

EDUCATION LAW INTO PRACTICE

AN UPDATE OF LEGAL ISSUES FOR STUDENTS WITH AUTISM: ELIGIBILITY AND METHODOLOGY*

by

PERRY A. ZIRKEL, PH.D., J.D., LL.M.**

An update of earlier versions,¹ this article is an annotated outline of statutory legal materials concerning education of children with autism spectrum disorder (ASD), with particular attention to the ASD-specific issues of eligibility and methodology.² More specifically, the first section provides a sampling of secondary sources that have systematically compiled the pertinent case law outcomes. The second section contains relevant IDEA regulations and policy letters. The third section summarizes the § 504 definition of disability. The fourth and largest section provides a trends overview and blurb-type listing of recent court decisions concerning free appropriate public education (FAPE)-related issues for children with ASD.³ The fifth section presents a checklist for districts derived from the case law, with parent lessons being the obverse side of the same checklist. The final section provides a sampling of state laws focused on ASD interventions.

* *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 376 Ed.Law Rep. [1] (May 28, 2020).

** Dr. Zirkel is University Professor Emeritus of Education and Law, Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.

1. For the earlier versions, see 322 Ed. Law Rep. 10 (2015); 262 Ed. Law Rep. 23 (2011); 201 Ed. Law Rep. 1 (2006).

2. The scope does not extend to ASD methodology cases in other contexts. *E.g.*, *M.R. v. Tajdar*, 58 NDLR ¶ 65 (D. Md. 2018) (allowed ADA Title III request for declaratory and injunctive relief to proceed against private daycare facility that rejected ABA services because “it wouldn’t be fair to the other kids”); *Garrido v. Dudek*, 731 F.3d 1152 (11th Cir. 2013) (affirming permanent injunction for Medicaid coverage of ABA

therapy for children with ASD); *Silver Lining Group v. Ohio Dep’t of Educ.*, 85 N.E.3d 789, 349 Ed.Law Rep. 186 (Ohio Ct. App. 2017) (upholding state education agency’s interpretation of “private provider” under state autism scholarship law as applied to private school with multiple locations); *Burke v. Indep. Blue Cross*, 171 A.3d 252, 348 Ed.Law Rep. 911 (Pa. 2017) (ruling that Pennsylvania’s Autism Coverage Law invalidated exclusions for ABA services at school).

3. The compilation is limited to cases concerning eligibility and FAPE, because autism is not particularly linked to the other categories of the case law, which tend to be generic across the various classifications of disability under the IDEA. For a limited exception, see *P.V. v. Sch. Dist. of Philadelphia*, 60 IDELR ¶ 185 (E.D. Pa. 2013) (ruling that system-wide transfer of schools for students with autism qualifies as a change in placement because it is likely to significantly affect the child’s learning experience).

EDUCATION LAW REPORTER

I. SECONDARY SOURCES⁴

Overall Case Outcomes:

PERRY ZIRKEL, *AUTISM AND THE LAW: RULINGS AND EXPERT ANALYSIS* (2001) (available from LRP Publications):

- 290 published hearing/review officer and court decisions from 1980 to 2000⁵
- completely incidental role of autism in approximately 40% of the cases
- approximately 30% at the preschool level
- sharply rising frequency of cases in recent years but relatively stable outcomes, averaging approximately 4.4 on 1 (parent) to 7 (school) scale
- decisions in the Tenth and Fourth circuits have been the most favorable to school districts, and those in the Third and Eighth circuits have been most favorable to parents.
- primary issues: 1) FAPE: substantive, including placement, and 2) FAPE: procedural

Perry Zirkel, *The Autism Case Law: Administrative and Judicial Rulings*, 17 FOCUS ON AUTISM 84 (2002):

- more favorable rulings for districts in court than at the hearing/review officer level but various confounding variables

Eligibility:

Julie Fogt, David Miller, & Perry Zirkel, *Defining Autism: Professional Best Practices and Published Case Law*, 41 J. SCH. PSYCH. 201 (2003):

- relatively few cases (n=13 from 1980 to 2002) specific to autism eligibility under the IDEA, almost all at the hearing officer level
- emphasis on legal requirements and standards, not professional best practices
- importance of expert witnesses, including school professional staff
- recognition that DSM-IV is not controlling

Frequency:

Perry A. Zirkel, *Autism Litigation under the IDEA: A New Meaning of "Disproportionality?"* 24 J. SPECIAL EDUC. LEADERSHIP 92 (2011):

- for FAPE litigation nationally from 1993 to 2006, the published case law has increased steadily

4. This section is limited to empirical analyses. Thus, it does not extend to more traditional narrative syntheses of the case law specific to students with autism. *E.g.*, Myrna R. Mandlawitz, *The Impact of the Legal System on Educational Programming for Young Children with Autism Spectrum Disorder*, 32 J. AUTISM & DEV. DISORDERS 495 (2002). Similarly, it does not extend to specialized issues within state laws. *E.g.*, Kerry Schutte, Kate Piselli, Ara Schmitt, Maura Miglio-Retti, Lauren Lorenzi-Quigley, Amy Tiberi & Noah Krohner, *Identification of ADHD and Autism Spectrum Disorder*, 46 COMMUNIQUE 4 (Sept. 2017) (identifying the

minority of states that either require medical verification or medical information in determining IDEA eligibility for ASD).

5. More recently, a study reported that there had been 354 IDELR-published hearing/review officer and court decisions from 1990 through 2002, but it did not provide enough information to explain the disparity with this total. Mitchell Yell et al., *Developing Legally Correct and Educationally Appropriate Programs for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM AND OTHER DEVELOPMENTAL DISABILITIES 182 (2003).

LEGAL ISSUES FOR STUDENTS WITH AUTISM

- the proportion attributable to the autism classification has remained approximately 8–9 times the proportion of children in the special education population

Methods–Outcomes:⁶

Mitchell L. Yell & Eric Drasgow, *Litigating a Free Appropriate Public Education: The Lovaas Hearings and Cases*, 33 J. SPECIAL EDUC. 305 (2000):

- 45 IDELR-published hearing officer and court decisions concerning Lovaas treatment programs from 1993 to 1998
- 76% of the decisions were reportedly in favor of the parents, but limitations in data collection and outcomes analysis

Susan Etscheidt, *An Analysis of Legal Hearings and Cases Related to IEPs for Children with Autism*, 28 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 51 (2003):

- 68 cases from 1997 through 2002, with 60% being hearing/review officer decisions
- outcomes favored districts—57% as compared to parents—43%
- key factors: goals consistent with evaluation, qualified IEP team members, and methodology tailored to goals

Catherine Nelson & Dixie Snow Huefner, *Young Children with Autism: Judicial Responses to the Lovaas and Discrete Trial Training Debates*, 26 J. EARLY INTERVENTION 1 (2003):

- limited to Lovaas/DTT court decisions (n=19) from 1997 to 2002
- only 3 Part C cases, all decided in favor of the defendant districts
- parents obtained substantial relief in only 4 of the 19 cases
- districts lost where they provided no support (rationale and evidence) for their proposed program

Claire Choutka, Patricia Doloughty, & Perry Zirkel, *The “Discrete Trials” of ABA for Children with Autism: The Outcome–Related Factors in the Case Law*, 38 J. SPECIAL EDUC. 95 (2004):

- relatively frequent cases (n=68) from 1980 to 2001, with 65% being hearing/review officer decisions
- two categories of cases: 63%—program selection (e.g., instructional approach) and 37% program implementation (e.g., location, duration, or frequency)
- 50–50 outcomes (4.0 on a 1–7 scale) in both categories
- key factors in both categories: testimony of witnesses, documentation of progress, and IEP elements

Doris Hill, E. Davis Martin, & Cynthia Nelson–Head, *Examination of Case Law (2007–2008) Regarding Autism Spectrum Disorder and Violations of the Individuals with Disabilities Education Act*, 55 PREVENTING SCH. FAILURE 214 (2011):

- 99 court cases in 2007 and 2008
- outcomes based on 3–category scale: district prevailed—54%, tied—19%, parent prevailed—27%

6. The Choutka et al. article reviews earlier research studies in this category. For an early sampling of case law in various broader categories, see Lyman Boomer & Linda

Garrison–Harrell, *Legal Issues Concerning Children with Autism and Pervasive Developmental Disabilities*, 21 BEHAV. DISORDERS 553 (1995).

EDUCATION LAW REPORTER

- parents did relatively well for claims regarding parental participation and unqualified personnel

Doris A. Hill & Stephanie J. Hill, *Autism Spectrum Disorder, Individuals with Disabilities Education Act, and Case Law: Who Really Wins*, 56 PREVENTING SCH. FAILURE 157 (2012):

- 62 court cases in 2009
- outcomes based on 3–category scale: district prevailed—63%, tied—8%, parent prevailed—29%
- parents did relatively well for unqualified personnel

Janet Decker, *A Comprehensive Analysis of Applied Behavior Analysis (ABA) Trends for Students with Autism*, 274 Ed. Law Rep. 1 (2012):

- limited to ABA published court decisions (n=39) from 1975 to 2009
- districts won 24 (62%), with 5 (13%) inconclusive and with 10 (26%) for parents
- parents did better in recent cases, but pro-district deference remained prevalent

Doris A. Hill & Regina Kearley, *Autism Litigation: Outcomes for 2010, Trends in Decision Making and Changes in Diagnostic Criteria*, 34 RES. IN DEVELOPMENTAL DISABILITIES 1843 (2013):

- 68 court cases in 2010
- outcomes based on 3–category scale: district prevailed—60%, tied—4%, parent prevailed—35%
- parents did relatively well for unqualified personnel

Doris A. Hill & Jonte Taylor, *Significant Outcomes in Case Law in the United States: Autism and IDEA in 2013, Transition Issues and Changes in Diagnostic Evaluation Criteria*, 12 J. AM. ACAD. SPECIAL EDUC. PROFESSIONALS 84 (Winter 2017):

- 85 court cases in 2013
- outcomes based on 3–category scale: district prevailed—65%, tied—9%, parent prevailed—26%
- parents did relatively well for ABA services (46% prevailed)

Bradley S. Stevenson & Vivian I. Correa, *Applied Behavior Analysis, Students with Autism, and the Requirement to Provide a Free Appropriate Public Education*, 29 J. DISABILITY POL'Y STUD. 206 (2019):

- 27 court cases from December 2004 to August 2016 purportedly specific to ABA
- outcomes based on a 2–category scale, with a few cases in both groups, were: in favor of district—67%; in favor of parents—33%

II. IDEA REGULATIONS AND POLICY LETTERS

IDEA Definition of Autism⁷

(a) [C]hild with a disability means that a child evaluated in accordance with [the applicable IDEA requirements for eligibility] as having . . . autism . . . and who, by reason thereof, needs special education and related services.

7. 34 C.F.R. § 300.8. The IDEA legislation, as of the 1990 Amendments, specifies autism as one of the 13 recognized classifications but does not specifically define it.

LEGAL ISSUES FOR STUDENTS WITH AUTISM

(c)(1)(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in this section.

(ii) A child who manifests the characteristics of “autism” after age 3 could be diagnosed as having “autism” if the criteria in paragraph (c)(1)(i) of this section are satisfied.

IDEA Standard for Procedural FAPE⁸

In matters alleging a procedural violation, a hearing officer⁹ may find that a child did not receive a FAPE only if the procedural inadequacies—

- (i) Impeded the child’s right to a FAPE;
- (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
- (iii) Caused a deprivation of educational benefit.

Rather, the definition appears in the IDEA regulations, which also define two other separate, but related classifications:

(b) *Children aged 3 through 9 experiencing developmental delays*. The term *child with a disability* for children aged 3 through 9 may, at the discretion of the State and [school district] and in accordance with [the FAPE regulation], include a child—(1) Who is experiencing developmental delays as defined by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and (2) Who, by reason thereof, needs special education and related services.

(c)(9) *Other health impairment* means having limited strength, vitality or alertness, . . . that results in limited alertness with respect to the educational environment, that (i) Is due to chronic or acute health problems . . . and (ii) Adversely affects a child’s educational performance.

Id. The OSEP policy letters on the following pages clarify the possible connections to developmental delay and other health impairment. Some state special education laws have differing definitions or criteria for

ASD eligibility. *E.g.*, ALA. ADMIN. CODE r. 290–8–9–.03(1); GA. ADMIN. CODE § 160–4–7–.05; LA. ADMIN. CODE tit. 28, pt. C1, § 701; MICH. ADMIN. R. 340.1715; MINN. ADMIN. CODE § 3525.1325; MICH. ADMIN. CODE r. 340.1715; NEV. ADMIN. CODE § 388.387; OR. ADMIN. R. 581–015–2130; S.C. CODE ANN. REGS. 43–243.1(B); S.D. CODIFIED LAWS § 13–37–28; TENN. COMP. R. & REGS. 0520–01–09–.02(4); 7 WYO. CODE R. § 4(d)(1). In general, however, the professional or medical definitions of ASD are broader than the IDEA definition of autism. *E.g.*, https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml?utm_source=rss_readersutm_medium=rssutm_campaign=rss_full (National Institute of Mental Health); [http://www.dsm5.org/Documents/Autism Spectrum Disorder Fact Sheet.pdf](http://www.dsm5.org/Documents/Autism%20Spectrum%20Disorder%20Fact%20Sheet.pdf) (DSM–V).

8. 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

9. Compare the state’s complaint resolution process (and OCR’s corresponding process). *E.g.*, Perry A. Zirkel, *A Comparison of the IDEA’s Dispute Resolution Processes: Complaint Resolution and Impartial Hearings* “An Update,” 369 Ed. Law Rep. 550 (2019); Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA*, 30 J. SPECIAL EDUC. LEADERSHIP 88 (2017).

EDUCATION LAW REPORTER

OSEP Policy Letters¹⁰ regarding Autism Spectrum Disorders¹¹

Letter to Coe, 32 IDELR ¶ 204 (OSEP 1999)

- children with pervasive developmental disorder (PDD) and its subcategory autism in DSM-IV¹² are eligible under the IDEA only if they meet the definition of “child with disability” for “autism” or other specified category, such as “other health impairment” (OHI)
- states may have criteria for eligibility of children under the disability categories so long as those criteria do not conflict with the federal definition
- children with PDD aged 3 through 9 may qualify as developmentally delayed if the state and district utilize that classification and the child meets the state’s diagnostic criteria
- IDEA-97 clarifies that “[n]othing in the Act requires that a child be classified by their disability so long as each child who has a disability listed in § 300.7 and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability under Part B of the [IDEA].”

Letter to Williams, 33 IDELR ¶ 249 (OSEP 2000):

- same eligibility clarification for child diagnosed with Asperger’s Syndrome, except at least partially ducks its role under OHI: “Regardless of whether Asperger’s Syndrome is identified as a condition that could render a child “other health impaired,” we do not believe it would be inconsistent with Part B [of the IDEA] for a State to permit school districts to evaluate children with Asperger’s Syndrome to consider whether they could be other health impaired.”
- addresses FAPE questions by clarifying that whether the child, once determined eligible, is entitled to speech pathology, occupational therapy, social skills training, or any other such service depends on whether the IEP team determines that it is required to assist the child to benefit from special education, not on whether the parent requests such service
- also addresses placement, discipline, and discrimination questions by generally reciting applicable provisions of IDEA (and § 504)

Letter to Autin, 58 IDELR ¶ 51 (OSEP 2011):

- addresses question as to permissibility of state or local education agencies establishing separate schools for students with autism, OSEP

10. “OSEP” refers to the Office of Special Education Programs, which is the agency within the U.S. Department of Education that administers the IDEA. Courts accord deference to the policy letters of such agencies within prescribed limits. Perry Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed. Law Rep. 391 (2003).

11. The other rarely published pertinent OSEP interpretations do not provide sufficiently specific and significant information to warrant republication here. *E.g.*, Letter to Anonymous, 60 IDELR ¶ 47 (OSEP 2012); Letter to Anonymous, 55 IDELR ¶ 72 (OSEP 2010); Letter to Anonymous, 30 IDELR 705 (OSEP 1998); Letter to Van-

Wart, 20 IDELR 1217 (OSEP 1993). The scope of pertinence here does not extend to issue related but not particular to autism, such as when must the IEP include methodology. *E.g.*, Letter to Anonymous, 49 IDELR 258 (OSEP 2007); Letter to Wilson, 37 IDELR ¶ 96 (OSEP 2002).

12. The recently issued DSM-V collapses the separate diagnoses of autistic disorder, Asperger’s disorder, childhood integrative disorder, pervasive developmental disorder NOS into one umbrella classification of autism spectrum disorder (ASD) and requires showing of symptoms in early childhood even if not recognized until later.

LEGAL ISSUES FOR STUDENTS WITH AUTISM

opined that placement must be on an individual basis in accordance with the applicable procedures and criteria for LRE

Dear Colleague Letter, 66 IDELR ¶ 21 (OSEP 2015):

- issues reminder that IEP and IFSP teams, in identifying and addressing individual needs, should avoid using “ABA therapists exclusively without including, or considering input from, speech language pathologists and other professionals who provide different types of specific therapies that may be appropriate for children with ASD”

III. ALTERNATE SOURCE OF COVERAGE: § 504 AND THE ADA § 504 AND ADA DEFINITION OF “INDIVIDUAL WITH A DISABILITY”¹³

[A]ny person who

- (i) **has a physical or mental impairment which substantially limits one or more of such person’s major life activities,**
- (ii) has a record of such an impairment, or
- (iii) is regarded as having such an impairment.¹⁴

Thus, the relevant, essential elements for FAPE eligibility are:

- physical or mental impairment
- +
- major life activity
- +
- substantial

IV. COURT DECISIONS RE: ELIGIBILITY AND METHODOLOGY¹⁵

1. *P Still v. DeBuono*, 101 F.3d 888, 114 Ed.Law Rep. 743 (2d Cir. 1996).
***But cf. Malkentzos v. DeBuono*, 102 F.3d 50, 114 Ed.Law Rep. 786 (2d Cir. 1996)**(mootness and lack of irreparable harm)

13. 20 U.S.C. § 706(8)(B); 34 C.F.R. § 104.3(j). For a two-volume comprehensive reference, see PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004) (available from LRP Publications). The ADA Amendments, which are effective January 1, 2009, effectively reverse a decade of court decisions that have taken a “demanding” and, thus, narrowing interpretation of this definition, particularly the second two elements. *E.g.*, Perry A. Zirkel, *New Section 504 Student Eligibility Standards*, 41 TEACHING EXCEPTIONAL CHILD. 68 (2009). Of additional significance for high-functioning students with Asperger disorder, a recent unpublished Third Circuit decision recognized social interaction as a major life activity. Although the student in this case did not meet the rigorous interpretation of substantial, the ADA would seem to suggest the possibility of the opposite outcome. *Weidow*

v. Scranton Sch. Dist., 460 F. App’x 181, 278 Ed.Law Re. 879 (3d Cir. 2012). Moreover, the recent ADA Title II regulations added “interacting with others” to the list of examples of major life activities. 28 C.F.R. § 35.108(c)(1)(i)

14. The second and third “prongs” (i.e., subsections “ii” and “iii”) of this definition cannot be the basis for FAPE. *See* Senior Staff Memorandum, 19 IDELR 894 (OCR 1992).

15. Coverage starts in 1998 with the exception of any *Part C (formerly Part H) cases, which are cited in italics. Court decisions from the federal appeals courts are cited in bold typeface.* The judicial outcomes are coded to the left of each case citation as follows: *P* = parent won; *S* = school district won; and () = inconclusive victory. Those concerning eligibility and methodology are respectively designated after the cita-

EDUCATION LAW REPORTER

- ruled under Part C in favor of parents' IFSP for ABA therapy for three-year-old with autism, including reimbursement—only issue was whether privately obtained services by personnel who did not meet state qualification standards were reimbursable [M]
- 2. *S Jefferson Parish Sch. Bd. v. Picard*, 27 IDELR 824 (E.D. La. 1998)
 - upheld “cottage” placement of 17-year old student with autism with limited mainstreaming opportunities in nearby high school, also rejecting parent claims regarding teacher qualifications and lack of BIP in IEP (but mixed results regarding emergency removals and music therapy) [~M]
- 3. *P T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 137 Ed.Law Rep. 555 (N.D. Ill. 1999)
 - rejected district's cross-categorical early childhood placement, w/o aide, upholding instead appropriateness of parents' home-based Lovaas placement for autistic five-year-old (tuition reimbursement case) [M]
- 4. *S Renner v. Bd. of Educ.*, 185 F.3d 635, 137 Ed.Law Rep. 215 (6th Cir. 1999)
 - upheld the appropriateness of the district's IEP for an autistic child even though it did not have the extent of Lovaas-type discrete trial training sought by the parents [M]
- 5. *S Wagner v. Short*, 63 F. Supp. 2d 672, 139 Ed.Law Rep. 232 (D. Md. 1999)¹⁶

tion with “[E]” and “[M].” Those cases that only partially or marginally concern methodology are marked with a “[~M].” The acronyms in the case blurbs include: ABA = applied behavior analysis; ADA = Americans with Disabilities Act; ASD = autism spectrum disorder; AT = assistive technology; BIP = behavior intervention plan; DIR = developmental, individual differences, relationship (model); ESY = extended school year; FAPE = free appropriate public education; FBA = functional behavioral analysis; IFSP = individual family services plan; IHO = impartial hearing officer; LRE = least restrictive environment; OT = occupational therapy; OCD = obsessive compulsive disorder; PDD = pervasive developmental disorder; PECS = picture exchange communication system; PRR = peer-reviewed research; SEA = state education agency; SLD = specific learning disabilities; SLT = speech/language therapy; and TBI = traumatic brain injury.

For a more comprehensive listing, including other issues, earlier cases, and hearing/review officer decisions, methodology case law, see ELENA GALLEGOS & JILL SCHALLENBERGER, *AUTISM METHODOLOGIES TO LIVE BY: LEGAL GUIDANCE FOR PRACTICAL PROGRAM STRATEGIES* (2011). For significant court decisions concerning children with autism but

not specific to this disability category, see, for example, *Winkelman v. Parma Cty. Sch. Dist.*, 550 U.S. 516, 167 Ed.Law Rep. 904 (2007) (ruling that parents have enforceable rights under the IDEA for proceeding pro se); *L.G. v. Fair Lawn Sch. Dist.*, 486 F. App'x 967, 287 Ed.Law Rep. 691 (3d Cir. 2012) (procedural violation and LRE); *Vives v. Fajardo*, 472 F.3d 19, 215 Ed.Law Rep. 247 (1st Cir. 2007) (rejecting parent's § 504/ADA retaliation claim for lack of requisite proof); *Pachl v. Seagren*, 453 F.3d 1064, 210 Ed.Law Rep. 940 (8th Cir. 2006) (upheld 70% segregated placement rather than parents' proposed fully inclusionary placement). Conversely, for a significant Supreme Court decision that did not involve a child with autism but affects the litigation on behalf of children with autism, see *Fry v. Napoleon Comty. Schs.*, 137 S. Ct. 743 (2017) (requiring exhaustion of the IDEA's due process hearing mechanism for non-IDEA claims when their underlying crux is FAPE). Finally, for a free download of a much more comprehensive compilation, including but not limited to various other decisions concerning students with autism, see *A National Update of Case Law under the IDEA and § 504/ADA Since 1998*, available in the “Publications” section of perryzirkel.com.

LEGAL ISSUES FOR STUDENTS WITH AUTISM

- upheld appropriateness of IFSP proposed for autistic child, despite parents' preference for a particular ABA program [M]
6. *P/S Adams v. State of Oregon*, 195 F.3d 1141, 139 Ed.Law Rep. 820 (9th Cir. 1999)
- upheld district's IFSP for child with autism, rather than intensive Lovaas-type program parent preferred, but rejected district's revised IFSP that reduced weekly service hours, because it "was not linked to [the child's] unique developmental needs" (tuition reimbursement case) [M]
7. *S Dong v. Bd. of Educ.*, 197 F.3d 793, 140 Ed.Law Rep. 116 (6th Cir. 1999)
- upheld school-based TEACCH program, rather than parents' home-based Lovaas-type program for autistic child (tuition reimbursement case) [M]
8. *S Blackmon v. Springfield R–XII Sch. Dist.*, 198 F.3d 648, 140 Ed.Law Rep. 519 (8th Cir. 1999)
- upheld reverse mainstreaming classroom placement of TBI/autistic child rather than parent's unilateral home-based early childhood program, concluding that procedural deficiencies were waived and, in any event, nonprejudicial (tuition reimbursement case) [M]
9. *P Walker Cnty. Sch. Dist. v. Bennett*, 203 F.3d 1293, 141 Ed.Law Rep. 1013 (11th Cir. 2000)
- upheld tuition reimbursement for private placement for student with autism, declining to hear additional evidence and pointing out deficiencies in the proposed IEP, including lack of BIP, OT, and ESY [~M]
10. *S Burilovich v. Bd. of Educ.*, 208 F.3d 560, 143 Ed.Law Rep. 437 (6th Cir. 2000)
- upheld the substantive and procedural appropriateness of district's mainstreamed IEP for elementary school student with autism, thereby rejecting reimbursement for "standard" 40-hour in-home program and parents' claim about specialized IEP team and staffing expertise [M]
11. (*P*) *Bd. of Educ. v. Michael M.*, 95 F. Supp. 2d 600, 144 Ed.Law Rep. 187 (S.D. W.Va. 2000)¹⁷
- ruled that district did not meet its burden to prove that its program, rather than the parents' in-home Lovaas program, was appropriate (tuition reimbursement case) [M]
12. *S Gill v. Columbia #3 Sch. Dist.*, 217 F.3d 1027, 145 Ed.Law Rep. 894 (8th Cir. 2000)
- upheld the substantive appropriateness of the district's proposed self-contained placement, with 1:1 aide and reverse mainstreaming, for
16. For subsequent separate litigation involving the same child under Part B, see *infra* the Fourth Circuit's 2003 decision and the federal district court's 2004 decision (case nos. 28 and 37).
17. The court subsequently upheld the appropriateness of the parents' program and ordered tuition reimbursement. *Board of Educ. v. Michael M.*, 33 IDELR ¶ 185 (S.D. W.Va. 2000).

EDUCATION LAW REPORTER

kindergarten child with autism, rather than parents' in-home 40-hour Lovaas program (tuition reimbursement case) [M]

13. P Sackets Harbor Cent. Sch. Dist. v. Munoz, 33 IDELR ¶ 154 (N.Y. Sup. Ct. 2000)

- held that, based on IEP-team voting process and applicable standards, parents were entitled to reimbursement for costs of home-based ABA program to supplement reduced in-school program for preschool student with autism [~M]

14. S Steinmetz v. Richmond Cmty. Sch. Corp., 33 IDELR ¶ 155 (S.D. Ind. 2000)

- upheld district's proposed preschool program for child with autism rather than parents' in-home ABA program (tuition reimbursement case) [M]

15. P Sanford Sch. Comm. v. Mr. & Mrs. L., 34 IDELR ¶ 262 (D. Me. 2001)

- upheld hearing officer's stay-put order and compensatory education relief when district's change for kindergarten child with autism from half-inclusion, half-ABA program to self-contained program was based on administrative convenience, not appropriate evaluation [~M]

16. P/S Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 155 Ed.Law Rep. 20 (1st Cir. 2001)

- upheld district's proposed placement of 17-year-old student with autism in self-contained class rather than residential placement, but added parent training to manage the child's behavior to the extent it linked to education progress [~M]

17. P Jaynes v. Newport News Sch. Bd., 13 F. App'x 166 (4th Cir. 2001)

- upheld tuition reimbursement for Lovaas program where the district failed to notify the parents of their right to challenge the proposed IEP (via a due process hearing) and the child evidenced progress as a result of the Lovaas therapy [~M]

18. P/S Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 155 F. Supp. 2d 1213, 156 Ed.Law Rep. 555 (D. Or. 2001)

- upheld appropriateness of a series of IEPs for a child with autism, including TEACCH rather than Lovaas, but found that lack of district (or other child-knowledgeable) member of IEP team for one year was a prejudicial error (ordering mediation as the first-resort remedy) [M]

19. S A.B. v. Bd. of Educ., 36 IDELR ¶ 65 (D.S.C. 2001)

- upheld appropriateness of inclusion-based ABA program and rejected appropriateness of home-based Lovaas program (based on restrictiveness and lack of generalization) for kindergarten child with autism [~M]

20. S C.M. v. Bd. of Pub. Educ., 184 F. Supp. 2d 466, 162 Ed.Law Rep. 126 (W.D.N.C. 2002)

- upheld appropriateness of school-based TEACCH program rather than parents' unilateral home-based Lovaas program for child with autism [M]

LEGAL ISSUES FOR STUDENTS WITH AUTISM

21. (*S*) M.E. v. Bd. of Educ. for Buncombe Cnty., 186 F. Supp. 2d 630, 162 Ed.Law Rep. 279 (W.D.N.C. 2002), **vacated sub nom. M.E. v. Buncombe Cnty. Bd. of Educ., 72 F. App'x 940, 180 Ed.Law Rep. 580 (4th Cir. 2003)**¹⁸

- rejected tuition reimbursement for in-home Lovaas program where the parents made only technical, unsupported challenges to the district's proposed TEACCH program and they admitted that they would not have accepted the offer in any event—but dismissed on appeal based on lack of jurisdiction [~M]

22. *S* Faulders v. Henrico Cnty. Sch. Bd., 190 F. Supp. 2d 849, 163 Ed.Law Rep. 423 (E.D. Va. 2002), **vacated sub nom. JH v. Henrico Cnty. Sch. Bd., 326 F.3d 560, 175 Ed.Law Rep. 414 (4th Cir. 2003)**¹⁹

- upheld appropriateness of district's ESY program for high functioning autistic child, with focus on improving social communication rather than 1:1 services and with goal of reasonable progress rather than mastery of skills [~M]

23. *S* Tyler v. Northwest Indep. Sch. Dist., 202 F. Supp. 2d 557, 165 Ed.Law Rep. 572 (N.D. Tex. 2002)

- upheld procedural and substantive appropriateness of proposed IEP for autistic preschool child, which included 6 hours of Lovaas in-home training rather than the 25 hours the parents insisted was necessary [M]

24. *S* J.P. v. W. Clark Cmty. Sch., 230 F. Supp. 2d 910, 172 Ed.Law Rep.193 (S.D. Ind. 2002)

- upheld appropriateness of district's eclectic TEACCH/PECS-based program, which included ABA/DTT, for high school student with autism rather than parents' full-time Lovaas-type program—rejection of parents' cookie-cutter, cost-related arguments [M]

25. *P* Neosho R–C Sch. Dist. v. Clark, 315 F.3d 1022 (8th Cir. 2003)

- held that the IEP's failure to include a proper BIP amounted, in this case, to a denial of FAPE in light of the obvious need of the child with autism-Asperger's and SLD for a BIP and unpersuasive evidence of academic progress [~M]

26. *S* Zasslow v. Menlo Park City Sch. Dist., 60 F. App'x 27, 175 Ed.Law Rep. 31 (9th Cir. 2003)

- brief ruling that despite turnover district provided qualified speech therapist for child with autism thus supporting proposition that parents do not have the right to select service deliverer [~M]

27. *S* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 176 Ed.Law Rep. 83 (5th Cir. 2003)

- upheld substantive appropriateness of proposed IEP for student with autism (Asperger's Syndrome), rather than private placement, based on Cypress-Fairbanks 4-factor test and upheld procedural appropriateness

18. The appellate court dismissed the case without prejudice because the hearing officer had not issued a final decision.

19. The appellate court vacated and remanded the decision due to lack of findings as to

whether the level of services provided in the child's IEP for the summer was adequate to prevent the gains the child made during the previous school year from being significantly jeopardized.

EDUCATION LAW REPORTER

based on no loss of educational opportunity (or infringement on parental-participation opportunity) [~M]

28. (S) Wagner v. Bd. of Educ. of Montgomery Cnty., 335 F.3d 297, 178 Ed.Law Rep. 694 (4th Cir. 2003)²⁰

- held that upon the unavailability of the then-current placement (here due to the only state-approved Lovaas provider ceasing the in-home services under the IEP w/o notice) “stay put” does not require the district to provide a comparable, alternative placement; the parents’ only remedies are either to agree with the district to a new placement or seek a preliminary injunction from the trial court changing the child’s placement [~M]

29. (P) G v. Fort Bragg Dependent Sch., 343 F.3d 295, 180 Ed.Law Rep. 474 (4th Cir. 2003)

- remanded to determine whether the district’s proposed IEP for four-year-old with autism, which contained Lovaas elements but not a Lovaas-certified consultant, met the Rowley substantive standard and whether the district denied the child FAPE during the previous three years (rejecting parental-objection standard for triggering compensatory education) [M]

30. (P) Greenwich Bd. of Educ. v. Torok, 40 IDELR ¶ 44 (D. Conn. 2003)

- granted preliminary injunction to maintain the hearing officer’s decision that ordered the district to change the kindergarten child’s classification from OHI to autism (based on IEE), reimburse the parents for home therapies, and provide various additional hours of 1:1 therapy at home or school—as the stay-put pending the judicial appeal [~E, ~M]

31. S T.B. v. Warwick Sch. Comm., 361 F.3d 80, 186 Ed.Law Rep. 15 (1st Cir. 2004)

- upheld district’s proposed placement of autistic kindergarten student in a specialized class that used the TEACCH approach rather than private school that relied on DTT–nonprejudicial procedural violations and deferential Rowley standard (tuition reimbursement case) [M]

32. S Johnson v. Olathe Dist. Sch., 316 F. Supp. 2d 960, 188 Ed.Law Rep. 307 (D. Kan. 2003)

- upheld district’s proposed IEP for an autistic sixth grader in a life skills class that used ABA and redirection techniques rather than home placement–procedural violations (e.g., IEP team composition) were non-prejudicial and methodology (here, redirection > planned ignoring) is within district’s discretion [M]

33. P Diatta v. Dist. of Columbia, 319 F. Supp. 2d 57, 189 Ed.Law Rep. 30 (D.D.C. 2004)

- upheld requested compensatory education relief of four years of 40-hour per week ABA program (including training, consultation, and

20. For the final decision on remand, see *infra* the district court’s 2004 Wagner decision (case no. 37).

LEGAL ISSUES FOR STUDENTS WITH AUTISM

monitoring) for student with autism whom the district “repeatedly misdiagnosed and mishandled” [~E, ~M]

34. *P Bucks Cnty. Dep’t of MH/MR v. De Mora*, 379 F.3d 61, 191 Ed.Law Rep. 42 (3d Cir. 2004)²¹

- tuition reimbursement award, at least under IDEA Part C, may include time expended by parent serving as Lovaas instructor [~M]

35. *P L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 191 Ed.Law Rep. 92 (10th Cir. 2004)

- rejected, based on LRE, district’s proposed placement of preschool child with autism in “hybrid” (approximately 50% nondisabled children) plus 8–15 hours/week of ABA as compared with parents’ unilateral placement of the child in a mainstream private preschool with phasing-out aide plus 40 hours/week of ABA, awarding parents equitable reimbursement of ABA program and aide (tuition not requested) [M]

36. (*P*) *Roe v. State*, 332 F. Supp. 2d 1331, 192 Ed.Law Rep. 56 (D. Nev. 2004), **partially rev’d on other grounds, 479 F.3d 1175, 217 Ed.Law Rep. 51 (9th Cir. 2007)**

- after hearing officer and review officer both rejected parents claims, including that child needed increased home-based Lovaas component upon moving from Part C to Part B, court allowed appeal based on § 1983 (IDEA) and § 504/ADA, thus opening possibility of money damages [~M]

37. *S Wagner v. Bd. of Educ.*, 340 F. Supp. 2d 603, 193 Ed.Law Rep. 172 (D. Md. 2004)

- upheld appropriateness of proposed IEP, despite cut-and-pasted goals/objectives from previous IEP, and placement, which was change from Lovaas to non-Lovaas school, including rejection of procedural violations as nonprejudicial [~M]

38. *P Deal v. Hamilton Cnty. Dep’t of Educ.*, 392 F.3d 840, 194 Ed.Law Rep. 88 (6th Cir. 2004)²²

- held that parents were entitled to tuition reimbursement based on two independent prejudicial procedural violations (fixed predetermination for TEACCH, not Lovaas, and repeated absence of regular ed teacher on IEP team where integration was at issue) and possible substantive violation of FAPE (remanding for careful determination, with limits on deference re methodology) [M]

39. *S J.K. v. Metrop. Sch. Dist.*, 42 IDELR ¶ 122 (N.D. Ind. 2005)

21. For earlier decisions in this case, see *De Mora v. Dep’t of Pub. Welfare*, 768 A.2d 904 (Pa. Commw. Ct. 2001) (ruled that the IFSP failed to provide meaningful progress); *Bucks Cnty. Dep’t of MH/MR v. De Mora*, 38 IDELR ¶ 2 (E.D. Pa. 2002) (ruled that attorneys’ fees are not available under Part C).

22. For the remanded decision, which was in the district’s favor, see *Deal v. Hamilton Cnty. Dep’t of Educ.*, 46 IDELR ¶ 45 (E.D. Tenn. 2006). However, the appellate court subsequently ruled that, based on the overall outcome of the case, the parents were entitled to 50% reimbursement. *Deal v. Hamilton Cnty. Dep’t of Educ.*, 258 F. App’x 863 (6th Cir. 2008).

EDUCATION LAW REPORTER

- upheld substantive appropriateness, including lack of ABA services, and rejected procedural violations as nonprejudicial, for preschool child with autism [M]

40. (P) Cnty. Sch. Bd. v. Z.P., 399 F.3d 298, 195 Ed.Law Rep. 715 (4th Cir. 2005)²³

- remanded appropriateness issue to trial court to reconsider with due deference to the hearing officer's findings that the parent's ABA placement for preschool student with autism was appropriate and the district's proposed TEACCH placement was not (tuition reimbursement case) [M]

41. P Escambia Cnty. Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248 (S.D. Ala. 2005)

- ruled that procedural inadequacies in autistic student's IEPs, which related to mastery dates of benchmarks and adequacy of annual goals, but not lack of FBA-BIP, resulted in denial of FAPE to student [~M]

42. (S) Brown v. Bartholomew, 43 IDELR ¶ 60 (S.D. Ind. 2005), vacated as moot, 442 F.3d 588, 207 Ed.Law Rep. 601(7th Cir. 2006)

- upheld district's proposed program for kindergarten student with autism rather than parents' preferred at-home ABA instruction [M]

43. S K.A. v. Charlotte-Mecklenburg Bd. of Educ., 43 IDELR ¶ 160 (W.D.N.C. 2005)

- rejected tuition reimbursement for 1:1 CARD program based on 1) substantive appropriateness of district's program for preschool child with autism, 2) nonprejudicial procedural violation of not providing written notice of denial of parents' unilateral placement, and 3) lack of FAPE in the LRE for said placement (e.g., lack of individualization and related services) [~M]

44. S Chisago Lakes Sch. Dist. v. J.D., 43 IDELR ¶ 164 (Minn. Ct. App. 2005)

- upheld district's determination upon reevaluation that the student no longer met the all the required criteria in the state regulations for eligibility under the classification of ASD, which is less strict than the classification of autism under the IDEA [E]

45. S Clear Creek Indep. Sch. Dist. v. J.K., 400 F. Supp. 2d 991, 205 Ed.Law Rep. 342 (S.D. Tex. 2005)

- ruled that reduced number and changed location of parent and in-home training sessions did not deny child with autism FAPE, thus reversing hearing officer's award of compensatory education—deferred to district on methodological considerations and construed causation issues as parents' unproven burden [~M]

46. (P/S) D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 203 Ed.Law Rep. 500 (2d Cir. 2005)

- remanded to determine whether the consideration of post-hearing evidence, which the review officer and district court used to rule that the district must provide at least 10 hours of in-home ABA therapy in

23. In an unpublished decision, the district prevailed on remand. Cty. Sch. Bd. v. Z.P., 45 IDELR ¶ 96 (E.D. Va. 2005).

LEGAL ISSUES FOR STUDENTS WITH AUTISM

addition to its self-contained special education program (with OT, PT, SLT, and parent counseling), was an error of law [~M]

47. *S B.V. v. Dep't of Educ.*, 451 F. Supp. 2d 1113, 213 Ed.Law Rep. 1073 (D. Haw. 2005)

- rejected tuition reimbursement for 15-year-old with Asperger Syndrome, concluding that district's program was appropriate despite parents' challenge to the choice of the teacher and skills trainer plus various procedural errors that were not prejudicial [~M]

48. *S Michael J. v. Derry Twp. Sch. Dist.*, 45 IDELR ¶ 36 (E.D. Pa. 2006)

- upheld procedural and substantive appropriateness of IEP and district's proposed placement for 11-year-old with severe autism in autistic support class, which was based on ABA principles, rather than the parents' successive in-home ABA and private school ABA programs [M]

49. *S Bradley v. Arkansas Dep't of Educ.*, 443 F.3d 965, 208 Ed.Law Rep. 22 (8th Cir. 2006)

- upheld substantive appropriateness of successive IEPs for high school student with autism [~M]

50. *P S.A. v. Riverside-Delanco Sch. Dist. Bd. of Educ.*, 45 IDELR ¶ 215 (D.N.J. 2006)

- parents requested full-day and obtained half-day preschool program based on ABA-DTT, due to experts' agreement that child with severe autism needed ABA-DTT and school district did not have trained personnel to do so, thus entitling parents to attorneys' fees of \$47k [M]

51. *P Cnty. Sch Bd. v. R.T.*, 433 F. Supp. 2d 657, 210 Ed.Law Rep. 976 (E.D. Va. 2006)²⁴

- upheld ABA at-home program as FAPE in the LRE for four-year-old with autism rather than district's TEACCH program (tuition reimbursement case) [M]

52. *S A.M. v. Fairbanks N. Star Borough Sch. Dist.*, 46 IDELR ¶ 191 (D. Alaska 2006)

- rejected parents' claim of lack of opportunity for meaningful participation in developing IEP for preschool child with autism and concluded that the IEP met the substantive standard when parents withdrew the child (prematurely) for ABA therapy [~M]

53. *S W.S. v. Rye Cty. Sch. Dist.*, 454 F. Supp. 2d 134, 214 Ed.Law Rep. 288 (S.D.N.Y. 2006)

- upheld appropriateness of proposed 50/50 placement of kindergartner with autism in regular school, concluding that FBA was appropriate and district's failure to send out notices to private schools did not constitute pre-determination [tuition reimbursement case] [~M]

54. *S Marc V. v. North East Indep. Sch. Dist.*, 455 F. Supp. 2d 577, 214 Ed.Law Rep. 497 (W.D. Tex. 2006)

- upheld appropriateness of program/placement of pre-kindergarten child with autism where district refused to grant parents' medically-based

24. For the court's subsequent ruling that rejected the district's stay-put claims, see *Cnty. Sch. Bd. v. RT*, 433 F. Supp. 2d 692 (E.D. Va. 2006).

EDUCATION LAW REPORTER

request for homebound instruction (based on diagnosis of PTSD after district stopped parent from accompanying child to class) [~M]

55. *S Leticia H. v. Ysleta Indep. Sch. Dist.*, 502 F. Supp. 2d 512, 224 Ed.Law Rep. 163 (W.D. Tex. 2006)

- lack of specific diagnosis of autism and lack of precise goals did not deny this eligible preschool child FAPE [~E/~M]

56. *P Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 217 Ed.Law Rep. 60 (1st Cir. 2007)

- ruled that student's Asperger Disorder adversely affected educational performance as broadly defined by state law, establishing that student was eligible here, since "need" was not a contested issue [E]

57. *S O'Dell v. Special Sch. Dist.*, 503 F. Supp. 2d 1206, 224 Ed.Law Rep. 222 (E.D. Mo. 2007)

- rejected claim of parents of preschooler with PDD that the district denied them a meaningful opportunity to participate in the IDEA process when it denied their request for in-home ABA therapy [~M]

58. *S San Rafael Elementary Sch. Dist. v. California Special Educ. Hearing Office.*, 482 F. Supp. 2d 1152, 219 Ed.Law Rep. 676 (N.D. Cal. 2007)

- upheld district's proposed placement of 13-year-old with autism in private day school rather than parents' requested residential placement, rejecting parents' claim that substantive standard for FAPE extended to generalization of behavioral effects to the home environment [~M]

59. *S Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 225 Ed.Law Rep. 136 (9th Cir. 2007)

- rejected FAPE-implementation claim for student with severe autism, concluding that the standard is whether district's implementation fell significantly short of the services required by the child's IEP (with liberal credit for the district's "corrective actions" in compliance with hearing officer's prospective order, which did not provide compensatory education) [~M]

60. *S Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 227 Ed.Law Rep. 100 (7th Cir. 2007)

- procedural errors, including alleged predetermination in LRE, were not prejudicial and despite lack of current PELs, the proposed IEP for gifted student with autism, ADHD, and OCD was substantively appropriate in these particular circumstances [~M]

61. *S J.D. v. Kanawha Sch. Dist.*, 48 IDELR ¶ 159 (S.D. W. Va. 2007), *aff'd mem.*, 375 F. App'x 333 (4th Cir. 2009)

- district's choice not to include parent-proposed 1:1 ABA services did not constitute predetermination [~M]

62. *(P) Mark H. v. LeMahieu*, 513 F.3d 922, 229 Ed.Law Rep. 53 (9th Cir. 2008), *further proceedings sub nom. Mark H. v. Hamamoto*, 620 F.3d 1090, 261 Ed.Law Rep. 48 (9th Cir. 2010)²⁵

25. On remand, the district court denied the plaintiff-parents' motion for summary judgment, preserving for further proceedings whether the district engaged in deliberate

ment, preserving for further proceedings whether the district engaged in deliberate

LEGAL ISSUES FOR STUDENTS WITH AUTISM

- held that § 504 provides a money damages remedy for failure of a district to provide FAPE to special education students (here two children with autism, for which the district spends approximately \$250k per year as a result of losing the due process hearing) if they prove: 1) failure to provide “meaningful access” (i.e., reasonable accommodation/commensurate opportunity); and 2) deliberate indifference on the part of the school authorities [~M]

63. (S) J.P. v. Cnty. Sch. Bd., 516 F.3d 254, 229 Ed.Law Rep. 391 (4th Cir. 2008)

- remanded for reconsideration of hearing officer’s opinion that district’s IEP for child with autism was appropriate because although not meeting the aspirational standard for detailed credibility determinations and legal analysis, it merited deference (tuition reimbursement case) [~M]

64. S Travis G. v. New Hope–Solebury Sch. Dist., 544 F. Supp. 2d 435, 232 Ed.Law Rep. 165 (E.D. Pa. 2008)

- upheld appropriateness of district’s IEP for kindergarten child with autism, including reduction of OT and ABA, and the district’s proposed ESY placement [M]

65. S Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 236 Ed.Law Rep. 179 (10th Cir. 2008)

- ruled that district did not deny FAPE to student with autism who made progress under three successive IEPs even though it did not generalize to other settings (tuition reimbursement case) [~M]

66. P/S Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 236 Ed.Law Rep. 94 (10th Cir. 2008)

- upheld appropriateness of district’s eclectic program for preschool student with autism even though it lacked an in-home component and concluded that failure to provide finalized IEP was nonprejudicial procedural violation [~M]

67. P/S N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 236 Ed.Law Rep. 603 (9th Cir. 2008)

- upheld tuition reimbursement for IEP where district did not evaluate the child with speech impairment in all the areas of suspected disability, i.e., autism (treating it as prejudicial procedural violation), but rejected parents’ claim that the child was eligible for ESY, thus ducking question of FAPE substantive standard for ESY [~E]

68. P Waukee Cmty. Sch. Dist. v. Douglas L., 51 IDELR ¶ 1 (S.D. Iowa 2008)

- upheld hearing officer’s PRR-based decision against district’s behavioral methodology but folded into the Rowley substantive standard for FAPE [M]

69. S M.W. v. Clarke Cnty. Sch. Dist., 51 IDELR ¶ 63 (M.D. Ga. 2008)

- upheld district’s proposed self-contained placement for 3–year-old child with autism as FAPE in the LRE and rejected appropriateness of

indifference. Mark H. v. Hamamoto, 849 F. Supp. 2d 990 (D. Haw. 2012), reconsideration denied, 58 IDELR ¶ 222 (D. Haw.

2012). Subsequently, the state reportedly agreed to a \$4.4 million settlement subject to approval by its legislature.

EDUCATION LAW REPORTER

parents' unilateral placement in mainstream private school plus ABA as not appropriate, thereby denying tuition reimbursement [~M]

70. *S Winkelman v. Parma Cty. Sch. Dist.*, 294 F. App'x 997 (6th Cir. 2008)

● rejected parents' claim of denial of FAPE based on delayed OT goals, lack of music therapy, and lack of 1:1 aide (tuition reimbursement case) [~M]

71. *S JG v. Douglas Cnty. Sch. Dist.*, 552 F.3d 786, 240 Ed.Law Rep. 87 (9th Cir. 2008)

● ruled that district's completion of an evaluation of preschool twins with autism within 38 days was reasonable, which was the 1999 IDEA regulatory standard applicable in this case and which controls rather than the state's 45-day deadline, because the district did not have reason to suspect autism upon the parents' request [~E]

72. *S A.D. v. N.Y.C. Dep't of Educ.*, 51 IDELR ¶ 134 (S.D.N.Y. 2008)

● upheld hearing and review officer's reduction of after-school ABA services from 25 to 10 hours per week (with 5 rather than 12 monthly hours of supervisory support) for gifted kindergarten child with autism based on appropriateness (tuition reimbursement case) [M]

73. *S A.C. v. Bd. of Educ.*, 553 F.3d 165, 240 Ed.Law Rep. 546 (2d Cir. 2009)

● held that IEP for child with autism developed, in violation of state regulation requiring FBA, was neither procedurally nor substantively deficient—IDEA's IEP "special consideration" provision, in effect, trumped state reg (tuition reimbursement case) [~M]

74. *S T.P. v. Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 241 Ed.Law Rep. 22 (2d Cir. 2009)

● held that consultant chart's "School Response" that showed district did not intend to offer more than 10 hours of school-based ABA did not constitute pre-determination of IEP for kindergarten child with autism (tuition reimbursement case) [~M]

75. *S Parenteau v. Prescott Unified Sch. Dist.*, 51 IDELR ¶ 213 (D. Ariz. 2008)²⁶

● upheld procedural and substantive appropriateness of IEP for eight-year-old with autism, which included TEACCH method and which did not necessitate an autism consultant on the IEP team, also concluding that the district had provided the parents—in response to their due process hearing complaint—with all that they had requested, including the consultant and 1:1 ABA aide, thus leaving no basis for compensatory education [M]

76. *S B.S. v. Placentia-Yorba Linda Unified Sch. Dist.*, 306 F. App'x 397, 242Ed.Law Rep. 88 (9th Cir. 2009)

26. In a subsequent decision, the district awarded the defendant-district \$141k in attorneys' fees and court costs, jointly payable by the parents and their attorney, but the Ninth Circuit reversed this award. Paren-

teau v. Prescott Unified Sch. Dist., 53 IDELR ¶ 333 (D. Ariz. 2009), **rev'd sub nom R.P. v. Prescott Unified Sch. Dist.**, 631 F.3d 1117 (9th Cir. 2011).

LEGAL ISSUES FOR STUDENTS WITH AUTISM

- upheld substantive appropriateness and LRE of successive two IEPs (with second providing for sp. ed. for language arts block) for child with autism (tuition reimbursement case) [~M]
77. *S. Blake C. v. Dep't of Educ.*, 593 F. Supp. 2d 1199, 241 Ed.Law Rep. 662 (D. Haw. 2009)
- held that district's program for child with autism did not meet the heightened standard under "meaningful benefit" standard under *Hellgate* (*supra*), showing difficulty of measuring progress and resulting in award of tuition reimbursement for part of 2007 (\$62k) as compensatory education for violation in 2005-06 [~M]
78. *S. Hensley v. Colville Sch. Dist.*, 51 IDELR ¶ 279 (Wash. Ct. App. 2009)
- upheld procedural (e.g., parental participation) and substantive appropriateness (e.g., ABA staff training) of IEP that district offered for nine-year-old with autism [~M]
79. *S. G.B. v. Bridgewater-Raritan Reg'l Bd. of Educ.*, 52 IDELR ¶ 39 (D.N.J. 2009)
- upheld appropriateness of district's subsequently revised IEP for preschool child with autism at public ABA program [~M]
80. *S. L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 242 Ed.Law Rep. 23 (9th Cir. 2009)
- held that preschool program for a child with autism was substantively appropriate and that the 20-minute limit on outside evaluators' classroom observations was a procedural flaw that did not deprive the parents of meaningful opportunity for participation (tuition reimbursement case) [~M]
81. *S. Joshua A. v. Rocklin Unified Sch. Dist.*, 319 F. App'x 692, 245 Ed.Law Rep. 669 (9th Cir. 2009)
- upheld appropriateness of IEP for student with autism concluding that its eclectic program met substantive standard and that failure to provide services based on PRR automatically means a denial of FAPE [M]
82. *S. A.G. v. Frieden*, 52 IDELR ¶ 65 (S.D.N.Y. 2009)
- held that IFSP that proposed 20 hours of ABA therapy per week was appropriate, rejecting parents' request for at least 30 hours of this service and their pre-determination claim [M]
83. *S. J.A. v. E. Ramapo Sch. Dist.*, 603 F. Supp. 2d 684, 243 Ed.Law Rep. 326 (S.D.N.Y. 2009)
- upheld appropriateness of IEP for five-year-old child with pervasive developmental disorder, rejecting claims that 1) classification under OHI rather than autism was substantive flaw, 2) IEP should have included 10 more hours per week of 1:1 behavior therapy, and 3) district should have done an FBA, as required by state law (tuition reimbursement case) [~E, ~M]
84. *S. E.G. v. City Sch. Dist. of New Rochelle*, 606 F. Supp. 2d 384, 244 Ed.Law Rep. 77 (S.D.N.Y. 2009)
- rejected parents' pre-determination claim and ruled that the district's proposed IEP, which included 10 hours of at-home behavior therapy and

EDUCATION LAW REPORTER

5 half days of regular education was FAPE in the LRE (tuition reimbursement case) [~M]

85. (S) Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 249 Ed.Law Rep. 34 (5th Cir. 2009)

- ruled that district's IEP was not substantively appropriate due to child's pattern of regression and IEP's insufficient services but remanded to apply this test for private residential placement: 1) whether it is essential in order for the disabled child to receive a meaningful educational benefit, and, if so, 2) whether it is primarily oriented toward enabling the child to obtain an education (tuition reimbursement case) [~M]

86. S Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547, 248 Ed.Law Rep. 690 (N.D. Ohio 2009)

- upheld, as not a denial of FAPE, district's determination that district properly classified child, who had previous diagnoses of ADHD, "absence seizures" and—most recently—Asperger Disorder, as ED rather than parent's proposed classifications of autism or OHI [E]

87. S T.Y. v. N.Y.C. Dep't of Educ., 584 F.3d 412, 249 Ed.Law Rep. 742 (2d Cir. 2009)

- upheld substantive appropriateness of IEP, despite deficiencies regarding parent counseling and speech/language services and with 1:1 aide rather than FBA-BIP, and rejected procedural claim that the IEP did not specify a school site for the educational placement²⁷ (tuition reimbursement case) [~M]

88. S E.H. v. Bd. of Educ., 361 F. App'x 156, 256 Ed.Law Rep. 562 (2d Cir. 2009)

- rejected parent's claims that IEP was deficient for lack of parental participation, class size of 12:1 rather than 6:1, and failure to include BIP [~M]

89. S Huffman v. N. Lyon Cnty. Sch. Dist., 53 IDELR ¶ 147 (D. Kan. 2009)

- rejected parent's various procedural challenges, including lack of autism-specific testing and personnel, and substantive challenges, including applicable standard (in the Tenth Circuit) and scientifically-based methodology [M]

90. S Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ., 53 IDELR ¶ 153 (S.D. Ohio 2009)

- rejected parent's claim that children with autism needed 30–40 hours of ABA services each week, ruling that district's offer of 30 hours subject to further evaluation information, was appropriate [M]

91. S J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 252 Ed.Law Rep. 591 (9th Cir. 2009)

- upheld appropriateness of IEP for child with autism, rejecting lower court's ruling that IDEA '97 raised the Rowley substantive standard and concluding that various asserted procedural violations, such as failure to

27. For another case concerning a student with ASD in which a federal appeals court ruled the opposite on this issue, see A.K. v.

Alexandria City Sch. Bd., 484 F.3d 672 (4th Cir. 2007), on remand, 544 F. Supp. 2d 487 (E.D. Va. 2008).

LEGAL ISSUES FOR STUDENTS WITH AUTISM

include methodology in the IEP, were a denial of FAPE (tuition reimbursement case) [M]

92. *S K.S. v. Fremont Unified Sch. Dist.*, 679 F. Supp. 2d 1046 (N.D. Cal. 2009), aff'd, 426 F. App'x 536, 270 Ed.Law Rep. 555 (9th Cir. 2011)

- upheld appropriateness of successive, similar IEPs with which the child made slow progress—expected rate based on the severity of the disability, and parent did not sustain burden to show that the child needed 30 hours of ABA per week to receive FAPE [M]

93. *S A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 254 Ed.Law Rep. 826 (E.D.N.Y. 2010)

- ruled that child with Asperger Disorder who was performing at average to above average levels in the classroom and was progressing academically did not meet the criterion on adversely affecting educational performance—no qualifier on adversely affecting but educational performance in Second Circuit means academic performance [E]

94. *S Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 256 Ed.Law Rep. 234 (S.D.N.Y. 2010)

- ruled that child with various diagnoses, including Asperger Disorder, ADHD, and dysgraphia, was not eligible as OHI or ED based on narrow, academic view of adverse effect on “educational performance” (tuition reimbursement case) [E]

95. *P/S Anchorage Sch. Dist. v. D.S.*, 688 F. Supp. 2d 883, 256 Ed.Law Rep. 298 (D. Alaska 2010)

- ruled that three consecutive IEPs failed to provide FAPE to child with autism based on prejudicial procedural violations, including lack of accurate and timely evaluation—upholding tuition reimbursement for ABA home program despite lack of special education certification but reversing hearing officer's order to replace IEP team with private company that implements the program [M]

96. *S Smith v. James C. Hormel Sch. of Virginia Inst. of Autism*, 54 IDELR ¶ 75 (W.D. Va. 2010)

- ruled that district's offer of homebound placement, while finding and arranging for residential placement, was not denial of FAPE to child with autism who private school, which offered ABA programming, expelled for life-threatening behavior [M]

97. *S M.N. v. N.Y.C. Dep't of Educ.*, 700 F. Supp. 2d 356, 258 Ed.Law Rep. 191 (S.D.N.Y. 2010)

- held that procedural violations (e.g., lack of FBA) did not deny FAPE and that the IEP for five-year-old at public charter school for children with autism (per ABA model) met the substantive standard w/o the parents' additionally sought itinerant services (tuition reimbursement case) [~M]

98. *S Doe v. Hampden–Wilbraham Reg'l Sch. Dist.*, 715 F. Supp. 2d 185, 251 Ed.Law Rep. 134 (D. Mass. 2010)

- ruled that 1) failure to have IEP in place at start of school year for child with autism could be attributed to parent (deference to hearing officer's finding); 2) parent's approval of previous IEPs did not waive

EDUCATION LAW REPORTER

FAPE implementation claim; 3) parent did not meet their burden of proving district did not implement expired IEP; and 4) the new IEP met the substantive standard for FAPE (including PRR) (tuition reimbursement case) [~M]

99. P M.H. v. N.Y.C. Dep't of Educ., 712 F. Supp. 2d 125, 260 Ed.Law Rep. 639 (S.D.N.Y. 2010), aff'd, **685 F.3d 217, 282 Ed.Law Rep. 37 (2d Cir. 2012)**

- upheld \$80,000 tuition reimbursement for kindergarten child with autism based on finding that child needed extensive 1:1 discrete-trial ABA services, which district's proposed 6:1 placement did not provide and which conformed to LRE consideration for the parent's unilateral private placement [M]

100. S Lathrop R-II Sch. Dist. v. Gray, **611 F.3d 419, 258 Ed.Law Rep. 983 (8th Cir. 2010)**

- ruled that lack of baseline data, behavioral goal, and full parental notice did not amount to denial of FAPE where district made good faith effort and reasonably met individual needs of student with autism [~M]

101. S M.S. v. N.Y.C. Dep't of Educ., 734 F. Supp. 2d 271, 263 Ed.Law Rep. 231 (E.D.N.Y. 2010), aff'd sub nom M.H. v. N.Y.C. Dep't of Educ., **685 F.3d 217, 282 Ed.Law Rep. 37 (2d Cir. 2012)**

- upheld substantive appropriateness of IEP for child with autism, including transition provision to return the child from private school and use of shorthand descriptors in BIP (tuition reimbursement case) [~M]

102. S C.G. v. N.Y.C. Dep't of Educ., 752 F. Supp. 2d 355, 265 Ed.Law Rep. 984 (S.D.N.Y. 2010)

- ruled that child with autism was no longer entitled to after-school 1:1 ABA program (and parent training) where the private placement's program met the substantive standard for FAPE based on the child's progress [~M]

103. S E.Z.-L v. N.Y.C. Dep't of Educ., 763 F. Supp. 2d 584, 267 Ed.Law Rep. 201 (S.D.N.Y. 2011), aff'd sub nom R.E. v. N.Y.C. Dep't of Educ., **694 F.3d 167, 284 Ed.Law Rep. 620 (2d Cir. 2012)**

- omission of parent training and counseling in IEP for child with autism, contrary to state law requirement, did not constitute denial of FAPE where the district provided such services as needed—same for lack of transition plan under IDEA where court found that the school would have offered services to meet the child's transition needs [~M]

104. P W. Windsor-Plainsboro Reg'l Sch. Dist. v. M.F., 56 IDELR ¶ 106 (D.N.J. 2011)

- ruled that parent was entitled to reimbursement for the home ABA program where the district's proposed eclectic program for child with autism was not reasonably calculated for meaningful benefit [M]

105. P Sumter Cnty. Sch. Dist. 17 v. Heffernan, **642 F.3d 478, 268 Ed.Law Rep. 668 (4th Cir. 2011)**

- held that the child's gains and district's rectifying measures were insufficient to avoid the denial of FAPE from the district's failure to implement a material portion of the IEP of a child with autism, which

LEGAL ISSUES FOR STUDENTS WITH AUTISM

was 15 hours/week of ABA therapy, and that the parent's unilateral home placement was appropriate (with LRE not applying) [~M]

106. S S.M. v. State of Haw. Dep't of Educ., 808 F. Supp. 2d 1269, 276 Ed.Law Rep. 153 (D. Haw. 2011)

- ruling that IEP for student with autism did not have to specify the qualifications of the service provider or the methodology and that the subsequent changes, including adding a transition plan and autism consultant teacher services, did not render the original version defective because they promptly resulted from information that the parent disclosed only belatedly (tuition reimbursement case) [M]

107. S Bd. of Educ. v. J.A., 56 IDELR ¶ 209 (N.D. W. Va. 2011)

- upheld appropriateness of SCERTS methodology for preschool child with autism rather than his previous ABA/DTT methodology—relaxed view of PRR (tuition reimbursement case) [M]

108. P R.K. v. N.Y.C. Dep't of Educ., 56 IDELR ¶ 168 (E.D.N.Y. 2011), further proceedings, 56 IDELR ¶ 212 (E.D.N.Y. 2011), aff'd sub nom R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 284 Ed.Law Rep. 629 (2d Cir. 2012)

- ruled in favor of tuition reimbursement for student with autism, where district's program was deficient in several substantive respects, including lack of FBA-BIP and more intensive ABA services (tuition reimbursement case) [~M]

109. S Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 268 Ed.Law Rep. 78 (8th Cir. 2011)

- ruled that district's failure to diagnose the child's autism did not amount to a denial of FAPE where the district's IEP met the substantive standard for FAPE, including addressing his unique needs, and the parents failed to prove their pre-determination claim (tuition reimbursement case) [E/~M]

110. P New Milford Bd. of Educ. v. C.R., 431 F. App'x 157, 271 Ed.Law Rep. 829 (3d Cir. 2011)

- upheld ruling that district's private school program for child with autism did not provide for a meaningful benefit, because he additionally required an after-school ABA program (tuition reimbursement case) [~M]

111. P N.Y.C. Dep't of Educ. v. V.S., 57 IDELR ¶ 77 (E.D.N.Y. 2011)

- based in part on evidence that TEACCH method would not be effective for this child with autism, upheld tuition reimbursement at private school that provided relationship-based methodology [M]

112. P P.K. v. N.Y.C. Dep't of Educ., 819 F. Supp. 2d 90, 277 Ed.Law Rep. 941 (E.D.N.Y. 2011), aff'd, 526 F. App'x 135, 297 Ed.Law Rep. 726 (2d Cir. 2013)

- upheld direct retroactive payment of tuition after finding that the proposed IEP for preschool child with autism lacked sufficient specially designed instruction (1:1 ABA) and related services (speech therapy and parent training per state regulation) and that the parent's unilateral placement was appropriate [~M]

EDUCATION LAW REPORTER

113. *S Aaron P. v. Dep't of Educ. of Haw.*, 57 IDELR ¶ 251 (D. Haw. 2011)

- upheld the appropriateness of the ABA/DTT services in the IEP of preschool child with autism based on Rowley reasonableness standard and ruled that lack of sufficient evaluation did not result in substantive loss, although remanding the case for other issues²⁸ (tuition reimbursement case) [E/M]

114. *S T.M. v. Gwinnett Cnty. Sch. Dist.*, 447 F. App'x 128 (11th Cir. 2011)

- summarily affirmed unpublished trial court decision that rejected parents' insistence on continuation of 1:1 Lindamood Bell services, finding that the new IEP met the substantive standard and that the district had not denied the parents the opportunity for meaningful participation [M]

115. *S G.D. v. Torrance Unified Sch. Dist.*, 857 F. Supp. 2d 953, 284 Ed.Law Rep. 180 (C.D. Cal. 2012)

- reduction of behavioral support services for six-year-old with autistic-like behaviors was not denial of FAPE where classroom observations revealed reduced need [~M]

116. *S Nalu Y. v. Dep't of Educ., State of Haw.*, 858 F. Supp. 2d 1127, 284 Ed.Law Rep. 325 (D. Haw. 2012)

- upheld district's evaluation that student did not qualify under autism (though did qualify under SLI and OHI) [E]

117. *P/S Woods v. Northport Pub. Sch.*, 487 F. App'x 968, 287 Ed.Law Rep. 746 (6th Cir. 2012)

- upheld, for a child with autism and cerebral palsy, the rulings that 1) the second-grade IEP amounted to a substantive denial of FAPE due to substantial lack of implementation plus lack of meaningful benefit in relation to child's potential; 2) the third-grade IEP represented procedural denial of meaningful parental participation due to a) failure to provide access to test protocols to parents' expert and b) development of goals/objectives outside of parents' presence plus substantive denial of FAPE due to reduction of services resulting in lack of meaningful benefit
- upheld 758-hour compensatory education award for two-year denial of FAPE for the child to "reasonably recover" in light of potentially closing window of opportunity, plus upheld requirement that the delivery be via a teacher with autism certification due to this provision in the IEP
- mixed outcome for IHO's conditioning of prospective relief on parents' re-enrollment of the child (whom the parents had removed for private schooling): no for the ordered evaluations and amended IEP but yes for the implementation of the IEP (which was half mainstreamed and half 1:1 autism services)
- upheld limiting award to pre-settlement hours amounting to \$25k in attorneys' fees. [~M]

28. The parent ultimately prevailed for the other issues. *Aaron P. v. Dep't of Educ. of Haw.*, 897 F. Supp. 2d 1004 (D. Haw. 2012)

LEGAL ISSUES FOR STUDENTS WITH AUTISM

118. *P* Orange Unified Sch. Dist. v. C.K., 59 IDELR ¶ 74 (C.D. Cal. 2012)

- ruled that district denied FAPE to six-year-old who had IEP for speech/language impairment by not providing evaluation for autism upon reasonable suspicion, with the court clarifying that “the inquiry is not whether the student actually qualifies for special education services, but whether the student should be referred for an evaluation” (tuition reimbursement case) [~E]

119. *P* R.E. v. N.Y.C. Dep’t of Educ., 694 F.3d 167, 284 Ed.Law Rep. 629 (2d Cir. 2012)

- adopting the snapshot approach but not strict four-corners rule and differentiating between serious (FBA) and minor (parent counseling) procedural violations based on state standards for FAPE analysis, reached mixed outcomes in three consolidated cases concerning students with autism (two for district and one in favor of the parent, including tuition reimbursement) [~M]

120. *S* F.L. v. N.Y.C. Dep’t of Educ., 60 IDELR ¶ 17 (S.D.N.Y. 2012)

- upheld proposed placement for child with autism that used TEACCH rather than sole ABA method (tuition reimbursement case) [M]

121. *S* Ramirez-Ortiz v. Puerto Rico Dep’t of Educ. 60 IDELR ¶ 132 (S.D.N.Y. 2013)

- ruled that the hearing officer’s order for payment and reimbursement of “psychological therapy services,” which was ABA for a child with autism, was not enforceable as applied to a provider who did not meet the state standards, i.e., a licensed psychologist [M]

122. (*P*) Young v. Ohio, 60 IDELR ¶ 134 (S.D. Ohio 2013)

- granted preliminary injunction under Part C, concluding that parents of two-year-old with autism were likely to succeed on their claim that the state’s decision not to provide ABA therapy or approve ABA providers constituted predetermination [~M]

123. *S* M.N. v. State of Haw. Dep’t of Educ., 509 F. App’x 640 (9th Cir. 2013)

- upheld denial of tuition reimbursement for child with autism who received a “meager” educational benefit after a year in a private ABA-based program [M]

124. *S* B.M. v. Encinitas Union Sch. Dist., 60 IDELR ¶ 188 (S.D. Cal. 2013)

- upheld hearing officer’s decision in favor of district’s segregated school-based placement, rather than parents’ home-based ABA placement, for preschool child with autism who was highly distractible but with strong nonverbal skills and his need to develop language and interpersonal skills—“the testimony of district personnel, who had daily or regularly scheduled time with [the student], was more persuasive than that of [the parent’s] witnesses, whose opinions were largely based on file reviews” [M]

125. *S* Shafer v. Whitehall Dist. Sch., 61 IDELR ¶ 20 (W.D. Mich. 2013)

EDUCATION LAW REPORTER

- ruled that predetermination that child's classification was primarily SLD and secondarily OHI and SLI rather than autism was harmless error where the IEP met the substantive standard for FAPE in relation to the child's individual needs [E]

126. *P* D.C. v. N.Y.C. Dep't of Educ., 950 F. Supp. 2d 494, 299 Ed.Law Rep. 943 (S.D.N.Y. 2013)

- ruled that 1) district's proposed placement was not substantively appropriate where the evidence that it would provide a seafood-free environment to ten-year-old with autism and seafood allergy were *R.E.*-excluded statements of school officials after the parent's unilateral placement decision; 2) the private placement was appropriate despite teacher's lack of certification in the school's methodology; and 3) the equities supported (tuition reimbursement case) [~M]

127. *S* P.C. v. Harding Twp. Bd. of Educ., 61 IDELR ¶ 223 (D.N.J. 2013)

- ruled that district's proposed program for three-year-old with autism was appropriate (tuition reimbursement case) [M]

128. (*P*) Y.S. v. N.Y.C. Dep't of Educ., 62 IDELR ¶ (S.D.N.Y. 2013)

- based on teacher's testimony opening the door to the methodology issue, remanded to the IHO to determine whether TEACCH meets the individual needs of five-year-old child with PDD [M]

129. *S* M.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 296 Ed.Law Rep. 57 (2d Cir. 2013)

- upheld procedural and substantive appropriateness of district's proposed IEP for nine-year-old with autism, ADHD, and Tourette syndrome, including lack of FBA and parental counseling in violation of state law (tuition reimbursement case) [~M]

130. *S* R.C. v. Keller Indep. Sch. Dist., 958 F. Supp. 2d 718, 301 Ed.Law Rep. 212 (N.D. Tex. 2013)

- ruled that IEP was substantively appropriate based on ED where additional classification of autism was not clear or necessary (tuition reimbursement case) [~E]

131. *S* T.G. v. N.Y.C. Dep't of Educ., 973 F. Supp. 2d 320, 303 Ed.Law Rep. 161 (S.D.N.Y. 2013)

- rejected claims of procedural inappropriateness (e.g., lack of FBA per state law and failure to discuss nonpublic placements) and substantive inappropriateness (e.g., teacher-student ratio) of proposed IEP for student with autism (tuition reimbursement case) [~M]

132. *P* F.O. v. N.Y.C. Dep't of Educ., 976 F. Supp. 2d 499, 304 Ed.Law Rep. 102 (S.D.N.Y. 2013)

- ruled that proposed IEP for child with autism and other disabilities was not reasonably calculated for benefit—insufficient attention to physician's testimony that autism was the child's primary area of need (tuition reimbursement case) [~M]

133. *P* C.L. v. N.Y.C. Dep't of Educ., 552 F. App'x 81 (2d Cir. 2014)

- short opinion deferring to IHO's—more well-reasoned than the review officer's—conclusion that district did not meet its burden to prove that

LEGAL ISSUES FOR STUDENTS WITH AUTISM

the proposed 6:1:1 program would enable the child to learn new material (tuition reimbursement case—appropriateness of private placement not at issue) [~M]

134. *P C.F. v. N.Y.C. Dep’t of Educ.*, 746 F.3d 68, 302 Ed.Law Rep. 901 (2d Cir. 2014)

- ruled that that the procedural violations in the proposed IEP, based on state law, of failing to provide for parent training and counseling and in producing an inappropriately vague BIP in the absence of an FBA combined with its substantive inadequacy of providing for a 6:1 student/teacher ratio, where child with autism clearly needed a 1:1 ratio, amounted to a denial of FAPE (tuition reimbursement case) [~M]

135. *P/S T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 305 Ed.Law Rep. 29 (2d Cir. 2014)

- ruled the IDEA’s LRE requirement applies to ESY placements just as it does to school-year placements but that the lack of an FBA–BIP and parent counseling training (both per state law) for child with autism were procedural violations that did not result in a substantive loss of education (tuition reimbursement case) [~M]

136. *S B.K. v. N.Y.C. Dep’t of Educ.*, 12 F. Supp. 3d 343, 309 Ed.Law Rep. 977 (E.D.N.Y. 2014)

- ruled that the proposed IEP for eight-year old with autism was substantively appropriate and rejected the various procedural challenges as either unproven (e.g., predetermination and FBA/BIP) or nonprejudicial (lack of parent counseling/training (tuition reimbursement case) [~M]

137. *S R.B. v. N.Y.C. Dep’t of Educ.*, 15 F. Supp. 3d 421, 310 Ed.Law Rep. 191 (E.D.N.Y. 2014)²⁹

- ruled that procedural violations (e.g., lack of vocational assessment, parent training/counseling, and measurable goals) were not a denial of FAPE in individual circumstances of this case and the 6:1:1 placement for this child with autism was substantively appropriate (tuition reimbursement case) [~M]

138. *P V.S. v. N.Y.C. Dep’t of Educ.*, 25 F. Supp. 3d 295, 311 Ed.Law Rep. 612 (S.D.N.Y. 2014)

- ruled that district’s “bait and switch” regarding proposed site for IEP for student with autism was a denial of FAPE in terms of parental opportunity for meaningful participation (tuition reimbursement case) [~M]

139. *S C.B. v. Garden Grove Unified Sch. Dist.*, 575 F. App’x 796, 309 Ed.Law Rep. 194 (9th Cir. 2014)

- rejected procedural challenges to IEP (e.g., absence of certain goals and of accommodations section) and upheld substantive appropriateness of interim small-group placement of child with autism who previously received 1:1 services [~M]

29. This case concerns the IEP for the year after the one ultimately addressed in the Second Circuit appeal *infra* (case no. 147).

EDUCATION LAW REPORTER

140. *S K.S. v. Strongsville Cty. Sch. Dist.*, 63 IDELR ¶ 125 (N.D. Ohio 2014)

- ruled that IEP for student with autism that provided for occasional sensory breaks in a glass enclosure within the general education classroom constituted FAPE in the LRE [~M]

141. *P C.U. v. N.Y.C. Dep't of Educ.*, 23 F. Supp. 3d 210, 311 Ed.Law Rep. 170 (S.D.N.Y. 2014)

- ruled that district's failure to provide parents of 15-year-old with autism with meaningful opportunity for participation by not providing parents with 1) copy of IEP in timely manner and 2) relevant information (e.g., resources adequate to implement the IEP) about the school placement (i.e., process, not necessarily site, of school selection), although rejecting other procedural and substantive challenges (tuition reimbursement case) [~M]

142. *P Millburn Twp. Bd. of Educ. v. J.S.O.*, 63 IDELR ¶ 229 (D.N.J. 2014)

- ruled that district did not evaluate preschool special education child in all areas of suspected disability when she showed clear signs of autism and that the resulting IEPs, which placed her in an inclusion class, did not meet her needs, whereas an ABA program did (tuition reimbursement case)³⁰ [E/M]

143. *P Blount Cnty. Bd. of Educ. v. Bowens*, 762 F.3d 1242, 308 Ed.Law Rep. 609 (11th Cir. 2014)

- upheld ruling, in case of child with autism upon transitioning from Part C (early intervention), that district offered "inadequate option[s] and [attempted to] wash its hands of its obligations" by acquiescing to the private placement (tuition reimbursement case) [~M]

144. *S A.S. v. N.Y.C. Dep't of Educ.*, 573 F. App'x 63 (2d Cir. 2014)

- upheld procedural and substantive appropriateness of proposed IEP, including the TEACCH methodology, for child with autism despite parents' preference for ABA-based program (tuition reimbursement case) [M]

145. *S R.K. v. Clifton Bd. of Educ.*, 587 F. App'x 17, 312 Ed.Law Rep. 65 (3d Cir. 2014)

- ruled that even if the district's refusal to provide parents with copy of consultant's report evaluating the system's ABA program and to allow their expert to observe the child's class were procedural violations, neither refusal deprived them of their opportunity for meaningful participation in the IEP and IHO process [~M]

146. *P P.L. v. N.Y.C. Dep't of Educ.*, 56 F. Supp. 3d 147, 316 Ed.Law Rep. 180 (E.D.N.Y. 2014)

- ruled that lack of transition assessment, FBA, and parent counseling/training per state law did not rise to the level of denial of FAPE for child with autism, but the proposed 6:1:1 placement was not reasonably

30. Although not at issue on the appeal, the IHO also awarded compensatory education for the period prior to the unilateral placement.

LEGAL ISSUES FOR STUDENTS WITH AUTISM

calculated to provide benefit due to the child's proven needs for 1:1 instruction (tuition reimbursement case) [~M]

147. *S R.B. v. N.Y.C. Dep't of Educ.*, 589 F. App'x 572, 313 Ed.Law Rep. 28 (2d Cir. 2014)

- rejected procedural challenge (less than full reevaluation after one year, mixed procedural-substantive challenge (omission of parents' choice of methodology) challenges to the proposed IEP and upheld substantive appropriateness of 6:1:1 placement to return middle school child with autism from specialized private school (tuition reimbursement case) [~M]

148. *S E.L. v. Chapel Hill–Carrboro Bd. of Educ.*, 773 F.3d 509, 312 Ed.Law Rep. 539 (4th Cir. 2014)

- ruled that district's embedded implementation, including supervised SLT interns, rather than the one-on-one approach that was the preference of the resigned SL therapist and that was the parents' interpretation, fulfilled IEP provision for four hours per week of SLT in the "total school environment" of eight-year-old with autism [~M]

149. *S F.K. v. Dep't of Educ., State of Haw.*, 585 F. App'x 710 (9th Cir. 2014)

- ruled that the district's placement for middle-school student with autism met the substantive and implementation standards for appropriateness [~M]

150. *S M.A. v. Jersey Cty. Bd. of Educ.*, 592 F. App'x 124, 314 Ed.Law Rep. 85 (3d Cir. 2014)

- upheld changed placement of child with autism from private ABA school to less intensive ABA program within the district based on the child's progress, ruling that the failure of the notice to specify the school did not deny the parents' meaningful opportunity for participation in this case [~M]

151. *P/S Cupertino Union Sch. Dist. v. K.A.*, 75 F. Supp. 3d 1088, 319 Ed.Law Rep. 352 (N.D. Cal. 2014)

- reversed the IHO's ruling that the district had engaged in predetermination for IEP of child with autism and seizure disorder, concluding instead that—distinguishable from *Doug C.*—the continuation of the IEP meeting without the parent did not violate the opportunity for meaningful participation in the specific circumstances of this case, but upheld the IHO's ruling that the district failed to implement the IEP at a material level for three-month period (compensatory education case) [~M]

152. *S Morgan M. v. Penn Manor Sch. Dist.*, 64 IDELR ¶ 309 (E.D. Pa. 2015)

- ruled that IEP for student with epilepsy, pervasive development disorder, and oppositional defiant disorder who may have had ASD was appropriate despite lack of "autistic support" because the IEP provided for the services addressing the individual needs of the student regardless of the label [~E/~M]

153. *S J.W. v. N.Y.C. Dep't of Educ.*, 95 F. Supp. 3d 592, 322 Ed.Law Rep. 849 (S.D.N.Y. 2015)

EDUCATION LAW REPORTER

- ruled that parents of child with autism sufficiently had raised methodology issue in their complaint but, even assuming arguendo that the ABA methodology was inconsistent with the success of the child's IEP, they failed to prove that the proposed public school was incapable of implementing the IEP (tuition reimbursement case) [M]

154. S M.L. v. N.Y.C. Dep't of Educ., 65 IDELR ¶ 96 (E.D.N.Y. 2015)

- ruled that district's proposed IEP that provided a 12-month placement with 6:1+1 student:staff ratio in a district special school with TEACCH methodology met standards of appropriateness—"The district was not required to consider any particular teaching methodology in the development of [the child's] IEP, and [the] IEP does not specify one [citing F.L.]" (tuition reimbursement case) [M]

155. P K.R. v. N.Y.C. Dep't of Educ., 107 F. Supp. 3d 295, 325 Ed.Law Rep. 124 (S.D.N.Y. 2015)

- ruled that exclusion of parents from the IEP process and, separately, inability of the proposed district placement to meet the child's sensory needs constituted a denial of FAPE (tuition reimbursement case) [~M]

156. (P) E.H. v. N.Y.C. Dep't of Educ., 611 F. App'x 728, 321 Ed.Law Rep. 113 (2d Cir. 2015)

- rejected parent's procedural and substantive challenges to the BIP for their child with autism and their claim regarding the proposed classroom capacity, but remanded for determination of whether the IEP's adoption of the private school's goals without its DIR/Floortime method resulted in a substantive denial of FAPE (tuition reimbursement case) [M]

157. P/S E.F. v. Newport Mesa Unified Sch. Dist., 65 IDELR ¶ 265 (E.D. Cal. 2015)

- rejected various other claims of parents of kindergartner with autism, including alleged inadequacy of FBA/BIP but upheld denial of FAPE and corresponding compensatory education for one-year delay in conducting an AT assessment upon learning of his success at home with iPod for communication [M]

158. S D.A. v. Meridian Joint Sch. Dist. No. 2, 618 F. App'x 891, 323 Ed.Law Rep. 711 (9th Cir. 2015)

- upheld district's determination of non-eligibility for high-functioning highschool student with ASD who excelled in his academic classes but not, due to his social and pragmatic difficulties, in his other classes, where he did as well as his nondisabled peers [E]

159. S G.K. v. MONTGOMERY CNTY. INTERMEDIATE UNIT, 65 IDELR ¶ 288 (E.D. PA. 2015)

- upheld IHO's decision for limited reimbursement to parent of pre-school child with autism for Lovaas services, ruling that the parents' unreasonable conduct factored into the district's incomplete implementation of the child's IFSP and IEP [~M]

160. P Sch. Bd. of Cty. of Suffolk v. Rose, 133 F. Supp. 3d 803, 328 Ed.Law Rep. 805 (E.D. Va. 2015)

- ruled that identification of student, who undisputedly was also OHI (based on ADHD) and SLD (in written expression), as ED rather than primarily qualifying with autism, and the failure to address autism in his

LEGAL ISSUES FOR STUDENTS WITH AUTISM

IEP was a substantive denial of FAPE (tuition reimbursement case) [E/~M]

161. S Z.R. v. Oak Park Unified Sch. Dist., 622 F. App'x 630 (9th Cir. 2015)

- summarily affirmed decision ruling that proposed IEP of student with autism was appropriate, rejecting procedural challenges based on the goals and the IEP team composition (specifically, assistant principal who taught one course qualified as regular education teacher member) (tuition reimbursement case) [~M]

162. S Q.W. v. Bd. of Educ. of Fayette Cnty., 630 F. App'x 580, 327 Ed.Law Rep. 639 (6th Cir. 2015)

- ruled that student who no longer exhibited notable academic, behavioral, or social difficulties in school was no longer eligible as student with autism despite his at-home problems [E]

163. S D.A.B. v. N.Y.C. Dep't of Educ., 630 F. App'x 73, 327 Ed.Law Rep. 623 (2d Cir. 2015)

- rejected claims of procedural inappropriateness (e.g., goals that were insufficiently measurable) and substantive inappropriateness (e.g., teacher-student ratio) of proposed IEP for student with autism (tuition reimbursement case) [~M]

164. P Sch. Dist. of Philadelphia v. Williams, 66 IDELR ¶ 15 (E.D. Pa. 2015)

- ruled that district's failure to implement tablet provision in IEP for high school student with autism met the requisite "substantial or significant" implementation standard (compensatory education case) [~M]

165. P M.S. v. Lake Elsinore Unified Sch. Dist., 66 IDELR ¶ 17 (C.D. Cal. 2015)

- ruled that the district failed to properly assess the behavior of a 13-year-old with autism by not using a variety of assessment tools/strategies and by using a behavior aide to conduct an FBA [~E/~M]

166. P GB v. N.Y.C. Dep't of Educ., 145 F. Supp. 3d 230, 331 Ed.Law Rep. 114 (S.D.N.Y. 2015)

- ruled that district denied FAPE for child with autism by failing to sufficiently address his medical needs in his IEP, although rejecting various FAPE procedural claims (e.g., predetermination) and "substantive" claims (e.g., present levels, goals, and sensory needs) (tuition reimbursement case) [~M]

167. S A.M. v. N.Y.C. Dep't of Educ., 66 IDELR ¶ 243 (S.D.N.Y. 2015)

- ruled that proposed placement in 6:1:1 district class with ABA therapy met substantive standard for FAPE for 7-year-old child with autism (tuition reimbursement case) [~M]

168. P Sch. Dist. of Philadelphia v. Kirsch, 66 IDELR ¶ 247 (E.D. Pa. 2015), aff'd, 722 F. App'x 215, 354 Ed.Law Rep. 674 (3d Cir. 2018)

- ruled that district's failure to have proposed IEPs for twins with autism completed on timely basis for start of kindergarten was procedural violation that significantly impeded the parents' opportunity for participation in the IEP process (tuition reimbursement case) [~M]

EDUCATION LAW REPORTER

169. *S J.M. v. Kingston City Sch. Dist.*, 66 IDELR ¶ 251 (N.D.N.Y. 2015)

- rejected claim of parents of child with autism that district denied them meaningful opportunity to participate in the IEP process (tuition reimbursement case) [~M]

170. *P McKay v. Sch. Bd. of Avoyelles Parish*, 66 IDELR ¶ 283 (W.D. La. 2015)

- ruled that district's failure to implement IEP-specified log for toileting skills of 9-year-old with autism did not amount to denial of FAPE where student made progress in various other specified areas (compensatory education case) [~M]

171. *S B.P. v. N.Y.C. Dep't of Educ.*, 634 F. App'x 845, 330 Ed.Law Rep. 23 (2d Cir. 2015)

- ruled that district's evidence was sufficient to prove that despite its social worker's misstatement, the proposed placement was able to implement the IEP of the child with autism (tuition reimbursement case) [~M]

172. *S N.M. v. Foose*, 165 F. Supp. 3d 365, 334 Ed.Law Rep. 344 (D. Md. 2015)

- ruled that proposed partially mainstreamed placement for student with autism met substantive standard for FAPE (tuition reimbursement case) [~M]

173. *S A.R. v. Santa Monica Malibu Sch. Dist.*, 636 F. App'x 385, 330 Ed.Law Rep. 85 (9th Cir. 2016)

- upheld, in brief opinion, that proposed collaborative preschool classroom was FAPE in the LRE for preschool child with autism (tuition reimbursement case) [~M]

174. (*P*) *M.G. v. N.Y.C. Dep't of Educ.*, 162 F. Supp. 3d 216, 333 Ed.Law Rep. 669 (S.D.N.Y. 2016)

- certified, for class action purposes, class of students with autism who sufficiently alleged district's blanket policy of denying them 1:1 instruction, ABA services, and services outside of the regular school day³¹ [M]

175. *P T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 326 Ed.Law Rep. 609 (2d Cir. 2016)³²

- ruled that district's refusal to discuss bullying upon parents' reasonable belief that it interfered with the student's ability to receive meaningful educational benefits significantly impeded their right to participate in the development of the IEP, thus constituting a procedural denial of FAPE—"not only potentially impaired the substance of the IEP but also prevented them from assessing the adequacy of their child's IEP" (tuition reimbursement case) [~M]

176. *S Reyes v. Manor Indep. Sch. Dist.*, 67 IDELR ¶ 33 (W.D. Tex. 2016)

31. For an earlier, similar class action suit, see *L.M.P. v. Sch. Bd.*, 516 F. Supp. 2d 1294 (S.D. Fla. 2007) (finding exception to exhaustion doctrine).

32. The Second Circuit did not find it necessary to reach the substantive bullying issue,

[32]

thus leaving in limbo the district court's successive rulings that provided standards for denial of FAPE based on bullying. *T.K. v. N.Y.C. Dep't of Educ.*, 779 F. Supp. 2d 289 (S.D.N.Y. 2011), *further proceedings*, 32 F. Supp. 3d 405 (S.D.N.Y. 2014).

LEGAL ISSUES FOR STUDENTS WITH AUTISM

- ruled that district's priority on behavioral interventions for 19-year-old with autism who exhibited self-injurious and aggressive behaviors met substantive standard for FAPE despite negligible academic progress (compensatory education case) [~M]

177. S M.P. v. Carmel Cent. Sch. Dist., 67 IDELR ¶ 35 (S.D.N.Y. 2016)

- ruled that proposed IEP for student with autism met the substantive standard for FAPE based on reasonably calculated goals and services for emotional and social, as well as academic, support (tuition reimbursement case) [~M]

178. S M.P. v. Aransas Pass Indep. Sch. Dist., 67 IDELR ¶ 58 (S.D. Tex. 2016)

- upheld district's determination that child with previous diagnosis of autism (Asperger disorder) and subsequent private diagnoses of ADHD, mood disorder, and ED did not qualify under the IDEA despite behavioral difficulties due to parents' failure to prove he had resulting need for special education [E]

179. P Norristown Area Sch. Dist. v. F.C., 636 F. App'x 857, 330 Ed.Law Rep. 512 (3d Cir. 2016)

- upheld ruling that district's second-grade IEP and, after unilateral placement, third-grade proposed IEP for student with autism were both not substantively appropriate due to lack of 1:1 aide (compensatory education and tuition reimbursement case) [~M]

180. P W.W. v. N.Y.C. Dep't of Educ., 160 F. Supp. 3d 618, 333 Ed.Law Rep. 235 (S.D.N.Y. 2016)

- ruled, in this "expanding, but still opaque, subject-matter area," that parents of child with autism may prospectively challenge a proposed placement school's capacity to implement an IEP w/o first enrolling their child in that school and that the district has, and in this case failed to fulfill, the burden to prove this capacity (tuition reimbursement case) [~M]

181. P E.H. v. N.Y.C. Dep't of Educ., 164 F. Supp. 3d 539, 334 Ed.Law Rep. 239 (S.D.N.Y. 2016)

- ruled that proposed IEP's inclusion of expired goals based on DLR/Floortime in private school for students with autism was not likely to produce progress in proposed placement in public school (tuition reimbursement case) [~M]

182. S M.T. v. N.Y.C. Dep't of Educ., 165 F. Supp. 3d 106, 334 Ed.Law Rep. 286 (S.D.N.Y. 2016)

- rejected parents' procedural claims of insufficient evaluative materials and lack of opportunity for meaningful participation and upheld substantive appropriateness of proposed placement for student, including lack of ABA methodology (because IEP only mentioned it as one of previous successful methods for the student) (tuition reimbursement case) [M]

183. S J.C. v. N.Y.C. Dep't of Educ., 643 F. App'x 31 (2d Cir. 2016)

- ruled that procedural violations (lack of parent counseling and FBA-BIP) was not prejudicial and that the proposed IEP met the substantive

EDUCATION LAW REPORTER

standard for the child with autism, also rejecting speculative inability of the school to implement the IEP (tuition reimbursement case) [~M]

184. *P I.B. v. N.Y.C. Dep't of Educ.*, 67 IDELR ¶ 113 (S.D.N.Y. 2016)

● ruled that proposed IEP for student with autism was not substantively appropriate due to his need for individualized services and a twelve-month program (tuition reimbursement case) [~M]

185. *S D.M. v. Seattle Sch. Dist.*, 170 F. Supp. 3d 1328, 335 Ed.Law Rep. 249 (W.D. Wash. 2016)

● upheld procedural appropriateness, including lack of pre-teaching and BCBA; substantive appropriateness, under snapshot rule; and LRE, including potential harm to the child, of IEP for child with autism [~M]

186. *S J.M. v. N.Y.C. Dep't of Educ.*, 171 F. Supp. 3d 236, 335 Ed.Law Rep. 273 (S.D.N.Y. 2016)

● rejected procedural challenge (specifically, lack of complete transition plan) as not prejudicial and substantive challenge to capability of the proposed placement of student with autism (e.g., size and noise) as impermissibly speculative based on R.E. (tuition reimbursement case) [~M]

187. *P S.B. v. N.Y.C. Dep't of Educ.*, 174 F. Supp. 3d 798, 335 Ed.Law Rep. 998 (S.D.N.Y. 2016)

● ruled that proposed 6:1:1 placement for student was substantively inappropriate due to his need for 1:1 instruction although the various alleged procedural violations were either not required (ABA instruction), not proven (parental participation) or not prejudicial (e.g., lack of FBA-BIP) (tuition reimbursement case) [M]

188. *P Oskowis v. Sedona-Oak Creek Unified Sch. Dist.*, 67 IDELR ¶ 150 (D. Ariz. 2016)

● ruled that district's delays in advancing student with autism on his goals entitled him to 212 hours of compensatory education [~M]

189. *S T.C. v. N.Y.C. Dep't of Educ.*, 67 IDELR ¶ 183 (S.D.N.Y. 2016)

● rejected various procedural and substantive challenges to district's proposed IEP for child with autism, including ruling that failure to specify the parents' chosen methodology did not amount to a denial of FAPE where the parents did not prove that it was necessary for the child to receive benefit (tuition reimbursement case) [M]

190. *S M.E. v. N.Y.C. Dep't of Educ.*, 67 IDELR ¶ 173 (S.D.N.Y. 2016)

● rejected parent's "prospective" challenge to the proposed placement of her child with autism at either of two district schools was speculative, i.e., not reasonably apparent, and he made sufficient progress (tuition reimbursement case) [~M]

191. *S Moradnejad v. District of Columbia*, 177 F. Supp. 3d 260, 336 Ed.Law Rep. 262 (D.D.C. 2016)

● ruled that IEPs for first grader with autism that moved from self-contained to partially mainstreamed placement met the substantive standard for FAPE, with due deference to the IHO and to the LRE presumption [~M]

LEGAL ISSUES FOR STUDENTS WITH AUTISM

192. *S R.E. v. Brewster Cent. Sch. Dist.*, 180 F. Supp. 3d 262, 337 Ed.Law Rep. 62 (S.D.N.Y. 2016)

- upheld two successive IEPs for sixth grader with autism with regard to implementation and substantive appropriateness, respectively (tuition reimbursement case) [~M]

193. *P L.O. v. N.Y.C. Dep't of Educ.*, 822 F.3d 95, 331 Ed.Law Rep. 609 (2d Cir. 2016)

- ruled that combination of serious procedural violations—failure to consider recent evaluative data, lack of FBAs–BIPs (under state law), insufficient S/L services (under state law for students with autism)—along with more minor procedural violations (e.g., parent counseling/training per same state autism law) amounted to denial of FAPE for three successive IEPs, remanding for compensatory education [~M]

194. *P Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 331 Ed.Law Rep. 673 (9th Cir. 2016)

- ruled that failure to evaluate preschool child with SLI for autism was procedural violation that deprived him of critical educational opportunities and substantially impaired his parents' ability to fully participate in the collaborative IEP process—district's informal observation does not trump clear notice from IEE and student's behavior [~E/~M]

195. *S N.T. v. Garden Grove Unified Sch. Dist.*, 67 IDELR ¶ 229 (C.D. Cal. 2016)

- upheld substantive appropriateness of proposed day class for student with autism, thus declining reimbursement for at-home ABA program [M]

196. *P W.S. v. Cty. Sch. Dist. of N.Y.C.*, 188 F. Supp. 3d 29, 338 Ed.Law Rep. 736 (S.D.N.Y. 2016)

- ruled that proposed 6:1:1 placement for child with autism was not individualized in terms of the child's needs and did not address her documented necessity for 1:1 ABA therapy (tuition reimbursement case) [M]

197. *S Doe v. Richmond Consol. Sch. Dist.*, 67 IDELR ¶ 264 (D. Mass. 2016)

- upheld, based on snapshot approach, substantive appropriateness of proposed IEP for student with autism (tuition reimbursement case) [~M]

198. *(P) F.L. v. N.Y.C. Dep't of Educ.*, 67 IDELR ¶ 266 (S.D.N.Y. 2016)

- remanded issue of whether high school student with autism needed 1:1 instruction beyond that the paraprofessional provided (tuition reimbursement case) [~M]

199. *S Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 333 Ed.Law Rep. 556 (9th Cir. 2016)

- upheld the substantive appropriateness of the proposed IEP of a high school student with autism in a self-contained class, also rejecting the “laundry list” of procedural violations and the LRE claim of a guardian who had challenged several consecutive prior IEPs (tuition reimbursement case) [~M]

EDUCATION LAW REPORTER

200. *S N.T. v. Garden Grove Unified Sch. Dist.*, 67 IDELR ¶ 229 (C.D. Cal. 2016)

- ruled that special education class for seven-year old with autism, which provided him with small-group (e.g., DTT social skills) and individual services, met the substantive standard for FAPE, contrary to the parents' insistence on a 40-hour at-home ABA program [M]

201. *P J.L. v. Manteca Unified Sch. Dist.*, 68 IDELR ¶ 17 (E.D. Cal. 2016)

- ruled that consultative, rather than direct, SLT services constituted a denial of FAPE based on its necessity in light of the severity of communication needs of this elementary school child with autism [M]

202. *S Ruhl v. Ohio Dep't of Health*, 68 IDELR ¶ 73 (N.D. Ohio 2016), further proceedings, 69 IDELR ¶ 278 (N.D. Ohio 2017), *aff'd on other grounds*, 725 F. App'x 324, 355 Ed.Law Rep. 109 (6th Cir. 2018) (no violation of IDEA where parents only belatedly provided proof of qualifying criterion)

- ruled that denial of Part C funding for ABA therapy for IFSP of child with autism did not violate § 504 or the ADA due to failure to show that the reason was the child's disability and that subsequent delay of six months after the parents qualified was not remediable under the IDEA for money damages [M]

203. *P A.U. v. N.Y.C. Dep't of Educ.*, 68 IDELR ¶ 135 (S.D.N.Y. 2016)

- ruled that proposed school was not capable of providing FAPE to child with autism because it did not offer a sufficiently small teacher:aide:student ratio and needed interaction with verbal peers (tuition reimbursement case) [~M]

204. *(P) T.C. v. N.Y.C. Dep't of Educ.*, 68 IDELR ¶ 137 (S.D.N.Y. 2016)

- remanded issue of school's capability to implement IEP of child with autism who had been in private school that uses DIR/Floortime to determine whether the goals required this particular methodology [M]

205. *P T.Y. v. N.Y.C. Dep't of Educ.*, 116 LRP 37325, *adopted*, 213 F. Supp. 3d 446, 342 Ed.Law Rep. 88 (E.D.N.Y. 2016)

- ruled that, despite various procedural nonprejudicial challenges, the proposed IEP was not substantively appropriate child with autism, who was in private placement that successfully used DIR/Floortime, for failing to meet his need for such a relationship-based instructional program or to provide SLT), awarding tuition reimbursement [M]

206. *S NB v. N.Y.C. Dep't of Educ.*, 68 IDELR ¶ 228 (S.D.N.Y. 2016)

- ruled that proposed IEP for child with autism and allergies was appropriate in relation to various challenges, including school's ability to implement DIR Floortime method, distinguishing "FB, where the assigned teacher specifically disclaimed any ability to implement DIR-specific goals" (tuition reimbursement case) [M]

207. *P Z.C. v. N.Y.C. Dep't of Educ.*, 222 F. Supp. 3d 326, 343 Ed.Law Rep. 198 (S.D.N.Y. 2016)

LEGAL ISSUES FOR STUDENTS WITH AUTISM

- upheld substantive appropriateness of proposed IEP and capability of proposed placement for student with autism (tuition reimbursement case) [~M]

208. *S Forest Grove Sch. Dist. v. Student*, 665 F. App'x 612, 340 Ed.Law Rep. 74 (9th Cir. 2016)³³

- ruled that district did not deny FAPE to a high school student with autism and ADHD when its IEP team refused to require the parents' preferred instructional method, which was based on English teacher's instructional approach [M]

209. *P A.M. v. N.Y.C. Dep't of Educ.*, 845 F.3d 523, 339 Ed.Law Rep. 22 (2d Cir. 2017)

- rejected procedural FAPE challenges (e.g., FBA-BIP and transition services) but ruled in favor of parent of child with autism for substantive FAPE because the proposed IEP's failure to provide 1:1 ABA therapy was contrary to "a clear consensus" of the evaluative info at the IEP meeting (tuition reimbursement case-remanded for remaining steps) [M]

210. *S Joanna S. v. S. Kingston Pub. Sch. Dist.*, 69 IDELR ¶ 179 (D.R.I. 2017)

- upheld district's determination that child's primary disability was ED-no harm and no clear expert support for autism as the key diagnosis (here, they agreed on anxiety) [E]

211. *S M.M. v. N.Y.C. Dep't of Educ.*, 69 IDELR ¶ 208 (S.D.N.Y. 2017)

- upheld limited compensatory award for ABA services upon parent's appellate challenge, seeking a more extensive award and § 504 relief [~M]

212. (*P*) *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017)³⁴

- ruled that the general substantive standard under the IDEA is whether the IEP is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances," remanding for application to this student with autism in a self-contained class (tuition reimbursement case) [~M]

213. *P/S Brandywine Heights Area Sch. Dist. v. B.M.*, 248 F. Supp. 3d 618, 347 Ed.Law Rep. 246 (E.D. Pa. 2017)

- upheld IHO's decision that district failed to provide FAPE based on delayed and faulty evaluation of child with autism upon transitioning with behavioral problems from IU program to district kindergarten, but that district met substantive standard for FAPE (under PRR and *Andrew F.*) without verbal method after the effects of the revised BIP (compensatory education case) [M]

214. *S K.M. v. Tehachapi Unified Sch. Dist.*, 69 IDELR ¶ 241 (E.D. Cal. 2017)

33. In a subsequent decision, the federal district court upheld the district's communication protocol as not violating the parent's rights under the IDEA in light of unreasonably excessive emails. *Forest Grove Sch.*

Dist. v. Student, 73 IDELR ¶ 115 (D. Or. 2018).

34. For the decision on remand to the district court, see *infra* case no. 229.

EDUCATION LAW REPORTER

- upheld substantive appropriateness of IEP for student with autism under Andrew F. standard, concluding that goals need not be aligned 1:1 to needs if addressed overall (compensatory education case) [~M]

215. *S T.M. v. Quakertown Cmty. Sch. Dist.*, 251 F. Supp. 3d 792, 347 Ed.Law Rep. 921 (E.D. Pa. 2017)

- upheld substantive appropriateness of IEP for fourth grader with autism and ID, concluding that the evaluation, progress measurement, and ABA-basis met the Andrew F. standard even if not the “gold standard” and 20 hours of 1:1 strict ABA that the parent’s BCBA recommended [M]

216. *S Z.F. v. Ripon Unified Sch. Dist.*, 70 IDELR ¶ 19 (E.D. Cal. 2017)

- rejected, due to lack of deliberate indifference, § 504 challenge to alleged wrongful denial of ABA services via alleged discriminatory eligibility criteria [M]

217. *S Smith v. Cheyenne Mountain Sch. Dist.*, 117 LRP 25901 (D. Colo. 2017)

- ruled that district did not have reason to suspect autism at the time of the reevaluation [~E]

218. *S Lauren C. v. Lewisville Indep. Sch. Dist.*, 70 IDELR ¶ 63 (N.D. Tex. 2017)

- ruled that district’s IEP, including provision for ABA services, met its FAPE obligation, concluding that that its various evaluative rejections of autism despite physician’s diagnosis did not violate child find or FAPE [~E/~M]

219. *S C.G. v. Waller Indep. Sch. Dist.*, 697 F. App’x 816, 348 Ed.Law Rep. 82 (5th Cir. 2017)

- upheld substantive appropriateness of proposed placement for student with autism under Andrew F. standard, declining reimbursement for ABA therapy [M]

220. *S R.A. v. W. Contra Costa Unified Sch. Dist.*, 696 F. App’x 171, 347 Ed.Law Rep. 762 (9th Cir. 2017)

- brief affirmance of ruling that parent’s unreasonable pre-condition of fully observing (i.e., seeing and hearing) the reevaluation amounted to a withdrawal of consent, thus defeating the FAPE claim based on the failure to complete the reevaluation [~E]

221. *P/S Sch. Dist. of Phila. v. Post*, 262 F. Supp. 3d 178, 349 Ed.Law Rep. 499 (E.D. Pa. 2017)

- upheld denial of FAPE for first grader with autism based on LRE and parentally prejudicial procedural violations of automatically assuming autistic support rather than general ed alternative; hearing officer’s award of compensatory education; and denial of § 504 retaliation claims [~M]

222. *P S.H. v. Mt. Diablo Unified Sch. Dist.*, 70 IDELR ¶ 98 (N.D. Cal. 2017)

- ruled, in relevant part, that the written offer of 40 minutes of SLT per week for high school student with autism, without specification of

LEGAL ISSUES FOR STUDENTS WITH AUTISM

individual or group setting was prejudicial procedural violation in terms of parental participation that did not impede district's methodological discretion [~M]

223. S Bd. of Educ. of Albuquerque Pub. Sch. v. Maez, 70 IDELR ¶ 157 (D.N.M. 2017)

- ruled, under Endrew F., that district's IEP for child with autism, which included ABA, provided FAPE despite not being strict ABA program that his parents sought [M]

224. P Richardson v. District of Columbia, 273 F. Supp. 3d 94, 350 Ed.Law Rep. 947 (D.D.C. 2017)

- ruled that initial evaluation that child was not eligible under autism or developmental delay (DD) was appropriate, despite district's subsequent determination after IEE that the child was eligible as DD, concluding that even if the alleged deficiencies (e.g., use of outdated testing data) constituted procedural violations, the parents failed to meet their burden of proof that the child, if the procedural violations were cured, would have been eligible at the time [~E]

225. S N.B. v. N.Y.C. Dep't of Educ., 711 F. App'x 29, 351 Ed.Law Rep. 798 (2d Cir. 2017)

- upheld the substantive appropriateness under Endrew F. of the district's proposed IEP for child with autism, concluding with deference to the review officer that the IEP's failure to mandate DIR/Floortime method was not a denial of FAPE and that the parents did not prove that the school was not capable of implementing the IEP (tuition reimbursement case) [M]

226. (P) R.S. v. Bd. of Educ. Shenendehowa Cent. Sch. Dist., 71 IDELR ¶ 85 (N.D.N.Y. 2017)

- denied dismissal of IDEA claims challenging SEA policies that did not require ABA methodology in IEPs (although dismissing the alternative § 504 claims for lack of gross misjudgment/bad faith) [M]

227. S L.M.P. v. Sch. Bd. of Broward Cnty., 879 F.3d 1274, 350 Ed.Law Rep. 938 (11th Cir. 2018)

- affirmed that the parents of triplets with autism lacked standing to challenge, as a procedural violation of predetermination, the alleged district policy of not including ABA services in IEPs because their children's IEPs provided for PECS, an ABA-based intervention [M]

228. S M.E. v. N.Y.C. Dep't of Educ., 71 IDELR ¶ 125 (S.D.N.Y. 2018)

- rejected parents' claim that proposed public school placement did not have the capability to meet the sensory needs of their five-year-old child with autism [~M]

229. P Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 290 F. Supp. 3d 1175, 353 Ed.Law Rep. 298 (D. Colo. 2018)³⁵

35. Subsequent to this decision, the district reached, with the parents, a settlement of \$1.3 million. filed an appeal with the Tenth Circuit and, a few months later (on 6/24/18) reportedly

EDUCATION LAW REPORTER

- ruled, on remand, from Supreme Court³⁶ that proposed IEP did not meet the new substantive standard for FAPE, concluding that the fourth grader with autism made minimal progress largely attributable to “the District’s lack of success in providing a program that would address Petitioner’s maladaptive behaviors” [~M]

230. (P) Lawrence Sch. Dist. v. McDaniel, 72 IDELR ¶ 8 (E.D. Ark. 2018)

- upheld IHO’s ruling that district did not provide comprehensive evaluation of gifted fifth grader with ASD and ADD, without determining whether the student was eligible under the IDEA [~E]

231. S Greene v. E. Poinsett Cnty. Sch. Dist., 72 IDELR ¶ 34 (E.D. Ark. 2018)

- ruled that district proposed ABA therapy for nine-year-old with autism at private clinic was LRE compared to part-time placement in home instruction [~M]

232. (P) K.M. v. Tehachapi Unified Sch. Dist., 72 IDELR ¶ 63 (E.D. Cal. 2018)

- denied dismissal of parent’s § 504/ADA claim that providing access to insurance-funded ABA therapist for nine-year-old with autism was reasonable accommodation analogous to service animal [~M]

233. S J.M. v. Matayoshi, 729 F. App’x 585 (9th Cir. 2018)

- ruled that proposed IEP for student with autism met the Endrew F. standard with regard to bullying although not entirely complying with the U.S. Department of Education’s Dear Colleague Letter (2014) [~M]

234. S E.S. v. Smith, 72 IDELR ¶ 184 (D. Md. 2018)

- upheld substantive appropriateness of proposed IEP for student with autism and SLD under Endrew F. standard (and rejected predetermination claim) (tuition reimbursement case) [~M]

235. S Parrish v. Bentonville Sch. Dist., 896 F.3d 889, 356 Ed.Law Rep. 900 (8th Cir. 2018)

- upheld substantive appropriateness of IEPs for two elementary school students with autism, with deferential “good faith” standard under the IDEA and § 504 for the IEP’s behavior strategies, including restraints [~M]

236. S E.E. v. N.Y.C. Dep’t of Educ., 73 IDELR ¶ 9 (S.D.N.Y. 2018)

- rejected claim that proposed in-district placement of child with autism in private school was not capable of implementing FAPE because the sensory equipment was not specified in the student’s IEP and, in any event, could have feasibly been in place at the start of the school year [~M]

237. S McKnight v. Lyon Cnty. Sch. Dist., 73 IDELR ¶ 13 (D. Nev. 2018)

- ruled that mainstreamed placement was FAPE in the LRE for a child with autism who was obtaining passing grades, rejecting the parents’ claim that a 1:1 aide was necessary [~M]

36. See *supra* case no. 212.

LEGAL ISSUES FOR STUDENTS WITH AUTISM

238. *S* M.G. v. N. Hunterdon–Vorhees Reg'l High Sch. Dist., 73 IDELR ¶ 46 (D.N.J. 2018), aff'd, 778 F. App'x 107, 370 Ed.Law Rep. 74 (3d Cir. 2019)

- upheld district's proposed placement in specialized in-district class for student with autism rather than continuing the student's out-of-district placement, finding that the 1:1 aide sufficiently mitigated the safety risk of elopement—affirmance, with deference to IHO's credibility determination, that the IEP provided “significant learning and meaningful educational benefits in light of [the child with autism's] individual needs and potential” standard [~M]

239. (*P*) L.T. v. N. Penn. Sch. Dist., 342 F. Supp. 3d 610, 361 Ed.Law Rep. 220 (E.D. Pa. 2018)

- ruled that IDEA requires proposing FAPE (via a contingent IEP) for student with disabilities (here autism) enrolled in a residential treatment facility in another district [~M?]

240. *S* Nathan M. v. Harrison Sch. Dist. No. 2, 73 IDELR ¶ 148 (D. Colo. 2018)

- ruled that transition plan for student with autism from private to public placement met Endrew F. standard for FAPE [~M]

241. *S* J.M. v. Tenn. Dep't of Educ., 73 IDELR ¶ 150 (M.D. Tenn. 2018)

- ruled that dramatic progress of student with autism after SEA provided guidance to LEA under state seclusion/restraint law mooted FAPE claim against SEA and disproved the claim against LEA [~M]

242. *S* Renee J. v. Houston Indep. Sch. Dist., 913 F.3d 523, 361 Ed.Law Rep. 925 (5th Cir. 2019)

- upheld appropriateness of IEP for high school student with autism, ID, and ADD, including transition plan and school refusal/bullying, and rejected predetermination claim regarding ABA [M]

243. (*P*) D.O. v. Escondido Union Sch. Dist., 73 IDELR ¶ 180 (S.D. Cal. 2019)

- ruled that district's four-month delay in assessing kindergartner with ED and OHI for autism, after being put on notice, was a procedural violation that resulted in denial of FAPE [~E]

244. *S* Bentonville Sch. Dist. v. Smith, 73 IDELR ¶ 203 (E.D. Ark. 2019)

- ruled that reevaluation, IEP contents, and BIP implementation upon changing fifth grader's primary classification from autism to ED did not amount to denial of FAPE [~E/~M]

245. *S* A.H. v. Smith, 367 F. Supp. 3d 387, 364 Ed.Law Rep. 1022 (D. Md. 2019)

- upheld substantive appropriateness, per Endrew F., of proposed IEP for middle-school student with autism as well as proposed placement's capacity to implement IEP's ABA provisions (tuition reimbursement case) [~M]

246. *S* E.M. v. Lewisville Indep Sch. Dist., 763 F. App'x 361 (5th Cir. 2019)

EDUCATION LAW REPORTER

- brief affirmance of district court decision that upheld the appropriateness of an IEP for a third grader with autism and other disabilities under Michael F. four-factor test, with no mention of Andrew F. and relaxed, similarly subsumed treatment of PRR [~M]

247. *S* Ascent v. New York State Educ. Dep't, 74 IDELR ¶ 69 (S.D.N.Y. 2019)

- ruled that parents of students attending private ABA schools lacked standing to sue SEA under IDEA and dismissed parents' IDEA and § 504/ADA claims as speculative at this point with regard to new state policy requiring ABA schools to offer related services, not just ABA, to students who need them [M]

248. *S* Dep't of Educ., State of Haw. v. L.S., 74 IDELR ¶ 71 (D. Haw. 2019)

- ruled that parents of student with autism were entitled to \$155k for tuition reimbursement for private school because the district's BIP for the student was not part of the IEP and, thus, deprived the parents of their participatory role [~M]

249. *S/(P)* E.P. v. N. Arlington Bd. of Educ., 74 IDELR ¶ 80 (D.N.J. 2019)

- ruled that IEP for preschool child in autism classroom was appropriate and subsequent exiting was justifiable based on lack of continued need for special education, but remanded for possible compensatory education for violation of LRE [E/~M]

250. *P* K.N. v. Gloucester City Bd. of Educ., 74 IDELR ¶ 73 (D.N.J. 2019)

- ruled that district after-school program's failure to continue providing trained aide supervised by special ed teacher for elementary school student with autism was a violation of § 504/ADA (meaningful access–reasonableness and necessity criteria), reserving issue of remedies for subsequent decision [~M]

251. *S* R.E.B. v. Dep't of Educ., State of Haw., 770 F. App'x 796, 367 Ed.Law Rep. 129 (9th Cir. 2019)

- ruled that district 1) sufficiently addressed the transition of the student with autism from private school although not specified in the IEP, 2) sufficiently specified the student's LRE; 3) was not required to specify the qualifications of the aide in the IEP; and 4) also was not required to specify the ABA methodology in the IEP [M]

252. *S* Albright v. Mountain Home Sch. Dist., 926 F.3d 942, 367 Ed.Law Rep. 913 (8th Cir. 2019)

- upheld substantive appropriateness of IEP, including its use of sensory integration, for child with multiple disabilities, including autism, in accordance with PRR and Andrew F., and rejected parental participation challenge in a case of “a profoundly toxic lack of trust” [M]

253. *S* L.J. v. Sch. Bd. of Broward Cnty., 927 F.3d 1203, 367 Ed.Law Rep. 103 (11th Cir. 2019)

- adopted the Van Duyn materiality standard for failure-to-implement claims and applied it in favor of the district for the stay-put IEP of child

[42]

LEGAL ISSUES FOR STUDENTS WITH AUTISM

with autism, distinguishing Andrew F. as applying to “content” FAPE claims [~M]

254. S J.G. v. Dep’t of Educ., State of Haw., 772 F. App’x 567 (9th Cir. 2019)

- ruled, in brief decision, that district’s proposed change in placement of middle schooler with autism from private school to its autism center, including use of LRE checklist, was not predetermination and met Andrew F. standard [~M]

255. S R.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 776 F. App’x 719, 369 Ed.Law Rep. 668 (2d Cir. 2019)

- rejected appropriateness of private school for grade 7 student with autism and anxiety disorder due to its failure to offer services designed to meet his unique needs despite limited evidence of social, emotional, and attendance improvement [~M]

256. S Elizabeth B. v. El Paso Cnty. Sch. Dist., 74 IDELR ¶ 288 (D. Colo. 2019)

- ruled that IEP for 6-year-old with autism and epilepsy met the Andrew F. substantive standard for FAPE, and that its provision for a 1:1 aide was not for ABA therapy under the circumstances, which included ABA services in the lab and constant needs for safety and supervision of the child [~M]

257. S Walsh v. Silver Lake Reg’l Sch. Dist., 76 IDELR ¶ __ (D. Mass. 2020)

- upheld appropriateness of district’s IEP for student with autism that provided ABA therapy, concluding that an ABA residential placement was not necessary [~M]

258. P D.L. v. St. Louis City Pub. Sch. Dist., 950 F.3d 1057, 374 Ed.Law Rep. 785 (8th Cir. 2020)

- ruled that IEP for fourth grader with ED that reduced his sensory therapies in contradiction of his repeated, cogent concurrent medical diagnosis of autism and provided for placement in school for correction of purely voluntarily behaviors failed to meet the Andrew F. standard for FAPE (tuition reimbursement case) [~E/M]

259. P Dep’t of Educ., State of Haw. v. Acen T., 76 IDELR ¶ __ (D. Haw. 2020)

- reversed IEP team’s exiting student with autism as no longer eligible, ruling that “[a] student does not become ineligible because he or she is performing at a satisfactory level with the aid of special education services” [E]

V. A CHECKLIST OF WINNING-LOSING FACTORS

IN AUTISM METHODOLOGY CASES

A. Your procedures:

- A.1 Has your district committed procedural violations, especially those that are prejudicial (i.e., amount to a denial of FAPE)?

B. Your program:

EDUCATION LAW REPORTER

- B.1 Is your IEP sufficiently specific to autistic students in general and this student specifically?
- B.2 Does your program/placement include any ABA or Lovaas component?
- B.3 Are the specially designed instruction and related services in the IEP based on peer-reviewed research to the extent practicable?
- B.4 Do the following have sufficient specialized expertise:
 - a) evaluator(s)
 - b) IEP team
 - c) teacher(s) and related service providers

C. Your witnesses:

- C.1 Are your expert witnesses credible and convincing:
 - a) child's teacher(s)?
 - b) other district personnel?
 - c) outside specialists?
- C.2 Do they have specific data concerning the child's progress?

D. Other factors:

- D.1 Is your attorney sufficiently specialized in terms of the world of special education?

What about the parents' advocate or attorney?
- D.2. If the case is at the judicial stage, did you win at the due process and/or review officer levels, particularly at the highest level in two-tier states?

VI. STATE LAWS

Some states have added requirements, via legislation or regulations (or guidelines, which do not have the force of law) that effectively add to the FAPE foundations established by the IDEA.³⁷ Here are a few examples:³⁸

37. For examples of state laws specific to ASD eligibility for special education services, see *supra* note 7. Additionally, state laws concerning the coverage of private or employee health insurance can play a significant role. *E.g.*, ARK. CODE ANN. § 23-99-418 (requiring insurance coverage of children under 18 with ASD, including ABA services up to \$50k per year); KAN. STAT. ANN. . . § 40-2,194 (requiring large group health insurance plans to cover ASD for children below age 12); N.M. STAT. ANN. §§ 13-7-16, 59A-23-7.9, 59A-47-45 (requiring group or blanket insurance to include diagnosis and treatment within limits); NEV. REV. STAT. §§ 287.0276 and 695G.1645 (requiring school districts that offer employees health insurance via a self-insurance plan to provide coverage for screening, diagnosis, and treatment of ASD for covered children through the end of high school); 40 PA. STAT. § 764h (requiring specified private health

insurers to pay up to \$36k for the diagnosis and treatment of covered individuals under age 21 with ASD). Finally, states have a variety of other limited ASD-relevant laws for the K-12 context. *E.g.*, CAL. EDUC. CODE § 56847; 19 DEL. ADMIN. CODE § 929; 105 ILL. COMP. STAT. 5/2-3.123; IOWA CODE § 356.65A); MISS. CODE ANN. § 37-169-3 (establishing an advisory committee on students with ASD); WASH. REV. CODE § 28A.155.190 (SEA public info on child find and identification); ALA. CODE § 22-57-20; FLA. STAT. § 1004.55; 20 ILL. COMP. STAT. 1705/57.5; IOWA CODE § 265.35; KY. REV. STAT. ANN. § 164.9813; OHIO REV. CODE ANN. §§ 3323.31-3323.34; OKLA. STAT. tit. 70, § 3520; W. VA. CODE § 18B-11A-3 (establishing state ASD resource or training centers); R.I. GEN. LAWS § 16-24.1-4 (SEA needs assessment, training modules, and continuing education certificate); MASS. GEN. LAWS ch. 38, § G1/2 (establishing certifica-

LEGAL ISSUES FOR STUDENTS WITH AUTISM

● Connecticut:³⁹

School districts must provide ABA services to any child with ASD if the student's IEP or 504 plan requires these services. The service provider must be either (A) licensed by the Department of Public Health or certified by the State Department of Education, with such services are within the scope of practice of such license or certificate, or (B) certified by the Behavior Analyst Certification Board as a behavior analyst or, if working under the supervision of a certified behavior analyst, an assistant behavior analyst, the child's teacher, or the child's paraprofessional.

● New York:⁴⁰

For students with autism, the various additional specifications for IEP appropriateness include: (a) a maximum age range of 36 months for instructional groups of students under age 16; (b) a special education teacher "with a background in teaching students with autism" when the child is in a placement with students with other disabilities or with regular education students; (c) parent counseling and training for follow-up intervention activities at home; and (d) transitional support services upon a regular education placement or one containing students with other disabilities.

● Michigan:⁴¹

For students with autism, FAPE must include either (a) an IU-approved autism-specific program approved, or (b) a class size limit of 5, with an aide if 3–5 students

● New Mexico⁴² and Texas:⁴³

For each child eligible under the classification of autism, the IEP team must "consider, based on peer-reviewed, research-based educational programming practices to the extent practicable and, when needed" the following 11 IEP components (with examples not summarized here):

tion endorsement for ASD transition specialists); MINN. R. 8710.5850; NEV. ADMIN. CODE § 391.378 (establishing ASD teacher certification); N.J. STAT. ANN. §§ 18A:26–2.8–18A:26–2.9 (requiring formulation and implementation of recommendations for ASD teacher training); NEV. REV. STAT. §§ 391.260A–391.270 (providing for ASD training for LEA personnel to the extent money is available from the state grant fund); VA. CODE ANN. § 22.1–298.3 (LEA training of autism aides in behavior management); OHIO REV. CODE ANN § 3310.41 (establishing voucher program for students with ASD); MO. REV. STAT. § 161.825 (establishing voucher program for students with either ASD or another of four other "needs conditions").

38. In contrast, the following part of the Pennsylvania regulations' definition of "autistic support" does not seem to add substantive requirements: "The IEP for [students with autism] *must* address needs as identified by the team which *may* include, as appropriate, the verbal and nonverbal com-

munication needs of the child; social interaction skills and proficiencies; the child's response to sensory experiences and changes in the environment, daily routine and schedules; and, the need for positive behavior supports or behavioral interventions." 22 PA. CODE § 14.131(a)(1)(1) (emphasis supplied).

39. CONN. GEN. STAT. § 10–76ii. This legislation defines ABA as "the design, implementation and evaluation of environmental modifications, using behavioral stimuli and consequences, including the use of direct observation, measurement and functional analysis of the relationship between the environment and behavior, to produce socially significant improvement in human behavior." *Id.*

40. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.13.

41. MICH. ADMIN. CODE I. 240.1758.

42. N.M. ADMIN. CODE § 6.31.2.11(B)(5).

43. 19 TEX. ADMIN. CODE § 89.1055(e).

EDUCATION LAW REPORTER

- (1) extended day or ESY programming
- (2) daily schedules reflecting minimal unstructured time and active engagement in learning activities
- (3) in-home and community-based training or viable alternatives that assist the student with acquisition of social/behavioral skills
- (4) positive behavior support strategies based on relevant information (e.g., a BIP based on a FBA)
- (5) futures planning (at any age) for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments
- (6) parent/family training and support, provided by qualified personnel with experience in ASD
- (7) suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social/behavioral progress based on the child's developmental and learning level (acquisition, fluency, maintenance, generalization) that encourages work towards individual independence
- (8) communication interventions, including language forms and functions that enhance effective communication across settings
- (9) social skills supports and strategies based on social skills assessment/curriculum and across settings
- (10) professional educator/staff support
- (11) teaching strategies based on peer reviewed, research-based practices for students with ASD