

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

**PERRY A. ZIRKEL
UNIVERSITY PROFESSOR OF EDUCATION AND LAW
LEHIGH UNIVERSITY**

© 2011

Part III

**PRESENTATION FOR THE NATIONAL AUTISM CONFERENCE
AUGUST 2011**

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.² 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 2000³
- 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, *The Case Law for Students with Autism: An Update*, 262 EDUC. L. REP. 23 (2011).

² The compilation is limited to cases concerning eligibility and FAPE, because autism is not particularly linked to the other categories of the case law, which tend to be generic across the various classifications of disability under the IDEA.

³ 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

Methods⁴

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

⁴ 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 Autism⁵

(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.

⁵ 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 Letters⁶ re Autism Spectrum Disorders⁷

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)

⁶ “OSEP” refers to the Office of Special Education Programs, which is the agency within the U.S. Department of Education that administers the IDEA. Courts accord deference to the policy letters of such agencies within prescribed limits. Perry Zirkel, *Do OSEP policy letters have legal weight?* 171 EDUC. L. REP. 391 (2003)..

⁷ The rare other published 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). The scope of pertinence here does not extend to issue related but not particular to autism, such as when must the IEP include methodology. See, e.g., *Letter to Anonymous*, 49 IDELR 258 (OSEP 2007); *Letter to Wilson*, 37 IDELR ¶ 96 (OSEP 2002).

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

Sec. 504 and ADA Definition of "Individual with a Disability"⁸

[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.⁹

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

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

⁸ 20 U.S.C. §706(8)(B); 34 C.F.R. § 104.3(j). For a two-volume comprehensive reference, see PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2004) (available from LRP Publications). The ADA Amendments, which are effective January 1, 2009, effectively reverse a decade of court decisions that have taken a “demanding” and, thus, narrowing interpretation of this definition, particularly the second two elements. *See, e.g., Perry A. Zirkel, New Section 504 Student Eligibility Standards*, 41 TEACHING EXCEPTIONAL CHILD. 68 (2009).

⁹ The second and third “prongs” (i.e., subsections “ii” and “iii”) of this definition cannot be the basis for FAPE. *See* Senior Staff Memorandum, 19 IDELR 894 (OCR 1992).

IV. RECENT COURT DECISIONS RE ELIGIBILITY AND METHODOLOGY

A. Brief Trends Analysis

The following overview of judicial trends to date is based on the numbered court decisions in the next section of this article. The bulleted conclusions, with the numbered examples, are within the two respective categories of eligibility and methodology. Methodology has two subcategories, pure and marginal.¹⁰

Eligibility: The court decisions concerning eligibility are infrequent, and the outcomes do not markedly favor either parents or districts.

- The cases specific to eligibility are few and typically focus on the adverse-effect or state criteria rather than on the IDEA criteria for the classification—see nos. 45, 57, 82, and 91.
- Some of these cases used eligibility to determine FAPE—see nos. 34, 56, 67, 71, 82, and 106.

Methodology: The court decisions concerning methodology are frequent, and the outcomes—which are based on the two-pronged standard for FAPE under the IDEA¹¹—markedly favor school districts.

- The pure methodology cases favor districts based on the deference doctrine, which is particularly pronounced for academic issues—see nos. 3, 4, 5, 6, 8, 13, 20, 24, 32, 33, 43, 49, 52, 64, 80, 87, 88, 89, 90, 91, and 92.
- A relatively recent Sixth Circuit case serves as a qualified reminder that this deference doctrine is not without limits—see no. 39. A few other cases provided at least ancillary support—see no. 29, 51, and 52.

¹⁰ The se two designations are abbreviated as follows: M = methodology; ~M = marginally methodology.

¹¹ The substantive prong, based on *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), is whether the IEP is reasonably calculated to yield educational benefit. For the procedural prong, the 2004 amendments of the IDEA codified the following formulation:

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

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

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

- Some methodology cases depended on other factors, such as:
 - procedural violations, which only count if prejudicial and, thus, only infrequently result in parent victories—see nos. 17, 18, 39, 42, and 67.
 - LRE—see nos. 7, 10, 36, 61, 69, 83 and 96.
 - other factors—see nos. 11 (burden of proof) and 10, 18, 26, 29, and 87 (staff qualifications).
- The newest and most direct factor is the IEP provision for peer-reviewed research—see nos. 68, 79, and, in part, 95.
- Several of the methodology cases were based on the high-stakes remedy of tuition reimbursement—see nos. 1, 3, 6, 8, 11, 12, 13, 21, 39, 41, 44, 63, 67, 70, 72, 74, 78, 81, 82, 83, 84, 89, 94, 95, 99, 104, and 106.
- Increasingly, school districts are including ABA in their methodology—see nos. 72, 74, 75, 80, 94, 103 and 105.
- The rest of the cases, designated as “[~M]” put methodology into the background, relying on regular FAPE analysis. Moreover, § 504 looms as a possible alternative avenue, especially for the remedy of money damages—see no. 62.
- A complicating but significant factor is state law where its requirements exceed those of the IDEA—see no. 71 (but see no. 81).

B. Overview Empirical Analysis¹²

The next two tables provide an empirical analysis of the frequency¹³ and outcomes¹⁴ of the cases listed in the next section.¹⁵ For the frequency table, the columns are five-year periods. The rows are the categories of the cases, as designated in the next section.¹⁶

A. Frequency Analysis

	1996-2000	2001-2005	2006-2010 ¹⁷
M Cases (n=37)	11	12	14
~M Cases (n=52)	3	19	32
Other Cases¹⁸ (n=9)	0	3	6
TOTAL (N=100)	14	34	52

This first table shows that the total volume of autism case law concerning eligibility and methodology have an upward trajectory. This ascending slope is not surprising due to the increasing societal awareness and litigious

¹² The categories for the cases are abbreviated as follows: M = methodology; ~M = marginally methodology; and Other = eligibility or combinations of other categories.

¹³ “Frequency” in this context refers simply to the number, or volume, of these court decisions per the designated time periods and subject categories. For other frequency studies, see, e.g., Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEAD. 22 (2008); Perry A. Zirkel, *The “Explosion” in Education Litigation: An Update*, 114 EDUC. L. REP. 341 (1997).

¹⁴ “Outcomes” in this context refers to a tabulation of which party in whose favor the court, illustrated by the coding in the case list. See *infra* note 29. The tabulation is based on a categorical scale, which preferably differentiates one or more intermediate points between the polar opposites of wins and losses. Moreover, the differentiation may differ depending on the unit of analysis, i.e., the whole case or specific issues in the case. See, e.g., William Lupini & Perry A. Zirkel, *An Outcomes Analysis of Education Litigation*, 17 EDUC. POL’Y 257 (2003) (seven-category scale for overall case outcomes); Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353 (2008) (five-category scale for specific issue rulings).

¹⁵ The list is limited to published court decisions. “Published” has new and varied meanings in light of electronic databases and specialized reporter series. Representing an intermediate interpretation, “published” in this context extends to court decisions in F. App’x and IDELR, but not those otherwise provided in Westlaw

¹⁶ See *infra* note 29.

¹⁷ Because the cases were compiled as of June 2011 and there is a delay from issuance to publication of the decisions, the period 2006-10 should be complete, and the list in the next section additionally includes a few of the early decisions for the first part of 2011.

¹⁸ “Other” refers to the relatively few cases concerning eligibility alone or in combination with one of the other two categories. *Id.*

propensity in relation to autism¹⁹ in addition to the overall upward trajectory of special education litigation.²⁰ The increasingly predominant proportion of “~M” cases is likely due to the traditional judicial deference for pure methodology disputes²¹ and the increasing complexity of special education litigation.²²

The next table uses the same categories for the rows, but the columns represent the previously delineated five-category scale. However, this outcomes analysis includes all of the decisions in the list in the next section, including the relatively few cases published thus far for 2011.

B. Outcomes Analysis²³

	<i>P</i>	<i>(P)</i>	<i>P/S</i> ²⁴	<i>(S)</i>	<i>S</i>
“M” Cases (n=39)	23% (n=9)	8% (n=3)	8% (n=3)	0% (n=0)	62% (n=24)
“~M” Cases (n=57)	18% (n=10)	4% (n=2)	5% (n=3)	7% (n=4)	67% (n=38)
Other Cases (n=10)	30% (n=3)	10% (n=1)	10% (n=1)	0% (n=0)	50% (n=5)
TOTAL (n=106)	21% (n=22)	6% (n=6)	7% (n=7)	4% (n=4)	63% (n=67)

¹⁹ See, e.g., Perry A. Zirkel, *Autism Litigation under the IDEA: A New Meaning of “Disproportionality”?* __ J. SPECIAL EDUC. LEADERSHIP (forthcoming 2011).

²⁰ See, e.g., Perry A. Zirkel & Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011).

²¹ See, e.g., Tessie Rose & Perry A. Zirkel, *Orton-Gillingham Methodology for Students with Reading Disabilities*, 41 J. SPECIAL EDUC. 171 (2007); Perry A. Zirkel, *Do School Districts Typically Win Methodology Cases?* 13 THE SPECIAL EDUCATOR 11 (issue 3, 1997).

²² See, e.g., Perry A. Zirkel, Zorka Karanxha & Anastasia D’Angelo, *Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT’L ASS’N ADMIN. L. JUDICIARY 27 (2007).

²³ The outcomes scale is as follows: *P* = conclusively for the parents; *(P)* = inconclusively for parents (e.g., denial of district’s motion for dismissal or summary judgment); *P/S* = mixed (i.e., partly for each side); *(S)* = inconclusively for school district; *S* = conclusively for school district.

²⁴ These entries in this column included the single “*P/S*” case.

This second table shows that, for each category and overall, the distribution of outcomes clearly favors the defendant districts, although—depending on how they are interpreted²⁵—the intermediate categories may partially mitigate the extent of this skew. Comparison of the first and second rows does not reveal a more pronounced pro-district deference for the “M” cases, but the limitations include not only the relatively small cell sizes and the inexact categories but also the imprecise unit of analysis.²⁶ Even more strongly, the small numbers and heterogeneous contents of the cases in the “Other” category serve as clear cautions against generalizing any comparison with the other categories. In any event, the predominating balance in the districts’ favor is not surprising in light of the overall recent trend in K-12 student litigation generally²⁷ and its broad special education subset,²⁸ especially in light of the methodology-oriented emphasis of the case selection.

Although this brief empirical overview does not address the rather complex issues of special education litigation, it provides a supplementary dimension for the trends analysis as well as a springboard for further, more in-depth study of the legal issues in the education of children with autism. The increasing frequency of special education litigation and, in particular, the cases concerning students with autism, warrant more scholarly attention.

²⁵ For example, from a district perspective or in terms of the judicial analysis for attorneys’ fees, the intermediate categories may be seen as parental victories along with the complete conclusive rulings in favor of parents.

²⁶ The measurement of outcomes with the entire case as the unit of analysis has evolved to provide more precision. Compare, e.g., Perry A. Zirkel & Anastasia D’Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 531 (2002) (using seven-category scale), with Anastasia D’Angelo & Perry A. Zirkel, *An Outcomes Analysis of Student-Initiated Litigation*, 226 EDUC. L. REP. 539 (2008) (employing three-category scale). However, using individual issue rulings as the unit of analysis may present a more promising alternative. See, e.g., Youssef Chouhoud & Perry A. Zirkel, *The Goss Progeny: An Empirical Analysis*, 45 SAN DIEGO L. REV. 353 (2008).

²⁷ See, e.g., Zirkel & D’Angelo 2008, *supra* note 26.

²⁸ See, e.g., Zirkel & D’Angelo 2002, *supra* note 26.

D. Case Citations and Blurbs²⁹

1. *P* ***Still v. DeBuono*, 108 F.3d 888, 25 IDELR 32 (2d Cir. 1996).** *But cf. Malktentzos v. DeBuono*, 102 F.3d 50, 25 IDELR 36 (2d Cir. 1996)(mootness and lack of irreparable harm)
 - ruled under Part C in favor of parents' IFSP for ABA therapy for three year old with autism, including reimbursement - only issue was whether privately obtained services by personnel who did not meet state qualification standards were reimbursable [M]
2. *S* ***Jefferson Parish Sch. Bd. v. Picard*, 27 IDELR 824 (E.D. La. 1998)**
 - upheld "cottage" placement of 17-year old student with autism with limited mainstreaming opportunities in nearby high school, also rejecting parent claims regarding teacher qualifications and lack of BIP in IEP (but mixed results regarding emergency removals and music therapy) [~M]
3. *P* ***T.H. v. Bd. of Educ.*, 55 F. Supp. 2d 830, 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]
4. *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]
5. *S* ***Wagner v. Short*, 63 F. Supp. 2d 672, 31 IDELR ¶ 53 (D. Md. 1999)³⁰**
 - upheld appropriateness of IFSP proposed for autistic child, despite parents' preference for a particular ABA program [M]
6. *P/S* ***Adams v. State of Oregon*, 195 F.3d 1141, 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]
7. *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]

²⁹ 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.** Those binding in Pennsylvania are shaded in grey. 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 eligibility and methodology are respectively designated after the citation with "[E]" and "[M]." Those that only partially or marginally concern methodology are marked with a "[~M]." Court decisions that are not specific to autism, much less the identified issues, are not included. For a more comprehensive listing, including other issues, earlier cases, and hearing/review officer decisions, see, e.g., PERRY A. ZIRKEL, *AUTISM AND THE LAW: RULINGS AND EXPERT ANALYSIS* (2001). For an alternate source specific to methodology case law, see ELENA GALLEGOS & JILL SCHALLENBERGER, *AUTISM METHODOLOGIES TO LIVE BY: LEGAL GUIDANCE FOR PRACTICAL PROGRAM STRATEGIES* (2008). For significant court decisions concerning children with autism but not specific to this disability category, see, e.g., *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007) (ruling that parents have enforceable rights under the IDEA for proceeding pro se); *Vives v. Fajardo*, 472 F.3d 19 (1st Cir. 2007) (rejecting parent's § 504/ADA retaliation claim for lack of requisite proof); *Pachl v. Seagren*, 453 F.3d 1064 (8th Cir. 2006) (upheld 70% segregated placement rather than parents' proposed fully inclusionary placement).

³⁰ For subsequent separate litigation involving the same child under Part B, see *infra* the Fourth Circuit's 2003 decision and the federal district court's 2004 decision (case nos. 28 and 38).

8. *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]
9. *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 [~M]
10. *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]
11. (*P*) **Bd. of Educ. v. Michael M., 95 F. Supp. 2d 600, 32 IDELR ¶ 170 (S.D. W.Va. 2000)**³¹
 • ruled that district did not meet its burden to prove that its program, rather than the parents’ in-home Lovaas program, was appropriate (tuition reimbursement case) [M]
12. *S* **Gill v. Columbia #3 Sch. Dist., 217 F.3d 1027, 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]
13. *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]
14. *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]
15. *P* **Sanford Sch. Comm. v. Mr. & Mrs. L., 34 IDELR ¶ 262 (D. Me. 2001)**
 • upheld hearing officer’s stay-put order and compensatory education relief when district’s change for kindergarten child with autism from half-inclusion, half-ABA program to self-contained program was based on administrative convenience, not appropriate evaluation [~M]
16. *P/S* **Gonzalez v. Puerto Rico Dep’t of Educ., 254 F.3d 350, 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 [~M]
17. *P* **Jaynes v. Newport News Sch. Bd., 13 F. App’x 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]

³¹ 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).

18. *P/S 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]
19. *S A.B. v. Bd. of Educ.*, 36 IDELR ¶ 65 (D.S.C. 2001)
- upheld appropriateness of inclusion-based ABA program and rejected appropriateness of home-based Lovaas program (based on restrictiveness and lack of generalization) for kindergarten child with autism [~M]
20. *S 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]
21. (*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 F. App'x 940, 39 IDELR ¶ 237 (4th Cir. 2003)³²
- rejected tuition reimbursement for in-home Lovaas program where the parents made only technical, unsupported challenges to the district's proposed TEACCH program and they admitted that they would not have accepted the offer in any event - but dismissed on appeal based on lack of jurisdiction [~M]
22. *S Faulders v. Henrico 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 [~M]
23. *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]
24. *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]
25. *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 [~M]
26. *S Zasslow v. Menlo Park City Sch. Dist.*, 60 F. App'x 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 [~M]

³² The appellate court dismissed the case without prejudice because the hearing officer had not issued a final decision.

27. *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) [~M]
28. (*S*) **Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 39 IDELR ¶ 122 (4th Cir. 2003)**³³
- held that upon the unavailability of the then-current placement (here due to the only state-approved Lovaas provider ceasing the in-home services under the IEP w/o notice) “stay put” does not require the district to provide a comparable, alternative placement; the parents’ only remedies are either to agree with the district to a new placement or seek a preliminary injunction from the trial court changing the child’s placement [~M]
29. (*P*) **G v. Fort Bragg Dependent Sch., 343 F.3d 295, 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]
30. *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 [~M]
31. (*P*) **Greenwich Bd. of Educ. v. Torok, 40 IDELR ¶ 44 (D. Conn. 2003)**
- granted preliminary injunction to maintain the hearing officer’s decision that ordered the district to change the kindergarten child’s classification from OHI to autism (based on IEE), reimburse the parents for home therapies, and provide various additional hours of 1:1 therapy at home or school—as the stay-put pending the judicial appeal [~E, ~M]
32. *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]
33. *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]
34. *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” [~E, ~M]

³³ For the final decision on remand, see infra the district court’s 2004 Wagner decision (case no. 38).

35. *P* **Bucks County Dep't of MH/MR v. De Mora, 379 F.3d 61, 41 IDELR ¶ 233 (3d Cir. 2004)**³⁴
- tuition reimbursement award, at least under IDEA Part C, may include time expended by parent serving as Lovaas instructor [~M]
36. *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]
37. (*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]
38. *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]
39. *P* **Deal v. Hamilton County Dep't of Educ., 392 F.3d 840, 42 IDELR ¶ 109 (6th Cir. 2004)**³⁵
- 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]
40. *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]
41. (*P*) **County Sch. Bd. v. Z.P., 399 F.3d 298, 42 IDELR ¶ 229 (4th Cir. 2005)**³⁶
- 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]
42. *P* **Escambia County Bd. of Educ. v. Benton**, 406 F. Supp. 2d 1248, 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 [~M]

³⁴ 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).

³⁵ 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 F. App'x 863 (6th Cir. 2008).

³⁶ In an unpublished decision, the district prevailed on remand. County Sch. Bd. v. Z.P., 45 IDELR ¶ 96 (E.D. Va. 2005).

43. *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]
44. *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]
45. *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 [E]
46. *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]
47. (*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]
48. *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 [~M]
49. *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]
50. *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 [~M]
51. *P* S.A. v. Riverside-Delanco Sch. Dist. Bd. of Educ., 45 IDELR ¶ 215 (D.N.J. 2006)
 • parents requested full-day and obtained half-day preschool program based on ABA-DTT, due to experts’ agreement that child with severe autism needed ABA-DTT and school district did not have trained personnel to do so, thus entitling parents to attorneys’ fees of \$47k [M]
52. *P* County Sch Bd. v. R.T., 433 F. Supp. 2d 657, 45 IDELR ¶ 274 (E.D. Va. 2006)³⁷
 • 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]

³⁷ 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).

53. *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]
54. *S* W.S. v. Rye City Sch. Dist., 454 F. Supp .2d 134, 46 IDELR ¶ 285 (S.D.N.Y. 2006)
 • upheld appropriateness of proposed 50/50 placement of kindergartner with autism in regular school, concluding that FBA was appropriate and district's failure to send out notices to private schools did not constitute pre-determination [tuition reimbursement case] [~M]
55. *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 where district refused to grant parents' medically-based request for homebound instruction (based on diagnosis of PTSD after district stopped parent from accompanying child to class) [~M]
56. *S* Leticia H. v. Ysleta Indep. Sch. Dist., 502 F. Supp. 2d 512, 47 IDELR ¶ 39 (W.D. Tex. 2007)
 • lack of specific diagnosis of autism and lack of precise goals did not deny this eligible preschool child FAPE [~E/~M]
57. *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 [E]
58. *S* Van Duyn v. Baker Sch. Dist., 502 F.3d 811 (9th Cir. 2007)
 • rejected FAPE-implementation claim for student with severe autism, concluding that the standard is whether district's implementation fell "significantly short of the services required by the child's IEP" (with liberal credit for the district's "corrective actions" in compliance with hearing officer's prospective order, which did not provide compensatory education) [~M]
59. *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]
60. *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 [~M]
61. *S* Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060, 48 IDELR ¶ 119 (7th Cir. 2007)
 • procedural errors, including alleged predetermination in LRE, were not prejudicial and despite lack of current PELs the proposed IEP for gifted student with autism, AD/HD, and OCD was substantively appropriate in these particular circumstances [~M]
62. (*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 [~M]

63. (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) [~M]
64. S **Travis G. v. New Hope-Solebury Sch. Dist., 544 F. Supp. 2d 435, 49 IDELR ¶ 248 (E.D. Pa. 2008)**
- upheld appropriateness of district’s IEP for kindergarten child with autism, including reduction of OT and ABA, and the district’s proposed ESY placement [M]
65. S **Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 50 IDELR ¶ 212 (10th Cir. 2008), cert. denied, 129 S. Ct. 1356 (2009)**
- ruled that district did not deny FAPE to student with autism who made progress under three successive IEPs even though it did not generalize to other settings (tuition reimbursement case) [~M]
66. P/S **Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306, 50 IDELR ¶ 213 (10th Cir. 2008)**
- upheld appropriateness of district’s eclectic program for preschool student with autism even though it lacked an in-home component and concluded that failure to provide finalized IEP was nonprejudicial procedural violation [~M]
67. P/S **N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 50 IDELR ¶ 241 (9th Cir. 2008)**
- upheld tuition reimbursement for IEP where district did not evaluate the child with speech impairment in all the areas of suspected disability, i.e., autism (treating it as prejudicial procedural violation), but rejected parents’ claim that the child was eligible for ESY, thus ducking question of FAPE substantive standard for ESY [~E]
68. P **Waukeet Cmty. Sch. Dist. v. Douglas L., 51 IDELR ¶ 1 (S.D. Iowa 2008)**
- upheld hearing officer’s PRR-based decision against district’s behavioral methodology but folded into the Rowley substantive standard for FAPE [M]
69. S **M.W. v. Clarke County Sch. Dist., 51 IDELR ¶ 63 (M.D. Ga. 2008)**
- upheld district’s proposed self-contained placement for 3-year-old child with autism as FAPE in the LRE and rejected appropriateness of parents’ unilateral placement in mainstream private school plus ABA as not appropriate, thereby denying tuition reimbursement [~M]
70. S **Winkelman v. Parma City Sch. Dist., 294 F. App’x 997, 51 IDELR ¶ 92 (6th Cir. 2008), cert. denied, 129 S. Ct. 2862 (2009)**
- rejected parents’ claim of denial of FAPE based on delayed OT goals, lack of music therapy, and lack of 1:1 aide (tuition reimbursement case) [~M]
71. S **JG v. Douglas County Sch. Dist., 552 F.3d 786, 51 IDELR ¶ 119 (9th Cir. 2008)**
- ruled that district’s completion of an evaluation of preschool twins with autism within 38 days was reasonable, which was the 1999 IDEA regulatory standard applicable in this case and which controls rather than the state’s 45-day deadline, because the district did not have reason to suspect autism upon the parents’ request [~E]
72. S **A.C. v. Bd. of Educ., 553 F.3d 165, 51 IDELR ¶ 147 (2d Cir. 2009)**
- held that IEP for child with autism developed, in violation of state regulation requiring FBA, was neither procedurally nor substantively deficient—IDEA’s IEP “special consideration” provision, in effect, trumped state reg (tuition reimbursement case) [~M]

73. S **T.P.v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 51 IDELR ¶ 176 (2d Cir. 2009)**
- held that consultant chart’s “School Response” that showed district did not intend to offer more than 10 hours of school-based ABA did not constitute pre-determination of IEP for kindergarten child with autism (tuition reimbursement case) [~M]
74. S **Parenteau v. Prescott Unified Sch. Dist., 51 IDELR ¶ 213 (D. Ariz. 2009)**³⁸
- upheld procedural and substantive appropriateness of IEP for eight-year-old with autism, which included TEACCH method and which did not necessitate an autism consultant on the IEP team, also concluding that the district had provided the parents—in response to their due process hearing complaint—with all that they had requested, including the consultant and 1:1 ABA aide, thus leaving no basis for compensatory education [M]
75. S **B.S. v. Placentia-Yorba Linda Unified Sch. Dist., 306 F. App’x 397, 51 IDELR ¶ 237 (9th Cir. 2009)**
- upheld substantive appropriateness and LRE of successive two IEPs (with second providing for sp. ed. For language arts block) for child with autism (tuition reimbursement case) [~M]
76. S **Blake C. v. Dep’t of Educ., 593 F. Supp. 2d 1193, 51 IDELR ¶ 239 (D. Hawaii 2009)**
- held that district’s program for child with autism did not meet the heightened standard under “meaningful benefit” standard under Hellgate (*supra*), showing difficulty of measuring progress and resulting in award of tuition reimbursement for part of 2007 (\$62k) as compensatory education for violation in 2005-06 [~M]
77. S **Hensley v. Colville Sch. Dist., 51 IDELR ¶ 279 (Wash. Ct. App. 2009)**
- upheld procedural (e.g., parental participation) and substantive appropriateness (e.g., ABA staff training) of IEP that district offered for nine-year-old with autism [~M]
78. S **G.B. v. Bridgewater-Raritan Reg’l Bd. of Educ., 52 IDELR ¶ 39 (D.N.J. 2009)**
- upheld appropriateness of district’s subsequently revised IEP for preschool child with autism at public ABA program [~M]
79. S **L.M. v. Capistrano Unified Sch. Dist., 566 F.3d 900 (9th 2009)**
- held that preschool program for a child with autism was substantively appropriate and that the 20-minute limit on outside evaluators’ classroom observations was procedural flaw that did not deprive the parents of meaningful opportunity for participation (tuition reimbursement case) [~M]
80. S **Joshua A. v. Rocklin Unified Sch. Dist., 319 F. App’x 692, 52 IDELR ¶ 64 (9th Cir. 2009)**
- upheld appropriateness of IEP for student with autism concluding that its eclectic program met substantive standard and that failure to provide services based on PRR automatically means a denial of FAPE [M]
81. S **A.G. v. Frieden, 52 IDELR ¶ 65 (S.D.N.Y. 2009)**
- held that IFSP that proposed 20 hours of ABA therapy per week was appropriate, rejecting parents’ request for at least 30 hours of this service and their pre-determination claim [M]
82. S **J.A. v. E. Ramapo Sch. Dist., 603 F. Supp. 2d 384, 52 IDELR ¶ 196 (S.D.N.Y. 2009)**
- upheld appropriateness of IEP for five-year-old child with pervasive developmental disorder, rejecting claims that 1) classification under OHI rather than autism was substantive flaw, 2) IEP should have included 10 more hours per week of 1:1 behavior therapy, and 3) district should have done an FBA, as required by state law (tuition reimbursement case) [~E, ~M]

³⁸ In a subsequent decision, the district awarded the defendant-district \$141k in attorneys’ fees and court costs, jointly payable by the parents and their attorney, but the Ninth Circuit reversed this award. Parenteau v. Prescott Unified Sch. Dist., 53 IDELR ¶ 333 (D. Ariz. 2009), *rev’d sub nom R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117 (9th Cir. 2011).

83. S E.G. v. City Sch. Dist., 606 F. Supp. 2d 384, 52 IDELR ¶ 228 (S.D.N.Y. 2009)
- rejected parents' pre-determination claim and ruled that the district's proposed IEP, which included 10 hours of at-home behavior therapy and 5 half days of regular education was FAPE in the LRE (tuition reimbursement case) [~M]
84. (S) **Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 52 IDELR ¶ 277 (5th Cir. 2009)**
- ruled that district's IEP was not substantively appropriate due to child's pattern of regression and IEP's insufficient services but remanded to apply this test for private residential placement: 1) whether it is essential in order for the disabled child to receive a meaningful educational benefit, and, if so, 2) whether it is primarily oriented toward enabling the child to obtain an education (tuition reimbursement case) [~M]
85. S **T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 53 IDELR ¶ 69 (2d Cir. 2009)**
- upheld substantive appropriateness of IEP, despite deficiencies regarding parent counseling and speech/language services and with 1;1 aide rather than FBA-BIP, and rejected procedural claim that the IEP did not specify a school site for the educational placement³⁹ (tuition reimbursement case) [~M]
86. S E.H. v. Bd. of Educ., 53 IDELR ¶ 141 (N.D.N.Y. 2009)
- rejected parent's claims that IEP was deficient for lack of parental participation, class size of 12:1 rather than 6:1, and failure to include BIP [~M]
87. S Huffman v. N. Lyon County Sch. Dist., 53 IDELR ¶ 147 (D. Kan. 2009)
- rejected parent's various procedural challenges, including lack of autism-specific testing and personnel, and substantive challenges, including applicable standard (in the Tenth Circuit) and scientifically-based methodology [M]
88. S Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ., 53 IDELR ¶ 153 (S.D. Ohio 2009)
- rejected parent's claim that children with autism needed 30-40 hours of ABA services each week, ruling that district's offer of 30 hours subject to further evaluation information, was appropriate [M]
89. S **J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 53 IDELR ¶ 280 (9th Cir. 2009)**
- upheld appropriateness of IEP for child with autism, rejecting lower court's ruling that IDEA '97 raised the Rowley substantive standard and concluding that various asserted procedural violations, such as failure to include methodology in the IEP, were a denial of FAPE (tuition reimbursement case) [M]
90. S K.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046, 53 IDELR ¶ 287 (N.D. Cal. 2009)
- upheld appropriateness of successive, similar IEPs with which the child made slow progress—expected rate based on the severity of the disability, and parent did not sustain burden to show that the child needed 30 hours of ABA per week to receive FAPE [M]
91. S A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 53 IDELR ¶ 327 (E.D.N.Y. 2010)
- ruled that child with Asperger's Disorder who was performing at average to above average levels in the classroom and was progressing academically did not meet the criterion on adversely affecting educational performance—no qualifier on adversely affecting but educational performance in Second Circuit means academic performance [E]

³⁹ For another case concerning a student with ASD in which a federal appeals court ruled the opposite on this issue, see A.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 47 IDELR ¶ 245 (4th Cir. 2007), cert. denied, 128 S. Ct. 1123 (2008), on remand, 544 F. Supp. 2d 487, 50 IDELR ¶ 13 (E.D. Va. 2008).

92. *P/S* Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883, 54 IDELR ¶ 29 (D. Alaska 2010)
- ruled that three consecutive IEPs failed to provide FAPE to child with autism based on prejudicial procedural violations, including lack of accurate and timely evaluation—upholding tuition reimbursement for ABA home program despite lack of special education certification but reversing hearing officer’s order to replace IEP team with private company that implements the program [M]
93. *S* Smith v. James C. Hormel Sch. of Virginia Inst. of Autism, 54 IDELR ¶ 75 (W.D. Va. 2010)
- ruled that district’s offer of homebound placement, while finding and arranging for residential placement, was not denial of FAPE to child with autism who private school, which offered ABA programming, expelled for life-threatening behavior [~M]
94. *S* M.N. v. New York City Dep’t of Educ., 700 F. Supp. 2d 356, 54 IDELR ¶ 165 (S.D.N.Y. 2010)
- held that procedural violations (e.g., lack of FBA) did not deny FAPE and that the IEP for five-year-old at public charter school for children with autism (per ABA model) met the substantive standard w/o the parents’ additionally sought itinerant services (tuition reimbursement case) [~M]
95. *S* Doe v. Hampden-Wilbraham Reg’l Sch. Dist., 715 F. Supp. 2d 185, 54 IDELR ¶ 214 (D. Mass. 2010)
- ruled that 1) failure to have IEP in place at start of school year for child with autism could be attributed to parents (deference to hearing officer’s finding); 2) parent’s approval of previous IEPs did not waive FAPE implementation claim; 3) parent did not meet their burden of providing district did not implement expired IEP; and 4) the new IEP met the substantive standard for FAPE (including PRR) (tuition reimbursement case) [~M]
96. *P* M.H. v. New York City Dep’t of Educ., 712 F. Supp. 2d 125, 54 IDELR ¶ 221 (S.D.N.Y. 2010)
- upheld \$80,000 tuition reimbursement for kindergarten child with autism based on finding that child needed extensive 1:1 discrete-trial ABA services, which district’s proposed 6:1 placement did not provide and which conformed to LRE consideration for the parent’s unilateral private placement [M]
97. *S* Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419, 54 IDELR ¶ 276 (8th Cir. 2010)
- ruled that lack of baseline data, behavioral goal, and full parental notice did not amount to denial of FAPE where district made good faith effort and reasonably met individual needs of student with autism [~M]
98. *P* New Milford Bd. of Educ. v. C.R., 54 IDELR ¶ 294 (S.D.N.Y. 2010)
- ruled that district denied FAPE by not sufficiently addressing behavioral issues of child with autism and that parent’s in-home program did so, thereby entitling the parent to reimbursement
99. *S* M.S. v. New York City Dep’t of Educ., 734 F. Supp. 2d 271, 55 IDELR ¶ 40 (E.D.N.Y. 2010)
- upheld substantive appropriateness of IEP for child with autism, including transition provision to return the child from private school and use of shorthand descriptors in BIP (tuition reimbursement case) [~M]
100. *S* C.G. v. New York City Dep’t of Educ., 752 F. Supp. 2d 355, 55 IDELR ¶ 157 (S.D.N.Y. 2010)
- ruled that child with autism was no longer entitled to after-school 1:1 ABA program (and parent training) where the private placement’s program met the substantive standard for FAPE based on the child’s progress [~M]
101. *S* E.Z.–L v. New York City Dep’t of Educ., 763 F. Supp. 2d 584, 56 IDELR ¶ 10 (S.D.N.Y. 2011)
- omission of parent training and counseling in IEP for child with autism, contrary to state law requirement, did not constitute denial of FAPE where the district provided such services as needed—same for lack of transition plan under IDEA where court found that the school would have offered services to meet the child’s transition needs [~M]

- 102. P** W. Windsor-Plainsboro Reg'l Sch. Dist. v. M.E., 56 IDELR ¶ 106 (D.N.J. 2011)
- ruled that parent was entitled to reimbursement for the home ABA program where the district's proposed eclectic program for child with autism was not reasonably calculated for meaningful benefit [M]
- 103. P** Sumter County Sch. Dist. 17 v. Heffernan, __ F.3d __, 56 IDELR ¶ 186 (4th Cir. 2011)
- held that the child's gains and district's rectifying measures were insufficient to avoid the denial of FAPE from the district's failure to implement a material portion of the IEP of a child with autism, which was 15 hours/week of ABA therapy, and that the parent's unilateral home placement was appropriate (with LRE not applying) [~M]
- 104. S** Bd. of Educ. v. J.A., 56 IDELR ¶ 209 (N.D. W. Va. 2011)
- upheld appropriateness of SCERTS methodology for preschool child with autism rather than his previous ABA/DTT methodology—relaxed view of PRR (tuition reimbursement case) [M]
- 105. P** R.K. v. New York City Dep't of Educ., 56 IDELR ¶ 168 (E.D.N.Y. 2011), further proceedings, 56 IDELR ¶ 212 (E.D.N.Y. 2011)
- ruled in favor of tuition reimbursement for student with autism, where district's program was deficient in several substantive respects, including lack of FBA-BIP and more intensive ABA services (tuition reimbursement case) [~M]
- 106. P** Fort Osage R-1 Sch. Dist. v. Sims, __ F.3d __, 56 IDELR ¶ __ (8th Cir. 2011)
- ruled that district's failure to diagnose the child's autism did not amount to a denial of FAPE where the district's IEP met the substantive standard for FAPE, including addressing his unique needs (tuition reimbursement case) [E/~M]

**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 Are the specially designed instruction and related services in the IEP based on peer-reviewed research to the extent practicable?
- B.4 Do the following have sufficient specialized expertise:
 - a) evaluator(s)
 - b) IEP team
 - c) teacher(s) and related service providers

C. Your witnesses:

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

D. Other factors:

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

VI. STATE LAWS

Some states have added requirements, via legislation or regulations (or guidelines, which do not have the force of law) that effectively add to the foundations established by the IDEA.⁴⁰ Here are two examples:⁴¹

- Connecticut⁴²:

Effective July 1, 2012, school districts must provide ABA services to any child with ASD if the student's IEP requires these services. The service provider must be either (A) licensed by the Department of Public Health or certified by the State Department of Education, with such services are within the scope of practice of such license or certificate, or (B) certified by the Behavior Analyst Certification Board as a behavior analyst or, if working under the supervision of a certified behavior analyst, an assistant behavior analyst, the child's teacher, or the child's paraprofessional.

- Texas⁴³:

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

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

⁴⁰ Additionally, state laws concerning the coverage of private health insurance can play a significant role. See, e.g., 40 PA. STAT. § 764h (amendment, called Act 62, requires specified private health insurers to pay up to \$36k for the diagnosis and treatment of covered individuals under age 21 with ASD).

⁴¹ In contrast, the following part of the Pennsylvania regulations' definition of "autistic support" does not seem to add substantive requirements: "The IEP for [students with autism] *must* address needs as identified by the team which *may* include, as appropriate, the verbal and nonverbal communication needs of the child; social interaction skills and proficiencies; the child's response to sensory experiences and changes in the environment, daily routine and schedules; and, the need for positive behavior supports or behavioral interventions." 22 PA. CODE § 14.131(a)(1)(1) (emphasis supplied).

⁴² CONN. GEN. STAT. § 1-76ii (2010). This legislation defines ABA as "the design, implementation and evaluation of environmental modifications, using behavioral stimuli and consequences, including the use of direct observation, measurement and functional analysis of the relationship between the environment and behavior, to produce socially significant improvement in human behavior." *Id.*

⁴³ 19 TEX. ADMIN. CODE § 89.1055(e) (2007).

- (8) communication interventions, including language forms and functions that enhance effective communication across settings
- (9) social skills supports and strategies based on social skills assessment/curriculum and across settings
- (10) professional educator/staff support
- (11) teaching strategies based on peer reviewed, research-based practices for students with ASD