by Christina Rainville, Esq.

THE CHILDREN'S CORNER

Does Vermont Law Allow Vermont's Education System to Discriminate Against Children with Disabilities Who Want to Attend Publicly-Funded Independent Schools?

Considerable controversy has been generated by the Vermont Board of Education's proposed rule that would alter Vermont's system of education by requiring the State's taxpayer-funded independent schools to accept students with disabilities. However, little attention has been paid to whether Vermont law compels this result. This article concludes that, as a matter of Vermont law, students with disabilities have a legal right to be admitted to and be accommodated in taxpayer-funded independent schools.

Under Vermont's system of education, towns that do not have public schools at the elementary, middle and/or high school level, provide "choice" by which the town pays a per-pupil stipend for students to select which school they will attend. In practice, this often results in students attending a nearby independent school, which in effect serves as the town's community school, which is paid from taxpayer-provided funds for each student who attends.[1] Those public payments, based on contracts between the local school board and the independent school, make up the vast majority of many independent schools' annual funding. Nonetheless, independent schools are free to not accept, or not accommodate, students with disabilities at the school's absolute discretion.

The result is that students with disabilities who live in towns with a public school at the relevant academic level can be assured of attending school in their communities and receiving required accommodations and/or services. By contrast, students with disabilities who live in towns whose community schools are taxpayer-funded independent schools cannot be so assured.

This differing treatment, created by Vermont's education system, has profound negative effects on students with disabilities. Children with disabilities whose communities have no public school, and who are denied access to their community independent school, need to travel, by necessity, to schools at significant distance outside their communities, where they have no friends and where it is a hardship for their families to support them. The harm of being forced to attend a geographically-distant school is significant. Children often cannot be involved in sports or after-school activities because of transportation issues, and it is difficult for the children to develop friendships because few parents are able (or can afford) the hours of driving that are required to bring a child to a friend's house 45 minutes or further away.

But for many children, the worst part is the stigma of knowing that someone in a position of power has, in effect, decided that the child is not "good enough" to attend the taxpayer-funded independent community school, and that sense of shame is re-enforced every time the child drives by the community school, sees a school bus the child is not permitted to be on, or watches a soccer game, from a distance, with children wearing uniforms the child will never be allowed to wear.

In addition, some students with disabilities who want to attend their community independent school may make a difficult decision and chose to forego required accommodations and/or services in order to be admitted or to be allowed to remain at the school if they require more accommodations or services than the school is willing to provide. Of course, not receiving legally-mandated support will significantly prejudice the educational opportunities for these students, a prejudice not suffered by children who can attend public schools in their communities without giving up their rights.

It does not appear that an education system that denies students with disabilities the opportunity to attend their taxpayer-funded community independent school can withstand scrutiny under Vermont law. In its polestar decision in *Brigham v. State*,[2] the Vermont Supreme Court, citing *Brown v. Board of Education*,[3] held that a "system [that] has fallen short on providing every school-age child in Vermont an equal education opportunity" violates the Education and Common Benefits Clauses of the Vermont Constitution.[4]

In rejecting a system that provided disparate financing for schools in various towns, the Court made clear that the State may not "abdicate the basic responsibility for education by passing it on to local governments."[5] Likewise here, it would not appear that the State's obligation to provide equal educational opportunities for students with disabilities is obviated by allowing towns to offer the "choice" of distant public schools when the community independent school is not an option, or to create a "choice" where students with disabilities may feel compelled to forego required accommodations and/or services in order to attend their community independent school. In language seemingly relevant to this issue, the Court held: "The distribution of a resource as precious as educational opportunity may not have as its determining force the mere *fortuity* of a child's residence. It takes no particular constitutional expertise to recognize the capriciousness of such a system."[6] (emphasis in original).

Here, disparate educational opportunity due to the "mere *fortuity* of a child's residence" occurs not because of differences

in funding from town to town, but due to the utilization of taxpayer-funded independent schools as part of Vermont's system of education. The question remains whether utilization of these "private" entities creates a circumstance by which *Brigham* does not apply. The following analysis strongly suggests that this is not the case.

Under *Marsh v. Alabama*,[7] and its progeny, legal and constitutional obligations cannot be evaded by describing public functions as "private" activities. Although the Vermont Supreme Court has not had occasion to utilize the *Marsh* doctrine, the Court in *Brigham* held explicitly that the Common Benefits Clause "is generally coextensive with the equivalent guaranty in the United States Constitution and imports similar methods of analysis."[8] Thus, there is no reason to believe that the Vermont Supreme Court would not import the teaching of *Marsh* and its progeny into Vermont law.

Cases following *Marsh* have held that a private entity that renders services which are municipal in nature is subject to equal protection requirements,[9] and that a private business that operates in close relationship to a government may not take action in violation of the Equal Protection Clause.[10] In *Burton v. Wilmington Parking Auth.*, the dispute involved a privately-owned restaurant that denied access to African-American patrons, where the restaurant leased space in a state-owned parking building. The Supreme Court held:"By its inaction, the [Parking] Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."[11] Vermont's independent school structure similarly places the "power, property and prestige" of the State behind the discrimination against children with disabilities.

Specifically in the field of education, the United States Supreme Court has held that an entity's "nominally private character . . . is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."[12] Considering the Vermont system, where independent schools are taxpayer-funded, serve as community schools, contract with towns to provide education, and, in at least one instance, have state legislators sitting on their board of trustees, there is little reason to believe that *Brentwood Academy* does not apply.

The *Marsh* cases thus appear to compel the holding that Vermont's independent schools provide a public function and, for the purposes of the Education and Common Benefits Clauses, are no different than public schools in their obligations to students with disabilities as part of the operation of the state's system of education.

Although independent schools have offered reasons why they should not be required to accept and provide required accommodations and/or services to students with disabilities, none seemingly will be sufficient to change this analysis. The Court in *Brigham* held that disparate treatment under the Education and Common Benefits Clauses can only be justified where "any discrimination occasioned by the law serves a compelling government interest, and is narrowly tailored to serve that objective."[13]

In applying this standard, it should be noted that the Vermont Independent Schools Association has maintained that it may be difficult for some schools to provide required accommodations and/or services to students with disabilities. But it is difficult to see how it will be more difficult than it is for public schools. Likewise, the claim that smaller independent schools will have particular problems in providing required accommodations and/or services ignores the fact that there are many small public schools in Vermont that do so.

Independent schools also have argued in a letter from the Vermont Council of Independent Schools to the Chairman of the State Board of Education that, if independent schools are required to accept students with disabilities, "independent school education will be accessible only to wealthy families that can afford to pay tuition." The basis for this contention is not explained. Because many of the independent schools are now almost entirely supported by taxpayer funding, it is difficult to see how this claim even makes sense.

Finally, independent schools maintain that students with disabilities can go elsewhere, *i.e.* to distant public schools. As discussed above, forcing these students out of their home communities alone works considerable prejudice. Moreover, the arguments that students with disabilities can attend a different school unfortunately brings to mind the discredited "separate but equal" rationale of *Plessy v. Ferguson*,[14] not the controlling rationale of *Brown v. Board of Education*. As the Court held in *Brigham*:

> We find no authority for the proposition that discrimination in the distribution of a constitutionally mandated right such as education may be excused because a "minimal" level of opportunity is provided to all. As Justice Marshall observed, "the Equal Protection Clause is not addressed to . . . minimal sufficiency but rather to the unjustifiable inequities of state action."[15] (citations omitted).

In the end, none of the independent schools' arguments would appear to come close to fulfilling the compelling state interest test of *Brigham*. In *Brigham*, the Court rejected the State's reliance on "the laudable goal of local control" as sufficient to allow disparate educational opportunities based on where children live.[16] Here, it is difficult to perceive even a "laudable goal" that supports the discriminatory system at issue. Therefore, it would strongly appear that Vermont law requires taxpayer-funded independent schools to accept students with disabilities and provide required accommodations and/or services.

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[1] At least two independent schools (in North Bennington and Winhall) actually served as the local public community school before obtaining independent status.
[2] *Brigham v. State*, 166 Vt. 246, 249, 692 A.2d 384, 386 (1997).
[3] *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
[4] Vt. Const. ch. I, art. 7, and ch. II, § 68.
[5] *Brigham*, 166 Vt. at 264, 692 A.2d at 395.
[6] *Id.* at 265, 692 A.2d at 396.
[7] *Marsh v. Alabama*, 326 U.S. 501 (1946).
[8] *Brigham*, 166 Vt. 265, 692 A.2d 395.
[9] *See Evans v. Newton*, 382 U.S. 296 (1966).
[10] *See also Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).
[11] *Id.* at 725.
[12] *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 298 (2001).
[13] *Brigham*, 166 Vt. at 265, 692 A.2d at 396.
[14] *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[15] *Brigham*, 166 Vt. at 267-68, 692 A.2d at 397.
[16] *Brigham*, 166 Vt. at 265-266, 692 A.2d at 396.

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