

**LEGAL ISSUES RELATED TO AUTISM:
ELIGIBILITY AND METHODOLOGY**

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This document is an annotated outline of statutory legal materials concerning education of children with autism spectrum disorder (ASD), with particular attention to eligibility and methodology issues.¹ More specifically, the first section provides a sampling of secondary sources that have systematically compiled the pertinent case law outcomes. The second section contains relevant IDEA regulations and policy letters. The third section summarizes the § 504 definition of disability. The fourth and largest section provides recent court decisions concerning free appropriate public education (FAPE)-related issues for children with ASD. The concluding section presents a checklist for districts derived from the case law, with parent lessons being the obverse side of the same checklist.

I. SECONDARY SOURCES

Overall Case Outcomes:

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

- 290 published hearing/review officer and court decisions from 1980 to 2000²
- completely incidental role of autism in approx. 40% of the cases
- approx. 30% at the preschool level
- sharply rising frequency of cases in recent years but relatively stable outcomes, averaging approx. 4.4 on 1 (parent) to 7 (school) scale
- decisions in the Tenth and Fourth circuits have been the most favorable to school districts, and those in the Third and Eighth circuits have been most favorable to parents.
- primary issues: 1) FAPE: substantive, including placement, and 2) FAPE: procedural

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

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

¹ For the publication of an earlier version of this document, see Perry Zirkel, *Legal Issues Related to Autism: Eligibility and Methodology*, 204 EDUC. L. REP. (WEST) 1 (2006).

² More recently, a study reported that there had been 354 IDELR-published hearing/review officer and court decisions from 1990 through 2002, but it did not provide enough information to explain the disparity with this total. Mitchell Yell et al., *Developing Legally Correct and Educationally Appropriate Programs for Students with Autism Spectrum Disorders*, 18 FOCUS ON AUTISM AND OTHER DEVELOPMENTAL DISABILITIES 182 (2003).

Eligibility

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

- relatively few cases (n=13 from 1980 to 2002)
- emphasis on legal requirements and standards, not professional best practices
- importance of expert witnesses, including school professional staff
- recognition that DSM-IV is not controlling

Methods³

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

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

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

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

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

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

³ The Choutka et al. article reviews earlier research studies in this category. For an early sampling of case law in various broader categories, see Lyman Boomer & Linda Garrison-Harrell, *Legal Issues Concerning Children with Autism and Pervasive Developmental Disabilities*, 21 BEHAVIOR DISORDERS 553 (1995).

II. IDEA REGULATIONS AND POLICY LETTERS

IDEA Definition of Autism⁴

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

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

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

⁴ 34 C.F.R. §300.7. The IDEA legislation, as of the 1990 Amendments, specifies autism as one of the 13 recognized classifications but does not specifically define it. Rather, the definition appears in the IDEA regulations, which also define two other separate, but related classifications:

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

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

Id. The OSEP policy letters on the following pages clarify the possible connections to developmental delay and other health impairment.

OSEP Policy Letters⁵ re Autism Spectrum Disorders⁶

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

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

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

- same eligibility clarification for child diagnosed with Asperger’s Syndrome, except at least partially ducks its role under OHI:

“Regardless of whether Asperger’s Syndrome is identified as a condition that could render a child “other health impaired,” we do not believe it would be inconsistent with Part B [of the IDEA] for a State to permit school districts to evaluate children with Asperger’s Syndrome to consider whether they could be other health impaired.”

- addresses FAPE questions by clarifying that whether the child, once determined eligible, is entitled to speech pathology, occupational therapy, social skills training, or any other such service depends on whether the IEP determines that it is required to assist the child to benefit from special education, not on whether the parent requests such service
- also addresses placement, discipline, and discrimination questions by generally reciting applicable provisions of IDEA (and Section 504)

⁵ “OSEP” refers to the Office of Special Education Programs, which is the agency within the U.S. Department of Education that administers the IDEA. Courts accord deference to the policy letters of such agencies within prescribed limits. Perry Zirkel, Do OSEP policy letters have legal weight? *West’s Education Law Reporter*, 2003, 171, 391-396.

⁶ The rare other published and pertinent OSEP interpretations do not provide sufficiently specific and significant information to warrant republication here. *See, e.g.*, Letter to Anonymous, 30 IDELR 705 (OSEP 1998); Letter to VanWart, 20 IDELR 1217 (OSEP 1993).

III. ALTERNATE SOURCES OF COVERAGE: § 504 AND THE ADA

Sec. 504 and ADA Definition of "Individual with a Disability"⁷

[A]ny person who

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,

(ii) has a record of such an impairment, or

(iii) is regarded as having such an impairment.⁸

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

- physical or mental impairment

+

- major life activity

+

- substantial

⁷ 20 U.S.C. §706(8)(B); 34 C.F.R. § 104.3(j). For a two-volume comprehensive reference, see PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004) (available from LRP Publications).

⁸ The second and third "prongs" (i.e., subsections "ii" and "iii") of this definition cannot be the basis for FAPE. Senior Staff Memorandum, 19 IDELR 894 (OCR 1992).

IV. RECENT COURT DECISIONS: FAPE/LRE FOR CHILDREN WITH ASD⁹

- P** *Still v. DeBuono*, 108 F.3d 888, 25 IDELR 32 (2d Cir. 1996). **But cf. Malkentzos v. DeBuono**, 102 F.3d 50, 25 IDELR 36 (2d Cir. 1996)(mootness and lack of irreparable harm) [M]
- ruled under Part C in favor of parents' IFSP for ABA therapy for three year old with autism, including reimbursement - only issue was whether privately obtained services by personnel who did not meet state qualification standards were reimbursable
- S** *Jefferson Parish Sch. Bd. v. Picard*, 27 IDELR 824 (E.D. La. 1998)
- upheld "cottage" placement of 17-year old student with autism with limited mainstreaming opportunities in nearby high school, also rejecting parent claims regarding teacher qualifications and lack of BIP in IEP (but mixed results regarding emergency removals and music therapy)
- S** *Frank S. v. Sch. Comm.*, 26 F. Supp. 2d 219, 29 IDELR 707 (D. Mass. 1998)
- upheld school district's mainstreamed placement, including after-school tutoring, for 12th-grade student with atypical PDD under state's maximum benefit standard (tuition reimbursement case)
- P** *T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 30 IDELR 764 (N.D. Ill. 1999)
- rejected district's cross-categorical early childhood placement, w/o aide, upholding instead appropriateness of parents' home-based Lovaas placement for autistic five-year-old (tuition reimbursement case) [M]
- S** *Renner v. Bd. of Educ.*, 185 F.3d 635, 30 IDELR 885 (6th Cir. 1999)
- upheld the appropriateness of the district's IEP for an autistic child even though it did not have the extent of Lovaas-type discrete trial training sought by the parents [M]
- S** *Wagner v. Short*, 63 F. Supp. 2d 672, 31 IDELR ¶ 53 (D. Md. 1999)¹⁰
- upheld appropriateness of IFSP proposed for autistic child, despite parents' preference for a particular ABA program [M]
- S/P** *Adams v. State of Oregon*, 195 F.3d 1141, 31 IDELR ¶ 130 (9th Cir. 1999)
- upheld district's IFSP for child with autism, rather than intensive Lovaas-type program parent preferred, but rejected district's revised IFSP that reduced weekly service hours, because it "was not linked to [the child's] unique developmental needs" (tuition reimbursement case) [M]

⁹ Coverage starts in 1998 with the exception of any *Part C (formerly Part H) cases, which are cited in italics*. **Court decisions from the federal appeals courts are cited in bold typeface.** The judicial outcomes are coded to the left of each case citation as follows:

P = parent won

S = school district won

() = inconclusive victory

Those concerning methodology are designated after the citation with "[M]." Court decisions that are not specific to autism, much less the identified issues, are not included. *See, e.g., H.W. v. Highland Park Bd. of Educ.*, 108 Fed. Appx. 731, 41 IDELR ¶ 260 (3d Cir. 2004) (rejected, based on appropriate placement, tuition reimbursement for child with AD/HD, Asperger's, and to other DSM-type disorders); *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 40 IDELR ¶ 203 (1st Cir. 2003) (rejected, based on insufficient notice, tuition reimbursement for child diagnosed with AD/HD and Asperger's). For a more comprehensive listing, including other issues, earlier cases, and hearing/review officer decisions, see PERRY ZIRKEL, *AUTISM AND THE LAW: RULINGS AND EXPERT ANALYSIS* (2001).

¹⁰ For subsequent separate litigation involving the same child under Part B, see *infra* the Fourth Circuit's 2003 decision and the federal district court's 2004 decision.

- S** **Blackmon v. Springfield R-XII Sch. Dist.**, 198 F.3d 648, 31 IDELR ¶ 132 (8th Cir. 1999)
- upheld reverse mainstreaming classroom placement of TBI/autistic child rather than parent’s unilateral home-based early childhood program, concluding that procedural deficiencies were waived and, in any event, nonprejudicial (tuition reimbursement case) [M]
- S** **Dong v. Bd. of Educ.**, 197 F.3d 793, 31 IDELR ¶ 157 (6th Cir. 1999)
- upheld school-based TEACCH program, rather than parents’ home-based Lovaas-type program for autistic child (tuition reimbursement case) [M]
- P** **Walker County Sch. Dist. v. Bennett**, 203 F.2d 1293, 31 IDELR ¶ 239 (11th Cir. 2000)
- upheld tuition reimbursement for private placement for student with autism, declining to hear additional evidence and pointing out deficiencies in the proposed IEP, including lack of BIP, OT, and ESY
- S** **Soraruf v. Pinckney Cmty. Sch.**, 32 IDELR ¶ 4 (6th Cir. 2000)
- upheld procedural and substantive appropriateness of district’s self-contained placement for a student with autism
- S** **Burilovich v. Bd. of Educ.**, 208 F.3d 560, 32 IDELR ¶ 85 (6th Cir.), cert. denied, 531 U.S. 957 (2000)
- upheld the substantive and procedural appropriateness of district’s mainstreamed IEP for elementary school student with autism, thereby rejecting reimbursement for “standard” 40-hour in-home program and parents’ claim about specialized IEP team and staffing expertise [M]
- (P)** **Bd. of Educ. v. Michael M.**, 95 F. Supp. 2d 600, 32 IDELR ¶ 170 (S.D. W.Va. 2000)¹¹
- ruled that district did not meet its burden to prove that its program, rather than the parents’ in-home Lovaas program, was appropriate (tuition reimbursement case) [M]
- S** **Gill v. Columbia #3 Sch. Dist.**, 217 F.3d 1027, 32 IDELR ¶ 254 (8th Cir. 2000)
- upheld the substantive appropriateness of the district’s proposed self-contained placement, with 1:1 aide and reverse mainstreaming, for kindergarten child with autism, rather than parents’ in-home 40-hour Lovaas program (tuition reimbursement case) [M]
- S** **M.T. v. Bd. of Educ.**, 33 IDELR ¶ 95 (N.D. Ill. 2000)
- upheld partially mainstreamed program for autistic-like child rather than fully segregated program that the parent proposed
- S** **Steinmetz v. Richmond Cmty. Sch. Corp.**, 33 IDELR ¶ 155 (S.D. Ind. 2000)
- upheld district’s proposed preschool program for child with autism rather than parents in-home ABA program (tuition reimbursement case) [M]
- P** **Sackets Harbor Cent. Sch. Dist. v. Munoz**, 33 IDELR ¶ 154 (N.Y. Sup. Ct. 2000)
- held that, based on IEP-team voting process and applicable standards, parents were entitled to reimbursement for costs of home-based ABA program to supplement reduced in-school program for preschool student with autism [~M]

¹¹ The court subsequently upheld the appropriateness of the parents’ program and ordered tuition reimbursement. Board of Educ. v. Michael M., 33 IDELR ¶ 185 (S.D. W.Va. 2000).

- P* **Sanford Sch. Comm. v. Mr. & Mrs. L.**, 34 IDELR ¶ 262 (D. Me. 2001)
- upheld hearing officer's stay-put order and compensatory education relief when district's change for kindergarten child with autism from half-inclusion, half-ABA program to self-contained program was based on administrative convenience, not appropriate evaluation
- S/P* **Gonzalez v. Puerto Rico Dep't of Educ.**, 254 F.3d 350, 34 IDELR ¶ 291 (1st Cir. 2001)
- upheld district's proposed placement of 17-year-old student with autism in self-contained class rather than residential placement, but added parent training to manage the child's behavior to the extent it linked to education progress
- S* **Devine v. Indian River County Sch. Bd.**, 249 F.3d 1289, 34 IDELR ¶ 203 (11th Cir. 2001), **cert. denied**, 537 U.S. 815 (2002)
- upheld appropriateness of district's specialized day program for child with autism rather than parent's proposed residential placement (tuition reimbursement case)
- P* **Jaynes v. Newport News Sch. Bd.**, 13 Fed. Appx. 166, 35 IDELR ¶ 1 (4th Cir. 2001)
- upheld tuition reimbursement for Lovaas program where the district failed to notify the parents of their right to challenge the proposed IEP (via a due process hearing) and the child evidenced progress as a result of the Lovaas therapy [~M]
- (P)* **Justin G. v. Bd. of Educ.**, 148 F. Supp. 2d 576, 35 IDELR ¶ 3 (D. Md. 2001)
- preserved for trial whether for child with PDD and AD/HD 1) lack of IEP denied FAPE, 2) segregated unilateral placement was appropriate, and 3) parents' delay was one-sided bad faith
- P* **Amanda J. v. Clark County Sch. Dist.**, 260 F.3d 1106, 35 IDELR ¶ 65 (9th Cir. 2001)
- failure to furnish parents with copies of child's evaluation reports was prejudicial procedural violation based on need for early detection of autism and for parental participation in planning
- S/P* **Pitchford v. Salem-Keizer Sch. Dist. No. 24J**, 155 F. Supp. 2d 1213, 35 IDELR ¶ 126 (D. Or. 2001)
- upheld appropriateness of a series of IEPs for a child with autism, including TEACCH rather than Lovaas, but found that lack of district (or other child-knowledgeable) member of IEP team for one year was a prejudicial error (ordering mediation as the first-resort remedy) [M]
- S* **A.B. v. Bd. of Educ.**, 36 IDELR ¶ 65 (D.S.C. 2001)
- upheld appropriateness of inclusion-based ABA program and rejected appropriateness of home-based Lovaas program (based on restrictiveness and lack of generalization) for kindergarten child with autism [~M]
- S* **CM v. Bd. of Pub. Educ.**, 184 F. Supp. 2d 466, 36 IDELR ¶ 96 (W.D.N.C. 2002)
- upheld appropriateness of school-based TEACCH program rather than parents' unilateral home-based Lovaas program for child with autism [M]
- [S]* **M.E. v. Bd. of Educ. for Buncombe County**, 186 F. Supp. 2d 630, 36 IDELR ¶ 97 (W.D.N.C. 2002), **vacated sub nom M.E. v. Buncombe County Bd. of Educ.**, 72 Fed. Appx. 940, 39 IDELR ¶ 237 (4th Cir. 2003)¹²
- rejected tuition reimbursement for in-home Lovaas program where the parents made only technical, unsupported challenges to the district's proposed TEACCH program and they admitted that they would not have accepted the offer in any event - but dismissed on appeal based on lack of jurisdiction [~M]

¹² The appellate court dismissed the case without prejudice because the hearing officer had not issued a final decision.

- S* Faulders v. Henrico County Sch. Bd., 190 F. Supp. 2d 849, 36 IDELR ¶ 183 (E.D. Va. 2002)
- upheld appropriateness of district’s ESY program for high functioning autistic child, with focus on improving social communication rather than 1:1 services and with goal of reasonable progress rather than mastery of skills
- (P)* Johnson v. Special Educ. Hearing Office, 287 F.3d 1176, 36 IDELR ¶ 207 (9th Cir. 2002)
- held that, in moving from Part C to Part B, the “stay-put” need only be (at least in California under analogous state law) comparable to the previous placement, not the exact same program and providers
- S* Tyler v. Northwest Indep. Sch. Dist., 202 F. Supp. 2d 557, 36 IDELR ¶ 236 (N.D. Tex. 2002)
- upheld procedural and substantive appropriateness of proposed IEP for autistic preschool child, which included 6 hours of Lovaas in-home training rather than the 25 hours the parents insisted was necessary [M]
- S* M.A. v. Voorhees Township Bd. of Educ., 202 F. Supp. 2d 345, 37 IDELR ¶ 3 (D.N.J. 2002), **aff’d mem.**, 65 Fed. Appx. 404, 39 IDELR ¶ 262 (3d Cir. 2003)
- upheld district’s proposed out-of-district IEP for severely autistic student rather than the placement in the self-contained district class that the parents sought to continue
- S* Sch. Dist. of Wisconsin Dells v. Z.S., 295 F.3d 671, 37 IDELR ¶ 34 (7th Cir. 2002)
- upheld homebound placement for disruptive student with autism (rather than 70% mainstreaming)
- S* MM v. Sch. Dist., 303 F.3d 523, 37 IDELR ¶ 183 (4th Cir. 2002); *see also* JH v. Henrico County Sch. Bd., 326 F.3d 560, 38 IDELR ¶ 261 (4th Cir. 2003) (“significantly jeopardized” standard for ESY)
- neither failure to start school year (for preschool child with autism and myotonic dystrophy) w/o completed IEP nor failure to develop new IEP for the following year was prejudicial in this case (and single standard for ESY – significant regression jeopardizing progress during year or toward self sufficiency – did not violate IDEA)
- (S)* DiBuo v. Bd. of Educ., 309 F.3d 184, 37 IDELR ¶ 271 (4th Cir. 2002)
- remanded to determine whether procedural violations (e.g., failure to consider parents’ evaluations for ESY) amounted to denial of FAPE for child with PDD (“speech/language disability”)
- S* J.P. v. W. Clark Cmty. Sch., 230 F. Supp. 2d 910, 38 IDELR ¶ 5 (S.D. Ind. 2002)
- upheld appropriateness of district’s eclectic TEACCH/PECS-based program, which included ABA/DTT, for high school student with autism rather than parents’ full-time Lovaas-type program – rejection of parents’ cookie-cutter, cost-related arguments [M]
- P* Neosho R-C Sch. Dist. v. Clark, 315 F.3d 1022, 38 IDELR ¶ 61 (8th Cir. 2003)
- held that the IEP’s failure to include a proper BIP amounted, in this case, to a denial of FAPE in light of the obvious need of the child with autism-Asperger’s and SLD for a BIP and unpersuasive evidence of academic progress
- S* Aaron M. v. Yomtoob, 38 IDELR ¶ 122 (N.D. Ill. 2003), further proceedings, 40 IDELR ¶ 65 (N.D. Ill. 2003)
- ruled that parent of child with autism was entitled to 6, not 12, trips per year for parent training at her child’s residential placement

- S** **Zasslow v. Menlo Park City Sch. Dist.**, 60 Fed. Appx. 27, 38 IDELR ¶ 187 (9th Cir. 2003)
- brief ruling that despite turnover district provided qualified speech therapist for child with autism thus supporting proposition that parents do not have the right to select service deliverer
- S** **Kings Local Sch. Dist. Bd. of Educ. v. Zelazny**, 325 F.3d 724, 38 IDELR ¶ 236 (6th Cir. 2003)
- upheld appropriateness of IEP despite child’s increasing behavior problems at home and harmless procedural error (here, lack of parental participation at third IEP meeting) – diagnosis of Asperger’s, OCD, and Tourette Syndrome
- P** **S.C. v. Deptford Township Bd. of Educ.**, 248 F. Supp. 2d 368 (D.N.J. 2003)
- ruled in favor of parents’ proposed residential placement of child with severe autism rather than district’s day placement of the child (Oberti factors)
- S** **Adam J. v. Keller Indep. Sch. Dist.**, 328 F.3d 804, 39 IDELR ¶ 1 (5th Cir. 2003)
- upheld substantive appropriateness of proposed IEP for student with autism (Asperger’s Syndrome), rather than private placement, based on Cypress-Fairbanks 4-factor test and upheld procedural appropriateness based on no loss of educational opportunity (or infringement on parental-participation opportunity)
- (S)** **Wagner v. Bd. of Educ. of Montgomery County**, 335 F.3d 297, 39 IDELR ¶ 122 (4th Cir. 2003)¹³
- held that upon the unavailability of the then-current placement (here due to the only state-approved Lovaas provider ceasing the in-home services under the IEP w/o notice) “stay put” does not require the district to provide a comparable, alternative placement; the parents’ only remedies are either to agree with the district to a new placement or seek a preliminary injunction from the trial court changing the child’s placement
- (P)** **G v. Fort Bragg Dependent Sch.**, 343 F.3d 295, 40 IDELR ¶ 4 (4th Cir. 2003)
- remanded to determine whether the district’s proposed IEP for four-year-old with autism, which contained Lovaas elements but not a Lovaas-certified consultant, met the Rowley substantive standard and whether the district denied the child FAPE during the previous three years (rejecting parental-objection standard for triggering compensatory education) [M]
- S** **County Sch. Bd. v. Palkovics**, 285 F. Supp. 2d 701, 40 IDELR ¶ 13 (E.D. Va. 2003)
- upheld substantive appropriateness of proposed preschool program for severely autistic child in reliance on district’s witnesses, more than parents’ experts, and regarded the three procedural violations found significant by the hearing officer (e.g., lack of BIP) to be harmless in light of parents’ failure to allow the child to move from the private, ABA school to the district
- (P)** **Greenwich Bd. of Educ. v. Torok**, 40 IDELR ¶ 44 (D. Conn. 2003)
- granted preliminary injunction to maintain the hearing officer’s decision --which ordered the district to change the kindergarten child’s classification from OHI to autism (based on IEE), reimburse the parents for home therapies, and provide various additional hours of 1:1 therapy at home or school -- as the stay-put pending the judicial appeal
- S** **T.B. v. Warwick Sch. Comm.**, 361 F.3d 80, 40 IDELR ¶ 253 (1st Cir. 2004)
- upheld district’s proposed placement of autistic kindergarten student in a specialized class that used the TEACCH approach rather than private school that relied on DTT – nonprejudicial procedural violations and deferential Rowley standard (tuition reimbursement case) [M]

¹³ For the final decision on remand, see infra the district court’s 2004 Wagner decision.

- S** Johnson v. Olathe Dist. Sch., 316 F. Supp. 2d 960, 41 IDELR ¶ 64 (D. Kan. 2003)
- upheld district’s proposed IEP for an autistic sixth grader in a life skills class that used ABA and redirection techniques rather than home placement – procedural violations (e.g., IEP team composition) were nonprejudicial and methodology (here, redirection > planned ignoring) is within district’s discretion [M]
- P** Diatta v. Dist. of Columbia, 319 F.3d 57, 41 IDELR ¶ 124 (D.D.C. 2004)
- upheld requested compensatory education relief of four years of 40-hour per week ABA program (including training, consultation, and monitoring) for student with autism whom the district “repeatedly mis-diagnosed and mishandled”
- P** Bucks County Dep’t of MH/MR v. De Mora, 379 F.3d 61, 41 IDELR ¶ 233 (3d Cir. 2004)¹⁴
- tuition reimbursement award, at least under IDEA Part C, may include time expended by parent serving as Lovaas instructor
- P** L.B. v. Nebo Sch. Dist., 379 F.3d 966, 41 IDELR ¶ 206 (10th Cir. 2004)
- rejected, based on LRE, district’s proposed placement of preschool child with autism in “hybrid” (approximately 50% nondisabled children) plus 8-15 hours/week of ABA as compared with parents’ unilateral placement of the child in a mainstream private preschool with phasing-out aide plus 40 hours/week of ABA, awarding parents equitable reimbursement of ABA program and aide (tuition not requested) [M]
- (P)** Roe v. State, 332 F. Supp. 2d 1331, 41 IDELR ¶ 266 (D. Nev. 2004)
- after hearing officer and review officer both rejected parents claims, including that child needed increased home-based Lovaas component upon moving from Part C to Part B, court allowed appeal based on § 1983 (IDEA) and § 504/ADA, thus opening possibility of money damages [~M]
- S** Wagner v. Bd. of Educ., 340 F. Supp. 2d 603 (D. Md. 2004)
- upheld appropriateness of proposed IEP, despite cut-and-pasted goals/objectives from previous IEP, and placement, which was change from Lovaas to non-Lovaas school, including rejection of procedural violations as nonprejudicial [~M]
- P** Deal v. Hamilton County Dep’t of Educ., 392 F.3d 840, 42 IDELR ¶ 109 (6th Cir. 2004)¹⁵
- held that parents were entitled to tuition reimbursement based on two independent prejudicial procedural violations (fixed predetermination for TEACCH, not Lovaas, and repeated absence of regular ed teacher on IEP team where integration was at issue) and possible substantive violation of FAPE (remanding for careful determination, with limits on deference re methodology) [M]
- S** J.K. v. Metrop. Sch. Dist., 42 IDELR ¶ 122 (N.D. Ind. 2005)
- upheld substantive appropriateness, including lack of ABA services, and rejected procedural violations as nonprejudicial, for preschool child with autism [M]

¹⁴ For an earlier decision in this case, where the state appellate court concluded that the IFSP failed to provide meaningful progress toward more than one of its goals, see De Mora v. Dep’t of Pub. Welfare, 768 A.2d 904, 34 IDELR ¶ 85 (Pa. Commw. Ct. 2001). For a related decision, in which the court concluded that attorneys’ fees are not available under Part C, see Bucks County Dep’t of MH/MR v. De Mora, 38 IDELR ¶ 2 (E.D. Pa. 2002).

¹⁵ For a concise account of this case, see Perry Zirkel, *Deal Right?*, 86 PHI DELTA KAPPAN 799 (2005). For the remanded decision, which was in the district’s favor, see Deal v. Hamilton County Dep’t of Educ., 46 IDELR ¶ 45 (E.D. Tenn. 2006). In another unpublished decision, however, the court ruled that, based on the overall outcome of the case, the parents were entitled to 50% reimbursement. Deal v. Hamilton County Dep’t of Educ., 258 Fed. Appx. 863 (6th Cir. 2008),

- (S) **JH v. Henrico County Sch. Bd., 395 F.3d 185, 42 IDELR ¶ 199 (4th Cir. 2005)**
- reversed and remanded for determination as to whether parents sustained burden of proof that the level of ESY services significantly jeopardized gains kindergarten student with autism made during the school year
- (P) **County Sch. Bd. v. Z.P., 399 F.3d 298, 42 IDELR ¶ 229 (4th Cir. 2005)**¹⁶
- remanded appropriateness issue to trial court to reconsider with due deference to the hearing officer's findings that the parent's ABA placement for preschool student with autism was appropriate and the district's proposed TEACCH placement was not (tuition reimbursement case) [M]
- P **Escambia County Bd. of Educ. v. Benton, 406 F. Supp. 2d 1208, 43 IDELR ¶ 5 (S.D. Ala. 2005)**
- ruled that procedural inadequacies in autistic student's IEPs, which related to mastery dates of benchmarks and adequacy of annual goals, but not lack of FBA-BIP, resulted in denial of FAPE to student
- S **Brown v. Bartholomew, 43 IDELR ¶ 60 (S.D. Ind. 2005), vacated as moot, 442 F.3d 588 (7th Cir. 2006)**
- upheld district's proposed program for kindergarten student with autism rather than parents' preferred at-home ABA instruction [M]
- S **K.A. v. Charlotte-Mecklenburg Bd. of Educ., 43 IDELR ¶ 160 (W.D.N.C. 2005)**
- rejected tuition reimbursement for 1:1 CARD program based on 1) substantive appropriateness of district's program for preschool child with autism, 2) nonprejudicial procedural violation of not providing written notice of denial of parents' unilateral placement, and 3) lack of FAPE in the LRE for said placement (e.g., lack of individualization and related services) [~M]
- S **Chisago Lakes Sch. Dist. v. J.D., 43 IDELR ¶ 164 (Minn. Ct. App. 2005)**
- upheld district's determination upon reevaluation that the student no longer met the all the required criteria in the state regulations for eligibility under the classification ASD, which is less strict than the classification of autism under the IDEA
- S **Clear Creek Indep. Sch. Dist. v. J.K., 400 F. Supp. 2d 991, 44 IDELR ¶ 60 (S.D. Tex. 2005)**
- ruled that reduced number and changed location of parent and in-home training sessions did not deny child with autism FAPE, thus reversing hearing officer's award of compensatory education -- deferred to district on methodological considerations and construed causation issues as parents' unproven burden [~M]
- (P/S) **D.F. v. Ramapo Cent. Sch. Dist., 430 F.3d 595, 44 IDELR ¶ 180 (2d Cir. 2005)**
- remanded to determine whether the consideration of post-hearing evidence, which the review officer and district court used to rule that the district must provide at least 10 hours of in-home ABA therapy in addition to its self-contained special education program (with OT, PT, SLT, and parent counseling), was an error of law [~M]
- S **B.V. v. Dep't of Educ., 451 F. Supp. 2d 1113, 45 IDELR ¶ 10 (D. Hawaii 2005)**
- rejected tuition reimbursement for 15-year-old with Asperger Syndrome, concluding that district's program was appropriate despite parents' challenge to the choice of the teacher and skills trainer plus various procedural errors that were not prejudicial

¹⁶ In an unpublished decision, the district prevailed on remand. County Sch. Bd. v. Z.P., 45 IDELR ¶ 96 (E.D. Va. 2005).

- S** Michael J. v. Derry Township Sch. Dist., 45 IDELR ¶ 36 (E.D. Pa. 2006)
- upheld procedural and substantive appropriateness of IEP and district's proposed placement for 11-year-old with severe autism in autistic support class, which was based on ABA principles, rather than the parents' successive in-home ABA and private school ABA programs [M]
- S** Bradley v. Arkansas Dep't of Educ., 443 F.3d 965, 45 IDELR ¶ 149 (8th Cir. 2006)
- upheld substantive appropriateness of successive IEPs for high school student with autism
- S** McQueen v. Colorado Springs Sch. Dist., 419 F. Supp. 2d 1303, 45 IDELR ¶ 157 (D. Colo. 2006)
- rejected challenge of parents of 8-year-old with autism to district's ESY policy, which limited goals/objectives to those required to retain learned skills, concluding that it was sufficiently flexible to permit teaching new skills if they were required
- P** S.A. v. Riverside-Delanco Sch. Dist. Bd. of Educ., 45 IDELR ¶ 215 (D.N.J. 2006)
- parents requested full-day and obtained half-day preschool program based on ABA-DTT, due to experts' agreement that child with severe autism needed ABA-DTT and school district did not have trained personnel to do so, thus entitling parents to attorneys' fees of \$47k
- P** County Sch Bd. v. R.T., 433 F. Supp. 2d 657, 45 IDELR ¶ 274 (E.D. Va. 2006)¹⁷
- upheld ABA at-home program as FAPE in the LRE for four-year-old with autism rather than district's TEACCH program (tuition reimbursement case) [M]
- S** Pachl v. Seagren, 453 F.3d 1064, 46 IDELR ¶ 1 (8th Cir. 2006)
- upheld district's proposed placement, which was 30% in segregated program, for 12-year-old student with multiple disabilities including autism, rather than full inclusion sought by parents
- S** Schoenbach v. Dist. of Columbia, 46 IDELR ¶ 67 (D.D.C. 2006)
- denied tuition reimbursement, concluding that the district's proposed program for a student with Asperger syndrome was appropriate – rejected alleged predetermination claim and found the program reasonably calculated although the private program provided more interaction with nondisabled students
- P/S** Sytsema v. Acad. Sch. Dist. No. 20, 46 IDELR ¶ 71 (D. Colo. 2006)
- upheld tuition reimbursement for first of two years based on procedural error of not presenting a final IEP to the parents for that year but denied the second year on substantive grounds, concluding that district's eclectic program for preschool student with autism was appropriate even though it lacked an in-home component [~M]
- S** A.M. v. Fairbanks N. Star Borough Sch. Dist., 46 IDELR ¶ 191 (D. Alaska 2006)
- rejected parents' claim of lack of opportunity for meaningful participation in developing IEP for preschool child with autism and concluded that the IEP met the substantive standard when parents' withdrew the child (prematurely) for ABA therapy [~M]
- S** Cabouli v. Chappaqua Cent. Sc. Dist., 46 IDELR ¶ 211 (2d Cir. 2006)
- upheld appropriateness of district's proposed IEP for teenager with Asperger syndrome, thereby reversing lower court's award of tuition reimbursement, based on deference to the review officer's decision
- S** W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134 (S.D.N.Y. 2006)
- upheld appropriateness of proposed 50/50 placement of kindergartner with autism in regular school, concluding that FBA was appropriate and district's failure to send out notices to private schools did not constitute pre-determination [tuition reimbursement case]

¹⁷ For the court's subsequent ruling that rejected the district's stay-put claims, see County Sch. Bd. v. RT, 433 F. Supp. 2d 692, 46 IDELR ¶ 4 (E.D. Va. 2006).

- S** Marc V. v. North East Indep. Sch. Dist., 455 F. Supp. 2d 577, 48 IDELR ¶ 41 (W.D. Tex. 2006)
- upheld appropriateness of program/placement of pre-kindergarten child with autism despite district’s refusal to grant parents’ medically-based (diagnosis of PTSD after district stopped parent from accompanying child to class) request for homebound instruction
- P** Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1, 47 IDELR ¶ 121 (1st Cir. 2007)
- ruled that student’s Asperger Disorder adversely affected educational performance as broadly defined by state law, establishing that student was eligible here, since “need” was not a contested issue
- S** D.P. v. Sch. Bd., 483 F.3d 725, 47 IDELR ¶ 181 (11th Cir. 2007)
- parents were not entitled to Part C IFSP as the stay-put placement of their triplets with autism
- S** Van Duyn v. Baker Sch. Dist., 481 F.3d 770, 47 IDELR ¶ 182 (9th Cir. 2007)
- rejected FAPE-implementation claim for student with severe autism, concluding that the standard is whether district’s implementation fell “significantly short of the services required by the child’s IEP” (with liberal credit for the district’s “corrective actions” in compliance with hearing officer’s prospective order, which did not provide compensatory education)
- S** O’Dell v. Special Sch. Dist., 503 F. Supp. 2d 1206, 47 IDELR ¶ 216 (E.D. Mo. 2007)
- rejected claim of parents of preschooler with PDD that the district denied them a meaningful opportunity to participate in the IDEA process when it denied their request for in-home ABA therapy [~M]
- (P)** K.S. v. Fremont Unified Sch. Dist. 47 IDELR ¶ 222 (N.D. Cal. 2007)
- concluded that parent’s claim that district’s failure to respond to various delays and problems in providing FAPE to child with autism was sufficient to meet the gross misjudgment or bad faith standard to proceed under § 504 and the ADA
- S** Brett K. v. Momence Cmty Sch. Dist., 47 IDELR ¶ 257 (N.D. Ill. 2007)
- rejected, for lack of preponderant proof, claim of parents of 9-year-old with autism that the extended bus ride to the private school caused student to act out to the point of denial of FAPE
- S** San Rafael Elementary Sch. Dist. v. California Special Educ. Hearing Office., 482 F. Supp. 2d 1152, 47 IDELR ¶ 259 (N.D. Cal. 2007)
- upheld district’s proposed placement of 13-year-old with autism in private day school rather than parents’ requested residential placement, rejecting parents’ claim that substantive standard for FAPE extended to generalization of behavioral effects to the home environment
- P** T.P. v. Mamaroneck Union Free Sch. Dist., 47 IDELR ¶ 287 (N.D.N.Y. 2007)
- ordered reimbursement to parents for ABA/DTT services that they provided to their child with autism when the IEP team cut these services w/o adequate justification—obvious need during transitions
- S** A.S. v. Madison Metropolitan Sch. Dist., 477 F. Supp. 2d 969, 47 IDELR ¶ 304 (W.D. Wis. 2007)
- rejected tuition reimbursement for residential placement of child with autism where the parents failed to show the connection between his aggressive behavior at home and the services he received at school—i.e., parents’ reason rather than child’s need
- S** Leticia H. v. Ysleta Indep. Sch. Dist., 502 F. Supp. 2d 512 (W.D. Tex. 2007)
- lack of specific diagnosis of autism and lack of precise goals did not deny this eligible preschool child FAPE

- (P)* Thompson R2-J Sch. Dist. v. Luke P., 48 IDELR ¶ 63 (D. Colo. 2007)
- ruled in favor of residential placement for 12-year-old with autism and mental retardation despite parents' less than desired cooperation
- (P)* L.M. v. Capistrano Unified Sch. Dist., 48 IDELR ¶ 189 (C.D. Cal. 2007)
- while upholding the rest of the hearing officer decision in favor of the district concerning the appropriateness of the preschool program for a child with autism, concluded that the 20-minute limit on outside evaluators' classroom observations deprived parents of meaningful opportunity for participation, remanding for determination of amount of tuition reimbursement
- (P)* L.M.P. v. Sch. Bd. of Broward County, 516 F. Supp.2d 1294, 49 IDELR ¶ 14 (S.D. Fla. 2007)
- preserved for trial whether district's alleged policy predetermining segregated placement of triplets with autism violated § 504, including requisite proof of intentional discrimination
- (P)* K.F. v. Francis Howell R-II Sch. Dist., 49 IDELR ¶ 244 (E.D. Mo. 2008)
- preserved for trial compensatory damages claim that district's early dismissal policy for special education class violated rights of plaintiff-parents and their child with autism
- (P)* Mark H. v. LeMahieu, 513 F.3d 922, 49 IDELR ¶ 91 (9th Cir. 2008)
- held that § 504 provides a money damages remedy for failure of a district to provide FAPE to special education students (here two children with autism, for which the district spends approximately \$250k per year as a result of losing the due process hearing) if they prove deliberate indifference on the part of the school authorities
- (S)* J.P. v. County Sch. Bd., 516 F.3d 254, 49 IDELR ¶ 150(4th Cir. 2008)
- remanded for reconsideration of hearing officer's opinion that district's IEP for child with autism was appropriate because although not meeting the aspirational standard for detailed credibility determinations and legal analysis, it merited deference [tuition reimbursement case]

**V. A DISTRICT CHECKLIST OF WINNING-LOSING FACTORS
IN AUTISM METHODOLOGY CASES**

A. Your procedures:

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

B. Your program:

- B.1 Is your IEP sufficiently specific to autistic students in general and this student specifically?
- B.2 Does your program/placement include any ABA or Lovaas component?
- B.3 Do the following have sufficient specialized expertise:
 - a) evaluator(s)
 - b) IEP team
 - c) teacher(s) and related service providers

C. Your witnesses:

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

D. Other factors:

- D.1 Is your attorney sufficiently specialized in terms of the world of special education?
What about the parents' advocate or attorney?
- D.2 **If the case is at the judicial stage, did you win at the due process and/or review officer levels, particularly at the highest level in two-tier states?**

