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Broken Promises: The Granite State's Return to the Institutionalization of Children with Disabilities

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Elizabeth Trautz

Broken Promises: The Granite State's Return to the Institutionalization of Children with Disabilities

21 U.N.H. L. Rev. 231 (2022)

ABSTRACT. In 1975, the New Hampshire legislature enacted a progressive statute which mandated the Department of Health and Human Services “to establish, maintain, implement and coordinate a comprehensive service delivery system for developmentally disabled persons.” This law was innovative for its time; it decreed that individual service plans (ISPs) be developed for every client in the state’s service delivery system, guaranteed “a right to adequate and humane habilitation and treatment[,]” and contemplated the state’s area agency system as we know it today. The statute was a steppingstone for the 1981 class action lawsuit of *Garrity v. Gallen*. This was one of many class actions nationwide, and part of the deinstitutionalization movement. Prodded by the *Garrity* court’s order demanding the establishment of area agencies, the Department of Health and Human Services (DHHS) led the State of New Hampshire in creating a system of community-based services for the developmentally disabled. The birth of area agencies allowed the state to become the first in the nation to embrace deinstitutionalization.

Despite the state’s seemingly valiant history with developmental disabilities, DHHS refuses to provide home and community-based services to children and young adults. This is because DHHS assumes that all developmentally disabled students under age twenty-one qualify for special education and that residential placement is the responsibility of local school districts and their taxpayers. This Note examines the longstanding struggle between parents of children with developmental disabilities, school districts, and the State of New Hampshire. Part I explains state and federal special education laws; Parts II and III detail the history of deinstitutionalization; Part IV scrutinizes how the state broke its promise to children with developmental disabilities; and Part V proposes potential solutions to this deep-rooted problem.

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INTRODUCTION

Janessa Verrill is one of 29,195 students in New Hampshire who qualify for special education under state and federal laws.¹ She is also eligible for home and community-based services pursuant to N.H. R.S.A. 171-A and N.H. Code Admin. R. He-M 503.² At nineteen years old, she is non-verbal, struggles with emotional regulation, and presents with severe behavioral challenges stemming from autism spectrum disorder.³ She “rarely sleeps for more than a couple of hours and requires constant supervision as well as help with toileting.”⁴ In short, Janessa requires round-the-clock care due to the severity of her disability.

Janessa’s mother, Lisa Verrill, is a single mother of five children, three of whom are on the autism spectrum.⁵ Consequently, Lisa is stretched very thin. Because Janessa’s needs “make leaving the home and waiting anywhere impossible[,]” Lisa cannot take her other children to after-school activities or pick them up from sports.⁶ Indeed, Lisa’s “other children have gone without her attention and interaction because of Janessa’s disability.”⁷ Consequently, Lisa can no longer support Janessa in her home.⁸

Janessa receives educational services from the Gilford School District.⁹ Janessa’s school district, like all public schools within the state, cannot provide

¹ See 20 U.S.C. § 1400; N.H. REV. STAT. ANN. § 186-C; Verrill v. Comm’r Lori Shibinette et al., No. 217-2020-CV-00382 (N.H. Super. Ct. Oct. 26, 2021) (order); STATE OF N.H. DEP’T OF EDUC., STATEWIDE CENSUS BY DISABILITY (July 8, 2021), <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/statewide-census-10-1-2020-hk.pdf> [<https://perma.cc/4TBC-GZEY>]; Roberta Baker, *Court Ruling Brings Critical Services to Young Adult Students with Disabilities*, LACONIA DAILY SUN (Nov. 3, 2021), https://www.laconiadailysun.com/news/local/court-ruling-brings-critical-services-to-young-adult-students-with-disabilities/article_b3624928-3b45-11ec-b287-635bd37d487c.html [<https://perma.cc/GZR2-R2UW>].

² See N.H. REV. STAT. ANN. § 171-A:1 (2006); N.H. CODE ADMIN. R. § He-M 503 (2015).

³ See Verrill v. Comm’r Lori Shibinette et al., No. 217-2020-CV-00382 (N.H. Super. Ct. Oct. 26, 2021) (order); Complaint, Verrill v. Comm’r Lori Shibinette et al., No. 217-2020-CV-00382 (N.H. Super. Ct. Aug. 7, 2020); Baker, *supra* note 1. Janessa was 19 at the time her Complaint was filed—she has since turned 21.

⁴ Baker, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See Complaint, *supra* note 4, at 3.

⁹ See *id.* at 2–3.

placement for non-educational reasons.¹⁰ Janessa’s needs are “social or behavioral, and not something the school could address through educational services” unless necessary to receive a free appropriate public education.¹¹ Accordingly, Lisa Verrill requested residential placement through the Department of Health and Human Services (DHHS).¹² DHHS rejected Lisa’s application, reasoning that home and community-based services are not available to students receiving special education.¹³ Janessa has subsequently fallen into a “service gap”—receiving services to support her education in school, but not the range of services she requires for life beyond the schoolhouse doors.¹⁴

Janessa is not alone. As previously stated, 29,195 students in New Hampshire qualify for special education, nearly 4,000 of whom are eligible due to autism or an intellectual disability.¹⁵ As children with severe disabilities outgrow their parents’ ability to care for them, families are left with two portals to nowhere. First, upper and middle-class families may unilaterally place their children in residential facilities and sue their school districts for reimbursement. However, under the special education laws, school districts can only legally place such children in schools that are state-approved to provide special education; many of which are private schools located out-of-state or beyond commuting distance.¹⁶ These children are thus detached from their families and communities at taxpayer expense. Second, less fortunate caregivers may attempt to place their children through the juvenile justice or child protection systems by obtaining a finding of delinquency,¹⁷ neglect,¹⁸ or “Child in Need of Services”¹⁹ (with limited exceptions, these options are only available to children under the age of eighteen, and often necessitate a parent showing she has willfully neglected or abused her

¹⁰ See 20 U.S.C. § 1401(9) (2010); 34 C.F.R. § 300.104 (2012); N.H. REV. STAT. ANN. § 186-C:2, II-V (2018); N.H. REV. STAT. ANN. § 186-C:9, 10 (2009); Andrew F. ex rel. Joseph F. v. Douglas County Sch. Dist. RE-1, 580 U.S. 386 (2017); D.B. v. Esposito, 675 F.3d 26 (1st Cir. 2012); Gonzalez v. Puerto Rico, 254 F.3d 350 (1st Cir. 2001); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983); Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981).

¹¹ See Complaint, *supra* note 3, at 1; Baker, *supra* note 1.

¹² See sources cited *supra* note 3.

¹³ See *id.*

¹⁴ See Baker, *supra* note 1.

¹⁵ STATEWIDE CENSUS BY DISABILITY, *supra* note 1.

¹⁶ See N.H. REV. STAT. ANN. § 186-C:2, II-III (2018); N.H. REV. STAT. ANN. §§ 186-C:9, 10 (2009); *Approved Private Special Education Programs*, N.H. DEPT OF EDUC., <https://www.education.nh.gov/who-we-are/division-of-learner-support/bureau-of-student-support/special-education/approved-private-programs> [<https://perma.cc/4EXF-TSND>].

¹⁷ See N.H. REV. STAT. ANN. § 169-B (1999).

¹⁸ See N.H. REV. STAT. ANN. § 169-C (2020).

¹⁹ See N.H. REV. STAT. ANN. § 169-D (2013).

developmentally disabled child²⁰). A third portal—placement through DHHS—has never been open to those receiving special education.

DHHS's unwillingness to fund residential placement for children and young adults, in conjunction with the obligation of school districts to place such children only in facilities that are state-approved to provide special education, results in a return to institutionalization, now privatized but publicly funded.

I. THE IDEA AND NEW HAMPSHIRE'S SPECIAL EDUCATION LAWS

The Individuals with Disabilities Education Act (IDEA) is the nation's federal special education law. Its stated purpose is, in pertinent part, "to ensure that all children with disabilities have available to them a free appropriate public education . . . designed to meet their unique needs and prepare them for further education, employment, and independent living . . ." ²¹ A "free appropriate public education" (FAPE) means special education and related services that are provided at public expense, meet the standards set forth by the state educational agency, "include an appropriate preschool, elementary school, or secondary education in the State involved," and conform to each student's individualized education program (IEP).²² In providing an "appropriate . . . education[,]" states must comply with the procedures set forth in the IDEA and develop IEPs which are reasonably calculated to enable students to make educational progress.²³ Indeed, it is ultimately each *state's* responsibility to ensure that all qualifying students with disabilities receive a FAPE, as it is the state that chooses to accept federal funding.²⁴ However, the State of New Hampshire fulfills its duties under the IDEA by assigning local school districts the obligation of meeting the educational needs of students with disabilities.²⁵

New Hampshire's counterpart to the IDEA is its "special education" statute, N.H. R.S.A. 186-C, which "represents the State's plan to ensure compliance with the federal mandates."²⁶

The statute requires the State Board of Education to "adopt rules establishing a process and standards for the approval and monitoring of programs of education"²⁷

²⁰ See N.H. REV. STAT. ANN. § 169-B:2, IV (2021).

²¹ 20 U.S.C. § 1400(d)(1)(A) (2010).

²² 20 U.S.C. § 1401(9) (2010).

²³ See *Andrew F.*, 580 U.S. 386, 399 (2017); C.D. by and through M.D. v. Natick Pub. Sch. Dist., 924 F.3d 621 (1st Cir. 2019).

²⁴ See 20 U.S.C. § 1412(a)(12) (2016); § 1413(g) (2015).

²⁵ See N.H. REV. STAT. ANN. § 186-C:1 (2009).

²⁶ See *Garrity v. Gallen*, 522 F. Supp. 171, 221 (D.N.H. 1981).

²⁷ N.H. REV. STAT. ANN. § 186-C:5 (2018).

but leaves the provision of special education services, and the funding of such services, entirely to local school districts.²⁸ Consequently, public schools are obliged to implement and fund IEPs for all eligible students ages six through twenty-one.²⁹ Pursuant to state and federal law, such students must be educated “to the maximum extent appropriate” among their nondisabled peers, otherwise known as the “least restrictive environment” (LRE).³⁰

An important exception to the requirement that public schools provide and fund special education services pertains to the obligations of other state agencies when disabled children require non-educational services. In Janessa’s case, for instance, the Gilford School District likely provides placement at its public high school and various special education supports. In addition, DHHS *should* provide home and community-based services. Such services are mandated by R.S.A. 171-A, which requires DHHS and its area agencies³¹ to provide “care, habilitation, rehabilitation, treatment and training” as well as “service coordination, community living arrangements, employment and day services and supports to families of individuals with developmental disabilities.”³² Unfortunately, DHHS refuses to provide home and community-based services to individuals like Janessa who are still in school.³³

Recognizing that many states have statutes similar to R.S.A. 171-A, the IDEA requires the formation of interagency agreements between state social agencies and state departments of education.³⁴ Interagency agreements must include: (i) an

²⁸ See N.H. REV. STAT. ANN. § 186-C:7 (2009); § 186-C:13 (2010) (“all expenses incurred by a school district in administering the law in relation to the education for children with disabilities in need of special education and related services shall be paid by the school district where the child resides”).

²⁹ See N.H. REV. STAT. ANN. § 186-C:7. A school’s duty to provide special education ends when the student reaches the age of 21 or receives a regular high school diploma, whichever comes first. See § 186-C:9.

³⁰ See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) (2012); N.H. REV. STAT. ANN. § 186-C:1, I (2009); N.H. CODE ADMIN. R. § Ed. 1111.01(a) (2017).

³¹ “Area agencies” are private, nonprofit corporations located across 10 geographical regions throughout the state which deliver services to eligible clients. They are funded and supervised by DHHS. See N.H. REV. STAT. ANN. § 171-A:2, I-b (2019); *Area Agencies*, N.H. DEP’T OF HEALTH & HUM. SERVS., <https://www.dhhs.nh.gov/dcbcs/bds/agencies.htm> [<https://perma.cc/5ABW-YYE2>]; *Area Agency Services*, DISABILITY RIGHTS CTR. - N.H., <https://drcnh.org/issue-areas/childrens-issues/healthcare-related-programs/area-agency-services/> [<https://perma.cc/297U-254C>].

³² N.H. REV. STAT. ANN. § 171-A. Interestingly, the statute defines “habilitation” broadly to include “programs of formal, structured *education* and treatment.” See N.H. REV. STAT. ANN. § 171-A:2, IX (emphasis added).

³³ See Complaint, *supra* note 3, at 1.

³⁴ See 20 U.S.C. § 1412(a)(12)(A).

identification of the financial responsibility of each state agency, which “shall precede the financial responsibility of the local educational agency”; (ii) conditions and terms of reimbursement to school districts; (iii) procedures for resolving interagency disputes; and (iv) procedures for agencies to determine and identify interagency coordination responsibilities.³⁵ New Hampshire’s special education statute implements that mandate by directing “[t]he commissioner of the department of education, the state board of education, and the commission of the department of health and human services” to enter into an interagency agreement.³⁶

To understand the purpose and policy behind the laws described above, one must first digest the nation’s turbulent history regarding individuals with developmental disabilities.

II. THE NATIONAL DEINSTITUTIONALIZATION MOVEMENT

The deinstitutionalization movement formally commenced in 1963, when President John F. Kennedy proposed in a speech to Congress a new approach to mental illness and developmental disabilities.³⁷ Kennedy’s plan aimed to supplant America’s “reliance on the cold mercy of custodial isolation” with the “open warmth of community concern and capability.”³⁸ Indeed, the Final Report of the Joint Commission on Mental Illness and Health, published in 1961, acknowledged the desolate conditions of American asylums and demanded titanic reforms to the nation’s approach to mental health.³⁹ Specifically, it concluded that community-based treatments were vital and proposed a continuum of community-based and hospital services.⁴⁰

Concurrently, investigative reporters brought the state of institutions out of the dark and into the homes of American families, prompting protests, investigations, and litigation.⁴¹

³⁵ *Id.* (emphasis added).

³⁶ See N.H. REV. STAT. ANN. § 186-C:7-a (2012).

³⁷ See John F. Kennedy, Special Message to the Congress on Mental Illness and Mental Retardation (Feb. 5, 1963). See also Jim Mansell & Kent Ericson, DEINSTITUTIONALIZATION AND COMMUNITY LIVING: INTELLECTUAL DISABILITY SERVICES IN BRITAIN, SCANDINAVIA AND THE USA (Jim Mansell et al. eds., 1996).

³⁸ See Kennedy, *supra* note 37.

³⁹ See JOINT COMM’N ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH: FINAL REP. (1961).

⁴⁰ JOINT COMM’N ON MENTAL ILLNESS AND HEALTH, *supra* note 39; DAVID POLIZZI & MATTHEW R. DRAPER, FORENSIC PSYCHOLOGY RECONSIDERED: A CRITIQUE OF MENTAL ILLNESS AND THE COURTS (2016).

⁴¹ See Liat Ben-Moshe, *The Perfect Storm*, in DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION (2020).

Graphic accounts of visits to institutions such as Willowbrook and Pennhurst State School detailed the desolate and abusive conditions endured by disabled Americans.⁴² In 1966, Dr. Burton Blatt of Boston University enlisted the help of Photographer Fred Kaplan in obtaining candid photographs of the back wards of four institutions.⁴³ In August of that year, Blatt published a photographic essay containing black-and-white photographs of naked patients covered in feces, “children with hands tied and legs bound,” and barren but overcrowded dormitories.⁴⁴ In 1972, investigative reporter Geraldo Rivera produced an exposé documentary of his visit to the country’s largest institution, the Willowbrook State School.⁴⁵ Originally aired on Eyewitness News, Rivera narrated:

There was one attendant for perhaps 50 severely and profoundly retarded children. *Children*. Lying on the floor naked and scared and smeared with their own feces. They were making a pitiful sound, a kind of mournful wail that it’s impossible for me to forget. This is what it looked like, this is what it sounded like, but how can I tell you about the way it smelled. It smelled of filth, it smelled of disease, and it smelled of death.⁴⁶

Regarding the institution’s title, Rivera opined, “it’s called a school, but that’s more a statement of aspiration than a fact.”⁴⁷ Indeed, fewer than twenty percent of the institution’s 5,230 patients attended any kind of classes.⁴⁸ Willowbrook was not an anomaly; as Blatt announced in his essay, “we know personally of few institutions . . . completely free of dirt and filth, odors, naked patients groveling in their own feces, children in locked cells, horribly crowded dormitories, and understaffed and wrongly staffed facilities.”⁴⁹ New Hampshire’s own Laconia State School—originally deemed the New Hampshire School for the Feebleminded—provoked controversy as early as the 1950s, after parents who visited the institution were “devastated by what they thought was the warehousing of people.”⁵⁰

⁴² See BEN-MOSHE, *supra* note 41.

⁴³ See BURTON BLATT & FRED KAPLAN, CHRISTMAS IN PURGATORY: A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION (1966). Blatt never revealed the names of the institutions she visited; he wished to avoid creating the impression that this problem was a local rather than national one. Seymour B. Sarason, *Foreword* to BURTON BLATT & FRED KAPLAN, CHRISTMAS IN PURGATORY: A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION (1966).

⁴⁴ See BLATT, *supra* note 43, at 13; BEN-MOSHE, *supra* note 41.

⁴⁵ See *Willowbrook: The Last Great Disgrace* (WABC-TV 1972).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ BURTON BLATT, *Introduction* to BURTON BLATT & FRED KAPLAN, CHRISTMAS IN PURGATORY: A PHOTOGRAPHIC ESSAY ON MENTAL RETARDATION (1966).

⁵⁰ See JULIE ANN RACINO, POLICY, PROGRAM EVALUATION, AND RESEARCH IN DISABILITY: COMMUNITY SUPPORT FOR ALL 34 (1999); LOST IN LACONIA (IL Media 2010).

Perhaps bolstered by the influx of media coverage, “deinstitutionalization advocates developed a legal strategy that relied centrally on the Due Process Clause of the Fourteenth Amendment.”⁵¹ This strategy came to fruition in 1972, when the United States District Court for the Middle District of Alabama ruled that civilly committed mental patients had a constitutional right to treatment and habilitation.⁵² This ruling “created the right to treatment reform case, and became the prototype for almost innumerable other lawsuits.”⁵³ Seven years later, two class action lawsuits⁵⁴ challenging forced medication at state institutions “became the prototypes for ‘right to refuse’ litigation.”⁵⁵ Synchronously, litigation involving the Willowbrook State School confirmed a patient’s right to protection from harm; holding that the facility’s residents were entitled to safety, a tolerable living environment, medical care, and freedom from conditions that “shock the conscience.”⁵⁶

Stirred by *Brown v. Board of Education* and its progeny of civil rights decisions,⁵⁷ Congress enacted the Education for All Handicapped Children Act (EHCA) in 1975.⁵⁸

The EHCA and Section 504 of the Rehabilitation Act would serve as a steppingstone by which institutionalization itself would be placed on trial.⁵⁹ Indeed, in the 1977 case of *Halderman v. Pennhurst State School & Hospital*, the United States District Court for the Eastern District of Pennsylvania announced

⁵¹ Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 22 (2012).

⁵² See *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff’d in part, rev’d in part and remanded sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); Ben-Moshe, *supra* note 41; Margaret F. Ewing, *Health Planning and Deinstitutionalization: Advocacy Within the Administrative Process*, 31 STAN. L. REV. 679, 682 (1979).

⁵³ Sheldon Gelman, *The Law and Psychiatry Wars, 1960-1980*, 34 CAL. W. L. REV. 153, 160 (1997).

⁵⁴ See *Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom.* *Mills v. Rogers*, 457 U.S. 291 (1982); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978); Gelman, *supra* note 53 at 169.

⁵⁵ Gelman, *supra* note 53 at 169.

⁵⁶ See *New York State Ass’n for Retarded Child., Inc. v. Rockefeller*, 357 F. Supp. 752, 765 (E.D.N.Y. 1973); BEN-MOSHE, *supra* note 41.

⁵⁷ See, e.g., *Pennsylvania Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954).

⁵⁸ See *Education for All Handicapped Children Act of 1975*, Pub. L. No. 94-142, 89 Stat. 773 (1975) (amended 2010); *About IDEA*, U.S. DEPT OF EDUC., <https://sites.ed.gov/idea/about-idea/#IDEA-History> [<https://perma.cc/Q4DJ-CLQD>]. The law’s name was changed to the Individuals with Disabilities Education Act in a 1990 reauthorization.

⁵⁹ See *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff’d in part, rev’d in part*, 612 F.2d 84 (3d Cir. 1979), *rev’d*, 451 U.S. 1 (1981); BEN-MOSHE, *supra* note 41.

that the confinement and segregation of developmentally disabled individuals in Pennhurst was “clearly...separate and not equal.”⁶⁰ The court thus ordered the State of Pennsylvania to provide community living arrangements for Pennhurst’s residents, “and, by extension, to close down the institution.”⁶¹ Less than one year later, six residents of Laconia State School, joined by the New Hampshire Association for Retarded Citizens (ARC) and parents of developmentally disabled citizens in New Hampshire, filed a class action lawsuit against the State of New Hampshire regarding conditions at the state’s institution for the developmentally disabled.⁶²

The nail in the institutionalization coffin came in 1999, when the U.S. Supreme Court ruled that states must provide the option for community-based treatment to individuals with disabilities and that unjustified institutional placement constitutes discrimination under the Americans with Disabilities Act.⁶³ *Olmstead* remains one of the most important civil rights decisions in the history of disability law; it continues to serve as a “promising doctrinal tool” for achieving the goals of deinstitutionalization.⁶⁴

III. NEW HAMPSHIRE’S DEINSTITUTIONALIZATION MOVEMENT

Less than a century ago, New Hampshire lawmakers perceived those with intellectual disabilities as nothing more than a “*tremendous economic burden*.”⁶⁵ The State Board of Education itself called for isolation of “the feeble-minded by segregation and custodianship[,]” sterilization, and prevention of marriage “by every possible means.”⁶⁶ Accordingly, parents and school districts deposited individuals with disabilities at the Laconia State School and Training Center, the state’s only public facility for developmentally disabled children and adults.⁶⁷ By 1970, the facility housed 1,167 adults and children.⁶⁸ While most considered the

⁶⁰ See *Halderman*, 446 F. Supp. at 1322.

⁶¹ BEN-MOSHE, *supra* note 41.

⁶² See *Garrity v. Gallen*, 522 F. Supp. 171, 176 (D.N.H. 1981).

⁶³ See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 607 (1999); See also *Olmstead*, 527 U.S. 607 (Stevens, J., concurring).

⁶⁴ See *Bagenstos*, *supra* note 51, at 39.

⁶⁵ N.H. STATE BD. OF EDUC., SIXTY-THIRD ANN. REP. UPON THE PUB. SCHS. OF N.H 127-28 (1924) (emphasis added). See also Erin R. Feltes & Eric R. Herlan, *Introduction* to N.H. SPECIAL EDUCATION LAW (1st ed. 2018).

⁶⁶ SIXTY-THIRD ANN. REP., *supra* note 65.

⁶⁷ See *Garrity*, 522 F. Supp. at 179, 224.

⁶⁸ See *id.* at 179–80.

conditions of the school to be “out of sight, out of mind,” those who entered observed a “barren, sterile environment, devoid of stimulation[.]”⁶⁹

In 1975, a collaborative effort between the parents of Laconia State School residents and various professionals working in state government led to the passage of R.S.A. 171-A.⁷⁰ The law was premised on the understanding that treatment and habilitation of individuals with disabilities was generally more effective when provided in community-based programs rather than in large, isolated institutions.⁷¹ Its stated purpose was “to enable the division of mental health to establish, maintain, implement and coordinate a comprehensive service delivery system for developmentally disabled persons.”⁷² The statute decreed that individual service plans (ISPs) be developed for every client in the state’s service delivery system,⁷³ guaranteed “a right to adequate and humane habilitation and treatment[.]”⁷⁴ and contemplated the establishment of area agencies through which community-based services would be provided.⁷⁵

In order to secure the implementation of R.S.A. 171-A, Governor Hugh J. Gallen directed DHHS to prepare a master plan titled “Action for Independence,” which set forth timetables for the accomplishment of the statute’s goals.⁷⁶ The Action for Independence “proposed a schedule for deinstitutionalization” which called for completion of ISPs for each resident at Laconia by June 1980 and community placement of one-hundred residents by 1981.⁷⁷

⁶⁹ See *Laconia State School*, THE LACONIA DAILY SUN, (Apr. 30, 2007), https://www.laconiadailysun.com/news/local/laconia-state-school/article_7f2d9cfd-48a6-50a9-9cfb-3d2148f94f23.html [<https://perma.cc/Z8EM-3PWT>]; Janet Krum et al., *The History of Laconia State School*, N.H. CHALLENGE, 2004. Richard Cohen, attorney for the plaintiffs in *Garrity v. Gallen*, described the conditions as “worse than Pennhurst,” as the facility received less funding per capita: “I couldn’t believe what I saw. . . half the buildings hadn’t even been certified as minimally adequate . . . the residents were half-clothed; no privacy in terms of toilet stalls.” In a word, the conditions were “dehumanizing.” Telephone Interview with Richard Cohen (Jan. 28, 2022).

⁷⁰ See Donald Shumway, *Closing Laconia*, in DEINSTITUTIONALIZATION AND COMMUNITY LIVING: INTELLECTUAL DISABILITY SERVICES IN BRITAIN, SCANDINAVIA AND THE USA 20 (Jim Mansell et al. eds., 1996).

⁷¹ See N.H. REV. STAT. ANN. § 171-A (1975).

⁷² N.H. REV. STAT. ANN. § 171-A:1 (1975).

⁷³ N.H. REV. STAT. ANN. § 171-A:12 (1975).

⁷⁴ N.H. REV. STAT. ANN. § 171-A:13 (1975).

⁷⁵ See N.H. REV. STAT. ANN. § 171-A:4 (1975); *Garrity*, 522 F. Supp. at 228.

⁷⁶ See *Garrity v. Gallen*, 522 F. Supp. 171, 182 (D.N.H. 1981); DONALD SHUMWAY ET AL., ACTION FOR INDEPENDENCE (1980).

⁷⁷ See *Garrity*, 522 F. Supp. at 182.

As recalled by the plan's author and former director of DHHS, Don Shumway, "[t]he passage of legislation did not lead to prompt fulfilment of its promises . . . [c]onditions at the institution remained very poor for those who remained or were admitted."⁷⁸ Indeed, as of 1981, only sixty-five percent of the ISPs had been completed and the community placement goal was revised to fifty residents by 1981, with an expectation that "these figures would have to be revised downward" due to the demise of another community project, Guardianship Trust.⁷⁹

A. *The Case of Garrity v. Gallen*

Prompted by the State's inaction, six residents of Laconia State School, joined by ARC and the parents of developmentally disabled citizens, filed a class action lawsuit against several officials of the State of New Hampshire regarding conditions at the Laconia State School.⁸⁰ The grounds for the lawsuit were that New Hampshire had violated its own law, R.S.A. 171-A, as well as the EHCA and the U.S. Constitution by failing to create a network of community-based services as promised.⁸¹

Over the course of what, at the time, was the longest civil trial in New Hampshire's history,⁸² Richard Cohen and John MacIntosh of New Hampshire Legal Assistance led the plaintiffs in attacking conditions at Laconia State School, "the validity of institutional life itself[,] and the State's unwillingness to implement R.S.A. 171-A."⁸³ By 1979, Laconia State School's population had decreased to 564 patients, and approximately eighty of those patients were under the age of twenty-one.⁸⁴ Testimony presented by both sides revealed the following deficiencies in the conditions at Laconia, including but not limited to:

- Over half of Laconia's residents were confined to living quarters reflecting "total environmental deprivation[,] and "[m]any of the wards [had] large

⁷⁸ Shumway, *supra* note 70, at 20–21; *See also Garrity*, 522 F. Supp. at 233 ("at the time of trial in this lawsuit not a single 'fixed point of referral' nor 'area agency' had been established").

⁷⁹ *See Garrity*, 522 F. Supp. at 182 ("the unexpected demise of . . . Guardianship Trust . . . created the need for thirty-five additional placements").

⁸⁰ *See id.* at 176.

⁸¹ *See id.* at 175–76. The Plaintiffs also sought relief under the Developmentally Disabled Assistance and Bill of Rights Act and the Nondiscrimination section of the Rehabilitation Act of 1973.

⁸² *See Shumway*, *supra* note 70, at 21. The trial took place over approximately 40 days. *Garrity*, 522 F. Supp. at 175.

⁸³ *See Garrity*, 522 F. Supp. at 175.

⁸⁴ *See id.* at 179–80.

open rooms with little furniture or other accouterments, and [could] only be described as sterile environments.”⁸⁵

- The facility was severely understaffed.⁸⁶
- The Education and Training Department served approximately 350 of 564 residents.⁸⁷
- There was no full-time medical director, nor were there on-site physicians, which led to “suffering” long-term health treatment.⁸⁸
- Approximately forty percent of the population at LSS received psychotropic drugs, most of whom were receiving excess dosages.⁸⁹
- Residents had been placed in restraints for inappropriate reasons, sometimes for long stretches at a time.⁹⁰
- A doctor was terminated from Laconia after it was discovered he had a practice of suturing injuries, especially facial, without anesthesia.⁹¹

The parties ultimately disagreed on one major point: “the responsibility on the part of the State of New Hampshire to affirmatively create these community programs.”⁹² Evidently, just as the State continues to deny responsibility for the provision of home and community-based services to individuals like Janessa, “N.H. RSA 171-A represent[ed] an *unfulfilled promise* to developmentally disabled individuals of the state” as early as 1978, when the lawsuit was initially filed.⁹³

Ultimately, the efforts of the plaintiffs’ attorneys and their expert witnesses on community habilitation,⁹⁴ the U.S. Department of Justice (who intervened in the case), and the state’s own Donald Shumway, led to a holding that the state had violated Section 504 of the Rehabilitation Act, the EHCA, N.H. RSA 186-C, and N.H. RSA 171-A. Accordingly, the court ordered the state to:

- Develop and implement a statewide service delivery system;

⁸⁵ *See id.* at 181.

⁸⁶ *See id.* at 182.

⁸⁷ *See id.* at 184–85.

⁸⁸ *See id.* at 190–91.

⁸⁹ *See id.* at 191–92.

⁹⁰ *See id.* at 192–93.

⁹¹ *See id.* at 193.

⁹² *See id.* at 176.

⁹³ *See id.* at 233 (emphasis added).

⁹⁴ Telephone Interview with Richard Cohen (Jan. 28, 2022).

- Revise its placement procedures “to [e]nsure that the State Department of Education is designated as the one centralized agency responsible for the placement of individuals aged three through twenty-one[;]”
- Establish area agencies;
- Complete ISPs based on comprehensive screening evaluations for each resident of LSS;
- Conduct periodic reviews of every resident at LSS;
- Ensure that all residents at LSS are afforded privacy and dignity;
- Evaluate all residents for participation in educational programs;
- And implement significant reforms to LSS itself.⁹⁵

The judge’s decision was “Solomon-like” for both parties.⁹⁶ “The advocates claimed victory, but so did state officials, who argued that the judge had done nothing more than order them to implement their own plan.”⁹⁷

B. The Aftermath

In response to the court’s Order, the state filed four plans of implementation by November 1981:

Plan A was to tear down and build up the institution at enormous expense; [P]lan B was a variation of institutional improvement; [P]lan C was to reduce the institutional size to approximately 250 over four plus years . . . and [P]lan D was to accomplish the task in two years.⁹⁸

Plan C was the preferred choice of both the state and the plaintiffs, and ultimately became the accepted plan of implementation.⁹⁹ In an effort to swiftly remove individuals ages six through twenty-one from Laconia, the Department of Education placed the facility’s children in residential treatment centers across the

⁹⁵ See *Garrity*, 522 F. Supp. at 240–45.

⁹⁶ See RACINO, *supra* note 50, at 67 (quoting one of the plaintiffs’ attorneys).

⁹⁷ John DiStaso, *NH Mental Health System Leads U.S.: State to be First to Close Institution for Retarded*, UNION LEADER, Dec. 17, 1990, at 1.

⁹⁸ Julie Ann Racino, *Garrity v. Gallen: The Role of the Court in Institutional Closure*, CMTY. & POL’Y STUD. 3, 27–28 (1993). The plans were each authored by Donald Shumway. Telephone Interview with Donald Shumway (Mar. 4, 2022).

⁹⁹ See RACINO, *supra* note 98; Telephone Interview with Richard Cohen (Jan. 28, 2022); Telephone Interview with Donald Shumway (Mar. 4, 2022).

state.¹⁰⁰ DHHS would place the remaining adults through its budding area agencies.¹⁰¹

“The next decade was marked by an increasing sophistication and refinement of the service [delivery] system”¹⁰² In 1983, New Hampshire successfully accessed the Medicaid Home and Community-Based Services waiver program.¹⁰³ By that time, roughly half of the state’s one thousand service recipients had transitioned to community living.¹⁰⁴ Five years later, the number of individuals in community programs had increased to nine hundred, with one hundred remaining at Laconia.¹⁰⁵ In addition, the state enacted legislation requiring DHHS to establish family support councils,¹⁰⁶ which “were a concrete representation of a beginning shift in the state to a new constituency base of families versus state institutional and community employees.”¹⁰⁷ John MacIntosh, second chair for the *Garrity* plaintiffs, described its aftermath as “an evolution” as “the state and the parents gained confidence with the quality of the placements, and . . . those with the most challenging behavioral problem[s] and medical conditions seemed to do better” outside of Laconia State School.¹⁰⁸

While the court emphasized throughout its opinion that neither the EHCA nor R.S.A. 171-A could be construed “as a legislative mandate for deinstitutionalization,”¹⁰⁹ the titanic reforms demanded by its Order of Implementation indirectly resulted in such.¹¹⁰ On January 31, 1991, Laconia State

¹⁰⁰ Interview with Donald Shumway (Mar. 4, 2022). According to Mr. Shumway, the children remaining at Laconia by 1981 tended to have more significant medical issues rather than behavioral ones. Nonetheless the State Department of Education interpreted the EHCA and R.S.A. 186-C as an obligation that school districts provide education and educationally related services to such children.

¹⁰¹ *See id.* The Medicaid Home and Community-Based Services waiver program is authorized by the Social Security Act, 42 U.S.C. § 1396 et seq. It provides states with funds to “furnish an array of home and community-based services that assist Medicaid beneficiaries to live in the community and avoid institutionalization.” *See Home and Community Based Services Waivers*, N.H. DEP’T OF HEALTH & HUM. SERVS. (Sept. 1, 2021), <https://www.dhhs.nh.gov/programs-services/disability-care/developmental-services/home-and-community-based-services-waivers> [<https://perma.cc/KKW5-UDPS>].

¹⁰² *See RACINO, supra* note 50, at 34 (citation omitted).

¹⁰³ *See id.*

¹⁰⁴ *See DiStaso, supra* note 97.

¹⁰⁵ *See id.*

¹⁰⁶ *See* N.H. REV. STAT. ANN. § 126-G:4 (1989) (amended 1995).

¹⁰⁷ *See RACINO, supra* note 50, at 36.

¹⁰⁸ DiStaso, *supra* note 97.

¹⁰⁹ *See Garrity, 522 F. Supp.* at 231.

¹¹⁰ *See generally RACINO, supra* note 98.

School closed its doors permanently.¹¹¹ This made New Hampshire the first state in the country without a public institution for the developmentally disabled.¹¹²

IV. NEW HAMPSHIRE'S RETURN TO INSTITUTIONALIZATION

Through the *Garrity* court's landmark decision, the Action for Independence, and Laconia's subsequent closure, DHHS was forced to embrace its affirmative duty, pursuant to R.S.A. 171-A, to provide home and community-based services to individuals with developmental disabilities. Today, the state funds ten area agencies through which it delivers services and supports to individuals with disabilities.¹¹³ Those supports include service coordination, day and vocational services, personal care services, community support services, and respite care.¹¹⁴ While the state has come a long way since its 1924 calls for isolation and segregation of "the feeble-minded,"¹¹⁵ it continues to "pass the buck" to localities by failing to live up to its statutory responsibilities.¹¹⁶ A January 2020 fiscal note from a subsequently tabled amendment to R.S.A. 171-A reveals at least 560 individuals ages eighteen to twenty-one are eligible but overlooked.¹¹⁷ This is because DHHS routinely directs its area agencies to decline home and community-based services to young adults and children like Janessa, who are eligible for developmental services under R.S.A. 171-A but still in school.¹¹⁸ As publicized by a recent Superior Court decision,¹¹⁹ the state believes that local school districts (and their taxpayers) should be primarily responsible for students who have not yet graduated or exited school—even when their needs are non-educational.¹²⁰

¹¹¹ See Krum et al., *supra* note 69. That same year, the property was transferred to the Department of Corrections and became Lakes Region Facility—a state prison. Laurenne Ramsdell, *Closing the Doors: Laconia State School Documentary Shines Light on the Negative Impact of Mental Institutions*, FOSTER'S DAILY DEMOCRAT (July 28, 2012), [https://www.fosters.com/article/20120729/G\]NEWS_01/707299892](https://www.fosters.com/article/20120729/G]NEWS_01/707299892) [https://perma.cc/5BAE-6SQG].

¹¹² See RACINO, *supra* note 50, at 36.

¹¹³ See *Area Agencies*, *supra* note 31.

¹¹⁴ *Bureau of Developmental Services*, N.H. DEP'T OF HEALTH & HUM. SERVS. (2022), <https://www.dhhs.nh.gov/programs-services/disability-care/developmental-services> [https://perma.cc/GP4Z-GDYG].

¹¹⁵ See N.H. STATE BD. OF EDUC., *supra* note 65, at 127.

¹¹⁶ *Garrity v. Gallen*, 522 F. Supp. 171, 224 (D.N.H. 1981).

¹¹⁷ See S.B. 714, 2020 Leg., 167th Sess. (N.H. 2020) (Fiscal Note).

¹¹⁸ See Complaint, *Verrill*, No. 217-2020-CV-00382 at 4.

¹¹⁹ See *Verrill ex rel. Verrill v. Comm'r Lori Shibinette*, No. 217-2020-CV-00382 (N.H. Super. Ct., Oct. 26, 2021).

¹²⁰ See *id.* at 2.

New Hampshire's public schools serve approximately 1,034 students with disabilities between the ages of eighteen to twenty-one.¹²¹ Many of those students will graduate alongside their peers, proceed to college or trade school, and move out of their parents' homes. But students like Janessa will not have that opportunity, as they will require round-the-clock care for the remainder of their lives. And after serving as their child's sole caretaker for eighteen years or more, some parents have no choice but to seek residential placement.¹²² These parents are left with two portals to nowhere: suing their local school districts or petitioning the juvenile justice or child protection systems for private, residential placement. A third portal—placement through DHHS—has never been open to those receiving special education.

A. Portal One: Placement Via School District

The IDEA and New Hampshire's special education laws permit parents of children with disabilities to unilaterally place their children in residential schools at taxpayer expense, presuming their local school district failed to provide the student with a FAPE.¹²³ The parents must then file an administrative due process complaint against their school districts to obtain reimbursement.¹²⁴ If the parties proceed to a due process hearing,¹²⁵ the school district will have the burden to prove that it met its obligations under the IDEA.¹²⁶ Of course, reimbursement is not guaranteed and may be reduced.¹²⁷

Where a child or young adult requires residential placement for reasons that are non-educational in nature,¹²⁸ suing the school district is a losing battle for both

¹²¹ *Statewide Census by Disability*, *supra* note 2.

¹²² These parents are typically disadvantaged single mothers whose children have grown larger, stronger, and thus more difficult to care for. Telephone Interview with Gerald Zelin, Shareholder, Drummond Woodsum (Jan. 2022); Telephone Interview with Richard Cohen (Jan. 28, 2022).

¹²³ See 20 U.S.C. § 1415(b)(6); N.H. REV. STAT. ANN. § 186-C:16-b (2021); N.H. CODE ADMIN. R. ED. § 1112 (2017); *Special Education Procedural Safeguards Handbook*, N.H. DEPT OF EDUC. (Apr. 2018), https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/2020-04/procedural_safeguards_handbook.pdf [<https://perma.cc/S3KH-6XBZ>]. As a precursor to unilateral placement, the student's IEP team must first deny the parents' request for residential placement. See sources cited *supra*, note 122.

¹²⁴ See sources cited *supra*, note 122.

¹²⁵ The IDEA encourages the parties to resolve their dispute outside of court by mandating that they participate in a resolution session. See 20 U.S.C. § 1415(f)(1)(B) (2005); *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993).

¹²⁶ See N.H. REV. STAT. ANN. § 186-C:16-b, III-a (2021).

¹²⁷ See sources cited *supra*, note 122.

¹²⁸ Courts and school districts alike have struggled for decades to interpret when a student's

sides. Even where a hearing officer agrees that a student requires residential placement to benefit from special education, school districts can only place such students in schools that are state approved to provide special education.¹²⁹ Currently, the State of New Hampshire has *three* approved private residential facilities that serve young adults with developmental disabilities: Legacy by Gersh at Crotched Mountain, Spaulding Academy & Family Services, and Easterseals Educational Programs.¹³⁰ Thus, students like Janessa are often placed in private institutions located out-of-state or beyond commuting distance from home; segregated from their families and communities at taxpayer expense. In addition, any transition services¹³¹ under the IDEA are disconnected from where they will live as adults. School districts cannot place students in group or foster homes because they are not “approved schools” – this avenue is only available through Portal 2.

Portal One is open only to upper- and middle-class families with the ability to front the cost of residential school tuition, which ranges anywhere from \$60,000 to \$300,000 annually.¹³² In addition, Portal One parents must expend the time and money required to proceed through a due process hearing.

needs are non-educational in nature. *See, e.g.*, *Kruelle v. New Castle County Sch. Dist.*, 642 F.2d 687, 693 (3d Cir. 1981) (the analysis must focus on whether residential placement is “a response to medical, social or emotional problems that are segregable from the learning process”); *Alice M. ex rel. Dale M. v. Bd. of Educ. of Bradley-Buorbonnais High Sch. Dist. No. 307*, 237 F.3d 813, 817 (7th Cir. 2001) (asking whether services provided at a residential placement would be geared primarily toward helping the child obtain an education rather than treating some underlying condition); *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 299 (5th Cir. 2009) (“In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education.”).

¹²⁹ *See* N.H. REV. STAT. ANN. §§ 186-C:2, II-III, C:9-C:10 (2018).

¹³⁰ *See Approved Private Special Education Programs*, N.H. DEPT OF EDUC. (2022), <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/private-providers-approved.pdf> [<https://perma.cc/N9U5-VAZF>].

¹³¹ “Transition services” are those designed to facilitate the child’s movement from school to post-school activities. *See* 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(a) (2006).

¹³² *See FY ’21 Private Provider Approved Rates*, N.H. DEPT OF EDUC. (June 3, 2020), <https://www.education.nh.gov/sites/g/files/ehbemt326/files/inline-documents/sonh/2020-2021-with-dhhs-rate-included-approved-rates-as-of-6-30-2020.pdf> [<https://perma.cc/N2MH-BYP2>]; *Special Education Tuition Prices*, MASS. DEPT OF EDUC. (Sept. 1, 2022), <https://www.mass.gov/service-details/special-education-tuition-pricing-details> [<https://perma.cc/CUL7-MM95>]. While this avenue allows parents to avoid fronting the cost of residential placement, it still burdens the school district and its taxpayers. *See* 20 U.S.C. § 1401(34).

B. Portal Two: Placement Via Juvenile Justice/Child Protection Services

The State of New Hampshire recognizes three avenues for the court-ordered placement of children: juvenile delinquency¹³³ through the Juvenile Justice System, abuse or neglect¹³⁴ through Child Protective Services, and Child in Need of Services (CHINS)¹³⁵ through Juvenile Justice. *These options are only available to children under the age of eighteen.*¹³⁶ Obtaining a finding of juvenile delinquency requires the child to have been found to have committed an offense that would otherwise qualify as a felony or misdemeanor if committed by an adult.¹³⁷ Placement via abuse or neglect necessitates a showing that a parent or guardian abused¹³⁸ or willfully neglected¹³⁹ her developmentally disabled child. Nonetheless, as the Governor's Commission to Study Area Agencies wrote in its 2005 Report:

For children with serious behavior or medical needs, where the parents cannot care for their child at home, and where a residential education placement cannot be obtained, some parents are forced to use (or be subjected) to the DCYF child protection process. This results in their unjustifiably incurring a determination of parental neglect. The [Bureau of Developmental Services/Area Agency] system does not generally provide for out of home options for children with developmental disabilities, even when it is needed.¹⁴⁰

Finally, a CHINS is a child who is habitually truant from school, runs away from home, enters unsafe circumstances, exhibits conduct that is equivalent to criminal violations, and “[i]s expressly found to be in need of care, guidance, counseling, discipline, supervision, treatment, or rehabilitation.”¹⁴¹

Notwithstanding these unfortunate avenues to placement, approximately three hundred children were placed by Child Protective Services and Juvenile Justice in congregate residential facilities in 2020, seventy to eighty-five of whom resided in

¹³³ N.H. REV. STAT. ANN. § 169-B (1996).

¹³⁴ N.H. REV. STAT. ANN. § 169-C:2 (2020).

¹³⁵ N.H. REV. STAT. ANN. § 169-D:9-c (1990).

¹³⁶ *See* N.H. REV. STAT. ANN. §§ 169-B:4 (2015), C:4 (2020), D:3 (1992). In limited circumstances, a juvenile court may retain jurisdiction over a minor “for a period of up to 2 years following the completion of any appeal” filed after the minor turned 17. *See* § 169-B:4, III; *see also* § 169-B:4, II (jurisdiction retained over child who, prior to eighteenth birthday, consented to extension of jurisdiction and is still attending school) (similar exceptions are in N.H. R.S.A. §§ 169-C to D).

¹³⁷ N.H. REV. STAT. ANN. § 169-B:2, IV (2021).

¹³⁸ N.H. REV. STAT. ANN. § 169-C:3, II (2022).

¹³⁹ N.H. REV. STAT. ANN. § 169-C:3, XIX (2022).

¹⁴⁰ GOVERNOR'S COMM'N TO STUDY AREA AGENCIES & THEIR ROLE IN PROVIDING SERVS. TO N.H., GOVERNOR'S COMM'N REP. 20 (2005).

¹⁴¹ *See* N.H. REV. STAT. ANN. § 169-D:2, II (2022).

residential facilities *outside the State of New Hampshire*.¹⁴² Thus, even those who may find success in home and community-based settings are often discarded in private residential facilities due to the State’s “over-reliance on residential services for children who exhibit problematic behaviors” and a “perceived lack of foster homes.”¹⁴³ This practice violates the IDEA’s call for placement in the least restrictive environment, as group homes and foster homes are far less restrictive than institutional placement.¹⁴⁴

V. HOW NEW HAMPSHIRE BROKE ITS PROMISE TO CHILDREN WITH DISABILITIES

Forty years ago, the *Garrity* court examined the “difficulties inherent in [the] crossed lines of authority” between the State Department of Education, DHHS, and local school districts.¹⁴⁵ “Presently,” the court wrote, “responsibility is divided, depending upon the age of the handicapped child, sources of funding, and types of services delivered.”¹⁴⁶ These crossed lines of authority continue to exist today, perhaps more tangled than ever. This issue is particularly concerning not only for its unremitting presence, but because “[o]ne of the major purposes of [the Education For All Handicapped Children Act] was to assure a single line of authority with regard to the education of handicapped children, so that no child would get lost in the shuffle”¹⁴⁷ Yet students like Janessa, who are eligible to receive services from both their school districts and DHHS, continue to be overlooked by the state. The struggle stems from the interagency agreement between DHHS and the State Department of Education, which plainly contradicts federal law, as well as willful misinterpretations by DHHS and an overall lack of resources.

A. *The Interagency Agreement*

Where the responsibilities of school districts intersect with state agencies such as DHHS, the IDEA contemplates that the state’s duties will “precede” the duty of the local school district.¹⁴⁸ In theory, the financial obligations of public schools—and their taxpayers—cease at the line between education and non-educational

¹⁴² STATE OF N.H. OFF. CHILD ADVOC., 2021 ANN. REP. 15 (2021). Such congregate residential facilities tend to be “more restrictive rather than therapeutic and rehabilitative.” *See* GOVERNOR’S COMM’N REP., *supra* note 140, at 21.

¹⁴³ *See id.* at 15.

¹⁴⁴ *See* N.H. REV. STAT. ANN. § 186-C:1, I (2009).

¹⁴⁵ *See Garrity*, 522 F. Supp. at 186.

¹⁴⁶ *Id.* at 235.

¹⁴⁷ *Id.* (quoting 45 C.F.R. § 121a.600 (1980)).

¹⁴⁸ *See* 20 U.S.C. § 1412(a)(12)(A)(i); *see also* Ciresoli v. M.S.A.D. No. 22. 901 F. Supp. 378, 388 (D. Me. 1995).

behavioral or medical issues. In practice, however, the line is blurred as DHHS habitually rejects its responsibilities to students eligible for services under R.S.A. 171-A. Indeed, the Interagency Agreement between the State Department of Education and DHHS imposes primary responsibility on local school districts for all areas of care, including residential school placement and “[s]uch other services as may be required under federal or state law.”¹⁴⁹ The Agreement commits DHHS to a meager list of services for those who are eligible for developmental and/or behavioral health services, “subject to availability of funding”¹⁵⁰

The current Interagency Agreement was entered into on December 31, 2008—just one day before an amendment to New Hampshire’s special education laws became effective.¹⁵¹ That amendment would have required the Commissioners of the State Department of Education and DHHS to “jointly solicit input from relevant advisory committees and the public” before adopting or revising the Agreement.¹⁵² Moreover, while the IDEA directs interagency agreements to encompass procedures for resolving interagency disputes, “including procedures under which local educational agencies may initiate proceedings,”¹⁵³ the dispute resolution mechanism set forth in New Hampshire’s Interagency Agreement places the power to resolve such disputes in the hands of two state employees: the Commissioner of Education and the Commissioner of DHHS.¹⁵⁴

The Interagency Agreement merely serves as a jumping off point for the state to disregard its duties under the IDEA. The Department of Education and DHHS’ pattern of “passing the buck” to school districts bleeds into statutes and regulations implemented by DHHS.

B. Misinterpretations By DHHS¹⁵⁵

As the Governor’s Commission to Study Area Agencies wrote in its 2005 Report, “RSA 171-A draws no distinction in determining eligibility or providing services

¹⁴⁹ N.H. Dept of Educ. & N.H. Dept of Health & Hum. Servs. Interagency Agreement § III(E)(1)(b) (Dec. 31, 2008).

¹⁵⁰ *Id.* at § III(E)(1)(c). Those services include foster care or other residential services pursuant to a court order and residential services for children who require admission to a nursing facility. *See id.* at § III(E)(1)(c).

¹⁵¹ *See id.*; N.H. REV. STAT. ANN. § 186-C:7-a, IV (2008) (repealed 2012).

¹⁵² *See* N.H. REV. STAT. ANN. § 186-C:7-a, IV (2008) (repealed 2012). The Commissioners overlooked the fact that the IDEA requires public hearings prior to the adoption of any policies and procedures. *See* 20 U.S.C. § 1412(a)(19); 34 C.F.R. § 300.165(a) (2009).

¹⁵³ 20 U.S.C. § 1412(a)(12)(A)(iii).

¹⁵⁴ *See* Interagency Agreement, *supra* note 149, at § II(M)(3)(a).

¹⁵⁵ “Misinterpretations” may be a misnomer. Don Shumway explained in an interview that

between children and adults Thus[,] children under 21 not having their service needs met by a school should be eligible for services to the same extent as an adult.”¹⁵⁶ DHHS does not agree with this sentiment. DHHS believes “home and community-based services are not available to anyone who is still in school.”¹⁵⁷ It interprets a provision of R.S.A. 171-A to create a carveout “[f]or persons in school and already eligible for services from the area agencies,”¹⁵⁸ arguing the statute imposes responsibility on DHHS only after “graduation or exit” from the school system.¹⁵⁹ This statutory interpretation flows into DHHS’s administrative rules, which declare that persons ages three to twenty-one shall be eligible for: (1) service coordination; (2) family support services; (3) respite services; and (4) other applicable services as needed, “except those that are the legal responsibility of the local education agency (LEA) pursuant to the Interagency Agreement”¹⁶⁰

DHHS’s interpretations of R.S.A. 171-A are incorrect, as “nothing in the language of RSA 171-A:1-a, I(a) bars the provision of services to otherwise eligible individual on account of their enrollment in school.”¹⁶¹ In fact, the plain language of the statute requires DHHS to set aside funds for students ninety days prior to graduating or exiting the school system “so that any *new or modified* services” are available to them.¹⁶² This necessarily implies that any existing services provided by DHHS would simply continue upon a student’s graduation. Indeed, “[i]f attendance in school prevented eligibility for services pursuant to the statute, then no students could be simultaneously ‘in school’ and ‘eligible for services.’”¹⁶³ As the Merrimack County Superior Court wrote in a March 1, 2021, Order:

The legislative history of RSA 171-A:1-a, I(a) further supports the Court’s reading of the statute. The bill was originally introduced “in part as a result of a piece of litigation the Disability Rights Center handled with regard to a young man who is between the ages of 18 and 21, and was enrolled in school.” Its Statement of Purpose indicated that the bill was designed to increase the availability of services by addressing “undue delays in

DHHS *always* interpreted R.S.A. 171-A as creating an option, but not an obligation, for DHHS to provide services to students receiving special education. Telephone Interview with Donald Shumway (Mar. 4, 2022).

¹⁵⁶ GOVERNOR’S COMM’N REP., *supra* note 140, at 20.

¹⁵⁷ *See Verrill ex rel. Verrill v. Comm’r Lori Shibinette*, No. 217-2020-CV-00382, 2 (N.H. Super. Ct., Mar. 1, 2021) (citation omitted) (order granting Plaintiff’s motion for summary judgment).

¹⁵⁸ *See* N.H. REV. STAT. ANN. § 171-A:1-a, I(a) (2021); *Verrill*, No. 217-2020-CV-00382 at 5.

¹⁵⁹ *See* sources cited *supra* note 158.

¹⁶⁰ N.H. CODE ADMIN. R § He-M 503.03(c) (2015).

¹⁶¹ *See Verrill*, No. 217-2020-CV-00382 at 5.

¹⁶² N.H. REV. STAT. ANN. § 171-A:1-a, I(a) (2021) (emphasis added); *Verrill*, No. 217-2020-CV-00382 at 5.

¹⁶³ *See Verrill*, No. 217-2020-CV-00382 at 6 (citation omitted) (Mar. 1, 2021 order).

providing services to eligible persons,” not to create a funding gap for individuals who are still in school but whose families are unable to provide support.

Moreover, “the Department’s own regulations envision the provision of disability services to individuals of school-going age”¹⁶⁴ by stating that individuals found eligible for services by an area agency “shall be” entitled to home and community-based care.¹⁶⁵ In addition, DHHS’ application for the Medicaid Home and Community-Based Services waiver program has no minimum age requirement and does not expressly exclude those who are still in school.¹⁶⁶

The Action for Independence supports this interpretation. The Plan states that when clients ages three to twenty-one require services beyond those provided by the local education authority, “and application for service is made to the area agency, an Individual Service Plan shall be . . . developed” by the area agency.¹⁶⁷

C. Lack of Resources

The state’s lack of resources has been identified as a “significant factor” in the plight of area agencies in general.¹⁶⁸ The area agency system “has faced significant and continuing budgetary constraints particularly since the mid 1990s[,]” impacting the quality and efficiency of services available, the capacity for staffing, the ability to end the waitlist for services, and the expertise needed to address individuals with more significant behavioral issues, to name a few.¹⁶⁹ As such, even if DHHS were to agree to provide non-educational services to students with disabilities, those students would either receive subpar home-based services or wait in a line for residential placement behind hundreds of other developmentally disabled individuals.¹⁷⁰

The developmental disability system appears to be wrestling with the same issues it identified as early as 2001, when DHHS began its first unsuccessful attempt

¹⁶⁴ See *id.* at 6–7.

¹⁶⁵ See N.H. CODE ADMIN. R § He-M 517.03 (2013); *Verrill*, No. 217-2020-CV-00382 at 7.

¹⁶⁶ See *Application for a § 1915(c) Home and Community-Based Services Waiver*, *supra* note 103.

¹⁶⁷ See Donald Shumway, ACTION FOR INDEPENDENCE 13 (1980).

¹⁶⁸ See generally GOVERNOR’S COMM’N REP., *supra* note 140 at v.

¹⁶⁹ See *id.* at iv.

¹⁷⁰ Technically, the State has no waitlist. See COMM. TO STUDY STATE’S SYS. OF SUPPORT FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES & RECOMMENDATIONS FOR REFORMS & IMPROVEMENTS, GOVERNOR’S COMM’N ON DISABILITY’S ANALYSIS & REP. 10 (2020). However, from the perspective of area agencies, many individuals continue to wait in their homes due to lack of staff/provider availability. Telephone Interview with Sandy Pelletier, President, Gateways Community Services (Mar. 11, 2022).

at ending the waitlist for services.¹⁷¹ Four years later, Governor John Lynch issued an Executive Order establishing the Commission to Study Area Agencies and their Role in Providing Services to New Hampshire.¹⁷² The Commission, chaired by Richard Cohen, produced its Final Report in 2005. The Report outlined the following impacts of budgetary constraints:

- Staffing shortages due to low wages and poor benefits, leading to “disturbingly high” turnover and vacancy rates;
- Decreased ability to attract qualified case managers;
- Lack of employment opportunities for individuals with disabilities;
- Inability to end the waitlist for services, including an average wait time of 361 days, “with many waiting much longer;” and
- Lack of residential services.¹⁷³

The Commission’s findings pertained to all developmentally disabled individuals, not just students.¹⁷⁴ However, the Report noted that “almost all” individuals receiving more comprehensive services, such as residential placement, were adults.¹⁷⁵ The inconsistency stemmed, at least in part, from the lack of an adequate interagency agreement between DHHS and the Department of Education.¹⁷⁶ Today, New Hampshire’s fiscal effort for developmental disability services continues to deteriorate. Compared to the rest of New England, New Hampshire spends the least amount on residential settings and non-residential community supports for individuals with developmental disabilities,¹⁷⁷ despite housing the third highest percentage of this population.¹⁷⁸

¹⁷¹ See GOVERNOR’S COMMISSION REP., *supra* note 140, at 4; Donald Shumway & Susan Fox, RENEWING THE VISION: N.H.’S PLAN TO PROVIDE ESSENTIAL CMTY. SUPPORTS FOR INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES (Nov. 2001).

¹⁷² N.H. Exec. Order No. 2005-03 (Nov. 18, 2005).

¹⁷³ See GOVERNOR’S COMMISSION REP., *supra* note 140 at v.

¹⁷⁴ See *generally* GOVERNOR’S COMM’N REP., *supra* note 140.

¹⁷⁵ See GOVERNOR’S COMMISSION REP., *supra* note 140, at 7.

¹⁷⁶ See *id.* at 16.

¹⁷⁷ See GOVERNOR’S COMM’N REP., *supra* note 170, at 10; DAVID BRADDOCK ET AL., STATE OF THE STATES IN INTELLECTUAL & DEVELOPMENTAL DISABILITIES (American Ass’n on Intellectual and Developmental Disabilities, 11th ed. 2017).

¹⁷⁸ See *Disability & Health U.S. State Profile Data: Adults 18+ Years of Age*, CDC (2019), <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/index.html> [https://perma.cc/7DHJ-CBCS].

VI. PORTAL THREE: AN UNOPENED BRIDGE TO RESIDENTIAL PLACEMENT

A. *Verrill v. DHHS*

Residential placement through DHHS was never an option for students like Janessa, who still attended public school but required residential placement for non-educational reasons. While area agencies have access to group homes and robust community-based services, school districts are restricted by their obligations under the IDEA and state special education laws.¹⁷⁹ Fortunately, the Disability Rights Center has made significant strides to combat DHHS's misinterpretation of its obligations under R.S.A. 171-A, culminating in a lawsuit on behalf of Janessa.¹⁸⁰ The original complaint, filed on August 7, 2020, sought a declaration that DHHS's failure to provide developmental services to Janessa violated R.S.A. 171-A.¹⁸¹ The Merrimack County Superior Court agreed, finding that DHHS was misapplying the statute by denying services to eligible individuals due to their enrollment in school.¹⁸² Moreover, it disavowed their statutory interpretation as "invalid and unlawful."¹⁸³ Accordingly, the Court ordered DHHS to "render appropriate home and community-based services to Ms. Verrill as soon as practicable . . ."¹⁸⁴ The Court also denied DHHS's request to stay its orders while it appealed, finding "no valid justifications . . . because a stay would potentially deny Ms. Verrill services that she, and others similarly situated, are lawfully entitled to . . ."¹⁸⁵

The case of *Verrill v. DHHS*, at its core, strikes this author as eerily similar to *Garrity v. Gallen*. Both involve plaintiffs simply requesting the services promised by R.S.A. 171-A; and both deteriorate into a shouting match over which agency is responsible for individuals with developmental disabilities. As it remains to be seen whether DHHS will honor its obligations based on court order alone (and acknowledging DHHS's pending N.H. Supreme Court appeal) other solutions are in

¹⁷⁹ See Richardson *supra*, note 128.

¹⁸⁰ See Complaint at 4–5, *Verrill ex rel. Verrill v. Comm'r Lori Shibinette*, No. 217-2020-CV-00382 (N.H. Super. Ct. Oct. 26, 2021); Telephone Interview with Pamela Phelan, Litigation Director, Disability Rights Center (Jan. 21, 2022).

¹⁸¹ See Complaint, *Verrill*, No. 217-2020-CV-00382 at 8. Specifically, the Complaint sought declaratory judgment, injunctive relief, and attorney's fees. *Id.*

¹⁸² See *Verrill ex rel. Verrill v. Comm'r Lori Shibinette*, No. 217-2020-CV-00382, 4 (N.H. Super. Ct., Oct. 26, 2021) (order).

¹⁸³ See *id.* at 7.

¹⁸⁴ *Id.* at 5.

¹⁸⁵ *Id.* at 7.

order. The proposed solutions in this Note are crafted from interviews with Richard Cohen, Donald Shumway, Gerald Zelin, and the 2005 Commission Report.

B. Rewrite the Interagency Agreement

As the Commission pointed out in its 2005 Report, the Interagency Agreement between the Department of Education and DHHS “does not adequately spell out a process and criteria for determining responsibilities and a prompt and adequate process for resolving disputes between agencies.”¹⁸⁶ In response, the Commission recommended a task force be established to improve the coordination of services provided by multiple agencies to children with developmental disabilities.¹⁸⁷ This Article renews this recommendation, with some modifications. First, the Commission suggested the task force “be headed by the Governor’s designee or a Governor’s designee with the chairs of House and Senate Education” with representatives from DHHS, the Department of Education, and their local subdivisions.¹⁸⁸ This author advises that such a task force instead be composed of representatives from DHHS, the Department of Education, local school districts, parents, and parent and/or child advocates. Such a compilation would prevent the administrative and legal oversights previously made by DHHS and the Department of Education. In addition, it would expectantly divide decision-making power equally among all parties impacted by the Agreement, rather than placing the sole crown atop the state.

Second, the Commission suggested “changes or improvements” be made to the Interagency Agreement.¹⁸⁹ This author advises a complete overhaul of the Agreement, bringing it into compliance with the IDEA. In complying with the IDEA, such provisions might include, but are not limited to: (1) placing primary funding responsibility on the state rather than local school districts and their taxpayers; (2) requiring that interagency disputes be resolved by a neutral third party or hearing officer; and (3) providing for a public hearing prior to adopting any subsequent amendments or revisions to the Agreement.

Moreover, the Agreement should include a demand that costs of residential placement be shared by local school districts and DHHS when such placement is required for non-educational reasons.¹⁹⁰ The criteria for what might qualify as “non-educational” in this context would be developed by the task force described above. In a general sense, however, the provision would place responsibility for expenses related to special education and related services in the hands of school

¹⁸⁶ GOVERNOR’S COMM’N REP., *supra* note 140, at 20.

¹⁸⁷ *See id.* at 28.

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ Memorandum from Richard Cohen to Author (Mar. 21, 2022) (on file with author).

districts. Any remaining expenses, including but not limited to room and board, would be the responsibility of the local area agency.

C. Amend R.S.A. 171-A

Despite two court orders demanding that DHHS fulfill its obligations under R.S.A. 171-A, the state continues to identify new and innovative ways to weasel out of its statutory responsibilities. As such, an obvious solution to this problem would be to amend the statute. Indeed, the relevant provisions of R.S.A. 171-A have never been altered—despite forty years of confusion regarding the statute’s language.¹⁹¹ In early 2020, DHHS (likely prodded by the Disability Rights Center) proposed an amendment which would add a “new category” of individuals, comprised of those aged eighteen to twenty-one and still in school, to whom DHHS would be obligated to provide services.¹⁹² That bill was subsequently tabled and replaced by a “[P]ilot [P]rogram.”¹⁹³ Yet to be approved by the Finance Committee, the Pilot Program would require DHHS to provide services to eligible individuals ages eighteen to twenty-one but still enrolled in school.¹⁹⁴ The Program would be limited to “not more than 20 eligible individuals.”¹⁹⁵

Another alternative would be to amend R.S.A. 186-C to permit New Hampshire hearing officers to join DHHS in disputes concerning a student’s educational needs.¹⁹⁶ For instance, in Massachusetts, “M.G.L. c.71B, § 3[] empowers hearing officers to join such agencies if services from those agencies may be necessary to provide ‘complete relief’ to the student.”¹⁹⁷ This would allow New Hampshire hearing officers to order DHHS and/or area agencies to provide services necessary for non-educational reasons.¹⁹⁸

¹⁹¹ There exists widespread reluctance to amend the substance of N.H. R.S.A. 171-A because it would open the door to a plethora of potentially problematic alterations. *Id.* The most notable amendment occurred in 2008 and tackled a “discrete issue.” *Id.*

¹⁹² *See* S.B. 714, 2020 Leg., 167th Sess. (N.H. 2020).

¹⁹³ *See* S.B. 430, 2022 Leg., 167th Sess. (N.H. 2022).

¹⁹⁴ *See id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See* Dan Heffernan, *Services from State Agencies for Students with Special Needs*, SPECIAL EDUC. TODAY (Jun. 21, 2013), <https://kcspededucationlaw.com/2013/06/21/services-from-state-agencies-for-students-with-special-needs/> [<https://perma.cc/V9ZG-73R7>].

¹⁹⁷ *See id.* (citations omitted).

¹⁹⁸ *See id.*; *see also* *In re Dennis-Yarmouth Reg'l Sch. Dist.*, 16 MSER 206 (Mass. Div. of Admin. L. App. 2010).

D. Reform Funding Streams

Like the crossed lines of authority between state agencies and school districts, funding streams have been polluted since the very inception of the IDEA. Indeed, when Congress passed the IDEA, it promised to fund forty percent of the average cost required to educate students with disabilities.¹⁹⁹ Congress has never delivered on that promise. “Today, the Federal Government pays less than half of what it originally promised in 1975, or roughly 18 percent of the total.”²⁰⁰ As such, an obvious—but likely unattainable—solution would be for Congress to follow through on its original guarantees.

At the state level, reforms to funding streams might include “measures or legislation to enable pooling, cost sharing or ‘braiding’ of multiple funding sources.”²⁰¹ This author proposes a cost sharing agreement between DHHS and the Department of Education, to be preserved in a memorandum of understanding signed by both agencies. The agreement would be triggered by a finding that residential placement is necessary, but not to receive a FAPE. It would deem the Department of Education and its subdivisions responsible *solely* for the educational components of any residential placement. As a result, DHHS would supplement the cost of all non-educational expenses, such as room and board. The cost sharing agreement might further include provisions for determining when expenses qualify as “educational” or “non-educational.” In addition, the agreement would necessitate dispute resolution between the agencies in certain circumstances.

Lastly, the Legislature might also consider applying for an Autism Waiver through Medicaid, as the State of Massachusetts has implemented.²⁰² The Autism Waiver Service Program provides additional federal funds for “children to receive Expanded Habilitation, Education, in-home services and supports, such as Applied Behavioral Analysis (ABA) and Floor Time, for a total of up to 3 years.”²⁰³

E. Avoid Residential Altogether

As was previously stated, residential placement is often prohibitively costly and overly restrictive. This restrictiveness violates the IDEA’s call for placement in the least restrictive environment as well as the very principles of deinstitutionalization. Nevertheless, numerous students have been placed in private, out-of-state

¹⁹⁹ NAT’L COUNCIL ON DISABILITY, BROKEN PROMISES: THE UNDERFUNDING OF IDEA 9 (2018).

²⁰⁰ *Id.* at 13.

²⁰¹ GOVERNOR’S COMMISSION REP., *supra* note 140, at 29.

²⁰² *See DDS Autism Waiver Service Program Overview*, MASS. DEP’T OF DEVELOPMENTAL SERVS. (2021), <https://www.mass.gov/dds-autism-waiver-service-program-overview> [<https://perma.cc/T8TH-9ZV8>].

²⁰³ *See id.*

residential facilities not because residential placement was necessary to receive a FAPE, but because area agencies—which have access to local group and foster homes—unequivocally deny responsibility to children who can no longer reside with their families. Reasoning that an overly restrictive placement is preferable to homelessness, schools with a conscience bend to the callous ideals of DHHS by funding residential placement for non-educational reasons.²⁰⁴ By virtue of the fact that public schools are restricted to state-approved special education placements, Granite Staters are essentially bankrolling institutionalization.

In order to avoid residential placement altogether, DHHS must instruct its area agencies to provide community-based placement in local group or foster homes while the child remains in public day school. The school would provide education, educationally related services (including transition services), and transportation to and from the student's dwelling. In turn, the area agency would furnish such services as required for life beyond the schoolhouse gates, including, but not limited to, room and board. This avenue would prevent the state from drifting further backwards towards institutionalization.

CONCLUSION

The *Garrity* decision has never been overruled; and DHHS's failure to implement R.S.A. 171-A stands in contradiction to federal and state disability rights laws. Just as occurred forty years ago, at least 560 individuals like Janessa continue to be lost in the shuffle. Local school districts—and their taxpayers—should not be the backstop for obtaining residential placement. Where students receiving special education require placement outside of the home for non-educational reasons, area agencies, funded by DHHS, should be responsible for providing such services. It's time for the state to fulfill its promise.

²⁰⁴ Telephone Interview with Gerald Zelin, Shareholder, Drummond Woodsum (Mar. 20, 2022).

