justice projects, alternative education services, and school counselors that parents may be able to use to help their children attend school consistently.[528]

For comparison, Connecticut, like Vermont, requires each local and regional board of education to adopt individual procedures concerning truancy. However, unlike Vermont, Connecticut statutorily requires these policies to include minimum standards.[529] Each local or regional policy must include: the holding of a meeting with the student's parent/guardian no later than ten school days after the fourth unexcused absence in a month or tenth unexcused absence in a school year; coordinate services and referrals with community agencies; notify parents/guardians of their obligations pursuant to the state attendance policy at the beginning of each school year; provide a phone number for the parent to call if the student will be absent; and

[525] 20-A M.R.S.A. §5051-A(3)(A) (West 2012).
[526] *See id.* §5051-A(3)(B).
[527] *Truancy and Dropout,* MAINE DEPARTMENT OF EDUCATION, (http://www.maine.gov/education/tdae/truancydropout.htm) (last visited Mar. 2, 2015).
[528] *Truancy and Dropout, supra* note 527.
[529] CONN. GEN. STAT § 10-198a (2014).

have a system of monitoring individual unexcused absences.[530] By requiring minimum standards for each local or regional truancy policy, Connecticut establishes a minimum benchmark for an acceptable truancy policy, and reduces the risk that a truancy policy will be unevenly or arbitrarily applied.[531]

Statutory Requirements of a Definition of Excused/Unexcused Absences

An issue Vermont and its students face is an uneven application of who is considered absent for legitimate reasons and who is not.[532] While the Education Elementary/Secondary School Register[533] provides guidance on what could be considered an unexcused absence, there is nothing in the law requiring school districts to follow the Register's definitions. This means that in one district, parental permission is the only thing that is required for an absence to be considered excused allowing for a student's two-week vacation to be considered an excused absence, while other districts permit absences to be excused only in specific instances, such as, illness and religious observances.[534] Several states provide a model for how to balance the need for districts to maintain their autonomy while still ensuring they meet a minimum standard.

For example, Connecticut's compulsory attendance policy defines a "truant" as a student who has four unexcused absences in any one month or ten unexcused absences from school in any school year.[535] Connecticut statutorily required the State Board of Education to define excused and unexcused absences by July 1, 2012.[536] On June 27, 2012 the Connecticut State Board of Education adopted the following definitions for excused and unexcused absences:

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[530] *See id.* § 10-198a.
[531] *See id.* § 10-198a(b).
[532] *See supra* Procedural Context - Statutes and Regulations.
[533] *See supra* Procedural Context - Statutes and Regulations.
[534] *See supra* Procedural Context - Statutes and Regulations.
[535] CONN. GEN. STAt § 10-198a (2014).
[536] *See id*. § 10-198b (2011).

Excused Absences

A student's absence from school shall be considered excused if written documentation of the reason for the absence has been submitted within ten school days of the student's return to school or in accordance with Section 10-210 of the Connecticut General Statutes and meets the following criteria:

A. For absences one through nine, a student's absences from school are considered excused when the student's parent/ guardian approves such absence and submits appropriate documentation; and
B. For the tenth absence and all absences thereafter, a student's absences from school are considered excused for the following reasons:
    a. student illness (Note: all student illness absences must be verified by an appropriately licensed medical professional to be deemed excused, regardless of the length of absence);
    b. student's observance of a religious holiday;
    c. death in the student's family or other emergency beyond the control of the student's family;
    d. mandated court appearances (additional documentation required);
    e. the lack of transportation that is normally provided by a district other than the one the student attends (no parental documentation is required for this reason); or
    f. extraordinary educational opportunities pre-approved by district administrators and in accordance with Connecticut State Department of Education guidance.

Unexcused Absences

A student's absence from school shall be considered unexcused unless they meet one of the following criteria:

A. the absence meets the definition of an excused absence (including documentation requirements); or
B. the absence meets the definition of a disciplinary absence

Disciplinary Absences

Absences that are the result of school or district disciplinary action are excluded from these definitions.

CONN. GEN. STAT. § 10-198b (2011), see Stefan Pryor, *Connecticut State Board of Education Definitions of Excused and Unexcused Absences Adopted June 27, 2012*, Connecticut Board of Education (June 27, 2012). http://www.sde.ct.gov/sde/lib/sde/pdf/pressroom/definition_excused_unexcused_absences.pdf.

The Connecticut compulsory attendance statute's definitions for excused and unexcused absences provide schools and families a clear understanding of how a student's absence should be defined. While the statute does not explain what type of documentation a parent/guardian would need to submit for a student to be excused from school, it does provide guidance on how a parent/guardian needs to proceed when their child is absent from school in order for their absence to be excused. Furthermore, within the definitions of excused absences after the tenth absence from school, the statute clearly states when documentation is necessary and whether there needs to be more than just parental documentation submitted for the absence to be excused.

Washington requires the superintendent of public instruction to adopt rules establishing a standard definition of student absence from school.[537] This standard definition of student absence from school was implemented through the Washington Administrative Code and includes the following definitions for absences:

> **Excused daily absences**
> The following are valid excuses for absences from school:
> 1. Participation in a district or school approved activity or instructional program;
> 2. Illness, health condition or medical appointment (including, but not limited to, medical, counseling, dental or optometry) for the student or person for who the student is legally responsible;
> 3. Family emergency including, but not limited to, a death or illness in the family;
> 4. Religious or cultural purpose including observance of a religious or cultural holiday or participation in religious or cultural instruction;
> 5. Court, judicial proceeding, or serving on a jury;
> 6. Post-secondary, technical school or apprenticeship program visitation, or scholarship interview;
> 7. State-recognized search and rescue activities consistent with RCW 28A.225.055;
> 8. Absence directly related to the student's homeless status;
> 9. Absences related to deployment activities of a parent or legal guardian who is an active duty member consistent with RCW 28A.705.010;

[537] WASH. REV. CODE § 28A.300.046 (West 2013).

10. Absence resulting from a disciplinary/corrective action (e.g., short-term or long-term suspension, emergency expulsion); and
11. Principal (or designee) and parent, guardian, or emancipated youth mutually agreed upon approved activity.

The school principal (or designee) has the authority to determine if an absence meets the above criteria for an excused absence.

Unexcused daily absences

Any absence from school is unexcused unless it meets one of the criteria for an excused absence.[538]

In contrast, while Vermont provides guidance on how unexcused absences should be defined through their register, Connecticut and Washington require all schools covered under their respective compulsory attendance laws to comply with the exact definitions of excused and unexcused absences set out by the Connecticut State Board of Education and the Washington superintendent of public instruction, respectively.[539] [540] By statutorily defining excused and unexcused absences, these states avoid different schools marking the same type of absence differently based on their school or district's definition of excused and unexcused absences, avoiding the potential for arbitrary and inconsistent applications. In formulating statutory definitions of excused and unexcused absences, similar to those employed in Washington and Connecticut, Vermont can ensure their truancy policies are more evenly applied and avoid geographic inequities by ensuring what is considered excused in a wealthier sector of Vermont is not considered unexcused in a different part of the state.

Implementation of Pre-Court Diversion Programs

Vermont lacks a statutory requirement that diversion programs be implemented prior to a family being forced into court in response to a student being unable to attend school. Diversion programs can be ideal because they have the ability to save families and children from having to

[538] *See id*. § 392-400-325.
[539] CONN. GEN. STAT. § 10-198b (West 2011).
[540] WASH REV. CODE § 28A.300.046 (West 2013).

deal with the stress and stigma that court proceedings can entail, while reducing the time and monetary costs incurred by the state of Vermont in a judicial action.[541] Vermont can look to the programs that other states have implemented to craft a fitting pre-court diversionary program.

For instance, in New York, prior to the filing of a petition to adjudicate a habitually truant student as a person in need of supervision, similar to Vermont's CHINS(d) procedure, the petitioner must first utilize diversion services to attempt to enable the student to attend school before there are legal repercussions.[542] The diversion services are "designed to provide an immediate response to families in crisis, to identify and utilize appropriate alternatives to detention and to divert youth from being the subject of a petition in family court."[543] The diversion program requires the agency in charge of truancy in the district to first make contact with the parents/guardians of the student and to provide them with information for referral service programs in their area; to schedule at least one conference with the student and their parents/guardians; to document clearly defined and diligent steps taken by the agency to provide appropriate services to the parent and student; and to review all steps taken by the school and attempt to further engage the school in appropriate diversion attempts as needed.[544] After exhausting all diversion services, the petitioner must also include in their petition the steps taken by the school district to improve the attendance of the alleged habitually truant student.[545]

The diversion program utilized by New York City sends students to "attendance court," which does not have power to punish the students but provides coordinated access to services and counseling; the "attendance court" consists of update hearings with retired judges every two

[541] *See supra* Introduction.
[542] N.Y. FAM. CT. ACT § 732 (McKinney 2010).
[543] *See id.* § 735.
[544] *See id.* § 735.
[545] *See id.* § 732.

weeks.[546] The use of the "attendance courts" give students who are unable to attend school an opportunity to receive services to address their reasons for missing school, and also provides the students with a n ongoing relationship with a judge who follows their progress and helps ensures the students are attending school and receiving appropriate services.[547] The Family Court Advisory and Rules Committee published a 2011 report noting the success of diversion programs in engaging school officials in the process of resolving truancy related school problems, obviating court involvement.[548]

The state of Maine's laws require schools to create a truancy intervention team and to set forth a procedure for providing notice to parents that their child is in danger of being labeled as truant.[549] School districts are allowed autonomy in creating their own individual truancy policies, but the statute provides guidance on how they may create their truancy intervention teams.[550] The requirement of the truancy intervention team supports the state's goal of keeping the courts out of the picture as long as possible, and the creation of guidance gives school administrators an idea of how the state interprets the law and seeks to have it implemented. The school district can then create their own procedures that will work within the confines of their budgets, resources, and regional philosophies while still conforming to some kind of standard, promoting more consistency of policies throughout the state.

In contrast, the state of Minnesota's philosophy on combating truancy is significantly different from Vermont's voluntary approach to pre-court diversion programs. Minnesota's truancy statutes call for "progressively intrusive intervention, beginning with strong service-

[546] William Glaberson, *Lessons in Tough Love at a Court for Truants*, N.Y. TIMES April 28, 2010, at A21. (*Available at* http://www.nytimes.com/2010/04/28/nyregion/28truant.html?pagewanted=all&_r=0).
[547] Glaberson, *supra* note 546.
[548] Monica Drinane et. al., *Report of the Family Court Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York*, FAMILY COURT ADVISORY AND RULES COMMITTEE 15 (Jan. 2011) (https://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2011-FamilyCourt-ADV-Report.pdf).
[549] 20-A M.R.S.A. § 5051-A(2)(A) (2012).
[550] *See id.* §5051-A(2)(B)-(F).

oriented efforts at the school and community level and involving the court's authority only when necessary."[551] Cities throughout Minnesota have interpreted the laws in different ways. Rochester, one of the state's major cities, is operating as a pilot program for the state that gets the county attorney's office involved near the beginning of the process. The idea is not to bring the student and parents into court, but instead is "to ensure that families get the support that they need from multiple agencies." While getting the prosecutor's office involved is not ideal, as the ultimate goal is to keep the court and any punitive measures out of the process, it is a way to allow a third-party mediator to come in and provide support and hopefully find a solution without dragging families into court. This program "stress[es] early intervention and collaboration among agencies and put[s] an emphasis on provided social service support rather than punishment."[552] If Vermont could find a way to provide mediation between families and schools prior to getting the state's attorney's office or the court involved, this could be a very useful method of getting to the root of attendance problems while adding a mechanism for coordination and enforcement of needed services.

Nicollet County, southwest of Minneapolis, has taken a different approach from Rochester. In Nicollet County, schools are required to hire a truancy officer, whose sole job is to monitor students who are frequently absent and work with those children and their families to keep them in school. Nicollet County's strategy is based on the hypothesis that if it is someone's job to keep track of students who are frequently unable to attend school that they will be less likely to fall through the cracks throughout the year and in following years. This program is partially federally funded, and also receives money through the Nicollet County Family

[551]Matthew Stolle, *Rochester schools to approach truancy in a new way*, POST-BULLETIN COMPANY (Aug. 21, 2014) (http://www.postbulletin.com/news/local/rochester-schools-to-approach-truancy-in-a-new-way/article_7821169a-7be4-5ef6-8b26-29d47683b0b1.html) (describing new methods of reducing truancy in Rochester); *see* Appendix D(2)(d).
[552] M.S.A. § 260A.01 (West 2004).

Collaborative, St. Peter Schools, and state-funded county probation reimbursement and has resulted in a 50% decrease in absences throughout the county.[553] The creation of a truancy officer in Nicollet County was successful enough that the county board has approved funding for the position through 2016.[554] Though money may be a problem for Vermont, the state already requires school-appointed truancy officers, and the position could pay for itself if they are required to be more substantively involved in the process as in Nicollet County if the cost of bringing each family into court could be averted.[555] Resources spent earlier in the process could result in substantial long-term savings.

Quite often schools and courts in Vermont lack sufficient resources to address each student with as much attention as he or she deserves.[556] A city in New Hampshire came up with a clever plan to work around the defunding of their state's CHINS program in 2011. To remedy the lack of funding, a judge who presided over the truancy court in Nashua, which is in the southeastern part of the state and borders Massachusetts, created a school-based, all volunteer truancy court. Judge Bamberger and the local juvenile court clerk ran court proceedings in Nashua North High School every other Tuesday morning for an hour.[557] Due to time constraints, only a limited number of students were allowed to participate (generally only juniors and seniors with over 20 absences), but the ability to hold proceedings on a volunteer basis was credited with

[553] Pat Beck, *Nicolette County, schools work to reduce truancy*, ST. PETER HERALD, (Dec. 23, 2014) (http://www.southernminn.com/st_peter_herald/news/article_5ec52584-6a2a-5a2a-9eb6-f6a604a28074.html); *see* Appendix D(2)(e).
[554] Beck, supra note 553.
[555] VT. STAT. ANN. tit. 16 §1125 (West 1969).
[556] Telephone interview by Lina Drada with Laura Singer, Principal at Albert D. Lawton Middle School, (Feb. 6, 2015).
[557] Kristen Senz, *Innovation in Tough Times: Judge Holds Court in School*, NEW HAMPSHIRE BAR ASSOCIATION (Feb. 22, 2013) (https://www.nhbar.org/publications/display-news-issue.asp?id=6715); *see* Appendix D(2)(f).

improving attendance in Nashua.[558] Such an endeavor would require dedication on the part of schools, judges, and court officials in Vermont, but it is a very real way to attack the resources problem if reallocating money is not an option.

CONCLUSIONS AND RECOMMENDATIONS

There are steps Vermont should consider taking to ensure its students are able to attend school consistently, are protected under the law, and interact with the court only as a last resort. The legislature, the Agency of Education, the judiciary, and school administrators should work together to create a system that is effective and is oriented towards the best interests of the child. Included within are a series of recommendations the State of Vermont could follow to provide fair and just mechanisms for combatting absenteeism.

Recommendations for the Vermont Legislature:

- **Establish minimum standards for what is an excused and unexcused absence.**

Definitive minimum standards for what constitutes an excused and an unexcused absence should be disseminated statewide. The definition for an excused absence in the Elementary/Secondary School Register[559] lacks statutory authority; leaving it up to each school or district to determine which absences will be considered excused. Statewide minimum standards for defining an excused and unexcused absence would provide greater clarity to students and families as to what constitutes an acceptable reason for their child to miss school, ensure that students who are unable to attend school due to a disability, trauma history, or

[558] Joseph G. Cote, *Nashua's truancy court, credited with boosting student attendance, closing with judge's retirement*, THE TELEGRAPH (Feb. 16, 2014) (http://www.nashuatelegraph.com/news/1029108-469/nashuas-truancy-court-credited-with-boosting-student.html#); *see* Appendix D(2)(g).
[559] *See supra* Procedural Context – State Regulations.

complex poverty-driven personal history are not unjustly penalized, and create a level of consistency throughout the state in the application of truancy policies.

Furthermore, by implementing minimum standards, rather than strict definitions, schools and districts retain a level of local discretion so that their local definition of excused and unexcused absences can reflect the character, needs, and resources of their school or district. The minimum standards for excused and unexcused absences should include language similar to the statutory definitions imposed in Washington and Connecticut.[560] The following sample statutory language to establish minimum standards in defining excused and unexcused absences:

a. Each school's definition of what constitutes an excused and unexcused absence shall, include, but is not limited to, the following:

Excused Absence

i. Student illness, health condition, or medical appointment;
ii. Student's observance of a religious holiday;
iii. Death in the student's family or other emergency beyond the control of the student's family;
iv. Absences directly related to the student's homelessness status;
v. Absences directly related to the student's disability;
vi. Absences pre-approved by the school or district;
vii. Absences directly related to court attendance, judicial proceeding, or serving on a jury;
viii. Absences resulting from a school or district disciplinary action (including, but not limited to, expulsion and suspension); or
ix. Educational opportunities pre-approved by the district or the school.

Unexcused Absence

i. Any absence that does not fall under the criteria of an excused absence shall be considered unexcused.

- **Create a model policy for schools to refer when crafting their own truancy policies.**

While the Secretary of the Agency of Education in Vermont established three attendance policy recommendations for schools and supervisory unions to adopt, a comprehensive model policy for addressing truancy would provide schools/districts more formal and more detailed

[560] *See generally infra* Appendix D: Alternative Practices.

guidance for creating their own policies.[561] Vermont lawmakers can look to Minnesota statutes when drawing up such a policy. Minnesota's statutes call for "progressively intrusive intervention" beginning early and oriented towards the provision of services.[562] Minnesota's laws discuss truancy intervention teams, truancy officers, and other service-oriented processes, but do so on a suggestive basis. If Vermont is concerned with preserving the local discretion of school districts and supervisory unions, Minnesota's statutes provide an excellent example to Vermont legislators for how to craft truancy policies aimed at early intervention and service delivery while maintaining flexibility and autonomy at a local level.

- **Establish comprehensive and consistent data collection on absences and truancy.**

The legislature should consider requiring schools to collect data on the number of absences and the reasons for an absence being considered excused or unexcused. Consistent and detailed data would allow the state to track absences and the reasons why a student is unable to attend school. This data would help to ensure that absences are not being considered unexcused arbitrarily, and would provide the state with a greater understanding of the underlying reasons for habitual absences and the services that may be needed to address those reasons statewide.

Recommendations for the Vermont Agency of Education:

- **Establish minimum protocols for schools to implement after a certain number of absences.**

To avoid students and families from being brought to court because a student is unable to attend school, the Agency of Education should define minimum protocols for schools to

[561] *See infra* Appendix B(2).
[562] *See infra* Alternative Practices.

implement at different levels of absences (i.e. what should be done after the first absence, fifth absence, tenth absence, etc.). The actions taken by the school at each level of absence should reflect an effort to intervene and uncover any potential causes of the absenteeism as early as possible so that the student may return to school without any further action or disruption to their education. Such policies could include organizing meetings with the student's parent or guardian to figure out the reasons why a student is unable to attend school, and/or coordinating necessary services for the student to help ensure their attendance.[563] Greater clarity and consistency regarding the minimum standards for notifying a parent or guardian when their child is absent, the school's policy on absences and truancy, and clear standards for when the child may be referred to the state's attorney's office to initiate a CHINS(d) proceeding may solve some of the potential due process problems noted within this report and help to ensure that the student is able to attend school consistently without the need for a court proceeding.[564]

- **Establish a curriculum that educates teachers and administrators on absenteeism as it arises for students with disabilities, trauma histories, and complex poverty-driven lives.**

An educational seminar for teachers and administrators on issues related to absences from school for students with disabilities, students trauma histories, and complex poverty-driven lives would be beneficial to ensure every person involved in the students' education have the same

[563]Connecticut's compulsory attendance policy established minimum standards for school/district truancy policies to include, among other requirements, holding meetings with parents after a defined number of absences and coordinating services and community referrals for the student. *See infra* Appendix D(1).
[564] *See supra* Legal Arguments – Due Process.

understanding of the complex reasons a student may be unable to attend school. This is something the Agency of Education, school administrators, and different service organizations could work on together to ensure that the needs of students, parents, and schools are all being met.

- **Initiate pilot diversion programs to keep students who are unable to attend school out of truancy proceedings.**

Diversion programs to address a student's absences before initiating a CHINS(d) proceeding could work to uncover the underlying issues for the student's absence without subjecting the student and their family to court proceedings and the potential for punitive results. Vermont could use the diversion programs enacted by the other states discussed in this report as inspiration.[565] One program to highlight is the one employed by New York City schools, which implemented "attendance courts."[566] Rather than being sent to truancy court, students are sent to meet with retired judges who explain the potential consequences of continued absences, sets the student up with appropriate services. Afterwards, the retired judge meets with the student every two weeks, receives updates from the student's school over this period, and helps to ensure the student is having their needs met while meeting their obligations in school.[567] The Agency of Education can achieve this goal by requiring schools to create diversion program for which the legislature can provide minimum standards and guidance. Schools should form their truancy policies around keeping families and students out of court through diversion programs that best suit the student's needs and the availability of local resources.

[565] *See infra* Appendix D(1) (Minnesota).
[566] Glaberson, *supra* note 546.
[567] Glaberson, *supra* note 546.

- **Distribute information to parents and guardians about the rights of students with disabilities and the school's responsibility to these students.**

A mechanism (whether it be a pamphlet, a website, a seminar, etc.) should be developed to educate parents/guardians about the rights of students with disabilities and the schools' responsibility towards students with disabilities. This mechanism for parents and guardians should include, at a minimum, information about the affirmative duties of educators to students with disabilities, re-evaluation requirements, and convey the administrative requirements that must be met prior to engaging in truancy proceedings against a student on an IEP or a 504 plan.[568] Vermont legislators could look to Maine's state-run website for guidance as Maine's state-run website provides guidance, statistics, and resources for parents, and could be a useful example to Vermont for how to create an inexpensive and informative tool for parents and guardians.

[568] *See supra* Procedural Context – Federal Statutes.