

LEGALLY DEFENSIBLE PROGRAMMING **FOR STUDENTS WITH AUTISM**

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Prevalence of Autism Spectrum Disorder

- Prevalence of diagnosis of ASD is 1 in 68 births. More recent data suggests that prevalence is as high as 1 in 45 births.
- Prevalence has increased by nearly 120% over the past 15 years.
- Average cost of educating a student with ASD is an *extra* \$6,800 per child.
- Well-developed parent support network promote methods like Lovass or Early Start which require large amount of 1:1 staff time.
- According to the CDC it costs an estimated \$17,000 more per year to care for a child with ASD compared to a child without autism. Costs include health care, education, ASD-related therapy, family-coordinated services, and caregiver time. For a child with more severe ASD, costs increase to over \$21,000 more per year.

National Conference of State Legislatures report: As of December 1, 2015, 43 states and the District of Columbia legally require insurance coverage of ASD services including:

- Alaska,
- Arizona,
- Arkansas,
- California,
- Colorado,
- Connecticut,
- Delaware,
- District of Columbia,
- Florida,
- Georgia,
- Hawaii,
- Illinois,
- Indiana,
- Iowa,
- Kansas,
- Kentucky,
- Louisiana,
- Maine,
- Maryland,
- Massachusetts,
- Michigan,
- Minnesota,
- Mississippi,
- Missouri,
- Montana,
- Nebraska,
- Nevada,
- New Hampshire,
- New Jersey,
- New Mexico,
- New York,
- North Carolina,
- Oregon,
- Pennsylvania,
- Rhode Island,
- South Carolina,
- South Dakota,
- Texas,
- Utah,
- Vermont,
- Virginia,
- West Virginia, and
- Wisconsin.

National Conference of State Legislatures

“According to the Council for Affordable Health Insurance, an autism mandate increases the cost of health insurance by about 1 percent. If the incidence of autism continues to increase and as more services are covered, the cost of insurance may increase 1 percent to 3 percent. This debate has intensified and states are taking a variety of approaches to meet the needs of children and adults with autism.”

See Burke v. Independence Blue Cross, (Pa. Superior Ct. Nov. 2015)— Pennsylvania court determine that coverage could not be denied under place-of-service exclusion therefore, school-based ABA would be provided.

IDEA Framework

Board of Educ. of Hendrick Hudson Central Sch. v. Rowley established the test to defining “FAPE”

- **Procedural compliance:** Has the school complied with the procedures of IDEA/Article 7?
- **Substantive compliance:** Is the IEP developed under the procedures of IDEA/Article 7 reasonably calculated to enable the student receive educational benefits?

Methodological Deference

- Deference is given to the school concerning instructional methodology provided that the IEP is reasonably calculated to provide educational benefits.
 - Lovass
 - TEACCH
 - Discrete Trial Training (DTT)
 - Applied Behavior Analysis (ABA)
 - Picture Exchange Communication Systems (PECS)
 - Pivotal Response Training
 - Social Stories
 - Floor time

Procedural Errors

- An IHO decision “shall be made on substantive grounds based on a determination of whether the child received a FAPE.” Unless, the procedural errors:
 - Impeded the child’s right to FAPE
 - Significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the child’
 - Caused a deprivation of education benefits.

Most often, allegations of procedural errors are linked to “significantly impeding the parents’ opportunity to participate in the decision-making process.

Common Procedural Errors with Evaluation

- Evaluations:
 - Timely referral
 - Timely evaluation and adherence to timelines
 - Timely offer of IEP
 - Timely transition from birth to three programs to preschool services
- *See Robertson County Sch. Sys. v. King, 6th Cir. 1996)*
- *See K.S. J. v. Fremont Unified Sch. Dist., (9th Cir. 2011)*

The DSM-V provides the following as the diagnostic criteria for autism spectrum disorder:

- A. Persistent deficits in social communication and social interaction across multiple contexts, as manifested by the following, currently or by history:
 - 1. **Deficits in social-emotional reciprocity, ranging, for example, from abnormal social approach and failure of normal back-and-forth conversation; to reduced sharing of interests, emotions, or affect; to failure to initiate or respond to social interactions.**
 - 2. **Deficits in nonverbal communicative behaviors used for social interaction, ranging, for example, from poorly integrated verbal and nonverbal communication; to abnormalities in eye contact and body language or deficits in understanding and use of gestures; to a total lack of facial expressions and nonverbal communication.**
 - 3. **Deficits in developing, maintaining, and understanding relationships, ranging, for example, from difficulties adjusting behavior to suit various social contexts; to difficulties in sharing imaginative play or in making friends; to absence of interest in peers.**
- B. Restricted, repetitive patterns of behavior, interests, or activities, as manifested by at least two of the following, currently or by history (examples are illustrative, not exhaustive; see text):
 - 1. **Stereotyped or repetitive motor movements, use of objects, or speech (e.g., simple motor stereotypies, lining up toys or flipping objects, echolalia, idiosyncratic phrases).**
 - 2. **Insistence on sameness, inflexible adherence to routines, or ritualized patterns or verbal nonverbal behavior (e.g., extreme distress at small changes, difficulties with transitions, rigid thinking patterns, greeting rituals, need to take same route or eat food every day).**
 - 3. **Highly restricted, fixated interests that are abnormal in intensity or focus (e.g., strong attachment to or preoccupation with unusual objects, excessively circumscribed or perseverative interest).**
 - 4. **Hyper- or hyporeactivity to sensory input or unusual interests in sensory aspects of the environment (e.g., apparent indifference to pain/temperature, adverse response to specific sounds or textures, excessive smelling or touching of objects, visual fascination with lights or movement).**

- C. Symptoms must be present in the early developmental period (but may not become fully manifest until social demands exceed limited capacities, or may be masked by learned strategies in later life).
- D. Symptoms cause clinically significant impairment in social, occupational, or other important areas of current functioning.
- E. These disturbances are not better explained by intellectual disability (intellectual developmental disorder) or global developmental delay. Intellectual disability and autism spectrum disorder frequently co-occur; to make comorbid diagnoses of autism spectrum disorder and intellectual disability, social communication should be below that expected for general developmental level.

The DSM-V further explains that the severity of the diagnosis is “based on social communication impairments and restricted repetitive patterns of behavior.” Diagnosis also needs to specify whether there is also an intellectual impairment and/or language impairment.

Other evaluation considerations

- Often, diagnosis descriptors associated with ASD diagnosis include “mild,” “moderate,” or “severe.”
- Must evaluate whether the school evaluate the child in all areas of suspected need and commonly associated with ASD.
- *See N.B. v. Hellgate Elementary Sch. Dist.* (9th Cir. 2008) – obligation to follow up with an evaluation after the parent secured a private evaluation
- *See K.S. v. Fremont Unified Sch. Dist.*, (9th Cir. 2011) – use of information assessments to assist in establishing rate of learning and impact of cognitive abilities.
- *See Weissburg v. Lancaster Sch. Dist.*, (9th Cir. 2010) – proper disability classification is less critical than ensuring identification of educational needs.

Evaluation of all areas commonly associated with ASD

- Communication
- Adaptive behavior
- Behaviors forming patterns of interfering with learning of self or others
- Cognitive abilities
- Learning styles and preferences
- Gross / fine motor abilities
- Social skills
- Sensory needs
- Needs for assistive technology
- Ensure a process of “ruling out”

Use of Appropriate and Qualified Personnel to Conduct Evaluations

- Evaluators need to be trained and qualified to assess students with ASD
- Consider use of outsider evaluator/expert
- *See Johnson v. Duneland Sch. Dist.*, (7th Cir. 1996) - school have right to use evaluator of their choosing.
- *See Zasslow v. Menlo Park City Sch. Dist.*, (N.D. Cal. 2001) - school have right to use their own service providers for therapies unless evidence demonstrates school personnel lack proper qualification.
- Evaluations can be highly subjective due to the nature of assessing behavioral characteristics, so having an evaluator with good clinical knowledge and skills can be key to developing an defensible program.
- Medical diagnosis need to be to given consideration and response.

The Failure to Consider the Recommendations of Private Evaluators

- IDEA/Article 7 require the consideration of any independent educational evaluation.
- School must demonstrate appropriate consideration.
 - *See Watson v. Kingston City Sch. Dist.*, (2d Cir. 2005) – consideration does not require school to incorporate recommendations of private evaluator.
 - Make sure IEE is based on reliable information.
 - *See Tarlowe v. New York City Bd. of Educ.*, (S.D. N.Y. 2008) – school properly determined IEE was incomplete and inadequately based on a small number of subtest to improperly focus on potential rather than current level of functioning
 - Ensure the CCC team review all recommendations and provide an explanation and basis as to why the recommendations will be rejected.
 - Ensure school has evaluative data to respond to recommendations of IEE.

The Failure to have Proper Representatives Present at IEP Meetings

- CCC team must include:
 - Parents of student
 - At least one regular education teacher (if is or may be participating in regular education environment)
 - Teacher of record
 - Agency representative
 - An individual qualified to interpret instructional implications of evaluation results if reviewing an evaluation
 - Other individuals at the parent or school's discretion
 - Child, if appropriate

Expertise and/or Experience in ASD

- *See Dong v. Board of Educ. of Rochester Community Schs.*, (6th Cir. 1999); *Parenteau v. Prescott Unif. Sch. Dist.*, (D. Ariz. 2008) – having the presence of persons who are generally familiar with various methodologies employed with children with ASD and experience in working with students with ASD can help to overcome allegations that the school failure to meaningfully consider the parents' request for a particular methodology by failing to have an expert present.
- *See Melodee H. v. Department of Educ.*, (D. Haw. 2008) – because the school failed to having anyone at IEP meeting who was familiar with the child, the description of proposed placement was lacking, and insufficient consideration was given to the harmful effects of placement in the elementary school, the court held it was a procedural error to fail to have the parents' expert at the IEP meeting.

Involving Parents in Decision Making Process

- *See Laddie C. v. Department of Educ.*, (D.C. Haw. 2009) – agreeing to disagree is not enough to show denial of full participation in the process or that the school pre-determined placement. The analysis looks at:
 - Which meeting the placement decision is actually made
 - Who was at the meeting
 - Where persons present sufficiently knowledgeable about the student's needs

Predetermination

- Predetermination of placement occurs when decisions are formed before the meeting and before parental input is considered.
 - Single-minded focus on a particular placement and refusing to meaningfully discuss the parent's proposal can support a finding that a violation occurred.
 - Ruling out a parent's request for ABA services as not consistent with LRE and focusing the school's placement can be problematic.
 - Ensure that the CCC team have information about the requested services:
 - Have staff visited or consulted the ABA service provider?
 - Have staff obtained and shared information about the student with the ABA service provider prior to the CCC?
 - What data exists to support or reject the proposals?
 - Are well-kept notes taken of the CCC discussion, options, and rationale to accept or reject?
 - Do notes reflect the comments, concerns, and input of the parent as well as school personnel?

Pre-meetings / Predetermination

- When staff do have pre-meetings, ensure that discussions do not include the adoption of any particular recommendations.
- Article 7 - “It is not necessary for a case conference committee to be convened in order for public agency personnel to discuss issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the student’s individualized education program. Public agency personnel may engage in preparatory activities to **develop a proposal or response** to a parent proposal that will be discussed at a later case conference committee meeting.”

Pre-meeting / Predetermination

- *See T.P. v. Mamaroneck Union Free Sch. Dist.*, (2d Cir. 2009) – School’s pre-meeting to review consultant’s recommendation was not a violation.
- *See Schoenbach v. Dist. of Columbia*, (D.D.C. 2006) – researching placement options prior to IEP meeting is not a violation.
- *See W.S. v. Rye City Sch. Dist.*, (S.D. N.Y. 2006) – suggesting the parents look at a particular placement before testing was complete was not pre-determining but rather consistent with where the data was leading as one option.
- *See E.W. v. Rocklin Unified Sch. Dist.*, (E.D. Cal. 2009) – school may meet to prepare draft goals/objectives, inform opinions, review 5 different placement options and compile reports without violating IDEA requirement to ensure parent participation.

The Failure to Make Placement Recommendations Based upon the Student's Individual Needs

- Do not make decision based on scheduling
- Avoid saying: "This is 'the autism program.'"
- Cost can not be a factor.
- Do not be dismissive of the parents' proposal or input. Avoid: "We don't use ABA." Staff need to be able to unpack, compare and contrast parents' proposal to the school's program.
- Avoid statements: "This is what our program does"
 - Instead: "Our program used the following evidence-based practices...."
- Understand that most schools are not implementing a true "ABA program." ABA can be narrowly defined. It is better to say, "We use ABA techniques."

The Failure to Provide Parents with Procedural Safeguards/Sufficient Notice

- CCC report must be consistent with discussions. *See Anchorage Sch. Dist. v. M.P.*, (Al. Sup. Ct. 2006)
- Ensure that all components being offered are included with sufficient clarity that parent understands what services/placement will include. *See Glendale Unified Sch. Dist. v. Almasi*, (C.D. Cal. 2000).
- Ensure parents have received a copy of procedural safeguards. (Also, helpful to document that those safeguards were provided.)

ROWLEY'S SECOND PRONG: THE CONTENT/QUALITY OF THE IEP

- Defining “Educational Benefit” is Critically Tied to the Student’s Potential
 - Need not maximize the potential
 - IEP must provide some educational benefit
 - Critical to analysis:
 - Evaluation data
 - Data on progress on goals and objectives
 - Goals and objectives that show progress year after year
 - Timely adjustments to the IEP when progress cannot be obtained
 - Ensure that goals yield data collection
- Differences with parents and schools need to clarify outcomes for generalizing skills, functional independent, and measuring progress.
- Ensure that expectation and annual goals can be realistically achieved in the time span of one year.

IDEA's "Peer-Reviewed Research" and "Evidence-Based" Requirement

- The IDEA/Article 7 requires the IEP's statement of special education and related services/supplementary aids and services to be "based on peer-reviewed research to the extent practicable...."
- IDEA/Article 7 include use of the terms "scientifically research based" when referring to interventions and services provided. "There are many interventions for ASD; yet scientific research has found only some of these interventions to be effective." <http://autismpdc.tpg.unc.edu>. The National Professional Development Center on ASD has found 27 practices through scientific research to be effective when implemented correctly with students with ASD. (Information can now be found: <http://afirm.fpg.unc.edu/>)
- Comments to the IDEA regulations explain that "to require all IEP Team meetings to include a focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods, as we believe such requirements are unnecessary and would be overly burdensome." However, DOE noted that states, school districts, and school personnel must select and use methods that research has shown to be effective, "to the extent that methods based on peer-reviewed research are available. This does not mean that the service with the greatest body of research is the service necessarily required for a child to receive FAPE. Likewise, there is nothing in the Act to suggest that the failure of a public agency to provide services based on peer-reviewed research would automatically result in a denial of FAPE."
- Comments to regulations also explain that "[w]hile the Act clearly places an emphasis on practices that are based on scientific research, there is nothing in the Act that requires all programs provided to children with disabilities to be research-based with demonstrated effectiveness in addressing the particular needs of a child where not practicable. We do not believe the recommended change should be made because, ultimately, it is the child's IEP Team that determines the special education and related services that are needed by the child in order for the child to receive FAPE."

Preferred Methodologies

- There is no requirement to adopt a particular methodology unless there is evidence that this is the only methodology that would provide the student with an educational benefit. *See Brown v. Bartholomew Consolidated Sch. Corp.*, (D. Ind. 2005).
- School may use eclectic programming models provided that the school can demonstrate that the program will support the student to make meaningful educational gains – even if there is no research to support the eclectic programming model.
- No requirement to provide a prescriptive amount of ABA services.
- Ensure use of evidence-based practices in the school program.

KEY: Ensure evaluation and assessment data supports goals and objectives, the IEP is developed with parental input, placement meets requirement of LRE, and appropriate use of ASD methodologies to support the IEP and placement.

Generalization of Skills

- Assess skills across school settings:
 - Communication
 - Behavior
 - Social Skills
 - Application of acquired skills
 - Functional skills
 - Other skills
- Ensure skill instruction is interdisciplinary and integrated across professionals.
- Consider issues of consistency with skills in home:
 - Training of parents and use of supports in home v. residential placement
- *See Thompson v. R2-J Sch. Dist. v. Luke P.*, (10th Cir. 2008) – the IDEA does not require generalization between school and home setting provided that student is making progress on skills in the school setting.

Determination of Least Restrictive Environment (LRE)

- LRE requires that “to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”
- Schools must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services:
 - instruction in regular classes,
 - provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement,
 - special classes,
 - special schools,
 - home instruction, and
 - instruction in hospitals and institutions

Balancing the LRE Requirement for a Student with ASD with Instruction Utilizing ASD Methodologies

- Ensure staff involved in placement are knowledgeable about ASD methodologies.
- Staff need to use common language and ensure common expectations as a component of implementing the IEP with fidelity.
- Use caution with use of 1:1 aides.
 - *See A.C. v. Board of Educ. Of Chappaqua Cent. Sch. Dist.*, (2d Cir. 2009) – a school’s use of 1:1 aide was deemed appropriate because the IEP provided for a system to fade the aide and foster independence.
 - *See Corpus Christi Indep. Sch. Dist. v. Christopher N.*, (S.D. Tx. 2006) – use of a 1:1 aide along with providing a more restrictive environment and counseling for a student who was showing increased difficulties was deemed LRE over residential placement.
- Consider the age/grade of the student, cognitive functioning level and ability to regulate behavior in the LRE analysis.

Unilateral Placements

- Ensure timely evaluation and offer of FAPE
- Parents are not required to try a public school placement before rejecting a school's IEP.
- Private school placement (or an award of compensatory education) must be based on whether:
 - 1) school's IEP was appropriate; and
 - 2) whether the private school is deemed appropriate to meet the student's needs.

Consultation with and Use of Experts/Expert Witnesses in Program Development for Students with Autism

- Use of experts can be vital to successfully defending an IEP.
- Ensure experts have some familiarity with student.
- Ensure parents' experts have access to observing the students' classroom and proposed placement options. (If not, this can be construed as a violation of parents' right to have meaningful participation.)
- Use experts to assist in training staff.
- Have experts evaluate the efficacy and implementation of the school's program.

Employment and Training of Teachers/Service Providers in an Array of Instructional Strategies Appropriate for Students with Autism

- Ensure staff are licensed and have training in ASD.
- Ensure on-going training for staff in ASD methodologies.
- Include related service personnel and ancillary staff in training.
- Ensure staff are “knowledgeable” about various ASD approaches and methodologies.
- Ensure staff can articulate the school’s continuum of services.
- Ensure key ASD trained staff persons can be brought into assist or train when issues arise. (ie. autism leaders)
- Ensure staff are familiar with the theoretical constructs of the program adopted and programs rejected.

Addressing FBAs/BIPs

- Ensure “systematic observations” “across environments” are conducted with each evaluation.
 - “Systematic observations” means an observation that is conducted to measure specific, well-defined behaviors using structured recording procedures.
- Ensure FBAs are conducted whenever behavior impedes learning of self or others.
- Include BIPs in the IEP and revise when needed.
- Ensure timely and on-going assessment of behavior.
- If disciplinary measures are needed, then ensure proper BIP planning along the way. BIPs must have ensure focus on positive behavior skill instruction.

Providing Adequate Transition Services in IEPs

- Consider transition services within school environments:
 - New routines
 - Program to new program
 - School to new school
- These can be highly anxious producing periods for family seeking that their child will be successful.

Some cases have determined that the lack of transition planning does not render the IEP invalid since the IDEA does not require such. However, other cases have held that school must address the unique needs of a student and offer an meaning educational benefit.

Extended School Year Services

- Most cases found in favor of schools include some amount of ESY services. This is particularly true with student with more significant features of ASD.
- The multi-factored approach suggests that the IEP team consider a number of factors, of which regression-recoupment is only one among the following:
 - a. Degree of regression suffered in the past.
 - b. Exact time of the regression.
 - c. Ability of the parents to provide educational structure at home.
 - d. Student's rate of progress.
 - e. Student's behavioral and physical problems.
 - f. Availability of alternative resources.
 - g. Ability of the student to interact with nondisabled children.
 - h. Areas of the student's curriculum that need continuous attention.
 - i. Student's vocational needs.
 - j. Whether the requested services are extraordinary for the student's disabling condition, as opposed to an integral part of a program for populations of students with the same disabilities.

Johnson v. Indep. Sch. Dist. No. 4, (10th Cir. 1990)

Recent developments

- HB 1257 – seeking legislative council to study the appropriate regulatory structure and agency to regulate independent centers that provide ABA services.

Questions

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