AUTISM SPECTRUM DISORDERS[1]

Autism spectrum disorders (ASD) are obviously is on the rise, as are the associated education and legal issues. Individual variability within the spectrum and the educational methodologies for addressing it contribute to the high and unsettled level of controversy. The following case and the subsequent question-and-answer discussion provide a sampling of the eligibility, methodology, and related legal issues under federal law.

THE CASE

LI was an elementary school student in Cornish, Maine. Although she excelled academically, by the fourth grade she began to experience problems with peer relationships and personal anxieties. In the fifth grade, her parents arranged for psychological counseling and anti-depressant medication for LI based on her increased social isolation and her drop in grades from "high honors" to "honors." As a result, LI became more successful in interacting with peers and participating in class.

During the summer preceding sixth grade, however, LI asked her mother to allow her to home-schooled or to attend a private school in New Hampshire, which was approximately 30 miles from home. Her mother refused both requests, believing that her daughter would benefit from her assigned, well-regarded sixth grade teacher.

Unfortunately, sixth grade did not go well for LI. By mid-September, the teacher met with LI's mother, reporting that LI had exhibited a passive resistance to her assigned academic work and a "serious lack of awareness," bordering on hostility, to her peers.

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[1] This article appeared in Professor Zirkel's column in the November/December 2008 issue of *Principal*, which the National Association of Elementary Principals publishes.

She also suggested that cuts or scratches on LI's arms might have been self-inflicted during "lengthy bathroom breaks" from class. Yet, she reported that LI was "a very bright young girl with strong language and math skills … capable of powerful insights in her reading and writing." The teacher and parent developed a "contract" for LI that would have entitled LI to study more advanced topics in her areas of interest in November if she satisfactorily completed her assignments for October. LI refused to sign the contract, stayed home from school on September 30 and October 1, and on the second of these two days, in the wake of an argument with her mother about one her assignments, took excessive quantities of prescription and over-the-counter medications in a suicide attempt. After being discharged from the hospital, LI met with a new therapist, who—suspecting Asperger's Syndrome—referred her to a neuropsychologist for diagnosis. After extensive testing, the neuropsychologist's diagnosis was Asperger's Syndrome and depression-related adjustment disorder. A resulting private speech-language evaluation similarly recommended social skills instruction.

In the meanwhile, the district initiated an evaluation to determine IDEA eligibility and promised to provide LI with home tutoring in the interim. Frustrated with the district's failure to deliver the promised tutoring and their difficulties trying to meet LI's educational needs at home, her parents, after providing the district with timely notice of their intent to seek tuition reimbursement, unilaterally placed LI in the New Hampshire private school. The team accepted the private diagnosis as valid and—although divided as to whether LI's condition constituted "autism," "emotional disturbance" (ED), or "other health impairment" (OHI)—the members concluded that it did not have a significant adverse affect on her educational performance, thus not necessitating special

education. Instead, the district offered LI a Section 504 plan, which included "social pragmatics." LI's parents rejected the proposal and filed for a due process hearing. LI remained at the private school placement, where she had been thriving academically and gradually developed some positive peer relationships. The private school did not provide the privately recommended services of social skills instruction and behavior therapy.

The hearing officer upheld the district's decision that LI was not eligible under the IDEA due to the requisite lack of adverse affect on her educational performance. The hearing officer concluded that the IDEA does not require services "to address social and emotional needs when there are *no* academic needs," finding that LI had been successful in terms of her classroom behavior, assigned work, and test performance. LI's parents appealed to federal court.

QUESTIONS AND ANSWERS

1. With regard to the issue of IDEA eligibility, what do you think the ultimate court decision was in this case?

In this case,[2] the First Circuit Court of Appeals specifically ruled in LI's favor, while in effect more generally responding to the question of whether a child with Asperger's Syndrome is eligible under the IDEA with an "it depends" answer. The key for LI was that Maine's state law defined "educational performance" broadly, without any specific narrowing standard for adverse effect—in contrast to the Second Circuit's earlier decision in a case from Vermont, which defines educational performance as "basic skills" and adverse effect as "significantly below

[2] *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007).

expected or age grade norms."[3] Thus, more generally, the appellate court seemed to conclude that eligibility, in terms of this second of the two essential elements under the IDEA, depends on state law definitions of adverse effect on educational performance.

2. What about the first essential element of eligibility under the IDEA, which is a recognized classification, did LI's condition qualify? More generally, does Asperger's Syndrome qualify under the IDEA definition of autism?

The first formulation of this question was not a problem in this case. As the multi-disciplinary team initially reasoned and the appellate court ultimately observed, there was no dispute that LI's particular dual diagnosis fit under ED or OHI, if not autism. The more general formulation of the question, again, has an "it depends" answer, this time on the individual characteristics of the child's Asperger's Disorder. Contrary to the DSM-IV, which psychiatrists and some psychologists use, the legally determinative criteria are in the IDEA.[4] More specifically, the IDEA definition of autism includes a significant effect on 1) verbal communication, 2) nonverbal communication, and 3) social interaction. Asperger's Disorder typically qualifies in terms of #3, but the other two criteria will depend on the individual child. Nevertheless, other recognized classifications in the IDEA, especially OHI, are likely to fulfill this first element, shifting the focus to the second element, which boils down to whether the child needs special education.

3. Did the First Circuit grant the parents' tuition reimbursement? How about their second requested remedy—compensatory education?

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[3] *J.D. v. Pawlet Sch. Dist*., 224 F.3d 60 (2d Cir. 2000).

[4] See, e.g., Julie Fogt, David Miller, & Perry A. Zirkel, "Defining Autism: Professional Best Practices and Published Case Law," *Journal of School Psychology*, 2003, v. *41*, pp. 201-216.

In this particular case, LI's parents did not succeed with regard to tuition reimbursement. The First Circuit's denial of this remedy was based on its conclusion that the private school was not appropriate due to its failure to "anything approaching the direct teaching of social skills" that she needed. As the second requested remedy, the parents did not dispute the lower court's delegation of compensatory education to the IEP team but sought specific specifics as to the type, form, intensity, and duration. The First Circuit declined, pointing to the complete absence of "evidence as to the effect of the district's failure to offer IDEA services to LI over the past two years." In general, the courts use a multi-step framework for tuition reimbursement and are still in the process of finalizing the standards for the corollary equitable remedy of compensatory education,[5] thus warranting an "it depends" answer for cases beyond LI's.

4. If, instead, the district had agreed with the parents that LI was eligible under the IDEA but proposed an IEP that did not provide the methodology that the parents insisted upon, which party would likely prevail upon litigating the matter?

For methodology cases, the odds would generally but not absolutely favor the district. Moreover, if the case also presents procedural issues, the outcome would also depend on the court's (or hearing officer's, if the case was not appealed) determination as to whether the district violated the IDEA's procedural requirements to the extent of denying the child an appropriate education. For example, in the Sixth Circuit's most recent decision concerning a child with autism, the appellate court 1) decided the procedural issue in favor of the parents, concluding that the repeated absence of the

[5] See, e.g., Perry A. Zirkel, P. "Compensatory Education under the Individuals with Disabilities Education Act. *Penn State Law Review*, 2006, v. 110, pp. 879-902.

regular education teacher at the IEP meetings and the evident fixed pre-determination of the district for its proposed methodology was prejudicial; 2) remanded the decision on the appropriateness of the disputed methodology to the trial court, observing that there were limits to the deference accorded to local districts in such matters.[6] Nevertheless, the trial court subsequently determined that the district's proposed methodology—TEACCH rather than the parents' in-home ABA program—met the substantive standard for appropriateness.[7] These autism cases are frequent,[8] and they continue to vary in their facts and outcomes.[9]

5. Finally, did the district's determination that LI was eligible under the Section 504 "square" with the current interpretations of that statute's definition of disability?

The answer would have been "no" based on the judicial interpretations until January 1, 2009, the effective date of the Americans with Disabilities Act Amendments (ADAA). The courts in recent year have been increasingly restrictive in their interpretation of the Section 504 definition of disability, particularly with regard to whether the diagnosed impairment "substantially" limits a major life activity.[10] Under these previously applicable restrictive standards, LI would not have qualified in this regard because her social issues would be subordinated within the broad scope of

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[6] *Deal v. Hamilton County Dep't of Educ*., 392 F.3d 840 (6th Cir. 2004).

[7] *Deal v. Hamilton County Dep't of Educ*., 46 IDELR ¶ 45 (E.D. Tenn. 2006).

[8] See, e.g., Claire Choutka, Patricia Doloughty, & Perry A. Zirkel, "The 'Discrete Trials' of Applied Behavior Analysis for Children with Autism." *Journal of Special Education*, 2004, v. 38, pp. 95-103.

[9] See, e.g., *J.P. v. County Sch. Bd*., 516 F.3d 254 (4th Cir. 2008); *O'Dell v. Special Sch. Dist., 503 F. Supp. 2d 1206* (E.D. Mo. 2007); *County Sch. Bd. v. R.T*., 433 F. Supp. 2d 657 (E.D. Va. 2006); *Clear Creek Indep. Sch. Dist. v. J.K*., 400 F. Supp. 2d 991 (S.D. Tex. 2005)

[10] See, e.g., Perry A. Zirkel, " Conducting Legally Defensible §504/ADA Eligibility Determinations," *West's Education Law Reporter*, v. 176, pp. 1-11.

learning, for which her central performance was not substantially below the average sixth grader despite her decline from high honors to honors. Even for the minority of courts that regarded interacting with others as a major life activity, LI would not have qualified for the requisite substantial limitation; "[t]he standard is not satisfied by a plaintiff whose basic ability to communicate with others is not substantially limited but whose communication is inappropriate, ineffective, or unsuccessful."[11] Indeed, if the particular child with Asperger's Syndrome did qualify under these stringent standards for Section 504, it is highly likely that they would qualify as meeting the criteria of one of the three IDEA classifications that indisputably applied to LI and as needing special education, which explains the lack of legal precedents under Section 504 specific to students with ASD. Thus, using Section 504 as a consolation prize in such a situation would likely represent an indefensible "child find" case under the IDEA.

However, the new interpretive standards under the ADAA, which also expressly apply to Section 504 and which were a Congressional reaction to and overruling of the restrictive judicial interpretations,[12] the answer is at least "maybe." The ADAA expanded the list of major life activities, including subsets of learning, such as concentrating and reading; however, these expanded examples did not include social interaction. If the courts infer that social interaction is a major life activity, the ADAA also made the "substantially limits" element of Section 504 eligibility less restrictive. Thus, LI would have a better chance of prevailing under a "child find" claim under Section 504, but the outcome will depend upon future case law.

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[11] See, e.g., *Jacques v. DiMarzio, Inc*., 386 F.3d 192, 203 (2d Cir. 2004).

[12] See, e.g., Perry A. Zirkel,"Legal Perspectives: New Section 504 Eligibility Standards. *Teaching Exceptional Children*, 2009, v. 41, n. 4, pp. 68-72. For a more detailed analysis, which integrates the previous case law, see Perry A. Zirkel, " A Step-by-Step Process for §504/ADA Eligibility Determinations," *West's Education Law Reporter,* 2009, v. 239, pp. 333-343.

6. Would your answer to any of the foregoing questions differ based on the national ethical codes for administrators or Pennsylvania's Chapter 235?

These sources do not point in the opposite directions for any of the questions, but they offer additional options and limitations. As a general matter, all of these national professional codes recognize the well-being of students as being your primary consideration, with integrity and due process.[13] Thus, in meeting the corollary ethical obligation to implement the laws, including the school district's policies, the education leader may opt to provide more than the IDEA's or § 504's minimum requirements for LI just as long as the leader does so with 1) compliance with state and local obligations and prohibitions, 2) appropriate communication to the district's central officials and 2) reasonable consistency for other students.[14] Finally, if meeting these three conditions is not feasible the education leader should use appropriate measures to correct those laws and policies.[15]

Chapter 235 reinforces this ethical guidance first by giving it the force of law and second by specifying possibly relevant requirements. Depending on the circumstances, these requirements include certification of the employees participating in LI's evaluation and program;[16] civil rights of LI and other students well beyond "disabling condition" and including non-interference with IDEA and § 504 advocacy by LI and her representatives;[17] and non-distortion of the evaluation of and curriculum for LI.[18]

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[13] See, e.g., AASA, Statement of Ethics for Educational Leaders, Standards 1-3 (2007); NAESP, Statement of Ethics for School Administrators, Standards 1-3 (1976); NASSP, Ethics for School Administrators, Standards 1-3 (2001).

[14] *Id*., Standards 4-5.

[15] *Id*., Standard 6.

[16] 22 PA. CODE § 235.7 (2008).

[17] *Id*. §§ 235.8 and 235.11(4)-(5).

[18] *Id*. § 235.10(1)-(2).

CONCLUSION

The identification and education of children with ASD pose significant legal issues for public schools, especially under the IDEA. The answer to these legal issue, like the educational question of which methodology is appropriate, are often "it depends," requiring an individualized factual determination and careful legal application. Much of the extensive litigation concerning children with ASD[19] is not peculiar to autism, representing instead legal issues applicable to special education generally, but—as LI's case and the accompanying Q-and-A discussion reveals—eligibility and methodology defy easy, all-purpose answers. The key is for general and special education personnel to work collaborative and creatively, in partnership with parents and regular education personnel, for effective utilization of resources and with reasonable expectations that carefully balance legal requirements with best practice.

[19] See, e.g., Perry A. Zirkel, "The Autism Case Law: Administrative and Judicial Rulings," *Focus on Autism*, 2002, v. 17, pp. 84-93.