STATE OF VERMONT

MEMORANDUM

To: Representative Oliver Olsen

From: Jim DesMarais

Date: April 20, 2017

Subject: Approved independent schools; open enrollment and special education services

This memorandum responds to your question as to whether, under federal or Vermont law, an approved independent school is required to maintain an open enrollment policy for all students with disabilities or to offer special education services to students with disabilities on account of the fact that it is entitled to receive publicly funded tuition for accepting parentally placed students.

I. Federal Law

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act are the federal laws protecting individuals with disabilities from disparate treatment during the school admission process. Acting in concert, the ADA and Section 504 of the Rehabilitation Act prohibit independent schools from:

> (1) using discriminatory admissions criteria to screen out otherwise qualified disabled applicants;
>
> (2) failing to ensure that otherwise qualified disabled students are not treated differently than other students because of a lack of services; and
>
> (3) failing to make reasonable modifications to practices, policies, and procedures to ensure that otherwise qualified applicants are given equal access to school programs.[1]

A disabled student is not automatically entitled to admission to an independent school. The ADA and Section 504 protections extend to "otherwise qualified" students who meet, with or without a reasonable accommodation, the independent school's non-discriminatory admissions criteria.[2] The ADA does not require an independent school to

[1] 42 U.S.C. § 12182(b)(2)(A)(i)–(iii). The ADA and Section 504 of the Rehabilitation Act are intended to be read in a manner consistent with each other. 42 U.S.C. § 12217(b). The "otherwise qualified" language of the Rehabilitation Act is used in Titles I and II of the ADA, and has been interpreted to apply to Title III. *Bercovitch v. Baldwin Sch.*, 133 F.3d 141, 154 (1st Cir. 1998); *Menkowitz v. Pottstown Mem'l Med. Ctr.*, 154 F.3d 113, 121 (3rd Cir. 1998).

[2] 29 U.S.C. § 794.

change its basic nature, character, or purpose to accommodate a student with a disability. Independent schools are not required to lower or substantially modify admissions standards to accommodate a student with disabilities.[3]

The federal Individuals with Disabilities Education Act (IDEA), which provides financial assistance to states to fund special education services, addresses whether independent schools accepting parentally placed students are obligated to provide special education services. Under IDEA, a parentally placed student attending an independent school does not have an individual entitlement to special education and related services.[4]

Even in the context of a State or local educational agency determining the placement of a student for special education services, an independent school is not required to provide those services. The court in *St. Johnsbury Academy* held that:

> "IDEA expressly contemplates that children will be 'placed in … [independent] schools or facilities by the State or appropriate local educational agency as the means of' complying with the statute, and with respect to such children, the statute obligates the '*State*'—not the private school—to '*ensure*' that such children 'are provided special education and related services, in accordance with an individualized education program.'" (internal citations omitted).[5]

My research has found no relevant statute or controlling case law that concludes that the receipt by an approved independent school of publicly funded tuition for parentally placed students would affect the conclusions in this section.

II. State Law

A. Statutory Law

1. Public school requirements

IDEA authorizes states that receive federal funds under that act to designate local education agencies that are responsible for the administration of those funds on a local level.[6] Vermont designates supervisory unions as the local education agencies responsible for providing special education services pursuant to the IDEA.[7]

Section 2901 of Vermont's education statutes (Title 16) requires public schools to maintain a comprehensive system of education designed to enable all students to succeed in the general educational environment. Under 16 V.S.A. § 2902, this comprehensive system of education includes a tiered system of academic and behavioral supports for the purpose of providing all students with the opportunity to succeed or to be challenged in the general education environment.

Because sections 2901 and 2902 require school districts to maintain a comprehensive system for <u>all</u> students, including a tiered system of academic and behavioral supports

---

[3] *Southeastern Comm. College v. Davis*, 442 U.S. 397, 413 (1979).

[4] 20 U.S.C. 1412(a)(10)(A).

[5] *St. Johnsbury Academy v. D.H.*, 240 F.3d 163, 171 (2nd Cir. 2001)

[6] 20 U.S.C. § 1413.

[7] 16 V.S.A. § 261a(6).

available as needed for any student who requires support beyond what can be provided in the general education classroom (special education), public schools are required to offer enrollment to all students and provide special education services to all categories of special education needs.

2. Approved independent school requirements

By their terms, the requirements of 16 V.S.A. §§ 2901 and 2902 do not apply to an independent school that is entitled to receive publicly funded tuition for accepting parentally placed students (an approved independent school).

There are only three references to the provision of special education services in relation to approved independent schools in Vermont's education laws. These references do not require an approved independent school to maintain an open enrollment policy for all students with disabilities or to offer special education services to students with disabilities. Rather, they relate to the power of the State Board of Education and the Secretary of Education and the setting of tuition rates for special education programs.

First, 16 V.S.A. § 166(b) states that "the Board's rules must at minimum require that the [approved independent] school has the resources required to meet its stated objectives, including financial capacity, faculty who are qualified by training and experience in the areas in which they are assigned, and physical facilities and special services that are in accordance with any State or federal law or regulation."

The reference to "special services that are in accordance with any State or federal law or regulation" could be read to provide evidence that the State Board has the authority to require that an approved independent school provide special education services. However, fairly read, I believe that this language is designed to ensure that an approved independent school has the resources required to carry out its mission, including resources required to perform the functions in the areas enumerated on the list. In my view, this language does not provide evidence of authority of the State Board to require an approved independent school to provide special education services. In any case, this language does not require approved independent schools to provide those services.

Second, 16 V.S.A. § 2973(a) states that the "Secretary shall establish minimum standards of services for students receiving special education in independent schools in Vermont" and shall set tuition rates for these special services. This section is entitled "Independent school tuition rates," and fairly read, I believe that it concerns the setting of tuition rates where approved independent schools offer special education services—it does not in my view reflect legislative intent to require that these services be offered. I believe that this view is supported by the last phrase of section 2973(a), which states that the Secretary "may advise independent schools as to the need for certain special education services in Vermont."

Third, 16 V.S.A. § 826 authorizes an independent school meeting education quality standards to establish a separate tuition rate for one or more special education programs offered by the school.

In addition, Vermont's education laws contain broader public policy statutes, such as 16 V.S.A. § 1, which states:

> "The right to public education is integral to Vermont's constitutional form of government and its guarantees of political and civil rights. Further, the right to education is fundamental for the success of Vermont's children in a rapidly-changing society and global marketplace as well as for the State's own economic and social prosperity. To keep Vermont's democracy competitive and thriving, Vermont students must be afforded substantially equal access to a quality basic education. However, one of the strengths of Vermont's education system lies in its rich diversity and the ability for each local school district to adapt its educational program to local needs and desires. Therefore, it is the policy of the State that all Vermont children will be afforded educational opportunities that are substantially equal although educational programs may vary from district to district."

This statute was enacted shortly after the *Brigham* decision discussed below under "Constitutional Law," and I believe that discussion is relevant to assessing how this statute would likely be interpreted by a court. I would note that this statute and other similar broad public policy statutes in Title 16 do not, I believe, demonstrate specific statutory intent to require approved independent schools to maintain an open enrollment policy for all students with disabilities or to offer special education services.

Finally, I would note that Vermont law embraces the federal laws discussed above that establish the rights of students with disabilities and does not provide greater protection. The Vermont Public Accommodations Act (VPA) explicitly states that the provisions of the VPA relating to individuals with disabilities "are intended to implement and to be construed so as to be consistent with the [ADA], 42 U.S.C. § 12101 et seq. and rules adopted thereunder, and are not intended to impose additional or higher standards, duties, or requirements than that act."[8]

B. Constitutional Law

1. The *Brigham* Decision

The Vermont Constitution requires that:

[8] 9 V.S.A. § 4500(a).

(1) "a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions to the convenient instruction of youth"[9] (Education Clause); and

(2) "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community…"[10] (Common Benefits Clause).

The Vermont Supreme Court, in *Brigham*,[11] held that the then-current education financing system was unconstitutional. The Court determined that education in Vermont is "a constitutionally mandated right."[12] It stated that to "keep a democracy competitive and thriving, students must be afforded equal access to all that our educational system has to offer."[13] Therefore, in order to "fulfill its constitutional obligation the [S]tate must ensure *substantial* equality of educational opportunity throughout Vermont."[14]

The Court was also careful to note that "substantially equal" does not mean perfectly equal, but it does not allow a system in which educational opportunity is necessarily a function of district wealth.[15]

While some of the language in *Brigham* is broad in scope ("students must be afforded equal access to all that our educational system has to offer"), its specific holding was more narrowly tailored. It held that the educational funding system, which it found created gross inequities in educational opportunities for students and which was based on the relative wealth of towns, violated the right to equal educational opportunities under the Education and Common Benefits clauses of the Vermont Constitution.

2. Analysis

The Vermont Supreme Court has not analyzed the Common Benefits Clause in connection with the "constitutionally mandated right" to education since it issued the *Brigham* decision. Indeed, my research found that no state courts, including Vermont's, have determined whether independent schools chosen by parents and that receive publicly funded tuition payments are constitutionally required to maintain an open enrollment policy for all students with disabilities or to offer special education services to students with disabilities.

[9] Vt. Const. Ch. II, § 68
[10] Vt. Const. Ch. I, Art.7
[11] *Brigham v. State*, 166 Vt. 246 (1997)
[12] Id. at 267.
[13] Id.
[14] Id. at 268 (emphasis in original).
[15] *Id*.

The Vermont Supreme Court has considered the Common Benefits Clause in other contexts, including in the decisions *In re Hodgdon* [16] and *Badgley v. Walton*.[17] Both *Hodgdon* and *Badgley* relied upon a three-part inquiry set forth in *Baker v. State*,[18] which the *Hodgdon* Court summarized as:

> (1) what 'part of the community' is disadvantaged by the legal requirement; (2) what is the governmental purpose in drawing the classification; and (3) does the omission of part of the community from the benefit of the challenged law bear 'a reasonable and just relation to the governmental purpose?' Factors to be considered in the third inquiry are the significance of the benefits and protections of the challenged law, whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals, and whether the classification is significantly underinclusive or overinclusive.[19]

It is not clear whether a court would apply this three-part test to the question posed by this memorandum, but if so, I would note the following.

First, students who could be found to be disadvantaged by the absence of a requirement that independent schools maintain an open enrollment policy or offer special education services are students who require these services and who have limited options to receive them. I would note that a finding that a court would likely consider, based on *Brigham*, is whether the nature of the disadvantage creates gross inequities in educational opportunities for students.

Second, the governmental purpose in not requiring independent schools to maintain an open enrollment policy or offer special education services is not, to my knowledge, clearly articulated. The Education Clause envisions that, in addition to the maintenance of schools, the General Assembly may permit "other provisions to the convenient instruction of youth." Vermont has a long tradition of offering families who live in towns without schools the option of sending their children, with tuition paid through public funds, to independent schools, which have not historically been required to maintain an open enrollment policy or to offer special education services. The General Assembly has adopted numerous laws that apply only to public schools, as discussed in my October 28, 2016 memorandum to you. Without a developed factual record, I cannot provide a view on how a court may assess this factor, although I believe a likely consideration would be the extent to which the evidence suggests that the General Assembly has sought to enhance educational opportunity by allowing independent schools to set their missions and determine how best to achieve them.

---

[16] 189 Vt. 265 (2011).

[17] 188 Vt. 367 (2010).

[18] 170 Vt. 194 (1999). The *Badgley* Court stated that in *Baker*, it had "rejected the rigid, multi-tiered analysis of the federal Equal Protection Clause analysis in favor of 'a relatively uniform standard, reflective of the inclusionary principle at [the Common Benefits Clause's] core.'" *Badgley* at 377, quoting *Baker* at 212.

[19] *Hodgdon* at 281, quoting in part *Badgley* at 377-78 and *Baker* at 212-14 (citations omitted).

Third, without being able to assess the governmental purpose as just noted, it is not possible to assess whether the absence of a requirement for approved independent schools to maintain an open enrollment policy or offer special education services bears "a reasonable and just relation to the governmental purpose." Based on the *Hodgdon* decision, I believe that a court may consider the following lines of inquiry in making this determination:

- the significance of the benefits in not requiring approved independent schools to maintain an open enrollment policy or offer special education services, perhaps framed in terms of the extent to which flexibility in setting their missions and execution strategies to achieve those missions provides an enhanced level of educational opportunities for students across the State;
- whether the absence of a requirement for approved independent schools to maintain an open enrollment policy or offer special education services promotes the government's stated goals, perhaps framed in terms of the impact on approved independent schools of imposing such a requirement and the degree to which they would need to change their missions or alter their operations; and
- the extent to which students who require special education services and who have limited options to receive them are affected by the absence of a requirement for approved independent schools to maintain an open enrollment policy or offer special education services.

Given the absence of specific precedent on the point, I believe that there is insufficient basis to conclude that a court would find that an approved independent school is required under the Vermont Constitution to maintain an open enrollment policy for all students with disabilities or to offer special education services to students with disabilities on account of the fact that it is entitled to receive publicly funded tuition for accepting parentally placed students.

III. Conclusion

In my view it is clear that, under federal law and Vermont statutes, approved independent schools (i.e., schools that are entitled to receive publicly funded tuition for accepting parentally placed students) are not required to maintain an open enrollment policy for all students with disabilities or to offer special education services to students with disabilities. Under the Education and Common Benefits clauses of Vermont's Constitution, there is no precedent addressing this specific issue. In the absence of specific precedent on this issue, I believe that there is insufficient basis to conclude that a court would find that an approved independent school is required under the Vermont Constitution to maintain an open enrollment policy for all students with disabilities or to offer special education services to students with disabilities on account of the fact that it is entitled to receive publicly funded tuition for accepting parentally placed students.