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SYMPOSIUM TRANSCRIPT

INTRODUCTION

Erin Sweet: Good morning, everyone. If we could all take our seats, uh we're going to begin with just a few words from Wendy Purdue, the Dean of the law school.

Dean Wendy Purdue: Good morning, everyone. Um, thank you for joining us here this morning, um, for this important program. Let me start by um thanking the - the PILR, uh staff and uh the um Courtney Squires, the Editor-in-Chief, and Nicole Evans and Erin Sweet, the Symposium Editors. Um eh students spend an enormous amount of time putting together um this program and uh...are are really um appreciative of your attendance at it. It's a great learning opportunity for them and we hope it's going to be a great learning opportunity for you all. This is an important program, um...the assuring educational equality for all students is a part of who we need to be as a country. Um, it - it reflects the recognition that eh all of our young people have enormous potential, but we have to take the steps to meet that potential. It's not always easy, um and it sometimes requires the intervention of experts to make sure it happens the way it should. Um so I'm delighted to see you all here, um and and delighted to um recognize the commitment that that represents, helping to assure that all of our young people can get the education they need and deserve. So, I hope you all have a terrific program. It's an all-star lineup, we've got some fabulous um speakers and presenters, uh so I hope you have an outstanding day.

Nicole Evans: Thank you, Dean Purdue. Good morning and welcome once again to this year's Public Interest Law Review Symposium: Not Just for Learning, a Comprehensive Look on How IEPs and 504 Plans Affect Youth. My name is Nicole Evans and I'm one of the Symposium Editors along with Erin Sweet, by my side. This symposium was born out of my interest in disability issues and Erin's interest in child advocacy. The need for discussions on IEPs and 504 plans is stark. In just the time that we have planned this symposium, an article was published about Wendy Little and her son Aaron, and their struggle over their school's non-compliance with Aaron's individualized education program which culminated in Aaron being disenrolled from the Chesterfield County Public School System. Before the 2022-2023 school year, Wendy and the Chesterfield School System were unable to agree to the terms of her son's IEP. Chesterfield refused to add a medical aid to the IEP to address the boy's compounding disabilities that required a... the aid for hygienic needs. Wendy also disagreed with the Chesterfield's IEPs team's attempt to have her son placed in high school because her... his education was at at a local day private Day School was subpar and left Aaron unprepared for a higher grade level. The night before school was to start, Wendy was notified that her son's special education

transportation was cancelled and that the school prohibited him from being enrolled. Aaron spent the last school year without any educational instruction and now he has fallen behind at least two grade levels. As of September, Aaron still remains at home without a start date for the current school year. With proper discussions, education, and advocacy, situations like Aaron's can be prevented.

Erin Sweet: On that note, we would like to thank you all for attending today to educate yourselves on the different issues surrounding youth with disabilities and the different strategies available to advocate for them. Our event today is a journey meant to take you from the start of the issue all the way through the remedies administratively, judicially, and legislatively. First, Dr. Norm Geller will walk us through what an IEP is, how to determine available interventions, and how to advocate for these services and protections for your client. Next, a panel of Special Education Advocates will discuss and debate hot topics surrounding IEPs. After a brief break, Valerie Slater will move us into the judicial system where she will illustrate the trends of youth incarceration and their intersections with youth of color and youth with disabilities. Professor Cotropia will then deliver our Ethics Presentation about ethical considerations on undisclosed classroom recordings, a new topic of conversation when gathering evidence to advocate for your client. After we break for lunch, we will return to the court space with two panels: one of GALs to discuss their role in this and other processes in child advocacy, and one with members of the Juvenile and Domestic Relations and Circuit Courts to discuss their roles and trends they see. Following our final break, Melissa Waugh will tackle the administrative remedies available to children and families denied other remedies, and we will close with a panel of Legislative Advocates who will discuss how children's and parents' rights intersect and diverge on this topic and how both can be advocated for. We hope you take away not only a better understanding of what options are available for students with disabilities, but also the vast issues that face children, parents, and advocates when trying to take advantage of these opportunities and options. Although all of the incredible people speaking today are working hard on these issues, there is much work to be done. But there is also much hope to be had, because the first step into solving a problem is to name it, and the second is to talk about the ways to change it. This is what we hope to do here today. If at any point today you have a housekeeping question, please find someone with a name tag. All sessions should have time for Q&A from both our in-person and online audience members, so please be sure to engage with our fantastic speakers and panelists. If you are attending for CLE or GAL credit, please make sure to check in at the check-in table or the online... if you are online please fill out and submit the brief survey put in the chat. Once again, thank you so much

for being here today. I'm going to hand it back over to Nicole to introduce our first session.

DECONSTRUCTING THE IEP: PATHWAYS TO DETERMINE
BEST INTERVENTION STRATEGIES AND LEGAL
PROTECTIONS FOR YOUR CLIENT

Dr. Norman Geller

INTRODUCTION

Nicole Evans: First, we will hear from Dr. Norman Geller in his presentation, Deconstructing the IEP: Pathways to Determine Best Intervention Strategies and Legal Protections for Your Client. Dr. Geller has a PhD from Virginia Commonwealth University and specializes in learning disabilities, ADHD, autism, and psychoeducational assessment. He frequently accompanies families to school meetings to facilitate best practices and intervention strategies. Dr Geller.

SPEAKER

Dr. Norman Geller: Can we hear me? Ah gotta love when a plan comes together. Okay so, I don't stand still. In fact, for anybody who knows me...I spend most of my time on in court, so today's a perfect place to be. The difference is if I'm not in this kind of a court, I'm on the pickle ball court, so it's all the same. So, I was really trying to find a way of how I can be just humorous and funny and how - how we start this off and I was looking for something about IEPs. Couldn't find anything, I mean it was all about teachers having to write IEPs and the best I came up with was the little sign that the teacher walked out of the room was no parents were killed or hurt during the IEP meeting. And unfortunately, that that should not be the case. We're dealing with children. We're dealing with our babies. We're dealing with the future of our civilization. Regardless of ability or disability, we should not have that issue. And so, I've been doing this for a very long time and I will tell you from my perspective, the IEP is the most powerful tool that we have in dealing with special education. Unfortunately, we don't use it properly. So, I have a... I have a gadget so I'm good. So, the first thing I just want to go over very quickly is do... are we are we do we know what the timelines are because people don't know about timelines. I was just working on this in a case in a school local local here to Richmond, and a parent or, excuse me, an advocate called the school council and said "I want this child referred for special education because they may have ADHD" and the counselor said "No no no, if you're referring for ADHD only the physician can do that." Well first of all, we have a violation because anybody can make

that referral and they have... and they the referral process starts and you have ten business days end of conversation. After that we have 65 business days for eligibility. That's business days, so that's five days per week that's 12, 13 weeks, but if we have holidays in there and snow days and things like that it could be 15, 16 weeks where this kid is sitting not getting services and without interventions we don't progress the way we need to. And then we have the IEP, we have 30 calendar days, and what we usually find is 30 calendar days you get... you get a draft IEP, the parent looks at it "oh this looks good" and we're done. I will tell you that the 30 calendar days and the review of those of, of the data that's in the IEP is so remarkably important, even if you have a child as young as six years old, when they become 18, that IEP is remarkably important.

By the way, I am from New York, I talk fast. Those of you who are from down south probably listen slower than I can talk and if you need me to slow down, repeat something, that's perfectly fine. I like making facial contact, so I can see people's eyes and get in the eye rolls. If there's a joke or a pun in there, my children- my grandchildren expect you to do some eye rolling. Um so, anyway. So, the cornerstone piece of an IEP is the present level of performance. And I'm going to focus on the word present because present means today, it doesn't mean two years ago, three years ago, four years ago. So, and I know this is really small, but this is really important because when I speak... when I speak to the um uh the the folks here at the University of Richmond and I go to schools, I talk to parents, I teach in the graduate level, I want to talk about what should be in there. That first paragraph people just kind of gaze- well lawyers don't gaze over any small fine print, but um but I. I look at this "An IEP is comprised of specifically designed instruction that involves adapting the content, methodology, or delivery of instruction to address the needs of the student, accommodations, modifications, and supplementary aids and services to ensure their access to the general curriculum." That's a huge piece in there. The times that we read that and we look at the present level of performance, the two don't match. And unfortunately, the teachers who write these and they all mean well and they all are lovely human beings, but they don't always have... we don't they don't get the information in the reports. If they don't have the information in the reports, because we haven't helped them put that information in the reports, then we have to do a better job. I do a lot of um clinical training across the country- across the world, actually- on autism assessment. And I do an advanced writing um, uh seminar on what you need to do... put into a report so it conveys into an IEP. If those reports just have numbers in there, the people who write the IEPs are really screwed. Um and that's probably a little bit my New York-ese coming up but that's just how I talk. Um we want, what we want to look at is present level of academic achievement and - and

functional performance. That doesn't mean, what you got on an achievement test three years ago. It doesn't mean what you got in kindergarten in your report card and now you're in fourth or fifth grade. I want to know what's happening now. That also means teacher: tell me what's going on in the classroom. This kid has no friends, the kid does not complete assignments, that's all part of present level of performance- it's clearly stated in there. Everything you have in your pre - and we'll go over this - everything you have in your present level of performance should lend itself to a measurable annual goal. Measurable annual goal. If I see a measurable annual goal in math, and for some reason, I go back to the present level of performance and it says "math is on grade level" please tell me why we have an objective. If you're telling me this kid has social deficit somewhere, I want to see something about social involvement. There are key words within the present level of performance that says to me this information that's missing somewhere. There's a key like I need to go back and backlink where that information is coming from. Benchmark and short-term objectives, supplementary aids, participation with neurotypical children. That's a little line at the very end of the IEP, tell me what that means. Look, if we have kids who are pretty involved, it's not easy for a general ed teacher to include them but there are ways of doing it. This is an individual educational plan, not a generalized individual plan to make life easy. And we know what we're talking about. Um so, and then you know, we have all this stuff these are the pieces that are key, but we need to really break down the - the key pieces to make sure that we are covering them and they are listed in the present level of performance...Carl, you're talking back to me...Okay...So again, we want to make sure everything we have in the present level of performance is tied to an objective...Thank you.

We make, you know, so when we look through this, I want to look at...I want to make sure all these aspects are covered. The reason I am so concerned, people are concerned about the end of the IEP. People are concerned about making sure we have a kid placed in the right disability category. People are concerned about the objectives. To me those are secondary. You may roll your eyes. Why is that secondary? Because if I can identify in the present level of performance based upon data, and I will tell you data does not lie. I don't care for opinions. I don't care for opinions, I want data. Show me, when you talk about a particular score when you have a particular deficit, you can't lie about that. You can't make this stuff up, numbers don't lie. But you need to learn how to use the numbers so as advocates and attorneys and anything else you do to help facilitate, and I I like the word facilitation, I like understanding the numbers. I like understanding what everybody else is working with. And the objectives should be linked to everything in the present level. So why am I so passionate

about the present level of performance? At six years old this child has had difficulty with socially engaging. This child has difficulty with processing language. This child has difficulty with processing speed. We have all the different little caveats as to what makes this child different. At six years old it doesn't sound like a big deal, but now when this kid is 11 years old, 12 years old, and suddenly he's 15 years old, he's in middle school, he's in high school, in fact the um... the um, the uh Disability Law Clinic here in University of Richmond, we have a little case study that we go over and and um this boy is found with a backpack full of drugs. And it's not his. He's clearly on the spectrum, it's not his, the police approach him, and they ask him questions and he nods his head, he you know he smiles, uh and turns out this little boy has autism, he is a slow processor, but he's a compliant kid, and nowhere does it... in the report says he's a slow processor, he has autism, he doesn't understand social engagement. Police approach him and suddenly he's answering questions... you know you know he's being Mirandized... you know how slow do we read that... you know not too slow. It doesn't say here please read slower for me because I, I - I need it you know cut down by about 50% speed. We can go back and say look we've known that this case had a problem. We know this kid doesn't always understand social cues. We can go back and say this has been a history of it rather than just being oh my goodness how convenient that he has autism and he's a slow processor. So, if we have it there we have a documented trail... of... year-to-year progress. People look at the IEP as a as a static. Here's my IEP for today. I'm want to go back and look at it for two years ago three years or four years ago. Does this IEP match what his current goals are or unfortunately in more situations than not they're rubber stamped. It's the same goals and objectives from the year before. And I will tell you that even though you don't, you can't change IQ, you can change achievement, you can change behaviors. What interventions work? The scientific method method is is um a baseline intervention data. The IEP should be using the scientific method. You know there's about 20, 30 or more years um ago that um we came out... (audio cuts out)... and they're being advertised as a scientific method. It's almost like you know when they came out with with with potato chips or um or even water. You know water contains no cholesterol. It's a great marketing device but you know a scientific method and the reading program said scientific method that means pre and post testing the IEP is pre and post testing and we should be using it in such a way. Unfortunately, the folks who are writing IEP's don't have the time to go over each individual item within an IEP and that's our job. When I get called in as an expert witness and I'll talk to an attorney or an advocate let's look at all the data, I wanna follow a path there is a really nice web of information for us... oops, OK... so I'm preaching that we have data. Even if a child has not been found eligible for special Ed even if the child has

not had testing there is data, and that's not just on Star Trek... thank you very much. Um that's that's at least two eye rolls today. So, there is data there. If you're in first grade you've got a plethora of data... the report card the report card has grades, the report card has attendance, the report card has teacher comments, the report card has work habits. You know doesn't work well with his peers he straight A's and B's doesn't work well with his peers is inattentive or you see a report card with lots of absences and lots of tardies. I wanna know that. I want to look at what happened from year to year the report card tells you what school the kid goes to. You're in 3rd grade and you've been to five different schools? That concerns me a lot. I wanna know what's going on and there's an inconsistency in terms of instructional delivery. Comments, I love the comments. The first comment of this of the school year says loved having Jonathan in my class. The last comment is: have a great summer. Marking periods 2, 3, 4, and 5 tell you everything. Have him work on reading, have him work on reading comprehension, have him work on self-control, having him work on not talking to his neighbors. That tells me a lot. I want that annotated information.

We have group testing starting in 3rd grade we have group testing. Let's look at the group test. How do we read the group test? Everything's in percentiles and we're going to walk through that in a minute about how do we look at group tests. That information is invaluable. People don't look at it, usually they wait until high school and they get placed into the you know the um into the college bound or not the college bound classes. But that's very useful. I want to hear about achievement and behavior. Tell me about how this kid behaves. Oh he's lovely in my class. Really? He's been he's been referred to the office 3 or 4 different times. When is he lovely? I am all I'm all about finding when the child behaves properly. I like the positive behaviors, but tell me about the stuff that he doesn't do well...Um...I want detail. Teachers know it but they're afraid to put something in there you know. And so at at at at at at an IEP meeting or child study meeting and I have you know Mrs. Smith you know you know talking about you know just sitting there as a teacher and she's nodding her head and agreeing with everything I'm going you know Mrs. Smith you seem to ... some of these some of these difficulties seem to resonate could you talk to me... tell me what you see. The minute I say to her tell me what you see the floodgates open up and we get the real kid because everybody else just goes in to observe. There are many times I've gone into schools and I observe for an hour. I'm a visitor, I'm a guest, I get the honeymoon for about an hour. And then from that we get a functional behavior...of functional behavior assessment and that doesn't tell me anything. I want to hear from the teacher that sees him from day-to-day. I see a kid who's behavioral behavior is horrible this year and last year it was fantastic and the year before was

horrible. Well tell me about that teacher where he was well behaved. What was her approach. What can we learn from that. Everything is a learnable teachable moment.

One of...one of the things I had the hardest difficulty with is a diagnosis or eligibility for kids with autism. We have a multitude of tools out there. One of the, most of the tools that people are using are quick and easy and they're like the Gillium autism rating scale...The um, the the um...I can't think of the other one. But nevertheless, that is a they are checklist or they give you a basically a checklist a a a guest a guesstimate all their oddities. But if anybody is working with kids with autism I put up the ADOS autism diagnostic observation schedule if you don't have that you don't have a detailed evaluation. That is the gold standard internationally. And if anybody wants to talk more about the ADOS and what the ADOS looks at you can give me a call. People who are trained to administer the ADOS have to go through a trainer in the state of Virginia. Right now we only have one trainer um and uh and and and and the thing is you know I'm looking for more and more people to become more expertise.

Again teacher report and comments we talked about that. Tell me about social understanding. You know I know that the state of Virginia now has diminished capacity and that's based upon cognitive ability. But what about diminished social understanding? And I don't understand the rules of of typical social interaction. Got a problem.

We have a young man or you we can have a young man and he's been taught to make eye contact. So they make eye contact. So I'm taught to make eye contact so I come over to this one young lady and I'm making eye contact and I'm making eye contact right and about 5 seconds ago got kind of creepy, right? Which means she knows me well. But the point is I'm told to make eye contact. On the other hand when you make eye contact you - you - you make eye contact you look away you may look at the hair you may look at the nose you may look to the back of the room and back again. But if I'm staring you know at 18, 20 years old I come across as a predator. And there's no predatory intent in any of that but I was told to make eye contact. So, we wanted to document is there any anything different with social understanding. People on the spectrum have a lot of pedantic thinking they are, you know, rule governed. You know had a six year old who was in a very advanced um high school uh um um a very advanced private school and the teacher decided to be creative one day and rearrange the tables and chairs. That's really cool and he tolerated it all the entire day. When the class was leaving he barricaded the door and said you're not leaving until we put the tables and chairs back. Rule governed behavior. You can you can interpret that as being this is a behavior kid who's pretty you know controlling or...I liked it the way it was

don't change things. We're gonna get out of here at 8:05, we're gonna take a break at 8:05, it's now 8:07, excuse me teacher you're a liar because you said 8:05. After we see them kids on the spectrum um you know Hank and I were talking the other night about some of the um um hidden um hidden- hidden diagnoses and hidden disabilities it's like these are hidden because that kind of behavior is interpreted as a significant emotional disturbance. And it's like no, he wants his world, even, the biggest problem we have with with is with young females you know teenage you know emerging teenage females because they like their world a certain way when they can't have their world a certain way on the spectrum um then they look as kind of pre-psychotic. We can't really give them a psychosis diagnosis until they're later teens or early early 20s and so is it autism or is it psychosis and we don't know we're not as good as we would really like to be.

Speech language. I love my speech and language pathologist. I think they are you know them they and and OT's are worth their weight in platinum. But we don't...they don't we're not giving them all the tools. You know we can talk about articulation you can't form the words we can talk about receptive language and expressive language getting our words out like pragmatic language we don't do enough with pragmatic language. People don't understand pragmatic language I mean what's really nice in here if I tell a stupid joke I get an eye roll you understand pragmatic language. But these kids don't. I had a young man who was being treated who was being treated for, Like 20, 21 years old, being treated for depression. And um his mother said to him so so Jason why are you sad all the time. Because mom it makes me really sad that you think I'm gonna kill you. That's a horrible thing to hear. And she said to him, Jason why would you say something like that. I have never thought that a day in my life. He said well mom you're constantly saying to me Jason you're going to be the death of me yet. Chuckle it's fine. I chuckled too the first time I heard it. But this is what he heard, that's the pragmatic language. Understanding the underlying intent of some of the language. So. And then look at social history, let's look at past testing, let's look at IQ from last year, let's look at IQ from the year before. Do we see changes in numbers? And then we have to look at medical records. You know one of the things that bothers people a lot is that we go through the entire child study process we go through all the testing and somebody and and and then eventually after you've given an IQ test and after you've given achievement testing then we test visual acuity then we test hearing it turns out the kid needs glasses. Do we retest the child? Should, but that should be one of the first things we do.

OK so let's get down to nitty gritty this is going to be statistics 101 and I need to check my time so because I do talk a lot um OK, we're good. So,

when we talk about standard scores and this is where we get statistics and data. Data does not lie, and I'm going to show you a chart in a minute. An average IQ, an average standard score, an average skill level in any academic area is 100s. So, if you see a standard score of 100 tells me the child is average. On any given day there's a degree of variability and this is where you can make yourself much more effective understanding this chart that I'm just going...to take a chance we're gonna go to that chart in a minute. And uh I'll make sense in a moment, but it went backwards, it was really good. Uh but Carl's here already ready to pounce when I screwed up so it's good. So, when so, when we look at a range of average plus or minus 15 points from 100 is average. If you know this you have enough information at your disposal to start asking questions. I am not a mechanic but I have enough I have the ability to ask enough questions of the mechanic to let them know that I'm inquisitive, I have some knowledge base. I'm going to start asking questions about my car about you know you know um what's going on with my car, that sound that I'm hearing. I'm just not going to take them at face value. But a score of 85 of plus or minus 15 from 100 gives us our average range. Anywhere between 85 and 115 is average. That being said if we have a score of 85 on one test and 115 on another test that's a 30 point difference, that's a 30 point discrepancy. The question is is there a level of significance in that range...Uh I'm gonna stand here. OK. What we are looking for is a significant difference. I have a word...standard de.. standard deviation plus or minus 15. If we see a difference between scores of more than 15 points that is statistically significant, it's not just a large difference. Don't use the word large difference. Schools want to hear significance and 15 points is one standard deviation and that is significantly... statistically significant. But you'll also see on different tests that maybe you'll see scores of 8 to 15 and those have a mean of 10 and a standard deviation of plus or minus 3. Same scale, different numbers. But be aware of that. We have you know the range, I'm gonna talk about the ranges a little more, but, what you know a low average, high average and and just plain average. Anything below a standard score of 70 is what we call the intellectual deficit or intellectual delay.. I'm sorry there are those kids that have intellectual disabilities and those numbers don't necessarily lie. Making sure though that it's a true story.

I had a youngster who was actually in this situation um child was trying to get into the advanced academic placement class and he came up with scores oh around 100, 110, which is nothing to sneeze about because that's a pretty bright kid, but he wasn't strong enough to get into the the advanced academic placement class. Turns out he was tested, his parents wanted to get him tested, and you get a new score and he had pretty profound ADHD. Put him on medication. Retested two weeks later. His IQ score went up by 20 points. It wasn't because the medication made him smarter but he had more he had

more access to his overall intellectual ability. If we have a kid who has significant emotional disturbance, if we have a kid that has ADHD, we have other complicating issues don't take the score just...you know you know just as you know this is what this is what the psychologist told me. I wanna ask questions. You know how do you feel when you have when you have a middle ear infection? You have a head cold, you have allergies, you are not on your best performance. I wanna hear if this kid's on his best performance or not.

Um one young lady I had and I worked in a um children's psychiatric hospital and I tested her and everybody had her intellectual disability. One day I walked in I was a new person I am and was old, still am, and um and she and she kind of liked me, I was kind of like the grandfatherly type, and she worked with me, we did testing, we got a a receptive language score of about 105. Tells me this kid's not intellectually disabled, this kid does have some significant emotional problems. She's been in, in the last 5 years, she's been in 12 different foster homes. She's not that emotionally stable. But you know she I did see a really nice score. The next day I went on to the unit to get her tested again and she starts screaming bloody murder that doctor's mean I hate him he's mean to me... And I wasn't gonna get any new scores, but I do have one score saying that this kid is somewhere outside the I.D. range. So, what I'm gonna try to do and folks who are on Zoom-land, I-I'm sorry, but you should have a copy of this, you should see this PowerPoint and, um . . . Carl tells me that's not gonna show up enough but, um, I have my own. So, when we look at this chart . . . Is there a way of blowing this up, Carl? I want to get the top thing blown up if at all possible. Okay, okay so . . . wait? I can wait. I love to . . . Oh my God! How'd you do that? Right there. Perfect! I love this man.

So, when we look at this chart, these are the standard scores right here. And y'all can see my, my, my laser beam. Mine's better than yours. And so, we look at this—this is a bell curve and here's our 100, here's our 85 to 115, and this is our average range, and you'll notice that 86% of our population is average. If we looked at more standard deviation, 115 to 130, all you do is add or subtract 15 points, this is our high average range. Um, and that's only about 15% of our population. Our low average range is 85 to 70, again it's, um, 85% of our population. Anything below 70 is our deficient range. Anything above 130 is very superior. You just now know more than half the people you're going to be dealing with. Now, how do we put it into practice? If you get scores that are percentiles, my little chart here does convert things over kind of nicely to the, the standard scores. So, how do we use this? . . . Can we do the same thing, just move down so I can see the right side, please?...Perfect! Well, I lost my box there somehow. Well, we can leave it

the way it is. So, we're going to look at IQ scores. Understanding IQ scores is really important. The way we learn is we learn through verbal and nonverbal. So, if I want to test your verbal skills...I'm gonna say some things to you, I'm gonna ask you to repeat them, I'm gonna ask you to give me vocabulary, I'm gonna ask you to have a conversation. That's verbal—your, your hands tied behind your back, your eyes can be closed—it's all mouth and ears. Comp- . . . and conversely there's nonverbal—no talking, no language—show me, you know, do some comparisons, do like a matrix, do a comparison of . . . and people who are taking pictures, if they want an e-mail, I mean I will send you a copy of this, so, um, in a, in a much better format. I saw you. This is why I like live, live better than Zoom. People on Zoom, please do that same thing, um, and I'll send you the information . . . Anyway. When we look at the nonverbal, it's how do I do well? How do I do with the visual stuff? Let's just say you go to a country and you don't speak the language. And how do you try to communicate? You use gestures. You use facial expression. As I go around the room, I see people's faces. I can read your faces. Each and every one of you have communicated with me nonverbally. You have that ability. Kids with a learning disability—80% of them are the language-based ones—you're gonna see lower verbal skills. 20% of the kids who have a learning disability have weaknesses in the nonverbal area. Those are the ones we typically see as Asperger's or nonverbal learning disability. But we want to do a comparison of the two scores. The thing to be very careful of is, if I take the verbal score and the nonverbal score, and I...um, average them together, I could get a score of 66. 66 is what range?... Intellectual disability. But, if I have a verbal score of 60 and a nonverbal score of 85, even though it may...it, it, it, it may average to a score in the I.D. range, that 85 tells me this is a kid who does not have intellectual disability. Does he succeed in language and verbally? Absolutely not. But I want to capture the part of the brain that works really efficiently. I'm gonna start asking that question. You're not gonna be instant neuropsychologists. You're not gonna be instant diagnosticians. But you now know to ask the question. Which I'm gonna show you in a little bit in the IEP, is that when I, I got a, I got a, a, on the IEP, there's an IQ score in there, and there's nothing in there about nonverbal skills. They just, for some reason, did not do that particular test. I don't know why. I want the psychologist who put in the report why they didn't do that section or report that. They didn't. So, we're going to compare those two, and then we're going to look at IQ versus achievement. If I've got a kid with an IQ of 65, which is intellectual disability, and I see achievement in reading being about a 55 to a 60, well, you know, they're performing where they would be expected to because I'm looking for that 15-point significant discrepancy. But, if I see a kid in reading who's got a 55, um, standard score, but in math they now have a 90...like, I need to pay

attention here, because a kid who has intellectual disability is not gonna get a 90. So, there is one of those, aha, let's look at the IEP. Why are we seeing these scores? If I see a kid whose overall IQ is a 60, and he's getting A's and B's on his report card, I have lots of questions. I'm not going to accuse anybody of anything, but I have lots of questions to be asking. The other thing is I want to look at achievements. Is the reading and the, and the math, and the, and the spelling, and the written language all within the same range or is there a great deal of discrepancy? And is there a discrepancy from first grade to fourth grade to fifth grade? I want to do a comparison of all the scores. When I'm called in as a, a, a, um, an expert witness and I have the attorneys come in and, and, and get prepped, I want them to know that. I want there . . . Let's look at the discrepancies. You don't have to have the answers. You need to have the questions. When I go to meetings . . . and I was talking to one of my friends over here yesterday . . . it's not important to be right. It's important to get it right. And by asking the questions, you get it right.

Ok. So, what are the implications? The implications are eligibility. Where are we going with this kid? Is this giving . . . in the different disability categories we have other health impaired, we have emotional disturbance, we have autism, we have learning disability, we have, you know, visually impaired, we, we, um, we have a, a plethora of eligibility considerations, but I want to know, where does this kid fit? And, and the bottom line is—as an advocate/facilitator...I told some of my friends last night I don't like being called an advocate, because an advocate just says we're gonna get into a fight. I want to be a facilitator. I want best practice and interventions for this kid. At the end of the day, I want proper interventions. I want to be able to ask the question. I don't...I never get into a fight, no matter what school system I go into, particular- ...even...in the state of Virginia, they love me because I don't get into a fight. In fact, you know what? One of the things I've told our law students every year to year—and it comes across as being rude, but I'm from New York, it's okay—um, I tell them when you get to a school and get to a meeting, shut up. Be the last person to talk. Because if you're the first person to talk, you're gonna be spending, you're gonna spend the entire meeting defending your perspective and your opinion. I wanna hear what's going on. I'm gonna ask questions upon questions upon questions and suddenly, when they start talking about how this kid has difficulty on the playground, and then we ask them, "socially, how is this child?" And they said, "oh he's, he's, socially, he's perfectly fine." But you just finished telling me that he had difficulties on the playground, let's talk about that. So, I'm using your word—not mine—your word to tell me what you saw...and I will tell you that, when I was growing up, my father had a temper, and the person sitting to his right at dinner was in the death seat. So, you are, unfortunately, you're in my death seat, and I apologize for picking on you. My father's no longer around, so he

can't prosecute me anymore...Um, I also want to look at manifest det-, manifest determination. Are any of these child behaviors that seem to be illegal a manifestation of what we see in terms of disability? And by putting as much detail as we can in the present level of performance, we had him protected. Don't tell me he went up to Johnny and, and threw something at him. If four or five other kids are doing the same exact thing and he's following the lead, well he should know better. It's like, no, he, he has a learning disability, he has autism, he has emotional disturbance, or whatever it is. Don't assume everybody knows better, because not everybody is wired the same.

Again, we talked about diminished capacity. There's data there. There's great data and if your kid has not been tested for an IQ, let's go back and look at school records. This kid is getting D's and F's. This kid is getting really poor percentiles on all his standardized testing. You know, what data do we have here? I can tell you a lot about a kid by just getting a set of records. What are the social limitations? Does he know how to play with other kids? Well, he's constantly putting his hands on other kids. For those people who have never read the book *Look Me in the Eye* by John Elder Robison, it's a fantastic book to read. John Elder Robison, um, got diagnosed with Asperger's at the age of 40. John Elder Robison is the person who created all the pyrotechnic lights and exploding guitars for the singing group, Kiss. Man was just absolutely brilliant but, when he was little, before he was diagnosed with autism, he knew that you need to have certain rules to play on, play in the sandbox and you need to follow my rules for the sandbox cause I'm very rule governed, and that wasn't working out so well, he wasn't very popular. And so, he learned that, you know...dogs like me. Dogs smile and wag their tail and they wag their tail and they smile at me when I pet their head and I rub behind their ear. So, if I do that to other kids, they're gonna like me. Well, that doesn't work so well, but now he's being accused of putting his hands on and, and touching other kids you know. So, look, you know, what is the diastasis to him putting his hands and touching people?

Um, and then, slow or limited processing. You know, I started off the conversation today about how fast I talk or how slow some of you listen, um . . . especially if you're from Kilmarnock, um, a friend of mine's from Kilmarnock that's where that came from ...um, but, um, but people don't always listen as quickly as we talk. The gift of time is the best gift we can give anybody, but we don't always do that. So, let's talk about limited processing speed and there, and there's testing, and there are numbers there that tell us about it. So it may, it may very well be the kids not very focused or attentive, um, and they need to get their frontal lobe, you know, warmed up and, and, and, and get, and get on, um, uh, get, you know, on, you know,

turned on.

What we want to look at is if a IEP is going to be effective, let's compare from year to year to year, not continually reporting the same scores. And the scores don't have to be scores, they can be report cards, information from the school, teacher report, teacher be- ,uh, behavior report, you know. Is there information to compare one year to the other and what are the differences? And then we want to integrate all this information and make it, uh, comprehensive. Ok. Not doing too bad. I have what, another two hours for this?...Kidding! Not really...Um, okay. What do the scores mean? Let's know what the scores mean. Go in there knowing and explain to the parents that this is what the scores mean. If you don't know what a score means, ask. Let the school know. I don't know what this means, can you explain it to me? Can you explain it to the parents?... Do we need a functional behavior assessment? People don't usually do a lot of functional behavior assessment but if there's a behavioral issue, what is contributing to that? What is the trigger for the functional behavior assessment? Don't tell me you're gonna go in for an hour and observe the kid, because you're gonna get nothing. In fact, if I've got a kid in third grade and he's been in school for two months, I don't need to even look at the kid. I can bring all the people working with this kid and triangulate all the information. What do you see during math? What do you see during reading? What do you see during, you know, during history? Why don't you see the problems that they're seeing and let's...not making you a better or worse teacher. I want to know what's impacting this child. Is it the beginning of the day? Is it the class right before lunch? Well, maybe they have, you know, maybe they're hungry, their blood sugar level is low. I want all the information. Is it because one particular kid is picking on them?...You know, my wife, she keeps on telling me this story over and over again, and over and over and over again, um, she's not here so I can get away with that, um, but she said, you know, when she was in camp, and she didn't know how to swim, and she was trying to learn to swim, and she couldn't learn to swim, kids would make fun of her. So, she told her parents what a terrible stomach ache she had, and so they took her to a- for a whole GI series. Turns out, she just was having this somatic response to kids making fun of her, you know, at camp with, with, with, you know, with swimming. Had they asked what's going on in camp and really did a functional behavior assessment, they would have realized—somebody's making fun of her. So, we need to look at that functional behavior assessment, and do it thoroughly, and get somebody really skilled. Don't just hire somebody because they're gonna come in for an hour and do a functional behavior assessment. You really wanna turn it around. Um, and, you know, are we looking at altering our intervention? You know, we've done it this way for the last two years—still not working. Maybe we need to revamp everything. Maybe we haven't gotten it right. It doesn't

make you an inept educator. It makes you a skillful educator when you say, "this is not working, let's try something different." Paradigm shifting. Anybody had the opportunity to meet, um, Barry Hewett—he's a school psychologist in, in Hanover County and I have no problem giving him a shout out, because he and his, his staff many years ago were looking at autism versus emotional disturbance—how do we differentiate the two? There are those kids that show significant signs of emotional disturbance, on the other hand, is it because of autism and the misunderstanding of social cues and social, you know, social mores? And then, is it, and then taking the IEP developers and holding them accountable...not "holing" them, holding them. Somebody didn't proofread that. Ok. So, let's play for a little bit...Carl, can you bring up the other- Carl? Can you bring up the...We're gonna look at an IEP and I want you to play with me. So, this is a child who's twelve years old, in the sixth grade and, um, okay we're gonna go...so the, the first page...can we make it bigger? Okay, so the first thing that we see on here is that this kid has an, a disability category of other health impaired. So, to me, I hear other, other health impaired I'm hear, hearing, you know, is there, is there some kind of brain infarction of some sort? Is there ADHD? I don't know what's going on. Is it a seizure disorder? I don't know. I want to know. So, I want my IEP tell me—what's going on? So, I'm gonna let you, I'm gonna...Go to the next page, okay? And in fact we're gonna go to...keep going. Keep going. I want that page. Yes. Keep on going up.

Okay, so let's look at this. Let's, let's...can you all see that? You can make it bigger if you can. Oh it's okay? I, I need this. Okay, so tell me, and this is a group discussion, tell me what you see about the scores and what you think. Does this kid have intellectual disability? Look at all the scores. We're looking for anything below the score of seven and comparing them to herself. Phonological processing um is a 58. how about the other scores on top? What I want you to be looking at is this score: verbal comprehension is an 86 but going back to your point of phonological processing, we have an 86 all the way down to a 58 quick math tells us that's a 28-point discrepancy. Oh, good thank you. Still love this man. Um, so we have a significant discrepancy. We even have proces-- we have we have a lot of scores in the 60s, 70s, and 50s, but the 86 says there's something in that brain that says this kid is not intellectually disabled. I love that 86. The question is what does this kid do in a nonverbal domain? There is a test call-- you know there's perceptual reasoning or nonverbal nonverbal um IQ... it's not up there. And this particular test of [unintelligible] does have that scale it's not reported. And I go back and look at the reports, it's not reported. So, that's one of my first questions: why isn't that in there? So, then we move down -- if we can go to the next... yeah that one right there we can. So I'm going to read that out if you can't read it, but this says um "the child came willingly to the testing

session, she was cooperative throughout the exam," I'm going to just sa-uh, keep on going..."When compared,"...right there's good... "when compared to the scores earned by others at the age level of achievement it's very low range of 40, and academic skills 40, ability to apply those skills of less than 40, fluency less than 40." So, academically, this kid is drowning...Compared to her IQ of 86 this kid is really struggling. So, one of my questions is was-was I mean today you know a standard score of 40 means. I'm the parent, I don't have a clue what that means. When you tell me there's a standard score of less than 40, you as an interventionist, what are you going to do? You're going to give us you're gonna give us uh-tu-um, you're gonna give us um interventions that are going to be above 40? I don't know what that means I just made that up. I don't know what that means. I want a descriptor in there. I will tell the -- I will ask the school, this kid's skills are really significantly delayed, but tell me what that means. Does that mean that the child can read words but doesn't comprehend? You know reading comprehension versus word recognition. There's a difference. I can read a foreign language fluently, have no idea what I'm reading. So, there's recognition versus versus comprehension. These are weaknesses but this doesn't help me develop an IEP to know where I'm going to start working with this child. I want to hear what the teacher's saying um. One of the things I'm gonna advise you to do when you look at an IEP, I want an error analysis. Describe the nature of this child's weaknesses academically. Tell me what kind of mistakes this child makes. That's one of the biggest concerns I have. So then if we can go down to the next one that's paragraph 3 and here, we see a sign says here that she gets extremely frustrated when she does not understand the concept or she answers incorrectly, struggles to work independently daily, and sometimes requests that perform tasks for her, and requires prompts. Um that's great, give me a little more detail. And this is just a preliminary stuff. She she she benefits from guided reading strip to help her focus on assignments. So, the question I have here is is this because she can't read or she can't focus? There's two things in the same paragraph, give me a little more. I'm gonna ask questions. You said she has difficulty with focusing, is this by nature ADHD or is this by a nature a learning issue? So... and by the way feel free to ask questions...If we can move onto the next page, which is gonna be page 4 of 28 Carl...OK so here's present level of performance. So, this child has been...can we move up little more? As far as we can tilt, we get to present word present level good OK. So, this child has been identified with other health impairment and is now working on SLL curriculum. Other health impairment. OK...um I've been watching Dancing with the Stars and she just gave me a 10. Huh?

Audience Member: [unintelligible]

Dr. Norman Geller: But the question is tell me why why OHI? It could be a number of -- go ahead

Audience Member: [unintelligible]

Dr. Norman Geller: This is the IEPT

Audience Member: [unintelligible]... you can't really ask that.

Dr. Norman Geller: You can ask anything you want! There's only one bad question. When you go to a meeting there's only one bad question at those meetings, and that's the one that's not asked.

Audience Member: [unintelligible] they're scared-er to ask questions, then they're just like "I don't know." like, especially like, saying you know does your child have ADHD? You can get like

Dr. Norman Geller: Why not? You can ask anything you want. This teacher can ask it. Do you think the child -- I mean, if the school system suggests that the child has -- ADHD by the way is believed to be a clinical diagnosis made by a physician. But the state of Virginia has an an an a other health impairment ADHD worksheet that's put out by the Department of Education. And so we can start looking at does this kid qualify under other health impairments under ADHD. But so that's the first question, is it ADHD? I don't know. Kid can have seizure disorder and have other health impairment. I don't know. But, when we're when we're deconstructing the IEP, we see that, that is a question mark and I want that answered. Nowhere in here and I mean I mean in the eligibility it might be in the eligibility, but most people aren't gonna go back and look at the eligibility, they're gonna look at the present level of performance because this is a document that uh moves with them from year to year to year. So, but absolutely ask -- I mean that's what I want you -- that's what I'm trying to arm you all with. Ask the questions. If you don't get an answer, then we need to find a way of getting that answer. We're not going to accuse anybody, you should know better! Let's find the answer. Um, so if we can go down to next paragraph where it says um lets see no that was it go back, good thank you. So when we look at this, this child has relative strengths in the areas of vocabulary and oral comprehension. I would like to know where we got that from. You know, where's that -- I mean if we're gonna put that in there let's reference what document we're getting that from. Doesn't mean they've done anything wrong, but I wanna have a I I I would like to have a map as where it's coming from. We're gonna continue with um... if you look at the, here due to very sl- - due to very slow processing information dependent on frequent prompting and review of concepts while completing classwork. Socially she chooses to interact with the same core group of peers and seldom adventures her sel-

beyond her comfort zone. We're now talking about something socially. My my autism radar just went up. It's like we're talking about social she doesn't venture out what's the cause of that and what's contributing to that? I I have some questions about that and then I want to go back and I want to look at the report. So, what I did was when I saw that I'm going I mean I've got a whole stack of stuff here and I went back and I looked at my information and... the problem is I can't read my own information... I went back and looked at a report from a few years beforehand and in a previous IEP two years beforehand one year beforehand it says that she was administered the Gilliam autism rating scale. You don't give somebody to Gilliam unless you're suspecting autism. And in this particular report it says that she has a very high likelihood of having autism. But it's never considered anywhere. So, as we keep on moving along, and I'm running out of time I'm gonna I wanna leave time for questions and uh questions and answers. The one thing I don't see in this is, how she doing on her report card? You you know what her skills are, you know what her IQ is looking like. When I go back and look at her report card from the year before, in English first some first nine weeks was an A, second nine weeks is a C, and she ended up with a final grade of a B. Huh. Geography, she ends up with a B. Health and PE an A. Math on grade level a B. Science, you know that that that she bombs out on and she gets a D and an F. But I'm going, how is she getting B's and C's? Is this kid on grade level? I want some some discussion about is she on grade level, what do the B's and C's mean, what are my expectations as a parent? I had a young lady in one of the city school systems who, sweet, sweet child, and the parents were sure she was getting she was getting all A's and she was sure the parents were sure she was going to be a doctor or a lawyer but she had an IQ of 60. And she spent most of her time under the desk. But, she was a sweet kid. Not that I want to give kids' D's and F's, but I want some qualifiers saying this is what's going on. Anyway, I have about two or three minutes left and I'm hoping this was helpful. We could be doing this for the next two or three hours, but are there any questions? Go ahead.

Audience Member: [unintelligible] behavioral needs and things like that...so schools I've seen where schools will say well they don't they're making they're making good grades especially when it was on eligibility they're making good grades whatever's going on with them is not affecting their education. No. They do not qualify for special education services.

Dr. Normal Geller: Yeah.

Audience Member: Branch that gap. I mean everything that you said really that's got my head spinning on you know how do we branch that gap.

Dr. Normal Geller: One of my heroes is Lieutenant Columbo who just

asked lots and lots of questions. The people of the grey hair know what I'm talking about. *laughs* But Columbo is a detective being played by Peter Falk and he just asks a lot of questions. And the way I would approach it like see you know she's getting all these A's and B's and she's got an IQ somewhere between 85 and 58 and IQ says academically she's everything you know you know below a standard score 40... how are we equating those two? you know how I mean are the grades being um adapted for her ability you know adapted are these adapted classes? Can we talk a little more about it? Because if it is I want in the IEP. I want her protected. You know when we when we get her into high school and she's getting A's and B's and reading at a second or third grade level and she goes out and commits a crime because she has no other means of supporting herself, we created that school to prison pipeline. Good question yeah. Somebody else?

Audience Member: I was just gonna say I was [unintelligible] and talk about the discrepancy, well ok this kid is making all As and has an IQ of 135 um why didn't biological processing did they have an FBA? You know? And it it seems to be ignored a lot. And I'm like it's the elephant in the room...

Dr. Norman Geller: And that's the question and when you ask a question like that I would hope that when you finished the meeting and they had minutes in there I would hope that we finished the meeting we had minutes in there that this question was put on the table we're going to investigate that -- they may not have an answer -- and I'm OK with not having an answer, I am not OK with um...I am not OK with just leaving it on the table and letting it die. Or uh put ya know, ask the question.

Audience Member: The other thing I do this is I ask the parent why are we here today? Do you think there's a problem? Well, the kid comes home every day, runs up and hides under her bed. That's that is learning. Learning caused this reaction. Something that's caused this.

Dr. Norman Geller: And the school would say --

Audience Member: And the school doesn't see it.

Dr. Norman Geller: And the school would say that's an issue at home. It's like, you know what? If this is contributing to a home situation, I don't want in two or three years from now for it to escalate to something that prevents them from going to school. So, I'm gonna stop here because I because my friend is coming up and um if you have any questions I'll be around until about lunch time we can talk. You can give me a call, we can talk. One more quick question?

Audience Member: No, I'll grab you.

2024]

SYMPOSIUM TRANSCRIPT

23

Dr. Norman Geller: Ok! Hopefully this worked out well for you. It is pretty perfunctory but there is a lot more to it um, she's only queuing me now.

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PRACTITIONERS PANEL: UNDERSTANDING THE IEP

*Courtney Pugh, Sara Platenburg, LaTonya Slade, Hank Bostwick
Moderated by Melissa Waugh*

INTRODUCTION

Erin Sweet: Thank you so much, Dr. Geller. Uh, next, we have our first Practitioners Panel on Understanding the IEP with Courtney Pugh, Sara Platenburg, LaTonya Slade, Hank Bostwick, and moderated by Melissa Waugh.

Melissa Waugh: Good morning, everyone. We are so excited to be here with you to talk about IEPs and especially to follow Dr. Geller's great presentation, and uh my name is Melissa Waugh. I am a special education attorney with the Belkowitz Law up in Northern Virginia, and uh I have with me I brought four of my colleagues and friends to come talk to you guys about, um what it's like actually sitting around the IEP team meetings and some of the issues and concerns or hot topics uh that we see in our everyday practice, and I'm just going to briefly, uh give you everybody's name and where they are. You'll see -- thank you -- uh where they work work. We have Hank Bostwick, he's also an attorney, special -- uh a little more than special education, but he has focused on that for many years. He is uh new lead with the legal aid Justice Center.

Hank Bostwick: Mid-November I'll be starting.

Melissa Waugh: He will be starting and uh, next to him we have LaTonya Slade. LaTonya is an advocate. Um, she is with the company Full Potential Education Advocacy and Consulting and she's in the Tidewater area. And then we have Sara Platenburg, also an advocate. Uh, Sara practices in Virginia but also several other states as well so she has brought experience there. And then we have Courtney Pugh who is more in Southwest Virginia um her company's Four Peaks Educational Consulting, also an advocate. And together, I was trying to calculate in my head, I think we have a little over 75 years of combined experience sitting around IEP tables. So, hopefully we can give you a few golden nuggets to take home today. Um *laughs*, but truly, folks, I mean this is a -- this is a group of rock stars and please check out their bios but I'm not gonna go into detail on that.

PANEL

Melissa Waugh: Um I did really quickly want to uh uh -- just gonna drop that down -- uh there are a few little things little nuggets, gilded nuggets we put in your handouts that were not going to address in detail, but check it out if you need it. Um, one item is what I call the Pre-IEP meeting worksheet, uh this is a worksheet you can use doing intake with a client when you're preparing for an IEP meeting. It's just some things to be thinking about. Um, I also included another little tool. It's called the IEP meeting worksheet. It is a chart with all the elements of the IEP and questions and things that to be asking that you've obviously discussed with the client in advance, but you can take this into a meeting with you. Oh, are my slides not up? Oh... Uh, actually, we could just go to, that, actually go back to the slide you're on, we'll start there. Can I move them? With the right to left arrow? Okay good. Alright, good, now I can get back where we were. Um, sorry about that. And uh, but these are in the box that everyone should have been given access to because there was a question about whether you, you're not gonna have it on a table anywhere, you have to electronically access this. But I just wanted to point out that these things are in there. They're tools that you can use if you choose to, but the idea is this is something you take into the meeting and it kind of helps keep you organized and on track to make sure you're covering all the issues that your client wanted to get addressed. Because a lot of times we run down rabbit holes and whatever and so this kind of can help you stay on track during those meetings. Okay. Uh, also, a copy of the PowerPoint slides is in the Box um that you can access electronically. We're not gonna go over every single slide. Dr. Geller covered a lot of this. I just wanted to make sure you guys had it in one um easy place to access. Uh, but as we all know, the IEPs are a product of a federal law called the Individuals with Disabilities Education Act, or IDEA. Yes, I understand that it spells the word idea, but I'm telling you, nobody in the bill calls it that. It's IDEA. So little tip of the trade there. And the one thing I want to point out about the IDEA because it's something I always, myself, try to keep in mind before going into these meetings, is why does the law exist? Why are we here? And it all comes down to the purpose, and it's right there in the law. And the purpose is to make sure that we're emphasizing special education and related services designed to meet a student's unique needs, to prepare them for further education, employment, and independent living. It's not just about academics, folks. It's about the whole child. And so that's what the law says, and that's what we need to be sure we're advocating for in these IEP meetings. But again, the key to effectuating the purposes of the IDEA is the IEP, the individualized education program. Some people call it plan. You're going to hear it both ways. The law says individualized education program, but both are fine. All right. I'm just going to scroll through this part pretty

quickly because Dr. Geller covered most of it. But the IEP is actually a written document, and it's developed by a team that includes the parent. And the parent can invite whoever they want to come to that team meeting. They can invite an advocate, their attorney, their next-door neighbor. They're allowed to invite whoever they need for support because, I'm telling you, as a parent of two children with special needs who are eighteen and nineteen, so I have been on this path a long time, uh you go into these meetings, it's one parent, and you've got ten or twelve school staff there. So, it can be a little overwhelming. So, yeah, they can take whoever they want with them into these meetings. And the whole point of the IEP is that it is to confer on the child a free and appropriate public education, or FAPE. That's how we refer to that, but free appropriate public education. And how do you know if this IEP is conferring a FAPE? Well, there are legal standards. It doesn't say in the...in the IDEA, right? But now the Supreme Court has...we have two big cases, *Rowley* and now *Andrew F.*, that have kind of fleshed out what it means to confer a FAPE. And in *Andrew F.*, prior to this Supreme Court decision, many jurisdictions relied on more than de minimis progress. So schools had a pretty low bar. It just had to be more than a de minimis amount of progress, and that's good enough. That was...evolved out of *Rowley*. And then the Supreme Court said, now, that the IEP must be reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. So, you have to make a prospective judgment based on where the child is today, which you're going to know what that is by looking at the PLAAFP or PLOP, but it's that present levels of performance section of the IEP. And that's . . . we're going to know where the child is today, and we need to make a prospective determination of what is reasonable for this child to achieve and accomplish. Um, and then the other important thing that came out of *Andrew* is that the goals in the IEP have to be appropriately ambitious, right? It's not . . . you know, we want to make sure that it's more than de minimis progress. We want to help these children, you know, do more, develop to the greatest extent that we can. All right? I'm going to skip over some of these. Dr. Geller did a great job on present levels of performance. So, um, but a couple of hot topics that we've noticed in, um, in this area. Teams failing to update the test data, leaving out test data. Um, just had a case where they just um completely misconstrued test data. Um, you'll get a giggle out of this, Dr. Geller. You know, we had a standard score of about an eighty, eight-one, and that was defined in the PLOP as average. But you see what . . . I mean . . . but what does a parent see? Huh? Nothing to see here. No problem. It's just very misleading. So, as advocates, we want to make sure that the PLOP is complete and that it's accurate. Um so I'm going to turn it over to Hank. He had a few comments he wanted to make um in his experience. And so, take it away.

Hank Bostwick: Yeah. Thank you. So, Dr. Geller, you did an amazing job talking about the importance of the evaluation process, but there are a couple of interlinked legal concepts that we need to talk about, right? And so, one of those is the concept of child find that I'm sure that you may have heard of in your studies in education law, special education law. And that's the obligation of a school district to identify all the children with disabilities within its jurisdiction, to identify and then assess to determine their level of educational need. One of the things that Dr. Geller uh focused on was the idea that we have to evaluate the children in all areas of suspected disability, and so the suspicion of a disability can come from a number of locations. I really want to draw, particularly law students', attention to *D.B. v. Bedford County School Board*.¹ That's out of the Western District. It was a case in 2010, and not only is it a great, like, primer, special education 101, in the way Judge Moon wrote his opinion, but it also gets to this direct issue of suspected disability. This was a child, black kid, came into the district pre-kindergarten . . . or kindergarten, and was reading at a pre-primer level. By the time we caught the case, when he was in fourth grade, he was still reading at a pre-primer level. And Judge Moon wrote that this was one of the saddest cases of social promotion that he'd ever seen. But one . . . the crux of one of the legal issues, and there were many that were dealt with in that case, was that there was a mention of MR, now intellectual disability, during an IEP meeting. This might be something that is impacting the child. Well, that was never followed through in the evaluation process or anything else. And so, as a result, there was an incomplete picture or profile of that student.

When we start with an incomplete picture or profile, then we're not going to be building from the ground up the foundation for that education. So, you did a great job about talking about the timeline for the evaluation process, but one thing I want to mention is that there is a mandatory triennial evaluation every three years, but a school division can evaluate a child yearly, and, in fact, a school division can evaluate a child more than yearly if the parent and the school district agreed. And this is often done when you administer a set of assessments and then there are alternatives to those assessments. So, you can't necessarily test, Dr. G, right, within the same year using the same instrument, but if there are alternate instruments within the same sort of panoply of testing you're doing, then you can use those, right? We have . . . we talked last week in our presentation about students who are passed along through the evaluation process through a procedure called the REED, R-E-E-D, and so if you'll look in the fine print of the IDEA, there is the review of existing evaluation data. So, a school division in cooperation or agreement with the parent can elect not to do any new additional testing, but simply

¹ *D.B. v. Bedford County School Board*, 708 F. Supp 2d 564 (W.D. Va. 2010).

review the existing evaluation data that they have at the moment, and then use that as a basis to go forward. Practice point...advocacy point, right? The school division has to inform the parent of their right to have that full triennial evaluation, right, and to forego the REED process. The REED process can direct where an eventual evaluation will go, to give . . . we're talking about identifying all areas of suspected disability, but once we move forward with the evaluation process, doing . . . simply doing a REED, we're not going to get the present levels that we need. Um, one thing, also, and I think you'll talk about it later, is the ability to request an independent educational evaluation if the parent does not agree with the school district's evaluation. And when a school district presents an evaluation, you'll often hear from the school board side, well, we didn't evaluate in that area, so you're not entitled to an IEE. My opinion, and I think it's supported by the case law, is that when the division presents an evaluation, they're presenting a full and individual evaluation. It's not . . . the onus is not on the parent to decide what areas that the student is evaluated in. That's way beyond the ability of advocates and attorneys even. So, a parent is not the one responsible for identifying the areas of need. It's the school division. So, when a school division hands you an evaluation, I believe that an IEE provider can test in areas, or evaluate in areas, that even the division didn't pick up on.

Melissa Waugh: Yes.

Hank Bostwick: But that's a controversial subject.

Melissa Waugh: Yes.

Hank Bostwick: Also, want to make sure that we're evaluating in all – all areas of academic . . . non-academic educational need. And that's a phrase that I repeat over and over again because often educators...well, there's not an academic problem. Well, there are tons of things that students pick up in the school...in the school experience that are not necessarily academic educational achievement or educational benefit. So, we have to look out for that. Um, also, the PLAAFP, as you mentioned earlier, is the heart of the IEP. So, as a litigation strategy, what I do if I'm preparing for due process or trying to put together a demonstrative exhibit for an IEP meeting, I will take the PLAAFP statements from year to year, using a, you know, PDF editing tool, and I'll actually cut those out. And I've even put them in my due process hearing complaints, so that the hearing officer can see from year to year there has not been much change, or there's surplus language that no longer applies that's been carried over from present level to present level year after year. And so, that really is the only way that we can prove regression, stagnation, lack of progress, is through the use of those statements. I tried to keep it at 1:20:00.

Melissa Waugh: You did good.

Hank Bostwick: But I could've...but I don't...I've...

Melissa Waugh: We've only had thirty minutes to cover, like, a million things...Um yes, LaTonya, please pop in.

LaTonya Slade: Just to say...I'm LaTonya. Just to say one quick thing. From the parent's standpoint, we may not have the verbiage or know what type of test to ask for. If you see that your child is not able to do something, whether it's academically, whether it's socially, whether... I mean, in any area, you can ask for them to be evaluated in that area. My child cannot do "this"... I need you to evaluate my child in this area. It does not have to be, you know...

Hank Bostwick: That's a great point because you might not necessarily know the nomenclature.

LaTonya Slade: Exactly. You don't...you may not know it. So, my child needs to be evaluated. And always put it in writing. Put it in writing. Whether you are asking that at the IEP meeting or whether you are talking to an administrator, you put it in writing: I want my child to be evaluated in this area. They cannot do this. That is your...the parent's key to make sure you keep that paper trail...

Melissa Waugh: Yeah.

LaTonya Slade: ...in everything that you do.

Melissa Waugh: And just quick follow up to what Hank was saying about IEEs because I've just filed two systemic complaints, and we prevailed on those, and the U.S. Department of Education has been super clear with VDOE that absolutely we are not limited in an IEE or independent educational evaluation to only the assessments that the school chose to do. That is now crystal clear. And in fact, we had to change the...here in Richmond, the legislature changed the regulations for special education to take the word component out because um U.S. Department of Education mandated that. So, we do know now. It's absolutely crystal clear that they cannot limit the IEE to only the tests they did.

Hank Bostwick: And, Melissa...

Melissa Waugh: Yeah.

Hank Bostwick: ...I should have mentioned that IDEA requires...oh, I'm sorry.

Melissa Waugh: No. Go.

Hank Bostwick: Well, IDEA requires that the evaluation assessment instruments be not culturally or racially discriminatory.

Melissa Waugh: Oh, thank you. Yes.

Hank Bostwick: So, we need to make sure that we access resources particularly. And some...with students of color, there is often overidentification, under identification in certain areas, particularly our non-native speakers. They are often...as I think Dr. Geller mentioned earlier, they are often diagnosed, or educationally diagnosed, with a specific...can't say the word.

Melissa Waugh: SLD.

Hank Bostwick: An SLD, thank you, right, in reading or reading fluency. So that's something to look out for too.

Melissa Waugh: Yup. And, Sara, you had a quick point?

Sara Platenburg: Yeah, real quick. Two quick points. Sorry. One is a tool at the IEP table. I request testing even if it's off, um, cycle, and I request that the eligibility is not opened, but that testing is done in order to inform the IEP team. So that's a way to get – to get your information without forcing the issue to open eligibility. In our state, we, you know, we have different consent options available to parents. But not all states have that, and so if you open eligibility in other states, there's a potential you're going to lose eligibility. So, one way that I use to get around that is request testing to inform the IEP team, rather than open eligibility, and that's been pretty successful. Another quick point, just piggybacking on what was brought up about litigation and using the PLAAFPs over time, I actually use that as a strategy before I go into any IEP meeting, particularly with new clients. I take the statements over time and the goals, and I will send that to the school in advance so that there's no secrets, right? I don't want secrets. I don't want anyone to show me something surprising at an IEP table, so I try not to do that either. And so, I will send in advance: this is the data from two years ago, this is the data from last year, this is the current data in the current draft that you just sent me, and these are the goals over time, and here's where we need to go. And so that way we don't have to wait until litigation. We don't have to wait until we get to that place because we know the best work is going to happen...the quickest work is going to happen at the IEP table. So that's just a good strategy that I use. Just letting you know.

Hank Bostwick: And if you're not going to jump on that, real quick...it's...well, I'll let you go.

Melissa Waugh: Because we're down to twelve minutes, twelve minutes,

my friends. So, um, but yes. And to follow up on that, new regulations that say the IEP team...the school has to provide to the parents at least two days before the IEP team meeting any draft IEP that they create. And the reality is most do create it. There is...they have that little loophole in there, but... and that gives us, as the advocates, a chance to review it, make edits, get things back to the team to review before we all get together. It makes things so much more efficient. Good point. But moving on. And, Sara, you are the next one, hot topic person.

Sara Platenburg: Okay.

Melissa Waugh: But we are now in the goals section. Again, there's some great information in the slides. Review those later. Um, but, Sara, you wanted to talk about a couple of things on the hot topics.

Sara Platenburg: I do.

Melissa Waugh: Go ahead.

Sara Platenburg: I have so many things to talk about with the goals. So, Dr. Geller did such a fantastic job with talking about data and the importance of having robust data and accurate data and current data. And I would say...and I use...I say all the time that the foundation of the IEP is – is the PLAAFP, right? If it's broken or if it's not all there, then we can't possibly write a really strong IEP. So that leads us to the goals. The goals are based on what's in the PLAAFP. And what I say to my clients all the time is that you should be able to draw a line from the PLAAFP, from the areas of need, directly to the goals. There should be goals aligned with all the needs. And so, like, I think what Dr. Geller was saying is that when there's something missing, right, we could have a big gaping hole in programming. And so it's really important that when we're looking at goals, we're developing goals, we use the term SMART goals, right? And that's a pretty readily used term in the world of education. And so, I know Melissa had a slide up here, right?

Melissa Waugh: Yeah.

Sara Platenburg: So, but we want specific goals, right? Specific goals are the key. I say all the time in IEP meetings, what is the – what is the actual skill that you're targeting? If I don't know what skill you're targeting...oh, ten minutes left? Oh my goodness. We have so much information to cover. I'm feeling stressed. Um so I'll talk a little bit quickly.

Hank Bostwick: Do we need an extra time accommodation here? (Laughs.)

Sara Platenburg: (Laughs.) Yes, we do. An extra time accommodation, and I was going to request visuals. So, I'll talk quickly. You did such a good

job talking so quickly. I'm from Chicago and I usually talk fast, and now I feel like I'm, like, a slow sloth.

Melissa Waugh: But I think you had one other quick point. Just, like, ten seconds.

Sara Platenburg: Okay. Okay. Quickly. So, goals. You need to be able to draft your goals so that we know what skill we're looking at. That they're measurable, meaning, how many times are you running the goal? I say to teams all the time, you can't run two times...the goal two times in a quarter and then for us to know that the kid made progress or not, right? You want lots of data samples. You want eight, ten, sometimes twenty, sometimes thirty data samples. The school will always push back on this, but it's really important to know whether or not the programming is working, and the only way to do that is to have enough data samples, right? So, you want that embedded into the goal.

Sara Platenburg: ...want to know the accuracy rating, right, of whatever the skill is. So, is the student going to do this five times at 90% accuracy? Okay, well what does that really look like, right? We don't want 75% accuracy I see this stuff—craziness—all the time and I said that mean 25% of the time the kids not doing it, so if 25% of the time the kid isn't able to read, then they're missing 25% of the curriculum, what are you talking about, right? So haha we have these conversations ... so important ... um, and we talked about um, sorry I—um now I feel like ... oh, achievable. This is really important. The goals have to be achievable. What I think is achievable is sometimes very different than what the schools think is achievable. So, I pull up always pull up the state standards oh okay so you think it's not achievable that the students going to write a paragraph in a year's time but right now they're writing three sentences I think it's pretty achievable right that they're writing may be a multi-paragraph paper at that point. What's the state standard? Where are we trying to go? So, you want to ask all the questions like Dr. Geller was saying like ask all the questions. Where are they now? Look at the work samples figure out what's achievable, figure out what's working, what's not working—is this working over here with Mrs. Smith? And, you know, with Mr. Thompson, you know, what's going on with with the student in each of the classes? Um talking about objective oh...

Melissa Waugh: I can we let Courtney talk a little bit? I'm so sorry it's the worst to be not be able to give the information prepared, but I want Courtney to have a chance to talk about...I'm sorry about services and accommodations there's just a couple of quick points I know you wanted to make on the services and um section.

Courtney Pugh: Absolutely, so the services section, I don't have the

benefit of Dr. Geller talking about at first. So, some of the things that we're seeing that are trends that are going on is the changing of the language that is being used on the services page. It is not just reading instruction anymore. They're now calling it specifically designed instruction. That doesn't tell the family and it doesn't tell you what kind of specifically designed instruction this child is receiving in that classroom. They're also just labeling as general education classroom versus the special ed classroom. Well, if we're talking about a student who on placements we're talking about a self-contained class, are we talking a resource class? Families need to understand how the service is being delivered to the child and where it's being delivered at. Another trend that they're doing right now is that they're changing, and they're not writing the minutes of the service delivery as far as the weekly, but now they're doing it for the whole reporting period. So, you're sitting with the family and they're like, they get 900 minutes of speech for the you know – reporting period. That's not a lot of speech. When you figure it out you know 900 minutes by 9 weeks is 100 minutes a week that would be like 10 minutes a day if they had that service like that. And when you count like, for example, November, December, there's not that many weeks in the month. Where is that service being delivered? And more importantly, when you have related services such as speech OT, if they're getting that service delivery how many other students are in their receiving it at the same time? Because 30 minutes of speech sounds really good if it's just me receiving it one-on-one but if I have everybody in here and...and Hank's working on articulation, we're working on conversation goals. Where are we getting that direct instruction that is related to our ISP's as as as our person, not as a collective unit? So, and a lot of times they're trying to bill these to Medicaid and other places so the service logs going back and seeing how much time this person is saying that they're working with your child can you come back because I've actually had them write it where they were you know giving services on Thanksgiving Day. Really? I don't think so. And the last final thing that I really would want out there is the fact that services and accommodations are for extracurricular and after school activities as well. So for example, in my own life my child had a vision impairment he was on the robotics team. They did not want him cutting his fingers off using drill presses and things like, that he had a one-on-one a after school that attended the robotics program with him. Some schools will push back and say "oh well that's after our teachers work hours." Doesn't matter. Extracurricular activities sponsored by the school system they have to provide the service or the accommodation for that. 30 seconds, there I'm done.

Melissa Waugh: Thank you my dear, wonderful. And LaTonya you had a couple quick hot topics you wanted to address related to accommodations.

LaTonya Slade: Yes, okay, so, uh, some, you'll see that, you'll see an accommodation or uh um a goal...what?

Melissa Waugh: You're good!

LaTonya Slade: Oh, the burden is put on the student to ask for help or to request an accommodation. Okay, first of all, you'll see this more in middle school, high school. Dr. Geller mentioned this and I made a note of it...if that student has diminished capacity, do they know how to do that? Do they know how to ask for? Do they know how to self-advocate? We have to make sure that the student is taught first how to do something. If it's going to be a goal, okay, the goal is that they do it. However, there needs to be language-specific language—that it's going to be taught to the student how to self-advocate. What does that look like? We have to make sure that that is in the IEP. They will be taught how to do such and such. It could be before the goal is...I mean.. our goals have to align with our PLAFF. They don't self-advocate. Okay, the goal is to self-advocate. What's the first step? We're going to teach that child how to self-advocate and then we're expecting them to do it at a minimum raise their hands, or you know, it has to be specific. Um so, the language has to be added to the IEP. We cannot leave the student out of the conversation. You have to ask the student, 'How can we help you? Does this what we're doing right now, does this help you?' Most of the time I can tell you I've heard so many times, 'No'. Okay, so what do you what would you like to see, this and and this, okay. That's what they want, that's what we put in. Don't leave the child out of the conversation. This is about their life. So, if they're able to sit there and – and listen and be in the conversation at a minimum as an advocate I want to talk to the child and say 'So what do you need?' at a minimum so I can go in there and speak for the child. And I will say this is what Johnny or Elizabeth said they need. This is what they said works for them and this is what does not because I want the team to know that this is not me, this is not mom, dad, this is the child who's asking for this. And it needs to be included in their IEP. You can go as young as you need to go, but you still need to ask.

Melissa Waugh: Thank you LaTonya. And I'm so sorry we're going to have to skip over our hot topics for placement and transition which is unfortunate, but again for the advocates out there, people working and going to these meetings, these hot topics just take a glance at them because it just kind of gives you a clue—a little flag—of something to be aware of in your meetings and to be able to address. The last thing we absolutely wanted to get to today, because um basically the IDEA creates two incredibly powerful tools for parents. One of them is the independent educational evaluation that we talked about before, which um, the US Supreme Court said in *Schaffer v.*

Weast gives the parents equal firepower.² All right, the Supreme Court understands there's an imbalance—a huge imbalance—of power between the parent and the experts that the school, right? So it's the independent evaluation that helps balance those scales. The second most powerful tool that we have, particularly here in Virginia, and it's not the same in every state, is the ability to uh um provide partial consent. Virginia is what we call a full consent state. In other word, the IEP cannot be changed without the parent's consent. Eligibility cannot be changed without the parent's consent. That is incredibly powerful. And the way we leverage that is with partial consent. And I like to tell especially the advocates that I advised under me and our firm that think of partial consent as maintaining the status quo. You can't add things to an IEP with partial consent, but what you can do is you can prevent the loss of something important. For example, if the school the kid had been getting an hour of speech language therapy a week and has been making could arguably some progress but now the school wants to cut the speech language therapy (typically with no data to support that decision in my experience), then with partial consent the parent does not consent to the removal of the speech language services. And therefore, that portion of the IEP goes into what we call 'stay put,' which is much broader definition in Virginia because of these consent powers that parents have, right? And that and uh and that allows that that part to stay in until it can be resolved. And uh again, some golden nuggets that we have in your box of materials uh one of them is uh one of them is an FAQ from Virginia Department of Education. You can't get it on their website anymore. They refer to it. It exists. They admit it but you have to contact people and whatever. It's in the box. Save it. Download it. Keep it. It's a golden nugget. And the other one is I put a sample in there of how at our firm we do partial consent. We literally use Adobe Acrobat. We put it right on the IEP. We X out in red 'I consent, I do not consent' because they don't Virginia IEP ... the State's new system ... doesn't give you an option for partial consent. I don't think schools want you to know, alright, because it is such a powerful tool, but parents have it. We want you to know they have it. Let's you use it to help protect um services and supports for our kids. Thank you.

Nicole Evans: Thank you, panelists and our wonderful moderator. We will now have a break until 10:20.

² Schaffer v. Weast, 546 U.S. 49 (2005).

THE TROUBLING INTERSECTION OF RACE, DISABILITIES, AND YOUTH INCARCERATION IN VIRGINIA

Valerie Slater

INTRODUCTION

Erin Sweet: Okay everyone, if we could all please grab our seats, so we can get ready for the next session to start. Uh next up we'll have Valerie Slater, and she is presenting The Troubling Intersection of Race, Disabilities, and Youth Incarceration in Virginia. Ms. Slater leads the 'Rise for Youth' coalition and advocates for the rights of system-involved youth. Additionally, she has also worked to protect the rights of children with disabilities in community, residential, and juvenile justice facilities throughout the Commonwealth. She has also worked at the Disability Law Center of Virginia and has dedicated her life's work to advocacy in its many forms to preserve and protect our most valuable resource, our youth. Please welcome Ms. Valerie Slater.

SPEAKER

Valerie Slater: Good morning, good morning, good morning everyone. As you've all just heard I'm Valerie Slater and yes, I am the Executive Director of 'Rise for Youth' and "RISE" stands for 'Reinvesting In Supportive Environments' because we believe first and foremost the prison isn't the place for children and the best way to keep them out of prison is to ensure that we are providing them with all of the resources that they need. That we are providing supportive environments for them to be able to find their path because every child is unique, and so therefore, their paths are also unique. And the best way to ensure that they are successful, that every demographic of children is successful, is to be individualized in our treatment of them. I'm so excited to see such a room full of some familiar faces, but folks who care about our children. So, what I'm going to talk about this morning is race, education, disabilities, youth incarceration, and how all of those things are working together, and in some instances, causing great harm to some of our children. So, I'm going to start with this thesis statement that I want you all to consider. Black youth with disabilities in Virginia are receiving a diminished level of support to access their education, they're disproportionately pushed out of school for their behavior because they're not seen as children in need of support, but rather as bad seeds that need to be rooted out, and they are disproportionately entangled in the legal system,

experiencing the harshest outcomes at every stage of criminal legal system involvement. So, we're going to start right there. I'm going to give everybody a moment to kind of ingest that because that was a lot. So now during the presentation, we're going to explore these interconnected components of race and disability and incarceration and we're going to discuss. First, I'm going to use this...so if I can learn how to use...there we, there we go. I wasn't pushing hard enough, there we go. So, we're going to talk about all of these components and how they interact and if we got some time at the end, I would love to entertain some questions.

So, the problem not surprisingly begins at school. Now, that's not ignoring the environments in the home situations that children are coming from. That's not what I'm saying. But once the child enters the school system, that's where we should be putting into place the supports necessary for kids to be successful and even reaching back into the home if need be and, you know, as we get further, I'm going to let you know that I'm not looking for teachers to do at all. Okay, I am not of that train of thought. I actually believe that we ought to be resourcing schools in such a robust way, that there are teachers that are teaching, there are support staff supporting, there are counselors counseling, there are uh...there are psychologists or whatever, whatever other level of support necessary doing their part. And there are even home care workers who are reaching into the homes and providing supports there because unfortunately now we have so many children raising children. And so oftentimes our education system is called upon to do so much, but I want you all to know, I just really need to drive home the fact that schoolteachers should not be doing it all. It's a collaborative approach. And because the school is where we have that first real connection to children -- and that's where we are not only giving them the academics, but we're giving them the social and the emotional learning, then we need to make sure that we're doing it in an effective way, so that they are going to be strong, robust, contributing members of society when they leave. So...when you look at the number of black children in Virginia that school aged 6 to 21 that only makes up 20%, but 27% of those students are students with disabilities. And now Virginia, our disability population in school, is 13% so when you consider that black people youth make up 27% of that, that's a significant number. And we've all heard the rhetoric that says the prison industrial complex, it looks at 3rd grade reading scores. We've all heard that, right? Third grade reading scores and then ready to start building prisons. Well, that's not exactly how it goes. What's really is happening is that if students aren't able to read by third grade, if they haven't caught on, then they are more likely to drop out. And if they drop out, then guess what? They're more likely to then be involved in the justice system. Also, if they aren't reading at level at grade 3, then it's harder for them to catch up. And if they're not catching up, then they may be acting

out. Not necessarily because, well ‘you know what I just want to cause trouble’ but ‘I don't fit in’. ‘Everyone else is getting it and I'm not’ and so then they end up receiving disciplinary actions uh uh beginning against them. And so, it's this horrible cycle. Rather than shoring up their skills and making sure that they are able to catch up. I need to catch up with my slides. I wish I could see it in front of me, I would be better *laughs*. But what I wanted to show you here on this particular slide is that.

So, first of all, the four categories are – there is below basic, basic, proficient, and advanced. Those are the four reading categories that are measured. Now, for black students, 57%, are below proficient. Below. And 75% of all students with disabilities are below basic reading proficiency. Now think about all of the things that happen when kids can't read. This is 4th grade, so we've already passed that 3rd grade mark. But 4th grade is where we had that first SOL, right? That's where we start measuring. So, if these students are below proficient, then guess what? They're the ones that potentially might be acting out. They're the ones that potentially are going to be targeted for, OK, we've got to do something with this one, right? We've gotta do something with this group. Because they are disrupting the classroom. And then when we look at the proficient children, only 15% of black students and only 8% a student with disabilities are actually proficient. That's – that is sobering. What are we going to do about that? So, I know I made that inference earlier, that there was a direct correlation between 4th grade reading proficiency scores and high school graduation rates. So now, let's look at it. This is the graduation data. So we were talking about kids in 2021. So, this is the 2021/2022 school year that we're looking at here. So, the graduation with a standard diploma and the reason I target the standard diploma is because that's the one that's going to lead to higher education. It's the one that's going to lead to, I can go into something vocational and just kind of move on and be successful. And so, let's look at those differences. Here we see that 91% of students without a disability graduated with a standard diploma. But 39, there's a 39% gap, between black students with disabilities, and those students, all students with no disability. But then, even when you look at the students who are not black with disabilities. Even that number is closer, to students without disabilities, isn't that something?

Why is that? Why is it that there is such a gap between? First of all the students with disabilities and in general, that 30-point gap. That's sobering, isn't it? 30% difference, but then add almost another 10% if you're a black student with disabilities. So, now we have talked about the educational attainment and we talked about how if you can't read, then you're more likely to get in trouble. So now, let's start talking about expulsion and suspensions. OK, now, you'll see that I have put up the 2023, 22/23, but can I just share

with you that 21/22 numbers were ahh similar, if not worse. But, but I just wanted to give you (clears throat) excuse me, I just wanted to make you aware that this is a problem that is persistent. It isn't going away. Look at the number of black students. 21.7. That's how many black students were enrolled in Virginia, 21%. But look at the, short term suspension and the long-term suspension. They were 46.5 and 51.7, so when you are only 21% of the population, but you are carrying double, almost triple the burden of these suspensions and expulsions or the short- and long-term suspensions. Once again, let's go back to the reading scores. We aren't reading at 3rd and 4th grade. And now we see that it's playing out. That discipline is pushing you out of schools. Let's look at expulsions. Still, they're 21% but 44% of the expulsions. Now, they don't disaggregate the data so I can't tell you how many of those black students were also students with disabilities. But if there are only 21%, we don't have to wonder or it's not a stretch of the imagination to imagine, right? How many of those students are also black students with disabilities. So, why is it important once again that students who aren't able to read, who are not accessing their education and who are being pushed out of school is for suspension and expulsion. What's next? What's happening to these students?

What is the - what are the implications of expulsion now? Now, I could read this but, I'm going to let y'all read it because you'll have these slides. But you know, kids that are getting pushed out, they are being involved in the justice system. Isn't that what we said? I've already shared that. Is there any doubt in anyone's mind that if a child is not where they ought to be, they might be in trouble. And, and – and that's just children by nature. Leave them alone long enough and they will find something to do when you're probably not going to want them to be doing what they're doing. That's just children. And so, imagine children that are frustrated, and they're angry because they have been pushed out of school. They aren't able to access their learning, and now they're being told that you don't fit here either. So, juvenile intake cases. Y'all know what an intake is? That's when kids have come into contact with – they they've gotten in trouble in some sort of way. And now they have been referred to the Court service unit because someone has filed a petition for them to now be involved with the system. It's called an intake. So, let's look at the number of intake cases. We've got 2021 and 2022. So, the numbers for black and white youth are pretty close. With white youth kind of a little further ahead, right? But then we have to decide who we're going to detain. That petition has been filed. And you're going to determine now whether or not you're gonna hold this child, pre-adjudication, before we decide what we're going to do with them in court. Whether they are going to umm be held because of a Post-D. I'm not gonna get into the into all of those different categories. But who's going to be detained? Let's look at that.

Something's happened here. Now the numbers have changed. It's 37% white youth that are being detained. And 55% black youth that are being detained. What happened? Now, 2 slides back. What one of those bullet points shared that children are pretty much getting in trouble. That they're doing the same things. At pretty similar rates. So, but the the detention rates have changed here. Who's being held has changed now. This is just the detention. Let's look at who has gone all the way through the system. And now we're looking at who has been committed to the Department of Juvenile Justice and will be held in in some sort of a facility or has gone to the deepest end if you will. The numbers have changed even more significantly. Now we're at 71.4 and 23.8. What happened? We have got to do something about these disparities, because if children with disabilities. If all children are pretty much getting in trouble at the same rate. If they're even intake cases are happening at the same rate. Comparatively. But then when we look at who's getting detained, then the numbers begin to – uh – deviate significantly. Something is wrong. Let's talk about why kids are incarcerated. Now, these are the deep end kids. So, out of these 4,226 youth were detained. I'm sorry, that's not the one I wanted to share 49%, 49.6% of all of the kids who have been committed to the Department of Juvenile justice are there for stealing crimes. That's burglary, larceny and robbery. Stealing. Can I share something with you? The majority of the spaces where kids are coming from are profoundly burdened with lack. Profoundly. I do not take lightly the actions of children when they are doing what they should not. Please don't misunderstand me, but profound lack. Plus, children might equal these kinds of behaviors. The second largest category was assault, and so we are incarcerating children because they are stealing and because they don't know how to manage their emotions and keep their hands to themselves. Again, not making light of the harm that children have caused. But when you look at these numbers. We ought to be concerned that you know those really horrific things like murder, sexual offenses. Those aren't the highest. Stealing is the highest. Stealing and assault. Something's got to change. And it's got to be the way that we are dealing with the needs of children, so that they learn how to manage their emotions. And so that they are not profoundly burdened with lack, not knowing how to deal with their emotions and then sometimes being left to fend for themselves and figure it out for themselves.

So, in essence, more than 70% of all of the incarcerated children are there once again for stealing and for assault over 70%. Do you want to hear another staggering statistic? We're not even doing a good job at rehabilitating because more than 70% of them end up back at the three-year mark. And that's not rearrested. That's not recharged. That's reconvicted. So, we're not even doing a good job of rehabilitating these children. So, what are we doing when we think about education? And I know I'm flipping back for a moment, but we

spend – and I'm gonna – be generous 13,000 at most per student for education in Virginia. That's very generous. You know how much it costs to incarcerate a child in our JCCR prison, Bon Air? Over \$250,000 a year. 13,000 versus 250.

When we consider where our heart is, when we consider where we are spending our resources because we want to invest – are we really willing as a Commonwealth to invest more in the prison system that is failing than we are in the education system? Shameless plug. I am for the one pot system, where we put all of the uh tax money into one pot and distribute it evenly across the Commonwealth, so that every education system is just and and full and robustly funded. I don't believe that we should have some localities where students have set of books at schools and a set of books at home and a laptop and new multimedia systems. And some school divisions, the books are falling apart and there isn't even enough for everyone to have one. So, teachers are xeroxing copies of pages to hand out to their students. So if we have those kinds of disparities in our education system, how can we expect anything less than those same kind of disparities in the way children are being processed through our justice system?

Again, talking about why the disparities exist? Kids are in trouble at pretty much. Let's see. They're doing the same things. But black kids are two and a 3rd, 2.3 times more likely to be arrested. And if arrested they are going to be treated more harshly in the system, at pretty much every point. Why? Black youth are perceived as more culpable and as older. Look at those numbers. I I I just want you to see what this is saying. This first in column A it's showing you what age are these children being perceived as, and we see that for whites they're perceived as. A little younger than they are right? Even for Latino youth, it's little younger. But look at black youth. They are perceived as more than twice their age. This – so here's the shocking part. This survey was given to undergrad students. But then culpability, meaning likely to commit a crime guilty. If if charged. Again, white youth less culpable. Gratefully lacking the the the percentage of more culpability is smaller than the age over estimation. But again, for Latino youth is pretty much the same. Yeah, you you probably did it because you probably did. Right?

Now, let's look at those implications of this for black girls. The adultification of black girls. Now that bottom line. The reason it's flat is because we're just looking at how we compare the age of black girls to white girls at all of these different points. But look how troubling that is. From zero to four, we have already, uh, jumped up. A half of a point and considering the age. But look at that 10 to 14 age group. Look how much older folks are perceiving black girls than white girls. And if you're older then, of course you're prob you're more culpable. You're less innocent. And the way this

information and I hope you take the time. You'll see that the website for every place that I got this data. It's at the bottom. Please go to these sites. Look at this data. See that I am not taking it out of context. This really is the way of our country right now. But if you are older. You are more than likely you understand what you've done? You did it. Right? That's the way we are perceiving children.

And here here it plays out right? And I recognize that. This is 2013-14 data, but the problem is that it's the same. I just wasn't able to find this data as cut and dry like this. And so, I want you to see that when we look at the suspensions of girls, we'll see that black girls 15.6% of the population, but 52% of the suspensions. Why? When we look at ah the the black girls on this side. This is referral to law enforcement and in school arrests. Again, only 15.6% of the population, but 37.3% of those referrals and arrests at school. That's what happens when you look at a child and say you're older than you really are. Therefore, you understand more than you really do. And you are more culpable than even your age would suggest. You know, whenever children are processed through the system, the first thing we look at is whether or not they're competent to face the charges against them. Meaning, do you understand the charges? Do you understand the process of the court? Are you able to participate meaningfully in your, uh, your defense? If we are thinking that children are older than they actually are, then we're going to answer yes to those questions more readily, whether they are or aren't.

So, what about black boys, what is the implication? When shown photos of white, black and Latino boys aged 10 to 17 alongside descriptions of crimes, undergraduate students overestimated the age of black boys by an average of four and a half years and found them more culpable of crimes. Why? How did we get here? How did we get to this place where we are so quick and easy, we so quickly and so easily will see black children as older? Now, this quote was taken from research published in 2014 by Philip Goff and others and it was entitled, and it is entitled, *The Essence of Innocence, Consequences of Dehumanizing Black Children*.³ And it consists of four studies of police officers, college students, and they find that black boys are as young as 10 may not be viewed in the same light of childhood innocence as their white peers. Instead, they are more likely to be mistaken as older, perceived as guilty and face police violence, if accused. Face police violence if accused of a crime. And this research provides evidence that these racial disparities are predicted by the implicit dehumanization of blacks. I don't want anyone to misunderstand me, I am not attempting to, to uh, make this a racial presentation, but what I am trying to do is make everyone aware of

³ Philip Goff, *The Essence of Innocence Consequences of Dehumanizing Black Children*, 106 *J. OF PERSONALITY AND SOC. PSYCH.* 526 (2014).

what is really going on when we have children being processed in schools and disciplined in schools, being pushed out of schools, and then that have engaged in some behavior that has them now in contact with the criminal justice system. If we don't take the time to recognize these realities, we are not going to make meaningful change. Because can I share with you that all of the changes that we have begun to make have had a greater impact on white youth and black youth. Until we recognize these realities, grapple with them and do something to change them, we'll continue to make some progress. But they are, but the disparities won't go away. The gaps will actually begin to widen. And ultimately, we are trying to bring justice for all youth. We are trying to bring equity so that every child has access to education. Every child is able to graduate, get across that stage, be celebrated by family and friends, move on to have meaningful and productive lives. And who should we want that more for than our students with disabilities? I, can I say I don't really like the word disability. I don't like it because it, it, it brings about a connotation or a mind less than when actually it's different ability, differently abled. Reminding y'all again the consequences of exclusion. When we push kids out. These are the things that happen. So, given the near universal protection, that society attempts to afford children, why is black youth so vulnerable to being treated as adults? That's what we've got to grapple with and change. So, we've talked about, the kids in school and whether or not they are being successful. We have talked about the push out and we have talked about involvement. Let's tie it all together.

So, when we look at the treatment needs of children who are incarcerated, more than 90 percent of all admitted youth appear to have at least one symptom of ADHD, which is Attention Deficit Hyperactivity Disorder, CED communication disability, ODD, Oppositional Defiance Disorder, or substance use disorder. Over 90 percent. Over 70 percent of them have had, have been prescribed a psychotropic medication. Over 70 percent of them are - uh- displaying symptoms of a mental health disorder as defined in our DSM, I don't know, number, whatever number we're at right now. Over 70 percent. And that is excluding the ADHD and those others. And more than 30 percent have current psychotropic medication prescriptions. So again, if the majority of them are black and they have been pushed out of school, and we're saying that it is those disabled children that are finding their way into the system, here are the numbers that demonstrate that that is true. I'm hoping that everyone is just like, "really, is that what we're doing?" That's what we're doing. That's what's happening here in Virginia. I'm not saying that that's the intent, but that is the consequence. That's what we are. That's what we're doing. So, I want to go back to the thesis statement. Can I...can I restate it? I've given you all of this data. Black youth with disabilities in Virginia are receiving a diminished level of support to access to their education. They're

disproportionately pushed out of school for their behavior, not because they're seen as children in need of support, but rather they're seen as bad seeds that need to be rooted out. They are disproportionately entangled in the legal system, and they are experiencing the harshest outcomes at every state of legal system involvement. That was my thesis statement. So, what are we going to do about it? Even from the White House. I'm not going to read this, but ultimately what it, what the President is saying is that we've got to do something about the disparities that are that exist in our the way we are treating children in school, the, uh, discipline that, uh, children are receiving. And specifically, there's been new guidance handed down from, um, the Department of Education on discipline provisions and guidance on the protections from discriminatory discipline. Familiarize yourselves. Those of you that are doing this work, familiarize yourselves. Be ready to come to the aid of all students with disabilities, but make sure that we are not continuing to allow the disparate treatment of certain children. Again, I'm, I'm saying we're not asking teachers to do everything. So, we've got to be asking for the funding for support staff in schools that will do all of the things that are needed for children to access their education. Isn't that something? Isn't that what our IEP is supposed to do? It is supposed to ensure that you are providing all of the supports necessary for children to be able to access learning, and so that they can receive a free and appropriate public education. What's appropriate? And I know that's a, uh, legal question. We could really get tangled up in that. But can I put forward that appropriate means that they're actually able to learn, and that if there are things in their behavior that are impeding that learning that we're going to put into place, what's necessary to, to remove those barriers? That if there are things in even in their home life, you know, we have that thing called a FAPT team. We've all heard of that, right? Help me out with the acronym. Help me to decode the acronym. FAPT, Family Assessment Planning Team. I've got two of them right. The other two I would've gotten wrong and I didn't want to do that. Family Assessment Planning Team. You put that together when there are not just behaviors at school, but perhaps there are struggles in the home that are impeding a child's ability to access their learning. What if we flipped the amount of money we were spending on incarceration and education, and we were willing to allow that kind of wraparound to happen for every student and we didn't have to wait until IDEA was involved to put in place every support for kids. What if?

Here, Here's the great thing. I may be making suggestions and saying what if, but we have, we have the ability to fight for and win these kinds of protections if we really want them, right? We can all work together to make these things happen, make them a reality. What if we embraced a village approach once again? What if we said every child belongs to each and every

one of us and we all made it our responsibility to ensure that every child was successful? That's something that we could do. As, as an attorney, when I represent a child, I represent the whole family, maybe not in the courtroom setting. But I am looking at all of the potential needs and I am bringing in my partners to make sure that we don't have this child in court again, not for the same thing. If there's a struggle between, whatever the struggle, I'm gonna make sure I'm gonna bring in the partners to help and to support. Some of the programming that we do in Rise for Youth, we have what's called the Youth Development Academy every year and we collect children, the ones that everyone is pretty much given up on. And we live with them in a retreat - styled setting for a week and we love on them and we tell them that they can make it. And we give them, we help them to develop a personal development plan. We provide them with a mentor that's going to help them meet the goals on that plan. We take them out to have fun. We introduce them to the community, them to employment partners. And while they talk about the work that they're doing, we're asking these young people to envision themselves in one of those spaces. We require them to collect public service hours, go and interact with these employers that you've met, find where you really want to be. And at the end, we sub grant money so that they can have a six-month paid internship with whichever one of those partners they select. This year, we're still in the process of getting all of our young people placed. Two of our young people decided to go back to high school and get their high school diploma. I actually had to put my legal head on and fight for the one of the two of them to actually get back in because the school was resisting. But that young person is in school now and thriving. Both of them are. We had, thank you. We have three young people decide you know what I can do college and three are in college. We've got a young person who is building out his own dream of a therapeutic cafe. And he's going to build this thing with the employment partner. And at the end when he is done with his internship. You're going to make sure that he has a business plan put together, and that he is able to present it to potential funders, so that someone can help him get this off the ground. Next year, he's going to come back and he is going to cater the graduation dinner for next year's class. This year, one of last year's graduates was our photographer, our paid photographer for this year's graduation. We've got to be willing to do what we're saying, right. We've got to be creative in the ways that we are showing young folks that they do matter. And especially those ones that folks have said, mmh, maybe not that one, but you know even when we put our application out. All of the different places that we go "well I don't know if you want those kids because I've got some really good kids that you should take." Why is it that we are so quick to want to push, even when I said we are specifically looking for the ones that have been pushed out the ones that have had the behavioral

challenges. And I'm going to tell you, we had some challenges. We had some. Let me not say all of the different challenges that we had. But we had challenges, but we were able to work through them. We were able to show children know we're not going to push you out just because you ran a foul here. What we're going to do is we're going to put the supports in place so that you don't do that again. And if we run into another challenge then you know what we'll deal with it when it comes. But we believe in these children believe, believe in these kids believe in them believe in their ability to succeed. We've seen some really dire statistics. Troubling, alarming, heart wrenching. It's up to us to do that to do different to make change happen. I did not mean to go off on that tangent.

There is federal legislation that is saying let's do better. The reducing racial and ethnic disparities in the juvenile justice system act of 2022 that has been introduced and it's moving through process now. Become an advocate. If you are not already doing legislative advocacy consider it. We, you know what, on the on one of the slides, you're going to see a QR code for Rise for Youth and I hope you will scan it. And it'll take you to our website, but it will also take you to our social media as you can see what we're doing. But it's also going to take you to a basic history of our legislative advocacy. And we are in the process now of hosting Conversations Around the Commonwealth. That's what we're calling them because we're going into different localities and having conversations with community members and young people. And young people, young people are leading. So, every space that we go into every locality that we go into, we find someone that is hosting young people. They are doing that work with young folks. That's who we partner with. Because while we may be based in the Richmond region, we are a statewide organization. Our next conversation is November 2nd. It's going to be at Hampton University. And we are partnering with an organization, Sister to Sister. And, you know, they work with young ladies. And so, they are going to be leading that conversation. And we are going to be taking notes because we've got to be sure that whatever we're advocating for the General Assembly is reflective of the needs, the desires and the, and what uh is the community saying. That's what our legislative advocacy has got to reflect. So again, S. 4398 take it down now. Fight for it.

The Office of Juvenile Justice and Delinquency Prevention. Do y'all know what the office is? It's the federal agency that determines how as, as uh uh a nation, we are going to be treating children in our justice systems. It sets the standard if you will. One of the great things about OJJDP is they're the ones and and realize that the feds can't tell us and the things that we have decided uh localities or states have the uh have the ability to control, Feds can't tell us what to do. But what they can do is tie money to it and say if you want this

money, do this thing. And that's what they have done as it relates to incarcerating status offense uh children with status offenses. And so basically what they have said is "do you want this pot of money for your juvenile justice uh initiatives? Then don't incarcerate students or children for status offenses. We've created an exception." Isn't that something, the valid court order exception? Which basically says if you as a status offender have run afoul, whatever the court, whatever stipulations the court has put on your if you run afoul, then we can incarcerate you for uh five days. We, we found ourselves a loophole. Take advantage of the Office of the OJJDP because you know what else they have, they have other pockets of uh buckets of money. There is an RFP out right now that says that if you as a government agency are willing to fund NGOs, non-governmental organizations, that are doing the work of supporting young people. We will give you this money, that you can then sub-grant. I don't know how many of you are working in government, but you know what, you can take this, even if you are not, you can take this to your Commonwealth's Attorney's Office that is a government agency. Can I toot the horn of the Richmond Commonwealth's Attorney for just a moment? They have created what's called Community Change Advocacy. Oh man- I'm slaughtering it uh- it's an agency within the Commonwealth's Attorney's Office that is basically ensuring that they are keeping as many communities members out of the justice system as possible.

They've established a restorative justice um group, which I'm a member of (laughs). And basically, are doing what they can to divert young people, to divert community members away from the system. So, that is an example of taking federal money and pouring it into programs that are not government in nature, but that are supporting the community. And that money has been distributed out towards the uh Virginia Center for Restorative Justice and other organizations to ensure that they are able to continue doing this work. So, go to OJJDP's website, look at their funding opportunities, and find the ones that you can take. Whether you are applying for those funds or whether you are going to your governmental agencies and saying, "Hey, I'll collect the non-governmental agencies that you can sub-grant to, you apply for these funds and we'll all come together and we'll do good in our community and keep as many young people out, of the system."

There's that QR code. So, please scan it (laughs). You will have access to this uh presentation. But can I just tell you that at Redefine the Vital Signs we think we should be taking a public health approach to public safety. And I think I have demonstrated that in the way that I have been kind of talking and putting forward what we can do. But if y'all would please take this survey, and you probably know all of these answers. But, we have a piece of legislation that we have asked uh the, uh we asked JLARK to do a study and

in that study it would be looking to move the Department of Juvenile Justice from the Public Safety and Homeland Security Secretary to, to the Health and Human Resources Secretary.

Do you know why that would be important? There is a paradigm shift in the way that you think about agencies in the Health and Human Resources Department. Right? There, you think about it differently, and that's what we want. We want our children to be considered in need of supports, not in need of criminalization. You know, when you look at the Department of Juvenile Justice, um, when you look at their mission, "to protect the Commonwealth from". Does anyone else have a problem with that? Department of Juvenile Justice, their mission statement, "to protect the Commonwealth from." That's a problem. We need to reframe, to support the needs of, is how I think it should start. So, connect with organizations doing the work, you know, there is a whole list of them here, and this isn't all of them. But, when you get this presentation there is a link to every one of them, there is a link to them all. Whether, whatever your passion is get connected. Start doing the work!

And zealous advocacy. You can re, you can help to reshape the narrative and the legal landscape in these ways, so if you aren't doing special education advocacy, consider taking it on. Consider taking it on. Encourage your colleagues to take it on. Support a less experienced attorney, for you attorneys in the room, support less experienced ones, so that they can be the best advocate possible. Show up at the General Assembly! Show up! I am telling you what, Rise for Youth and so many other organizations that we are partnering with, we are there all Session long. And we are fighting, and fighting hard. And we are asking that you come and help, add your voice, add the voice of all of those uh spread the word and bring your people. Bring your people.

I am going to read this because I want y'all to hear it. Virginia must begin dismantling the system that over scrutinize, over criminalize, and over incarcerate youth of color, and especially youth of color with disabilities. We are faced with the damaging toll the current oppressive system has taken on our youngest residents, and their undervalued and overpoliced communities. Now, is the time for bold action that goes beyond acknowledgement and baby steps. It's for a paradigm shift, that demands needed change in policing, school discipline, our legal system, community resource allocation, and that creates system that move youth from trouble to triumph. A healthy community is a thriving community that begets health families, healthy families will raise healthy children and they will contribute to building healthy communities. And that cycle as it continues, will yield positive results when we seed it with resources, commitment, and love. Virginia, our time is right now. Thank y'all.

I think I might have just a couple of minutes, 5 minutes, if any...

Audience Member: So, I'm a guidance counselor and I've been in special education for a while. When I first started I came across a guide and you spoke about the guiding documents. We have the department of education that puts out these guiding documents to help, you know, and one your presented in your presentation today. Great, but as a student, I am a student also I am getting my Masters in Education in Law. I learned that these guiding documents are basically just suggestions, they have no legal uh strength behind them. What do we need to do to change that? It makes no sense. I can go into a meeting and see that the guiding documents say this, but the school is not taking that information that you just put up there and putting it into action in any kind of way. Because they don't have to. How do we change that?

Valerie Slater: Changing and making guidance law is a much more difficult matter. But here is what you can do. When you look at the guiding document and you look at what the school administration is doing and you look at the results if you're able to demonstrate that because they are not following this guidance that they are not providing that free and appropriate education, that they are falling short. Then, you are able to write a complaint that says you have failed to provide this thing that the law requires you to do. And then you start talking about what resolution would look like, you write new guiding documents, guidelines.

Audience Member: Hi there, I loved your presentation (laughs). One of the things that I just wanted to point out or mention, I am presenting a little bit later, in my (unintelligible). One of the things that we can talk about, some of the examples that you shared here with us today are very similar to some of the information that Charles, let me get his name right, Charles Thurston used right when he was collecting information for work for Board versus Brown of Education that with what black schools that were for their secondary school, or the courts, was that uneven funding of resources. Right? Like you said, they could get, like your example, your white schools back then had the crop as a human resources, higher pay for teachers. So, do you not see that this is just a newer form of the same kinds of, segretaive types of behaviors, or even maybe determined, not sure if you're similar Dr. Webb, but might range from the result of integration. Do you believe that possibly some of the statistics are resolved yet?

Valerie Slater: I do believe that, that that does explain partially. I also believe that we have been feed a narrative, um, for so long. That um, how many of you remember the Super Predator Age, Era?

Audience Member: Yes!

Valerie Slater: You know these incorrigible, untamed, wild children who are going to ravish our communities, right? We were taught that, and then even our entertainment media began to reflect that. Who were the thugs? Who were the bad guys? They were always black and brown folks, right? We have been feed those images so long that they have kind of just been engrained, those are undergrad students that said black youth were older and more culpable – more likely to commit a crime, those were undergrad students. You know, we want to pretend that the media doesn't impact us, but it does. Whatever you ingest is going to impact you, and so even well intended folks who are trying to make change, until they begin to grapple with those things, those narratives that they have ingested and decide you know what I am not going to subscribe to that, it is simply not true and I am looking for equity for every student, that is when we are going to start seeing change. And I am at one minute, so this has to be the quickest question ever.

Audience Member: Go ahead.

Dr. Geller: The data analysis was staggering, it is concerning. It's lovely, concerning. Well, it's not lovely but it, but, one of the things you are suggesting is looking at 504s and special education. That is a little concerning to me, and I will tell you why here in a moment. When you showed the slide that said assault and robbery, at 17 years old, at 17 we saw an increase in that, among all the ages. It seems to me like once they get to high school we're pushing these kids out without a lot of skills and they have a lot of problems with (unintelligible). Special education and 504 is great, but the on the other tool belt that we have is responsive intervention, and not waiting until 17 years old. Starting in preschool, trying some kind of intervention now, because we aren't just talking about academic skills, but all kinds of school classes, as well as improving academic status and graduation rates. And that is a tool that we can use.

Valerie Slater: Dr. Geller, I could not have said it better myself. We have not taken the time to prepare children. And by the time they get to 17 and they are doing these things what do we expect? And so, you are absolutely right, we need to start putting interventions in place to ensure that children don't get to that point. And with that I know that my time is up, so once again, I thank you all.

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ETHICAL CONSIDERATIONS ON UNDISCLOSED CLASSROOM RECORDINGS

Professor Chris Cotropia

INTRODUCTION

Nicole Evans: Thank you, Ms. Slater. Our next presentation is our ethics presentation. Ethical Considerations on Undisclosed Classroom Recordings presented by Professor Chris Cotropia. Professor Chris Cotropia is the Dennis I. Belcher Professor of Law at the University of Richmond. He writes, teaches, and presents.

Chris Cotropia: You don't need to say all that.

Nicole Evans: Okay, here he is.

SPEAKER

Chris Cotropia: I didn't mean to cut you off Nicole. Nicole and Erin have been doing an amazing job. And I really appreciated being um kind of a watcher on um uh this morning because I'll just admit I know a decent amount about ethics, I teach Professional Responsibility. Um but, my main area of expertise is in patent law, so that is very outside what is going on today. So um, Carl's been my friend since 2006, if I can date us all here, while Carl gets that ready. I am going to play the role that Erin and Nicole wanted me to play. I am going to play the role of the law, so this is the practice of law. I am going to play this. Erin and Nicole said, "Look I'll admit, someone else kind of dropped out, can you help us out?" I live in the building. Uh. And um so, there is this, this kind of growing, this is not that surprising to me um maybe because I teach some technology and privacy law. This idea that we might have situations where individuals might be secretly recording someone else and this might be particularly taking place in the school setting. Um this is not that foreign, I remember the story of Sarah Sims, she was in Norfolk in 2017. Unfortunately, her 9-year-old daughter was being bullied at school. She reached out to the school, the school said "I don't know what you're talking about. Nothing's happening." And Sarah says, "Look, we've got technology for this." And she hands her daughter a recording device and says, "Hey look, just set this on your desk and we will document the bullying. Right? And then they'll know about it one way or another." So, her daughter does that, she sets it on the desk, leaves it on the desk, teacher picks it up,

what is this? And the next thing that is happening is the Norfolk Police are being called, and Sarah is brought up on felony six murder charges. That's what, that's what we find out in a lil bit, that's the felony anti-wiretapping statute. Um uh, and this is, wait what are you talking about? How is this?

It be so- it would be so um and this is a really real situation. Now fortunately the charges were dropped, uh this was on CNN, C-Span all this type of stuff um. And so, I think that the the kind of, Sarah situations are not that uncommon. I think I'm not on it, I'm not clicking. Uh I can do it if it won't work. I don't want to play it. I just want to go to the next slide, there we go. So, this is the motivating hypothetical that we are gonna talk about. Right, the motivating hypothetical is that we've got an IEP or a 504 in place. Right? Um and we have one of two situations either there's some trust breakdown, where we don't think the data is really being gathered from the classroom and/or the IEP or 504 are not being observed so we would, we need some taping. We don't trust what the teachers are saying or administrators, or having had kids, still having kids. I don't trust what my kid is saying at school, right? She says she's not getting it, is she getting it one way or another. One of the ways that I can just verify this for myself is to have it taped in some way, right? Um, so then the parent either asks the attorney about could I secretly record, or I understand a lot of times the parent might show up and say "I've got a secret recording," right? Or we might even have a situation where the lawyer as an advocate, I think that's one of the neat things about the discussion this morning, is that lawyers are about law but they're also about solutions. The lawyer might suggest, "I don't think we are getting the straight story, maybe we should think about a secret recording." This prompts ethical considerations for the attorney. And this prompts ethical considerations for the attorney not only because if they're the ones advising to do the secret recording, but if they've got investigators, advocates, their client doing it. Those ethical actions fall back on the attorney if the attorney is the one giving the advice, right? So, there's our professional responsibility, here's our one-hour credit before October 31st, right? Which I—for those in the room that are barred in Virginia, right big day. But there's also a concern about the liability for the parent or child. The Sarah Sims of the world. We don't wanna put one of our clients in a situation where the police are gonna be called. And they'll turn to us and say "whoa wait a minute, I didn't expect to pay for this." Right? And so, we have these two considerations that are there.

So, a couple of caveats and limitations. I'm not your attorney, this is not attorney-client relationship, I'm not giving you any legal advice, one. Two, I really don't know anything about 504, education law et cetera. Although, I've had some experience as a parent in that regard, I don't have it um uh legally.

Right? So take what I tell you today with those kind of lenses. I do have some expertise in professional responsibility. And if you wanna kinda just zone out to the end here, the ultimate answer is, it depends. This is a real kind of law school type answer. And maybe I'm putting this as a punchline to force you to actually have to listen, right, to the end of this presentation. Um there's also lunch, I guess, that's waiting for you at 12:20. So, we have some rules that are at tension here for us Virginia Bar members, or bar members outside of the Commonwealth. There's Rule 1.1, which basically tells us that as attorneys we need to provide competent legal advice.⁴ Right, if we don't provide competent legal advice we're not meeting our professional rules. And not only does it have to be competent, we need to be diligent advocates for our clients. This is always the two that I think a lot of students in particular maybe lawyers too that are out there, right. When you're shying away from the ethical line, in some ways 1.1 or 1.3 are pushing you to get closer. Right, because you're trying to help your client. What pushes on the opposite side of that particularly in this circumstance is Rule 1.2. That is, when you do engage your client you don't give your client advice to do illegal things. Makes sense, right? The other thing is there are third-parties that you are going to interact with and we are, some maybe we are not, we are a profession. We are supposed to act like professionals. So, we are not supposed to be nasty to third-parties if we are not needing to be nasty to third-parties. That's kind of a real bastardization of 4.4. And 8.4 says even if you aren't doing something illegal, you shouldn't really engage in deceit, right? Trickery. Things that just don't look good on the profession. And that's our 8.4 misconduct. And essentially there's this tension between these two when we think about the idea of an undisclosed recording. And so, I being a law professor we always take a look at the actual rules, right, competence here. I've got to have competent representation, I've got to know the law. I've got to have thoroughness, preparedness, right? I need to look at this issue and get closely to understand what's going on. I've got to reasonably, diligently, and promptly advocate for my client. And this is in comparison to when I do counsel my client, I do certainly should not counsel my client, or even assist my client in engaging in criminal or fraudulent behavior. And one of the things about this are fraudulent is why we start to expand this analysis beyond bare legality, right? I don't want to help them do fraud, I can though, discuss with them, and this is the kind of situation we're talking about here, should I secretly disclose or not? What's the proper course of action? And I certainly need to discuss them the legal consequences of any proposed course of conduct. Right so, so so even if in the end you're

⁴ MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983) (these are the rules that will be referenced through the duration of this presentation).

gonna say no for your professional responsibility you should be able to communicate with the client why the answer is no. Or why the answer is less or is is yes. And as we go about this, I talked about third-parties, rule 4.4(a). I'm not supposed to be out there just trashing other people, right? We're not kind of bulls in China shops breaking a bunch of plates. I'm not supposed to embarrass, delay, or burden a third-person, if it's just to do that. Now we we do that as lawyers right but we need to make sure there's a purpose to it. And, I should, very important for our hypothetical here, motivate, use methods of obtaining evidence that might violate the legal rights of a person. I've got to watch out for that, right? We're supposed to abide by these third-party per people. And then for 8.4, I need to make sure I don't assist or induce others to violate professional responsibility rules. So, this is not just you as an attorney, if you're engaging in advocate – and I would seen advocate- uh, I gotta make sure those advocates aren't out there doing something that violates professional responsibility rules. And I need to make sure I don't engage in conduct that is not just illegal, dishonest, fraud, deceit, or misrepresentation. So, here's our tension, right, that we're presented with. And I want to start with the most basics, and that is, this shouldn't be shocking to anyone that wouldn't even know the professional responsibility rules, us as attorneys should not advocate for illegal action. Kind of odd right? Right. Ever. Thank you. And the illegal action that can go on here with an undisclosed recording is wi- is essentially wiretapping, which sounds so old and who's on a phone anymore whatever right?

And here's Virginia's code for wiretapping. Interception, disclosure of wire, electronic or oral communications, is unlawful. And when you take a look at the statute, it seems insanely broad. Except as otherwise provided, we'll look at that in a second, if you intentionally intercept, endeavor to intercept, or procure any other person to intercept or intervene or intercept any wire, electronic or oral communications, you shall be guilty of a class 6 felony. Now maybe there's some people in the room that nervous now that have been taking pictures of slides. I, I've called the Richmond PD, they'll be down here soon, right. Well, turns out there's some exceptions to this, because this seems pretty big. This is what Sarah Sims got hit with, right? There are exceptions. Two big ones that we are concerned with with our discussion today of this motivating hypothetical. The first is oral communications, this is the law, is not what we necessarily think are all oral communications. The oral communications the statute is concerned with are oral communications in which the person that's uttering the oral communications has an expectation that it won't be intercepted. My gut is that the Dr. this morning expected for people to take pictures of his slides, right? So even though you were capturing his oral communications, it was not an oral communication pursuant to the statute. Right, this would be the

same if someone heaven forbid would like to record what I'm saying right now, I can't say I would have some expectation, someone should be the opposite, I would hope someone cares about what I'm saying. Right, this is my experience every Wednesday and Thursday in class, right? That's not our only exception. The other exception this is what people talk about are we a two consent or an all consent state or one consent state. And if anyone's ever heard this phraseology before, in Virginia we are a one-consent state. Why? If it turns out that one of the parties to the communication is consenting to it being recorded, it's not a wiretap. Which essentially means that even if the doctor said nobody here better take pictures of my slides, the person taking the picture, although we'll talk a little bit as to whether this is really a communication or not, is taking the picture, and I'm consenting to the picture I'm taking, right. I'm doing it, right. It's not a- uh- it's not falling under the wiretap statute, right. Which is really big in Virginia. And so one of the things is we'll go through our analysis and I'm gonna talk about this stuff in the concept of Virginia. If I'm in an all-consent state or a two-consent state, this gets much, much trickier. Because it means that I need both parties to the communication to say it's okay. If it's not an oral communication or that first point.

So, what do we mean by oral communication. Here in the Commonwealth of Virginia, this is one thing I learned, as someone who originally came here from Texas and some other jurisdictions, where they actually decided to write to their law down and issue cases and actually have minutes for their general assemblies and all this stuff. And I come to Commonwealth and there are very few published decisions at all, we just decided to have a Court of Appeals that might have some more decisions. We actually do have a decision on what do we mean by oral communication, and essentially the definition of oral communication tracks the constitutional expectation of privacy. Which maybe just shrunk a little bit as of late, right? But essentially has a subjective and objective prong. That is, for this to be an oral communication that could be protected by wiretap statute, the person uttering the words has to subjectively think that it's private. But there also has to be an objective understanding that it's private. Right? So again, I hate to pick on the Dr. He's not a doctor, I'm the cheap doctor, which is a JD, we get kind of kind of short-run doctorates. If the Dr. believes I should have some expectation of privacy, but objectively we say why would he think this is private, it's being on Zoom, there are all these people in the room. We would say sorry it's not something protected by the wiretap statute. Or we can flip it around and objectively we think it's probably private but subjectively the speaker says I don't think this is private. Right, or something like that would get us out of this. And so, we can try to apply this to the concept of what we're doing right now. Right? Would a teacher's oral communications in

class, do we think that they would have an expectation of privacy? Maybe subjective if we've got our oddball teacher. Objectively it's really hard, right, to think that when I'm sitting in front of a classroom of 30-40 students that I've got an expectation of privacy. We can even think about this this is something that came up during our kind of the zoom years of the of covid, right? Whether I would have an expectation of privacy if I'm I'm having a zoom class et cetera. And so maybe for those oral communication which might be what the undisclosed secret record is thinking of, they might not be oral communications under the wiretap statute, depending on the circumstances. We're also gonna pick up some other communications in the classroom, right, hopefully if this is a good class the other students might say something. Do they have an expectation of privacy? Right. No, probably not. If we're thinking of a normal kind of classroom that's there. So probably for both of these communications we might be able to take them out of our concept of an oral communication.

What if we get out of the classroom, we go to other settings? The IEP meeting. Well, it's not as much of a public place. There are just a couple people in there. People are looking me wanting the answer. I don't have the answer. But this would be our harder one. Right? And if we start to try to triangulate this as to what do we mean when we lose that expectation of privacy, there are a couple of example cases. None of them in Virginia, because we don't issue written decisions here. We have one out of Wisconsin. There was a disabled child who was being harassed by the bus driver. If if you read this case uh you will uh all sadly uh know ah it's really sad in some ways the stuff this bus driver was saying to this child. And the parent says you know what, we're going to put a recorder in your backpack and we're gonna get this stuff on a tape. It gets down on tape, and actually, the tape is then being used, this is why it's *State v. Duchow*,⁵ the tape is being used by the police to prosecute this individual. He wants it excluded because he says listen this was brought by illegal means. Right. Fru- fruit of the poisonous tree. And the way this was brought in was the state was able to establish there no expectation of privacy on that bus. Right? He might have thought it should be private, but we objectively wouldn't think statements made by a bus driver on a public bus would be private. So, the answer there was no.

Then there's a case in Texas. Um, this was a situation where someone had actually taken a phone, put it on record, put it in a locker room. There was a lot politics behind, as us in Texas with sports will have, the coach probably used certain words when he was talking to the girls during half time. Said

⁵ *State v. Duchow*, 749 N.W.2d 913 (Wis. 2008).

let's get this on tape, they get it on tape and they want to use it to get him fired. Texas appellate court said actually there, the coach had an expectation of privacy. So, this is our triangulation of like where, how small is the group, where is this being done, it was big that this was being done in, I guess, there's a part of the locker room where they would normally meet during half time, typically many would be excluded from the locker room unless you were part of this small team. There the court says you know what, I think that's an oral communication that's protected.

The last one comes to us from Illinois. It's a special educational classroom. Here actually, the school district installs video, really to monitor the teachers to make sure they are doing their job and acting appropriately. They find out some things are not going that right. Plock was one of the teachers, actually sues the school board and says look you guys have to stop doing this, you are violating the wiretap. And here I think this is kind of our classroom exception. That's not an oral communication. You shouldn't have an expectation of privacy if you're in a classroom that there right. So, we can maybe try to use this to triangulate where we think we have an oral communication, where we might not. So, say fine, a lot of situations if we're doing these undisclosed recordings, we're probably not catching oral communications that the statute talks about. Let's say we do though, right? That's not the end of the legality question, because we're in a one-consent state. And the obvious argument will probably be, well wait a minute the child is consenting to the communication, right. And so, the child is the one who says it's ok. And so even if this is something where there's an expectation of privacy, we've got consent, we fall under an exception. One big question that comes up initially is whether minors even have the capacity to consent. Shocking, a lot of times minors do not have the capacity to consent. There's a concept though of vicarious consent that's used a lot of times when a parent kind of kind of emboldens the child, or tells the child you can do this, or says to someone they can do this to the child et cetera. And we can say vicariously the parent has consented to the communication even though it's the minor that's acting in that capacity. I think that's what would be considered here. So, we're probably okay with that. The other one which, I have to admit there's not a ton of case law on, is what does it mean to be a party to the communication.

This will shock you. I was one of these kids that actually didn't talk a lot in class, probably because I wasn't able to stand in the front of the classroom and talk to everyone. So, if I'm sitting there not saying anything, but I've got a recorder in my backpack, am I a party to this communication that's going on? Um uh I have to admit, there's just not a lot of case law on this. Um, I could say I'm a party to the conversation because I'm meant to be part of the

conversation, right? Like I'm in that classroom because I'm supposed to be part of the class and what's being discussed. So probably those situations where the child is present. Right? And they're the ones that might have the recorded in their backpack or or sewn into their jacket, et cetera. They probably are a party to the comm... communication. What if it turns out that the child is not present? Getting back to the Sarah Sims case. The recorder was actually confiscated when the child was out at recess and the recorder was just still going there left on the desk. Do you think we have consent in that situation? I've set up the recorder and I've left it. Our pro attorney here shaking her head no. She's exactly right, right? And this is I think one of our concern points about if it turns out it actually is a protected oral communication and we're really relying on that one party consent situation. I'm concerned about situations where I'm going to start picking up conversations where the child is not there with the recorder. So, putting it in their backpack. And they leave their backpack in the locker room. I don't know, they they leave it just because they're children and they just leave it somewhere, right? And it picks up some recording. There you're not going to be able to use this exception. Right? You're not going to be able to use this exception for those recordings that are there. We're going to eventually get near the end to talk about practicalities, but I think this is something to think about with regards to practicalities. Because if its anything like my children its, even if they're ages of 18 and 16, I cannot direct them what to do, they don't listen to me what I could, what they're supposed to do. So, I think it be may be hard to think about a situation where they're always going to have the reporter on them or not, but that's something we would need to have there in this particular situation.

So OK, fine we maybe have dealt with the legality under the wiretap statute right we've got our our initial question of is it an oral communication. I think a lot of situations where these recordings are taking place probably isn't an oral communication. We're in a one consent state I think we might actually have consent in a lot of those situations where it is protected under oral communication. I then started to brainstorm other scenarios. Um uh We're gonna have lunch here in a little bit. Only 5 minutes though. We got more than 5 minutes, don't we, Carl? Yeah, we we're good um maybe Carl's got lunch in 5 minutes. Oh, oh, stay here. No, I know they have lunch in 5 minutes. I promise you we'll have lunch in about oh 40 minutes. Maybe that makes it a little bit. Um uh, right. No, OK, less than forty.

So...so what about FERPA? So, so the other thing I do is I teach. We talk a lot about FERPA. This is actually a big question. When we had zoom classrooms, like what do we do with FERPA or we have FERPA concerns et cetera. So, one of the things about FERPA is that it applies to educational

records. Umm. And so, I think the typical is grades, but maybe other things that are in the student's educational file that the institution holds on to. Umm, there was a Supreme Court case in 2002 where there was a challenge to FERPA for peer grading, right? So, this is the situation where the professor has really decided to just not have to do anything. And so, I say, "guess what? You guys are grading yourselves. This is part of the pedagogy. We're going to really get some good teaching done here." It's one that's that's FERPA violation because now Janie next to me know I am getting a C. She's gonna put a C on my paper and I'm going to get a C. And the Supreme Court said no, actually those are not educational records until the teacher puts it in their gradebook. Right? And the reason I think this is relevant to our analysis is, is that we're thinking about FERPA applying to something when we've actually recorded it down and put it in some type of institutional record. Right?

So, let's think about it in this scenario. What about the re- classroom conversations, right. So, we're having a conversation in the classroom. We think that that is an educational record? Probably not, right? Now the exception of this could be, and this is what we had to deal with here at the University of Richmond, is if the schools were recording it. And making it part of a record, Well, then there might be FERPA concerns about that recording. Right. And we've talked a lot internally as a faculty particularly during COVID like we would have these recordings about access. Who had access? Do we need FERPA waivers? Do we not need FERPA waivers? But if it turns out that I've got a child in the classroom that's recording the conversation, we probably don't have a FERPA violation because what's being recorded is not an educational record. There might be some other variations of this, but I don't think we've got a FERPA issue. The final issue on the legality question might be a question about school policies or code of conduct. My chi- one child used to one child still goes to a Henrico County public school, and so I decided to pull up the code of student conduct that, you know, they sign every year and we've never flipped through and never looked at and who knows what's in there. There's always her name. I'm like, get ready. Who knows what's in here? And so I did this search. I said, well, um um what about recording it? And actually, this was one of the big kind of kind of hooks for the Sarah Sims Norfolk case, is the Norfolk uh County Public School but It's against school policy, right? And it turns out, maybe not shockingly, it's against Henrico County School policy. Students using cell phones or other electronic devices record anything or anyone without authorization is strictly prohibited failure to adhere to this policy resulted in the confiscation and it may be used as evidence. This seems very ominous. I don't know what it's being used as evidence and other consequences may apply. So probably if I've got a child recording, they're violating the school policy. My gut is all schools have this policy in place. The question is, is that

a legality concern, right? I mean, is this a legality concern? This might be evidence when we get to the other prongs of professional responsibility, the idea of misconduct, deceitful fraud, but this doesn't make it illegal. I do think though this is something to think about on the practicality side. Right? That the child is caught with the recorder. Yes, I'm concerned about my bar license. I might also just be concerned about the child being kicked out of school, right? That's probably not a result that you want to give your client, right? And so, this would be, I think, more of a practicality concern as opposed to a legality concern. OK. So, we've stepped through the legality question. I think that there's gonna be cases where it's going to be legal for a child to wiretap, their teacher, that sounds really nasty or whatever. They're gonna be legal situations. It turns out that's not the end of the analysis. Because we don't just want our attorneys to do things that are legal. You know, it seems like we're going there in today's society, but we want them to be a little better than just doing things that are legal. And it turns out that the Virginia State Bar has been really big about this. And that is, we still need to be respectful of these third parties. We're not supposed to embarrass, delay, or burden them. Right? If there's no reason to do that, and maybe even more importantly, we're not supposed to engage in dishonesty, fraud, deceit or misrepresentation. I think this is where it gets more difficult. Because inherently when I say secret recording or undisclosed recording, right, there's just a nature to that where there is a level of deceit. Sounds loaded, morality wise. And actually, the Virginia State Bar has been battling with this. And actually, a lot of State Bars have been battling with this question. Not specifically in the classroom context, but broader for a long time. What do we do...about secret recordings, you maybe knew this or didn't know this. And so, the Virginia State Bar has this ability to get these legal ethics opinions, You can get individual ones that you can actually push out broader kind of kind of hypothetical questions where they'll actually publish an LEO. That is, I like the conversation earlier about guidelines. It's like a guideline. It doesn't control, but it's always nice if you got a guideline on your side. If you don't have a guideline on your side and there's really a long history of these LEOs. Where overtime the Virginia State bar and many state bars have flip-flopped on whether these things violate 8.4 or not.

So, in true law school fashion, we're gonna walk through the history of these LEOs. And the one of the things I hope that you take away from this is you'll get a sense of maybe where truth lies somewhere in the middle of all of this. And this becomes really big because there is a Supreme Court case here in Virginia, *Gunter* that kind of falls in the middle of this. And the big thing is going to be we always got to make sure that recording is legal, But, even if it's legal, we're going to be wondering whether we've got dishonesty, fraud, deceit or misrepresentation. So, our first LEO is in 1989. Someone

asked the Virginia State Bar. They said, hey, is it OK for an attorney to record a telephone conversation with opposing counsel in pending litigation? Some real trust going on here, right? Do you think we got a legality concern here? We're in one-consent state. No, right, I'm on the phone, I'm a party to the communication. There might be a thought of privacy here, but I've got consent. We don't have a legality problem. But the Virginia State Bar said well that's not the end of it. You need to be concerned about 8.4. Are you acting dishonestly, fraudulently, deceitfully, or misrepresentat...misrepresenting in some way? And this LEO is insanely short. They don't expound any further than that.

Okay, great. Thank you. That didn't really help very much. Well, pending at the same time as the Supreme Court case *Gunter v. the Virginia State Bar*.⁶ This was a scenario where we had an attorney, was representing a client in a domestic relations matter. He suggests to his client to install a recording device on, I love, this terminology, on the marital phone. I guess there's the marital phone and there's the other phone. If you want to really think about perceptions here, do you think he's representing the man or the woman, in this case? The husband. I'm just I'm, just stereotypes play strong in all this stuff. He says, "look let's tap her phone. It's the marital phone, and let's see if we can get some evidence of infidelity." Shocker. Wife's not engaged in infidelity. The one thing the wife is engaged in is she knows that her husband's been going to get an attorney, and so she's making sure that any new income that she's making is not going in the joint account. Well, that information is really important to the attorney and the husband. And they say, "OK, we need to act on this information." And so they immediately filed, try to get the divorce file, try to move this, this, this, this money around, et cetera. The wife finds out about the recordings during the divorce um litigation, and she, guess what, calls the police. And she says there's an attorney who tapped my phone or at least instructed someone to tap my phone and the police arrest the attorney. And if we think about this, under the wiretapping statute, this is not one consent. The marital phone does not mean that the husband's always on the marital phone, right? There's no one person exception here. Actually, a fairly good case that this is a wiretap problem. He actually ends up getting acquitted. Right. Doesn't go to jail. Well, that's not the end of the story, right? Um it's not just about jail if you're an attorney. It's also about the State Bar. And so the State Bar says, "great, you got acquitted, but man, you violated 8.4. You violated 8.4 because it was illegal (1) although his pushback in the litigation was, well, it wasn't illegal I had a jury that acquitted me. And the Virginia State Bar goes, "OK, fine, it might have been legal, but this was deceitful, dishonest, et cetera. And you're [unintelligible] recordings of the

⁶ *Gunter v. Virginia State Bar*, 238 Va. 617 (Va. 1969).

conversations is an underhanded practice, desired to ensnare uh an opponent. It's completely beyond fairness and candor. And they actually affirm the State Bars Disciplinary Action under 8.4. This case ends up having a big impact on the early LEOs after this as to the scope in which I can do undisclosed recordings. It turns out, though, and we're going to find out here, that the Virginia State Bar didn't read the whole case. Um, the Virginia State Bar in this *Gunter* case. The Supreme Court pretty specifically say "Listen. We were really specific that this is a situation where the lawyer or the lawyer's agent wasn't a party to the conversation. It's a really big no, no, right? We're not gonna answer any other circumstances that might not be before us, right? And this would be the situation where you might actually have the attorney right, or the attorney's agent on the other end of it." Um The Virginia State Bar doesn't seem to take this to heart, and they kind of run with *Gunter*. And for a number of years, they're going to be ah issuing LEOs where they're going to be deciding that any secret taping is a violation of 8.4, right?

So let me give you some examples. So here is a hypothetical. Now we've got the wife secretly taping her, I guess it's the marital phone. Maybe it's not the marital phone. Maybe this is just the husband's phone. Right? Conversations on the marital pho- phone. The wife has done this before engaging the attorney. The wife then comes to the attorney that she's um uh engaged for for for divorce proceedings. And says, hey, look, I've got these these recordings, right? And the attorney says no, no, no, no, no, you gotta stop that. You're not a party to the conversations, right? These things are illegal you can't do anything else with it. And so, the question was, could the attorney still use the tapes in the divorce proceeding? Right. And one of the arguments was, look, I didn't give her the advice to do it. She did it though, and now I've got these tapes, can I use them as evidence? The Virginia State Bar and their LEOs says no, you can't. *Gunter*, right? We've got an 8.4 problem. This is dishonest. This is probably illegal, quite frankly, because um uh nobody was on the on the recordings. The wife wasn't on the actual recordings that are there. So, we got an 8.4 problem. The other thing that came up in this case, but this as bonus if we want to get deep and PR issues is whether the attorney needed to rat out his client, right. This is the nose, noisy withdraw scenario. Um this the LEO says no you don't need to do that. Like look even if the wife's actions are illegal they've stopped. Right. She's not still doing that. There's no bodily harm. There's no big risk here. And quite frankly, it might actually hurt your representation of the wife going forward right to kind of rat out this. I'd have to disclose confidentiality, et cetera, so can't use them. But you don't need to tell anyone about it. This one is actually not that shocking of a result, given that it probably was an illegal recording, right, because the the the wife wasn't on the phone. How about this one? Right? So, a couple years later. The hypothetical that's sent into the

LEO, we've got an attorney. This feels very law school-ish. We're A, B's and C's here, right? Represents A who was abused by her father B. Right. This is a representing her in a cause of action against her father. Civil cause of action because of this abuse. The downside, and I think this is where we get some kind of kind of similarities to some of the situations we talk about today, is we've got a kid, there's just not a lot of evidence right there. There's her accounting of what has happened, right, but I don't have a lot of physical evidence or written things, et cetera. And so, in the conversations between the attorney and the client A and B, the attorney figures out that actually the the the daughter is still in communication with her father. He says "well so you still talk to him?" "yeah yeah yeah" "well in those conversations, does he talk about the abuse?" "Yeah, he'll, he openly talks about." "Let's record." Right? Great evidence. You can think about the scenario that if she sat down with the father and said, OK, I'm gonna record you now tell me about all the bad things you did. Maybe he's that brazen. I've seen idiots that are that brazen right, but no, right? It says it needs to be undisclosed. And they actually do the recording, and the father admits to the abuse. The problem is under the earlier LEOs, I'm nervous about this-is if I'm an attorney. I don't have a legality problem because we've got consent from the kid, right? They're there, part of the conversation. You would hope the Virginia State Bar would have some practical sense. In 1992 they did not. They said no. You can't use these tapes. You can't even ask them to do this because of the *Gunter* case. And it turns out here, which is important, the father was not represented by anybody which is important because if the father was represented by an attorney, I've got another concern, right? I've now got communication with a represented party on the other side of a litigation ,right? And so, then that would be a problem but it wasn't here...and I get a sense after this and I too and it's not just happening Virginia, a lot of these Virginia state, these state bars are really hamstringing the ability for individuals to collect information that's legal, but for some reason is thought to be fraudulent, etc. Here's another one from 1995. And if anyone kinda follows these, there's not a ton of LEOs out there and there are a lot of them on these undisclosed recordings. Here we've got an attorney who's an officer for the corporation calls up essentially an employee and says, "Look, we're terminating you." Records the termination call without the employee's knowledge, right? Um, probably CYA, this probably is just part of company policy...the person gets fired, engages an attorney, and says "Hey can you represent me in this this wrongful termination?" During discovery they find out that there is this secret taping by attorney A.

First of all, is this illegal? The attorney recording the call that they're on with B if they're in Virginia? No, and see, um I'm gonna pretend that I've taught people stuff and they've learned I don't know right. It's not illegal, what

do you think the Virginia State Bar is going to do with all these previous cases say it's ethical or not? Not, right? They sure as shit might say not here if they didn't say if they said no for the sexual abuse they better say it for the employee right? We're going to be fair here. And they said no. *Gunter*, it's just dishonest, fraudulent right? And they even went so far to say look the attorney can't even record another person if the other person is actually threatening the attorney personally which is actually what was happening in this, can happen in employment cases, employees can be mad right? And part of it was just the attorney trying to just cover themselves right, they're saying they say no you can't even do that because of your professional rules of responsibility. And the LEO each go so far to say that B's attorney might need to actually report A's attorney's conduct to the bar because they violated 8.4. This is really expanding the scope of the LEO. So attorney C is the one that's representing the employee thank you there we go that good, good. You would have done you did well in the MBE probably, right? Um (clears throat) this is going on and I think that it it we're getting the modern era right and and realities are realities and we get an LEO in 2000 where essentially somebody asked the State Bar can you just please tell us there gotta be circumstances where you can do this. There's gotta be right? And the Virginia State Bar says "Okay okay we'll revisit some our previous LEOs," and they modify some stuff. And they say you know we probably held *Gunter* to be a little bit broader than we thought it was right that was actually a case where we had an illegal recording and we've actually concluded that our prior opinions sweep too broadly and therefore are overruled this is where you say to me "Why did we spend half a class talking about a bunch of cases that are no longer good law?" This is education we know where we came from where we're going right? So where are we now? Right and so they give some hypotheticals. This one I think is the one that I don't know why the the Virginia State Bar didn't figure out. There is a whole host of attorneys that direct a gaggle of individuals that have a lot of money and resources to do a lot of secret taping they're called police. Right? Technically those attorneys were violating 8.4...and so now the Virginia State Bar says yeah you know you're exactly right actually no no no they aren't violating 8.4 because there's another interest involved there's a reason why we have secret wire taps right... and so we're going to allow that. There's another situation where we might have secret wire taps and those are testers in housing discrimination cases right? This is when I want to get that specific evidence of discrimination under the Fair Housing Act, what do I do? I send an individual that has the traits that we think the discrimination is happening, and while we might be able to have a statistical discrimination case it's the best to have an actual specific evidence of discrimination. So, I need the individual to show up, "Will you give me a place?" They say no and then we, I'll just admit, then

the Caucasian person shows up and says “Yes you can have that apartment.” Technically, right it's gotta be secret or the person's not gonna tell you the truth. Now the Virginia State Bar says you know what that's not a violation you can do those secret recordings. What about that situation you talked about where I as the attorney myself and being threatened. Can I secretly tape those threats? That's fine too, right?

So, we're starting to now see this relaxation of at least what the ethical opinions say is okay or not okay. They recognize that there might be other facts out there which I think this is important for our analysis right there are gonna be circumstances where this is allowed. We won't tell what those are. Right? um um but they're they're out there right? While this is going on in Virginia, the American Bar Association is also kind of fighting with this question um and they come up get a formal opinion this is not something that would necessarily give you much weight in Virginia, but I think it's important. They also remove the kind of complete bar against secret recording. They say “Listen, I know we said 1971 you couldn't secretly record people there are circumstances where you can do that...right? One of the things that you can't do is if someone asks the attorney or the attorney's agent “Are you recording me?” You've gotta tell the right answer to that, that that is fraud or deceit right? Not that you have to tell them, but if they say... “You wearing a mic?,” right before they rip your shirt off or whatever right, you gotta say “Yes I'm wearing a mic,” right... but then you say “Okay fine, if it's legal and I disclose if asked am I okay?” And actually the ABA says you know what we're divided on the question. Which this is fine and dandy if I'm trying to litigate up to the Supreme Court if my bar license is on the line I don't like this kind of, again, in between. I've got to feed my kids. I want to make sure I can help my client. But they say in the end it's inadvisable which I think when we get near the end of this, I think it you got to really be careful with this on a number of reasons and one of the things is is that it turns out circumstances are really gonna matter. And so after this ABA opinion you start to have a final series of LEOs from the Virginia State Bar. Can you give me more examples essentially was the request in 2010. They say yes, first of all we go back to that one where you were secretly taping the abuser. We were probably wrong on that, right? And the reason we were wrong, this gets back to the beginning. Is that there's this tension. I'm trying to help my client. My client says that they were abused, I don't have great evidence but my client is telling me that the unrepresented defendant is saying that they did the abuse and I probably know that if I tell that person I'm taping them they're gon—not gonna say the truth right? And so here I think the Virginia State Bar says “Listen, we understand there's this tension, and if the attorney analyzes that tension and comes up in the end and says you know what this is the only way for me to help my client out, and it's legal, then it's

okay to tape, right, secretly and we don't have an 8.4 problem. And so, I think that's why they come to the answer here that it's okay to secretly tape the abuser [clears throat] and here actually we go back to the situation we had with the attorney for the for the corporation. Here the attorney for the corporation is actually trying to investigate a a sexual harassment complaint by one of the employees and what the attorney for the corporation says is "Look, here, just secretly tape the person when they're doing the harassment and we'll use that" right? Which under the un old LEOs you would think would be a violation and in the end the court here, the court, the Virginia State Bar, says that's not a violation. Which if we kind of reset with all these things we get this sense that you know what we're we're we're starting to allow these undisclosed recordings. Here's the last one: The criminal lawyer, "I'm representing my client charged in a conspiracy. We've got an unindicted co-conspirator who's not represented. I'm worried that this person might change their story at trial. Let's secretly record them." Virginia State Bar says "Yes, that's proper," right? So we're we're we're we're we're seeing this kind of movement in this direction. We'll we'll we'll relieve the the bonus here and let's get to our (clears throat) so you say "Fine, I've listened to this for too long. Professor Cotropia can you please make something out of this mess?"

First, you got to make sure it's legal, which I think there are situations with the the tape recorder on the kid that you might have an illegality problem; particularly if it's sitting around somewhere with the child not there. Make sure you're in Virginia, it's a one-consent state, one-person consent state. Beyond that you've gotta know there's just not a bright line on the professional rules question. Which means you need to do your own internal analysis: Is this the best way to get the information that I need for my client? Which think you gotta think about alternatives. Do I need a secret tape recorder? What's the likelihood of the secret tape recorder catching [unintelligible] things that might be illegal, right? Have I tried other alternatives? Are there indications that I am worried about people lying, etc? And so, I think circumstances matter here a lot and this is why I say like it depends, unfortunately I don't think there's an ultimate answer yes or no on this. There is a modern trend to allow these ethically, thank you, but I still think overarchingly, if you think about like what's my presumption, my presumption is don't do it, it's inadvisable, unless that's my ultimate recourse, right? What I need to do. And this would be the same if if the a a recording tape came to you... and you're thinking about trying to use it, right, do I really need to use it um yes um or no. I'm gonna get past the last hypothetical and I'm gonna conclude with this and then I'll take confessions. Um uh I I really think looking through all this and I think this is where the practicality meets the the professional responsibility side to it. My uninformed on the

practicality side, but at least from the PR side is that you really want to consider other options first and if anything, maybe even document those somewhere, right? I've considered doing asking asking for information, maybe even asking to say, you know, is there any documentation? Could I observe the classroom? Could I have someone else observe the classroom? Those types of things because I think that as the ABA said, generally, you really don't want to do these undisclosed recordings. I think the other thing is consider the practicalities of all of this. The Sarah Sims scenario I think is a great one where, not a great one because she got charged by the police, but a great one to give you the practicality concern. She handed her daughter this recorder and I don't think her daughter had a sense of what this thing was and basically came into the classroom and just set it on her desk. It's not really undisclosed anymore, one, if that's your purpose, and two, then it created this problem where she left it...right? And so here I'm gonna have to have a child, again I'm just thinking of mine, I'm sure yours are insanely well-behaved and do exactly what you asked them to do, that has to understand what this thing is. Don't disclose it to anyone because that's the purpose of this, make sure you're around when it's recording. And I've read stuff about children that try to sew it in the jacket and the child's like fiddling with it. Maybe practically turns it off and you don't it's only downside not upside, right? I think also the practicalities in a sense of if you're caught with it probably does violate the School Code of Conduct. Doesn't mean it's a PR problem, professional responsibilities, it might be a PR problem on the other side right? Where is my position on this? What are the relationships between them? So, I think you really want to consider the practicalities, definitely do a case-by-case analysis, which maybe is the oh God you know I won't, give me a bright-line rule. There isn't one here. And then my final point, and this more comes from the the the privacy law space, and I know here. Look I've been on the other side of this, you want to skin on the wall, you you're you're mad about what's going on is to try to have empathy for the other side, and when I see the other side in a sense of the teacher, the IEP coordinators. I'm thinking about the the Dr.'s comments. Empathy goes a long way, right? And so I feel like the undisclosed recording is that last resort where, yes I empathize with the privacy of the teacher and and I empathize with the fact that the educators are trying to do their best, and I really only want to reach for this kind of kind of secret recording if after thinking about all those empathies I've gotta do this, right, I've gotta do this for my client um I I've gotta do this to represent um uh them and their child. Okay, so I know lunch is on the other side, um but I'm happy to take questions and not give legal opinions. Yes!?

Question from Audience: (unintelligible)... LEO that distinctly address the situation of a nonverbal disabled child the family believes is being abused in school, and and did the secret recording and it was determined that is an

exception, yes that is non-violent (unintelligible).

Prof. Chris Cotropia: , it maybe a possibility. I might have, I don't I don't see that there have been cases about a nonverbal child that this wasn't abuse but this was more about a question of accommodation and privacy for the other individuals in the room. So, this not be this was a recording device part of accommodation and there was a question about the other kids in the room, but I'm not going to tell you, it'd be great if there was one in the court. I do think it triangulates to the other abusive situations we're talking about, right? So, if if there, this is my non-answer law professor, if there is a reason that what I think the analogy that I would level, leverage on heavily on are the ones where, "Hey, they're being abused, I uh the abuser is not going to tell me if up front right? So, so that's... it's a great and yeah we should talk. I'd love to know if there is [unintelligible].

Audience Member: I have two questions.

Prof. Christopher Cotropia: Okay sure, I'll take it two.

Audience Member: The, what [unintelligible]

Prof. Christopher Cotropia: They, they probably work with attorneys, so you'd be concerned about this.

Audience Member: So, I, I work at a state office, so with Virginia being one-party consent state.

Prof. Christopher Cotropia: That's right.

Audience Member: And it's actually in our regulatory language, does that mean we can record IEP's for special education.

Prof. Christopher Cotropia: That's great. So, this is domain knowledge that I don't know, so that's great that's great. You might think I think this is getting back to [unintelligible] is not publicized. Having that regulation in your back pocket, it's like no I can, right? So, um go ahead.

Audience Member: The problem's here in Virginia but I have an IEP meeting in Florida where it's not a one-party consent state, but I still want to record because I'm sitting here in Virginia participating and isn't that the living trap?

Prof. Christopher Cotropia: [unintelligible] So there are a couple things that I think that we have to so there's the so let's start with the legality question—so so there's a PR question but there's the "Do I go to jail?" question which is probably more important. Um uh and and and and I think that might be a concern if if I'm if I'm communicating with someone with a two-party state; I would be afraid that I'm I'm effectuating an act in that state, and you

have knowledge that they're in that state then that I would be concerned. That's my, I so I would not do and that's where knowledge and I I and even just doing some Google searches I was able to find really good lists of two-party, one-party states so that's um uh. And the second thing I would say about that is even if, I I still think you probably have a legality, even if you have a legality problem, I think this is where the 8.4, and this wouldn't be as much of an issue for you, but the attorney that might be helping you. Say you know what, even if technically you're not in that jurisdiction it's more deceitful or fraudulent because those individuals you're dealing with are in a state they might not know it, that's a two-party state, right? And so, I think I think Massachusetts might be a two-party, and so there just expectations are we don't do that crazy stuff you guys do in Virginia or whatever so yeah. So that's the that was the first question or?

Audience Member: [Unintelligible]

Prof. Christopher Cotropia: Oh oh oh

Audience Member: [Unintelligible] So, with a parent situation you can advise and you know they have ADHD a lot of the times [Unintelligible].

Prof. Christopher Cotropia: Yeah, I'll.. I'll self-represent here, yes okay yes,

Audience Member: ...[Unintelligible] If the exact thing that they need isn't an accommodation...

Prof. Christopher Cotropia: Yes so this is what [unintelligible] so yeah this is what I thought although maybe the accommodation is so I know sometimes, particularly at our level we. We're not this, and we can talk about this offline, we don't know who needs the accommodation, this has been a discussion about how we provide services to our students we just get a list and say these are the accommodations you need to provide I don't even know who I'm providing them to. Which, I don't think is really the way to do it but whatever, but maybe even if it has to be secret for some reason the ADA loophole I think is a big one right? In the sense of so even under wiretapping there's an exception if it's allowed by law so this would be like a search warrant but it would also be this and I'm thinking about the scenario where I believe it was a nonverbal either nonverbal or they needed their recordings to understand later in the school saying no they're privacy concerns, wiretapping, I mean, it's always good confirmation where the domain knowledge people are saying that I read the case correctly.

Audience Member: In the case of a child with dyslexia and the parents want to use like an echolalia or LightScribe or something for him to take notes in the classroom, and the teacher is saying no because of privacy, rules

we're saying there's no expectation of privacy.

Prof. Christopher Cotropia: I think that's the first one, but I think even if there was, I think that the opinion said that ADA you know accommodations trump that basically, right? [unintelligible] we're not going to put a camera on their shoulder. I think we have one minute.

Audience Member: [unintelligible] the um notifying the school that you're going to be recording is sometimes a push for the school that they are on their game and doing the right thing. They know they are going to be recorded and this has to be a part of the student's educational records.

Prof. Christopher Cotropia: This is interesting to think about the circumstances, so this is disclosures right so when you're thinking about your personal duties and whether this is the best thing for your client in some circumstances disclosure is at least modified. We might be recording it sometimes you might not know when, but I just want to let you know, right? Which actually would get you out of a lot of these problems we're talking about here it might get you closer - so that's a that's a really good point to think about when you're thinking about this.

I'll just wrap up really quick she had talked to the school a number of times to try to do something and the school non-responsive... but I think those situations where maybe you could say under the circumstances I think we're good shape right and um using the figure out the taping mechanism technology nowadays. I was reading, you read online- there's some like the voice activated on the child's wrist that - thank you again for the confirmation! And so, I think these are the kind of - I know we've got lunch outside, right Nicole? And I don't want to say that and they leave and then they're mad and all this stuff. like well thank you very much. Thanks Carl.

Erin Sweet: So, we do have lunch outside so please if you exit through these doors uh you'll see the lunch right on the side there you are welcome to eat um in here in the commons area where we have the live screen, uh if you've been over there. and we will have lunch till one o'clock so one o'clock y'all can be back in your seat that's perfect! Thank you so much.

PRACTITIONERS PANEL: THE ROLE OF THE GAL

*Rebecca Imholt, Jennifer Newman, Erika MacCormack
Moderated by Prof. Julie McConnell*

INTRODUCTION

Nicole Evans: Uh, next up we have our second practitioners panel on the role of the GAL with Rebecca Imholt, Jennifer Newman, Erica McCormack, and moderated by Julie McConnell.

Prof. Julie McConnell: Hello everyone, it is wonderful to have you here at the University of Richmond. I'm going to start out by asking each Panelist to tell you their name, where they practice, how many years of experience they have practicing, and why they've chosen to be GALs. So, I'll start with Erica.

Erica McCormick: Great thank you Julie. I'm Erica McCormick, I practice here in Richmond in Midlothian and Chesterfield County at Winslow, McCurry and McCormick. I've got 11 years almost 12 of experience now, and I originally got into and still continued to serve as guardian ad litem because I appreciate advocating for children in the context of legal proceedings.

Prof. Julie McConnell: Terrific. Jen.

Jennifer Newman: That was like an academic answer right - so I'm Jen Newman. I have been practicing for 23 years I worked for the state for a year of that, so I guess that doesn't count. I've been a certified qualified guardian ad litem for 17 of those 23 years. I did not take a direct course here. I was going to be a prosecutor - I've never prosecuted a single case in my life. Uh I went to work for a defense attorney, uh when I was in law school, and I was an appellate writer for a long time with her. And honestly it was about who you know, so her partner is a juvenile court judge and said "we have a terrible pool of attorneys here please come work in the juvenile court." I said "I don't know anything about juveniles" and 17 1/2 years later I am usually the one that asked questions about in terms of ad litem work. So, that was not what I set out to do, not what I designed to do I'm I'm not a warm and fuzzy person for the most part, but um I can't think of a better job than representing the best interest of children in whatever legal matter that is.

Rebecca Imholt: Um my name is Rebecca Imholt, and I have been a

guardian ad litem for about 10 years now. I actually came out of law school wanting to do that. I clerked for Judge Williams and the Henrico Juvenile Court while I was here as a 3L um, and he really introduced me into a bunch of different guardian ad litem. Um I trained with them and realized exactly how hard that job is, so I didn't do it for a few years, and then I got roped into doing it and I've been doing it ever since.

PANEL

Prof. Julie McConnell: Wonderful. So, I am going to ask questions and then hopefully we'll have some time at end for a few questions from the audience as well, but one of the first questions I wanted to ask is do any of you also serve as the attorney for the child for example as a court-appointed defense attorney?

Erick McCormack: I do.

Jennifer Newman: I do as well.

Prof. Julie McConnell: OK.

Rebecca Imholt: I do not.

Prof. Julie McConnell: All right, and how do you balance that with your work as a GAL? You're going sort of back and forth between those two roles.

Ericka McCormick: So, it's a very different standard of representation standard of representation when you're the child's attorney. You are arguing for what they would have you argue for just as you would for an adult you know delinquent. I'm sorry for an adult defendant. So, a lot of times if you're representing them on a CHINS petition or something of that nature as a Guardian, um it's best interest. It's a very different standard; it is not necessarily what the child wants that I have to advocate for as a guardian. I advocate for their best interest, which may be different than their actual express desires for what they want.

Prof. Julie McConnell: Thank you – does anyone else want to answer that?

Jennifer Newman: The only thing that I would add to that is: remember your role. I, I frequently tell colleagues it's a, it's a joke and not a joke, but sometimes I forget what hat I'm wearing. When I'm dealing with a client I don't think that I do that in a courtroom and I don't think anybody would accuse me of doing that in the courtroom, but sometimes that's hard for other people to see because they're like whoa what is Jen talking about because I'm advocating for the kid to you know not go to detention and not be found guilty

of anything. Whereas if I were over in the other seat I might be arguing other things. Um but remember your role. I also think that there is a benefit to remembering that you do both roles, so that when you're talking to the child, when you're talking to the family, especially there are a lot of delinquency cases where there also will be a guardian appointed on the CHINS case. There always is. Um so, I think you know you miss an opportunity if you don't also kind of talk to them that way as well so that you help them understand where the guardian ad litem might be coming from and why you might be advising them to do certain things as the defense attorney because you've got a guardian ad litem involved so.

Rebecca Imholt: Well and I don't represent children as and as court appointed, but I represent frequently parents in custody visitation cases uh as a private attorney for them. And that can be a challenging role as well, because with my guardian ad litem hat while I listen to the parents. Obviously, I don't have to do what they want me to do. As the attorney for a parent, if they want me to advocate for a certain thing that's my job. I have to advocate for that even if I personally don't think it's necessarily the best thing for that child, so that's certainly a hard thing to balance.

Prof. Julie McConnell: , picking up on that issue of your role. Can you talk a little bit about the role of the GAL in special education cases?

Ericka McCormick: Rebecca looks eager.

Rebecca Imholt: So, actually, it's kind of a hard thing because for the most part we don't get involved in a lot of Special Education cases. What we have is more of a tangential relationship with you know IEP and other areas with with kids, if a child is in front of the court for a CHINS petition, which is a Child in Need of Services or Child in Need of Supervision. Then we might be getting talking to the school about what services are in place what services need to be in place if the school does the child have an IEP? Do they need an IEP? To determine what what if services are already in place and what that kid might need. Same in a custody case we might be looking at the IEP to see what's going on what parent is being the parent that is really advocating for the child at the school and if that's going to impact custody visitation. But in terms of actually, say being part of the IEP needing some things like that unless that's going on while I am appointed, I generally am not involved in that.

Jennifer Newman: Um so, I think this ties into two things and I'll try and answer the question. But I think guardian ad litem for the most part, are kind of a jack of all trades, master of none. Um you, you need to know so much, a little bit, of lots of stuff right. Um so, I think part of our issue with answering that question is I don't think any of us really have been involved in a true

special education case. Um because guardian ad litem aren't appointed on those. We are involved in other cases where special education stuff is happening and we're injecting ourselves. Um and that's not the only type of scenario or topic where that happens, and as a guardian ad litem you just have to understand that. There are going to be things that you were doing something else on a custody visitation case and all of a sudden you find yourself sitting at an IEP meeting you're like well what am I doing? So, I'll give that caveat. I think, I think it really depends on the case it really depends on the family, and I think it depends on the guardian ad litem. Um in foster care cases, um which I do tons of, those are probably the longest cases from start to finish um that a guardian ad litem is involved in. So, you could theoretically and I think in one case I have been involved from child study request all the way to the development of the IEP, and I was at every meeting. Um and I was there advocating, and at times I was the voice of the parent because the parents had flaked. Um and parents maintain educational rights during a foster care case. But in a custody visitation case it's more about um is the parent cooperating are you getting what you need from the parent in order for the school to be addressing what needs to be addressed either in developing the plan or in getting the testing done or whatever it is, and so it's more about that connecting to services. Um if there's an IEP happening, um an IEP meeting, if there's a child study meeting happening, if there is a disciplinary meeting happening and I'm the GAL, I'm there. Um I get really angry when people don't invite me um because one of our standards say we should go. I can't go if I don't know. Um so so, um I think we find ourselves in little bits and pieces of that we're certainly not the experts on the IEP process because of that but it's it's one of those things where you have to know just enough to know what you don't know and where you need to direct people.

Prof. Julie McConnell: Thank you (to Ericka McCormick) Do you want to address that?

Ericka McCormick: I think they have pretty much summed that up in a very succinct manner.

Prof. Julie McConnell: So, if you have a case where you were appointed as guardian ad litem in a delinquency, for example, and you learn that the child had been expelled because of the delinquency would you be involved in perhaps appealing the expulsion before the board?

Ericka McCormick: I can't say that I've ever had that. I can't say I wouldn't be involved either. I think again it's as Jennifer said it's very fact specific. Um and so a lot of that is going to depend on what other parental supports are or are not there for that child and who else is advocating for

them. If no one else is advocating, then yes that could be a scenario in which that could certainly arise, but if you've got other advocates and you've got a parent that's involved with the departmental worker then it may be less of a less of an involvement at that point.

Jennifer Newman: Umm one in 17 years. I think it's a matter of timing. Um and timing and when the case comes and when all of the other matters are happening with the school and timing and when somebody would like to tell the guardian ad litem that's going on. Um I have been more involved in while they're still trying to make that decision what's going on um. In fact, I have a case very recently where the child's behavior was unbelievable at the high school, she ended up biting a staff member. She did not get charged we oddly had a foster care case two days later where the neurologist was testifying and the defense attorney of all people asked whether or not her behavior as explained by the staff members and the administrators could have been a manifestation of her disability and got an answer of no. This is not particularly helpful it's like everyone in the back of the courtroom is taking that and running with it and I so I interjected and was like well whoa whoa wait a minute OK that was in the context of a foster care case like let's let's talk about what the disability is and what happened. um cause they were going to expel her um and we dialed it back to at least two weeks of homebound, and let's all reassess. But so more, I've done more of that kind of in the before we've taken a true action I've been involved in.

Rebecca Imholt: And I would agree with that it tends to be less the formal process of the appeal and more the conversations with the school of "hey before you guys talk appealing what can we do to prevent that from happening? How do we how do we mitigate the issues that we all see are happening, but ensure this child is still getting educated because we that's important?" And also making sure the child's not not doing anything is really important, particularly in a delinquency kid.

Prof. Julie McConnell: So, hearing your answers it makes me think that it is very important to get the school records in your cases. To get that IEP or that 504, to get any information about a manifestation determination review that sort of thing. How do you go about getting those records?

Ericka McCormick: So, my general intake process once I get an order of appointment regardless of the case. If I've got a school age child which can often include you know 4 year olds that are sometimes in the head start programs and things. Just because they're not in kindergarten doesn't mean there may not be some work that the counties are already doing, and so I'll send a records request to the school for the records including discipline, IEP, 504s, grades, attendance, et cetera. It's a form letter that goes out and

obviously it's tailored to each particular school and child but certainly it's a form that I'm sending it as the guardian. It used to be that the school would just simply fax those back to you some schools were really quick some schools had more going on, but I would say generally I would get them back within a week. And I think the new policy, at least for Chesterfield, I can't speak to Henrico perhaps, Rebecca can chime in, is that they are now faxing those requests to the um County School attorney. And so what's actually happening, and then the school attorney is sending it to me directly, so what's happening is I'm actually having a longer period of time. And so sometimes when we're appointed super fast and we've got in the context of foster care you're coming back at a five day hearing, and and some of those things I don't have the records yet. And so it's not that I haven't asked, I don't have them. Um but then when I do get them back depending on what's going on, they'll be a varying stack that comes in, the paralegal brings them and sits down. I just spent about an hour reviewing several last night, so that's my process for getting them. I don't know what Henrico or Richmond does.

Prof. Julie McConnell: So let me ask. When you send that letter are you relying on 16.1-266?

Ericka McCormick: I always attach a copy of my appointment order um and page 2 because sometimes folks aren't really familiar. Um we have occasionally have pushback from medical providers as well as school providers, and so um then I have a highlighted version that I I send as a gentle by the way I don't need permission from a parent or anybody it's right here within the code and it's highlighted, and that tends to be fairly effective so.

Prof. Julie McConnell: So, the combination of citing 16.1-266 and providing your appointment order.

Ericka McCormick: Yes

Prof. Julie McConnell: And you said the second page of the appointment order.

Ericka McCormick: Yes, because that's where it lists what we have access to without ... by mere virtue of the appointment yes.

Prof. Julie McConnell: Thank you.

Rebecca Imholt: Right and I think we have provided a copy of the order of appointment um with your materials, but but if you look at the second page, the second page is literally: 'Without further order from the court, the guardian ad litem is allowed to get all of this stuff.' Um which is the really easy way of saying it's it's the it's our pass to get school records, medical records without going to the parents who can often be, um.

Erika McCormac: Obstructionist

Rebecca Imholt: Uncooperative, um, or subpoenaing records which takes time and money to do and you have,

Jennifer Newman: And then you have to disclose them to the other side.

Rebecca Imholt: You have to disclose them to the other side, that sort of thing, I've also found that if you are having a little bit of issues, Henrico doesn't require them to go to the county attorney yet. Um most of the time they will send it. I've had a couple push back and say 'You can come to the school and get them, but we're not going to fax them to you.' Um normally I try to visit kids at the school anyway if I can because then I don't have parents breathing down my neck while I'm trying to talk to my ward, um and so while I'm there I just kind of stand there and wait for them to get me my records if they've been particularly difficult about getting me records. Um because if I'm there they can't ignore me as easily as they can ignore the fax.

Jennifer Newman: Yeah, I mean I so I'm going to I'm going to do two plugs which would probably go to a later question, but um the reason why you're going to get a different answer from each of us is because we probably all have the same form letter. And I don't know perhaps maybe I might have originated that letter. Um knowing other GALs is super important and talking to other GALs on like how do how do you start your case and what do you do um is so important, right. Um and we all share our work. Like seriously I can't tell you how many people I've sent that form letter, I've sent my form questionnaire that I send out, they all start to look alike and you're like 'I don't even know who started this' you know, somebody might have tweaked something in it, but other than that they all really kinda look alike, including formatting. Um but, it's hysterical, but I, interestingly enough, I think um, I don't cite the code section, I never have. I say 'I have a court order give it to me' I've never had push back, um I think I also always ask when I'm standing there. Um, because one I get it and I get it faster but two it just kind of opens up an avenue to have a conversation with the person who's getting it, because they know more about Jack than you think they do, right? And they will tell you things that are not going to be in the school records. So, I do a combination of both of those things, I've never had to push back with the statute as a guardian ad litem, it's very different as the defense attorney, but as a guardian ad litem I've never had to push back with the statute. The only other thing I'll throw out again like kind of a practice tip type of thing is: be mindful of what you do with them because the schools talk. The schools know who I am, 'kay? They know who Erica is, they know who Rebecca is, they know because we do enough volume that we're in and out of the schools. Be careful what you do with the school records and make sure that you are

mindful of whether or not you are really allowed to further disseminate and what you can further disseminate. Um be mindful about you know repeating what that nice person in the administration office just told you about Jack and his family. Um because that kind of goodwill is just going to get you even farther, um and so if it was going to be the letter that gets bounced to the County Attorney, it won't get bounced to the County Attorney because you've not ever done anything that they think you are now like, you know, coming after them. Um so just be mindful of that obviously there are legal obligations, um, of what you do with records as well but the way you treat the staff um and the way you treat those that you decide you will contact because of something that's in the school record, um those things will all come back to haunt you in the next 15 cases, um so just be mindful of that.

Julie McConnell: It's really interesting that you don't have to cite the statute because we actually um had a change in council for the school system in Richmond Public Schools recently, and the new council is actually suggesting that even the statute is not enough to get the records.

Erika MacCormac: Really? Wow!

Julie McConnell: He suggests that that FERPA counter you know is more important and without consent he won't provide records.

Erika MacCormac: Wow!

Julie McConnell: Very interesting new development. So, every locality's a little different. But we should be able to get those records by statute without consent, but of course if you can get a consent that's even, you know, more helpful but we don't always have that ability.

Erika MacCormac: It's also I think,

Jennifer Newman: And it delays things if you have to get it.

Julie McConnell: I'm sorry?

Jennifer Newman: It delays things if you have to get it.

Julie McConnell: Yes.

Erika MacCormac: Yeah, I don't like having to stand up to a judge and say 'Well have you looked at this' and say 'Well judge I asked I haven't gotten it back,' um just because I like to be prepared. I've also had more pushback with private schools than public schools.

Rebecca Imholt: Yes.

Jennifer Newman: Absolutely

Erika MacCormac: We are not nearly as known of an entity as a guardian

ad litem, what is that? Even in, frankly, some of the most contested custody and visitation litigations. Where the parents, you're up in Circuit, they have hired you, so um this you know they have agreed everyone's on board and they are they are paying you to be the guardian which is a slightly different role than when you're appointed in the juvenile courts. And so you'll go to a private school, and same thing as Rebecca said meet the child at school, I don't get the accusations of they said XYZ because mom brought them or dad brought them, it's the child's house when you think about it, they spend so much time of their day there it's a very stable place. And they put 'Who are you? What do you do?' and I recently had one say 'Well you can't visit with the child, I had my order and um we can't give you records our attorney will be in touch' and I said 'Absolutely fine, here's my card' and went on my merry way. I wasn't going to gain anything to Jennifer's point, of standing and at this particular juncture it wasn't an emergency, I didn't need to see the child. Um but it also had some ramifications because I wanted for this child to come when no one knew I was coming, and so there was no way for mom or dad to prepare her, um to say whatever she was going to say to me. And now I've lost that element of surprise because I got that pushback and so I can certainly go again but now as the guardian I have to listen knowing the child may have been told what to say if I show up again, and so that is something that because I got that pushback, I lost that element. So, I had to make a case judgment at that point: was it worth standing there and saying 'I'm not moving, get the lawyer on the phone' or balancing everything else that I knew was also going on saying 'Well it was a good shot' and that's a case by case analysis you kind of have to give yourself in the moment.

Julie McConnell: Yeah, that actually leads me to ask a question about how do you navigate challenges with parents, you know, when you're in the role of guardian ad litem?

Rebecca Imholt: It depends, which is the lawyer's favorite answer to any question. Um, it really does depend on what the case is. You know, if I've got a foster care case and the parent is non-responsive or something like that, that can lead to ramifications about whether or not that child's coming home, right? You know, um, if it's a custody case and the parent is being difficult sometimes it's trying to figure out why, because a lot of times it's because they don't understand your role and you've talked to that other parent and therefore you must be on that other parent's side. I had a situation with that literally yesterday where a mom called me to rant about the fact that dad hadn't given the child medication recently and the child has to have the medication, said 'Okay,' so I called dad said 'Hey, I hear the kid's supposed to be taking this medicine what's going on?' 'I don't know why she's calling you he's taking his medicine it's fine you. Why why are you bothering me

with this' and I pointed out to him, you know, 'This isn't a situation where I'm believing what she's saying, but she's given me this this concern, I have to investigate that. Part of that investigation is finding out if, you know, Charlie's actually taking the medication Charlie's supposed to be taking.' Um so some of it's kind of digging deeper what is the issue, um it could be a language barrier, I've had that happen, it could be an educational barrier and you got to make sure you're talking to somebody at the level that they can understand what you're talking about. Um and sometimes it's just they don't have the time to talk to you and they don't want to talk to you and this is all too much for them to handle. And it's hard to balance that out with representing your ward and representing what that child needs, but also understanding that people are human and that any case in front of the court is a hard case for a person to be there.

Jennifer Newman: Yeah it's um, that question and how do you how do you talk to the kids, um are like they're like nightmare questions, right? Because there's no there's no answer, there's no real answer, um we could talk for hours in fact you could do an entire day seminar on that, because it's an evolving process. I am not the same person that I was 17 years ago when I interviewed the first parent, I don't approach cases the same way, I probably don't approach cases the same way as I did six months ago, um it's an evolving process. It's about human nature, it's about connections, it's about boundaries, knowing your own boundaries and your own roles, getting burned, right? So, my mom is my mom my entire life has said 'You learn more from a negative experience than a positive experience.' No wiser advice is there. Um so, you get burned and you're like 'Oh I'm not doing that again,' right, um so it's an ever-evolving process but I think part of what, at least starting out what I would say to people is: know your boundaries, know your roles, know your biases before you ever pick up that phone. Um, you need to be respectful of the fact that they may not have time, they may have emotions connected to the case whatever it is, but also, I'm not going to advocate then you have that phone call at 8:30 at night because they work, okay, because we have to have boundaries also. Um, but and the other thing that I will say is, which is part of the reason, so my unofficial motto dubbed by my colleagues has always been 'If both parents hate me then I'm doing my job.' I don't make issues that aren't issues the court can't resolve. It is so easy to do that because they want to pick about everything, right? The court is not going to tell you who can get Johnny's haircut, the court's not going to do it. So, I'm not going to listen for an hour and a half about why mom says it should only be her and dad say it's only him and at the barbershop. So, you have to be able to say to them, 'I understand that could be frustrating, that sounds like a co-parenting issue, that sounds like something you all need to be working out together, but in terms of the court process legally these are the things the

court's going to focus on, so let's talk about that.' Um, and you've got to do that without making them mad, right, because there are the ones that are like, 'I just want you to listen to me about the about Johnny's haircut and if you're not gonna then I don't want to talk to you.' And that's when you have to figure out okay I've been doing this long enough, I know how to go around. I can go around and represent my ward by going around. Um it makes it harder and it's more work when you do it that way, but sometimes you do sometimes you have a parent who just isn't going to give you the information you need, will not talk to you, hires a lawyer who says, 'You're not talking to my client, whatever it is,' um, there are absolutely those cases, I mean unfortunately I've had custody visitation cases where the one parent never spoke to me, never, because they hired an attorney who said, 'You can't speak to my client.' And I was like, 'Okay, this is, I don't know how this is going to go, but you, you're' and I tell the court, 'I feel like I was handicapped in my investigation because I only received information from one side, and then funneled through an attorney, if I even got information through the attorney.' Um because I want the judge to recognize why perhaps my recommendation sounds a little wonky based on what the judge has now heard, and that's because well I didn't know half of that before we walked in, not for lack of trying.

Erika MacCormac: I agree with that I think it's a very evolving process. To Jennifer's point, I don't practice it the same way I did when I started out. Um, you know constantly calling and checking in. I'm going to have my initial you know questionnaire and then I'm going to have a phone call and then I we follow up as needed after that. But if I have a parent that comes in and it's crickets and it's been crickets for four months and they come to court, well 'You know here's all these things and I didn't hear from the guardians,' like well did you pick up the phone? Did you reach out to me? How am I supposed to know this is going on if you don't bring it to me? Um and I think I push back in that fashion far more than I did when I started. I also, um, in terms of boundaries and things like, that there have been some parents that I have taken off of a telephone and I'll say 'You know what, all our communication at this point is going to be in writing, it will not be a telephone anymore.' Um I've done that, um I have done where, you know, I'll only do letters, old snail mail, and that's because I've had a parent that's called, yelled at me, screamed at me, cursed at me, accused me of things, accused my staff of things. I mean so those are like extreme examples that's certainly not the norm, and then the other thing I often find I have to educate parents on 'You're supposed to be neutral.' You're, no I'm not. I'm not neutral if I'm neutral I'm not doing my job. My job is to advocate for the best interest of a child, I am zero assistance to the court if I come up and give a recommendation and say, 'Well judge I don't really have an opinion. I don't have a recommendation for the court. I'm neutral, I can see both sides.' That's

not what the court's appointed me to do the court's appointed me to investigate and stand up before the judge and say, 'Based on my investigation,' and I often will start by saying, um, you know, just 'Any opening from the guardian,' all I'll do is say, 'I've talked to' and I'll just kind of go through who I've talked to, what I've done, just a very, 'Here it is,' so that, to Ms. Newman's point, if I haven't talked to the parents like, 'Well I called dad and left a voicemail and sent emails I never got a response,' you know. 'There's that judge, you can do with it what you will,' but then I have to give a recommendation and to give a recommendation in the best interest of a child means I've had to pick a side. I'm not neutral. I have had to make a choice to advocate for what is in the best interest of that child. So, I find that's common people expect you to be neutral. It's not the job.

Julie McConnell: So, when you made that determination about what is in the best interest of the child, and part of what you recognize is that they need services. How do you go about getting those services funded, getting them in place, deciding which ones are appropriate?

Jennifer Newman: So, I have actually filed CHINS myself before, um so appointed on a private custody and visitation litigation and then I get into and go, 'Oh heavens,' and I'll go down and file a CHINS. Um and that will of course trigger for the services, rarely for supervision, but definitely for services, and then that will generally trigger the ball rolling. Um you can also only ask for foster care prevention off of a paper as Ms... to her point I called Jen, I don't know a month or two ago and said, 'I've got this terrible case I can't what's going on I need foster care, I need foster care,' and um 'Judge had me file a CHINS and this is new,' because it used to be sometimes you would get foster care prevention plan in place without having a paper before the court where the court can remove a child and that's what you need, and so I'm talking that through to Jennifer, that's why the CHINS is needed, and so I've done that too to get foster care prevention in place to also help see what we can do and other services offered, so I've filed those before

Julie McConnell: Can you briefly explain what a CHINS is?

Jennifer Newman: Sure, so a child in need of certain, well, I'm sorry, someone else want to talk? There are several...

Rebecca Imholt: There's child in need of services and child in need of supervision. Um essentially it's a paper for the court saying, 'This child needs supervision.' There's lot of times it's truancy issue, the kid's not going to school, running away, that sort of thing uh services, kid needs something and they're not getting it, um because either because the parents don't know how to access the services, they don't have the money for the services, or we just don't know what services they need. Um so it puts some... puts the child

before the court, there are some interesting ramifications to that in terms of the court can order the parents to do certain things, court can order the child to do certain things, there can be um show uh criminal implications to that if parents fail to do that contempt of court issues if they fail to do it or the child fails to do something. Um it can order foster care to be put the foster care prevention to be put in place, you can order the family to go to different, um services. Henrico, for example, and I do a lot of work in Henrico, so Henrico mental health let's do us, get evaluation to see what this family actually needs, that sort of thing.

Jennifer Newman: And trans... and custody can be transferred off.

Rebecca Imholt: Yes

Erika MacCormac: Which means they could in theory come away from mom and dad if neither is suitable and they can be put into the foster care, and then that of course rolls a whole other process. Sometimes you have the same guardian, sometimes you don't, depends.

Julie McConnell: So, what if there's a situation where you think it's actually appropriate for the child to stay in the home, but that they need additional services: grief counseling or whatever other services might help um build up the protective factors in this family, how do you go about getting those funded?

Jennifer Newman: So, I'll tackle that: so, I don't know anybody who's been practicing less than five years who didn't come out of the mental health profession who can answer that question, and that's because it's different in every single jurisdiction, right, which is why you hear you hear Erika saying, 'I practice in Chesterfield,' can hear Rebecca saying, 'I practice in Henrico,' because it matters. Um and it matters for those of us who do this to know who practices elsewhere in case we need to call that person and say, 'The family has now moved jurisdictions, what is there?' Um and how do we access it there? Um, there are some things that, statewide, are sort of consistent, uh not enough, I think, to be helpful, um, so you have to know your jurisdiction. You have to know the people in the jurisdiction that have access, access to that. So, you need to have a connect at your, at your local CSB, which is your community service board. You need to have a connect at the Department of Social Services. Um, you need to have a connect at your CSA Office, which is sometimes inside, um, the Department of Social Services. That's the, um, that's, that's the funding stream that comes down from the state for a lot of services. Um, you need to know your private providers. Um, yeah, I mean I, because, in a straight up custody and visitation case, a lot of times that's just me saying, 'listen, I know in Chesterfield, same day access at Chesterfield mental health, you can go there, they will they will

do an assessment immediately that day and it will tell you whether or not they can meet your needs.' Um, or I can say I have worked well with these three counselors and I think they're great for this age group. Um, can't fix the funding issue, right? Um, and I, I stay away from, even though I'm sure everybody would really like, I, I'm not I'm not gonna suddenly become the health insurance, Medicaid expert. I don't know, so when they say to me, does that provider take Medicaid? I don't know the answer. Please call them and ask them. Um, I know about the community service board. I don't know about the lo--the local private providers. It's just too much information at some point. You have to kind of stop and be like, I can't, I can't be the one that holds that information. Um, so I can't always fix the funding piece, but I can, at least, direct, um, to services. A lot of times, I don't know why, but a lot of times I say things like, do you have private insurance? Have you called them? Like, some people don't know that some private insurance has, like, a five-day visit or, you know, five time visit for mental health services or something like that. They don't even know that, and so I just happen to say it and they're like, oh wait. And then, they call and boom. Now we've found this funding source that we didn't have before. Um, and then the rest of it is knowing, again, knowing what's out there. So, most localities, you can ask for what's called a community staffing, which is done through your FAPT CSA office, but it's not an official request to go before FAPT because we cannot do that, um, as the, as the GAL, but it gets a whole bunch of people at the table from the school, from local um, um, private agencies, from the state agencies, from the community services board, there is usually somebody there from the court services unit, um, and you kind of just say like, this is what's going on in the home and all of a sudden, and you're like, at a table of experts, right? And all of a sudden, they're like, well, you know, you need this kind of therapy, and you need this kind of therapy, and we need to hook you up with this mentorship program, and, and, and then they do that. And if something needs to be connected to a funding source, they can present it to FAPT. Um, so there's knowing that.

Julie McConnell: Can I take you back for one minute, Jen? I'm sorry, can you explain how we would get before that team?

Jennifer Newman: The community staff? Call your CSA coordinator.

Julie McConnell: And how do you find out who the CSA coordinator is?

Jennifer Newman: Mm, they're online now. Yeah, it was a lot harder 20 years ago, but now they're, now they're all listed online. There's a whole list under the, um, the Children's Services Act is what "CSA" stands for, and it lists the coordinators across the Commonwealth. Um, but that's how you get before the, the staffing. If you, it gets slightly more complicated and probably

too complicated to get into here, but if, can take things before FAPT, then you are bothering that person. So, if your kid is on probation, they can take things to FAPT. So, you go to the probation officer, and you say, hey, listen, this kid needs to be in some kind of, you know, specialized degree of counseling, whatever, um, and they don't have any insurance that's going to cover that. You know, would you consider taking that to FAPT? So, knowing who a FAPT case manager is, um, becomes important, but it's, it's something that you learn, um, over the course of time. A probation officer, one, is one, the court services unit is one, and if anybody, if they're connected with the Community Services Board, they're another. GALs cannot, people will tell you all day long we can. There are limits to what GALs can do. We cannot ask for a case to go to FAPT. We go to those meetings, and we advocate, but we cannot ask for it to be heard.

Julie McConnell: So, did I hear you correctly that a probation officer starts that process with FAPT?

Jennifer Newman, Erika MacCormac, Rebecca Imholt [simultaneously]: They can.

Julie McConnell: Who else can besides a probation officer?

Jennifer Newman: Anybody, anybody connected to the to the, the community services board, so if you've got any.

Rebecca Imholt: If it's a department, if it's a foster care case, Department of Social Services can. I've had Henrico Mental Health help me get into FAPT. Um, usually, if I've got some, if I've got some tapped resource, if I can't get it there, they know somebody who can. Um, and I think part of the, how to connect into the services is very dependent on what case, kind of case it is, right? Um, because, obviously, if it's a Department of Social Services case, I'm reaching out to that social worker that's on that case. I'm reaching out to the Department to say we need a family, uh, what's called an FPM which is a Family Partnership Meeting, um, to talk about what services this family needs. How are we funding those services? Do we need to take it to FAPT, you know. If it's a CHINS petition, DSS is often on those cases, so we can get it through there, or if there's Henrico Mental Health involved, they can often get me there as well. So, it just really does depend on what kind of case it is, um, to the point of, you know, IEPs, things like that. If I'm seeing the child struggle at school and it's a CHINS petition, I can go to the school and request a child study. I can say, hey, this kid doesn't have an IEP. Maybe they should, or can we at least look at the possibility of why, why, why are we struggling here? We can request that as guardian ad litem if we're appointed. That's the other thing I think a lot of people forget with guardian ad litem. When I'm appointed, and when the case is over, that's the time I

can do stuff. If the case is done, I have no more power. I have no more authority, um, because my entire authority is derived from my order of appointment.

Julie McConnell: So, who can request a child study? And what is a child study?

Jennifer Newman: You opened the door.

Rebecca Imholt: Oh, I opened the door. So, a child study is essentially what starts the process, um, to see if a child needs an IEP or a 504 plan, um, under uh, the, at the school. I believe parents can request a child study, guardian ad litem can request a child study, and I believe a teacher can as well if a teacher is seeing the need for the child as well. I'm, if that's, I don't know if that's an all-encompassing list, but those are the people that I know, so I'm, I'm enjoying the nodding of the heads over here, so, yes. Yes, um, so that's, that's kind of one of those things, if you go to the school and say, we see a need here. Please, can we try and see what we can do. They'll do it. They have to.

Julie McConnell: Yeah, that's great. And can you also break down which kids go to CSA and which kids go to FAPT for the funding? And sometimes, is there overlap?

Jennifer Newman: Um, there's absolutely overlap because the CSA bucket is actually the bucket that funds FAPT.

Julie McConnell: So, but you said earlier, a probation officer would take it to FAPT, right? And that's not true with the CSA if you go directly to the CSA for funding?

Jennifer Newman: So, the, the CSA piece is. So, many, many CSAs, again, who, which is who supports the local FAPT teams, will do what's called a community staffing. So, it's, I call it like the unofficial FAPT, because you, you, you cannot ask for money, but it is the room of experts that sit at your FAPT table, that hear what's going on and say, these are the things that are out there, number one, and here's what we think would help, and here's how you access it. From that point, they can connect you to somebody who becomes your case manager who can take it to FAPT, if there's a funding piece to it. Um, but it is, it is a direct connection to services and to knowing what's in your locality, um, because, again, it's, it is made up of, it is made up of FAPT team members. It is usually larger than a FAPT team, the community staffings are. Um, but it is not a, it is not a formal 'we're coming here to say we need a psychological evaluation, will you please pay for it?' It's a 'we're coming here, here are all the issues that are going on in the home. Help us.' Right? So, there's not even really a specific request for a certain

something, um but the, the experts are at the table and someone says, that sounds like, that a psychological is, you know, in need, or an updated psychological for the child, or a connection to grief counseling, or family functional therapy, or something. Um, and here's where you can go to connect yourselves to that. And, again, if one of those pieces like a psych eval, ends up being something where there's a funding issue, um, as long as they then connected the family to somebody who can become a case manager. that case manager can then take that to FAPT, so it ends up being, like, a two-step, three-step process.

Erika MacCormac: I find it's a very helpful tool, um, for individuals and families that may not have as much legal sophistication or understand the legal system. They don't have the money to pay an attorney. Um, and so, if you're appointed as a guardian, in, um, a private custody case for example, and you see these things, but you don't have parents' counsel, right, we can't really give parents legal advice because our duty is to our, our child. We can give our child legal advice, right, we can do that, but we can't give it to the other parents, and so, it's kind of, as Jen said, it's a go around to get the services in place that you believe serve your child's best interest, but in a way that you're not, you know, stepping on other toes, and it's more effective. Um, that's where I find it really, the staffing can be very helpful.

Julie McConnell: Terrific. So, we're almost out of time. If you could each give us one thing you wish you had known when you first started working as a GAL, I think that would be really helpful.

Rebecca Imholt: Ooh, um, so this is one thing that one of the guardian ad litem that I trained with told me. Um she was very, very blunt, which I think is important. Uh, you're going to do this job. Some days you're going to hate it. Uh, some days, nobody is going to like you, um, and they're going to tell you that everything is your fault. One, that doesn't make it true, and two, there are going to be days where you it's worth every second of it. So, it's just kind of one of those, if you know, if you love it, you love it. You're certainly not doing it to get paid, so yeah.

Jennifer Newman: It, it is, it's probably the most, um, in most ways, the most thankless job, um, except when it's not. Um, and then it's extraordinarily rewarding. Um, I think for me, it was, um, I didn't realize because I had not, I didn't know what a GAL was when I got recruited to come be a criminal defense attorney in juvenile court. I, I had no idea. I'd never heard the term. Um, and I had been practicing four or five years. Um, but I don't think I realized how much people think we know, um, and how much we can do, and how unrealistic that really is. I, I did not know that, but I also didn't know that I also was going to need to learn a lot of stuff about a lot of different

things, and have just the right amount of information, um, to look somewhat competent, but be able to direct people in the right direction. I, I just, if you, if you watch it in action, I just, I don't think that's obvious, right? We just look like the third lawyer in the courtroom, um, asking some questions, um, but what happens outside that courtroom is, is expansive. Um, and I just didn't know that.

Erika MacCormac: Um, same thing, I mean, I like to say it's kind of like neurosurgery, right? You, you practice for the 3%. You know you're going to lose 97% of your patients. You practice for that 3%, so I try to keep that in perspective on those days when everyone is telling you you're the terrible things, or they go on social media, and they talk about how terrible this guardian ad litem was, and how dare they, and they're a bad mother, and blah blah, yeah, whatever. Um, so you have to have a thick skin. I think I knew that going in. I too had a very blunt, um, mentor, and I think that's kind of important. Now, we've all said it. You, if you're going to do it, you've got to find mentors that are going to be there, to send a text and say 'I have this. Can we talk? Or what have you done?' Um, having someone to soundboard and bounce with is so important. I think, in all areas of law, but especially in the guardian world as well. What I don't think I knew, um, going into it was that it would make me a better lawyer. And the reason I say that is because by sheer virtue of being that third lawyer in the courtroom I, so early on in my career, gained the ability to observe other, more seasoned trial attorneys and so, it was very helpful for me, especially as a younger attorney, because I started guardian work pretty much at the same time I came out and passed the bar, and so I was able to take things I liked here, and I liked how that attorney did this, and so observing and then taking those things and putting them into my own practice. So I, I think that was something I went in because I wanted to advocate for the children who don't have a say, sometimes, in what's happening in their life if their mom and dad are separating, but ultimately, I think it's also made me a better attorney because I've observed, um, other counsel and frankly, I've observed the judges. Um and so I feel like I have a pretty good feel now, if I have a private client come to me to say, well, this is how this is probably going to go. This is what we need to really be looking at, and so I think it's really complemented my practice by, by having both.

Julie McConnell: Terrific. Thank you. I think we have time for one question quickly if anybody has a burning question they want to ask the panel. Yes.

Audience Member: I've had positive experiences with GALs. [unintelligible] I was a public school teacher [unintelligible] they just like said hyper focus on what the child needs and sometimes they may ask

teachers. Like, I've just had good experiences. I know parents, sometimes it can get kind of heated, so I just wonder, do you all ever have someone come in? I know you're, but do you ever have someone just come with you to be a second set of eyes and ears when parents are involved, so that they can be a witness to that? Like I know it gets heated, excited, and they only care.

Jennifer Newman: It's super interesting. Um, yes, you have to be careful with that, but yes. Um, I, I used to, not anymore, um, but I, I used to, if my door was open with a parent, it's because I wanted other ears, right? Nobody was sitting in, but there were enough, there was enough business in the building, I wanted other ears. Um, I have absolutely brought my investigator with me, um, to home visits when I, either, she happened to also be a former police officer. If I either was concerned about my safety, um, or I was concerned about, um, you know, a heated confrontation. Um, those are also the cases though where you have to stop and say, do I need to have that conversation? Can I say 'it's only by email'? Um, is it only by phone? Um, and, so that's, that's where really being able to assess what your job is and what the actual issues are in the, in the case, and what information would be gained. Um because you, I mean, you know there are just some cases where you, every single time, it's that dad on the other phone, it's not going to be pleasant, and if you're not getting anything, that's, it makes it hard because it doesn't repair any relationship, but if I'm not getting anything in terms of my investigation to further the best interest of the child, then why am I participating in it? Um, and, and you're not, you're just not going to be a fan of everybody, but I think most professionals would say exactly what you just said, and that's because we're dealing with you on a professional level. We're trying to deal with a parent on a professional level who's not dealing with us on a professional level, is very emotional, and on top of that, again, kind of how I got the reputation, I'm pointing out your deficiencies, right? For each of you, both mom and dad, and they don't want to hear that from me. Um, and you know, and they don't ever expect but almost always get, you know, I need to have physical custody now because Joey's failing math. Well, when I go talk to the teacher and I find out, well, it's also because, by the way, you don't, the other parent doesn't even bring the kid to math class in the morning because they're tardy every one of those days. Well, it, now I'm shining light back on you, and you're the one who made the complaint about the other parent and they don't, they don't like that. And so, you're always going to have a little bit of that, um, but yeah, you have to be careful about having, having somebody there. You don't have an attorney client relationship with that parent, so you're not violating anything there. Um, but it does need, you need to think about who it is, right? And most of us, I mean, me in particular, I'm a solo. Um, so when I had the investigator there, I mean, I paid her out of my own pocket, because there is no such funds for a guardian ad litem, so

that was out of my own pocket. Um, and but, she was my employee. She was my contract employee, um, and so if you don't have that situation, it gets a little inky, but I definitely had the open door rule. Um, and people knew if I had the door open, it's because I was concerned that things were going to take a turn, or at any moment, I was gonna have to say, you know, what this is not a productive meeting and we're ending it.

Rebecca Imholt: And what I try to do is if there's somebody else in the case, a lot of times at work, I've got some a parent that's that acrimonious or difficult, there's somebody, another professional in the case that can help. For example, if it's a foster care case, if you've got a social worker, go do the home visit with the social worker, you know, or if it's a case where you've asked the court for CASA, which is court appointed special advocate, they're volunteers that write reports to the court, you can do your meeting with your, your visit with the CASA worker that's on the case. The other reason I do that is because, in all likelihood, they're already going to be the court, in the courtroom, so if I need them to testify, they're already there. I've already got them there. I don't need to worry about subpoenaing yet another person to the courtroom because they're already there. I don't need to worry about subpoenaing another person to the courtroom because they're already there.

Julie McConnell: So, the good news is we have time for a few more questions because um one of the members of the next panel is running a little bit late so if there are other questions we'd love to hear them yes.

Question asker: Ummm how your cases come to be.... so are most of the cases that you you currently have cases of students who are in foster care or families who are going more so and then there's been some kind of referral? I think you explained this earlier but I'm just a little curious about that. And the second part of my question what's the how do you know when it's over where your role has ended and um and where do like? I was just curious.

Jennifer Newman: So, second I'm going to answer the second question first, wait because it's it is confusing to people, but it's super bright and clear. Um you get appointed and that and we're not talking about Circuit Court cases, okay? Um I know Ericka brought them up but they're they're just another beast, but you get appointed based off of a petition that's been filed or motion to amend in the court, okay? It has a case number. When that case number has a final order you're done. Okay, so if you're appointed on a petition for custody and visitation um for Joey and then you have a trial two months later and there's a final order giving custody to to dad and mom has visitation you're you're finished no matter what else might be going on. You might still be in the process of connecting to services and you know working on a child studying all that kind of stuff, but that that's why that first question

about the special education case would really hard for us the answer because it is literally that clear. Um that when that first and it's all controlled by case numbers because of the way um the juvenile court came into inception so that case number is what controls it, so even if other things are filed if you're not appointed on those other things, your appointment ends when that first case is finished. Final order, yep.

Question asker: [unintelligible] processes.. and then your...it ends...and then who looks out for the child?

Jennifer Newman: Well you you hope to God that the parents are, um and then you navigate the phone calls from the parents because they're like 'Ms. Newman' and I'm like I I'm...and and that becomes super weird, right? Because you want to be helpful, right? Because you want to make sure that they still follow through, but at the same time, so, that's a lot of 'I don't have the authority to do anything but, you know, those are the names that I gave you, I'd encourage you to call them, and schedule an appointment' but you don't, we don't have any, we only operate by step, by by court order, so once the court order is no longer a valid court order, we have no authority to do anything. And so it it it's a fine line and parents don't really understand it when you're trying to follow up but it's it's that definitive.

Erika MacCormac: Sometimes it's helpful too so if you've got private custody petitions um you know as a practicing attorney if one side filed, you wanna file, because if the other party the petitioner withdraws the case is done. And so if you are afraid after hearing oh waffling is like whoa we don't need to if I'm going filing the CHINS well now that's my motion, I'm now in control of when I pull that motion or not. Um and so a lot of times it's being proactive with what you're filing to keep the CHINS case number alive even if someone over here you can't control kills the custody and visitation case number so.

Rebecca Imholt: And and there are some caveats to that I've had judges, for example, leave me on a case even after a final order for certain number of days so that I have the ability to file something if I need to. Um and I've certainly again filed things in the effort to try to stay on a case because of that case filing goes away, then I'm out of luck and that kid can be, but but to Jen's point earlier of you learn more from your mistakes than from your um than from your successes. I had a situation where I had a ward who had my contact information contact me after the case was over and I told her I would call her back after I had an answer for her and I got an angry phone call from the dad who a, correctly, told me I didn't have any right to speak to his kid and if I did he was going he was gonna file all sorts of things. Could he probably file all the sorts of things that he threatened? No but I didn't have authority to

speaking to that child, and so dad absolutely the right couldn't and actually it hurt my relationship with that kid to the point because I didn't follow through with what I had said I was gonna do. To the point where when it came time for that child to have a new guardian ad litem reappointed and often they will reappoint the same guardian ad litem to the case if the case comes back for the court so that that the child doesn't have to relearn. I made the decision to not be that child's guardian ad litem again because I didn't I think that that child needed somebody that they could believe would follow through, and I had hurt them for that was that was my bad. You know but you learn from your mistakes.

Jennifer Newman: And your first the first part of your question is everything you can think of yeah and you know and I'm I'm not trying to be flippant but literally everything you can think of. Um in the custody visitation cases we're appointed, in CHINS cases we're appointed, you're absolutely appointed on an abuse and neglect which turns into a foster care case, you can be appointed on a family abuse protective order, you can be appointed on a judicial bypass, you can be appointed on a delinquency case as the GAL, you can be appointed on a criminal case as the GAL for the victim. I mean and I mean protective order for because there's the caveat in that statute, I think it's I think it's subsection G, is basically anytime a judge thinks it's a good idea. Um if it's in juvenile court, and so it that's that's kind of where that Jack of, you know, 'Jack of all trades master of none' comes from because it's it's everything you can think of and sometimes it's things, you're like I've never done this before.

Erika MacCormac: And that's why you reach out to your classmates and go 'I've got this, have you ever had?'

Jennifer Newman: Yeah, so, the cases are varied probably more so than in any other kind of practice.

Julie McConnell: Yes?

Question asker: I have a question in the custody context and it's regarding the issue of sole legal decision making... [unintelligible]

Erika MacCormac: [unintelligible] Yes we did.

Rebecca Imholt: So, what's your question?

Question asker: So, question it's a huge big deal because unfortunately, there are some schools who will use that relationship between the parents who both qualify as a parent and PA to play them against each other. One parent knows the child's disabilities, believes the child has disabilities, is advocating, the other parent: nothing and just wants stick it to them and so

the schools are sending IEPs home in backpacks. So maybe this scenario: dad who's willing to stick it to Mom signs it thereby initiating the parent's right to think about process or do other things because a parent has consented to what the school wanted to do. So, it can be a made huge problem especially.

Jennifer Newman: So, I spoke on that panel to the judges last the judges last time.

Erika MacCormac: Spent 90 minutes on this one topic.

Jennifer Newman: Yeah um and it. Hopefully GAL's are learning that and understanding that because you know judges don't want to make that call um for a lot of reasons a lot of them are very legal reasons about not wanting to make that call about giving one decision to you know one parent decision-making power over the other. Um, but those are the types of scenarios where the judges would give it more thought. Um you know part of what we talked about is you know what is the actual issue? You know, is it one parent sticking it to the other parent um you know or is it a religious exemption we don't want the child medicated? We so it's very you know, it's, but the judges need, the GAL's need to be able to access that information well enough to present it to the judge, so that the judge has all of the information about if you don't make this decision, here's what's playing out or here's what could play out.

Rebecca Imholt: And I would also argue that that's part of the reason it's so important to reach out to the school to get the records because I cannot tell you the number of times that I've either gone to the school to talk to a kid, or I sent the letter to get their school records and had a counselor call me back and go "oh thank God this child has a guardian ad litem, can I talk to you?" Uh which of course I want to talk to that person right away hahaha um, but if I haven't asked for those records unless a parent tells you I'm involved. Y'all aren't gonna know. The school's not gonna know.

Jennifer Newman: And actually, that brings up an interesting point about what Rebecca was talking about with you know like a child reaching out to you afterwards. I can't tell you how many times I've been called because some school staff member has seen my name in the file and I'm like, yes I was and the case is over and I can't I can't do anything. Um but I get I know why they're calling me. You know I'm on the custody visitation order they can see that I was at the IEP meeting, that you know and they're like oh yeah you're this child's guardian ad litem for life it's like doesn't work that way and the parents and the parents aren't currently fighting in court. Um but I'll be calling you if they do.

Rebecca Imholt: When they do.

Jennifer Newman: Because all because all the courts there there's really there there's a there's not really a mandate but there's a very strong suggestion that it should always be the same guardian ad litem, if they're willing to accept the appointment. That's for consistency not just for the child but across the board um for the for the the same reason they assign the same judge um to every filing that comes in on that family so.

Erika MacCormac: And it is I mean I was on the phone I guess Wednesday with one of the school board attorneys for Chesterfield because the mom had shown up at the school and I had been there to visit my my child earlier, I think a week or two before. And so of course there's my name in the file and then the mom's having a moment in her feelings um and it was really raising a stink and you need to call. And so, I picked up the phone and call the County Attorney and I was like here I am what can I do for you what do you need from me, and it was an interpretation and accuracy of a protective order that governed whether or not mom could have contact um with the child. And then what was the current legal status? Was there a valid court order? Um so interpreting and kind of confirming for them with that too. That's one of the first times I've actually had that come up, so it's always something um but yes.

Julie McConnell: One last question? Yes?

Question asker: Yeah [unintelligible] So how often do judges actually go with your recommendation? And if they don't go with your recommendation, what's an example why they didn't?

Jennifer Newman: I I'm gonna say that that's a tough question because um, um, so technically your recommendation is based on your investigation as well as the evidence we have heard in court, okay? Um I think um I think we have a lot of really good GALs, and we have a lot of really bad ones. Um you can't stop forgetting that you're one too. Um because sometimes and again this is one of those learn from your mistakes. Sometimes your recommendation the judge is like what and, it's because it's based on your investigation, but you didn't provide any of that evidence, so the judge doesn't understand what you mean. Um or you didn't ask the parent who might have provided a little more information the right question, so again the judge is like I don't know why you're and and in that case not following the recommendation to them it makes sense because they've got to make decision based on the evidence. Um and I I will say that that's one of the places where, yes. Judges do appreciate us. I do not agree that things are where they were 17 years ago. I don't think our recommendations carry the weight they did 17 years ago. Um I think judges have heard enough about 'you need to make your decision based on law and the facts that are in front of you.' Um and I

think sometimes for them it's really hard when they have a really experienced GAL for a really long time making a recommendation that doesn't quite fit with what they heard. Um, but I think they're making the right call and they're following the law based on the facts of what they've heard today not certain recommendations. So, I think it's a different I think it's a different mindset than it was 17 years ago. Um we we can bring the dirt back right because we've done the investigation that's why you can't forget to be a lawyer you can't forget, 'how do I get [unintelligible] records, I need CASA to testify she saw the mom, I can't say I saw the mom, I can do this [unintelligible] um and you can't just rely on somebody like written that, and so you can't forget that you're a lawyer. And so, I I always when I'm training young GALs I always say figure out what your recommendation is sooner than you think you should and then figure out what you need to make that recommendation make sense. Because you have to be able to back it up in time to get records, to get witnesses, um you know, whatever else you might need so that the judge has the information that they need. But I I don't I don't think, and because of that I I don't track it anymore I think there's a lot of um more often times one side versus the other if they have an attorney say I that right because it's the easy way out I I've already said it. Um, so I think they more often accept it you know as a whole than even the judges do I think the judge is still trying to put a little bit of a tweak on it and then you also have judges who will never ever follow a specific recommendation that you have like on a specific topic because you know that judge. But as the GAL, if you still think that's what's best you gotta make that recommendation. So, if you know the judges never ever gonna do week on week off during the school year but you think that's what's best in this case you gotta recommend it. Even though you know you know that judge is gonna say no every time.

Erika MacCormac: And so, in being a lawyer sometimes it means you have to I hate to subpoena a teacher or guidance counselor because I'm a daughter of an educator. I I know what it means when you have to sit there and make sub plans. So, when I have to be the lawyer and I there is no other way for me to get it in but through a direct witness subpoena, I have to issue it, but I do try to always call in advance and say I am so sorry, here's the date. Because we know the trial date two or three months sometimes more in advance, so we try to give as much notice but um no if we subpoena you, it's because we probably have no other choice, and we have to be able to support our recommendations, so.

Rebecca Imholt: I think there is absolutely that perception um particularly with say pro se parents of 'oh the judge is just going to rubber stamp whatever the guardian ad litem says.' I hear that all the time, and I will tell you that I often hear the judge say I agree with the guardian ad litem. I would posit that

a lot of times they're agreeing with me because I have road mapped them to that with my questions or my evidence that I've presented to the court, so that when I make my recommendation I can point directly to: and dad testified that this was happening and mom testified to this was happening, with the evidence shows the court just like any other lawyer with a closing argument my recommendation points to those things. I might add a little weight to it by saying 'and I've done the investigation by talking to this person this person this person' so the court knows I've done my job before I walked into that room. But if the court is, I will tell you, I very rarely ever looked at a judge and said why'd you agreed my recommendation I didn't I didn't put the evidence out there for you. And I think if you've done your job as a guardian ad litem they might agree with you and I've had judges where I've done that and they go, 'I hear you, I don't agree,' and they've done something completely different and then I have an obligation to decide if I need to appeal it.

Jennifer Newman: Mhm.

Rebecca Imholt: Because as the child's guardian ad litem, I too have to make the decision if that if I truly think that's not correct for my child; I need to appeal it.

Erika MacCormac: Mhm.

Jennifer Newman: And then your appointments are.

Rebecca Imholt: Right and that my appointment continues forever and ever and ever.

Julie McConnell: I think we need to wrap up. Thank you all so much.

PRACTITIONERS PANEL: JUDICIAL ADVOCACY

*Judge Langer, Judge Landry, and Judge Campbell
Moderated by Kevin Woodson*

INTRODUCTION

Erin Sweet: Yes, thank you so much Professor McConnell and all of our excellent GAL's for being with us today. Um, next is our third practitioners panel which is our judicial advocacy panel so we'll have the honorable Judges Langer, Landry, and Campbell moderated by professor Kevin Woodson.

Kevin Woodson: So good afternoon, everyone uh we are in a crunch for time. We have 3 distinguished guests and not a whole lot of time to to get their insights, so I'm just going to jump right in and get started. Uh, if each of you could please introduce yourselves, and and tell everyone where you preside and how long you've been on the bench and how you got there. That'd be great.

Judge Landry: Want me to start? Uh good afternoon, everyone I'm Judge Landry and I sit in Colonial Heights Juvenile Domestic Relations court and also Chesterfield County Juvenile Domestic Relations Court. I've been on the bench for nine years, and how I got there, I believe it was a miracle. And um yeah, I wrote the Vatican uh they have not assigned an inquisitor yet to come out investigate that but I'm I'm going to urge them to. Thank you.

Judge Langer: I'm Mary Langer I'm a judge in the Richmond Juvenile Domestic Relations Court. Um I took the bench in 2016, I think that's right, and uh I'm gonna, also a miracle. But um prior to taking the bench I was a prosecutor in the city of Richmond and also in Chesterfield County. Focused my practice on um complex child abuse and domestic violence cases. Um I also did a little stint at the AG's office where I met Judge Campbell for the very first time, and uh I started my career as a public defender in the city of Richmond.

Judge Campbell: My name is Richard Campbell, and I uh was on the Juvenile Domestic Relations District Court in the City of Richmond for almost 16 years and Judge Langer and I worked together there many years. Uh before that, I was a state and federal prosecutor, and also in the Attorney General's office. Uh I went on the Circuit Court in the city of Richmond about a year ago. Um went to law school here and uh teach a class on um family law procedure um if anybody's interested in that next semester, so.

PANEL

Kevin Woodson: So great, thank you. Uh and the next question is for Judges Langer and Landry in particular. Uh how would you describe your role as a judge on the Juvenile and Domestic Relations Court? What are some of your powers and duties there?

Judge Landry: I can go first.

Judge Langer: Sure, I'll correct you.

Judge Landry: Okay thank you. I have two sentences. I'll try to condense it. Um my background I'll just say is a guardian ad litem. Uh I served as a guardian ad litem for 24 years before I took the bench and um it kind of consumed my practice. I had a general practice of mostly a solo practitioner and um um that's just sort of to explain the following two sentences, I suppose. Is that what I see my role as what I've see, what I see my role as now after um uh after a few years on the bench and um the years uh before that was to, I wrote help young adults in particular to become resilient. And um I'm going to talk a little bit more about that later, but that is the overarching umbrella from my point of view. All right? In terms of and I think it replaces a word uh the word is compliance. Um which is something that we get sort of uh tied into in terms of complying, having young adults check all the boxes in terms of what they're supposed to do such as go to school, etc., etc. And um I've been trying to shift my thinking into trying to help young adults to overcome challenges, because that's why they are there. They have particular challenges and how can we do that whether it's through services or otherwise. Uh I also wrote my second major sentence is to help um. Let's see. Parents and children survive the crisis. I often uh tell parents that what I see my job is to help their children survive their dispute and um uh and secondly everyone who comes into out court I believe is at some level of a crisis and, so that's the assessment from my point of view in terms of looking at their needs and trying to address those.

Judge Langer: I'll give a bit of a more technical answer just to make sure that everyone understands the scope of cases that the juvenile court hears. Um is pretty broad, so um today for instance I did child sport enforcement um also crisis times, but a little bit different than might we might be thinking of with guardian ad litem and children per se. Um there's also custody visitation and private child support matters, um spousal support. There is the delinquency matters where young people are charged with offenses that would be criminal offenses if they were over the age of 18. Um CHINS matters so kids who are in need of services that they aren't able to access without the Court's assistance. Um attendance issues that might be also charged under a truancy, uh, CHINS petition. And then there's the adult

offenders where there's domestic violence so intimate partner violence um as defined by the code so those, those adults and children um that come before the court and so um yes everybody we see is perhaps at a bit of a crisis point and I , I certainly agree that we're trying to help them through that and hopefully grow uh from the the problems that have brought them there. Um but it is a broad broad authority and jurisdiction that the juvenile court um manages.

Judge Campbell: Foster care too. You may have mentioned that, but that's not foster care um, and I would just say for my perspective that in according to the code you probably know this the Circuit Court has concurrent jurisdiction with the Juvenile Domestic Relations District Court. So, certainly, things are appealed to us but we also have concurrent jurisdiction so all that that broad um scope is also part of what is the work of the circuit court.

Kevin Woodson: So, I have a follow-up question for you judge Campbell. Uh now that you've presided on both courts, could you tell us about some of the differences, or how your your prior work on the JDR Court has informed your work on this court?

Judge Campbell: Well, it certainly has. I mean I think one of the reasons that the general assembly asked me to serve when they did was because it had been since my predecessor Judge Jenkins went to the Circuit Court that someone had gone from our court to the Circuit Court, and there are um particularly in issues like foster care um to a lesser extent uh uh support, but probably more juvenile criminal matters there there is an expertise that we have in the juvenile court that is just particular to what we do. Um so that has helped me out a great deal um and it's helped me be able to I was just relating to to my friends uh be of assistance to my colleagues who may not have had as as much experience in in what we do. Um certainly a court of record, and so when you're in the Juvenile Domestic Relations Court, very high volume um, and you know it's million served. And so uh it's it's um I don't know that I think the pace is as different as it is just being mindful that you're on the record uh and things are a bit more deliberate um, but the issues are really similar um. And it's interesting when you have an appeal remember in Virginia we have trial *denovo* appeals from the district court so we're really starting over so I'm using the very same things that I was using in the Oliver Hill Courts Building and the John Marshall Court Building, it's just a new day.

Kevin Woodson: Thank you. And so, the next question is sort of a broad question for whoever wants to take a crack at it and it's when the facts of a particular case require you to balance difference or even conflicting interests

between children, parents, uh guardians ad litem, uh DSS, etc.. How do you go about doing so?

Judge Langer: Sure. [unintelligible].

Judge Landry: All right um what's the load star, the best interest of the child? That's where your focus needs to be, that's the way that I see it and yes everyone has um um interests in it. I had um a parent who filed a motion to amend and what he cited as the reason why there should be a change in the custodial arrangement, is he said because I deserve as much as the other parent does. And how I responded to that is I said um sir uh it's not about what you deserve, and ma'am it's not about what you deserve it's about what your children deserves. So that's I think is the load star in terms of trying to balance the various interests is you have to focus on the interest of the child that's involved.

Judge Langer: And there's really no other answer than that right that. That's what is, that's the reason we're sitting in the spot that we're sitting in, is to try to discern what is what what structure of whatever matter we're taking up, foster care, custody visitation, a delinquency, um uh disposition is serving the child's interests and so that. There shouldn't be a conflict of interests. There might be different opinions about how that interest is served, but everyone who's working in the court should be trying to explain to to me the fact finder why their position is in the best interest of the child. And I you know, we don't have a lot of lawyers, a lot of lawyers who appear in custody and visitation cases in in the Richmond Court. I think Chesterfield has a great deal more, but um you know I often have a lawyer who just says it's the, this is the best interest. I was like well that's my, that's what I'm going to decide. I understand that's what I'm supposed to do. I need some facts. I need some evidence. I need some information that's going to help, help me agree with you. Right? If you're right that's great, but tell me how that is and or something that I can at least consider, so that I'm certain that um the best interests of the child are served. You can't, you can't just tell me, and I often see the pleading that is what's the chip you know. Why the change to, to the custody? Why the change to the custody order? It's in the best interest of the child. And again, I'm like well that's kind of the whole point so much like when people are seeking protective orders and they say, "they threaten me." I said well, how about you tell me what they said and let me decide if it's a threat. So right, help me, give me some facts and then see if I can come to the same conclusion, but, but help me.

Judge Campbell: Yeah, I I was with one of our colleagues my former colleagues at the um JDR Court and she was saying that in either her first for one of our confirmation hearings that one of the legislators said about being

a Juvenile Domestic Relations District Court Judge, it's just the best interest of the child, how difficult can that be? Well, it's very difficult. Um and and what what uh my friends and colleagues have indicated here uh tells you why. I do think to your question there are competing interests that then you have to stack up against as you're determining the best interest of the child. So, for instance, parents are, they have a primacy of interest and we run into that a lot in Richmond because we have a lot of grandparents with deep abiding interests in their grandchildren. And sometimes, we have to look at them and say you had your turn and mom and dad are now rearing this child. And you may think you know better than your child, but you know that kind of thing. You have the competing interest between parents sometimes and DSS, and you have kind of an ongoing struggle of is the child going to go back home to parents who maybe have some challenges or is DSS on a road to either you know long-term foster care or adoption? So, I do think you have these things that stack up against, you know what competes against uh each other uh for the best interest of the child.

Kevin Woodson: So, uh I guess moving to the the children in need of services context. Uh could you explain as you see it, uh why is it important to ensure that young people in need receive the right services? So, what are the possible consequences of of getting it right or or children falling through the cracks and not getting those services?

Judge Landry: Um again I tried to condense it into one sentence. Um my response is that there's little possibility of appropriate change without appropriate services. And uh so, ya if you don't match up the services with the actual need or if you don't understand the need in the first place, what chance do you have? Well, I guess you have a blind chance that you'll get it right but um so that's my response.

Judge Langer: Well, there's an escalation of problem, right? I mean what what's the what is the need that the service is being addressed to? So, I mean mental health issues, we we've had a pretty good example this week of what happens when mental health goes unchecked right um or untreated and and access is a big issue for many of many of the services. And so um an exacerbation of the problem, even absent of curing, actually addressing the problem, we've got to try to keep at least the status quo. Um, but we know that uh delinquent children will dive deeper into the system and and that's not a good outcome. Without the proper services so that trying to avoid sort of this checklist of we'll do these three things for every child. That's not every child needs those three things. They may need another eight things. They may need one of those things. They may you, we've got to be matching the services to the needs of the individual child in order to avoid any further problems and that's probably the hardest part is to not kind of fall into some

kind of cookie cutter response.

Judge Campbell: Yeah, I think I think that in a city like Richmond a CHINS um petition be it child need of services or child need of supervision, you got to think about the fact that by the time a parent or a guardian or a school has gotten to where they're they are swearing out a court paper for help with a child, things are at a rough place. And people need help. And you know we handle our CHINS in such a way that we are fairly clear, uh that this is not you haven't been charged with a crime, you know. I used to have my my uh young people either contest it or not contest it, not plead guilty or not guilty and part of the reason was because you just need to release those services. These people just need some services in place. Judge Langer came up with a PASS docket which is related in in terms of getting the citizens to a place where they can avail themselves of being you know uh school resources for a true child or a child that's not being sent to school or mental health services, but it's hugely important in terms of of the Court acting on it because when people come it's really a cry for help.

Kevin Woodson: And I guess to to back up a bit. Uh what kinds of actions or services can you provide? So, either uh you know in the CHINS, in cases of delinquency cases, or uh with respect to CHINS petitions. What kind of services do you provide or can you provide?

Judge Landry: Lots. I think the first step is assessment. You have to really understand what the needs of the family are and particularly with regard to CHINS because usually I think it's the tip of the iceberg is what you see, a child's not going to school. All right, that's not the problem. Okay there's a lot of underlying problems, typically it's mental health services, it may be lack of medical care. Um it may be see, what else I was oh well, parents. Parents may be a very dysfunctional household, I've seen a lot of that and um so then you try to match up those services after you do that initial assessment. Whether it's a mental health assistance for the parents, um I've seen a lot of effectiveness with parent coaches. Alright, because uh when you have a dysfunctional, I shouldn't call them dysfunctional parent, but parent who has a lot of challenges in terms of just scheduling or those sorts of things. Attaching someone who is their own coach as to how to help out, you know not only are they handing them a piece of paper saying here's a here's an agency you can call and seek help, but to help them in terms of: well let's sit down let's plot it out in your phone as to who you need to call for what, and in fact let me make the first call for you and calls up the pediatrician's office, :look we'd like to bring in Johnny and mom's right here next to me because Johnny needs some sort of assessment in terms of medical care.” And that and um and then I think the you besides medical, mental health, parent coaching um and with the first part being the assessment, housing is also a

critical need. And I think I know in Richmond it's a critical need, and I know in Colonial Heights it's it's a real issue. You know people are subject to eviction and um and they're in and out multiple homes within a short period of time. That really affects a child in multiple ways.

Judge Langer: So, so my first answer to that question is that I don't provide services right. We are not, we are not the people who provide services. I am not an expert in service providing. I have a pretty good idea of agencies and and methods of treatment that are available in the community that I, that respond to different needs, but it is about getting families to professionals who who can do the work. And the court doesn't vet those people but for delinquent, say for children on probation, right the um the court services unit has vetted um people who have applied to be vendors of services. And hopefully confirmed that they are doing evidence-based practices with current treatment methods that are effective and that they are following through with ongoing evaluations to determine that the people who say they're serving the kids are serving them, that they're showing up when they say they're showing up, they're giving them the hours of of service that they need, and so it is about it's about Marsh-, our role, my role I believe is to give the incentive to go and do and make that make the assessment appointment. Make it. Get to it. Follow through on on the appointments that are needed. Substance abuse is another avenue that wasn't mentioned. But right there's great many many many avenues but encouraging, being being the the carrot and the stick that helps people admit or accept that this is something that's needed so long enough that they can see the benefit and they'll take it on and do it themselves.

Judge Campbell: Yeah, I I mean, I think you know sustaining a CHINS petition releases basically funding. It's the the money is then going to be there for the child to have the services. Um I I think that you can see here too that there's layers here. Um there are parents that need services and I am a big one on asking where are the parents because too many times in the cases get to my court, we have a really bad situation with a young person who's committed a really bad criminal act. And the question does need to be asked: "where were the parents?" Well, when we're at this juncture, perhaps we can put some of these services in place to make sure the parents are coming to the table but then we've got services for the children as well. So, a lot of layers and as Judge Langer says, it's a matter I think of getting those resources to, to the families.

Kevin Woodson: And, uh, Judge Langer, could you tell us more about the PASS uh, docket and your work with that?

Judge Langer: I would love to. Um, this is my pet project. Uh... Professor

McConnell um graciously donates her and her students' times to help to help make this work. Um, and it's in her work is an integral part of it. So, um, as I said, I was a prosecutor in the city of Richmond before I took the bench and I sat on. I don't, I can't count the number of committees and task forces and working groups and whatever other phrase you can put for people sitting down to talk about... truancy issues and how we how we would improve the attendance in Richmond Public Schools. And in many of those meetings I would say: "I think we should start with elementary school kids," and if we don't change what's happening in elementary school. I don't think we're gonna really make any difference, and people would get mad at me and tell me I was throwing away a generation of people and I didn't really mean that. I didn't mean don't do anything about them. I just meant why aren't we doing something for elementary school kids. And so, when I took the bench, um, and our bench and out court became fully, um the bench became fully filled when our fifth judge came back, there was a little bit more freedom in some of my docking time. And so, I went to um the person at Richmond Public Schools who had been in the same number of work groups and discussion groups and task forces that I had been and was equally frustrated with really never getting to really try something new and different, and I said: "so how about we do this now?" And she said "Can we really?" and I said "Well it's just you and me talking, so, you know what, what would it look like, if we could do the thing that we really want to do?" And we came up with this idea that we would hold um a docket outside of the courthouse we would have it at a school, so we would show parents that schools were the, school was where we wanted everyone to go. We would focus on um elementary school children up to the sixth, seventh, I think we've had a couple of eighth graders because of... just because kids need siblings and things, but primarily um elementary, middle school and we would invite um service providers to come, we call it our vendor group, to come to the same location. Um, and, and we would connect them to these people on that day uh so our RBHA, is there, social services is there, VCU health is there, um all of the service providers from within the school system so community schools, their health people um,... their security groups, um uh that trauma informed care network, um quick offered to help offer some resiliency and trauma informed things for the parents. Um, who am I missing? Mckenny Vento for the housing issues – the housing issues so transportation can be arranged for kids. Uh we also um, Central Virginia Legal Aid there because particularly post, well, I guess you realized it pre-covid, post-covid is another whole discussion. Um Central Virginia Legal Aid came for the eviction issues, because so many of our parents were really unstable in their housing. So, the petition is that the parents are identified by the school system as not having enrolled their children properly or not the kids not attending properly and by

not attending properly I mean most of our cases have 50 to 80 absences. There's only 180 days in the school year, by the way. Um, so, they're identified, a petition is brought through the Court that's called a 'parental participation petition,' not easy to say, um that says the parents have not engaged with the school properly to ensure that their child attends properly and you can give a fine or other things that are needed by the court so we go to the other things needed by the court. We order, I order, the parents to attend to meet with each of the service providers and they have to provide a little checklist they have to um and then obviously correct the attendance issues. Ms. McConnell and her students offer counsel to the parents, they're in a pro bono fashion representing the parents, so that they're getting somebody to talk to, to say, you know, "I don't know why I'm here, nothing's really wrong." And I think Ms. McConnell helps them understand that maybe something's wrong, sometimes. Um, but really when we talk about identifying layers of issues um these are the most complicated cases that I hear, I mean and we used to do them in our court in 10 minute segments and these people would come in and they would just drop all the stuff on us and we're like "I got 10 minutes! I got 10 minutes!" And I got... I got nothing, right I, just don't have what so um we're. Having the people right there um I think there's been some real boost in the use of mental health services because of it I mean, um we've just seen, we've seen, a lot. I think the first docket after Covid, so about two years that we didn't do it. Um, I tell the story all the time, this woman's in court she's holding this baby and she rocking this baby, rocking this baby, rocking this baby, she gets a little worked up and she says to me um "I don't know why we're here talking about you know Johnny...what's the big deal? I have two other children. I'm not sending them to school either." And everyone, all the grownups in the room for, all of us, all of us are like "Uh what is she talking?" And two of her children had aged into school age during Covid. Richmond Public Schools didn't even know about these two children. The social workers like looking at me going "Can you ask their names?" And so I mean the depth of these problems right so she's like "What's the big deal? You're not worried about the other two." Well we kinda are now that you've raised it, so let's try to talk about what we're gonna do for all of your children, right? But I mean it is just you can't imagine, you really can't imagine um the things that people are dealing with, and also trying to get their kids to go to school. So, I sometimes don't think it's very effective, but um we had a lawyer who just joined us. I was trying to recruit her to do something for the PASS docket, so I was like "come watch." And uh she's like "Wow this is, this is so great. This is so different." And I thought okay, we've lost our we've lost our will, our ability to see that, so it's nice to have a fresh set of eyes that say "I think this is different and I think this might really do something." And so, then I

said “What are you going to do to make it even better?” And we’re so, we keep bringing different people in and trying to address needs that, that become, that are identified to us from these parents. I need people to walk kids to school. If anybody wants to help children walk to school, that’s what I need.

Judge Campbell: Yeah, I would like to just say we, we in Richmond um and and not every jurisdiction in Virginia does this way, but there’s one paper you file for the younger kids. That’s a failure to send your child to school which means the parent is having to answer for that. Truancy, is when you know, Matilda is 16 and we’re not going to look at mom anymore because she can get herself to school and the reason she’s not going to school is probably something to do with her behavior more than mom’s behavior. But to to Judge Langer’s uh, point before the past docket I would have these failures to send uh cases and you can always appoint a guardian ad litem according to code, so I would at least start getting in there and I would put a guardian ad litem on for the child and you know, as I think you indicated, the failing to send the child to school was just the surface I would say better than half those cases ended up being foster care cases, cases with mental health issues, CHINS issues, and so it was good that it gotten brought had been brought into the court, but the real issue was a family issue was a bigger issue the kinds of things that the PASS docket is addressing and just keep in mind these parents oftentimes are willing to go to the PASS docket to do elementary school stuff. The truancy piece gets harder, because a lot of them didn’t go that far in school, so they’re okay with talking to school people when their kids in third grade but by the time we get to ninth you know what they didn’t do ninth grade either, so I you know, so we have a lot of issues with that.

Kevin Woodson: Well, thank you. That sounds like a pretty remarkable program. So glad to hear about it. Uh, Judge Landry could you tell us more about the Resiliency Award for successful CHINS participants?

Judge Landry: Uh, certainly. First, I hope I get there. All right. As soon as possible, talk to Judge Langer about it and I think it’s an absolutely fabulous idea. Um, we’ve got some particular challenges up to 10 years ago I think, there was one, there was one truancy officer for the entire county. Chesterfield county – 365,000 people I think, and you had one person trying to handle all the cases; it was impossible. That’s no longer the case there’s more, but there’s some um challenges there in terms of trying to get something done and it occurred to me. Um my experience as a guardian ad litem uh with CHINS cases I was appointed a number of times in those matters is that um I had one that went on for three years and it was like this: every three months we would do a review, and um, and, Johnny uh wasn’t

going to school anymore and so the Judge would say “Please go to school, and if you don’t I’m going to do something.” Three months later, same speech. Three months later, same speech. You’ve got everyone coming in, um, who’s involved, there’s a number of professionals who are trying to provide services in that, and uh it’s just not working. And I remember one case where um a young man, he, he uh was testifying and, and I asked him the astute question “So you started going to school? Why is that?” And he said: “I was tired of coming in court.” Well, that’s good reason. So, I guess we could do that and spend three years of court time um traipsing in. I just see that as torturous for the families and no point; a waste of resources. So, I sat down with, um, the agency. I decide to experiment in Colonial Heights because there’s a lot smaller community. You can basically walk around the courthouse and gather all your people together immediately. And I sat down with um the inter-agency team members which is um in CHINS. You convene what’s called inter agency team and it, it is you know, mental, uh public health, mental health, court services unit, those folks, schools that are involved and so let’s try a different approach. The code looks at three different stages really in terms of CHINS matter: Adjudication, disposition, and review all right? I said, “let’s focus on coming in getting everything front loaded all right?” Right in the start and then trying to resolve it one way or the other in a six-month time period, and if we don’t succeed by then we let it go. And um, so that’s what we started doing, and what we wanted to do was to focus around helping the young adult because quite frankly as, as was mentioned in those matters, typically you’re dealing with high schoolers ok. Or they’re high school age, ok so they might have repeated the seventh grade three times. And um so they’re there – what can we do realistically? Let’s focus on trying to help them uh meet their challenges okay with whatever it is. And um, so that’s what we started doing and at the end um as they, and what I have found is that um you can succeed um within three hearings, that’s possible, maybe four. And, uh, where a young adult, because of the services that are coming in they’re helping them, and what we do is um I award them a resiliency award, and we have a celebration and and I do a kicker beforehand as they start to succeed and I turn to everyone in the courtroom and I say “I think we should have a celebration if he continues like this” or she continues like this. And then I ask the young adult, “What’s your favorite food for lunch?” And it’s always pizza so it’s easy and um you know “What do you like to drink with your pizza?” And I find that out and then “What’s your favorite dessert?” and they tell me that. And so, we have a little celebration later. I dismiss the CHINS. And the, um, this is what really gets them, okay. This is the resiliency award. They are handed a plaque – I’m going to try not to start crying. And the first one and it’s held true in almost, um, well at least half of them. Award this and the young adult just starts

crying or holds it back and says “I’ve never received an award before.” And what I tell them, is that “I want you to put this someplace, okay, that you can see it every day and you can tell yourself, ‘I have overcome. I have done it before, I can do it again.’” And the challenges are different, you know? Um a lot of kids with mental health, especially now with Covid and just you know, if you’re an introvert and you had to go back to school, and you’ve got a lot of things going on at home. You know you feel really uncomfortable and your anxiety is really high, depression. You know depression is out of sight in terms of young adults now. And um, so it is, it’s a major, major act of resiliency and in terms of being able to do that. And their parents or their guardians, I mean it really impacts them also, and um, and each situation is different. But there’s that sort of commonality in it in terms of trying to overcome that young adult themselves making the decision to overcome the challenges that they face. And we’ve had um we’re about to do uh next Friday, we’ll do our 12th, uh, celebration and um, which to me is um, you know and 10 of these are in Colonial Heights because that’s where I started to focus on and for a community of 18,000, and uh to be able to award 10 of these and have success within uh 11 months, um, is really extraordinary, from my experience.

Kevin Woodson: I guess, uh, a more, a less inspiring but important and informative question for those in the room who are considering uh practicing in this area is uh, if you all could tell us a bit about guardians ad litem uh, specifically how do you go about assessing their reports? What kind of considerations determine how much weight you grant to a particular GAL report?

Judge Campbell: Well, we continue to use Guardian Ad Litem in the uh Circuit Court. And oftentimes when a case is coming out from lower court, uh, the guardian ad litem will continue on with that case there are cases where sometimes the attorneys. Sometimes even the lower court will say, “you know what, maybe somebody else needs to take a look at this,” um more often than not, the reports at least in the city of Richmond are given orally, verbally, um we do have some given in writing. There is some benefit to it being done in writing for those of you all who may go on into that kind of practice but it takes a lot of you know time and preparation to do that. Um sadly, I have to say that I just want to guardian ad litem that’s done their job, that has gone and seen the child recently. That can give me a legitimate, recent um, report. So, I always open any case I have with a young person by looking straight at the GAL. The first thing we do is to hear sort of a “How are things going?” I don’t want their whole report, but you know that gives me an immediate uh sense of how recently they’ve seen the child. Because they’ll say, oh “I just saw him yesterday” or “I’ve saw him last week,” or

“I’ve seen him three times” or “I haven’t seen him in a while.” Um, and uh in terms of how much we rely on them um, you know this is really throws you to some of the fundamentals of uh practicing law, but their reputations are fairly uh quickly known by the Court. And so, uh, there are GALs that I would take everything they’ve said and probably do everything they said or most of it. And there’s some, not so much, now you know there’s some great GALs that I will not necessarily always agree with, and that’s because we do what we do every day, and we sort of have this unusual situation of seeing so many cases at some point in time you kind of know what’s going to work and what’s not. Um but, um and I always tell families, “Don’t necessarily think that just because the GAL says it, the Court’s gonna follow it.” Um, but you know, there are definitely, when when uh, I had a clerk that worked for me for a better part of 10 years and um, without me ever having to say so that clerk knew who to appoint as a GAL, and who I was not going to deal with very easily. And not because I didn’t like them, it was because they didn’t serve the child well, they didn’t do their job, you know, and so um we need good GALs. I know you’re continuing to have a need for them, it’s a very important job um. Um but that’s some of what I would say, you all have.

Judge Landry: Yeah, we need lawyers to serve on our court appointed list so if any law students out there um if you're going to put out a shingle shingle, uh, feel free to come help our court, help our families, and and learn a lot really fast. Um but I agree with everything that judge Campbell said um but here's, uh, so here's it's a judicial perspective right? So, I'll tell you, it is startling when you take the bench, all the things that you can see from that seat that I didn't know judges could see, like the facial expression on every single person in the room. And so, um I really have to go back to some of the cases I tried and wonder what kind of faces were being made behind me that the judge saw. But that would keep me awake at night, so I try not to. But, when a a lawyer, particularly a GAL, starts talking, and everybody in the room is kind of going (questioning face), right? It makes me question if the information that I'm getting is particularly accurate, or current, or something right? There seems to be something that's wrong. Now sometimes people just get angry because it turns out the GAL is telling me something they really didn't, they hoped would never be said out loud. And that's a different face and I can access that one too. But, um, it's important to know that that you are, if you're working as a GAL, that you should be doing your own independent work and that that is the work that the court wants to hear. Because I'm going to hear from other people in the room. I'll hear from Mom. I'll hear from Dad. I'll hear from social workers, right? I I I don't need a you know, “that all said,” as if that's your report. Uh, I need the work of: what's going on at school, what's going on in a medical condition, what how is the treat-, you know, are are is the treatment that the Court's ordered being

followed through? Is it being effective? Are we heading in the right direction? Is the child safe, and happy, and healthy, right? The thing that that that I can't get an unbiased view of from the other parties, um, and I know when I was practicing law as a even as a criminal lawyer when there would be a GAL I would have a conversation in the hallway and then I would walk in, and suddenly the GAL is parroting the exact thing that I just said to them in the hallway and I thought, 'They're getting paid, they're getting paid for that, right?' (laughs) so um just I mean... I think as Judge Campbell started his comments, do do the work and then tell us about your work, that's what we want to know.

Judge Langer: I think I'm just going to add two things. Uh, first of which is, how I assess it is I listen to the questions posed by the Guardian Ad Litem of the witnesses. That tells me a little bit how much they have done, and for me that's the key point. You know if they're asking basic questions and it's obvious that they really don't know the answer, um then that tells me something, all right? And um, the second thing I just want to point out is that um I think it was 2020 um statute was amended in terms of the requirements for Guardians Ad Litem and that they're supposed to, uh, file a certification form which says that they've complied with the standards of performance but also how much time they have spent in talking to their client, the child, right? And so that's another, uh, I think important um bit of information. I leave it at that.

Judge Campbell: Bear in mind too, in Virginia, uh Guardian Ad Litem is telling us what the child wants, all right? We we don't have a lot of "Kramer versus Kramer." We don't have kids in the courtroom and and and uh you know, at least in Richmond, we don't relish taking them in Chambers. A lot of people (say): "You talk to the child, you talk to the child!" That's a very traumatic thing for a child to do. And so generally our practice is to not do that unless we have to. There are times when you need to. But that GAL needs to tell me, I mean, they may not agree with it, you know, Mary may want to go live, I always say, at Disney World if she had her druthers, um but but she needs to tell me that's what this what and and good GAL's will say that. You know, Mary would tell you she wants to live with Mom – I don't think this is best for her judge because I've done all this work and she needs to go with Aunt or father or whatever. But um you know that's a very important role. And if they don't know their Ward, if they haven't talked to them, then that's a terrible disservice to the child.

Judge Landry: And I have to disagree slightly. And, um, respectfully. And we're doing a different approach in Chesterfield. Um, and we've um, the bench has adopted a protocol to have children involved in the dependency matters, so it's not too much of a disagreement. But,

Judge Campbell: with private custody.

Judge Langer: Yeah.

Judge Campbell: I don't, we definitely have them in dependency cases.

Judge Langer: And and we're not going to um, at least at this point, um do that, but we think it's very important for a child in in foster care matter to have a say, and, uh, to be involved, and to be in the courtroom, if they want to be in the courtroom, or to part-, have the ability to be able to participate in some fashion that they feel comfortable with. It's always their choice, all right? But, um, I've just gone to too many conferences where you have, um, adults now, but who went through the system when they were children, who talk about how they weren't talked to, all right, by anybody. They never had an opportunity to talk to the judge, never knew what was going on. And basically, someone's going in there and making representation, "Oh well it's too traumatic to have them, uh, come in." And, um, our point is it's extremely traumatic not to have them involved. It's their life. They need to have a voice, and they need to be there if at all possible. And, uh, we've um, there's been some adjustment in terms of uh trying to change people's practice in terms of that. I had one matter which was a um it was going to be a change of goal to adoption. And if you know anything about that, well if you're 14 or older, you can undermine, not undermine, but you can say "no" to the adoption. So, it's kind of important to understand what the person, um, has said. Uh what the, um, uh, child believes in that instance. And um, it became as I was quizzing the folks um, on this change of goal, um, "Has this been discussed with the Child?" You know it's dead silence in the courtroom, all right. Uh so no one has talked to this 14-year-old, who is articulate, who is smart, who I knew wanted to be involved, okay? You want to object to a lot of things. I I knew that, and um no one had talked to him about the change of goal, and then I got some push back from the department. I pushed back harder, and um I continue the matter down. And said, "This is what's going to happen. Um, you're going to talk to this young man about the change in goal, and I want him to be able to participate however he wants." And he did, subsequently. He participated by phone, and it was absolutely great, because he had an hour long, we took an hour, imagine that, um on the phone, and listened to him. This was in Chambers, okay? And um, and he told me, um, all of his hesitation, we talked a lot. His Guardian Ad Litem was present. His CASA was present. And it was, I think, a critical piece. And that switched everyone's mindset in that case. And we're trying to do that. Um, we have assistance with the national, um, Council for Juvenile Family Court Judges. Uh, ABA. We put on some workshops with all our stakeholders to get everyone on board to how they can fit into that process, so that we can have children in those dependency matters participate and have a vested interest in

it, and so they become the focus. See what I mean? Okay. And they become the focus as to the adults just coming in with their best interest being served.

Judge Campbell: Yeah, and just to be clear Richmond is completely on board with that. I was meaning private custody cases. We we've done that in dependency cases for 20 years I think so.

Judge Landry: Thank you.

Professor Woodson: Well great. Uh on that uh note of agreement I think we have to end. So, Judge Landry, Judge Langer, Judge Campbell, thank you so much for taking the time to share your perspectives.

Nicole Evans: Thank you our honors and Professor Woodson. We will now have a break until 2:55.

WHAT TO DO WHEN THE SCHOOL SAYS “NO”

Melissa K. Waugh

INTRODUCTION

Erin Sweet: All right, if everyone could please grab their seats. Our next speaker is Melissa Waugh, presenting on “What to do When the School Says ‘No.’” Uh, Melissa Waugh has practiced special education law for the last thirteen years and represents parents at IEP meetings and mediation with state and federal complaints, and due process hearings, and in federal and state litigation. Her representation includes matters arising under the IDEA, the ADA Section 504, and Title 9.⁷ She and her husband are also the parents of two amazing children who happen to have special needs. So, she understands firsthand the complexity of this area of law, and the dire need for more parents-for more attorneys representing the interest of parents of children with disabilities in our schools. Please welcome Miss Melissa Waugh.

SPEAKER

Melissa Waugh: Alrighty, good afternoon, I'm back. Sorry about that. Uh, you thought you were rid of me, but no. Uh, and this time the crazy people are giving me a whole hour. So, uh, but what we're gonna talk about today—although I don't see my slides up here, so, um . . . oh, they're in process, uh . . . there we go! What we're going to talk about, uh, for the next hour, is what we can do when the school says “no.” And there are lots of things that the schools can say “no” to parents on. Uh, “no, your child isn't eligible.” “No, your child, um, uh, it's not a manifestation of your child's disability. We're going to go ahead and fully discipline the child.” “No to a good transition plan.” “No, we're not going to provide you with data.” It just—there's a lot of things that we can get no's to. Um, but we're not without, uh, recourse. There are things that parents can do. And there are three primary laws that, um, that I utilize in my advocacy work, particularly with the schools and when it comes to IEPs and eligibility. Um, one we—you've heard about a lot today is IDEA. But there are two additional laws that provide rights to children with disabilities and their parents and that is Section 504 of The Rehabilitation Act, and the Americans with Disabilities Act. And I, um—early on in my career doing special education law, um, someone—I saw this in another

⁷ Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. (2004).

presentation, this Venn diagram—but it really helped me in one snapshot to understand kind of the scope here, right? So the black box are all students with disabilities, and that the majority of them actually qualify under Section 504 in Americans with Disabilities Act or ADA. And then there's a subset of those students who also qualify under IDEA. Um, but it's important to remember that all the students who qualify under IDEA will meet the definitional requirements to qualify for protections under 504 of the ADA. So, that's why it's so important that we remember we have those tools in our toolbox as well. Um, so sources of authority are, of course, the federal statutes and laws that are the three, in particular, I just talked about. Um, there are federal regulations that are in the Code of Federal Regulations or CFR. Um, we also have judicial decisions, um, from federal courts, from state courts, but also from due process hearing officers. Um, you can, uh, rely on—on those and cite those in—briefs, and state regulations, um, and then guidance documents from federal and state, uh, organizations, such as, um, within the U.S. Department of Education, you have, uh, the Office of Civil Rights or OCR. You have OSEP, um, OSERS as well, and then in the Virginia Department of Education, they will also produce guidance documents. Um, but I think it's—maybe it was LaTonya who said, you know before, that she learned in her Education Law class, um, while these don't have, um, bind—there's not binding authority, um, but they are precedential in the sense that these guidance documents, um, can guide the decisions particularly of our administrative due process hearing officers, um, as to what the school district should be doing.

All right, so the first law we're going to go through with the administrative remedies, um—what you can do when the school says “no”—is IDEA. There are several common areas of disagreement that we see all the time, um—and I kind of put these in order of, kind of, where they happen chronologically. The first thing is “Child Find.” School districts have a legal obligation to go out into the community—not just their little school buildings, okay, but out in the community—and identify all children suspected of having a disability, and evaluate them for special education services. That is actually their legal obligation. Yeah, but, realistically, that's—that's not really happening, um, a lot, even within their own little school houses, right? Parents are having to fight schools, uh, to get them to even evaluate the children for eligibility. But, technically, that is their requirement—even children who are homeschooled, even children who are in private schools. Um, so that is one area that we see a lot of, um, disagreement. And, uh, let's see, the next one is eligibility—failing to find a child eligible who, you know, in our humble opinion, would otherwise qualify. Um, a lot of times that comes in the evaluation process. The school district isn't fully evaluating the students in all areas of suspected disability. Um, that can contribute to this failure to find them eligible in the

first place. Um, sometimes it's finding them eligible inappropriately as—I think he's gone now—but Dr. Geller was talking about this morning and—and I mean I had this case recently, with intellectual—actually we had a mutual friend, uh, with intellectual disability, that a lot of times the schools are looking at just an IQ score and not looking behind the score. Um, and part of—in the DSM-V, to be diagnosed with an intellectual disability—also in addition to having an IQ score of a certain level—they also have to have, uh, uh, subsequent deficits in adaptive functioning, and there's, I think, about six areas of adaptive functioning. So anyway, sometimes schools get it wrong—finding them eligible, but eligible in the wrong category for the wrong reason. Um “Independent Educational Evaluations” we talked about a little bit earlier. That is a—one of the two, I think, most powerful tools in a parent’s toolbox. Um, independent educational evaluations are paid for by the school district, but the parent goes out into the community and pro—and finds an independent—in other words, no affiliation with the school—provider to then do the assessments that they want on their child. Um, FAPE, the, uh, Free and Appropriate Public Education, which is the requirement—that's the goal of the IDEA. And so, uh, areas of disagreement or whether, um—first of all the IEP that was designed, did it actually meet the child's individual needs, and then more importantly, um, was that IEP actually followed? Um, and for, you know—once the parent and the school district agree “this is what needs to be done,” what is in this IEP and this document, that's what needs to be done to confer a free and appropriate public education or FAPE on—on the child, when the school doesn't follow what's in that document, then, by definition, they are not providing that child with a FAPE. So, those are some of the areas, um, that we deal with, um, through administrative remedies. “Least Restrictive Environment,” um—this goes to the heart of why the IDEA came about. Um, some—some of you may or may not not know the, um, disability rights, and the IDEA, and—these all grew out of the Civil Rights Movement. Um, those cases came about about the same time we had *Brown v. Board*, uh, *Brown versus Board of Education*, and, at that time, as I'm sure everyone in here knows, that's where the U.S. Supreme Court said “separate but equal is not equal,” and so, um—in the educational context based on race—and so, a lot of families at that time who had children, who were being routinely excluded from the public school system started saying, “Wait a minute, our kids are being housed in these facilities where they're not getting any education.⁸ Um, how is that any different?” And so, that was kind of the evolution of, um, the—the disability rights movement, and then, of course, the development and the ultimate passage of the IDEA. But “least restrictive environment” means, these students should be—and with disabilities—should

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

be educated to the greatest extent possible and appropriate for that child with other non-disabled children. Um, and it—it can be a bit of a slur in some circles, but, you know you may have heard the word “inclusion.” But the idea that we want children with disabilities to be educated right alongside children without disabilities to the greatest extent appropriate for that child. And it's not appropriate for every child and, for some children, the appropriate placement might be in a separate classroom, with a smaller class size, more one-on-one assistance, medical care, whatever. It has to be based on the needs of the child. But the ultimate thing is: where the IDEA came about, is that we were trying to combat this idea that any child with a disability needs to be segregated, needs to be put aside, in a warehouse, somewhere else, and not, you know, we should, our normal children shouldn't have to be exposed to that. Alright, that's what we're fighting. And so, the least restrictive environment, again, is the core of what we do. It's making sure we're, um, including kids with disabilities as much as—as possible and as appropriate. The IEP: failure to develop appropriately ambitious goals—that's an industry standard; failure to implement it with fidelity, I talked about that—they didn't do what they said, that they agreed the child required; procedural violations. “Parent Participation,” it's got to be meaningful, um, parents have rights. The IDEA created procedural safeguards that are protecting the rights of the parent as well as the child. And then “Discipline.” Um, I think it came out a couple times today about these manifestations of a child's disability. There are lots of protections for children under the IDEA in disciplinary matters. And so, um, uh, part of that is, after—on the eleventh day, that, again, maybe, uh, could be consecutive or could be cumulative, but on the eleventh day of the child not being in their regular placement—suspended, whatever, in-school suspension, out-of-school suspension—that triggers these manifestation determination review hearings. And, if it is determined that the behavior that is causing the disciplinary action is a manifestation of the child's disability, then they go right back to their placement. All right, otherwise, they get, with some exceptions, treated just like any other student, um, as well. So, these—we see a lot of discipline cases that come out. “Stay Put,” um, I mentioned that earlier this morning, but that is the, um, the idea that during any kind of litigation of, uh, a special education matter, the child stays in their current educational placement—the placement that the parent last gave consent to. Um, that's called “Stay Put.” That's the federal definition. In Virginia, because, um, consent is required to any change to the IEP, to any change in eligibility, um, we take a much broader view of “Stay Put.” Um, you don't actually have to be litigating a case, um, just—from the point the parent decides not to provide consent and there's a point of disagreement, there's “Stay Put.” And that's why—I was saying earlier with the partial consent—it basically maintains the status quo. The school can't change, without the

parent's consent, what's happening. And so, we refer to that as "Stay Put" or "stay put on that issue." Um, uh, okay, I think that's enough about that.

So, uh, when things get so bad that the parent feels like their child, you know, can't be educated—or worse, isn't safe, um, in that school district—the parent has rights to remove the child from school. Um, of course, we all know the option of homeschooling, the parent could certainly homeschool. The parent could certainly place the child in a private school at any time, even if they don't have an IEP. But what's unique about children who are protected under IDEA is that, if a parent has to remove the child from a school and place them, say, in a private school, if they followed these rules, then they can, down the road, seek reimbursement for the cost of that private placement. Um, so that's kind of the extra protections that they have. But, they—the rules are: either at an IEP meeting, before you actually remove your child from the school district, you have to state your concerns and that you intend to enroll the child in this private day placement or private program, and you intend to seek reimbursement from the school. Or, the other—you don't have to do both, it's either-or—or, ten business days before removing the child, you send this letter to the school that essentially says the same thing. Um, now, the way the regulations are written—and this is Hank's DB vs. Edward County case—um, the way the regs are written—or the rules are written—is that, um, the administrative, um, due process hearing judge, right, has the option not to grant reimbursement. It's not mandatory. Unfortunately, in Virginia, our hearing officers tend to take the view: if you don't follow this to the letter, if there's any small, slight deviation at all, you're done, you're not going to get reimbursed. It's unfortunate. But, we actually have a great, um, case out of the district court, in the western district, um, Hank's case, that said—where the judge said, "look, it's not—we're not gonna hold the, the parent, um, who wasn't represented at the time, to the letter of the law here. And we're not required to do so, that's not what the rules are. It's just, the hearing officer has the discretion not to award if you don't follow the rules." So, um, but—practice tip: make sure this happens, because, in reality, um, unfortunately, our hearing officers will tend to latch onto any small, possible thing to be able to find against the parents. Um, it is very rare for parents to prevail in Virginia, um, on, uh, administrative due process hearings, um, despite, you know, competent representation, uh, but, um, and there was a—there was a class action lawsuit recently filed that got dismissed, but it's still being, um, investigated, out of Richmond, but on this issue. So, it's not just me, anyone who's ever done any of these can, can, can testify that, uh, yeah, it's very difficult to win in Virginia. Um, but let's talk about some of those options, okay, besides that very difficult due process path. Um, there are other options that we have when we run into these common problems. First of all, there's informal resolution with the district. Um, there's some districts in

Virginia who have, um, like, internal review, uh, uh, procedures that may not be official—you may not find it written down anywhere, but as you work in the district and you develop relationships with the administrative staff, particularly the, um, director of special education, sometimes you can reach out, say “hey, here’s what’s going on, you know, can we work something out?” or, um, whatever the case may be. But, so it is possible, again, as you develop those relationships, to try—try to do some informal resolution, um, of problems. Uh, at the Virginia Department of Education, or VDOE, there is an ombudsman for special education, and I think I’ve got some more information in your slides, more details on this, um, and links to more information. But, there is an ombudsman for special education. They don’t represent parents, but it’s a place that parents can, um, call and ask questions, um, about, “Is this right?” or you know, “I’m being told this by this school, you know, what should I say or what should I do back?” Um, that’s primarily their function. There’s another, uh, option that they have in the VDOE which is called a facilitated IEP. Um, that is where, uh, the school and the parents jointly can request that a trained facilitator, uh, who works for Virginia Department of Education, comes into the IEP team meeting and helps facilitate the process. But they’re not providing legal advice, they’re not, um, they’re just making sure the process is moving forward in a c—you know, uh, as collegial or collaborative way as possible. But again, they’re not giving legal advice to the parents. Um, and, while I’m on that, about not giving legal advice—that’s the frustrating thing, and, in, I’m glad, um, it was mentioned in my bio about—I very quickly learned once, going to my kids’ first IEP meeting—we adopted two kids from foster care who came with IEPs. So, I go to the first meeting, and you know, it’s all friendly and nice, and they give you this book, here are your rights, thank you very much—six months later, I get through that, and I’m like, “What?” How are you expecting lay—I mean, at this point I’ve been an attorney for seven or eight years, and I—I’m looking at this—you’re expecting lay parents to A) read all this, and B) understand it and apply all this to their unique fact pattern for their children? This is crazy-town! And so, anyway, funny enough, I started going to conferences to learn more to advocate for my own children and met Hank. He was teaching at one of the conferences—and this was a million years ago—but um, but, yeah, and he said “Look, you’re an attorney and you’ve learned this stuff, you know more than most people out there working, why don’t you take some cases from my legal aid office?” So, anyway, that’s how I got into doing special education law because there is such a need—yeah, so, the reason I’m here, it’s all his fault! Blame Hank! But, uh, but anyway—um, but the, that is, that is the problem, and I can’t tell you how many times I’ve said along the way, through all these years, “Parents just don’t know what they don’t know.” And without good advocates, without good attorneys, without GALs who know at

least a little something about special ed, and judges, um, there's no one to really point parents to—to what really should be happening for their children. And we all want to believe that the teachers love our kids and want the best and—and the staff all want the best thing for our children. And it's not that they're bad people—they're not—but the reality is: they're put into boxes by their administration, and—who are worried about cost, and worried about staffing, and these kinds—so, there's a lot of things that go into what's happening and what is and is not being told to parents in these meetings. Um, so, again—adding to our cadre of folks who can get out there and help parents navigate this incredibly, um, confusing and difficult process is great. Um, yes.

Audience Member: [unintelligible]

Melissa Waugh: [laughs]

Audience Member: [unintelligible]

Melissa Waugh: Well, here's the thing: parents don't have to pay, all right? And I'm going to talk about some—I am going to talk about the pros and the cons, especially with mediation, whatever, and how that's set up. But, you know, parents shouldn't have to pay for these things. And th—and these things are made available, the facilitate IEP, uh, facilitate—IEP facilitator, um, that's free—that doesn't cost the school or the parent anything to have that person come in. Um, the value is debatable, um, you know, to how much value they can add to the process, but um, but that's free. Uh, let me talk about state complaints real quick, and then I'm gonna get to mediation. State complaints, um, are filed with the Virginia Department of Education. When I first started practicing law, uh, about thirteen years ago, um, I did a few state complaints, but very quickly it became very clear that VDOE did not take their job seriously. Um, and then—then meeting more colleagues and talking to other people—it wasn't just me, I wasn't crazy—this was happening across the state. I would file a state complaint, and I would say, “All right, parent is complaining of issues, uh, A B and C.” And we would get this notice of complaint back, where VDOE decided they were going to investigate, uh, issues R, Z, and Q. R, Z, and Q? Who said anything about R, Z, and Q? I am not kidding you, they literally would change the claims and then ultimately find, “and the parent doesn't win.” You know, the school was fine on R, Z, and Q. We didn't even care about R, Z, and Q! And it wasn't me. So, the system was completely broken. Um, so, for, I don't know, seven, eight years, none of—none of us were filing state complaints. But, um, because of advocacy by Cheryl Poe and others, um, over the last three to four years, where they've got US Department of Education to come in and investigate Virginia Department of Education—and they spanked 'em. I mean, they did.

There's no other way to say it. They said, "you are wrong, and, um, you need to clean up this state complaint system," and things have been getting better. We're not getting the changing of the claims anymore. We're getting serious investigations where they're actually talking to people, they're actually going and getting documents, um, and we're getting good results, we're getting, um, uh, findings against these school districts. Now, VDOE still doesn't quite have their act together with the corrective action plans, um, and—right—um, where the corrective action plan is where VDOE says "Yes, school district, you screwed it up, um, but here's what we want you to do to make things right." And, um, so, in some circumstances, they'll get what looks like a pretty good corrective action plan, but then they never enforce it, so then the parents are forced to go to due process—just, just a horrible process—um, to be able to enforce these things. And so, um, so that's a problem. Or, the things that they, uh, order in the corrective action plan are just so, uh, benign, I mean it's just a slap on the wrist and—prime example, um, I did two systemic complaints, um, recently, against, uh, Loudoun County Public Schools, and, um, on these IEEs because they set fee caps that were so low that literally there wasn't a parent who got an IEE who didn't have to pay hundreds, if not thousands of dollars out of pocket. And again, remember, the law is—it's supposed to be free. And so—and you can imagine with our lower-income populations, it's devastating. They can't afford that. So, um, so, we did the complaint, we prevailed, they did find that their rates were too low, but for all these—for example, Loudoun County has almost 10,000 students with IEPs, and this was—the SSEAC had been involved, this had been years they had been doing this, right? And so, the corrective action plan said that the only, that the, uh, first of all, the school district got to decide how they're going to determine who they were going to reimburse, right—after all these years, thousands of families—who they were gonna reimburse, and how, and to what extent. And so, what the school district came up, this great plan for them, was that they were only gonna reimburse, um, parents who had requested a waiver of the fee cap based on a unique circumstance. When the Virginia Department of Education, in their letter of findings, said they've created a circular problem for parents because since the fee cap was low for everybody, there was no unique circumstance. Yet, they let the district determine the criteria for reimbursement of anyone who got—who asked for a waiver. In the second complaint on the same issues—because they didn't fix the problems and—that we filed a year later, we got the information of how many—how many families got reimbursed, right? This big, huge school district, how many families got reimbursed? You know how many got reimbursed? Five. That's it. And not—some of them not even the full amount that they spent because they capped it at their new, uh, fee cap amount, which we got a ruling a year later was still obscenely too low. So, um, so we still

got some issues with complaints, but, it's better. And so, now I'm changing my song about complaints and I'm telling people, "let's do file the complaints, um, let's do—let's hold VDOE accountable to make sure that they're um, investigating, uh, the schools and making sure they're complying with the law.

Audience Member: [unintelligible]...as a preface or precursor to eventually filing due process to get the investigation done?

Melissa Waugh: Yes, absolutely, they could. The great thing about the state complaints is that, um, it's a very short turnaround or timeline for them to get a response. And so, um—and because VDOE's still under the microscope with U.S. Department of Education right now, so they're being pretty good, um, about staying pretty close to those timelines. Now when they ask for an extension it's just of a couple of days in my experience. Um, so, uh, so, yes, you can get that done quickly, because—as we'll see, I'll say in a minute—for administrative due process, you have a two-year statute of limitations period, so when you're talking about a state complaint being resolved within, you know, let's say sixty days on the outside, um, with some extensions, that's plenty of time to then go ahead and file something, um, for due process. So yes, it absolutely could be a precursor. But hopefully, if VDOE's doing things right with the corrective action plan, you don't have to go to due process, because we're resolving it where it should be resolved, which is at the, um, the state complaint level, where it doesn't cost parents six arms and twenty-five legs—which I'll get to with due process. "Mediation." Uh, mediation, again, when I first started, the first several years that I practiced was fantastic. Um, the mediators are trained by Virginia Department of Education, they're paid by VDOE, it's, uh, the mediator itself is free to the parents, um, the school and the parents have to agree. We would go to these mediations and the school would negotiate in good faith. And we got great results through mediation. Um, and I know you've been around long enough, too, that you did as well. Um, and then again about six, seven, maybe eight on the outside years ago, something happened—we don't know. But all of a sudden, the mediators weren't holding the school districts to account. They weren't holding their feet to fire—the fire. Like, you know when, um, for example in district court, if we're getting mediation with the, uh, um, the magistrate judge, you know, they expect you to come in prepared, ready to negotiate in good faith, and they're not gonna let you get away with it. It used to be that way with mediation through VDOE. It's not anymore. And we've dipped—our firm, we've dipped our toes in the water. In fact, the last time I did mediation, that was our mutual friend, and, um, the school district literally requested mediation. And then, when they came to mediation after—now, I've spent a lot of money preparing and we've brought in an expert witness to

testify, um, so the parent invested a lot thinking we're going to do this in good faith and the school district came in and said: "Yeah, we're, um, we're gonna do this one little tiny thing that costs us nothing and that's it. Thanks for playing." And we're, like—and even the mediator came back into our room and was like, and, and, and, and, and the council, opposing counsel, they were like, "that's it." That's, you know, and they asked for the mediation, but there's really nothing, you know, if—if they decide not to mediate in good faith, there's not really anything that we can do, and the mediators aren't allowed to do anything, apparently. So, at this point, mediation, we are not recommending, um, and, you know. Yes, go ahead.

Audience Member: [unintelligible]

Melissa Waugh: Fair enough. . . . Yeah . . . yeah.

Audience Member: [unintelligible] . . . find out what you're seeking—then they offer things that should have been in the IEP to begin with.

Melissa Waugh: Exactly.

Audience Member: Or they're giving me something that you should have been given already [unintelligible] Anyway, but the person that—who is sitting in a lot of these mediations, you know, DS, isn't in that position anymore, so I'm hoping that there's a shift to...

Melissa Waugh: They—there could be, and we're always looking for that, we're always hopeful—always hopeful. We can't do this job without being hopeful, okay. Um, because there are so many things stacked against, um, parents, but, um, but yeah, we're hopeful mediation will get better, but at this point I can't unfortunately say . . .

Audience Member: Well, they started using the postal worker, uh, union mediators who have no idea what special education . . .

Melissa Waugh: That is correct, that is correct. So, these aren't mediators necessarily that are specific to, um, special education. Oftentimes, they are—will primarily do other kinds of things. I had the gentleman in the middle.

Audience Member: Yeah, I had [unintelligible] the school's counsel to say "can you explain that to me, can you explain the law to me," because they don't understand anything about special education.

Melissa Waugh: Yeah.

Audience Member: And—and I wonder if you should start—you know most of our school systems now use the same law firms, and one of the things that I've seen that was happening in Spotsylvania County and other larger counties are now coming to my county and so I can—all I have to do is see

what happened two years ago, you know, down here, and just like, oh, okay, now I see, because now everything is mediated.

Melissa Waugh: Oh, interesting, so in that district, it is. So, again, you have to kind of run your district and, and, and dip your toe in the water, um, with these things that, unfortunately, I just can't say—at least from a systemic level, from Virginia Department of Education—that there's been much change or effort to make the mediation process productive again. It used to be, um, but it's just not anymore. "Due Process hearing." That's an appeal, uh, and—and it's an administrative, um, hearing. Uh, but for those of you who've never been to a special education administrative due process hearing, um, make no mistake—it's trial, okay? When I was in law school, I did Social Security administrative hearings, you know as a law student, we're sitting in a office—I mean it's just, it was low key, okay. Um, this is nothing like that—nothing like that. This—I tell my clients—this is like going to court, except, we're not in a courthouse, and the hearing officer doesn't wear a black robe. But other than that, it's really the same. Um, we—which, I keep pushing back on this and—and the U.S. Department of Education pushes back on this—but we are full [unintelligible] practice, uh, at least in—in these administrative due process hearings—and for those of you who aren't attorneys, you're probably like what does that mean? Yeah, guess what the parents are thinking? "What does this mean?" You know, the intent of the administrative hearings were that parents, unrepresented, could come in and work things out with the school. That is not what they have evolved into. Um, so—so the cases can be dismissed on, um, before the parents have even had a chance to present or describe evidence, or have an opportunity to look at any testimony, uh, but—but again, that's just how it's working in Virginia. Um, we have, uh, due process hearings that came out in the class action that was filed, in their, um, complaints and their exhibits, uh—but there are multiple hearing officers in Virginia who have, um, been hearing officers for literally decades who not once have ever found for a parent. Hey, that's shocking. You mean to tell me—in decades, not once a parent came into your hearing room and had a legitimate claim? Um, that's what parents are up against. Uh, and the other part about due process is, because it was so labor intensive, um, and again, like a trial, when you hire competent legal counsel, it's very expensive.

Audience Member: It's your house. It's—you're putting your house . . .

Melissa Waugh: Yeah, well, I did—the two—the last due process cases I did this summer—our firm did two of them. But—we tracked all our time, did the timing, that, you know, ultimately will file things in and get our—our fees but, we had \$160,000 and, yeah. So, not that all of our cases are that expensive, but I mean, we're not talking \$10,000. We're talking six figures. Okay, what parent can afford that? I mean, really? You know? And so—and

it's hard for our lay friends to be able to do any of these cases because they are so labor intensive, and it tak

es so long to cue them up properly where they even have a—have a shred of a chance . . .

Audience Member: So, you're talking about the problem getting reimbursement—expert witnesses . . . [unintelligible]

Melissa Waugh: Yes, well—the horrible U.S. Supreme Court decision that said that, um, yes, while you—if you're the prevailing party, you can recover attorney's fees, you can't recover expert witness fees. So unless we—especially when we're doing our pro bono work—unless we can get an expert to do it for free and come testify, um, it can be a problem for our lower-income families. It's—it's a mess. It's a mess. So, um . . . yes. So, um, I—I have some slides. Like I said, you guys can check them out—they're all in your box, right. If you want to get, um, links and phone numbers and stuff for all of these—here's the form for the facilitated IEP, state complaints—again, a state complaint can be made by anyone—an individual or an organization. Um, it is formal, and you do write it. They give you a little form that's—is it even two pages? Could be one page, could be two on the outside—little form that parents can fill out. Um, the complaint that I'm finishing up now—will be drafting as soon as this thing—or sending in as soon as this is over—is twenty-six pages single-spaced. Um, so, uh, you know, again, it's kind of—even the form sets parents up for failure. There's no way that a parent is going to put enough information on that form to prevail at the standard that, you know, the information that VDOE would want or need to make a good decision in their favor. But again, it just kind of sets parents up because they don't know—they were given this form, okay, so I must—two sentences should be plenty.

Audience Member: [unintelligible]

Melissa Waugh: And you do. . . . Yes.

Audience Member: . . . everything you're sharing, so if you have tons of documents, you know, backing up your case, you got to make multiple copies and mail those out.

Melissa Waugh: Well, that could be done electronically. You can file electronically. But you do have to, uh, basically, I just copy the school on when I email my complaints to the VDOE. But anyway, um, but it's sixty days to a decision. Um, but—and there is, there is—oh, a practice tip—uh, so, parent files complaint, the school district has an opportunity to respond, um, and, uh, if—if this, if V—sorry I skipped a step. Parent files a complaint. If VDOE decides that it's sufficient, then they will issue, um, a notice of—a notice of complaint saying, “we are going to investigate.” Then they set a

timeline. The school district gets a chance to respond, right, but then there's one more deadline where either party can provide additional evidence, alright? So, there is no reply brief—and every single time, the school, just like “Miss. Waugh is not allowed to do a reply brief,” and I always say “I'm not doing a reply brief. I'm providing additional infor—uh, evidence.” Um, but there is an opportunity for the parent to get the last word, but you just want to make sure you're filing that on, like, the last day that you can file it and then you get the last word.

Audience Member: [unintelligible] . . . the school lie about something, didn't tell you about something, didn't provide . . .

Melissa Waugh: Yes—one year, and it's from 'knew or should have known' um, but generally speaking, you know, again, practice tip—make darn sure you have a document that is within that one-year window, or VDOE isn't—they're going to boot it for insufficiency. Yeah. Just make sure you can document on a piece of paper that you're sending them, you know, for example, um, the prior written notice from an IEP team meeting where a crummy decision was made that you're upset about or an email where, um, the principal says, um, you know, “Even though we know you're supposed to be getting Orton-Gillingham instruction for your child, uh, we don't have a teacher, and so, we'll let you know in some future date when we're going to hire a teacher who's trained to give your child what your IEP says the child is supposed to get.” Um, that email could be the documentation starting the clock, because at that point you knew—they are failing to provide the services that everyone agreed in that IEP the student needed for FAPE.

Audience Member: [unintelligible]...they don't know the laws, and so, when I find out the law on my own—so, they were supposed to give me something they never gave me so there's no—there's no paper except for me telling them, “I just discovered this was the law can you give me this piece of paper you were supposed to give me,” and then you know, so . . .

Melissa Waugh: Yeah. So again it can be—just do the best you can, right, to document some way you're within that one year window and, if possible, don't wait that long, um, oftentimes we know that they screwed it up long before a year. Um, okay, real quick—I just want to move on to the due process hearing, um, some of the points there, again, as I said, even that—it's a administrative hearing, an evidentiary hearing, it is on the record. Um, it's before a impartial hearing officer, um, meaning that they are not paid, uh, by the school district, um, although we do find that there is some manipulating by the school districts to get certain hearing officers that they want assigned—which is unfortunate but again, you know, there's not a lot we can do on these things. Um, but, technically they're supposed to be impartial and, uh, let's see,

the burden of proof falls on the party who's filing the, uh, due process complaint—which is typically the parent. Um, so the parent does have the burden of proof, which is very difficult because the school district has all the documents, the school district has all the experts, and the parents can't get expert witness fees paid, and unless you did the IEE—that's the reason why the IEE is such a powerful tool, because technically it's supposed to be for free, right, even though some districts set their fee cap too low, but, um, but basically that's a way a parent can get an expert witness who could testify because it's got to be somebody who evaluated the child or else the hearing officers will boot him out. I mean, I can't tell you how many times myself and my colleagues—we brought in experts in dyslexia or experts in, you know, an intellectual disability who reviewed the child's records but never actually spoke to the child, but the hearing officers will say that testimony is out. They, they, they give it no credibility at all, because they didn't—even though we know in court that happens all the time, you have—you bring in expert witnesses on a topic—that doesn't fly in Virginia due process. But any who, um, it's a two-year statute of limitations, unless there's some kind of misrepresentation or they did not provide the parent their rights in their native language, um, which is a case that Hank and I had in the past as well, um—and you got to be careful because issues not raised in the due process complaint can't be raised at the hearing or obviously on appeal, and so, um, again, that's a little problematic for parents who aren't represented because, again, there's a little form that VDOE provides that is two pages long, um, but, again, it gives you like this much space to say your problem and, again, when we're filing a due process complaint it's, you know, fifteen pages, twenty-five pages, thirty-five pages, and plus, you know, thirty-five exhibits or more, um, so it's just, it—it kind of sets the parents up for failure, but that's—that's what we have. Okay. Uh, our hearing officers in Virginia—we don't have discovery, um, in, in, uh, in our Administrative Hearings, um, but the hearing officers can issue subpoenas for witness testimony or for documents. The problem is that, um, if the school district just ignores them, uh, there's not a lot you can do. My boss in two different, uh, uh, circuit courts have—has filed this petition, um, where the—the school didn't comply. We asked the hearing officer to enforce his subpoena, he refused, and then we took it to Circuit Court for enforcement and, twice now, we've got rulings that, um, uh, that the hearing officer has to enforce the subpoena. So then, what do you do, when they refuse? You're just kind of out of luck. So, um, it's a problem, but technically they can issue subpoenas and I guess the school districts just can comply if they feel like it or not. Um, the hearing officers can exclude certain evidence and testimony and, um, uh, they are required to enter some kind of disposition on each and every issue or claim that the parent raised in their complaint, uh, but again we don't have discovery, so there's no depositions,

there's no, um, interrogatories, there's none of that. Um, all you get are the records, and you get, um, you know, witnesses that can come testify, that, again, you haven't interviewed because no School Board attorney is going to let you interview anybody who works for them. So, um, that whole thing that you learn in law school about 'never ask a question of a witness that you don't know the answer to,' throw that out the window. That does not apply, uh, in what we do, um, because we, we, we don't get to talk to these School Board, um, staff so, uh, anyway. This is just the timeline that's going to be in your materials. So, I'm gonna kind of skip through some of that. Uh, "Remedies"—and it's my segue into real quickly talking about 504 and ADA, um—let's see, yeah, got a little bit of time. So, remedies under the IDEA—you can get prospective relief, um, the hearing officer could order a finding of eligibility, um, they could order some kind of change to the IEP, a change in placement, or prevent a change in placement. Uh, for example, if, um, the child was in a special private day school that the school was paying for, and the school all of a sudden decided, "we don't want to pay for that anymore," and—and again paying—let me make this clear to you, because a lot of people don't understand why I'm talking about it. Schools actually don't pay for these private day placements. Uh, you may remember some earlier panelists talking about CSA and FAP teams and all of that, well the Comprehensive Services Act says, "If a private day placement or residential placement is in the IEP, then CSB has no choice—they are mandated to pay for it." And that's important, right, because you know the old adage 'follow the money,' um, but a lot of times I'll have clients be like, "oh well I know Johnny really needs you know this \$120,000 a year placement at this special school, but ah, if I do that, how's that going to hurt all the other children at school and take away from their services" and whatever, um, and I have to, you know, explain to them how the funding works—it's not being paid for by the school. Which is always in my mind, kind of makes me go, "do they not under—do the people in these IEP teams not understand how the funding works? Because, why are they fighting so hard to not give kids what everyone agrees they really need?" But, um, but they do. But, but—little side note there, practice tip, um, on how this funding actually happens. So, any who, but if the school wanted to stop, um, placing a child at a private day school, that is the kind of thing the parent would not provide consent to and then you could file due process, um, to enforce that, although you don't really have to because they got to leave—that's the 'stay put' placement. The school could file due process against the parent, um, but anyway, so it could prevent a change in placement, and the hearing officer could reverse a manifestation determination decision—and, by the way, there is expedited due process for these disciplinary matters, it's a much, much shorter time frame. Um, they can grant retrospective relief, comp ed., or tuition reimbursement, attorneys fees and cost—no expert

witness fees, um, and no punitive damages under IDEA. Section 504: the Rehabilitation Act and Americans with Disabilities Act—I'll explain a little more detail about those in a sec—um, but they're civil rights laws, they're about equal access to education, so it's a different standard and under—Section 504 also has a FAPE standard, um, that is very different from IDEA. IDEA remember, that's it's—it—we got rid of more than *de minimis* but it's not equal. All right? And in fact, the first case on FAPE, the U.S. Supreme Court decided in Raleigh, they specifically, um, said that under IDEA—that FAPE did not guarantee an equal education to non-disabled children. They specifically said that for IDEA.

Section 504 has a FAPE requirement. It is exactly that. It—under section 504 of the Rehabilitation Act, schools are to provide equal access to education. They can't, um, it's—it is an equality standard, a comparative standard, and that's very powerful. It's one thing I think we probably don't, as advocates, leverage enough, um, because we are all so locked into IDEA—because it is so dominant—but it is different. But, in these cases that we bring 504 and ADA claims, you can also get retrospective relief, comp ed., tuition reimbursement. You can get monetary or compensatory damages—which is different for IDEA. So, for example, um, because the school, you know, messed something up with the child's education, the child's at home, the parent had to quit their job—because who was going to stay home with Johnny, um, while he's there all day—um, the parent had to pay for private, uh, counseling and the counselor, the only counselor that took their insurance, was an hour away. Under 504 and ADA, you can get the, um, mileage cost going to and from therapy. You can get lost wages, um, so there are more damages that are available under these laws than are available under IDEA. Um, the problem that—well, it is a problem, but—but, um, the way that you prevail on those claims, however, is much harder than IDEA, because we have to prove intentional discrimination—which the courts have said means you have to prove bad faith and gross misjudgment, and circuits vary on what they consider to be bad faith and gross misjudgment, and, unfortunately, in our circuit, um, there's a very high bar to be able to prove bad faith and gross—a very high bar. Um, so that does make these cases difficult, but that doesn't mean we're not bringing them. We're still filing them. We're still trying to—to, um, make progress on that front, because this can be a very powerful law and, um—to protect children's civil rights, um, so we just keep fighting the good fight. Um, but you—again the other good thing about 504/ADA is you can get expert witness fees. Uh, oh and quick practice note also, um, recovering attorney's fees that, um, while the prevailing party—if the prevailing party is the parent they get their attorney's fees. However, if the prevailing party is the school district and the hearing officer rules that, um—not the hearing officer, I apologize—um, that—the district court judge, because

you file a fee petition in federal district court—and if the judge rules that the parents', uh, complaint was frivolous or brought in bad faith, uh, then they—in that situation, they can award attorney's fees against the parent and their attorney. Keep that in mind. Let's not be filing any frivolous lawsuits out there. Um, it has happened, but the cases that I've read are truly egregious where the parent filed literally the same claims five times, um, you know. So, these are—the examples are egregious but—but just, you have to be aware and you have to tell your client if they want you to file something crazy-town that I don't feel like paying the school board \$160,000. They get plenty of money. Um, alright, so, uh, don't have a whole lot of time left, so I'm gonna kind of breeze through, kinda hit the highlights on 504 and ADA. The big thing to know is that, um, it's a broad civil rights non-discrimination law. This one's 504. ADA is very similar. Um, it does also apply to, um, not just to schools but also to colleges that receive public funding and provides protection for people with disabilities. Um, again, here's the issue. It's to provide equal access to education so it is a comparative standard to non-disabled students in—in our situation. Um, unlike the IDEA, it also includes an anti-retaliation provision and, um, and that includes not just retaliating against the student, but retaliating against the parent, or an advocate, or anyone who is, um, advocating for that student's civil rights under this law or under the Americans With Disabilities Act. Um, so, but there is an anti-retaliation provision, uh, in the law and, uh, the law provides legal remedies if a school district discriminates, excludes, or retaliates against a parent, child, or school district employee that are exercising their rights under the law. Um, eligibility—and it's the same for Americans with Disabilities Act, all right? Um, but it requires a physical or mental impairment that substantially limits one or more major life activities. Um, the Americans with Disabilities Act amendments a few years ago, um, there were some horrible Supreme Court decisions that basically made it really raise the bar for eligibility under the Americans with Disabilities Act. Section 504 adopts the same eligibility standards and so, Congress came back and said, "no, that is not what we meant, we don't want this to be a high bar for people with disabilities to qualify under these laws," um, so it—it's—it is not a high bar to qualify. The other thing that's different about these laws for—to qualify for protection is, under IDEA, you have to show an adverse impact, um, on their academics, on their education, right, in that realm. Here, it's substantially limiting one or more major life activities. So, the life activity may not involve anything at school, it may be some—a major life activity that's a problem in the home, or somewhere in some other environment, that's irrelevant for eligibility for these laws. Also, the other difference is, under IDEA, you have to show, to be eligible, that the student needs specially, uh, uh, special education—specially designed instruction. That sometimes can be very difficult and a

tricky wicket. Um, that isn't at all involved in these laws. So that's why, if you remember my Venn diagram, the 504/ADA circle was so much bigger, because it's so much easier to qualify under these—under these laws. Uh, here's where I talked about the Amendments Act—not only that, um, the determination of eligibility should not demand extensive analysis, but you can't consider ameliorating effects of mitigating measures like ADHD medicine. They can't say, "Oh, but Johnny's on meds now and he's perfectly fine in the classroom," um, when Johnny was, you know, off the chain three months earlier. Uh, that's irrelevant from—for the decision or the determination about whether the child is eligible. Um, and other things like, um, assistive technology or reasonable accommodations—you know, a lot of times, before these kids get a 504 plan or an IEP, the school is intervening, they're doing things, especially good teachers, right? They're giving these kids all kinds of accommodations and help. But, you can't look at—like, say Johnny was making A's and B's, why—doesn't need a plan, he's doing just fine. Yeah, but Johnny's getting A's and B's because the teacher's reteaching the material, because the teacher's letting him retake the test three times, because—you know, which is okay. That's not a bad thing, but, at least for the purposes of ADA and 504, teams can't take that into consideration. They have to look at what's happening before the teacher was implementing all of these interventions. Um, I'll let you guys read some of this stuff—there's a big, long list, and it's not exclusive, of the different major life activities, um, but caring for oneself, you know, if—if, um, uh, bending, speaking, learning, it—it's a broad list. And, it's also major bodily functions, not just the activities, and again, those are not exclusive. Um, again, 504 requires students be given comparable aids, benefits, and services, uh, this includes music, physical education, lunch, services of the guidance office, vocational training programs that our kids often get excluded from. Um, these are they, uh, unlike—like, I said before, unlike IDEA, where the Supreme Court rejected this comparative standard—that is the standard under 504 and ADA. All right. And I talked a bit, a little bit, about FAPE requirements—same kind of thing: free appropriate public education, but the difference is, it's got to provide equal access—it's the last, second to last line there—to the education that, uh, non-disabled peers receive. Okay, uh, oh, let me go back real quick, similar things—informal resolution is always an option, um, federal complaints, the U.S. Department of Education's Office of Civil Rights, uh, let me just say though—they take forever. I have one that we filed, I think, nine months ago and I keep checking back, um, with OCR and they keep saying, "We haven't decided whether to even investigate yet." So where the VDOE state complaints—pretty quick turnaround, the federal, um, OCR complaints take forever. Uh, but they do—they can be effective when they do finally investigate, uh, it just takes a long time. There are often local appeal and

grievance procedures that you can get in the policies but, um, you're not required to exhaust, uh, any of those to be able to either go to due process or even to go right into federal court. The only thing you have to worry about with exhaustion before bringing 504 or ADA claims into federal court is: have you exhaust—if, um, your claims involve a free appropriate public education, if those are the kinds of claims you're making, then you would have to exhaust your IDEA due process procedures. Yeah, so . . .

Audience Member: [unintelligible]

Melissa Waugh: Yeah.

Audience Member: [unintelligible]

Melissa Waugh: Vision. Yeah, so, here's what—okay here's what they said in *Fry*, all right? Justice Kagan said in the U.S. Supreme Court decision for *Fry*, “how do you know if you have to exhaust through IDEA administrative due process first?” Okay? And it was a two-part test. Number one: can the student bring the same claims that you have at issue against a library or a movie theater, and prong two of her test was: can an adult bring these same claims against a school? And in *Fry*, it was a matter of a, uh, a dog—a service assistance dog that the school refused to let the student bring in. But that claim could have been brought by an adult as well and so, that's why the Supreme Court held in that case, exhaustion was not required. Um, the newest case is *Perez*—which I'm about—so excited—about to file one to test the *Perez*, um, holding—but in that one, it was a matter of what kind of um, uh, damages you were requesting. If you're only requesting the monetary damages—compensatory damages, I should say—um, then you do not have to exhaust through IDEA due process. So, those are the two U.S. Supreme Court decisions about exhaustion. But if it has anything to do with the school, um, and you don't meet one—either the *Fry* test or the *Perez* test—then you better file due process. And that's even if a child has not even yet been found eligible—even if the school said, “This kid isn't even eligible!” There's case law out there that says you still have to go through due process.

Audience Member: [unintelligible]

Melissa Waugh: I do. Yes sir, I do. So I—I'm going to dot every i and cross every t. So, I will raise my 504 and ADA claims. Typically in Virginia, our hearing officers refuse to hear ADA claims. There is actually—in the Virginia regs that say they have the discretion to hear 504 claims. Some do, some don't. But, that's—that's where we are. Ok, um, I'm going to zip on through. And, like I said, ADA pretty much is very similar. There's some more powerful communication regulations that—that we use under ADA, but otherwise everything is pretty much the same. Um, oh and by the way, you—

there are due process, um, that you can do that are for 504 and ADA, but you—if you’re going to file due process, you need to file it under IDEA so you can exhaust—so there’s never an issue and you don’t have to do two due process cases to exhaust if you don’t prevail on the first one. Um, but, again, you don’t have to exhaust any grievance or any due process procedure under 504/ADA. The only thing you have to exhaust if you, I guess, fail the *Fry* or the *Perez* test is an IDEA administrative due process—that, you have to go through that, that nightmare. Yeah, and ok. Same thing with [unintelligible]. Lots of guidance documents: um, OCR and OSEP, U.S. Department of Education on their website, Virginia Department of Education has lots of great websites. I always—I barely know Pete Wright but, um, he’s got this website, Wrightslaw, that has a lot of free information that parents can search. Um, so—I don’t get a kickback or anything—but its a good resource, um, that I send people to. So, I think we only have maybe two or three minutes, so maybe one or two questions? Anyone? One minute. Yep?

Audience Member: [unintelligible] . . . against parents. I, like you, I mean, I had a law degree and when they hand me those “my rights” book, I was like, “First of all, none of this makes sense.” Then, when I started learning what the federal law said I was like, “This doesn’t even say what the federal law says.” So—and certainly no IEP team I’ve ever been a part of ever knew the law—not a single one.

Melissa Waugh: Yeah, it’s, um . . .

Audience Member: [unintelligible]

Melissa Waugh: Yeah, it—it’s, um, there’s a lot of misinformation that teams are giving parents—and again parents don’t know what they don’t know and they trust. Um, so, yeah it’s—it’s tough out there, but again, we wouldn’t be doing this job if we didn’t have hope and, you know, we hope that any of these law students out here will decide to pick this up as an area of law that they would like to specialize in and work in, uh, because it is a great need.

Audience Member: Well, and they just redid the parent’s guide to be more simplistic for the families, but it’s taken out a whole lot of stuff that gets you the background information about why this is in here in the first place.

Melissa Waugh: Well, and, funny thing, I actually made this argument in that due process case this last summer—that rights book, you know, that we all got, and then I got mine and I was like “Oh it took me six months to get through.” And, the thing about it is, now, knowing what I know, the majority of the really important stuff—the important rights aren’t even in the book. It’s not complete. It doesn’t give parents all our rights and there are certain things

that the parent was going to be held to account because the school said that we gave her her rights [unintelligible] Here are the six things related to this case that there's not a peep about it in those parent right books that they gave them. Anyone else?

Audience Member: How—how do you get your clients? How do you market? Is it just word of mouth or . . . [unintelligible]

Melissa Waugh: Yeah, because, um, yeah, there's so few of us that do this work and my law firm, we don't market or anything, we just, I mean, Belkowitz Law has been around for at least ten years maybe? Yeah. I've been with them five. So, um, you know, but I think all of us are the same.

Audience Member: [unintelligible]

Audience Member: I mean I literally had a friend talk to me. Uh, he's licensed in DC, Maryland, and North Carolina, talked them into getting licensed in Virginia, um, just—I'm in the Tidewater area and you really don't have anyone, um, to help represent families. Because she's full . . . [unintelligible]

Audience Member: They address education, special education law and they have private attorneys involvement . . . [unintelligible] . . . so that's another option.

Audience Member: And, if you're really looking for cases, go to rural areas—especially here in Virginia—because there is no specialized attorneys basically . . . [unintelligible].

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PRACTITIONERS PANEL: LEGISLATIVE ADVOCACY

Valerie L’Herrou, Rachael Deande, Cheryl Poe, Abbey Phillips
Moderated by Tara Casey

INTRODUCTION

Nicole Evans: Thank you so much, Ms. Waugh. Our final session of the day is also our final practitioner’s panel on legislative advocacy. It’s with Valerie L’Herrou, uh, Cheryl Poe, and Abbey Phillips—unfortunately, Rachael Deande is sick today—and it will be moderated by Professor Tara Casey.

Tara Casey: [unintelligible] . . . um, which I guess is probably, uh, a good motto for the type of work that we’ve been talking about all day long—there is no break. There is no break. Um, my name is Tara Casey and I’m on the faculty here at University of Richmond School of Law. I’m the director of the Carico Center for pro bono and public service, and it is my honor to moderate this panel of amazing individuals who are engaging in legislative and policy advocacy, which is, um, a different branch of practitioner in this space. Um, I’d like to go ahead and introduce our panelists. Unfortunately, as was mentioned earlier, Rachael Deande, who’s the executive director of Voices for Virginia’s Children is not well today. Um, and so, uh, she—as determined as a warrior as she is, um, there are days where you just have to say “no.” And so, she is, um, is home sick today. But, I feel like, in the time that we have, we still have plenty to discuss with the wonderful people here in the front. Um, right next to me is Valerie L’Herrou. She’s the deputy director of the Center for Family Advocacy at the Virginia Poverty Law Center. She is a policy attorney for low-income families and children and their parents in the child-welfare system, and she advocates for evidence-based, trauma-informed solutions that respect families’ strengths and right to self-determination. Prior to joining VPLC, Valerie was the director of public service career development here at the University of Richmond School of Law. She’s also an alum. Um, and she also spent time as a public defender for a number of years in Charlottesville. Thank you so much, Valerie, for joining us today. Next is Abby Phillips. Abby is a macro social worker by training and began her public policy career with the goal of centering equity and creating systemic change while eliminating racism, discrimination, and barriers to economic mobility. That is a mission statement. Um, she has extensive experience working in the Virginia General Assembly from running special projects in the governor’s office as an assistant secretary of

the Commonwealth to serving as chief of staff for both state delegate and state senator. She is a co-founder and board member of the philanthropic giving circle called Collective 365 which is at Henrico county and she's also Henrico county court-appointed special advocate for fourteen years. Thank you so much for being here, Abby. And last, but certainly not least, at the far end, is Cheryl Poe. Um, Cheryl is the founder and executive director of Advocating for Kids Inc., which is a special education advocacy organization that provides resources, information, and workshops to parents and professionals, with a special focus on addressing the needs of Black and brown children with disabilities. Um, Cheryl has over twenty years of experience working with children with various disabilities and their families, and she was the chair of the National Association for the Education of African-American Children with Learning Disabilities, parent network and served on the board of the council of parents, advocates, and attorneys, where she served as co-chair for the social racial equity committee. She's also the past board president of the National Allies for Parents and Special Education and completed a two year term as the student outreach and recruitment committee chairperson for the Mid-Atlantic Group Psychotherapy Society, board of directors. Um, Cheryl holds a masters degree in urban education and counseling and is the mother of two boys with learning disabilities. So thank you so much Cheryl for, for joining us today as well. Pretty amazing, right?

PANEL

Tara Casey: Um, so this is the—this is the practitioner's panel for legislative advocacy and I wanted to actually start, uh, with a question to Valerie, because you're the attorney—well, I'm an attorney—the attorney on the panel, and—what is the difference between legislative policy advocacy and legal advocacy? Especially when you're a lawyer who's having to be in both worlds.

Valerie L'Herrou: Well, that's a really good question and, um, I was thinking about that today before I came over here, and I thought of this sort of old canard that, you know, a good lawyer knows the law and a great lawyer knows the law and the judge, and there's certainly things about that that is completely wrong and also there's lots of different ways to interpret it. Um, but I was thinking that when it comes to legislative advocacy, it is absolutely true that a good, uh, legislative advocate knows the law and a great legislative advocate knows the law and the legislators, um, because legislators all have—they come to this, uh, their work, uh, serving us, um, from lots of different perspectives and experiences, and it used to be that much of a general assembly, if not most, were attorneys, and that is no longer true. There's a

smaller, uh, a minority of legislators who are now attorneys in the Virginia General Assembly and so, um, having that experience as, uh, an attorney I find has been super valuable in terms of both analyzing the statutes or their proposed, uh, bills, um, and having the understanding that, “Oh, if you put this comma here, it might sound better as a sentence, but it’s gonna change the meaning of the sentence.” And a lot of legislators don’t really understand that. Um, another thing is that if you work in a particular area of law that the statutes are going to impact, you’ve been in the courtroom, you’ve used those statutes, and you know, you know, what the impact of it will be on people in the courtroom, and that’s a really valuable perspective that—that legislators really really appreciate. Um, but the other thing is that you, um, you know, have to have the sort of broader understanding of personalities, and perspectives, and political leanings, and things like that, and so you have to—you can’t just go in and say, “Well, the law says this and this is, you know, have it—what the outcome will be if you change this.” You have to figure out, well, what message will resonate with that person in order to get your point across? And so, it’s a, um, you know, that—that’s very similar to, like, trying to persuade a jury in some ways, except that, um, it’s just sort of, I don’t know, more wide open I want to say. Um, and you certainly don’t have to worry about things like, uh, hearsay, rules, and things like that. One of the funniest things is that you can always tell when someone is getting up before a committee of the General Assembly who was an attorney, because you’re supposed to address your marks to, you know, Mr. Chair, members of the committee, miss chairwoman, members of the committee, and people—and I do this sometimes too—sometimes, you will start off saying “Your Honor,”

Tara Casey: May it please the Committee.

Valerie L’Herrou: Exactly.

Tara Casey: Well, and—and I think, like, going further with this, with legislative policy advocacy, because—Abby, I neglected to mention, you are also the director of, um, policy at the Legal Aid Justice Center. Big part I forgot in your introduction, my apologies. But as somebody who is in an organization where there is both legal advocacy and legislative advocacy, can you walk through for us, what that type of legislative policy advocacy looks like in your organization?

Abby Phillips: Yeah, yeah so, we’re a legal aid organization. So, we’re providing legal aid to the community. And really, that’s the direct service that informs how we make policy and decisions, and how we develop policy to take it to the General Assembly. And our organization is trying to essentially dismantle the over-criminalization of poverty through both, uh, legal work through impact litigation and through advocacy work in the General

Assembly. So, we can represent people one-on-one, but we also recognize that if there are issues with the existing laws, we have to try to change those, um, to address a lot of the things that we are seeing happen over and over and over again with our clients. So, one thing that's really wonderful about Legal Aid Justice Center is that we work in community with impacted groups to help us figure out how to address, um, the biggest needs that the community is facing. So, we don't just have our attorneys go into the courtroom for, say, like, a housing, uh, eviction case and let the attorneys decide how they think the law should be changed, but we also work with that impacted person, who was possibly evicted or facing eviction, to help us understand what they are going through and the barriers that they're navigating, and then use that as a way to develop policy—cause otherwise it's just a lot of people making decisions for the group of people that's actually most impacted by what's happening. And same in our—in our work. We have a youth justice program and our youth justice program has attorneys that work in special education, and when those issues are coming up in the General Assembly, we have that direct experience on the front lines with community members navigating the IEP system, um, and we can go to legislators and say, “here's why this will be problematic if you pass this,” or “here's why this will be helpful if you pass this,” and so, we can bring that direct legal experience and community experience into the actual policy making process. And frankly, I think that's the best way to make policy. As many voices who are impacted, as many stakeholders that have an interest in that issue, should be part of that conversation, and most certainly the ones that are going to be impacted by how we change the laws—their voices should be raised in that process. So, that's part of how we do it at Legal Aid Justice Center.

Tara Casey: Well and—and going now further to Cheryl—so much of your work is empowering individuals to be engaged in this advocacy as well, and so I would love to hear, like, how does your organization address what can oftentimes be the deficit in information for—for children, for children of color, for parents as they are going through this process and are wanting to be advocates on the legislative policy stage for themselves and for other members of their community.

Cheryl Poe: Well, I work with other agencies like, um, Abby. Amy Walters, like, she's a partner with her. So, their capacity is bigger and their temperaments are probably better-suited for that kind of work. Um, so, I identify, um, parents or community members that are being impacted by specific laws that are going up to say, “Hey, if you can give testimony or give to support to this.” But, um, our organization really—I don't see ourselves that much, um, being involved in laws, um, and law development other than watching, right, for laws that I know are going to target Black students with

disabilities in our public schools, that lead them into the school to prison pipeline, like, for instance, um, last year there was a three strike law that was coming up and, though I did not, um, personall—well, I guess I did—I reached out to people, um, locally in the Virginia Beach area—but I really did need to count on the other agencies amongst the states that do this kind of work to push it up and make sure that people that needed to know that this is bad law, um, that they got that information so it didn't go through. So, that's—that's how I see it. Yeah. I see my work more as a legal advocate when you talk about the two, just from a perspective of recognizing—a lay, I should say lay legal advocate right, not an attorney.

Tara Casey: Asterisk, no UPL present here.

Cheryl Poe: Yes, thank you. Exactly, cause, uh, they love coming after us as advocates, and—even though I play one on TV sometimes. Um, I look at regulatory language that's already in place because, as Melissa just walked us through, there are tons of regulatory language laws that already are supposed to protect our people of color right? And our students with disabilities. So, when I intersect all of those laws together, I use that to help push agendas that are, um, for my individual clients. But I've learned—because I can't go to court and I don't want to go law school—using systemic complaints through those pieces and then you have a bigger impact.

Tara Casey: So, to follow up a little bit on that, because your experience is—been long. I mean, it's been over a number of years. Have you seen—how would you describe the evolution of that advocacy?

Cheryl Poe: For me?

Tara Casey: Yeah...

Cheryl Poe: It's been huge. It's been huge. Um, I initially didn't know what a spec. ed. advocate was. Didn't, you know, kind of pay attention to it—even though I grew up as a student with a disability, and I remember having an IEP, and I remember going into those special rooms, and I remember being teased. I remember all those pieces of it. You know, after I was able to compensate and learn what I needed to learn, I kind of forgot about it until I had children, cause things are hereditary. Right? So, as soon as I, um—so when I had my son, my first, my oldest son, I was in grad school to become a therapist—post-grad school to become a therapist. That's what I wanted to do. I wanted to do therapy, and I wanted to do therapy for the Black community because mental health was an issue—it is, continues at times to be an issue, but it's evolved way more than our public education has. So, um, I think I—my services have evolved over the years in several ways. I'm moving from a parent—just a parent advocating to get her two Black male students services

that are appropriate and aren't discriminated in a Virginia Beach city public school, with a mother that's from New Jersey. So that's one stage of what I had to do. And then after I was able to see the success and trust that my children were going to be saved, and that I knew enough to help others. You know, it's—it's the kind of same feeling I guess you guys had but a different level of, "gees, if I, me, am having this amount of trouble as a Black female . . ." You know, I was really, you know, I was told my child needs speech therapy because I was speaking Black English to him at home. Right? So if I am facing that kind of overt, in your face, discriminatory bias behaviors, imagine what people who weren't empowered, weren't—didn't have a master's, weren't, um, getting the appropriate sped. ec. services to be able to stay in school and get that degree. You know, so, I evolved into then advocating for others and—and did that for a majority of the time. I still do that, but the last couple years, I've really been using the Justice Department, um, the U.S. Department of Education, to file systemic complaints. I currently—well, I did it—I filed the systemic complaint against the U.S. Department—uh, against the Virginia Department of Education, um, on behalf of all students with disabilities across the state stating that, "The VDOE failed in its duties during the COVID time to ensure that students with disabilities receive special education services, and the VDOE allowed school districts to hide behind a phrase of, 'these services aren't available at this particular time or this phase.'" The OCR picked it up. I was surprised, I will admit. I didn't think they would, but they—they picked it up. They are actively investigating our Virginia Department of Education. I also have a U.S. Department of Justice complaint. I got a call on Monday. I did a systemic complaint against Chesapeake public schools for racial and disability discrimination—got a call that they will be coming here next week. Boots on the grounds in Chesapeake—both units, the units that will be looking at the racial discrimination, um, components of the allegations—that's a different department. It's still justice but it's under a different header, I guess, and they will be working with the US Department of Just—the justice department, for the people that look at the disabilities, civil rights educational claims. So, what I've learned and what I'm hoping to work on—thank you—with, uh, the group up here—because we, we're all in this work together—is that's what we're going to have to chang—do. We're going to have to file systemic, large complaints. We're going to have to coordinate. So, when I'm, um, filing a complaint in Virginia Beach, if I can pull in some people from Roanoke, or pull some people from Richmond, or pull some people in from wherever, so that it's statewide—and that really needs to be against the racial discrimination that is happening to Black students in the state of Virginia when it comes to our public schools. It is disgusting. We have to do something differently. For the last twenty years—twenty years—Black students with disabilities, well,

Black students overall, but Black students with disabilities, especially, are overrepresented in expulsions, suspensions, referral to courts, anything negative. They're not graduating equally to their non-disabled peers, and I do have theories on why that exists but I'll wait for you to ask that later. I think that's, like, one of your questions.

Tara Casey: Well, but I think, but what you're talking about it's—it's—also these are things that are just keep happening and, and Abby, I'm—I'm curious, because of your experience both in the secretary of the Commonwealth's office and also, with, um, this delegate and state senator—like during all of your time there, what were things that you were seeing that just were coming up time and time again, and just were not moving the needle, but yet still coming to the General Assembly, or coming to the secretary or governor's office, time and time again

Abbey Phillips: I mean, the—the biggest thing that comes to my mind is how we fund public schools, and how the deficit of that funding results in things like Black and brown children, especially with disabilities, being disproportionately suspended and expelled. We don't have enough support staff in schools. I think there's a real crisis around actually having, um, aids for kids with special needs in public schools and we have under-invested in our public school system over, and over, and over again, and advocates have been coming to us and saying that this is what's happening. This is part of why we are seeing these things happen, and if you want to holistically invest in our communities, and our kids, and our families, you have to start funding public schools in a way that addresses the whole person. So you have mental health support in schools. So you have school social workers, and school psychologists, and counselors. So you have aids in classrooms, um, where there are children with specialized learning, um, or children with disabilities, and we just haven't done that, we haven't done that ever. Like, we have never fully funded public education in Virginia, um, the way that we should be doing and—and our communities are suffering because of that, and it is not been for a lack of advocates coming and telling the General Assembly that this is a problem. But, essentially they would need to invest a billion dollars to fix these, uh, systemic problems . . .

Tara Casey: And that's not an exaggeration, it really...

Abbey Phillips: It's not.

Tara Casey: the...they—they put a number next to it and it is a billion dollars.

Abbey Phillips: Yep. They'd have to invest a billion dollars, and they haven't done it.

Tara Casey: Yeah.

Abbey Phillips: They haven't done it. We, we, um, in 2008, we had a cap put on support staff and have not yet fully raised that support staff cap, and that includes specialized support staff that's, um, school counselors, social workers, um, and psychologists, and we have lifted it up a little bit so that the ratios are getting a little bit better, but it's still not enough, and we're seeing, I think, generations of consequences . . .

Cheryl Poe: Yes.

Tara Casey: Yes.

Abbey Phillips: . . . from making those, um, uh, decisions for our legislators and our governor's staff, making those decisions to not fully invest in public schools. In the meantime, we're hearing, we have like, surplus of a budget and we're putting lots of money in our rainy-day fund because we are . . .

Tara Casey: And rebate checks.

Abbey Phillips: Yes.

Tara Casey: Rebate checks coming out next year.

Abbey Phillips: Rebate checks—if you live here in Virginia you're gonna re—get a rebate check. And, frankly, that—rebate checks is the compromise—because we were trying to do tax cuts, and—and there is a, um, a coalition called the Fund Our Schools Coalition and they fought really hard not to, um, have those tax cuts in place and to try to really push legislators to put a foot down, um, putting this ca—tax cuts in place, because just cause we have a surplus now, does not mean that's going to exist in the future and that absolutely would cut into something like public education funding.

Tara Casey: Yeah. So, with all of this in the landscape, um, Valerie, I, I would—I would love to hear your perspective cause we're coming into a General Assembly session, we're coming into a historic election, and we're coming into a—a General Assembly session that many are—are—are finding difficult to predict what it will look like. What do you—what—what change though, do you think is right now most pressing in the child welfare and—and parental rights space that we should be possibly focusing on as we're coming into the next General Assembly session?

Valerie L'Herrou: So, that's a great question, thank you—give me a chance to get up in my soap box. So, um, speaking of things that repeat and repeat, I've been working for a number of years on improving the, uh, quality of the legal representation that is provided to parents when children are

removed from them judicially, um, after an investigation by Child Protective Services. And, one thing that relates to all the things we're talking about is that Virginia has this really terrible habit of saying, "You know what, we think that x amount of dollars is a good thing for this, so let's put in our code that we will pay x amount of dollars for this thing." Twenty years later, with inflation and lots of other things, we're still paying x amount of dollars. And, as an example, um, the attorneys who are appointed to represent parents when their children are removed and placed in foster care are play—are paid a flat fee of \$120, um, with no fee cap waiver, and that, uh, is per . . .

Tara Casey: Let that sink in.

Valerie L'Herrou: Yes. \$120, flat fee per petition filed—and a first petition can be up to three hearings long, and I ju—looked up recently how much—that was set in, uh, 2003, um, and so, here we are, uh, twenty years later, and it's still \$120. And I—so I looked up how much was, you know, how much in today's dollars was \$120 back then? It's \$69. So essentially, attorneys are getting paid \$69, um, to handle three court hearings. And so, you know, here are the things we hear: oh, the attorney just walked up, got up, and walked out in the middle of the court hearing; judges can't find any attorneys to appoint; attorneys don't show up for the court hearing; attorneys don't return parents' calls; attorneys don't prepare for hearings; attorneys do not subpoena witnesses; they do not review evidence; they do not argue or advocate for their clients in court. Now, there are plenty of attorneys who *do* do all those things, but they're working pro bono essentially, so the \$120, especially when you're covering the five day hearing—and these are mandatory hearings that are mandated by federal and state law—five day hearing, an adjudicatory hearing, which sometimes is combined with the dispositional hearing, but that's three hearings, um, on three different issues, and, um, having handled these cases, I know that you can put dozens or even hundreds of hours into these cases, but that basically pays for—at the court appointed rate, that's basically an hour and a third, um, but considering the court appointed rate itself of \$90 an hour hasn't changed either since 2000, um, that's basically—you're asking someone to work for—for nothing basically, and, and attorneys have also told me that they don't even bother to submit their voucher to the Supreme Court, because that's even more time on top of all the time that they've already lost and so there's no point. So they just treat it as if it's pro bono. So, I've been working on this, um—the Virginia Commission on Youth recognized this as a problem back in 2015 and so VPLC worked on it, on that, in that year. I joined VPLC in 2016 and started working on it then. There have been repeated bills to make improvements since 2015, uh, including 2015, uh, 2020, uh, 2022, um, and 2023, um, and most of those bills substantively have passed the General Assembly, but the

money to fund them has not. Um, but this year, I am very hopeful that we will actually achieve some momentum, and one of the things that's really important to know is, you know, when we talk about—we hear a lot about parental rights, you know. Our governor has talked about, “parents matter, blah blah blah,” And so, when we hear that, a lot of times we're thinking about the things that we hear about in the news, you know, parents matter when it comes to, oh, what books should my child be reading in the library? Or, parents matter when it comes to what pronouns does the child want to use to be referred to themselves when they're in school. But, we're talking about low income parents who don't matter, as far as the court system and our child protection system, um, goes, um, but also, all the data out there shows that when parents get better legal representation, the outcomes for the child are vastly improved and happen on a much faster rate, so when a child is removed into foster care it's not like, oh that's the end of the story. The parent works with the Department, and the Department is supposed to, by law—again, federal and state law—work with the parent to provide services to the parent, to address the issues that cause the child to be removed in the first place, and so that's an ongoing process. And if the parent has better legal counsel, that process happens much faster. And in states that have adopted what's called the ‘holistic’ or ‘multidisciplinary model’ of legal representation, it happens on average four months faster. In Virginia, we spend over \$300 million annually on foster care for 5,000 children in care. So, that's between, you know, uh, 500, uh—or \$5,000 and \$20,000 a month per child. And so, if we were to shorten, um, that amount of time that children spend in foster care by an average of just one month, we would be saving \$25 million a year. So, this is something that the General Assembly has had a chance to look at and yet has said, “oh, well that's, you know, how—where are your figures coming from, how do you know?” Um, but what they did finally do in, uh, 2022 was create a work group, and the work group made a bunch of recommendations. In 2023, those recommendations are put before the General Assembly and they're like, “Oh, you know, well, that looks good but, you know, I think we need more studying.” So instead of doing anything, they created two new studies. But one thing that happened last year that is different—and this is an example of just, I don't know, serendipity or something—I was talking to one of the legislators and he's like, “Yeah, this is terrible, it's been going on for a long time, it's horrible, you know. Back in 2005, we had the same problem with criminal, uh—the criminal defense attorneys who are appointed, and, um, it didn't change until the state bar got involved,” and I went, “Oh!” So, I immediately reached out to the state bar and they're like, “Oh, we don't get involved in legislative matters. That's, you know, something we don't do.” And I was like, “Well, you did do it in 2005,” and he was like, “Really?” And I said “Yes. Here's a letter that you sent to Governor Warner that is on your

website.” And they're like, “Oh.” So, um, I have been working since January to, um, uh, reach out to uh, a committee of the state bar, including one in which, uh, Professor Casey serves on—and that is the access to, uh, Legal Services Committee—and reaching out to members of Bar Council, and, uh, on October 13th, Bar Council voted unanimously to take legal action, um—or to take legislative action, um, on this issue. Now, they still need to get permission from the Supreme Court, um, but since the Supreme Court has, uh, just raised the rate that they are paying attorneys on appeal, so the Supreme Court and Court of Appeals has also raised the rate that they're paying attorneys who represent parents on appeal in the Court of Appeals. I'm very hopeful that they are very cognizant of the issue and—and will finally pass it. Um, but that's an example of, you know, it's a complex issue, because it's not an issue where you go to court and you have a trial, and you either win or lose and then everybody goes home. It's a case where the attorney stays with that client, sometimes for two years or more, um, under the, again, it's a scheme of federal and state laws that mandate hearings on certain time periods—go on a very long time—and it can impact a parent's variability to be a parent. Never mind what pronouns their child wants to use, never mind what books are in the library, but whether they even are able to be a parent, and, um—to follow up on your point Cheryl—the parents who are impacted are, of course, almost all low income, but disproportionately parents of color. And in some cities, um, like, uh, Portsmouth for example, sometimes the number of children in foster care are four to five times higher than the number of—of Black children in foster care than of Black children in the general population. And we see that in a lot of areas. Now, in Southwest Virginia, we don't see that, just because there tends to be fewer Black children anyway, um, but those—in those areas, there are disproportionately just more children in foster care generally, and that relates to the opioid epidemic, and then also the prejudice we have about drug abuse.

Tara Casey: Well and—and I think that what you're also bringing up in that—that—that last comment—and Cheryl, I'd like to ask you this question—is the intersectionality of all of this, um, and there's these, um—and the challenges of almost confronting the intersectionality, because you wind up having to touch different spaces, different spheres, different communities, different areas, so what—oh, yeah, so, so take the deep breath.

Cheryl Poe: Yeah.

Tara Casey: So, so, when confronting the intersectionality of these issues, what do you see as being the biggest challenge, um, going forward?

Cheryl Poe: Well the—one of the biggest challenges is that a lot of the large nonprofit organizations in the state of Virginia that are literally tasked

and provided funding either through the state or the federal government—I'm speaking specifically about special education or educational needs, right? Um, are run by white women, and their boards are usually all white or maybe one Black person, right? So, right there, we know that the lens of what is valued or what needs to be addressed at any particular time through their goals, through their strategic plans, are coming from a white lens—a white supremacist lens. Because if you don't have a Black voice at the table, if you don't have a minority—several, not just one, several minority voices at the table—then we, we aren't seen, we aren't heard, our needs aren't taken as serious. Now, I'm not saying that a white woman could not advocate on behalf of the needs of Black families. I'm not saying that at all. Um, but I am saying that if we're going to talk about making significant, long-lasting change, we need to revamp everything, you know? We need to make sure that when they pull these stakeholders groups together and they pull these study groups together, that they are inclusive of everybody. The demographics of Virginia should be represented in those settings and they're not. Prime exam—example: the Virginia Department of Education, um, their state SEAC, which is a special education committee that they have to have, right? And it's to talk about the needs of students across the state, and they have, um, requirements for regions like, you can only have two people from this region or a person from this region, so they have those democratic, those uh, demo-demographics covered. I went and there was no Black people in there, and I'm like, how is that possible when we make such a large percentage of students receiving special education services? How can you ignore? I mean, you can't be listening to our needs, because if you were, (A) I think we would be having better outcomes, but you—you're not even engaging. You're not engaging the community that is impacted the most. So, uh, I—I really encourage leaders, um, to—leaders of these kinds of organizations or people that have that power to do that—when we talk about inclusion—because when it comes to disability, we'll talk about inclusion real quick—say, “where's your person with disabilities on—where are, also, your—the representation of the demographics racially on your boards? Where are their voices when you're making policies that impact our community the most?” Like that three-strike law. I—I can't believe that that would be an educational bill that had somebody, you know, of color—hopefully, several—that's why I say several, because just because they were Black, we don't all have to think the same thing—but, the discussion in the views of how traumatic that could be based on where we know we are, like how did that escape anybody? Like, it—it just amazes me. And just to touch on the—the um, the parental right. Every time I hear those words come out of his mouth, I just cringe. I—I think I'm having a—a traumatic response to it, right? I really am. That's like, wait a—so the only people who count as far as parents are those

who want to ban books that tell the true history about how Black people were hurt, or if you're using the wrong pronoun for a child. That's when the rights count? We have IDEA! Do you know the word parent is listed in there 440 times? What about those rights? He's totally just picking and choosing who counts.

Tara Casey: Yeah . . . I also see, I just saw that we have five minutes left. I do want to leave an opportunity for folks in the audience to ask questions. I always have questions. I question everything. So, but, I do want to give folks the opportunity for questions.

Audience Member: [unintelligible] . . . jokes really on me, um, but I just want to say it is disgusting what I've seen. Um, the blatant racism that I thought I was removing my children from. I'm thankful I—my children—two of them are now grown, three more to go. Um, but I just—I just want to thank you all what you're doing, especially Ms. Poe. [unintelligible]

Cheryl Poe: Virtual hug.

Audience Member: [unintelligible] I thought, Alabama's horrible, but Virginia's better. But, it is so much worse than Alabama, so much worse.

Cheryl Poe: Can I just jump and say that, like, people forget—that's one of the things that I do in my training when I talk about the intersectionality, right, of racism and education. You realize, not that long ago in Virginia, kids—Black kids could not go to school with white kids. You close down public education to avoid Black kids being able to sit in the same classroom with white kids. I actually had, um, my grandmother, we live from a small town up north—Newark—and we literally had—she would have, like, people come and stay with her during the week so they can go to school, from Virginia, and then go home on weekends, because they weren't allowed to access public education in Virginia. So, Virginia has never, ever—have you all ever heard of the Norfolk 17? Yeah. Right? Have you ever heard those stories? It is disgusting what they had to go through. Could you imagine trying to go to school, knowing everyone in the school hates you? Talk about mental health issues. I mean, for—like, we need to be honest. Virginia has never liked Black people. Let's just be honest about that. And just because it's 2023 and we've had one Black president, one Black, uh, vice president, it doesn't mean that America is all of a sudden like, like, aware of woke. Right? So, I just think we have to be honest about the realities of racism and how much it's embedded here in Virginia, where, you know, the slave trade [unintelligible]. You know, this is it. So, why—I mean, nothing's changed. Well we still [unintelligible] but, from the mindset, the idea that whiteness is better than blackness. Um, anti-blackness. Those kinds—that kind of mentality exists in our system, not just education, housing like you talked about—

systems that are supposed to protect children, like all of us.

Tara Casey: So—oh, yes.

Audience Member: [unintelligible] It's not just today, but it's—even every time when I do have [unintelligible]. I have to take time to process and to really remember that there is a reason why I do what I do and to not say I'm giving up because [unintelligible] sucks. Excuse my—my language, but it does. And when it comes down to children and—of all races, um—and then the disproportionality that happens for, you know, a, a big group of our children—Black children, Brown children, Latino, I mean, poor—I mean it's just, I've seen it. Just like Cheryl said, I've seen it, even with my own. Um, I appreciate everything that everybody here does. I appreciate having a conversation about it. But damn it, I want to see some movement.

Cheryl Poe: Yes!

Audience Member: That part frustrates me to no end. And it's really hard to stay in this fight when you don't see the dial move. Or, it moves in teeny, tiny bits. It's hard to stay in it. Believe me, I'm not giving up because there is hope, right? So, but, I just wanted to say that I'm really—I'm really having a hard time right now. I—I'm gonna have to go back to my room and really be depressed because I hate seeing—hearing—hearing it, we have to hear, we got to be, we but, but I want to be able to do something. I want to blow it up, start it over—not literally blow it up, so don't go [unintelligible] . . . when they start—you know when they hit. If you don't get it right at the beginning, it's going to suck at the end. And then it's going to come out and they're going to be out here in society. Um, they're in jail, or they're out here, you know, they have nowhere to go. And I don't care where you come from—that's anybody. And I have to agree with the, um—what's the lawyer's name? Valerie, that was up here [unintelligible]. Yeah, we can ask for a whole bunch of money, but when they divvy it up and they give most of the money to this group, and this group, but then you have this little group over here in Franklin—in Franklin County, where they don't have nothing. They have nothing. They can't provide half the stuff that they need to provide for their students. That is wrong! What—who makes the decision that one group of students struggle more than another? That is so wrong. I'm gonna stop there.

Tara Casey: It is. It is. And honestly, our time is up, and I feel like this is definitely a conversation, and an ongoing conversation, and it should make us angry. And it should make us really upset. And we should leave here feeling both, um, discouraged and inspired and have all of those feelings happen at the same time. And, I love the line that you said—you're not going to be giving up anytime soon. And, it's in that moment of discouragement and pessimism that you still have that voice inside you that says, “I am not

going to give up.” And I have been so impressed by everyone in this space, by PILR, and by the advocates here, because this entire day was a day spent about discussing all of the barriers that are before our children in Virginia. And you are all here. You chose to spend your Friday here—I like to think not because the CLE deadline is Tuesday. I like to think that the reason y’all are here is because you recognize that there are these barriers, that there’s—and nevertheless, you are not going to give up and I appreciate you all for being here. I appreciate the panel for being here, and thank you so much.

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CLOSING REMARKS

Courtney Squires

INTRODUCTION

Erin Sweet: We will now close a few words from our editor-in-chief, Courtney Squires.

SPEAKER

Courtney Squires: No, you guys are totally free to stay. Please, stay up here with me. Good afternoon, everyone, um, as Erin said, my name is Courtney Squires. I'm the current editor-in-chief of Richmond's Public Interest Law Review. Um, the privileges of this position are probably the most apparent on days like this. Um, and while I, personally—and everyone who is sitting in this room today could probably spend another eight consecutive hours talking about youth advocacy and the importance of adequate education for Virginia's children, and Alabama's children, and all children in the United States and beyond, um, I'm really here now to extend the deepest gratitude and thanks to everybody that made today possible. First, I want to congratulate our outstanding Symposium editors, Erin Sweet and Nicole Evans. Erin and Nicole took their roles in stride last May—I think, is when we did the appointment process, if we all can remember that far back—um, and put in countless hours, in addition to their important summer internships, um, to make today possible. Thank you both for your dedication to the event and for everything that I know that you will contribute to the legal profession, um, in a few short months when we graduate. Second, I'd like to thank the members of our symposium committee who worked alongside Erin and Nicole to make today run smoothly. Thank you to Laney Flanigan, PILR's first ever director of programming, um, for directing this committee and for all, um, all of their hard work arranging last night's reception, today's breakfast and lunch, and the celebratory social event after, um, the symposium wraps up. Thank you to our committee members, um, Victoria Hagerott, Tucker Weiser, uh, Kristie Thompson, Reagan Cavanaugh, and Kaitlyn Grant. Thank you all for your willingness to support today's event and for going above and beyond, um, your positions on the Public Interest Law Review. Next, I'd like to thank all of the University of Richmond staff and administration for all the work that they did to put on today's event. In particular, thank you to Richmond Law's resident tech expert, Carl Hamm, who I believe is still in the room, um, and also Eli Anderson, another one of our tech support staff here, um, for allowing us to

share today's event with a virtual audience, um, as well as all the various sound checking and technology services that, um, Carl provided and coordinated for us today. Thank you to Mary Ruth Keys for her ongoing support with scheduling today's event, um, providing the beautiful advertising materials, um, and for essentially every logistical need in between. Thank you to Professor Joyce Janto for assisting our team with getting CLE approval for today's event—not just pending, it's approved. And thank you to Dean Sklut for her overarching support of today's event, of the University of Richmond Public Interest Law Review, and for all of our law school journeys that we—that we started two and three years ago. And finally, thank you to our faculty advisor, Professor Janice Craft. Um, I'm sure she's glad that we held our first in-person symposium since the start of our—the start of the pandemic. Um, and her first semester as our faculty advisor, might I say. Uh, and, lastly, thank you to the practitioners, the judges, the faculty, and faculty moderators who contributed to today's symposium. Thank you for the important work that you're doing in your respective spaces and for giving us all kinds of new knowledge and expertise, um, today. In particular, I'd like to thank Professor Julie McConnell, um, for connecting our symposium committee and editors to perhaps most of the speakers that we had here today. Um, and also for Melissa Waugh for all that you did to develop today's topic and sort of, um, provide direction to our symposium editors this summer. I hope everyone, whether you joined us in person or online, um, enjoyed your time with us today and, as we've said, please check your email for further information related to those CLE credits. Um, and do stay tuned for our written symposium issue that will be published in early 2024. Thank you, again, um, for sharing your Friday with us and for continuing these difficult but important conversations of surrounding youth advocacy. Um, I wish everybody a great night and a great weekend, thank you.

[End]