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Articles

ENGULFED BY THE SPECTRUM: THE IMPACT OF AUTISM SPECTRUM DISORDERS ON LAW AND POLICY

Sheryl Dicker and Emily Bennett*

I. INTRODUCTION

Over the past few years, public service announcements have alerted the public to a new public health crisis: the growth of Autism Spectrum Disorders (“ASD”) among children. Many of the announcements use inflammatory language, such as:

- “The odds of a child being in a Broadway show are 1 in 11,000; the odds of a child being diagnosed with Autism: 1 in 166.”¹
- “The odds of a babysitter calling 911: 1 in 1400; the odds of a child being diagnosed with Autism: 1 in 150.”²

These advertisements are part of a public health strategy to warn parents and the public about the growing incidence of Autism and to seek support for finding the cause or cure for this perceived epidemic. In fact, the most recent estimates from the Center for Disease Control for the number of children diagnosed with Autism is 1 in 110,³ while the American Academy of Pediatrics estimates that number closer to 110 in 10,000.⁴ Additionally, recent government estimates suggest that the annual cost to society for children and adults with ASDs is between \$35

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¹ *Harley Graham – Autism Speaks Commercial December 2008*, YOUTUBE, http://www.youtube.com/watch?v=LGcm12S_7ZQ (last visited Feb. 7, 2011).

² *Autism Awareness Babysitter*, YOUTUBE, <http://www.youtube.com/watch?v=6cCMRLa25Mw> (last visited Feb. 7, 2011).

³ *See Autism Spectrum Disorders: Data & Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 13, 2010), <http://www.cdc.gov/ncbddd/autism/data.html> (“It is estimated that between 1 in 80 and 1 in 240 with an average of 1 in 110 children in the United States have an ASD.”).

⁴ Michael D. Kogan et al., *Prevalence of Parent-Reported Diagnosis of Autism Spectrum Disorder Among Children in the US, 2007*, 124 PEDIATRICS 1395, 1397 (2009), <http://pediatrics.aappublications.org/cgi/content/full/124/5/1395>.

and \$90 billion.⁵ Despite all of the warnings and millions of dollars raised, the cause or cure of Autism has not been found and few evidence-based effective treatments have been uncovered. In addition to the public awareness campaigns, the high prevalence of ASD has had an unrecognized, though profound, impact on public policy and law.

This Article argues that the growing prevalence of ASD is shaping current law and policy relating to all disabilities and will have a profound impact on children with disabilities, particularly concerning special education. Indeed, over the last decade almost 700 federal court cases have involved Autism and special education. Autism cases and policy are setting new legal standards and initiating changing interpretations of the law. Additionally, a large percentage of funds have been earmarked for intensive—yet often unsupported by research—services in more restrictive settings. Conflicts among the federal circuit courts concerning many key special education issues, however, further complicate this changing area of law.

Part II of this Article provides an introduction to ASD and its treatment as well as presents the history of special education law in the United States. In Part III, the Article provides the first survey of ASD and the law by tracing the evolution of Autism in the courts and analyzing the major trends that have emerged from thousands of court cases that involve diagnosis, treatment, placement, and funding of services, as well as redress from alleged injuries from vaccinations concerning ASD. In Part IV, the Article charts recent federal and state legislative enactments relating to ASD, focusing on insurance, the new federal health care reform legislation,⁶ funding, education practices, lifespan services, and new state oversight mechanisms. In essence, ASD is engulfing the law, policy, and funding of the disability world, though this impact has yet to be recognized by the broader community. Although the full effects of this prevalence remain to be seen, this Article attempts to both bring attention to the extensive impact of ASD cases and begin to analyze the ramifications of this reality.

II. THE HISTORY OF ASD AND THE LAW

Autism is not a specific disorder but a neurodevelopmental disability characterized by problems in reciprocal social interaction

⁵ INTERAGENCY AUTISM COORDINATING COMM., DEP'T OF HEALTH & HUMAN SERVS., 2010 STRATEGIC PLAN FOR AUTISM SPECTRUM DISORDER RESEARCH 1 (Jan. 2010) [hereinafter IACC STRATEGIC PLAN], available at http://www.iacc.hhs.gov/strategic-plan/2010/IACC_2010_Strategic_Plan.pdf.

⁶ Patient Protection and Affordable Care Act, Pub. L. No. 111-108, 124 Stat. 119 (Mar. 23, 2010).

(difficulty in reading social cues, poor peer relations, failure to seek enjoyment), communication impairments (delay or failure to speak or conversational difficulties), and often repetitive and restricted patterns of behavior⁷ (unusual preoccupations, compulsive behaviors and rituals).⁸ It varies in its severity from mild to severe but retains those key characteristics in various forms throughout life. As a result of the range of impairments, it is referred to as a spectrum disorder: ASD.⁹ While it was first observed in the 1940s,¹⁰ only the recent prevalence of the disorder has shined a spotlight on ASD.

Prior to 1975, children with severe disabilities, including children with ASD, were often excluded by law from attending school.¹¹ Without an education, many of these children spent their lives in institutions. After years of vigorous parent advocacy that included a series of successful class action lawsuits in the early 1970s, Congress passed the Education for All Handicapped Children Act in 1975 (“EHA”).¹² The Act guaranteed a “free appropriate public education for all handicapped children” (“FAPE”).¹³ All children with Autism were covered by the Act, as were children with any other handicapping conditions. However, because Autism was a rare, low-incidence disability in 1975, it was not specifically mentioned as a disability category under the new law, and children with Autism were categorized instead as “seriously emotionally disturbed” or as having “childhood psychosis.”¹⁴

The Act was amended in 1986 to create two new programs: Early Intervention for Infants and Toddlers with Disabilities (serving children from birth to age three) and the Pre-School Special Education Program (for children ages three to five).¹⁵ Once again, Autism was not

⁷ Comm. on Children with Disabilities, *The Pediatrician’s Role in the Diagnosis and Management of Autistic Spectrum Disorders*, 107 PEDIATRICS 5 (2001).

⁸ Catherine Lord & Somer L. Bishop, *Autism Spectrum Disorders: Diagnosis, Prevalence and Services for Children and Families*, 24 SOC. POL’Y REP. 3 (2010).

⁹ *Id.*

¹⁰ Leo Kanner, *Autistic Disturbances of Affective Contact*, 2 NERVOUS CHILD 217 (1943).

¹¹ See, e.g., *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 875–76 (D.D.C. 1972) (explaining that the D.C. Board of Education argued that children could not be educated in the public schools because of their disabilities and that the cost of providing education was prohibitive).

¹² Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.).

¹³ *Id.* § 613(a)(2), 89 Stat. at 782.

¹⁴ EDITH FAIRMAN COOPER, CONG. RESEARCH SERV., 77-227 SP, AUTISTIC CHILDREN: BACKGROUND INFORMATION AND LEGISLATIVE CONCERN 3, 19 (1977).

¹⁵ Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 11 Stat. 1145 (1986).

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mentioned in the 1986 amendments.¹⁶ It remained a low-incidence disability, with occurrence estimated at 1 in 2500 children.¹⁷

It was not until the Act was amended again in 1990 that Autism was listed as one of the disorders under the definition of the term “children with disabilities.”¹⁸ The amendment also changed the name of the Act to the Individuals with Disabilities Education Act (“IDEA”).¹⁹ The IDEA was amended most recently by the Individuals with Disabilities Education Improvement Act of 2004.²⁰ This amendment specifically called for developing and improving programs to train special education teachers on the needs of children with ASDs.²¹ In 2006, the Department of Education augmented prior regulations to assist in implementing the IDEA.²² The regulation defines Autism as follows:

(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, 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.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.²³

¹⁶ *Id.*

¹⁷ See *Autism Decline*, AUTISM COACH, <http://www.autismcoach.com> (follow “Autism Declines as States Ban Mercury from Vaccines” hyperlink) (last visited Aug. 24, 2010) (citing David A. Geier & Mark R. Geier, *Early Downward Trends in Neurodevelopmental Disorders Following Removal of Thimerosal-Containing Vaccines*, 11 J. AM. PHYSICIANS & SURGEONS 8, 8 (2006)) (“Between 1989 and 2003, there was an explosion of autism. The incidence of autism (and other related disorders) went from about 1 in 2,500 children to 1 in every 166.”).

¹⁸ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 101(a)(1), 104 Stat. 1103, 1103.

¹⁹ *Id.* § 901(a)(1), 104 Stat. at 1142.

²⁰ Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1482, 9567-9567b (2006)).

²¹ *Id.* § 662, 118 Stat. at 2774-75 (codified as amended at 20 U.S.C. § 1462(b)(2)(G)).

²² Assistance to States for the Education of Children with Disabilities, 34 C.F.R. § 300 (2006).

²³ *Id.* § 300.8(c)(1)(i)-(ii). It is worth noting that the number of students identified within the education system does not match the prevalence statistics described above; far fewer

Finally, in 2006, Congress expanded its Autism focus by enacting the Combating Autism Act, which provides federal funding to support Autism research, screening, intervention, and education.²⁴

In light of these statutes and the evolution of the federal government's recognition of Autism as a unique disability, this Article will examine the development of case law interpreting the provisions described above and applying these statutes to individual cases of ASD.

III. SPECIAL EDUCATION LITIGATION: EXPANSIVE BUT NOT COHESIVE

A. *Background: Board of Education v. Rowley*

The United States Supreme Court decision in *Board of Education v. Rowley* is the touchstone of current case law affecting children with disabilities and their rights under the EHA, now called the IDEA.²⁵ In *Rowley*, the Supreme Court determined what constitutes a "free and appropriate education" as guaranteed by the IDEA.²⁶ Amy Rowley was a deaf child who received educational accommodations pursuant to an Individualized Education Program ("IEP") during her kindergarten year.²⁷ These accommodations included an FM hearing aid, sign language training for several school staff, and communication devices in the school office for her parents, who were also deaf.²⁸ In preparing the IEP for Amy's first grade year, her parents requested a sign language interpreter for all academic classes, but the school rejected this request as unnecessary.²⁹ The lower court sided with Amy's parents because an interpreter would maximize Amy's learning potential.³⁰ The Supreme Court reversed and held that federal law does not require maximization of a child's learning potential; schools do not have to bring a student with disabilities up to the level of her peers or maximize her learning

children are being classified as autistic under the IDEA than what other research would suggest. See NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *Children 3 to 21 Years Old Served in Federally Supported Programs for the Disabled, by Type of Disability: Selected Years, 1976-77 through 2007-08* (2010), <http://nces.ed.gov/fastfacts/display.asp?id=64> (reporting that in 2007-08 school year, the U.S. Department of Education was supporting 296,000 children with Autism, constituting 4.5% of the total student population served under the IDEA).

²⁴ Pub. L. No. 109-416, 120 Stat. 2821 (2006) (codified at 42 U.S.C. §§ 280i-280i-4, 283j (2006)).

²⁵ 458 U.S. 176 (1982).

²⁶ *Id.* at 188.

²⁷ *Id.* at 184.

²⁸ *Id.*

²⁹ *Id.* at 184-85.

³⁰ *Id.* at 185-86.

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potential in order to meet the legal standard.³¹ Because her current educational accommodations were “adequate,” additional services were not necessary.³² This holding is central to all subsequent discussions in this Article.

B. When is a Child on the Autism Spectrum?

Before Autism Spectrum Disorders were as prevalent as they are today, children with ASDs were often misdiagnosed and put into other categories, such as “seriously emotionally disturbed.”³³ Incorrect diagnoses meant that students often did not receive appropriate services. Today, when determining whether a child is on the autism spectrum, courts rely exclusively on the IDEA definition of Autism, a definition that focuses on educational performance.³⁴ They do not place weight on the Diagnostic and Statistical Manual of Mental Disorders IV (“DSM-IV”) definition.³⁵ This can be confusing since most clinicians traditionally use the DSM-IV for reference. By contrast, the DSM-IV provides a more in-depth description of the various behaviors a child with Autism might exhibit by age three. It does not focus on educational deficits nor does it exclude children with primary emotional disturbance.³⁶

³¹ *Id.* at 198.

³² *Id.* at 209.

³³ *Supra* text accompanying note 14.

³⁴ See 34 C.F.R. § 300.8(c)(1)(i)–(ii) (2006) (defining autism in terms of educational performance).

³⁵ See *infra* note 36 (providing the DSM-IV definition of Autism).

³⁶ The DSM-IV defines Autism as follows:

A. A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

(b) failure to develop peer relationships appropriate to developmental level

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

(d) lack of social or emotional reciprocity

(2) qualitative impairments in communication as manifested by at least one of the following:

(a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)

In *School District of Wisconsin Dells v. Littlegeorge*, a district court concluded that the hearing officer erred in determining that Autism, as defined in 34 C.F.R. § 300.8(c)(1)(i), was synonymous with the disorders included in the definition of Pervasive Developmental Disorder (“PDD”) in the DSM-IV and, therefore, that a child diagnosed with “Pervasive Developmental Disorder Not Otherwise Specified” would automatically exhibit behaviors that would be classified as Autism under the IDEA.³⁷ The court also noted “that the term autism does not apply ‘if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of [§ 300.7].’”³⁸ Thus, when a child’s medical diagnosis suggests that she or he may have an ASD, but that child is educationally on grade level or the student has consistently been diagnosed as suffering from an emotional disturbance, an IEP classification of Autism may not be permissible.

Similarly, a Review Officer in an administrative decision by New York’s State Review Office (“SRO”) determined that a child met the New York statutory definition of Autism and was therefore appropriately classified as autistic despite having been diagnosed by a private

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- (b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others
 - (c) stereotyped and repetitive use of language or idiosyncratic language
 - (d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level
 - (3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:
 - (a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus
 - (b) apparently inflexible adherence to specific, nonfunctional routines or rituals
 - (c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)
 - (d) persistent preoccupation with parts of objects
 - B. Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.
 - C. The disturbance is not better accounted for by Rett’s Disorder or Childhood Disintegrative Disorder.

AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 75 (4th ed. 2000).

³⁷ 184 F. Supp. 2d 860, 877–78 (W.D. Wis. 2001), *aff’d* 295 F.3d 671 (7th Cir. 2002).

³⁸ *Id.* at 878 (quoting 34 C.F.R. § 300.7(c)(1)(i) (2001), which became 34 C.F.R. § 300.8(c)(1)(i) by 2007).

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psychologist with pervasive developmental disorder “with only Autistic-like features.”³⁹ The Review Officer distinguished between a clinical diagnosis of Autism and characteristics fitting the educational definition of Autism, noting that only the latter is relevant for provision of services under the IDEA.⁴⁰ Another SRO decision several years later reaffirmed that the relevant definition for the purposes of classifying a child for special education services is the statutory definition rather than the DSM-IV definition.⁴¹

In contrast, the hearing officer in *Student v. Greenwich Board of Education* cited both the statutory and DSM-IV definitions of Autism in determining that a child was entitled to a classification of Autism.⁴² However, in that case, the school district disputed the child’s classification as autistic even though the child squarely met the statutory definition of Autism.⁴³ The hearing officer did not base the child’s entitlement to services on the DSM-IV definition, but rather used this definition to lend more strength to his decision to classify the child as autistic.⁴⁴ Thus, this decision is consistent with the general rule that entitlement to IDEA special education services should be based exclusively on the statutory definition of Autism.

The question of whether ASDs are curable disorders or a developmental disability is currently debated. Historically, government agencies have treated ASDs as developmental disorders, implying that they are lifelong conditions.⁴⁵ Paradoxically, at least one court has implied that a diagnosis of ASD is not lifelong, nor does it necessarily warrant continuous services for a child.⁴⁶ In *Eric H. v. Judson Independent School District*, the court focused only on symptoms the child currently exhibited, rather than on previously exhibited symptoms; the court ruled that the school district acted properly by removing a child’s classification as autistic after a thorough re-evaluation by a qualified examiner showed

³⁹ N.Y. State Educ. Dep’t, SRO 91-28 (Sept. 5, 1991) (emphasis omitted), available at <http://www.sro.nysed.gov/decisionindex/1991/91-028.htm>; see also N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(zz)(1) (2009) (showing that New York’s current statutory definition of Autism is identical to the federal definition as stated in 34 C.F.R. § 300.8(c)(1)(i)).

⁴⁰ *Supra* note 39.

⁴¹ N.Y. State Educ. Dep’t, SRO 99-3 (Dec. 17, 1999), available at <http://www.sro.nysed.gov/decisionindex/1999/99-003.htm>.

⁴² Conn. Dep’t of Educ., 02-257 (July 24, 2003).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See, e.g., *Autism Spectrum Disorders*, CTR. FOR DISEASE CONTROL, <http://www.cdc.gov/ncbddd/autism/index.html> (last visited Dec. 17, 2010).

⁴⁶ *Eric H. v. Johnson Indep. Sch. Dist.*, No. SA-01-CA-0804 NN, 2002 U.S. Dist. LEXIS 20646, at *29-30 (W.D. Tex. Sept. 30, 2002).

that the child no longer had symptoms of Asperger's Syndrome.⁴⁷ The parents did not argue that the child did not exhibit symptoms at that time; they only argued that the autistic classification should remain in place because if it were removed and the child's services were stopped, it would negatively affect the child's learning and behavior in the future.⁴⁸ Thus, according to this particular case, a child cannot be classified as autistic, and special education and related services cannot be in place, unless a child is *currently* exhibiting symptoms that qualify him for an autistic classification. This holding, however, conflicts with the reality that while early intervention and various treatment options can have positive outcomes, Autism is consistently viewed as a lifelong developmental disability.⁴⁹

C. What Services Are Required for a Child on the Autism Spectrum?

As previously mentioned, the Supreme Court has determined that in order to satisfy the requirements of FAPE, the disabled student's IEP only has to be reasonably calculated to provide some educational benefits.⁵⁰ Further compounding the challenges parents face when obtaining services for their autistic child, the Supreme Court recently held in an ASD case that parents seeking relief have the burden of proof in all cases under the IDEA.⁵¹ These decisions are concrete examples of how the growing prevalence of ASD litigation is shaping all law concerning disability.

Schools are required to work with parents to prepare or review an IEP annually for every student with a disability.⁵² In theory, an IEP ensures that education strategies are uniquely tailored to the needs of the particular child.⁵³ In addition to detailing educational services, strategies, and accommodations, an IEP should identify benchmarks for tracking progress. Both school officials and parents participate in the IEP process, and states are required to provide an administrative path for

⁴⁷ *Id.* at *36.

⁴⁸ *Id.* at *8.

⁴⁹ See, e.g., *Understanding and Evaluating Your Options*, AUTISM SOC'Y AM. (Jan. 24, 2008), http://www.autism-society.org/site/PageServer?pagename=life_treat_options (implying that Autism is a lifelong disability by talking about various lifelong treatments).

⁵⁰ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982).

⁵¹ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) ("The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is . . . represented by his parents.").

⁵² See 20 U.S.C. § 1414 (2006) (describing evaluation requirements and eligibility determinations for IEPs).

⁵³ *Rowley*, 458 U.S. at 192.

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parents to challenge any aspect of their child's educational program or the IEP.⁵⁴

Again, in *Rowley*, the Supreme Court determined that the school district does not need to maximize a child's learning.⁵⁵ Circuit courts have elaborated and interpreted the *Rowley* decision, sometimes arriving at conflicting conclusions.⁵⁶ For example, the Second Circuit held that an IEP must provide "more than 'mere trivial advancement'" for the student.⁵⁷ The Tenth Circuit, noting that a FAPE "is hardly self-defining," characterized the requirement as simply more than *de minimis*.⁵⁸ Thus, a school is not obligated to provide a student with ASD with the best program for addressing Autism but rather a program that is reasonably calculated to help the child achieve some educational benefit as outlined in *Rowley*.⁵⁹ In contrast, the Ninth Circuit recently concluded—based on post-*Rowley* amendments to the IDEA—that an IEP is required "to confer a 'meaningful educational benefit.'"⁶⁰

The determination of what services a student is entitled to turns on whether the IEP is "reasonably calculated to enable [him or her] to receive educational benefits."⁶¹ Four factors from *Cypress-Fairbanks Independent School District v. Michael F.* are particularly helpful in determining whether the IEP is "reasonably calculated to provide a meaningful educational benefit under the IDEA."⁶² In the sixth grade, Michael F. was diagnosed with Tourette's Syndrome, a neurological impairment with behavioral components sometimes similar to Autism.⁶³

⁵⁴ See *id.* at 181–84 (summarizing the statutory requirements related to IEP creation and implementation as well as the recourse options for dissatisfied parents under 20 U.S.C. § 1415 (2006)).

⁵⁵ *Id.* at 192; see also *supra* Part III.A (explicating the circumstances surrounding the case).

⁵⁶ For more information on circuit differences, see, for example, Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After Rowley?*, 39 SUFFOLK U. L. REV. 1, 7 (2005). "Specifically, the Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits apply the 'meaningful benefit' test. The First, Eighth, Tenth, Eleventh, and D.C. Circuits employ the 'adequate benefit' or 'some benefit' test. Finally, the Seventh Circuit appears to use a mixture of the two." Aron, *supra*, at 7; see also Philip T.K. Daniel, "Some Benefit" or "Maximum Benefit": Does the No Child Left Behind Act Render Greater Education Entitlement to Students with Disabilities, 37 J. L. & EDUC. 347, 357–62 (2008) (comparing the "meaningful benefit" standard, the "adequate benefit" standard, the Seventh Circuit's mixed standards, and the recent decision from the United States Department of Education Office of Civil Rights).

⁵⁷ *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1121 (2d Cir. 1997).

⁵⁸ *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148 (10th Cir. 2008).

⁵⁹ *Rowley*, 458 U.S. at 207.

⁶⁰ *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1213 (9th Cir. 2008).

⁶¹ *Thompson*, 540 F.3d at 1148 (citing 20 U.S.C. § 1412(a)(10)(C)(ii); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 978 (10th Cir. 2004)).

⁶² 118 F.3d 245, 253 (5th Cir. 1997).

⁶³ *Id.* at 248–49.

His parents and the school committee worked together to construct an appropriate IEP for Michael, though his parents eventually placed him in a residential facility due to his violent behaviors.⁶⁴ This placement lasted until they could no longer afford the tuition.⁶⁵ His parents sought reimbursement of the private tuition and were denied.⁶⁶ They appealed, and the court identified the following four factors to evaluate the IEP that the school district proposed:

- (1) the program is individualized on the basis of the student's assessment and performance;
- (2) the program is administered in the least restrictive environment;
- (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders" [which includes individual teachers, school administrators, and the child's counselors]; and
- (4) positive academic and non-academic benefits are demonstrated.⁶⁷

The *Rowley* definition of FAPE imposes unfortunate limits on what type of services children with ASDs are guaranteed. In terms of specific methods of teaching autistic children, there has been much controversy surrounding whether parents are entitled to an Applied Behavior Analysis program ("ABA"), which was the first treatment identified by research as an effective therapeutic strategy for children with Autism.⁶⁸ However, questions remain regarding its efficacy for all children with ASD, including the needed intensity of therapy. ABA is premised on the idea that children with Autism are less likely to develop behaviors based on observation alone and thus require direct repetitive instruction to develop certain habits.⁶⁹ ABA primarily uses clear instructions and

⁶⁴ *Id.* at 249-51.

⁶⁵ *Id.* at 251.

⁶⁶ *Id.*

⁶⁷ *Id.* at 253; *see also* Richardson Indep. Sch. Dist. v. Michael Z. *ex rel.* Leah Z., 580 F.3d 286, 290-91, 293 (5th Cir. 2009) (applying the *Michael F.* factors in an appeal by a school district that had been required by a district court to reimburse the family of a disabled student for expenses incurred while the student resided in a psychiatric facility).

⁶⁸ *See, e.g.,* IACC STRATEGIC PLAN, *supra* note 5, at 23 ("Behavioral Therapies, such as Applied Behavior Analysis (ABA) based therapies, which use the principles of reinforcement and repetition, have been used since the 1960s and have been studied most extensively.").

⁶⁹ *See, e.g.,* *What is Applied Behavior Analysis?*, CENTER FOR AUTISM & RELATED DISORDERS, INC., http://www.centerforautism.com/getting_started/aba.asp (last visited Jan. 22, 2011); O. Ivar Lovaas, *Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children*, 55 J. CONSULTING & CLINICAL PSYCHOL. 3 (1987); John J. McEachin, Tristram Smith & O. Ivar Lovaas, *Long-Term Outcome for Children With Autism Who Received Early Intensive Behavioral Treatment*, 97 AM. J. MENTAL RETARDATION 359 (1993).

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positive reinforcement techniques to teach behaviors that may not otherwise be learned through observation. It reinforces behaviors to the point that they are fluent or part of the child's everyday life. The regiment requires painstaking repetition and an enormous investment of time and money. Yet, few other therapies are evidence-based, and the intensity and duration for ABA remains an issue for research.⁷⁰

In 2010, the first randomized control study to demonstrate the effectiveness of a comprehensive behavior development program for toddlers was conducted.⁷¹ The Early Start Denver Model ("ESDM") is a comprehensive program using ABA strategies plus social enhancements.⁷² The study concluded that the ESDM was more effective than the programs currently available in the community.⁷³ The interventions began when the children were under two and a half years of age.⁷⁴ The study randomly assigned forty-eight toddlers diagnosed with ASD into one of two groups: one group received the ESDM program, delivered by a trained therapist who integrates ABA with developmental and relationship-based approaches; the other group received "intervention recommendations and referrals for intervention from commonly available community providers in the... region."⁷⁵ Results showed an increase in IQ, language, and adaptive behavior and improved Autism diagnoses.⁷⁶ Yet, the issue of intensity—the number of hours per day and per week—remained untested.⁷⁷

While the aforementioned study represents recent progress, the case law has historically focused on ABA. Based on the *Rowley* definition of FAPE, however, courts often decide that a child is not necessarily entitled to an ABA program—even when parents can prove the effectiveness of this program for their child—if the school provides an alternative program that gives the child *some* meaningful benefit.⁷⁸

⁷⁰ See generally IACC STRATEGIC PLAN, *supra* note 5, at 23 ("Of the numerous behavioral interventions currently in use, little scientific evidence from randomized controlled trials (RCT) supports their efficacy.").

⁷¹ Geraldine Dawson et al., *Randomized, Controlled Trial of an Intervention for Toddlers With Autism: The Early Start Denver Model*, 125 PEDIATRICS e17, e18, e22 (January 2010) (reporting that the Early Start Denver Model was more effective with toddlers than other interventions available in the community).

⁷² *Id.* at e18.

⁷³ *Id.* at e22.

⁷⁴ *Id.* at e18.

⁷⁵ *Id.*

⁷⁶ *Id.* at e22.

⁷⁷ See *id.* at e18 (indicating that the study was based on twenty hours of therapy per week, but that the study did not undertake to address variations in frequency or duration within the program).

⁷⁸ E.g., *J.P. ex rel. Popson v. W. Clark Cmty. Sch.*, 230 F. Supp. 2d 910, 945–46 (S.D. Ind. 2002).

In *J.P. ex rel. Popson v. West Clark Community Schools*, the parents of a child with Autism disagreed with the school district about how critical ABA therapy was to the educational services needed for their child.⁷⁹ J.P. was diagnosed with Autism when he was twenty-six months old.⁸⁰ At this time, he did not use any words, did not use vocalizations with his body movements, and was not yet toilet-trained; most significant, at age two he did not engage in any appropriate play.⁸¹ His communication skills were rated on the level of a four- to eight-month-old and his receptive communication skills on the level of an eight- to sixteen-month-old.⁸² While the district offered ABA therapy, it believed that a combination of other strategies was appropriate for J.P.⁸³ His parents, on the other hand, believed that ABA was so far superior to these methods that the alternative options were not appropriate.⁸⁴ The court refused to accept the parents' argument that ABA should be recognized as the only acceptable way to teach autistic children.⁸⁵ Instead, the court noted that the child's teachers, as well as outside educational experts, approved the program the school used to teach students with Autism.⁸⁶ Therefore, the court held that the school was not obligated to implement the parents' desired program.⁸⁷

Similarly, in a Massachusetts administrative hearing, the hearing officer concluded that even though there was credible evidence that a student with Autism benefited tremendously from his home ABA program, there was also evidence that he was successful with the school's program once the ABA stopped.⁸⁸ Because the student was able to make meaningful progress without ABA, it was not a denial of a FAPE to exclude ABA services from the IEP.⁸⁹ Thus, there is not a set approach embraced universally by courts. Instead, the test remains whether the child benefits from the program—not whether it is the best possible program.

Despite the holdings above that indicate that ABA therapy is not usually required if districts have another program that will provide benefits to a child, school districts are not permitted to institute a policy

⁷⁹ *Id.*

⁸⁰ *Id.* at 920.

⁸¹ *Id.* at 921.

⁸² *Id.*

⁸³ *Id.* at 916-17.

⁸⁴ *Id.* at 930.

⁸⁵ *Id.* at 939.

⁸⁶ *Id.* at 917.

⁸⁷ *Id.*

⁸⁸ Middleborough Pub. Sch., Mass. Bureau Special Educ. Appeals, BSEA 03-2915, at 20 (2003).

⁸⁹ *Id.* at 23.

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refusing to provide ABA-type programs to children with ASDs.⁹⁰ In *Deal ex rel. Deal v Hamilton County Board of Education*, Zachary was diagnosed with Autism by age three.⁹¹ In developing his first IEP, the school district did not include ABA therapy. The district had previously developed and invested in an alternative approach to teaching students with Autism and denied the parents' request for ABA therapy. In rejecting the district's determination, the court stated that IEPs should be based on the specific needs of the child, and that a school district cannot outright refuse to consider a specific method of treatment.⁹²

[T]he school district may not . . . decide that because it has spent a lot of money on a program, that program is always going to be appropriate for educating children with a specific disability, regardless of any evidence to the contrary of the individualized needs of a particular child. A placement decision may only be considered to have been based on the child's IEP when the child's individual characteristics, including demonstrated response to particular types of educational programs, are taken into account.⁹³

Thus, even though schools are not required by the IDEA to maximize a disabled child's educational benefit, they must still consider any and all programs that may help a particular child learn. Schools cannot reject a program simply because it does not already exist at the school if it appears that this program will be the one most likely to help the child achieve educational gains. This highlights a key factor for parents: school districts are obligated to provide and, if necessary, *develop* programs for a child to achieve educational benefits. Simply put, it is clear that school districts cannot have all-or-nothing policies; they cannot ban or only use ABA therapy. Rather, school districts are required to make individualized determinations of appropriate services for each child.⁹⁴

The Tenth Circuit recently examined the outcomes that are required under the IEP. In *Thompson*, an autistic student made progress in school but was not able to generalize his skills in daily life.⁹⁵ The Tenth Circuit

⁹⁰ See, e.g., *Deal ex rel. Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004).

⁹¹ *Id.* at 845.

⁹² *Id.* at 845-47.

⁹³ *Id.* at 859.

⁹⁴ *Id.*

⁹⁵ *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1146 (10th Cir. 2008).

held that generalization of skills across settings is not required by the IDEA.⁹⁶ The requirement is only that the student be making *some* progress *in school*; the goal of self-sufficiency is not a guarantee.⁹⁷ This case, like many other cases, demonstrates a lack of understanding of the nature of ASD as a social and behavioral disability; thus, some of the cases seem paradoxical given the nature of ASDs. Courts have even imposed limits on what falls within the context of education for IDEA purposes, which contradicts the nature of challenges faced by students with ASD.⁹⁸ For example, the U.S. District Court of New Mexico held that the IDEA only seeks to provide academic educational services and rejected social skills programming for a student.⁹⁹ This focus on academic education reflects a belief that socializing is a beneficial, but incidental, by-product of public education; this is in conflict with the nature of the disability and even with the IDEA definition of Autism.¹⁰⁰ The IDEA specifically highlights social deficits as part of ASD.¹⁰¹ It seems illogical for a court to then hold that the IDEA does not require addressing these deficits in the IEP.

There are some bright spots however. States, of course, are free to increase the standards necessary for an IEP to provide a FAPE. In *Burilovich ex rel. Burilovich v. Board of Education*, the Sixth Circuit noted that Michigan's statute added to the federal FAPE mandates "by requiring that an IEP be designed to develop the 'maximum potential' of a child," which would include a child with ASD.¹⁰² In determining whether a particular IEP met this increased standard, the court found that in a case where there was conflicting testimony as to the best program for the child, the school's plan constituted a FAPE if the teaching method it proposed was appropriate for the child and allowed him to benefit.¹⁰³

⁹⁶ *Id.* at 1150.

⁹⁷ *Id.*

⁹⁸ *See, e.g., Lathrop R-II Sch. Dist. v. Gray ex rel. D.G.*, 611 F.3d 419, 426 (8th Cir. 2010) (noting that the IDEA does not require an IEP to address behavior issues; a "good faith effort" is sufficient and all that is required to assist a student in meeting the educational goals set forth in the student's IEP).

⁹⁹ *Chavez v. Bd. of Educ.*, 614 F. Supp. 2d 1184, 1223-24 (D.N.M. 2009).

¹⁰⁰ *See supra* notes 34-35 and accompanying text.

¹⁰¹ *See supra* text accompanying note 23 (quoting 34 C.F.R. § 300.8(c)(1)(i)) (defining autism under the IDEA).

¹⁰² *Burilovich ex rel. Burilovich v. Bd. of Educ.*, 208 F.3d 560, 565 (6th Cir 2000) (citing Mich. Comp. Laws Ann. §§ 380.170(a), 380.1711(17)(a), 380.1751(1) (West 1997)).

¹⁰³ *Id.* at 572.

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D. Where Should the Child Be Placed? The "Least Restrictive Environment" Requirement

As part of a FAPE, the IDEA requires that students with disabilities be educated in the least restrictive environment ("LRE").¹⁰⁴ Failure to provide an education in the LRE is a substantive flaw in the IEP.¹⁰⁵ This means that children with disabilities should be in a regular school setting or as close to a general education setting as possible. For example, the District Court of Hawaii recently moved a thirteen-year-old autistic child from a private school, which he had attended for seven years, to a public school, emphasizing the intent of the IDEA that, to the maximum extent possible, children should be educated along with students who are not receiving special education services.¹⁰⁶ However, different circuits have taken varying views on how to implement this requirement.

In *Daniel R.R. v. State Board of Education*, the Fifth Circuit developed a two-prong test.¹⁰⁷ The first prong of the test assesses "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. If it cannot, [courts should next ask] whether the school [practices inclusion] to the maximum extent appropriate."¹⁰⁸ It is only if a school meets these requirements that it has provided an education in the least restrictive environment to students with a disability. The *Daniel R.R.* court emphasized that the "analysis is an individualized, fact-specific inquiry that requires [the court] to examine carefully the nature and severity of the child's handicapping condition, his needs and abilities, and the schools' response to the child's needs."¹⁰⁹ Both the Second and Third Circuits have adopted identical tests.¹¹⁰

In *Roncker ex. rel. Roncker v. Walter*, the Sixth Circuit created an analysis specifically for when a more restrictive facility should be

¹⁰⁴ 20 U.S.C. § 1412(a)(5) (2006).

¹⁰⁵ *E.G. ex rel. A.G. v. City Sch. Dist. of New Rochelle*, 606 F. Supp. 2d 384, 390 (S.D.N.Y. 2009).

¹⁰⁶ *Laddie C. ex rel. Joshua C. v. Dep't of Educ.*, No. 08-00309 SOM/BMK, 2009 U.S. Dist. LEXIS 25618, at *12-13 (D. Haw. March 27, 2009).

¹⁰⁷ *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

¹⁰⁸ *Id.* The court uses the phrase "mainstreamed," but "inclusion" is the more appropriate term today.

¹⁰⁹ *Id.*

¹¹⁰ *See P. ex rel. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119-20 (2d Cir. 2008) ("[A] court should consider, first, 'whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate.');" *Oberti ex rel. Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir. 1993) (adopting the test articulated in *Daniel R.R.*).

considered superior to the general education classroom.¹¹¹ Under this test, the initial inquiry is “whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.”¹¹² Ironically, this is a reversal of the tests used in other cases. The Sixth Circuit prefers framing the issue in this way because it “accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities.”¹¹³ The Eighth Circuit has adopted an almost identical test.¹¹⁴ It is not hard to project that these rulings could result in more children with ASD in more restrictive settings, producing fewer opportunities for interaction with non-disabled peers. Accordingly, several recent news articles have highlighted the growing number of children in isolated settings and the high cost of private programs.¹¹⁵

In an administrative decision applying the *Roncker* analysis, the hearing officer found that the practice of “‘Reverse’ mainstreaming” – bringing general education students into the special education classroom for some period of the day – does not in any way create a less restrictive environment for the special education students.¹¹⁶ It is only when the

¹¹¹ 700 F.2d 1058, 1063 (6th Cir. 1983).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See Pacht *ex rel.* Pacht v. Seagren, 453 F.3d 1064, 1067-68 (8th Cir. 2006).

¹¹⁵ See, e.g., Robert Barnes & Daniel de Vise, *Court Weighs Funding for Special Education: Private-School Tuition at Heart of Case*, WASHINGTON POST, April 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/26/AR2009042602249.html> (providing examples of the rising costs of tuition for private programs).

In Montgomery County, for example, private tuition expenses have risen from \$21 million in fiscal 2000 to a projected \$39 million in fiscal 2010. The Montgomery school system, which has a more comprehensive special-education department than many other systems, has 614 students attending private schools this year. Fairfax County schools spent \$15 million on tuition in the 2007-08 academic year The system now has 233 students in private schools. But others spend much more. Prince George's County schools, with fewer services, this year spent \$56 million on 1,168 students. And the District [of Columbia], with a historically troubled special-education department, has 2,300 students receiving private care at a cost of \$141 million.

Id. See also Amanda M. Fairbanks, *Tug of War over Cost to Educate the Autistic*, N.Y. TIMES, Apr. 19, 2009, at A28. The Interagency Autism Coordinating Committee estimates the costs for addressing all of the needs of people with ASD as between \$35-90 billion annually. IACC STRATEGIC PLAN, *supra* note 5, at 1.

¹¹⁶ Mich. State Office Admin. Hearing & Rules, Dep't of Educ. v. Allen Park Pub. Sch., SHE 06-77, 48 (May 1, 2007).

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special education students are actually placed in the general education classroom that the placement can be considered less restrictive.¹¹⁷

In *Board of Education v. Ross ex rel. Ross*, the Seventh Circuit explicitly refused “to adopt any sort of multi-factor test for assessing whether a child may remain in a regular school.”¹¹⁸ Rather, the court held that

it is not enough to show that a student is obtaining *some* benefit, no matter how minimal, at the mainstream school in order to prove that the District's removal of [a student] violated the “least restrictive environment” requirement. Instead, giving due deference to the administrative findings and the conclusions of the district court, we ask whether the education in the conventional school was satisfactory and, if not, whether reasonable measures would have made it so.¹¹⁹

Thus, the inquiry under this analysis is whether the child was receiving—or could receive with reasonable modifications—a meaningful education in a general education classroom. Only if the answer to this is no can the child be placed into a more restrictive environment.

Finally, the Ninth Circuit employs

a four-factor balancing test to determine whether a district’s placement offered education in the [least restrictive environment]: (1) the educational benefits of placement full-time in a regular class; (2) the nonacademic benefits of such placement; (3) the effect the student has on the teacher and other students in the regular class; and (4) the costs of mainstreaming the student.¹²⁰

Applying these factors, the Ninth Circuit found that benefits to be derived from a mainstream program were minimal and a special education program would better meet the child’s needs, which overcame the preference for mainstreaming or inclusion.¹²¹ In applying the same

¹¹⁷ *See id.*

¹¹⁸ *Bd. of Educ. v. Ross ex rel. Ross*, 486 F.3d 267, 277 (7th Cir. 2007).

¹¹⁹ *Id.*

¹²⁰ *B.S. ex rel. R.S. v. Placentia-Yorba Linda Unified Sch. Dist.*, 306 F. App’x 397, 399–400 (9th Cir. 2009) (citing *Sacramento City Unified Sch. Dist. v. Rachel H. ex rel. Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994)).

¹²¹ *Id.*

test, the District Court of Nevada minimized the non-academic benefits, which the student would achieve during other parts of the day, and upheld the decision to provide math instruction in a special education classroom.¹²² The court relied on the lack of meaningful gains the student previously made in math.¹²³ These conflicts in the circuits concerning placement have ramifications for all children, not only those with ASD. Such confusion can have a chilling effect on school district development of least restrictive settings not only for children with ASD but also for all children with disabilities.

E. Reimbursement: Who Pays When Schools Do Not Comply with IDEA Requirements?

Typically, school districts pay for all special education and related services dictated by an IEP utilizing IDEA and other federal, state, and local funds. When a school district does not provide adequate services, parents may find private providers to provide appropriate services.¹²⁴ The private providers can be very expensive and the questions become: how do parents pay for private services? If the school district is responsible, what must parents do in order to obtain reimbursement? Much of the recent litigation regarding appropriateness of the IEP, particularly for children with ASD, is focused on reimbursement of costs for private services.

In *School Committee of Burlington v. Department of Education*, the Supreme Court declared that the IDEA authorizes reimbursement of parents for private special education services.¹²⁵ *Burlington* addressed the education situation of Michael Panico, a student classified as “handicapped” within the meaning of the IDEA.¹²⁶ The parents and the school disagreed over the source of Michael’s disabilities: his parents believed that his difficulties were neurological while the school system believed it was an emotional disorder.¹²⁷ A similar debate often takes place when determining services for students with ASD. The district proposed placing Michael in a six-student classroom within the public school system; his parents rejected this proposal and placed him in a private, highly specialized school.¹²⁸ The Supreme Court first noted that

¹²² *Yates ex rel. Yates v. Washoe Cnty. Sch. Dist.*, No. 03:07-CV-00200-LRH-RJJ, 2008 U.S. Dist. LEXIS 68937, at *13–16 (D. Nev. Aug. 27, 2008), *aff’d* 2009 U.S. Dist. LEXIS 46970 (D. Nev. May 20, 2009).

¹²³ *Id.* at *13.

¹²⁴ *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 369 (1985).

¹²⁵ *Id.*

¹²⁶ *Id.* at 361.

¹²⁷ *Id.* at 362.

¹²⁸ *Id.*

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a child who meets the criteria of the IDEA is entitled to receive an appropriate education at public expense.¹²⁹ The Court then held that the IDEA authorizes reimbursement of parents for expenditures for private special education if the court determines that the private placement, rather than the placement proposed in the IEP, is appropriate.¹³⁰ Thus, this decision establishes the right of parents in certain circumstances to obtain reimbursement of the costs of private special education and related services.

In *Winkelman v. Parma City School District*, the United States Supreme Court determined that the IDEA grants rights to parents as well as children.¹³¹ The Court disagreed “that the sole purpose driving IDEA’s involvement of parents is to facilitate vindication of a child’s rights.”¹³² Because parents have their own rights under the IDEA, they are entitled to bring IDEA claims representing their own rights, rather than those of their children, without an attorney.¹³³ This case reinforces parents’ rights to seek reimbursement of the costs of private services.

Reimbursement can be appropriate even when parents move a child to a private placement without consent from school authorities, though it is at their own risk. If the court finds that the proposed IEP placement was appropriate, a district will not have to reimburse the parents.¹³⁴ This situation is problematic, however, because it gives an enormous advantage to wealthy families who can afford to take the risk of paying for private programs without a guarantee of reimbursement. The reimbursement cases are another example of how ASD cases have reshaped case law for all under the IDEA, though it creates a troubling dilemma. On the one hand, courts do not want to delay students receiving services—even if private; on the other hand, public school systems must retain their obligation to develop timely appropriate services. There is a process that courts should follow to ensure that the laws do not favor wealthier families. Thus, in a reimbursement suit, the appropriate inquiry consists of three questions: (1) determining whether the IEP offered by the school district was appropriate; (2) determining whether the private placement was appropriate; and (3) determining whether equitable considerations support reimbursement.¹³⁵ The Fifth Circuit recently followed the guidelines of *Burlington*, reiterating that

¹²⁹ *Id.* at 361.

¹³⁰ *Id.* at 370.

¹³¹ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 527 (2007).

¹³² *Id.* at 528–29.

¹³³ *Id.* at 535.

¹³⁴ *Id.* at 531–32; *see also Burlington*, 471 U.S. 359.

¹³⁵ *See N.R. ex rel. T.R. v. Dep’t of Educ.*, No. 07 Cv. 9648 (BSJ), 2009 U.S. Dist. LEXIS 27273, at *15 (S.D.N.Y. March 31, 2009) (interpreting *Burlington*, 471 U.S. 359 (1985)).

reimbursement is appropriate upon a finding of a failure to provide a FAPE available in a timely manner, prior to placement in a private setting.¹³⁶ The Second Circuit elaborated on how to determine if the IEP was appropriate: courts are to (1) examine whether the state has complied with IDEA procedures in developing the IEP; and (2) consider whether the IEP is “reasonably calculated to enable the child to receive educational benefits.”¹³⁷ Only if the court finds procedural or substantive violations of the IDEA should the court evaluate whether the private placement obtained by the parent is appropriate for the child’s needs.¹³⁸

The substantive requirements focus on whether the services provided or offered to the child comply with the IDEA requirements—whether the child will receive educational benefit.¹³⁹ The procedural requirements, however, are more technical and easier to identify, and errors are quite common. Procedural requirements ensure that diagnosis and service determinations are made in a timely fashion with the most information and participation possible, and they ensure that parents have clear routes to appeal any service decisions.¹⁴⁰ As procedural requirements serve as a safeguard for parents, a pro-compliance stance is critical. Courts, however, have taken varying approaches to technical violations of the IDEA. The Ninth Circuit has held that while technical violations do not automatically render an IEP invalid, violations “that result in the loss of educational opportunity” are to be taken seriously and are a violation of the right to a FAPE.¹⁴¹ Thus, major procedural violations render an IEP invalid. For example, referring parents to a private Autism center (even when the parents never obtained services from that center), rather than actually providing an evaluation, was a violation that denied the student a FAPE.¹⁴² The Sixth Circuit has taken a similar position, holding that procedural violations of IDEA only amount to denial of a FAPE where they result in substantive harm.¹⁴³

¹³⁶ Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 293 (5th Cir. 2009).

¹³⁷ T.P. ex rel. S.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 (2d Cir. 2009) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982)).

¹³⁸ *Id.*

¹³⁹ See *supra* Part III.C (discussing substantive educational benefit requirements).

¹⁴⁰ See 20 U.S.C. § 1415 (2006) (outlining procedural safeguards under the IDEA); Bd. of Educ. v. Rowley, 458 U.S. 176, 205–07 (1982); N.B. ex rel. C.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1207–08 (9th Cir. 2008).

¹⁴¹ N.B. ex rel. C.B., 541 F.3d at 1207.

¹⁴² *Id.* at 1209.

¹⁴³ See Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 765 (6th Cir. 2001) (“[A] procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district’s failure to comply with the procedural requirements of the Act will constitute a

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Sometimes, however, courts will override more trivial procedural violations in favor of the school districts. The Ninth Circuit held that certain procedural violations, such as not including the student's private school teacher in the IEP meetings or not incorporating all of the goals suggested by a private provider, would not undermine the IEP validity and did not deprive the student of educational opportunities.¹⁴⁴ The IEP was still tailored to meet the student's unique needs and would provide *some* educational benefits.¹⁴⁵ Similarly, the Northern District of Illinois adopted the Sixth Circuit position that technical compliance with all procedural requirements is not required; so long as parents have not suffered prejudice, substantial compliance with 20 U.S.C. § 1415 is sufficient.¹⁴⁶ The Second Circuit held that failure to conduct a behavioral assessment was not enough to find a lack of a FAPE.¹⁴⁷

The Tenth Circuit recently adopted the Fourth and Seventh Circuits' position that a parent not participating meaningfully in the IEP development process is not a procedural violation of the IDEA that denies a student an educational opportunity.¹⁴⁸ Additionally, the District Court in Arizona has held that the IDEA does not require an Autism expert to be part of the IEP team, based on the difficulty of identifying an Autism expert.¹⁴⁹ The court held that the provision of a general, qualified special education teacher was sufficient.¹⁵⁰ The troubling nature of these cases cannot be underestimated. Such decisions would have been unheard of a decade ago, but today with the proliferation of cases, particularly involving ASD, and the recent placing of the burden of proof on parents,¹⁵¹ some courts are taking a more lax approach to procedural violations.

denial of a FAPE only if such violation causes substantive harm to the child or his parents.").

¹⁴⁴ Joshua A. *ex rel.* Jorge A. v. Rocklin Unified Sch. Dist., 319 F. App'x 692, 695 (9th Cir. 2009).

¹⁴⁵ *Id.*

¹⁴⁶ Richard Paul E. v. Plainfield Cmty. Consol. Sch. Dist. 202, No. 07 C 6911, 2009 U.S. Dist. LEXIS 29833, at *42-43 (N.D. Ill. April 9, 2009).

¹⁴⁷ A.C. *ex rel.* M.C. v. Bd. of Educ., 553 F.3d 165, 173 (2d Cir. 2009).

¹⁴⁸ Systema *ex rel.* Systema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 1314 (10th Cir. 2008). Courts may be particularly hesitant to find that a procedural violation rises to the level of denial of a FAPE where parents are uncooperative. *See, e.g.,* C.H. *ex rel.* Hayes v. Cape Henlopen Sch. Dist., 606 F.3d 59, 69 (3d Cir. 2010) ("[W]e decline to hold that a school district is liable for procedural violations that are thrust upon it by uncooperative parents.").

¹⁴⁹ Parenteau *ex rel.* C.P. v. Prescott Unified Sch. Dist., No. CV 07-8072-PCT-NVW, 2008 U.S. Dist. LEXIS 104465, at *23-24 (D. Ariz. Dec. 11, 2008).

¹⁵⁰ *Id.*

¹⁵¹ Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 51 (2005).

After examining substantive and procedural IDEA compliance, courts examine the private placements that warrant reimbursement. Once it has been determined that the IEP is insufficient, courts have been flexible in accepting various placements by parents. Significantly, in *Richardson Independent School District v. Michael Z.*, the Fifth Circuit held that reimbursement is not limited to placement by a parent in a purely private setting; the same standard should apply if the placement chosen by a parent has both private and public components.¹⁵² After evaluating the IEP under Supreme Court guidelines, the court turned to whether the private placement was appropriate. Rather than ban placement in any non-private setting, the court adopted the following test: "In order for a residential placement to be appropriate under IDEA, the placement must be 1) essential in order for the disabled child to receive a meaningful educational benefit, and 2) primarily oriented toward enabling the child to obtain an education."¹⁵³ The District Court for the Central District of California came to a similar decision in holding that the distinction between a nonpublic *school* and nonpublic *agency* is immaterial to reimbursement in light of the purposes of the IDEA.¹⁵⁴

Finally, in evaluating reimbursement claims, courts emphasize equitable considerations in determining if the private placement is appropriate for the child's needs but note that parents bear the burden of persuasion.¹⁵⁵ Emphasizing equitable considerations from *Burlington*, the Southern District of New York addressed a parent's placement of her autistic child in the Rebecca School, which can cost over \$72,000 per year in tuition alone.¹⁵⁶ The district conceded that the IEP was not appropriate.¹⁵⁷ The court then evaluated equitable considerations, holding that where parents notify the school district of their dissatisfaction and do not frustrate the district's efforts to place the child in an appropriate setting, equitable considerations allow for reimbursement.¹⁵⁸ The equitable considerations seem to focus a great deal on the behavior of parents through the IEP conflict. If parents have

¹⁵² See 580 F.3d 286, 295–96 (5th Cir. 2009) (awarding reimbursement for fees associated with the private Texas Neurological Rehabilitation Center where the student attended an on-site, public charter school).

¹⁵³ *Id.* at 299.

¹⁵⁴ *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 655 F. Supp. 2d 1088, 1100 (S.D. Cal. 2009).

¹⁵⁵ See, e.g., *T.P. ex rel. S.P. v Mamaroneck Union Free Sch. Dist.*, 554 F.3d 247, 252 (2d Cir. 2009).

¹⁵⁶ *N.R. ex rel. T.R. v. Dep't of Educ.*, No. 07 CV 9648 (BSJ), 2009 U.S. Dist. LEXIS 27273 (S.D.N.Y. Mar. 31, 2009); Alyssa Katz, *The Autism Clause*, N.Y. MAGAZINE, Oct. 22, 2006, <http://nymag.com/news/features/23172/>.

¹⁵⁷ *N.R. ex rel. T.R.*, 2009 U.S. Dist. LEXIS 27273, at *10.

¹⁵⁸ *Id.* at *17–20.

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participated in the process, rather than making it impossible for the district to offer appropriate placements, equitable considerations will tend toward reimbursement; if the parents have refused to participate or cooperate with the school district, equity tends to disfavor reimbursement.

F. *Early Intervention Case Law*

Early identification of ASDs is critical to the most effective management of ASDs and optimal outcomes for children. The American Academy of Pediatrics ("AAP") recently issued a report recommending that all pediatricians screen every child in their care for signs of ASD at 9, 18, and either 24 or 36 months.¹⁵⁹ The AAP developed a screening and surveillance algorithm to assist primary care physicians in the identification process.¹⁶⁰ These screenings will facilitate earlier referrals to the Early Intervention program. Children suspected of having a delay or being at risk of a delay or developmental disorder such as Autism will be referred for services.¹⁶¹ Arguably, children diagnosed with ASD by a pediatrician or other physician should qualify for Early Intervention services as children with "a diagnosed physical or mental condition that has a high probability of resulting in developmental delay" under Part C of the IDEA.¹⁶² Otherwise, children will qualify under the broader standards encompassing children "under 3 years of age who need[] early intervention services because the individual is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures in 1 or more of the areas of cognitive development, physical development, communication development, social or emotional development, and adaptive development."¹⁶³

The IDEA makes funds available to states that provide "appropriate early intervention services . . . to all infants and toddlers with disabilities in the State and their families."¹⁶⁴ This represents a two generational service system in that it provides services to both children and their

¹⁵⁹ Chris Plauché Johnson, Scott M. Myers & Council on Children with Disabilities, *Identification and Evaluation of Children with Autism Spectrum Disorders*, 120 PEDIATRICS 1183, 1195 (2007).

¹⁶⁰ *Id.* The report argues that given the prevalence of ASDs, every pediatrician will inevitably treat multiple children with ASDs. *Id.* at 1184. Pediatricians must understand the clinical signs of early ASD and understand the importance of early diagnosis and intervention. *Id.*

¹⁶¹ *Id.* at 1196.

¹⁶² 20 U.S.C. § 1432(5)(A)(ii) (2006). See generally 20 U.S.C. § 1431-1445 (2006) (pertaining to infants and toddlers with disabilities).

¹⁶³ 20 U.S.C. § 1432(5)(A)(i) (statutory numbering omitted).

¹⁶⁴ *Id.* § 1434.

families. Typically, after a multidisciplinary evaluation, parents, evaluators, early intervention officials, and others meet to develop an Individualized Family Service Plan (“IFSP”).¹⁶⁵ The IFSP includes a current assessment of the child, goals for progress, and implementation strategies, including delineation of services to the child and the parent (such as parent training or parent counseling) and the environment in which the child will receive services.¹⁶⁶

Part C of the IDEA requires that a state provide early intervention services to infants and children with disabilities from birth to age three in order to receive financial assistance from the federal government.¹⁶⁷ After the third birthday, states are required to provide a FAPE to students with disabilities between the ages of three and twenty-one years old in order to receive funds under Part B of the IDEA.¹⁶⁸

1. Early Intervention Services

Service requirements for early intervention reflect similar principles as those applied in Part B (IDEA), IEP cases. In *A.G. ex rel. N.G. v. Frieden*, a child was diagnosed with Autism when he was twenty months old.¹⁶⁹ He was initially diagnosed as autistic by both a private pediatrician and a New York City Early Intervention Program provider.¹⁷⁰ The evaluation provided by the City’s contractor included psychological, developmental, speech/language, and occupational therapy evaluations, but did not include service recommendations.¹⁷¹ In developing the IFSP, the Early Intervention officials proposed twenty hours of ABA therapy and a variety of other services; the parents wanted more ABA therapy.¹⁷² In determining that the proposed level of ABA therapy was sufficient, the court reiterated many of the principles from IEP cases: substantial compliance with procedural requirements is sufficient and the substantive requirement does not require maximizing potential or providing the best services.¹⁷³ Accordingly, the judge noted that while the parent’s witnesses testified that more than twenty hours of ABA therapy (the proposed amount) was desirable, none testified that

¹⁶⁵ *Id.* § 1436(a).

¹⁶⁶ *Id.* § 1436(d).

¹⁶⁷ *See generally id.* § 1435 (describing requirements of state systems serving infants and toddlers with disabilities).

¹⁶⁸ *See supra* Part III.C (discussing the range of substantive entitlements under Part B).

¹⁶⁹ *A.G. ex rel. N.G. v. Frieden*, No. 08 Civ. 1576 (LAK), 2009 U.S. Dist. LEXIS 24887, at *7 (S.D.N.Y. Mar. 25, 2009).

¹⁷⁰ *Id.* at *7-8.

¹⁷¹ *Id.* at *8.

¹⁷² *Id.* at *12-13.

¹⁷³ *Id.* at *18.

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twenty hours would produce only trivial benefits.¹⁷⁴ Indeed, as previously stated, there is a paucity of research on the intensity of services.¹⁷⁵

In a letter responding to an inquiry on whether parents of a two-year-old autistic child can insist on an out-of-network placement if they have demonstrated evidence that ABA has improved their child's development and their local Part C provider does not provide ABA therapy, the United States Department of Education, Office of Special Education and Rehabilitative Services clarified that the IFSP Team, which includes the child's parents, makes an individualized determination of whether a particular method of providing services is needed for a child to achieve the outcomes in the child's IFSP.¹⁷⁶ Evidence from the parents alone is insufficient to determine what method will be most successful to help the child receive the desired outcome.¹⁷⁷ Thus, the inquiry remains individualized. Although a child is not entitled to ABA services just because those services have proven effective for the child in the past, the case law still emphasizes that an absolute bar on a particular therapy violates the IDEA.¹⁷⁸ The District Court of Arizona followed this line of reasoning, holding that the district was not required to provide a particular type of service so long as it employed qualified professionals who made IEP decisions based on the child's needs.¹⁷⁹

As in Part B, there is no set policy on the number of hours of ABA therapy a child should or can receive, nor is there research on this important point.¹⁸⁰ *B.D. v. Debuono*, while remanded for fact-finding, noted that a district's categorical limit on the number of hours of ABA therapy a child could receive, even if a de facto practice and not a formal

¹⁷⁴ *Id.* at *42.

¹⁷⁵ See *supra* note 70 and accompanying text.

¹⁷⁶ Letter from Patricia J. Guard, Acting Dir., Office of Special Educ. & Rehabilitative Servs., to [redacted] (Sept. 24, 2007), available at http://www.ideainfanttoddler.org/pdf/Redacted_9-07.pdf.

¹⁷⁷ *Id.*

¹⁷⁸ See, e.g., *Deal ex rel. Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 855-60 (6th Cir. 2004).

¹⁷⁹ *Parenteau ex rel. C.P. v. Prescott Unified Sch. Dist.*, No. CV 07-8072-PCT-NVW, 2008 U.S. Dist. LEXIS 104465, at *22-25 (D. Ariz. Dec. 11, 2008).

¹⁸⁰ See, e.g., IACC STRATEGIC PLAN, *supra* note 5, at 23-25 (noting that there is little scientific evidence to support the efficacy of many programs currently in use; the document notes that ABA and other behavior therapies have been studied most extensively but calls for effective interventions based on modern research and rigorous studies to evaluate the effectiveness of many of the treatment options available).

regulation, would constitute a violation of the property interest grounded in the IDEA.¹⁸¹

Parents are entitled to reimbursement when services are reduced or changed for reasons not related to the child's needs; parents are not entitled to reimbursement simply because they believe the student would benefit from additional or different services. In *Adams ex rel. Adams v. Oregon*, parents enrolled their son in Early Intervention Services.¹⁸² The parents eventually challenged whether the services provided were sufficient under the IDEA. In evaluating the IFSP, the court cited IEP cases, much like the court in *A.G. ex rel. N.G. v. Frieden*, reiterating that an appropriate intervention program does not mean the absolute best services or potential maximization for the child.¹⁸³ Rejecting the lower court's assertion that it is impossible to tell if the IFSP provided the child with a meaningful benefit because of the supplemental private services, the Ninth Circuit emphasized that the question is whether the IFSP was appropriately designed and implemented so as to convey a meaningful benefit—the “reasonably calculated” standard.¹⁸⁴ Thus, the court concluded that the IEP was appropriate because it was based on careful research and literature.¹⁸⁵

2. Early Intervention Reimbursement

Much like in Part B, reimbursement has become a major issue in Part C litigation. Case law addressing IEP violations of the IDEA have been used to evaluate IFSP violation claims. In *Frieden*, the court evaluated the IFSP using IEP case law after the parties effectively stipulated to the applicability.¹⁸⁶ Thus, the court conducted the same three-step inquiry that is used in IEP claims: 1) whether there was procedural compliance with the IDEA; 2) whether there was substantive compliance with the IDEA; and 3) whether the private program was appropriate for the child's needs.¹⁸⁷ Again, only substantial procedural compliance is required, and there is no requirement that optimal services be provided. There is no requirement of maximization of a child's potential.¹⁸⁸

¹⁸¹ *B.D. v. DeBuono*, 130 F. Supp. 2d 401, 431 (S.D.N.Y. 2000).

¹⁸² 195 F.3d 1141, 1144 (9th Cir. 1999).

¹⁸³ *Id.* at 1149.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ No. 08 Civ. 1576 (LAK), 2009 U.S. Dist. LEXIS 24887, at *16-17 (S.D.N.Y. Mar. 25, 2009).

¹⁸⁷ *Id.* at *17-18.

¹⁸⁸ *Id.* at *18.

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In evaluating a challenge to the appropriateness of an IFSP, Part B principles were also applied by the District Court of Maryland in *Wagner v. Short*.¹⁸⁹ Although Part B focuses on educational benefits and Part C focuses on enhancing developmental needs, the “basic structure” of the two programs is very similar.¹⁹⁰ In *Wagner*, a child and his parents filed suit against the county’s infants and toddlers program for violation of the IDEA.¹⁹¹ In an administrative hearing, the IFSP was found to be adequate, and the parents challenged that decision.¹⁹² The district court has broad authority to order compensatory services for past deprivations resulting from IDEA violations; the IDEA also allows courts to grant compensatory services to children who are beyond the statutory age.¹⁹³ This is significant because it prevents cases from being thrown out as moot where the child is beyond the age of eligibility.¹⁹⁴

In *Malkentzos v. DeBuono*, parents sought early intervention services for their son, who was diagnosed with ASD when he was approximately eighteen months old.¹⁹⁵ Following several evaluations, it was recommended that the child be enrolled in twenty hours of ABA therapy each week. The service provider to which the family was referred did not provide ABA therapy, and the child was too young for another state-certified program.¹⁹⁶ The director of one of the programs assisted the family in structuring an in-home ABA therapy program, which included hiring college students who were not state-certified in ABA.¹⁹⁷ After the child made progress with ABA therapy, the father requested that the IFSP be modified to provide forty hours of ABA therapy.¹⁹⁸ The request was denied because there was a shortage of providers; the father continued to employ the college students.¹⁹⁹ The IFSP was modified to

¹⁸⁹ *Wagner v. Short*, 63 F. Supp. 2d 672, 677 (D. Md. 1999).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 675.

¹⁹² *Id.*

¹⁹³ *Id.* at 676–77.

¹⁹⁴ This principle has also been applied in Part B cases. See, e.g., *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 189 (1st Cir. 1993) (holding that the IDEA allows courts to grant compensatory education services to plaintiffs who establish that they did not receive the education services to which they were entitled while under the statutory age); *Lester H. ex rel. Octavia P. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990). Recently, the Court of Appeals for the Third Circuit held that financial compensation was not sufficient when a student passed the age of eligibility but had not received appropriate educational services; the school district was required to provide all elements of a FAPE, rather than merely financial compensation. *Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 719–20 (3d Cir. 2010).

¹⁹⁵ 102 F.3d 50, 52 (2d Cir. 1996).

¹⁹⁶ *Id.* at 52.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 52–53.

provide eight and a half hours of ABA each week.²⁰⁰ In *Malkentzos* and a related case, *Still v. DeBuono*, the courts held that private providers do not have to be certified when a parent uses their services because the IFSP was insufficient due to a provider shortage.²⁰¹ This lowering of the standards for qualified professionals is another example of the negative potential of ASD litigation for all children with disabilities; the windfall from such decisions has yet to be fully realized.

3. Transition from Part C to Part B

The transition from Part C to Part B has been an issue of recent litigation. There is a conflict in the circuits on whether the “stay put” provision of the IDEA, which entitles students to stay in the prior setting during any appeal, applies to this transition period.²⁰² This is a critical issue because it enables the child to receive ongoing services during the pendency of an appeal.

In *M.M. ex rel. A.M. v. New York City Department of Education*, the child began receiving early intervention services around her second birthday.²⁰³ Under her IFSP, she received thirty hours per week of ABA therapy, parent training, two hours per week of occupational therapy, five hours per week of speech, and two hours of physical therapy each week.²⁰⁴ Several months before the child’s third birthday, the New York Department of Education’s Committee on Pre-School Education was notified of A.M.’s potential eligibility and the evaluation process began.²⁰⁵ The mother and the district could not agree on an IEP and the mother placed the child in a private setting.²⁰⁶ The mother sought a due process hearing and continuation of the services provided under the IFSP during the pendency of the due process hearings, but she was denied. The *A.M.* court held that the IDEA does not entitle a child to pendency placement at the level of services received under the IFSP during a dispute over the transition from Part C to Part B.²⁰⁷ According to the *A.M.* court, this pendency right only applies once a child has previously received services in the public school system.²⁰⁸ This decision

²⁰⁰ *Id.* at 53.

²⁰¹ *Id.* at 54; *Still v. DeBuono*, 101 F.3d 888, 893 (2d Cir. 1996). *Malkentzos* was remanded on appeal due to standards for granting injunctive relief. 102 F.3d at 54–56.

²⁰² See 20 U.S.C. § 1415(j) (2006) (“[D]uring the pendency of any proceedings . . . the child shall remain in the then-current educational placement of the child . . .”).

²⁰³ 583 F. Supp. 2d 498, 501 (S.D.N.Y. 2008).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 501–02.

²⁰⁷ *Id.* at 510–13.

²⁰⁸ *Id.* at 512–13.

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once again underscores the legal ramification for all children with disabilities from the proliferation of ASD litigation. In contrast, in *Pardini ex rel. Pardini v. Allegheny Intermediate Unit*, the Third Circuit, relying on the provision that the transition be “smooth,”²⁰⁹ held that the pendency provision applied in due process hearings during transition.²¹⁰ *Pardini* shows that well-planned litigation can reap benefits for all children, while *A.M.* stands for the unexpected outcomes of ASD litigation that can affect all children with disabilities.

In *D.P. ex rel. E.P. v. School Board*, much like in *A.M.*, the Eleventh Circuit rejected *Pardini* and held that the IDEA does not entitle plaintiffs to continue receiving services pursuant to their IFSP while the IEP is finalized.²¹¹ In this case, three autistic triplets were denied continuation of IFSP services until the IEPs were in place.²¹² Interestingly, the parents were not without remedy if they could prove that the district failed to provide a FAPE, entitling them to reimbursement.²¹³ However, the school district did not have a duty to simply continue IFSP services before the IEP was in place. Like the *A.M.* court, the Eleventh Circuit based its decision on the perceived statutory language, finding that the stay-put provision does not apply when a child is applying for initial admission, although virtually all other procedural safeguards from Part B have been applied over and over by courts.²¹⁴ The issue of the applicability of the stay-put provision to Part C is a worthy subject for the 2011 reauthorization of the IDEA.²¹⁵

G. Vaccine Litigation

The potential link between early childhood vaccinations and Autism has been the subject of a large body of litigation and research. Parents’ exclusive recourse if they believe a vaccine caused Autism is to file a complaint under the National Childhood Vaccine Injury Act (“Vaccine Act”).²¹⁶ Over 5,300 cases have been filed alleging that a vaccine caused

²⁰⁹ See 20 U.S.C. § 1412(a)(9) (2006) (discussing the requirement that children in early intervention programs experience a “smooth and effective transition” to specific preschool programs).

²¹⁰ *Pardini ex rel. Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181, 185–92 (3d Cir. 2005).

²¹¹ 483 F.3d 725, 729–30 (11th Cir. 2007).

²¹² *Id.* at 727.

²¹³ *Id.* at 730 n.1.

²¹⁴ *Id.* at 729–31; *M.M. ex rel. A.M. v. N.Y.C. Dep’t of Educ.*, 583 F. Supp. 2d 498, 501 (S.D.N.Y. 2008).

²¹⁵ Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400–1482; 9567–9567b).

²¹⁶ Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. § 300aa). The vaccine that is most often associated with Autism is the MMR vaccine (Measles, Mumps,

ASD. This massive body of litigation has been assigned to a Special Master and has revolved around two issues. Most significantly, is there a causal connection between vaccination—particularly the measles, mumps, and rubella (MMR) vaccine—and Autism? The second issue raised by these cases concerns the statute of limitations. The federal vaccine statute requires that the injury be reported or the case filed within three years from the date of the occurrence of the first symptom.²¹⁷ This creates a challenge for families with children with Autism because ASDs tend to have a slow onset with no definite appearance of first symptoms.²¹⁸ Despite all these questions, the vaccine controversy has used millions of research dollars. It was largely put to rest in early 2009 when a Special Master ruled that three plaintiff families with children with ASD failed to prove a link between vaccines and ASD.²¹⁹

Additionally, in 2010 the Lancet retracted an oft-cited 1998 paper—the only research showing a link between vaccines and Autism.²²⁰ The Interagency Autism Coordinating Committee developed a Strategic Plan for future research relating to Autism. While it calls for continued cooperation with the National Vaccine Advisory Committee and

and Rubella), which is administered around the age of one and then again before starting school. See generally Helia Garrido Hull, *Induced Autism: The Legal and Ethical Implications of Inoculating Vaccine Manufacturers from Liability*, 34 CAP. U. L. REV. 1 (2005) (discussing compulsory vaccinations, increased prevalence of Autism, and the National Vaccine Injury Compensation Program); Katherine Marie Bulfer, Comment, *Childhood Vaccinations and Autism: Does the National Childhood Vaccine Injury Act Leave Parents of Children with Autism Out in the Cold with Nowhere to Go?*, 27 CAMPBELL L. REV. 91 (2004) (analyzing the implications of the National Vaccine Injury Act for parents); Gordon Shemin, Comment, *Mercury Rising: The Omnibus Autism Proceeding and What Families Should Know Before Rushing Out of Vaccine Court*, 58 AM. U. L. REV. 459 (2008) (proposing improvements to the National Vaccine Injury Compensation Act); Bartholomew C. Wacek, Comment, *Taking Sides in the Vaccine/Autism Legal Battle*, 8 DEPAUL J. HEALTH CARE L. 305 (2004) (analyzing the legal issues in state and federal vaccine litigation).

²¹⁷ See Bulfer, *supra* note 216.

²¹⁸ See IACC STRATEGIC PLAN, *supra* note 5, at 7.

²¹⁹ Snyder *ex rel.* Snyder v. Sec'y of Health & Human Servs., 88 Fed. Cl. 706, 745–46 (Aug. 11, 2009); see also Thomas H. Maugh II & Andrew Zajac, 'Vaccines Court' Rejects Mercury-Autism Link in 3 Test Cases, L.A. TIMES, March 13, 2010, <http://articles.latimes.com/2010/mar/13/science/la-sci-autism13-2010mar13>.

²²⁰ Retraction – Ileal-Lymphoid-Nodular Hyperplasia, Non-specific Colitis, and Peroxisome Developmental Disorder in Children, THE LANCET (Feb. 2, 2010), <http://download.thelancet.com/flatcontentassets/pdfs/S0140673610601754.pdf>; see also Scott Hensley, *Lancet Renounces Study Linking Autism and Vaccines*, NAT'L PUB. RADIO (Feb. 2, 2010, 12:25 PM), http://www.npr.org/blogs/health/2010/02/lancet_wakefield_Autism_mr_au.html (announcing the retraction).

monitoring of potential links, it does not identify a need for more research on the causal connection between vaccinations and Autism.²²¹

IV. LEGISLATION

A. Federal

1. Federal Hurdles

As discussed in the introduction, there have been strides in recognizing Autism in federal laws.²²² However, despite these advances, some laws and regulations potentially pose an obstacle for children with high functioning Autism. Children with high functioning Autism may be academically equal or superior to their peers, yet may still have significant problems with social interaction.²²³ In 2006, the Department of Education developed regulations augmenting prior regulations to assist in implementing the IDEA.²²⁴ The regulations define Autism as “a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance.”²²⁵ The regulations further state that if a disabled child needs only related services but not special education services, she is not considered a child with a disability, and therefore is not necessarily entitled to free related services.²²⁶ The regulation qualifies this by saying that if the related services a child needs are considered special education services under state standards, the child will still be considered a child with a disability for the purposes of the IDEA.²²⁷ Under this federal regulation, unless a state provides that training in social interaction is a special education service, rather than a related service, a high-functioning autistic child may not get the services he or she desperately needs. The Federal No Child Left Behind Act, with its focus on standardized testing and alternative testing for students with disabilities, does not accurately

²²¹ See IACC STRATEGIC PLAN, *supra* note 5 (discussing future research related to Autism but not mentioning vaccine research); see also Donald G. McNeil, Jr., *Court Says Vaccine Not to Blame for Autism*, N.Y. TIMES, Feb. 13, 2009, <http://www.nytimes.com/2009/02/13/health/13vaccine.html>.

²²² *Supra* notes 18–24 and accompanying text.

²²³ Lord & Bishop, *supra* note 8, at 4 (“Social impairments are characterized by lack of social-emotional reciprocity, failure to seek to share enjoyment, poor use of nonverbal communication, and difficulty in peer relations.”).

²²⁴ 34 C.F.R. § 300 (2006).

²²⁵ *Id.* § 300.8(c)(1)(i) (2007).

²²⁶ *Id.* § 300.8(a)(2)(i).

²²⁷ *Id.* § 300.8(a)(2)(ii).

measure the progress of students with ASDs, particularly those students with social deficits.²²⁸ Several pieces of legislation that would have been helpful to individuals with Autism were not passed during the 111th Congress, and their future remains uncertain.²²⁹ The Combating Autism Act of 2006 provides federal grant money for ASD research and establishing Centers of Excellence for Autism epidemiology.²³⁰

2. Health Care Reform

The 2010 health care reform legislation signed by President Obama on March 23, 2010, is of great significance to children and adults with ASD. Perhaps most importantly, insurance companies will be prohibited from denying coverage to children with pre-existing conditions such as ASD. This applies to children immediately and will apply to adults in 2014.²³¹ Eventually, insurance companies will also be prohibited from charging consumers different prices based on demographic or health status. The bill's coverage of behavioral health treatments on the list of essential benefits is critical to families facing the challenges of a child with ASD and is a step in the right direction. However, even in 2014, not all insurance companies will be required to cover the entire list of essential benefits and existing coverage, including plans offered in the large group market outside exchanges, and self-insured plans, also known as ERISA plans, will not be required to provide the essential

²²⁸ No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002). See Shima Kalaei, Note, *Students with Autism Left Behind: No Child Left Behind and the Individuals with Disabilities Act*, 30 T. JEFFERSON L. REV. 723, 725 (2008) (stating that autistic children are not adequately protected by the educational standards imposed by the No Child Left Behind Act ("NCLB") because the act allows for alternative assessments for students with disabilities). The Note argues that these alternative assessments do not accurately portray students' progress. *Id.* at 733-37. Even more troubling, the Note states that focusing on these inadequate academic assessments especially harms autistic children by taking the focus away from teaching them the functional, developmental, and social skills they so desperately need. Although instruction in these important life skills are provided for in the IEP, they are considered irrelevant for meeting NCLB standards, so teachers end up not focusing on them. *Id.* at 738-40. The Note proposes that Congress amend NCLB so children with Autism can be evaluated based on their proficiency in meeting IEP goals rather than evaluating these students with meaningless modified assessment techniques. *Id.* at 744-47.

²²⁹ See, e.g., The Autism Treatment Acceleration Act of 2009, H.R. 2413, 111th Cong. (2009); S. 819, 111th Cong. (2009) (mandating the establishment of an Autism Care Center Program); Helping HANDS for Autism Act, H.R. 1707, 111th Cong. (2009); S.B. 706, 111th Cong. (2009) (focusing on a wide range of services for adults); Combating Autism Act of 2006.

²³⁰ 42 U.S.C. §§ 280i to 280i-4, 283j (2006).

²³¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

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benefits package.²³² Thus, behavioral health treatments such as ABA or the new ESDM might not be included in some plans. Therefore, the activities of individual states remain critically important in defining essential benefits and requiring coverage of a wide range of services for children and adults with ASDs.

B. State Legislation

States have enacted a number of laws related to children with ASDs. New York and New Jersey, for example, have enacted statutes to address systemic issues concerning ASDs. One recently enacted New York law directs the Commissioner of Health to establish a program for use by pediatricians for the early screening of children for ASDs.²³³ The law provides that these programs must require children to be screened at regular intervals during their critical developmental stage and that any child diagnosed with Autism must be referred to appropriate intervention services.²³⁴ The law provides for incorporation of the guidelines from the AAP.²³⁵ A recent New Jersey statute places the burden of proof and the burden of production in IDEA cases on the school district, overturning a recent Supreme Court decision.²³⁶ Under *Schaffer*, states can determine the burden of proof in IDEA cases and can shift the burden back to school districts, which enhances the rights of parents.²³⁷

1. Insurance Legislation

A growing number of states have enacted statutes to ensure that insurance companies cover necessary diagnosis and treatment of ASD. As of early 2010, approximately twenty-three states had enacted autism insurance reform laws.²³⁸ Insurance companies frequently reject claims for these treatments by alleging that they are experimental or that the costs are associated with special education and are therefore not medical

²³² See *U.S. House Passes Health Care Reform Bill Containing Provision for Autism Insurance Reform*, AUTISM VOTES, (March 22, 2010), <http://www.autismvotes.org/site/apps/nlnet/content2.aspx?c=frKNI3PCImE&b=3930723&ct=8107177>.

²³³ N.Y. PUB. HEALTH LAW § 2500-j (McKinney Supp. 2010).

²³⁴ *Id.* § 2500-j(1)(a).

²³⁵ *Id.* § 2500-j(1).

²³⁶ N.J. STAT. ANN. § 18A:46-1.1 (West Supp. 2010).

²³⁷ See *Schaffer v. Weast*, 546 U.S. 49, 62 (2005) (placing the burden of proof on parents in IDEA cases).

²³⁸ *Autism Speaks State Autism Insurance Reform Initiatives*, AUTISM VOTES, http://www.autismvotes.org/site/c.frKNI3PCImE/b.3909861/k.B9DF/State_Initiatives.htm (last visited Dec. 23, 2010).

treatment expenses that should be covered by insurance. New Jersey recently enacted a law addressing this problem by mandating coverage of behavioral therapy and other treatments for children with Autism.²³⁹ The New Jersey law also explicitly states that services cannot be denied because the services are educational and not medically restorative, which is an important issue in insurance law.²⁴⁰

While states are passing such laws, many contain age restrictions or insurance caps that limit the applicability of these anti-discrimination insurance laws. All too often adults with ASDs are not covered. It is interesting to note that while most new state laws cover children, most of those children would be eligible for services under the IDEA and may not need as much protection as adults with ASDs. Thus, the effectiveness of laws with such limits is still unclear, given the large group that remains uncovered. New York law directs insurance companies not to exclude coverage for the diagnosis and treatment of ASDs.²⁴¹ A bill passed by committees of the New York State Senate and Assembly would require all insurance companies to cover evidence-based, clinically proven Autism therapies without any age limitation or caps.²⁴²

Massachusetts,²⁴³ New Jersey,²⁴⁴ and Colorado²⁴⁵ have enacted similar statutes. The Colorado statute includes ABA therapy among the treatments that must be covered and prohibits denial of coverage under most conditions.²⁴⁶ Texas requires health insurance plans to cover ASD, but only from diagnosis to nine years of age.²⁴⁷

Illinois recently amended its insurance statute to require insurance companies to cover the diagnosis and treatment of Autism for children twenty-one years of age and younger.²⁴⁸ However, the law limits the required coverage to \$36,000 per year.²⁴⁹ The statute defines ASDs as “pervasive developmental disorders as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders,

²³⁹ N.J. STAT. ANN. § 17:48-6ii (West 2008 & Supp. 2010).

²⁴⁰ *Id.* § 17:48-6ii(b).

²⁴¹ N.Y. INS. LAW § 3216(i)(25) (McKinney Supp. 2010).

²⁴² S.B. 7000B, 2010 (N.Y., 2010). On October 8, 2010, the bill was delivered to the Governor for his signature. *S07000 Actions*, NEW YORK STATE ASSEMBLY (Oct. 17, 2010), http://assembly.state.ny.us/leg/?default_fld=&bn=S07000%09%09&Summary=Y&Action=s=Y.

²⁴³ MASS. GEN. LAWS ANN. ch. 175, § 47B (West Supp. 2010).

²⁴⁴ N.J. STAT. ANN. 17B:27-46.1v (West 2006).

²⁴⁵ COLO. REV. STAT. ANN. § 10-16-104.5 (West 2006 & Supp. 2010).

²⁴⁶ *Id.* § 10-16-104 (1.4)(XII).

²⁴⁷ TEX. INS. CODE ANN. 1355.015 (West 2009 & Supp. 2010).

²⁴⁸ 215 ILL. COMP. STAT. 5/356z.14 (Westlaw through P.A. 96-1485 of the 2010 Reg. Sess.).

²⁴⁹ *Id.* at 356z.14(b).

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including autism, Asperger's disorder, and pervasive developmental disorder not otherwise specified."²⁵⁰ Kansas also relies on the DSM-IV to require coverage under any group insurance policy or contract that provides medical, surgical, or hospital coverage.²⁵¹

South Carolina adopted a definition for ASDs identical to that of Illinois.²⁵² However, its insurance coverage requirements differ from Illinois's requirements. To be eligible for insurance coverage, a child must have been diagnosed with an ASD by age eight.²⁵³ Also, the statute only provides coverage for a child until he or she reaches age sixteen.²⁵⁴ The statute caps coverage at \$50,000 and limits eligible treatments to those prescribed by the treating doctor.²⁵⁵

Maine takes a slightly different approach to defining Autism than Illinois or South Carolina by defining it as "a developmental disorder characterized by a lack of responsiveness to other people, gross impairment in communicative skills and unusual responses to various aspects of the environment, all usually developing within the first 30 months of age."²⁵⁶ It then goes on to define an adult with Autism as someone whose diagnosis falls within the category of Pervasive Development Disorders under the DSM-IV and who "[h]as been assessed as having an adaptive behavior score at a level of functional impairment as determined by the [Department of Health and Human Services]."²⁵⁷

Connecticut requires insurance coverage for ASD therapies, uses the DSM-IV definition of Autism, and defines behavioral therapy as "any interactive behavioral therapies derived from evidence-based research, including . . . [ABA],"²⁵⁸ but only children under fifteen years of age are entitled to these therapies and they must be provided by a licensed provider.²⁵⁹ However, the law allows the insurance company to limit coverage for behavior therapy to \$50,000 for a child less than nine years of age, \$35,000 for a child between nine and thirteen years of age, and \$25,000 for a child between thirteen and fifteen years of age.²⁶⁰ Also, the statute states that a diagnosis should not be valid for less than twelve

²⁵⁰ *Id.* at 356z.14(i).

²⁵¹ KAN. STAT. ANN. § 40-2,105 (Supp. 2009).

²⁵² S.C. CODE ANN. § 38-71-280(A)(1) (Supp. 2009).

²⁵³ *Id.* § 38-71-280(E).

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 38-71-280(D), (E).

²⁵⁶ ME. REV. STAT. ANN. tit. 34-B, § 6002(1) (2010).

²⁵⁷ *Id.* § 6002(2).

²⁵⁸ CONN. GEN. STAT. ANN. § 38a-514b (West Supp. 2010).

²⁵⁹ *Id.* § 38a-514b(a)(4).

²⁶⁰ *Id.* § 38a-514b(d).

months, implying that annual evaluation requirements may be permissible.²⁶¹

Montana requires that all disability policies, certificates of insurance, or contracts must provide for coverage of diagnosis and treatment of ASD for minor children.²⁶² The statute relies on the definitions in the most recent Diagnostic and Statistical Manual of Mental Disorders.²⁶³ However, the requirement only applies up to eighteen years of age, and it limits coverage of ABA therapy to \$50,000 per year for children less than eight years of age and \$20,000 per year for children between nine and eighteen years of age.²⁶⁴

New Mexico requires coverage of diagnosis and treatment of ASD under all group health insurance plans for children nineteen years of age and younger.²⁶⁵ This bill provides a \$36,000 annual maximum but imposes a \$200,000 lifetime maximum.²⁶⁶ The Act also notes that services that are supposed to be covered under the IDEA may be excluded from the required coverage.²⁶⁷

Nevada requires certain health care plans and insurance policies to provide an option of screening, diagnosis, and treatment of ASD for children under eighteen years of age (or twenty-two years of age if enrolled in high school).²⁶⁸ This law also provides for licensing of behavior analysts and certification of Autism behavior interventionists.²⁶⁹ On the other hand, Louisiana recently amended a statute to exempt individually underwritten, guaranteed renewable, limited benefit health insurance policies from the requirement for coverage of diagnosis and treatment of Autism spectrum disorders for children under seventeen years of age.²⁷⁰

While the issue of health insurance coverage has attracted the attention of state legislatures, it is troubling that many of the laws contain age and monetary limits that deny a guarantee of coverage to many children and adults when coverage is most needed. Hopefully the new federal health care reform law will diminish this problem.

²⁶¹ *Id.* § 38a-514b(f)(2).

²⁶² MONT. CODE ANN. § 33-22-515(1) (2009).

²⁶³ *Id.* § 33-22-515(2).

²⁶⁴ *Id.* § 33-22-515(4).

²⁶⁵ N.M. STAT. ANN. § 59A-22-49(A) (LexisNexis Supp. 2010).

²⁶⁶ *Id.* § 59A-22-49(B)(2).

²⁶⁷ *Id.* § 59A-22-49(B)(5).

²⁶⁸ NEV. REV. STAT. ANN. § 689A.0435(1) (LexisNexis Supp. 2009).

²⁶⁹ *Id.* § 689A.0435(7)(d).

²⁷⁰ LA. REV. STAT. ANN. § 22:1050(H) (2009).

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2. Education Legislation

Some states have tackled the issue of education of children with ASDs through statute. Delaware recently amended its state law to better conform to the IDEA.²⁷¹ Other state laws have tackled more challenging issues. New Jersey has a law allowing school districts to apply to the Commissioner to receive additional special education funding beyond the standard amount if they have “an unusually high rate of low-incidence disabilities, such as autism.”²⁷² Illinois requires IEP teams to consider a number of factors when creating an IEP for a child with an ASD.²⁷³ These factors include the verbal and nonverbal communication needs of the child, the need to develop social interaction skills, the needs resulting from the child’s unusual responses to sensory experiences and resistance to changes in daily routines, and the need for positive behavioral intervention.²⁷⁴ Michigan has a regulation requiring that classrooms for students with Autism have no more than five students and that the teachers in these classrooms have special training in addressing ASDs.²⁷⁵

Nevada developed a competitive grant fund to be used for training of school professionals to work with students with ASD, from diagnosis through intervention.²⁷⁶ Additionally, the Act requires the Department of Education and the Department of Health and Human Services to ensure that there are professionals with qualifications to work with students with ASD.²⁷⁷

Missouri codified the creation of five regional Autism programs throughout the state; the regional programs are responsible for coordination of a system of care responsive to the unique needs of the region and required parental advisory councils.²⁷⁸ Services to be included in the programs include therapy, respite care, communication therapies, and advocacy training.²⁷⁹

Texas codified an Autism resource center to be run by the Health and Human Services Commissioner to coordinate a system of care for individuals with Autism and other pervasive developmental

²⁷¹ H.B. 396, 145th Leg., Reg. Sess. (Del. 2010).

²⁷² N.J. STAT. ANN. § 18A:7F-55(g) (West 2010).

²⁷³ 105 ILL. COMP. STAT. ANN. 5/14-8.02(b) (West 2006 & Supp. 2010).

²⁷⁴ *Id.*

²⁷⁵ MICH. ADMIN. CODE r. 340.1758 (2009).

²⁷⁶ NEV. REV. STAT. ANN. § 391.405 (LexisNexis Supp. 2009).

²⁷⁷ *Id.* § 391.410.

²⁷⁸ MO. ANN. STAT. §§ 633.220(2), (3), (5) (West Supp. 2010).

²⁷⁹ *Id.* § 633.220(4).

disorders.²⁸⁰ The center is required to provide training to various professionals who are likely to work with students with ASD.²⁸¹ Similarly, Alabama created Autism centers to coordinate services between the government and the school system for individuals with Autism and their families.²⁸²

3. Workgroups and Taskforces

Many states have demonstrated an interest in studying the prevalence, impact, early diagnosis, treatment, and education of children with ASD by establishing formal working groups or taskforces assigned to prepare reports and recommendations on these very issues. Once again, ASD has been treated as separate from other disabilities as states do not often establish separate workgroups for individual disabilities. This level of legislative attention underscores the enormous impact of the prevalence of ASDs. Many states have appointed commissions and/or taskforces to study the state's current approach to ASDs and to provide recommendations for improvement.²⁸³ While the increased recognition of the prevalence of Autism is an important step forward, it remains to be seen how states will react to the recommendations that result from the various taskforces. Specifically, many of the state-designated groups discussed do not necessarily have a budget, full-time staff, implementation powers, or permanence. Each of these factors limits the power of the groups to create true change.

In addition to appointing taskforces and work groups to report on services for the needs of individuals with ASDs, some states have recognized that families need support as well. The Illinois General Assembly recently directed the Department of Children and Family Services to develop a support program for families who are struggling to care for a child with a pervasive developmental disorder.²⁸⁴ Missouri and Kentucky have both created Applied Behavior Therapy boards,

²⁸⁰ TEX. HUM. RES. CODE ANN. § 114.013 (West Supp. 2010).

²⁸¹ *Id.* § 114.013(b)(2).

²⁸² ALA. CODE § 22-57-20 (LexisNexis Supp. 2010).

²⁸³ *See, e.g.*, 2010 ARIZ. SESS. LAWS 206 (creating the Autism Spectrum Disorder Task Force); ARK. CODE ANN § 10-3-2603 (Supp. 2009); MD. CODE ANN., HEALTH-GEN. §§ 13-2801 to 13-2806 (LexisNexis 2009) (creating a Commission on Autism); N.J. STAT. ANN. 30:6D-62.4 (West 2009) (directing the Commissioner of Human Services to establish an Asperger's Syndrome Pilot Initiative); N.D. CENT. CODE § 50-06-32 (Supp. 2009) (creating the Autism Spectrum Disorder Taskforce).

²⁸⁴ 20 ILL. COMP. STAT. 505/5(l) (Supp. 2009).

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which are tasked with reviewing licensing processes for behavior analysts.²⁸⁵

Perhaps the most effective task force on ASD was not created by the legislature but by the executive branch. In 2004, the Pennsylvania Commissioner of Public Welfare convened a broad-based task force consisting of government officials, parents, consumers, and experts to study issues relating to ASD.²⁸⁶ This task force produced a report in 2004 recommending the creation of a Bureau of Autism Services. As a result, the Bureau of Autism Services was founded in 2007 as a branch of the Office of Developmental Disabilities in the Department of Public Welfare.²⁸⁷

V. CONCLUSION

The growing prevalence of ASD has triggered enormous advocacy activity. Individual litigation—not class actions—remains a major strategy concerning ASD. For example, a quick search on LexisNexis as of March 2010 reveals 691 federal court cases in the last ten years with the words “Autism” and “IDEA.” Of those, 507 were in the last five years and 248 were within the last two years. These numbers represent only cases in federal courts, and the IDEA requires parents to exhaust administrative remedies through due process administrative procedures before proceeding to court. Thus, it is reasonable to assume that thousands of due process cases involving ASD issues under the IDEA have been filed in this decade. These numbers are indicative of the sheer volume of ASD cases litigated, as ASD has become an epidemic that our country must address. The case law reviewed in this Article reveals the changes in disability education law and policy resulting from the trend. Such changes, and their ultimate impact, have thus far gone unnoticed. The law has been changed for all children with disabilities by this volume of court decisions in a wide range of areas—parental burden of proof, pendency during transition from Part C to Part B, the definitions of “least restrictive environment,” and qualified professionals as well as requirement for reimbursement. The differences among the federal

²⁸⁵ KY. REV. STAT. ANN. § 319C.030 (West Supp. 2010); MO. ANN. STAT. § 337.305 (Westlaw through the end of the 2010 First Extraordinary Session of the 95th General Assembly).

²⁸⁶ *The Case for More and Better Research*, AUTISM CENTRAL PA, <http://pennstatehershey.org/sites/autismcentralpa/research/> (last visited Dec. 24, 2010) (reviewing the subcommittee’s findings).

²⁸⁷ Kim Goff, *Bureau of Autism Services – A Valuable Resource for the Autism Community*, EXAMINER.COM (Feb. 26, 2009, 3:59 PM), <http://www.examiner.com/special-needs-kids-in-philadelphia/bureau-of-autism-services-a-valuable-resource-for-the-autism-community>.

circuit courts on many critical issues are compounding confusion. Most of these results were created by cases that largely focused on parental reimbursement—a risk that most parents with children with ASD and other disabilities cannot take. Those cases created law on ancillary issues that have ramifications for all children with disabilities. This result cries out for a more coordinated litigation strategy similar to the efforts to establish the right to education.²⁸⁸ It would begin with lawyers communicating about ASD issues and planning and developing targeted litigation.²⁸⁹

This Article has identified the early impact of ASD litigation on education and disability law, including the development of standards for evaluating diagnosis and treatment under the IDEA and increased attention from both state and federal government. While the true ramifications will not be known for some time, it is clear that law and policy must focus on effective, evidence-based interventions and establishment of appropriate treatment programs for children with ASDs. That research must focus on finding effective treatment modalities including the recommended level of intensity for children and adults. These suggestions echo the new recommendations of the federal research advisory body.²⁹⁰

Thus, there needs to be a clear advocacy strategy established for ASD that plans major litigation as well as state and federal legislation. This is precisely what happened in the disability rights field prior to the enactment of the Education for All Handicapped Children's Act in 1975.²⁹¹ Without a targeted and planned strategy, states will continue to create bad law adversely affecting children with ASD and other disabilities and enact legislation with limited benefit for those children and adults with ASD. With all the activity generated by Autism awareness efforts, it is time to channel those effort to go to the next step—targeted, planned, and cohesive advocacy efforts that include parents, physicians, attorneys, and other professionals. Only through such effective advocacy efforts will law and policy reflect the true needs of children and adults with ASD.

²⁸⁸ See, e.g. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868–71 (D.D.C. 1972) (coordinated class action litigation establishing the right to education); see also SHERYL DICKER & MARK I. SOLER, *STEPPING STONES: SUCCESSFUL ADVOCACY FOR CHILDREN* 113–55 (1990) (use of multistrategic advocacy efforts to establish the right of children with disabilities to attend regular schools).

²⁸⁹ DICKER & SOLER, *supra* note 288.

²⁹⁰ See IACC STRATEGIC PLAN, *supra* note 5, at 24–25 (identifying research needs).

²⁹¹ Pub. L. No. 94-142 (1975).