

AUTISM SPECTRUM DISORDERS: CASE SCENARIOS¹

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Case 1. Eligibility²

In 2004-05, A.J. received special education services arranged by the district in an integrated private preschool program. In May 2005, the IEP team determined that he was not eligible for further preschool special education services due to the progress reports from his teacher and his reaching kindergarten age. However, for 2005-06, his parents elected to continue him in the preschool program at their own expense but as one of the regular education, not special education, students. In January 2006, A.J.'s mother attended a meeting at the preschool where the teachers reported that he was doing fine academically but his behavior was disruptive. Promptly thereafter, his parents requested and the district completed a multidisciplinary evaluation. Illustrative of the evaluation findings, A.J.'s classroom teacher reported that "[he] does well academically [but] has difficulty socializing with peers." The school psychologist reported that A.J. exhibited average verbal and nonverbal skills, and the speech therapist obtained above-average scores in overall language development. On the other hand, the parents provided the report from a private behavioral specialist stating that A.J. "will require services when he enters school in September 2006, most significantly services that support development of pragmatic social skills." In early May 2006, the IEP team met and concluded that A.J. was not eligible for special education services. His parents asked for reconsideration, providing (a) a medical diagnoses of Asperger Disorder, and (b) a May 2006 report from his private occupational therapist indicating that A.J. had "serious social issues that need consistent intervention." In June 2006, after considering the additional info, the IEP team reaffirmed its non-eligibility determination.

In late July 2006, A.J.'s parents filed a request for an impartial hearing, arguing that their private evaluations supported a classification of autism based on Asperger Disorder and also supported their son's need for special education services. Their requested relief included reimbursement for privately obtained occupational therapy and counseling. After an eight-session hearing that ended in late October 2006, the hearing officer issued a decision in favor of the district, concluding that the parents had not met their burden to prove that A.J.'s condition adversely affected his educational performance, which is an essential element for eligibility under the IDEA.

- 1) *Is it likely that A.J. meets the criteria of the following IDEA classifications:*
 - a) *autism*
 - b) *other health impairment*
 - c) *speech/language impairment*
- 2) *Assuming that A.J. meets the criteria of at least on of these classifications, is he likely to meet the connected second essential element—adverse effect on educational performance that requires special education?*
- 3) *As their plan B, would the parents likely to succeed on a claim of eligibility under Section 504?*

¹ For additional case scenarios, with question and answer discussions, see Perry A. Zirkel, "Autism Spectrum Disorders," *Principal*, v. 91, no. 5, pp. 50-51 (May/June 2012) and *Principal*, v. 88, no. 2, pp. 58-61 (November-December 2008).

² *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299 (E.D.N.Y. 2010).

Case 2. FAPE³

In spring 1997, representatives from the Hamilton County school system, which is in western Tennessee, met with the parents of Zachary D., who was then three years old, to develop an IEP for him. Based on his previous diagnosis of autism, the IEP provided for placement in a preschool “comprehensive development class” (CDC) at Ooltewah Elementary School.

In September 1997, when Zachary began his program at CDC, his parents also initiated, with their own funds, an in-home program of applied behavioral analysis, or ABA, which relies on extremely structured one-on-one instruction with comprehensive data collection and analysis. The program, implemented through the Center for Autism and Related Disorders, is patterned on the methodology developed by Dr. Ivar Lovaas at UCLA.

In May 1998, the IEP team met to consider extended school year, or ESY, services for Zachary. Convinced that he was making exceptional progress in their own program, his parents requested that the school district fund a 40-hour per week home-based ABA program, along with speech therapy, for the summer. When the school district representatives asserted that Zachary’s progress was attributable to CDC, the parents requested the data proving the efficacy of the district’s approach for children with autism. The district refused both requests. Instead, the district provided an ESY program consisting of three 45-minute speech therapy sessions per week.

In October 1998, the IEP team finished a 95-page IEP for 1998-99, which provided 35 hours per week of special education in the CDC (which included multiple methodologies, including discrete trial training (DTT)) plus related services, including speech therapy (SLT) and physical therapy (PT). The parents filed a “minority report: requesting the district to fund their private in-home ABA program.

During the remainder of the 1998-99 school year, the IEP team met approximately every other month to address the parents’ concerns and discuss Zachary’s progress. He attended the district’s program only 16% of the time, while continuing the home-based, Lovaas-style ABA program.

At the May 1999 IEP meeting, the parents requested an ESY program of 43 hours of 1:1 ABA therapy and 5 hours speech therapy per week. The IEP team concluded that Zachary’s excessive absenteeism precluded documenting the requisite regression, thus declining to provide ESY.

In August 1999, the IEP team met twice to develop an IEP for the coming school year. The district proposed a continuation of Zachary’s CDC program plus mainstreaming in terms of attending, with a paraprofessional, a regular kindergarten class for three 15-minute periods per week and for lunch each day, with subsequent increases in time as feasible for him. The specialized instruction in the CDC used an eclectic TEACCH methodology, which included a 1:1 DTT component. It also included the use of the picture exchange communication system and hand-over-hand physical prompts; SLT for 30 minutes per day, PT for 30 minutes per week, and occupational therapy for 30 minutes every two weeks

³ Deal v. Hamilton Cnty. Dep’t of Educ., 392 F.3d 840 (6th Cir. 2004), *cert. denied*, 546 U.S. 936 (2005), on remand, 46 IDELR ¶45 (E.D. Tenn. 2006), *aff’d*, 258 F. App’x 863 (6th Cir. 2008), *attorneys’ fees*, 2006 WL 285446 (E.D. Tenn. 2006). For a discussion of the original decision, see, e.g., Perry A. Zirkel, “Deal Right?” *Phi Delta Kappan*, v. 86 no. 10, pp. 799-800 (June 2005).

Dissatisfied with the proposed placement, Zachary's parents—without notice to the district—unilaterally enrolled him in September 1999 in a private preschool for nondisabled children for two 3-hour sessions per week with a personal aide and continuing their in-home ABA program for approximately 30 hours per week. On 16 September, after securing the services of a New York City lawyer who specializes in autism cases, they filed for a due process hearing, seeking reimbursement of their expenses for Zachary's education.

The hearing commenced on 15 March 2000 and concluded almost a year later, on 13 February 2001, after 27 sessions. In addition to the extensive transcript of testimony, including several expert witnesses, the hearing officer reviewed tens of thousands of pages of exhibits, viewed several videotapes, and personally observed Zachary in more than one setting.

In the meanwhile, the District convened an IEP meeting in August 2000 to develop an IEP for the 2000-01 school year. The resulting IEP proposed Zachary's placement primarily in a regular kindergarten class at Westview Elementary School. The parents rejected the IEP, although they had Zachary attend Westview part-time that year.

On 20 August 2001, the hearing officer issued a decision that was largely in the parents' favor. He concluded that the district had committed two procedural violations that amounted to a denial of its obligation under the IDEA to provide a "free appropriate public education," or FAPE: 1) its IEP representatives had predetermined, pursuant to an unofficial policy of refusing to consider "Lovaas style ABA," to reject automatically the parents' proposal; and 2) the district failed to have a regular education teacher attend the IEP team meetings. He also ruled that the district had engaged in substantive violations of the IDEA by failing to propose a "proven or even describable method" for educating Zachary, failing to provide him with 30 hours per week of intensive Lovaas style ABA; and failing to provide him with ESY in summer 1999. He ordered reimbursement for the in-home ABA program, but—due to the parents' failure to provide the District with the IDEA-required notice—not the private school tuition.

In October 2001, both sides sought judicial review. In the wake of the hearing officer's decision, the district hired an attorney from Atlanta who has a nationwide practice in special education law. In May 2002, the district requested, via its outside counsel, the court to hear additional evidence. During the next several months, in response to a partial granting of its request, the district conducted a series of nationwide depositions, had four expert witnesses and two lay witnesses testify before the judge, and introduced 24 additional exhibits. The parents opted not to provide additional evidence.

On 3 March 2003, the court issued its decision, ruling that (a) the parents had not proven pre-determination; (b) the absence of the regular kindergarten teacher did not result in substantive harm in this case; (c) the IDEA does not require an IEP team member who is an expert in the parents' preferred methodology; and (d) the district's proposed eclectic approach met the substantive standard of *Rowley*, with due deference to districts for methodology questions. The parents promptly filed an appeal.

- 1) *In light of the 2004 amendments of the IDEA,⁴ which party is likely to judicially prevail as a result of the appeal for each of these procedural violations?*
 - a) *absence of an autism expert*
 - b) *absence of the regular education teacher*
 - c) *pre-determination*

- 2) *Which party is likely to judicially prevail in terms of the IDEA's substantive standard for FAPE?⁵*

- 3) *What is the effect of the answers to items 1 and 2 on . . .*
 - a) *tuition reimbursement?*
 - b) *attorneys' fees?*

- 4) *What other remedy might the parents have sought, and what would be likely arguments and outcome have been?*

- 5) *If the parents and district had resolved eligibility by using a Section 504 plan, did they have a right to an impartial hearing,⁶ and what would have been the applicable substantive standard?*

- 6) *In either event, i.e., IDEA or Section 504, what other formal avenues of legal enforcement could the parents have used in addition or alternative to the adjudicative route?⁷*

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

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

- (i) Impeded the child's right to a FAPE;
- (ii) 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
- (iii) Caused a deprivation of educational benefit.

⁵ The substantive standard is whether the district's proposed IEP was reasonably calculated to yield (meaningful, not trivial) educational benefit.

⁶ See, e.g., Perry A. Zirkel, "Impartial Hearings for Public School Students under Section 504," *West's Education Law Reporter*, v. 279, no. 1, pp. 1-17 (2012).

⁷ See, e.g., Perry A. Zirkel & Brooke L. McGuire, "A Roadmap to Legal Dispute Resolution for Students with Disabilities," *Journal of Special Education Leadership*, v. 23, no. 2, pp. 100-112 (September 2010).

Case 3. FAPE⁸

Born in September 1998, T.W. had an early diagnosis of autism and cerebral palsy.

In May 2005, T.W.'s father was elected to the school board of the school district in Northport, Michigan, which has a total enrollment of only 150 students and a total staff of 16 teachers.

Early in the subsequent school year, when T.W. was in first grade, his parents filed a due process hearing to challenge his IEP, but the parties reached a settlement agreement on October 14, 2005.

In August 2007, his parents filed another due process hearing, this time challenging the IEP for T.W. for grades 1 (2005-06), 2 (2006-07), and 3 (2007-08). The due process hearing amounted to 32 sessions between November 2007 and August 2008. The plaintiffs' posthearing brief was 426 pages in length, and their reply brief was 152 pages long. During the course of the hearing, the parents unilaterally placed T.W. in a private school.

In August 2008, T.W.'s father lost his school board seat in a recall election.

On February 2, 2009, the hearing officer issued a 141-page decision, with some of the 12 issues in each party's favor. For example, the hearing officer concluded that the district denied FAPE to T.W. in 2006-07 by failing to implement the resource-room and autism-consultant services in his IEP, resulting in negligible progress in the general curriculum, including regression in some academic areas due to lack of proper intervention and stimulation. For 2007-08, the hearing officer similarly found a denial of FAPE based on not only reduced IEP services but also lack of opportunity for meaningful parental participation by 1) not providing their expert (at U. Michigan) with T.W.'s test protocols, and 2) insisting on the professionals' development of the IEP goals after the meeting. The resulting relief included 768 hours of 1:1 compensatory education from an autism specialist (based on 12 hours for each of the 64 weeks of denied FAPE) and prospective placement with such 1:1 services conditional on the parents' re-enrollment of T.W.

On appeal, the federal district court upheld the hearing officer's decision and granted attorneys' fees to the parents, which was limited to \$27k due to the district's timely offer of settlement, which provided equivalent relief but no attorneys' fees. The district filed an appeal with the Sixth Circuit.

⁸ Woods v. Northport Pub. Sch., 487 F. App'x 968 (6th Cir. 2012).

1. What do you think was the Sixth Circuit's decision for each of these district claims?

- a) grade 2 substantive appropriateness: despite some implementation failures, T.W. obtained meaningful educational benefits
- b) grade 3 procedural appropriateness: the district invited the parents to review the requested test protocols in person at the school
- c) grade 3 substantive appropriateness: the district implemented the reduced individualized services

2. If the Sixth Circuit agreed with the hearing officer regarding the two-year denial of FAPE, what do you think the appellate court's response to the following district challenges to the ordered remedies?

- a) the amount of compensatory education and its delivery by an autism specialist (which was difficult to arrange in this small town) are unreasonable
- b) the prospective placement in the district with "one-to-one direct instruction by a special education certified teacher with an endorsement to teach students with autism . . . daily at the same time and for the same duration that [T.W.'s] general education classmates [were] receiving instruction in reading, writing, and mathematics" (i.e., half of each school day) violates LRE

3. If the Sixth Circuit agreed with the prospective placement, what do you think was its response to the parents' challenge that conditioned this relief on T.W.'s reenrollment in the district?

4. Similarly assuming *arguendo* that the Sixth Circuit agreed with most of the relief, what do you think was its response to the parents' challenge to the amount of attorneys' fees?

5. What additional claim was available to the parents under Section 504 in light of the recall of T.W.'s father from the school board?

6. Was the litigation cost-effective for the parents and/or the district? How could the problem have been avoided or mitigated?